

SPECIAL FEATURE

# COVID-19

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## RESOURCE GUIDE

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**Daily Commercial News**

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# Construction contracts impacted now and into post-COVID world



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JOHN BLEASBY  
CORRESPONDENT

Wouldn't it be wonderful to think that the COVID pandemic was a one-time event? However, in a world increasingly integrated through personal travel and international supply chains, it remains entirely possible that we will be confronted with a new pandemic in the future.

Therefore, it is vital that the industry look beyond this current period. Project parties joined together by contract must address potential pandemic events as one of several key considerations when drawing up their agreements.

"The impact of COVID-19 on the construction industry has been widespread and has resulted in numerous issues including increased material and labour costs, work delays, global supply chain shortages, and government regulation," Sahil Shoor, partner with Gowling WLP, told the Daily Commercial News. "This has affected how construction contracts are being negotiated. In particular, parties are seeking to rebalance risk allocation and avoid excessive risk as it relates to these new issues."

Yet as Rob Kennaley of Kennaley Construction Law points out, "the words 'pandemic' and 'epi-

demic' do not show up in the CCDC or CCA standard form contracts that have been in use in Canada for decades." He agrees that the risks associated with a COVID-like occurrence are too great and significant to go unaddressed or left to chance.

In many cases, viral pandemics are not even included in the list of "force majeure" events in construction contracts either, writes Trent Cotney, CEO of Cotney Attorneys & Consultants. In the past, he says these were reserved for "floods, tornadoes, hurricanes, earthquakes, landslides, wildfires and other 'Acts of God,' as well as human-caused emergencies such as terrorism, war, riots, strikes and explosions."

Yet COVID has taught us that a pandemic can have the same impact in terms of material supply delays and work stoppages. These need to be properly dealt with, particularly as they affect compensation. For that reason, Shoor recommends the inclusion of a pandemic-specific clause.

Shoor explains that although contractors can now be expected to take steps that anticipate supply chain interruptions, "the cost of mitigation efforts will generally be allowed by contractors in the fixed price and GMP (Guaranteed Maximum Price) amounts."

Some contractors will include such mitigation costs as allowance items, or provide for a cost reduction if the restrictions underlying the increases are lifted sooner than the date of substantial completion.

Delay costs resulting in claims for additional procurement costs can also involve the work force. Shoor uses the example of delays caused by workplace lockdowns or when site personnel test positive.

Furthermore, there can be changes in laws during a pandemic that can slow or halt project work.

"Changes in applicable law provisions in construction contracts may be used to limit the impact of governmental orders that place restrictions on the global supply chain and on the actual construction on the construction project", says Shoor. "Changes in applicable law provisions, however, do not eliminate the challenge presented with best or expected practices around COVID-19 avoidance and mitigation which is not legally binding in nature."

Responsibility for any added costs associated with these adjustments does not have to be entirely one-way. While payment adjustments can be made to deal with uncertainties in the labour and supply chain, Shoor says parties may also contractually limit any added costs assigned to the owner resulting from unforeseen events. For example, it could be agreed that costs beyond certain limits would be covered by contractors, or that owners be required to pay a percentage of the difference between the actual cost and the maximum price.

Matters could develop to the point that one party or the other wishes to partially or completely suspend work for a period of time. Allowing this offers flexibility and responsiveness to the situation at hand. However, any suspension of construction work will likely result in increased costs associated with restarting again, plus costs for labour, security, additional safety measures, or construction permit extensions. Shoor says that, "Contractual terms specifying consequences for the suspension of work instructed by a specific party, whether the owner and/or the contractor, can be included to dilute the impact of suspension provisions."

Similar considerations can be given to allow the outright termination of a contract, giving the owner the right and opportunity to review the economic viability of continuing the project at all.

At the end of day, Kennaley points out that contracted parties should keep their expectations reasonable, taking into account limits to what an owner or contractor can or should do to penalize a failure to perform in the face of COVID or a similar event.

He cites Mr. Justice Koehnen's remarks from the 2021 case, Crosslinx v. Ontario Infrastructure, held before a Ontario Commercial Court.

