

# COVID-19 and Construction: Identifying Issues and Managing Risk



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## COVID-19 and CONSTRUCTION: IDENTIFYING ISSUES and MANAGING RISK



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## COVID-19 and Construction

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❖ This Week's Topics:

So a Contractual Notice or Approval or other Contractual condition precedent to a claim was missed in relation to COVID-19 impacts ... So What?	Employment Law issues: Leaves of Absence, Layoffs, Terminations, Employment Agreements and Government Subsidies
Should Legislative Solutions be Employed to Alter constructions or subcontracts to address the economic impacts of COVID-19?	Questions

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# COVID-19 and Construction: Identifying Issues and Managing Risk

## Contractual Conditions Precedent

- ❖ The application of legal principals in the context of each particular circumstance:

To what extent will our Judges, Arbitrators and Adjudicators strictly enforce Notice Provisions, Approval Requirements or other Conditions Precedent to a Claim under a Contract or Subcontract?

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## Contractual Conditions Precedent

- ❖ The application of legal principals in the context of each particular circumstance:

In the COVID-19 Context:

The notice of delay for a schedule extension (10 days under CCDC contracts);

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# COVID-19 and Construction: Identifying Issues and Managing Risk

## Contractual Conditions Precedent

- ❖ The application of legal principals in the context of each particular circumstance:

In the COVID-19 Context:

The notice of a claim for additional compensation (within a reasonable period of time under CCDC documents)

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## Contractual Conditions Precedent

- ❖ The application of legal principals in the context of each particular circumstance:

In the COVID-19 Context (common clauses):

following up (within a reasonable period of time under CCDC documents)

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# COVID-19 and Construction: Identifying Issues and Managing Risk

## Contractual Conditions Precedent

- ❖ The application of legal principals in the context of each particular circumstance:

In the COVID-19 Context (common clauses):

following up with a detailed claim (within a reasonable period of time under CCDC documents)

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## Contractual Conditions Precedent

- ❖ The application of legal principals in the context of each particular circumstance:

In the COVID-19 Context (common clauses):

Objections to a finding of the Consultant within a fixed period of time

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# COVID-19 and Construction: Identifying Issues and Managing Risk

## Contractual Conditions Precedent

- ❖ The application of legal principals in the context of each particular circumstance:

In the COVID-19 Context (common clauses):

Notices of Default and Notices of Suspension of the Work or Termination of the Contract / Subcontract

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## Contractual Conditions Precedent

- ❖ The application of legal principals in the context of each particular circumstance:

*Technicore Underground Inc. v. Toronto (City)*, 2012 ONCA 597

follows the SCC in *Corpex (1977) Inc. v. The Queen in right of Canada*, [1982] 2 SCR 643: **compliance with a notice provision is a condition precedent to legal proceedings**

neither new nor earthshattering in 2012!

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- ❖ The application of legal principals in the context of each particular circumstance:

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However, the Court did address two significant potential defences in the face of a failure to give a required notice: (i) prejudice; and (ii) waiver

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## Contractual Conditions Precedent

- ❖ The application of legal principals in the context of each particular circumstance:

*Technicore Underground Inc. v. Toronto (City)*, 2012 ONCA 597

re- Prejudice – the Court held that the owner/defendant need not *prove* that he or she was prejudiced by the failure to give notice; and

The Court held that prejudice is to be presumed!

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- ❖ The application of legal principals in the context of each particular circumstance:

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re Waiver - occurs when one party to a contract (or proceeding) *takes steps* that amount to waiving reliance on some known right or defect in the performance of the other party

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## Contractual Conditions Precedent

- ❖ The application of legal principals in the context of each particular circumstance:

*Technicore Underground Inc. v. Toronto (City)*, 2012 ONCA 597

re Waiver – a classic and common example of waiver: where the contract requires a written change order but the parties operate on the basis of verbal approvals: if the client pays a change verbally approved, waiver is almost certainly established for the purposes of future verbal approvals.

