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Risk Management During COVID-19

COVID-19 | MATTERS DESERVING IMMEDIATE ATTENTION Delays, Substitutions and Personal Injury Claims

The consequences of COVID-19 to the architectural, construction and insurance sectors will be deeply felt, and much discussed in the near future. Three matters, however, deserve immediate attention from architects:

1. Delays and Delay Claims
2. Substitutions to Your Design
3. Personal Injury Claims

COVID-19 Special Bulletin 1 dated March 20, 2020 introduced these topics. This Special Bulletin 2 provides a more comprehensive discussion.

Other concerns will certainly arise as the situation develops, and these will be tackled as soon as they become apparent. In the meantime, it is more essential than ever that architectural practices maintain careful records of all instructions and actions. If you aren't in the habit of doing this already, **start now**.

During the current crisis, with work from home protocols and closed borders, it will be difficult to adhere to normal schedules, for a number of reasons. These include: unavailability of even common building materials; slowdowns in professional services; shortages of labour; delays in getting approvals from clients, building departments and consultants; reduced shipping capabilities; and an increase in general indecision and confusion.

It is clear that measures that are implemented to combat the spread of the COVID-19 virus will have significant impacts on the construction industry, on architects and their consultants.

What can architects do to manage these risks?

We cannot stress enough the importance of record-keeping. Document everything! Oral agreements will not be helpful to architects when they are faced with seemingly unfounded accusations related to architectural services provided.

Architects may face claims related to several aspects of their practices. The most obvious of the risk management activities every architect should observe is adoption of, and adherence to, the directives of all levels of government and the "social distancing" protocols being promoted to halt the community spread of the virus. These have been evolving rapidly and many will require a change in the way that architects and their consultants provide their services. It is not "business as usual" for anyone, including architects.

In addition to the risk that an architect's actions or inactions may contribute to the spread of the virus within the community, resulting in personal injury to others, there are other types of potential claims for damages arising from the COVID-19 crisis – and the measures required to combat its spread – that merit proactive risk management practices.

The measures taken to combat the spread of the virus will almost certainly involve other outcomes, such as:

- delays in the delivery of architects' and consultants' design services;

- delays in the approvals processes applicable to building projects;
- delays in the production and supply of specified materials and components;
- shortages and delay in delivery of commonly used construction materials;
- delay in the construction process and completion of projects under construction.

Reasons for the delays will include:

- shortages of labour and disruptions to all types of businesses and organizations due to self-isolation or illness;
- lack of access to building permit departments or personnel due to closures of public services mandated by provincial or municipal authorities;
- inefficiencies arising from clients, authorities, architects and consultants adapting to “work from home” regimes – voluntary or mandated by health authorities;
- reduction in production capacity – globally and locally;
- reduction in shipping capability – from abroad and within Canada;
- uncertainty and confusion.

A predictable outcome of these circumstances will be losses suffered by the owners and any number of entities involved in the design and construction process. Unfortunately, despite the unprecedented circumstances, it is certain that some will attempt to mitigate their losses by pursuing claims against architects and their consultants. Some of these claims may relate to the very measures the architect or others took to aid in the battle against the COVID-19 virus.

Pro-Demnity will be on hand to vigorously defend Ontario architects who are faced with such claims – as we already do for any other claims against architects.

However, architects can adopt or reinforce risk management approaches that may make them less attractive targets and strengthen our ability to provide a defence.

We anticipate that three areas, in particular, will benefit from proactive risk management efforts by architects: Delays and Delay Claims, claims arising from Substitutions to Your Design and Personal Injury Claims.

1. Delays and Delay Claims

Among the more common challenges faced by architects and the Pro-Demnity Claims team are

Delay Claims that result from an allegation by a client, contractor or other party in the chain that an error, negligence or failure to act promptly by the architect or one of its subconsultants is responsible for a delay in the progress of the work, and that this delay has caused damages to the other party.

Architects can help themselves counter any such claims throughout this crisis by ensuring they maintain the normal and expected procedures and standards that apply to the provision of architectural services.

Maintenance of comprehensive records of communications with clients, consultants, contractors, subcontractors and suppliers has always been good practice. Today it is essential.

Of particular importance in defending any Delay Claim is the careful documentation of information related to any circumstances that arise on a project that may, in turn, trigger or contribute to a delay in any part of the design and construction process.

The unprecedented circumstances related to COVID-19 virus provide added impetus for maintaining comprehensive records. These should include documentation of the array of measures taken by your practice and others in the design, approvals and delivery of construction chain related to the COVID-19 crisis.

Many contractors have developed tools for assigning delays to a variety of actions or alleged failures to act on the part of others upon whom they rely for information. Architects and other consultants are a common target. These efforts to develop a delay claim may be supported by special consultants retained by the contractor to assist in maintaining records and supplying other information for the purposes of developing a delay claim against an architect, or others.

Faced with the increased opportunities for delays to arise “due to circumstances beyond the control of the contractor” – or any other party that has suffered losses due to the COVID-19 crisis – it may prove doubly important to your defence that you have maintained good records of your communications within the consultant team, your client, your contractors and suppliers, throughout the project.

Design and construction projects extend over considerable periods of time and involve large investments. Failure to meet schedules and investment objectives, for whatever reason, can result in costly losses for clients, contractors and others. Although we are all caught up in common efforts to contain and combat the COVID-19 virus today, there is a very real potential for serious financial losses to be exacerbated by the measures to contain the COVID-19 virus.

