

April 9, 2020

Risk Management During COVID-19

COVID-19 | MATTERS DESERVING IMMEDIATE ATTENTION Projects Proceeding Without a Building Permit

As noted in earlier Bulletins, The City of Toronto Building Department and building authorities in other municipalities have put Building Permit processing and construction site inspections “on hold.” The decisions to suspend these services raise questions for architects who may be retained to provide architectural services on projects that proceed into construction despite the inability to obtain a Building Permit.

The *Building Code Act* and Regulation under the *Architects Act* still apply. Architects who are engaged on an emergency project related to COVID-19 control *may be* at relatively low risk of attracting a claim related to lack of a Building Permit. However, projects unrelated to the COVID-19 emergency are in a different category. Any architect who is providing general review services on a project where a Building Permit has not been issued should consider utilizing a disclaimer on all relevant correspondence and reports in order to reduce the risk of a claim or complaint. The following is recommended.

DISCLAIMER No.2 – Proceeding Without a Building Permit

By proceeding with this project, (insert names of Client, Contractor, and all Consultants) acknowledge that a Building Permit has been rendered unattainable due to an emergency public health crisis. (insert name of Architect) disclaims any and all liability arising from the fact that a Building Permit has not been obtained. It is acknowledged and understood that (insert name of Client) agrees to hold (insert name of Architect) harmless for any liability, claim, suit, action, complaint, loss or damage that may result from the lack of a Building Permit.

The above statement is to be used **in addition to the recommended disclaimer** to be included in any reports or correspondence that are submitted to a building department or any authority having jurisdiction where building officials are not attending construction sites.

Refer to Pro-Demnity [COVID-19 Special Bulletins 3, 4 and 5](#).

Building Permits Are Not Available

The City of Toronto and other municipalities have suspended the processing and issuance of Building Permit applications and site visits by building inspectors during the COVID-19 pandemic.

Quoting from a recent City of Toronto advisory:

Building Permits and Inspections

Toronto Building will not be able to accept or issue building permits. In addition, no preliminary project applications, zoning reviews, or property information letters can be applied for, processed or issued. No progress inspections will be undertaken by City Inspectors during this service

disruption. However, construction may proceed without a City inspection, provided the applicant submits a report from the qualified designer responsible for the design, after City services have resumed.

Although other municipalities have adopted a similar stance, there is no indication of any alternative approach available for processing an application or issuance of a Building Permit that Pro-Demnity is currently aware of.

Refer to Pro-Demnity [COVID-19 Special Bulletins 4 and 5](#) for advice respecting general review services where the municipality is not sending building inspectors to construction sites.

What the Rule Books Say

The inability to obtain a Building Permit creates a conundrum for architects. OAA Regulatory Notice R.9, “General Review Where Contractor Proceeds Without a Building Permit” makes it clear that:

Architects who provide general review services where construction proceeds without a building permit do so in violation of the Building Code Act and in contravention of the Regulation under the Architects Act.

The *Building Code Act* 1992, Section 8(1), reads as follows:

No person shall construct or demolish a building, or cause a building to be constructed or demolished in a municipality unless a permit has been issued therefor by the Chief Building Official.

In the normal course, architects who provide general review services where construction proceeds without a building permit will be in violation of the *Building Code Act* and in contravention of the Regulation to the *Architects Act*.

Emergency Projects Need to Proceed

But life during the COVID-19 pandemic is not normal, and apparently not anticipated by either the *Building Code Act* or *Architects Act*.

It is assumed that a postponement in the start of construction during the COVID-19 pandemic due to the refusal of a municipality to receive and process building permit applications will not be a risk management concern for architects whose clients are prepared to wait until the municipality resumes processing and issuing Building Permits. Clients may be disappointed with the delay, but adherence to the emergency measures to combat the spread of the virus will trump other considerations for most projects.

COVID-19 control measures may generate projects that ordinarily would require the issuance of a building permit. Examples include: hospitals, health care facilities and emergency projects designed to help handle the spread of the COVID-19 virus.