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- ❖ The application of legal principals in the context of each particular circumstance:

*Ross-Clair v. Canada (Attorney General)*, 2016 ONCA 205

the contractor was required to follow up with a detailed accounting of its claim, sufficient to allow the Consultant to review the claim and make a determination. The contractor was also required to follow up with more information as reasonably required by the Consultant

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## Contractual Conditions Precedent

- ❖ The application of legal principals in the context of each particular circumstance:

*Ross-Clair v. Canada (Attorney General)*, 2016 ONCA 205

the Consultant objected that the backup to the claim was insufficient and requested more detail. The contractor did not provide the requested information but merely commenced proceedings. The Court of Appeal denied the claim for failure to follow the notice provisions.

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# COVID-19 and Construction: Identifying Issues and Managing Risk

## Contractual Conditions Precedent

- ❖ The application of legal principals in the context of each particular circumstance:

*Jessco Structural Limited v. Gottardo Construction Limited*, 2016 ONSC 2189 (Ont. Div. Ct.)

Gottardo's site-super requested additional, out of scope work, on three occasions and Jessco performed that Work. The site-super then signed-off on Jessco's time sheets.

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## Contractual Conditions Precedent

- ❖ The application of legal principals in the context of each particular circumstance:

*Jessco Structural Limited v. Gottardo Construction Limited*, 2016 ONSC 2189 (Ont. Div. Ct.)

The Divisional Court upheld the dismissal of Jessco's claim for failure to follow the contractual notice / approval terms and conditions. Gottardo effectively got the work for free...

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- ❖ The application of legal principals in the context of each particular circumstance:

*Jessco Structural Limited v. Gottardo Construction Limited*, 2016 ONSC 2189 (Ont. Div. Ct.)

The Contract required that the parties negotiate any changes. This did not happen. The site-super merely requested the additional work but there was no negotiation or agreement on price.

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## Contractual Conditions Precedent

- ❖ The application of legal principals in the context of each particular circumstance:

*Jessco Structural Limited v. Gottardo Construction Limited*, 2016 ONSC 2189 (Ont. Div. Ct.)

The Divisional Court upheld the Motion Judge's decision that the contractual condition precedent had not been followed.

It also found no prior conduct that waived its entitlement to rely on that clause.

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- ❖ The application of legal principals in the context of each particular circumstance:

*Jessco Structural Limited v. Gottardo Construction Limited*, 2016 ONSC 2189 (Ont. Div. Ct.)

Jessco was to get a written change order for any changes and did not (only obtaining a verbal approval).

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## Contractual Conditions Precedent

- ❖ The application of legal principals in the context of each particular circumstance:

*Jessco Structural Limited v. Gottardo Construction Limited*, 2016 ONSC 2189 (Ont. Div. Ct.)

The majority of the Divisional Court, in denying the appeal, focused on the fact that no negotiation had taken place as required. We don't believe Jessco should be taken as establishing that a verbal approval can never be relied on in the face of a written approval requirement ...

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- ❖ The application of legal principals in the context of each particular circumstance:

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There was also a very strong dissent from the majority's view, from Justice Wilson. The Court of Appeal may at some point, accordingly, revisit the principals applied in *Jessco*.

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## Contractual Conditions Precedent

- ❖ The application of legal principals in the context of each particular circumstance:

For those wishing to seek an extension, make a claim, respond to a Consultant's decision or suspend or terminate work, the moral of the story is that notice provisions, approval requirements and conditions precedent should be complied with where-ever possible.

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# COVID-19 and Construction: Identifying Issues and Managing Risk

## Contractual Conditions Precedent

- ❖ The application of legal principals in the context of each particular circumstance:

Where a condition precedent has been missed, the party with the claim may look to establish prior words or conduct that would amount to a waiver by the other side of its rights to rely on the contractual provision in question.

The party might also look to prove an absence of prejudice (however this would speculative and might be difficult to do)

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## Contractual Conditions Precedent

- ❖ The application of legal principals in the context of each particular circumstance:

For those responding to such a request, claim or step, care should be taken to see if there is a failure to follow a contractual condition precedent;

Care should also be taken to ensure that contractual entitlements are not waived in writing or by conduct.