It will not be a surprise if, a year or two from now, today's common fight against the virus may be overlooked by some of the clients, contractors or others who are sharing our experiences today. When that happens, your records may be essential to remind everyone that the COVID-19 crisis had an impact on the project that resulted in specific outcomes.

2. Substitutions to Your Design

It is very likely that measures taken to combat the COVID-19 virus will result in a genuine inability to obtain delivery of specified products and systems to suit the client's or contractor's project schedule. Predictably, this may prompt proposals for substitutions, along with requests that the architect and other consultants consider substitutions to their designs and approve them under "emergency" conditions.

Given the current unprecedented circumstances, such requests may be reasonable responses to the situation. In every case, architects must maintain their professional standards and duty of care in considering the appropriateness of any substitution.

The current crisis does not justify any architect's actions in ignoring the impacts of proposed substitutions, or overlooking those that may happen on the project without its knowledge or express agreement. The *Architects Act* and Regulations have not been suspended; building codes have not changed; and the standard of care applicable to an architect's services, advice and approvals has not been reduced. Thus the "special" circumstances related to the COVID-19 virus are unlikely to provide an effective defence to the architect where a substitution fails to perform adequately in the completed project.

Quoting from Pro-Demnity's December 31, 2016 Bulletin: *Dealing with Substitutions to Your Design*:

One way or another, the architect will find itself facing allegations of negligence in the provision of its services related to the substitution, including:

- *failure by the architect to provide a suitable design in the first place; and / or*
- *acceptance or approval of an unsuitable substitution by the architect; and / or*
- *failure of the architect to recognize that what was being constructed did not conform to the architect's design and specifications.*

Actions or failures to act by the architect may result in the architect being deemed to have accepted or approved of the substitution, thus

converting the substitution into the architect's design, regardless of other considerations.

In addition, failure to advise your client of the consequences that may arise where the substitution was incorporated without professional input may constitute professional misconduct.

Regulation 27 under the Architects Act includes as a prescribed Standard of Practice Item 49.8:

Every member or holder shall present clearly to the member's or holder's employer or client the consequences that may be expected from any deviation in a design for which the member or holder is responsible in a case where the member or holder's judgment was overruled by a non-technical authority.

Apart from the usual considerations respecting any substitution cited in the Pro-Demnity Bulletin there may be a reasonable expectation for the architect and any other design consultants to give "special" consideration to a proposed substitution that may not ordinarily be their first choice or usual practice. The scheduling and other challenges flowing from the restrictions imposed to try to contain the COVID-19 virus may have placed a somewhat different duty of care on architects in these circumstances than what they have been used to or might otherwise have applied.

Nevertheless, the architect's obligation to adequately investigate and advise its client on the consequences, pro and con, respecting the proposed substitution remains unchanged.

Regardless of the inevitable pressures to do so, be very wary of allowing COVID-19 considerations to justify a decrease in vigilance or diligence respecting substitutions to your and your consultants' designs.

As discussed earlier in this Special Bulletin, it is critically important to maintain comprehensive records of the communications regarding the circumstances giving rise to the consideration of any substitutions, whether or not they are related to the COVID crisis. We urge you, as Ontario architects to use this risk management tool in your own interests.

The entire content of the December 31, 2016 Pro-Demnity Bulletin: Dealing with Substitutions to Your Design can be downloaded from the Pro-Demnity website: www.prodemnity.com. It's the third bullet under Recent Bulletins and Notices in the menu on the right-hand side of every page.

3. Personal Injury Claims

Personal injury claims against architects are a growing challenge. COVID-19 creates a new source of

exposure to such claims. As professionals and business operators, architects are obliged to observe all required or recommended measures to help prevent the spread of the virus. To do otherwise may result in exposure to claims that their negligence has caused or contributed to spreading the virus to others – work colleagues, consultants, clients, contractors, tradesmen and any other individuals – who may become ill or die.

Architects could also find themselves in litigation where a sudden halt to construction due to COVID-19 mandates by the government, or contractors' own internal limitations, create a dangerous situation. As with other personal injury lawsuits, the architect could be blamed for any shortcomings at a construction site resulting in the perceived dangerous condition causing a personal injury.

Personal injury claims can involve an array of issues, such as: loss of income (short term or lifetime), pain and suffering, long term care and support costs, loss of physical capability or loss of enjoyment of a normal life. Personal injury claims can involve very large amounts.

Fortunately, ample advice is available from public health and other knowledgeable authorities. Architects are advised to adopt such advice in their practices, to help manage the risk that their actions or inactions may lead to a claim related to personal injury to others. These measures include:

- avoiding face-to-face meetings – with anyone;
- assurance that their own offices and personnel and the construction sites they visit are employing mandatory and recommended preventive measures;
- avoiding conveyance or handling of documents and other materials unless reasonable efforts have been taken to assure the materials are “virus free”.

Architects are encouraged to make it their business to adopt any and all measures available to protect themselves, their colleagues, those they interact with in the course of provision of their services and the community at large, in order to reduce the risk that they may face such a claim.

THINGS YOU CAN DO NOW

1. Follow all provincial, federal and public health guidance on protective and precautionary measures related to COVID-19.
2. Keep careful and detailed records of actions and instructions related to active projects.
3. Be vigilant and diligent respecting Substitutions arising from fall-out from COVID-19.
4. Manage client expectations with respect to potential delays due to material or labour shortages.
5. Utilize the tools and advice respecting COVID-19 provided by the OAA.
6. Maintain good communications with clients, consultants, contractors and authorities, all of whom are struggling to address COVID-19.