It would not be unreasonable for the province to use its authority to suspend the application of some or all of the provisions of the *Building Code Act*, the *Architects Act*, the *Engineers Act* and other regulations in order to expedite the delivery of these emergency facilities. That would be helpful, but is not assured at the time of writing.

What is Reasonable in the Circumstances

No one can reliably predict the outcome of any claim, complaint or disciplinary hearing related to an architect providing services on an emergency COVID-19 project

that proceeds without a building permit. However, it is reasonable to expect that the courts and regulatory bodies will apply “common sense” in the application of the law and regulations, recognizing the extraordinary circumstances that applied during the COVID-19 pandemic.

A seasoned Pro-Demnity claims veteran comments: “The Law at the end of the day will recognize that these are not normal times and there will be some latitude for muddling through as best you are able.”

But memories are short, litigation is common and no one can prevent a claim or complaint being commenced. Regardless of the outcome, architects faced with unreasonable claims or complaints will still need to defend themselves.

Insurance Implications

Architects are expected to know the rules that apply when construction proceeds without a Building Permit. Providing general review services on a project where a Building Permit has not been issued remains a breach of both the *Building Code Act* and the Regulation under the *Architects Act*. Any claim alleging the architect made a *deliberate* or *intentional* decision to facilitate a breach of either the *Building Code Act* or Regulation under the *Architects Act* could trigger the exclusion in its professional liability insurance coverage respecting “intentional acts.”

Hospital, healthcare and emergency COVID-19 projects that commence without a building permit merit special consideration. In our assessment, any complaint or claim against an architect whose actions supported the provision of life-saving emergency facilities in the absence of a Building Permit is unlikely, and stands little chance of success.

Pro-Demnity will defend a claim against an architect for damages arising from its error, omission or negligence either for failing to obtain a building permit, or providing general review services on a project proceeding without a permit.

However, architects can adopt or reinforce risk management approaches that may make them less attractive targets and strengthen our ability to provide a defence. These include adherence to all provincial, federal and public health guidance on protective and precautionary measures related to COVID-19; maintenance of detailed records of actions and instructions related to active projects; and use of the tools and advice respecting COVID-19 provided by the OAA.

And most importantly, maintain good communications with clients, consultants, contractors and authorities, all of whom are struggling to address COVID-19.

What Can Architects Do? Advice from a Lawyer

If asked to provide general review services for emergency projects that are undertaken to assist in dealing with the COVID-19 crisis and are being constructed without a permit, we recommend inserting

the disclaimer below on all site visit reports. Additionally, in the absence of specific protection provided by the province respecting emergency projects, it would be reasonable to include a specific contractual indemnity from the Client for any and all liability arising from the fact that a Building Permit is not available or has not been obtained.

RECOMMENDED DISCLAIMER No. 2 – Proceeding Without a Building Permit

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This disclaimer repeats the wording on page 1. Disclaimer No. 2 is to be used **in addition to the recommended disclaimer** to be included in any reports or correspondence submitted to a building department or any authority having jurisdiction where building officials are not attending building sites.

Pro-Demnity Bulletins: Risk Management During COVID-19 MATTERS REQUIRING IMMEDIATE ATTENTION

[COVID-19 Special Bulletin 1: Potential Claims & Things You Can Do Now](#)

[COVID-19 Special Bulletin 2: Delays, Substitutions & Personal Injury Claims](#)

[COVID-19 Special Bulletin 3: Building Officials Suspending Site Inspections - Part I](#)

[COVID-19 Special Bulletin 4: Building Officials Suspending Site Inspections - Part II](#)

[COVID-19 Special Bulletin 5: General Review and Site Visits](#)

The contents of this Bulletin are provided for general information purposes only. The information contained herein is not legal advice and should not be relied upon as such. Readers must consult their own lawyer respecting the applicability to any particular circumstances of any of the information provided in this Bulletin.

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In the event of a claim against an architect, the terms and conditions of the Pro-Demnity insurance policy will apply. Coverage decisions can only be made at the time a claim arises, based on the allegations and the then known circumstances.