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## Contractual Conditions Precedent

- ❖ The application of legal principals in the context of each particular circumstance:

For all parties, understand that the first judge, arbitrator or adjudicator is likely to take a good, hard look at the equities. Nothing is every as black and white as it seems, when we get to a Court/hearing room . . . .

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## Contractual Conditions Precedent

- ❖ Appeals in the Context of Contract Interpretation:
- ❖ where a question on appeal is one of fact or mixed fact and law, deference is given to the “trier of fact” unless there is an “palpable and over-riding error”

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## Contractual Conditions Precedent

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❖ Appeals in the Context of Contract Interpretation:

❖ *Sattva Capital Corp. v. Creston Moly Corp.*,  
2014 SCC 53

contractual interpretation is a question of mixed fact and law subject to deferential review on appeal  
***except in relation to standard from contracts***

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## Contractual Conditions Precedent

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❖ Appeals in the Context of Contract Interpretation:

❖ *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37

However, deference will be warranted if the factual matrix of a standard form contract that is specific to the particular parties assists in the interpretation.

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# COVID-19 and Construction: Identifying Issues and Managing Risk

## Contractual Conditions Precedent

- ❖ The application of legal principals in the context of each particular circumstance
- ❖ *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37 ;

deference will also be warranted if the parties negotiated and modified supplementary conditions, because the interpretation will likely be of little or no precedential value.

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## COVID-19 and Construction

- ❖ This Week's Topics:

So a Contractual Notice or Approval or other Contractual condition precedent to a claim was missed in relation to COVID-19 impacts ... So What?

Should Legislative Solutions be Employed to Alter constructions or subcontracts to address the economic impacts of COVID-19?

Employment Law issues: Leaves of Absence, Layoffs, Terminations, Employment Agreements and Government Subsidies

Questions

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# COVID-19 and Construction: Identifying Issues and Managing Risk

## Legislative Relief From Contracts?

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Can, and Should, Contracts and Subcontracts Be Altered or Amended by Legislation to Provide Relief from the Economic Impacts of COVID-19?

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## Legislative Relief From Contracts?

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Can, and Should, Contracts and Subcontracts Be Altered or Amended by Legislation to Provide Relief from the Economic Impacts of COVID-19?

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# COVID-19 and Construction: Identifying Issues and Managing Risk

## Legislative Relief From Contracts?

- ❖ The power of our governments to alter contractual terms and conditions, of course, cannot be debated:
- ❖ the *Sale of Goods Act*, the *Consumer's Protection Act*, the *Ontario New Home Warranties Plan Act*, the *Insurance Act*, the *Employment Standards Act*, the *Occupational Health and Safety Act* and (of course) the *Construction Act*

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## Legislative Relief From Contracts?

- ❖ The power of our governments to alter contractual terms and conditions, of course, cannot be debated:
- ❖ such legislation has been generally applied to contracts going *forward*, from no earlier than the date the legislation is passed but usually from some date in the future

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# COVID-19 and Construction: Identifying Issues and Managing Risk

## Legislative Relief From Contracts?

- ❖ In the COVID-19 context, our governments have imposed legislative changes to existing contracts, altering risk profiles already negotiated between parties
- ❖ In Ontario this is most evident through orders which have empowered certain employers to impose “work deployment measures” to address critical and essential care needs.

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## Legislative Relief From Contracts?

- ❖ In the COVID-19 context, our governments have imposed legislative changes to existing contracts, altering risk profiles already negotiated between parties
- ❖ orders authorize the employers to take any reasonably necessary steps to respond to and prevent the COVID-19 pandemic, *notwithstanding the provisions of any other statute, regulation, order, policy, arrangement or agreement (including any collective agreement).*

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## Legislative Relief From Contracts?

- ❖ In the COVID-19 context, our governments have imposed legislative changes to existing contracts, altering risk profiles already negotiated between parties
- ❖ specified employers can re-deploy staff, change work schedules and assignments, defer or cancel vacations, absences or other leaves and assign bargaining unit work to non-unit employees, contractors or volunteers

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## Legislative Relief From Contracts?

