

IMPACTS OF COVID-19 ON BC'S CONSTRUCTION INDUSTRY

The COVID-19 crisis has affected all sectors of the economy nationwide with the construction industry being no exception. This article looks at the impacts observed on the Construction industry of British Columbia, Canada.

PROVINCE-WIDE RISK ACCEPTANCE AND MITIGATION APPROACH

From the outset, the BC Provincial government exempted the construction and industrial sites from the guidelines prohibiting gatherings of more than 50 people. The Government designated the Construction Industry as an 'essential service.' The directive was confirmed as early as March 20th, 2020, by the Provincial Health Officer Dr. Bonnie Henry and the President of the Vancouver Regional Construction Association, Fiona Famulak.¹

As a result of the directive, many construction and industrial sites across British Columbia, including the Site C dam and LNG Canada, remain open as employers have committed to maintaining social distancing of one-to two-meter between workers at the worksite. Employers have pledged to adhere to these measures either by reducing the number of people on-site through staggered shifts or by making sure that workers are not congregating in break rooms. In addition, employers are providing hand-washing facilities at their sites, increasing signage, and making sure workers do not come to work unwell.

In response to the crisis, the B.C. Construction Association (BCCA) launched a "virtual hotline" to gather the observations, questions and requests for guidance, from those working in the construction industry. According to the Association, the hotline has generated tremendous feedback and responses that have greatly contributed to its ability to respond to the issues and mitigate the unprecedented crisis of COVID-19.²



Figure 1 BCCA "Virtual" Hotline

¹ <https://www.cbc.ca/news/canada/british-columbia/bc-construction-sites-open-covid-1.5504066>

² BCCA Facebook page

REMEDIES AVAILABLE TO CONSTRUCTION EMPLOYERS UNDER CCDC-2

Counsel to the BC Construction Association issued an advisory note³ to the industry on how to apply the CCDC 2 2008 -stipulated price contract provisions when dealing with COVID-19 and its impacts. Some of the items raised are discussed below:

1. Paragraphs 6.5.3 and 6.5.4 of CCDC
 - (a) COVID-19 would likely qualify under paragraph 6.5.3.4 as a "*cause beyond the Contractor's control other than one resulting from a default or breach of Contract by the Contractor,*" permitting an extension of the Contract Time.
 - (b) Under paragraph 6.5.3, the Contract Time would be extended for such reasonable time as the Consultant might recommend in consultation with the Contractor, but the extension of time would not be less than the time lost as the result of the event causing the delay unless the Contractor agreed to a shorter extension.
 - (c) Importantly, the Contractor would not be entitled to payment for costs incurred by the delay unless such costs resulted from actions by the Owner, Consultant, or anyone employed or engaged by them directly or indirectly.
 - (d) Further, under paragraph 6.5.4, no extension would be made for the delay unless Notice in Writing of the cause of the delay was given by the Contractor to the Consultant no later than 10 Working Days after the start of the delay.
2. Paragraphs 10.2.4 and 10.2.7:
 - (a) Under paragraph 10.2.4, the Contractor must comply with the laws, ordinances, rules, regulations, or codes which are or become in force during the performance of the Work and which relate to the Work, to the preservation of the public health and to construction safety.
 - (b) Further, under paragraph 10.2.7 if subsequent to the time of bid closing, changes were made to the applicable laws, ordinances, rules, regulations or codes of authorities having jurisdiction due to COVID-19 which increases the cost of the Work, the Contractor may submit a claim in accordance with GC 6.6
3. Paragraph 7.2.2:
 - (a) If the Work is suspended or otherwise delayed for a period of 20 Working Days or more under an order of a public authority as a result of COVID-19, and providing that such order was not issued as the result of an act or fault of the Contractor or of anyone directly or indirectly employed or engaged by the Contractor, The Contractor may, without prejudice to any other right or remedy the Contractor may have, terminate the Contract by giving the Owner Notice in Writing to that effect.

³ Jenkins Marzban Logan LLP: <http://www.bccasn.com/media/Construction%20Contracts%20and%20COVID-19.pdf>

4. The report highlighted additional rights, entitlements, and remedies under Paragraphs 10.2.4 and 10.2.7 as well as 7.2.2. The full report can be found in the link referenced.⁴

Although this provides some helpful guidance to contractors with regards to entitlement, it remains the case that a Contractor will have to particularize it's case, establishing cause and effect and demonstrating that the cause, that being the Covid-19 pandemic, resulted in the losses claimed with regards to time and money.

