

March 26, 2020



Keith Burkhardt



COVID-19 and CONSTRUCTION: IDENTIFYING ISSUES and MANAGING RISK



Rob Kennaley

Kennaley Construction Law

COVID-19 and Construction: Identifying Issues and Managing Risk

COVID-19 and Construction

- ❖ Uncertainty in a Fluid Situation:
 - Project Impacts
(Delays, Increased Costs and Lost Productivity)

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COVID-19 and Construction

- ❖ Uncertainty in a Fluid Situation:
 - Project Impacts
(Delays, Increased Costs and Lost Productivity)
 - Options to Manage and Mitigate Risk

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COVID-19 and Construction

- ❖ Uncertainty in a Fluid Situation:
 - Project Impacts
(Delays, Increased Costs and Lost Productivity)
 - Options to Manage and Mitigate Risk
 - Future Projects

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COVID-19 and Construction

- ❖ Uncertainty in a Fluid Situation:
 - Project Impacts
(Delays, Increased Costs and Lost Productivity)
 - Options to Manage and Mitigate Risk
 - Future Projects
 - OHSA Issues and Obligations
 - Labour Instability and Employment Issues

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- ❖ Project Impacts
(Delays, Increased Costs and Lost Productivity)
 - The Contract Documents will probably govern schedule extensions and additional compensation
 - You need to read and understand how your Contracts/Subcontracts manage the risk of change, of delay, of health issues and of the unforeseen

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COVID-19 and Construction

- ❖ Project Impacts
(Delays, Increased Costs and Lost Productivity)
 - The Contract Documents will probably govern schedule extensions and additional compensation
 - You need to read and understand how what conditions precedent to claims and extensions your Contracts/Subcontracts have established

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- ❖ Project Impacts
(Delays, Increased Costs and Lost Productivity)
 - The Contract Documents will probably govern schedule extensions and additional compensation
 - We will review common clauses in the CCDC-2 Standard Form Stipulated Price Contract as a focal point for discussion
 - however, CDDC forms might not be used or and are commonly altered by Supplementary Condition

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- ❖ Project Impacts
(Delays, Increased Costs and Lost Productivity)
 - Frustration?
 - If your contract/subcontract deals with it, there can be no frustration
 - Difficult or unduly harsh performance does not generally give rise to frustration

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- ❖ Project Impacts
(Delays, Increased Costs and Lost Productivity)
 - Frustration?
 - it may be that where a contract or subcontract allocates the risk of delay, change and the unforeseen heavily but does not address a pandemic, the availability of frustration is heightened

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- ❖ Project Impacts
(Delays, Increased Costs and Lost Productivity)
 - *Force Majeure?*
 - CCDC - the standard force majeure clause
...an extension but not compensable.

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6.5.3 If the *Contractor* is delayed in the performance of the *Work* by:

- .1 labour disputes, strikes, lock-outs (including lock-outs decreed or recommended for its members by a recognized contractors' association, of which the *Contractor* is a member or to which the *Contractor* is otherwise bound),
- .2 fire, unusual delay by common carriers or unavoidable casualties,
- .3 abnormally adverse weather conditions, or
- .4 any cause beyond the *Contractor's* control other than one resulting from a default or breach of *Contract* by the *Contractor*,

then the *Contract Time* shall be extended for such reasonable time as the *Consultant* may recommend in consultation with the *Contractor*. The extension of time shall not be less than the time lost as the result of the event causing the delay, unless the *Contractor* agrees to a shorter extension. The *Contractor* shall not be entitled to payment for costs incurred by such delays unless such delays result from actions by the *Owner*, *Consultant* or anyone employed or engaged by them directly or indirectly.

- **CCDC *Force Majeure*:
an extension but no additional compensation**

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- ❖ Project Impacts
(Delays, Increased Costs and Lost Productivity)
 - CCDC – other clauses

... the unforeseen conditions clause?

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GC 6.4 CONCEALED OR UNKNOWN CONDITIONS

- 6.4.1 If the *Owner* or the *Contractor* discover conditions at the *Place of the Work* which are:
- .1 subsurface or otherwise concealed physical conditions which existed before the commencement of the *Work* which differ materially from those indicated in the *Contract Documents*; or
 - .2 physical conditions, other than conditions due to weather, that are of a nature which differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the *Contract Documents*,
- then the observing party shall give *Notice in Writing* to the other party of such conditions before they are disturbed and in no event later than 5 *Working Days* after first observance of the conditions.