- ❖ In the context of the COVID-19 state of emergency, the measures make sense. One might wonder, however, how far our governments might reasonably go in retroactively altering the negotiated terms of a contract to address the economic impact of COVID-19.
- ❖ Such steps may, indeed, be worthwhile or necessary in society in general and in the construction industry in particular

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## Legislative Relief From Contracts?

- ❖ In the U.S., a number of states are already leading the way. Louisiana, Massachusetts, New Jersey, New York, Ohio, Pennsylvania and South Carolina have each proposed legislation that would require insurers to pay out on claims for COVID-19 related losses even if the policies do not provide for such coverage.

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## Legislative Relief From Contracts?

- ❖ In some cases, coverage is deemed to be provided under business interruption insurance policies, notwithstanding an expressed pandemic exclusion clause.
- ❖ In others, property insurance policies are retroactively amended by legislation to remove the requirement for physical damage from the definition of “property damage”, thereby opening the door to valid claims that would have otherwise been properly denied.

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## Legislative Relief From Contracts?

- ❖ These U.S. proposals are generally applied retroactively and are focused on providing relief to small businesses.
- ❖ They are financed through the creation of a fund into which all, or many, insurers will contribute (much in the way automobile insurers in Ontario pay into a fund to provide coverage for uninsured motorist claims).

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## Legislative Relief From Contracts?

- ❖ We anticipate that proposals such as these will be at least considered in Canada.
- ❖ It certainly makes sense to utilize whatever reasonable remedies might be available to assist (particularly small) businesses with the potentially fatal consequences of having to shut their doors for extended periods of time).

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# COVID-19 and Construction: Identifying Issues and Managing Risk

## Legislative Relief From Contracts?

- ❖ The further question becomes: to what extent might our federal or provincial governments consider further altering contractual rights and remedies in an effort to relieve against the economic impacts of COVID-19.
  - ❖ How they might be structured and funded so as to not prefer one contracting party over another is the crux of the issue.
- ... (Consider the call for legislative relief from the obligation to pay rent, for example)

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## Legislative Relief From Contracts?

- ❖ A number of proposals which would alter the remedies and obligations of parties to a contract have already been put forward in and in relation to the Construction industry in Ontario:
- Requests for legislation which would relieve contractors and subcontractors from the otherwise harsh consequences of how increased health and safety costs and the impacts of delay have been allocated in their contracts and subcontracts

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# COVID-19 and Construction: Identifying Issues and Managing Risk

## Legislative Relief From Contracts?

- ❖ A number of proposals which would alter the remedies and obligations of parties to a contract have already been put forward in and in relation to the Construction industry in Ontario:

Owners have asked for relief from the obligation to compensate contractors for delays suffered due to a “stop work order” (which might be payable under standard form CCDC2 and OPSS contracts) and from increased and extended financial carrying costs (which would otherwise be payable under their financing agreements)

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## Legislative Relief From Contracts?

- ❖ A number of proposals which would alter the remedies and obligations of parties to a contract have already been put forward in and in relation to the Construction industry in Ontario:

Owners and Contractors have both asked for relief from a contractor’s or subcontractor’s ability to terminate a contract or subcontract on the basis of such a “stop work order”.

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# COVID-19 and Construction: Identifying Issues and Managing Risk

## Legislative Relief From Contracts?

- ❖ In the end, these types of proposals will, and should be, at least considered. Again, how they might be structured and funded so as to not prefer one contracting party over another is the crux of the issue.
- ❖ That having been said, given the size and importance of the construction industry, creative means to fund such legislative remedies might be critical to avoiding substantial insolvencies, job losses and downturns in one of the most important sectors in our economy.

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Employment Law issues: Leaves of Absence, Layoffs, Terminations, Employment Agreements and Government Subsidies

Should Legislative Solutions be Employed to Alter constructions or subcontracts to address the economic impacts of COVID-19?

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