"The purpose of an obligation to substantially complete a project by a given date is to incentivize constructors to keep the project moving forward and to impose a financial penalty if they do not do so... Imposing financial penalties for delays caused by the pandemic does not further the purpose of including a substantial completion date in the contract. It merely penalizes a contractor who may be working with heroic efficiency to complete the project in a timely manner even though it is impossible to do so because of circumstances beyond the contractor's control. Imposing financial penalties on contractors for failing to meet a substantial completion date in those circumstances only incentivizes them to cut corners and imperil public health and safety."

"In the circumstances I do not think it appropriate to adopt an interpretation of a contractual provision that runs contrary to its purpose and that incentivizes constructors to imperil public health."

## Economic Snapshot

# Cresting of 4th COVID wave points to smoother sailing ahead for New Brunswick



John Clinkard

With a 14-day case rate of 157 per 100,000 population vs 116 per 100,000 for the entire country, it's clear the fourth wave of COVID-19 has hit New Brunswick hard. In the face of this headwind, overall hiring in the province has remained flat for the past 11 months while the unemployment rate, currently 9.3%, is the third highest in the land, and well above the national average, now 6.9%. While the overall employment stats are rather bleak, a closer look reveals that full-time hiring is up by +3,000 jobs year to date driven primarily by gains in public administration, education services, and accommodation. Also, according to the *Canadian Federation of Independent Business*, full-time staffing plans in the province are the highest they have been since mid-2019.

### Affordable housing a big draw

While the onslaught of successive COVID-19 waves has significantly depressed New Brunswick's employment growth over the past year, it has had little impact on the inflow of migrants from other provinces as well as from outside Canada. A recent Royal Bank of Canada (RBC) report titled *A Regional Renaissance: More Canadians drawn to live on the Atlantic Coast during pandemic* indicates the region's affordable housing has been a major attraction for individuals and families. According to RBC, Saint John, New Brunswick is Canada's most affordable census metro area. During the first half of this year, net interprovincial migration hit a record +3,300 individuals, which was augmented by a +2,898 increase in international net migration.

### Housing starts at 10-year high

Driven by the strong inflow of individuals from outside the province, persisting low-interest rates, and the above-mentioned highly affordable house prices, sales of existing homes year-to-date in N.B. are up by +31% versus the first nine months of 2020 and by +39% over the same period in pre-pandemic 2019.

As a result of this exceptionally strong surge in demand, the months' supply of homes for sale has, over the past year, dropped from a COVID-19-induced high of 9.4 in April of 2020 to a record low of 2.3 in September 2021. Over the same period, the average house price for the province has accelerated from no change y/y in April 2020 to +22.4% in the latest month. That said, New Brunswick's average house price at \$256,000 is the lowest among provinces and well under the national average of \$689,303.

Spurred by the surge in demand, housing starts in New Brunswick year to date are up by +15% versus 2020 and by +34% vis-à-vis 2019. Single, semi, and row starts are up by +58%, more than offsetting a drop of -13% in apartment starts. Given the solid +32.4% year-to-date increase in residential building approvals, housing starts in New Brunswick should total in the range of 4,100 to 4,300 units this year and 3,900 to 4,100 units in 2022 compared to 3,500 units in 2020.

Despite the lacklustre job gains over the past several quarters, consumer spending as reflected by retail sales in New Brunswick are up by +16% YTD over 2020 and by +13% versus the first seven months of pre-pandemic

2019. While the bulk (52%) of the gain in retail sales this year has centred on motor vehicles, sales of house-related goods including furniture and home furnishings (+45%) as well as building materials (+18%) have also been solid, consistent with the healthy pattern of home sales.

### N.B.'s exports fuelled by higher oil prices

From an external perspective, due in large part to strong demand for petroleum products in the United States, New Brunswick's merchandise exports are up by +51% year to date after contracting by -23% in 2020. Other products which have headed south across the border in significant volumes since the beginning of this year are seafood (lobsters and salmon), lumber, and liquid natural gas.