Concealed or unknown physical conditions?

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- ❖ Project Impacts
(Delays, Increased Costs and Lost Productivity)
 - CCDC – other clauses
 - ... the hazardous substances clause?

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6.4.4 If such concealed or unknown conditions relate to toxic and hazardous substances and materials, artifacts and fossils, or mould, the parties will be governed by the provisions of GC 9.2 - TOXIC AND HAZARDOUS SUBSTANCES, GC 9.3 - ARTIFACTS AND FOSSILS and GC 9.5 - MOULD.

9.2.5 If the Contractor

- .1 encounters toxic or hazardous substances at the *Place of the Work*, or
- .2 has reasonable grounds to believe that toxic or hazardous substances are present at the *Place of the Work*, which were not brought to the *Place of the Work* by the Contractor or anyone for whom the Contractor is responsible and which were not disclosed by the Owner or which were disclosed but have not been dealt with as required under paragraph 9.2.4, the Contractor shall
- .3 take all reasonable steps, including stopping the *Work*, to ensure that no person's exposure to any toxic or hazardous substances exceeds any applicable time weighted levels prescribed by applicable legislation at the *Place of the Work*, and
- .4 immediately report the circumstances to the *Consultant* and the *Owner* in writing.

9.2.7 If the Owner and Contractor agree or if the expert referred to in paragraph 9.2.6 determines that the toxic or hazardous substances were not brought onto the place of the *Work* by the Contractor or anyone for whom the Contractor is responsible, the Owner shall promptly at the Owner's own expense:

- .1 take all steps as required under paragraph 9.2.4;
- .2 reimburse the Contractor for the costs of all steps taken pursuant to paragraph 9.2.5;
- .3 extend the *Contract* time for such reasonable time as the *Consultant* may recommend in consultation with the Contractor and the expert referred to in 9.2.6 and reimburse the Contractor for reasonable costs incurred as a result of the delay; and
- .4 indemnify the Contractor as required by GC 12.1 - INDEMNIFICATION.

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- Hazardous Substances Clauses may apply where it can be shown that the pathogen was brought into the workplace by someone other than the contractor or the contractor's forces;
- They may not apply where a subtrade worker brings in the pathogen or where there is merely a threat that it *might* be brought in.

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- ❖ Project Impacts
(Delays, Increased Costs and Lost Productivity)
 - Delay Provisions: Action or Omission of Owner
... extension and reimbursement

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6.5.1 If the *Contractor* is delayed in the performance of the *Work* by an action or omission of the *Owner*, *Consultant* or anyone employed or engaged by them directly or indirectly, contrary to the provisions of the *Contract Documents*, then the *Contract Time* shall be extended for such reasonable time as the *Consultant* may recommend in consultation with the *Contractor*. The *Contractor* shall be reimbursed by the *Owner* for reasonable costs incurred by the *Contractor* as the result of such delay.

- ... delays caused by Owner, Consultant, etc. are generally compensable under CCDC terms

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COVID-19 and Construction

- ❖ Project Impacts
(Delays, Increased Costs and Lost Productivity)
 - Delay Provisions- CCDC:
 - ... a *Stop Work Order* of a Court or other public authority ... additional compensation
 - ... *not clear that this has happened...*

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6.5.2 If the *Contractor* is delayed in the performance of the *Work* by a stop work order issued by a court or other public authority and providing that such order was not issued as the result of an act or fault of the *Contractor* or any person employed or engaged by the *Contractor* directly or indirectly, then the *Contract Time* shall be extended for such reasonable time as the *Consultant* may recommend in consultation with the *Contractor*. The *Contractor* shall be reimbursed by the *Owner* for reasonable costs incurred by the *Contractor* as the result of such delay.

- Not clear that a “social distancing” or “stay at home” recommendation is an “order”;
- Such Orders may be forthcoming, however;
- Site specific MoL/MoH/MAG Orders may be made;
- The doctrine of “constructive suspension” might be considered

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- What about Orders that allow the work to continue but make the work more expensive and/or place inordinate liability on the contractor/subcontractor?
... the Region of Niagara “Order” in relation to pre-construction surveys?