BC BUILDERS LIEN HOLDBACKS IN THE TIME OF COVID-19

The builders' lien holdback is a portion of funds held back by the person primarily liable on each construction contract or subcontract.

The purpose of the holdback is to provide security for parties in the construction pyramid and to limit liability when funds do not flow down the construction pyramid as required. The Builders Lien Act (BLA) provides that parties have 45 days following completion of the construction project (or the occurrence of one of the other triggering events) to file a lien.⁵ The payer may then release the holdback after 10 additional days pass, assuming the conditions of section 8 of the BLA have been met.⁶ The payer exposes itself to financial risk if it prematurely pays out the holdback before this 55-day period expires.⁷

The *BC Emergency Program Act* has suspended certain limitation periods in the province, specifically limitation periods relating to court proceedings.⁸ Statutory decision-makers are also empowered to waive, suspend, or extend certain mandatory time periods.⁹ The Limitation Periods (COVID-19) Order took effect on March 26, 2020 (the "**Suspension Order**") and will remain in effect for the duration of British Columbia's declared state of emergency.¹⁰ The Suspension Order has preserved legal rights in circumstances where the COVID-19 pandemic has prevented parties from taking timely steps in court.¹¹

What is the Implication of the Covid-19 Emergency Act Suspension Order on limitation periods on the 55-day holdback period?

On April 8 2020, the BC Government rescinded its original order which extended limitation periods and issued a new suspension order confirming that the suspension did not apply to any time limitation periods or time periods under the *Builders Lien Act*.¹²

The new Limitation Periods (COVID-19) Order no. 2 came into effect on April 15, 2020. The BC Supreme Court and Court of Appeal are closed for regular business.¹³ The BC Supreme Court is accepting e-filing,

⁴ <http://www.bccasn.com/media/Construction%20Contracts%20and%20COVID-19.pdf>

⁸ Province of British Columbia, Ministerial Order 86/2020; Province of British Columbia, Province suspends legal time limitations due to COVID-19, 27 March 2020.

⁹ Limitation Periods (COVID-19) Order, MO86/2020, s. 3

¹⁰ *Ibid*, s. 1

¹¹ https://mcmillan.ca/Files/220795_Holdbacks_in_the_time_of_COVID-19.pdf

¹² http://www.bclaws.ca/civix/document/id/mo/mo/2020_m098

¹³ https://www.bccourts.ca/supreme_court/documents/Notice%20of%20Suspension%20of%20Civi%20and%20Family%20Proceedings%20REVISED%20March%2030,%202020.pdf

but the Court of Appeal has asked litigants not to file anything except where urgent. Lien security/release was not on the list of urgent and essential matters.¹⁴

We need a paragraph in here which gives some practical advice on what to do / what this actually means in practice.

CONCLUSION

There is no question that the COVID-19 pandemic has affected the entire Construction industry; limiting resource availability, impacting the supply chains and slowing the progress of work to mention but a few issues.

The BC Government has implemented measures aimed at offering a degree of protection to the industry, but how effective these measures will be remains to be seen. Despite these unprecedented times and the uncertainty surrounding the economy, there are lessons to be learnt from the BC Construction Industry:

1. A strong collaboration between the provincial health authorities and the BC Construction Association is required to ensure the health and safety of all involved in the construction industry.
2. The acceptance of risks and mitigation strategies put in place by industry stakeholders have resulted in the implementation of innovative processes enabling business continuity.
3. Open two-way communication channels and the dissemination of vital information is essential to enable construction employers to make sound commercial decisions and keep businesses viable.
4. Whereas most contractual agreements did not foresee this unprecedented COVID-19 pandemic, there are contractual safeguards and provisions in the CDCC 2-2008 stipulated price contract to enable parties to exercise their rights and claim remedies. However, the circumstances of each contract must be reviewed in their specific context in order to determine the best path(s) forward.
5. There are no changes in Notice provisions or Time periods in respect of the BC Builders Lien Act under the Emergency Act.
6. Records, records, records!! Accurate record keeping during this COVID-19 period will be critical to ensure parties are able to both prove entitlement to damages and defend against claims.

¹⁴ <http://www.cba.org/Sections/Construction-Law/Resources/Resources/2020/Status-of-construction-and-related-legislation>