The very strong gain in global energy prices over the past 12 months and a growing consensus that prices will rise further due to a significant slowdown in energy investment, point to a further rise in the value of New Brunswick's exports well into 2023.

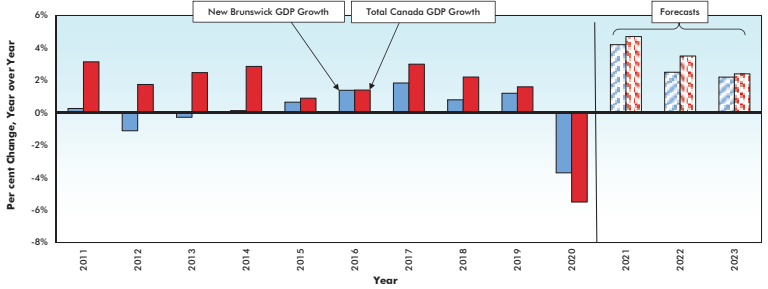
### CAPEX to pick up in 2021 and 2022

After posting solid gains of +19% y/y in 2017 and +13% in 2018, capital spending retreated by -10% in 2019 and by the same percentage again in 2020. However, despite the persisting drag of COVID-19 on economic activity since March of 2020, two recent surveys of capital spending in the province are pointing higher. First, Statistics Canada's *Non-residential Capital and Repair Expenditures* survey indicates public and private spending will post a gain of +10% this year. Second, the more recent survey of major projects by the *Atlantic Provinces Economic Council* indicates that investment in the province will increase by +\$2.2 billion, its average level for the past ten years.

Major projects underway or expected to go forward in the near term include the Atlantic Science Enterprise Centre, upgrades to Port Saint John's container terminal, and upgrades to the Saint John Pulp Mill. Other projects which are approved or near approval include the Mactaquac Generating Station upgrade, the Sisson Mine Project, and the NB Power/Moltex Energy small modular reactor project.

John Clinkard has over 35 years' experience as an economist in international, national and regional research and analysis with leading financial institutions and media outlets in Canada.

## Real\* Gross Domestic Product (GDP) Growth — New Brunswick vs Canada



\* "Real" is after adjustment for inflation.  
Data Sources: Actuals — Statistics Canada; Forecasts — CanaData.  
Chart: ConstructConnect — CanaData.





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# Roadbuilders road to COVID site safety ‘exemplary’: ORBA

DAN O'REILLY  
CORRESPONDENT

It's been a long road for the Ontario Road Builders' Association (ORBA) and its member firms from the outbreak of COVID-19 in Canada in early 2020 to the emphasis on double vaccinations.

"Like everyone else we were blindsided. They were no guidelines on how to deal with the pandemic," says ORBA president Rocky Coco, who also is president of Coco Paving Inc.

At the same time, the association and its members "lobbied hard" to avoid a provincial government shutdown of road construction, arguing that it was an essential business, he says.

Road contractors did an "exemplary job" in coping with the pandemic, says Coco, who estimates they lost an average \$150-per-day-per-worker from additional costs such as purchasing safety equipment and lost productivity from enforcing social distancing.

In addition to conducting on site safety procedures — such as daily screening of workers — they adhered to government and public health policies and guidelines and followed the recommendations of its own association, say Coco.

"Every morning I chaired a meeting of our COVID Response Team," says ORBA chief executive officer Bryan Hocking on the actions the association knew had to be taken as the entire country went into lockdown.

Comprised of himself and the directors of stakeholder relations and marketing and communications and their support staff, the five-member team assessed the various government and public health pronouncements directive which "were coming out fast and furious" and then sent out daily bullet points



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to its members.

The morning assessment meetings have continued throughout the pandemic, although have narrowed down to three days and include non-COVID subjects.

Along with government and public health directives, the material and other information was also posted to association's website and was the basis for the publication on of a COVID-19 Best Practices Asphalt Industry Best Practices Guide by the Ontario Asphalt Pavement Council, a council of ORBA representing the asphalt manufacturing and installation sector.

Work on the guide began in April in 2020 and then released in June, says Hocking, acknowledging the work of technical director Doubra Ambaiowei and OPAC's plant

and paving committee for its creation.