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6.5.2 If the *Contractor* is delayed in the performance of the *Work* by a stop work order issued by a court or other public authority and providing that such order was not issued as the result of an act or fault of the *Contractor* or any person employed or engaged by the *Contractor* directly or indirectly, then the *Contract Time* shall be extended for such reasonable time as the *Consultant* may recommend in consultation with the *Contractor*. The *Contractor* shall be reimbursed by the *Owner* for reasonable costs incurred by the *Contractor* as the result of such delay.

- What about Orders that allow the work to continue but make the work more expensive and/or place inordinate liability on the contractor/subcontractor?
... how does the contract deal with change?
... is this now a completely different contract?
... is the contract / subcontract frustrated?

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- ❖ Project Impacts
(Delays, Increased Costs and Lost Productivity)
 - **Entitlement** to an Extension or to Additional Compensation is not Enough
 - Notice Provisions **Must** be Followed for Both Extensions and for Additional Compensation

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Technicore Underground v. Toronto 24 (City), 2012 ONCA 597

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

Jessco Structural Limited v. Gottardo Construction Limited, 2016 ONSC 2189

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6.5.4 No extension shall be made for delay unless *Notice in Writing* of the cause of delay is given to the *Consultant* not later than 10 *Working Days* after the commencement of the delay. In the case of a continuing cause of delay only one *Notice in Writing* shall be necessary.

- No extension without notice

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6.6.1 If the *Contractor* intends to make a claim for an increase to the *Contract Price*, or if the *Owner* intends to make a claim against the *Contractor* for a credit to the *Contract Price*, the party that intends to make the claim shall give timely *Notice in Writing* of intent to claim to the other party and to the *Consultant*.

6.6.2 Upon commencement of the event or series of events giving rise to a claim, the party intending to make the claim shall:

- .1 take all reasonable measures to mitigate any loss or expense which may be incurred as a result of such event or series of events, and
- .2 keep such records as may be necessary to support the claim.

6.6.3 The party making the claim shall submit within a reasonable time to the *Consultant* a detailed account of the amount claimed and the grounds upon which the claim is based.

- No Additional Compensation without Timely Notice and Timely Backup
- READ THESE PROVISIONS CAREFULLY

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COVID-19 and Construction

❖ Options to Manage and Mitigate Risk

- Understand what your Contract/Subcontract Says!
 - Meet *all* of your Notice Provisions!
 - Get approvals where required, as required!
 - Respond where required, as required!
- Do this to preserve your Rights under your Contracts and Subcontracts!

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COVID-19 and Construction

❖ Options to Manage and Mitigate Risk

- Is Suspension of Work an Option?
- Is Termination of Contract/Subcontract an Option?
 - Has there been a default?
 - Does Prompt Payment Apply?
 - Is Termination for Convenience an Option?
 - Does the market now work in your/their favour?
- Is a Change in the Work an Option?

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- ❖ Options to Manage and Mitigate Risk
 - Lien Claimants: Preserve your claims!
 - Beware the Stayed Limitation Period

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1. Any provision of any statute, regulation, rule, by-law or order of the Government of Ontario establishing any limitation period shall be suspended for the duration of the emergency, and the suspension shall be retroactive to Monday, March 16, 2020.
2. Any provision of any statute, regulation, rule, by-law or order of the Government of Ontario establishing any period of time within which any step must be taken in any proceeding in Ontario, including any intended proceeding, shall, subject to the discretion of the court, tribunal or other decision-maker responsible for the proceeding, be suspended for the duration of the emergency, and the suspension shall be retroactive to Monday, March 16, 2020.

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❖ Options to Manage and Mitigate Risk

- All parties: preserve your claims!
 - Preserve Claims for Lien (even if expiry not an immediate concern);
 - Make timely Bond and Insurance Claims;
 - Consider Trust Remedies where applicable;
 - Does Adjudication Apply?

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❖ Future Projects / Proposed Changes

- Beware Unbalanced Pandemic Risk Allocation
- Consider Reasonable Pandemic Risk Allocation
- Do you want the Job?
- Consider Potential Changes in the Marketplace!

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❖ OHS and Labour Issues

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COVID-19 and Construction Businesses

Health and Safety, Labour and Employment Issues

Keith P. Burkhardt

March 26, 2020



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Agenda

- Occupational health and safety
- Workplace Safety and Insurance Board
- Labour relations
- Employment issues
- Record of Employment

Occupational Health and Safety Act

■ General duties of

Owner

Constructor

Employer

Supervisor

Worker

■ Additional duties in regulation

Construction Projects, O Reg 213/91

Health and Safety – Toilets and other “Facilities”

- Constructor responsible for “facilities”
- Supervisor required to inspect “sanitation systems” at least once per week
- One toilet for every 10 or 15 workers
- One clean-up facility for every two toilets
 - Wash basin with running water
 - Soap or hand cleanser
 - Paper towels or a hand dryer

Health and Safety - Toilets

- Include a toilet with a lid
 - ❑ Toilet paper holder (with supply of toilet paper)
 - ❑ Sanitary napkin disposal for females
- Provide privacy and protection from weather and from falling objects
- Be illuminated, heated and ventilated
- Be serviced (pumped), cleaned and sanitized
 - ❑ Constructor to keep record of servicing

Health and Safety – Drinking Water

- Reasonable supply of potable drinking water
 - Piping system or clean, covered container with a drain faucet
- Workers provided a sanitary means of drinking the water
 - Shall not be required to share a common drinking cup

Health and Safety – COVID-19

- Extra scrutiny
- Minimize groups of workers
 - Stagger start and end times, breaks and lunch
 - Changes to toolbox and safety talks
 - Limits on workers in a hoist
- Sanitize tools, equipment and work locations
- Remind workers about actions to minimize transmission of COVID-19

Questions to Ask Workers and Visitors

- Within the last 14 days, have you:
 1. Experienced, or been in close contact with someone with, flu-like symptoms, or been diagnosed with, or been in close contact with someone who has been diagnosed with, COVID-19; or
 2. Travelled outside Canada; or
 3. Been on a cruise ship?
- “Yes” to any question = Access denied

Question #1 – Broken Out

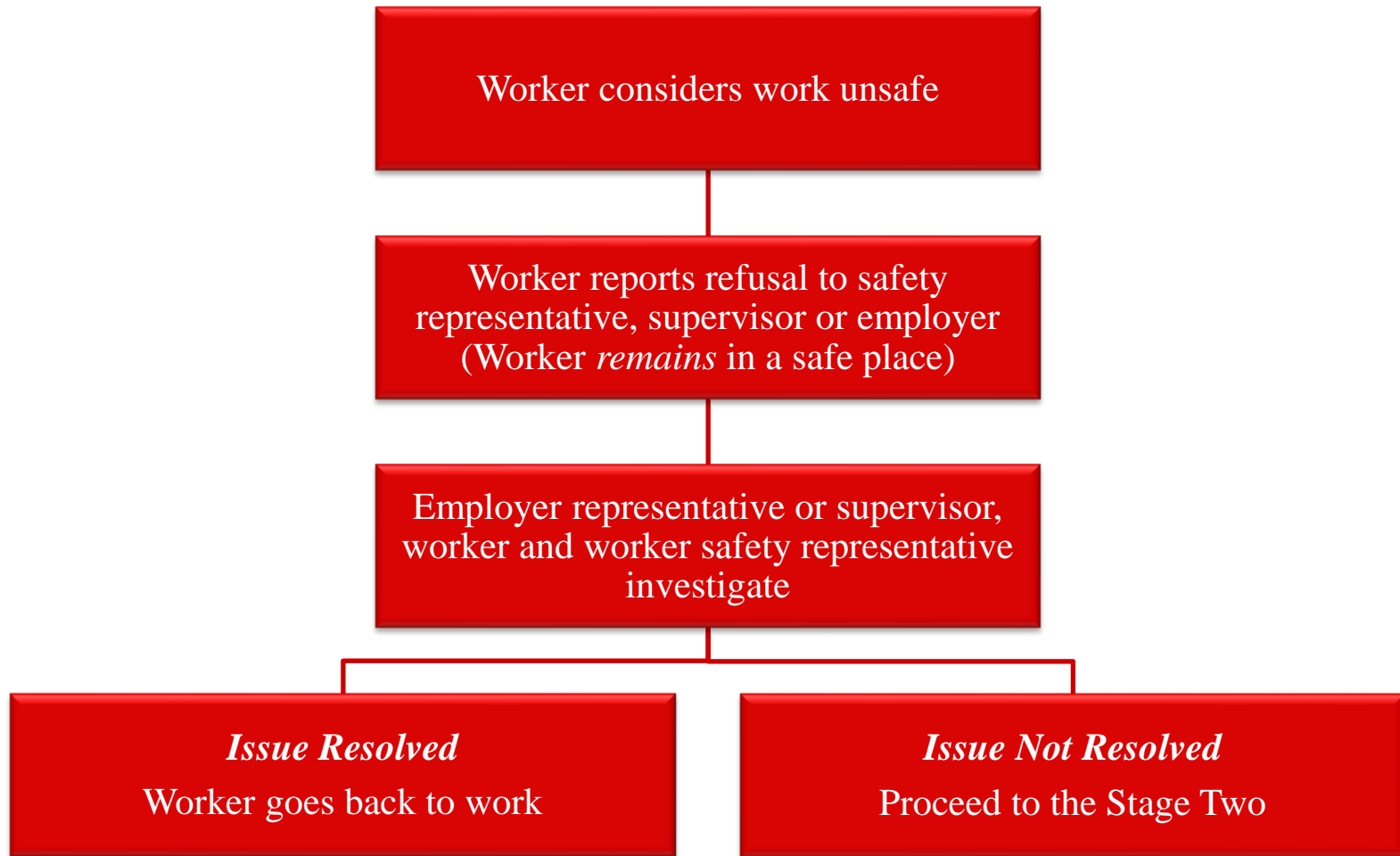
■ Have you:

- Experienced cough, fever, trouble breathing or any other respiratory issue;
- Been diagnosed with the flu or COVID-19;
- Been in close contact with someone who has had a cough, fever, trouble breathing or any other respiratory issue; or
- Been in close contact with someone who has been diagnosed with COVID-19?

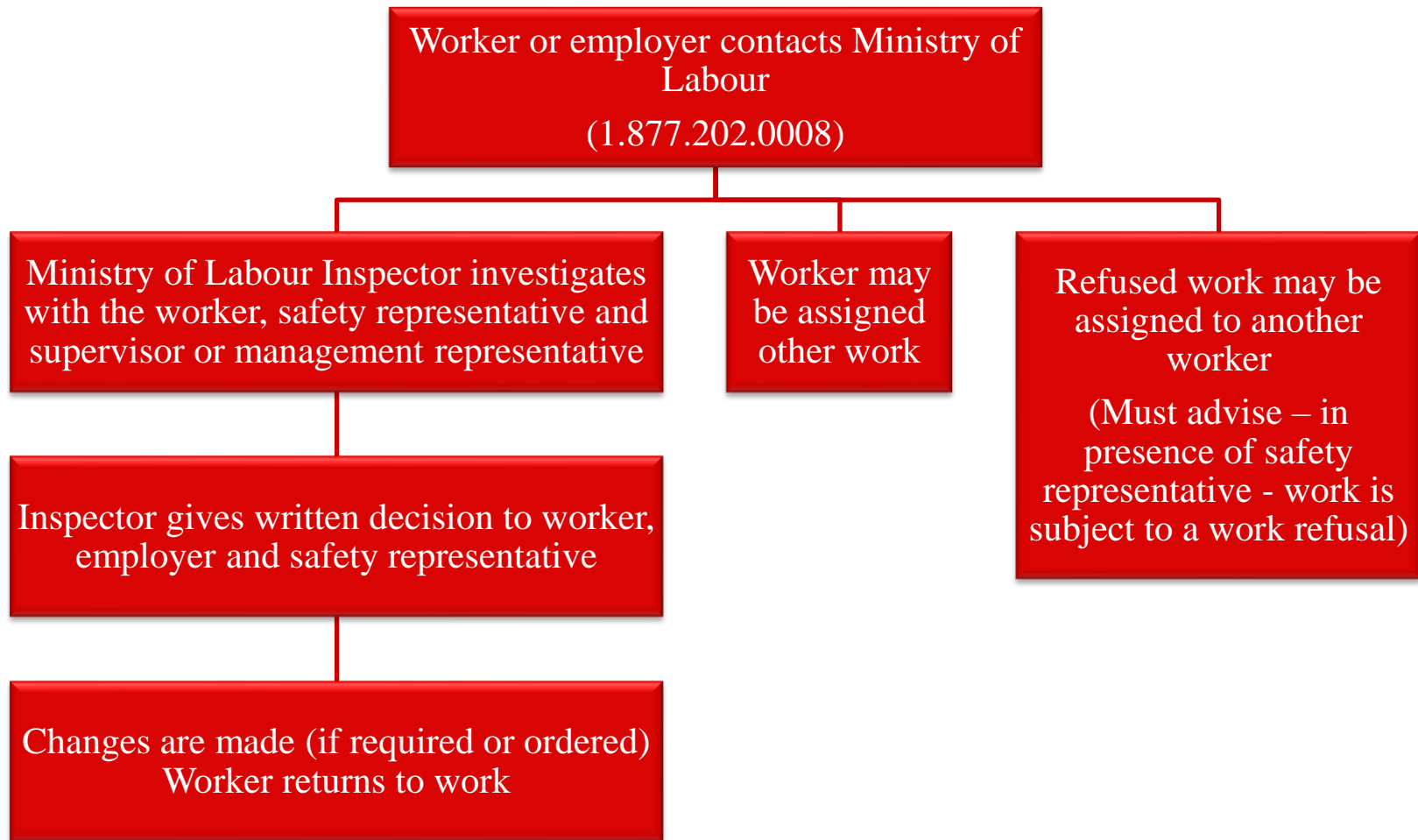
Taking Temperatures – Best Practices

- Advanced notice and test everyone each time they enter the site
- Maintain privacy
- Trained individual performing the test
- Infrared digital thermometer or temple touch
- Determine threshold in advance (100 degrees)
- Do two tests if temperature in excess of limit
- Keep results private

Work Refusals – Stage One



Work Refusals – Stage Two



Workplace Safety and Insurance Act

- Occupational Disease and Survivor's Benefits Program
- Require work-related exposure
- Consider objection to entitlement in a Form 7

Labour Relations Considerations

- Review collective agreements
- Layoffs
 - Timing of layoffs, final pay and records of employment
 - Recall from layoffs
- Addressing shortage of workers
 - Additional workers from union(s)
 - Subcontracting of work

Employment Considerations

- Importance of employment contracts
- Reductions in hours and rates of pay
- Reduce to “skeleton crew” in office
 - Work from home options
 - Employees may take vacation or use lieu time

Employment Considerations

■ Temporary layoff

- 13 weeks if benefits are not continued

- 35 weeks if benefits are continued

■ Termination of employment

- *Employment Standards Act* and common law entitlements

- “Constructive dismissal” issues

Obligations to Pay Employees

- Employees are paid when they are at work
- Employees are not entitled to pay when they are not working
 - Quarantine or self-isolation
 - Layoff
 - Leave of absence/decline opportunity to work
- Employees may be eligible for EI
- Employer may establish SUB plan

Record of Employment (ROE)

- Timing as per collective agreement or within five calendar days of the first day of an interruption of earnings
- Block 16 - Reason for ROE
 - ❑ Sick or quarantined – Code D (Illness/injury)
 - ❑ Shortage of work – Code A (Shortage of Work)
 - ❑ Employee chooses not to come to work but is not sick or quarantined – Code E (Quit) or N (Leave of Absence)

Government Programs and Promises

- Canada Emergency Response Benefit (CERB)
 - Income relief of \$2,000 per month for four months
 - Self-employed/pieceworkers
 - Individuals who remain home with family member who is ill or children out of school
- Temporary Wage Subsidy for Employers
 - 10% of the remuneration an employer pays
 - Maximum of \$1,375 per employee \$25,000 total per employer

Next Steps

- Ensure health and safety measures are met
- Communicate with workers and unions
- Consider office operations
- Go a level above
- *Wash your hands...*

Questions?



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March 26, 2020



Keith Burkhardt



COVID-19 and CONSTRUCTION: IDENTIFYING ISSUES and MANAGING RISK



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