Distributed electronically to all ORBA members, the four-page document included a list of measures for restricting the spread of the pandemic. Some were standard practices which would apply to any business, such as the need for frequent handwashing and adhering to social distancing.

Others were more specific to the industry, including emphasizing the importance of electronic ticketing and asking third party haulers to remain in their trucks at construction sites. Another recommendation was that asphalt samples should be bagged and tagged.

"At no point did employers or their employees pushback against those recommendations," says Hocking, adding that the "road building industry reacted very quickly

and went above and beyond," industry guidelines and government regulations.

Road builders developed their own set of protocols and were "quite innovative" in implementing on site safety measures. Some examples include setting up mobile wash stations, sanitizing equipment at the beginning and end of shifts, and installing Plexiglas between the front and back seats in trucks, he says.

Focusing on the issues of return-to-work policies vaccinations, Hocking notes that ORBA's head office in Mississauga reopened in early September. But anyone entering the building has to be double vaccinated. Based on feedback the association has been receiving, some of its member firms are also enforcing similar restrictions for their office environments.

On the construction sites the situation is a little different. Not only are there more people on those sites, some unions are in favour of mandatory vaccinations, while others are not. A recent ORBA study revealed the number of vaccinated versus non-vaccinated workers roughly corresponds to national figures, he says.

It would be easier for the industry if the province would implement across-the-board regulations that apply to all businesses. Echoing comments other association and business leaders have made, Hocking says the differing policies: "gets a little confusing. But we realize the government is in a difficult position."

At the same time, there is no confusion on how a recently implemented direction by the City of Ottawa will impact all contractors in that municipality, says Hocking.

In early September that city implemented mandatory vaccine policy that requires all employees, volunteers, students, and outside contractors to be fully vaccinated against COVID-19 by this Nov. 1.



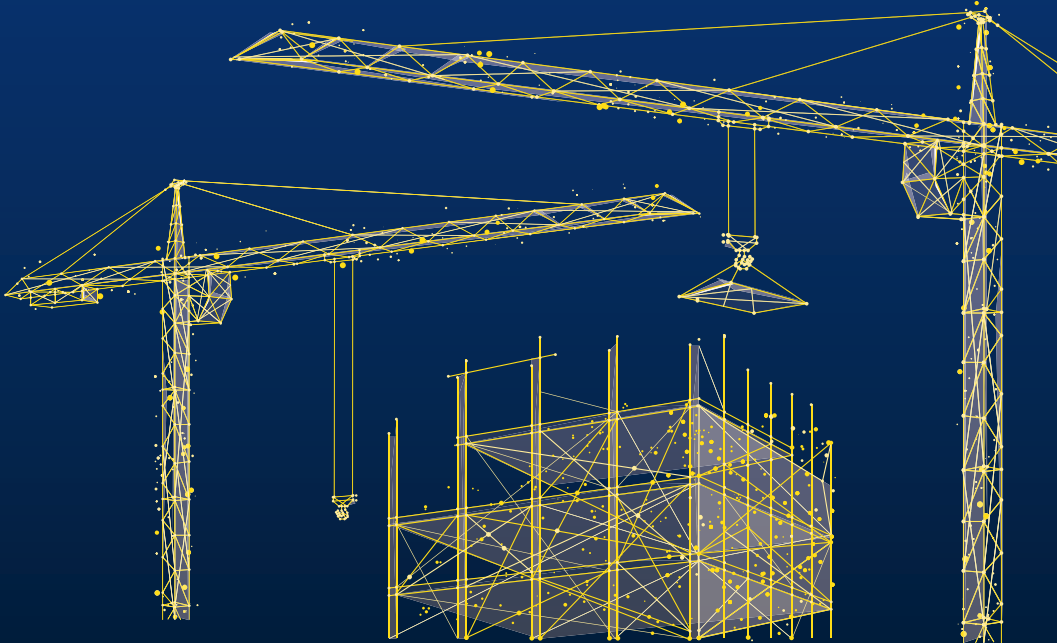
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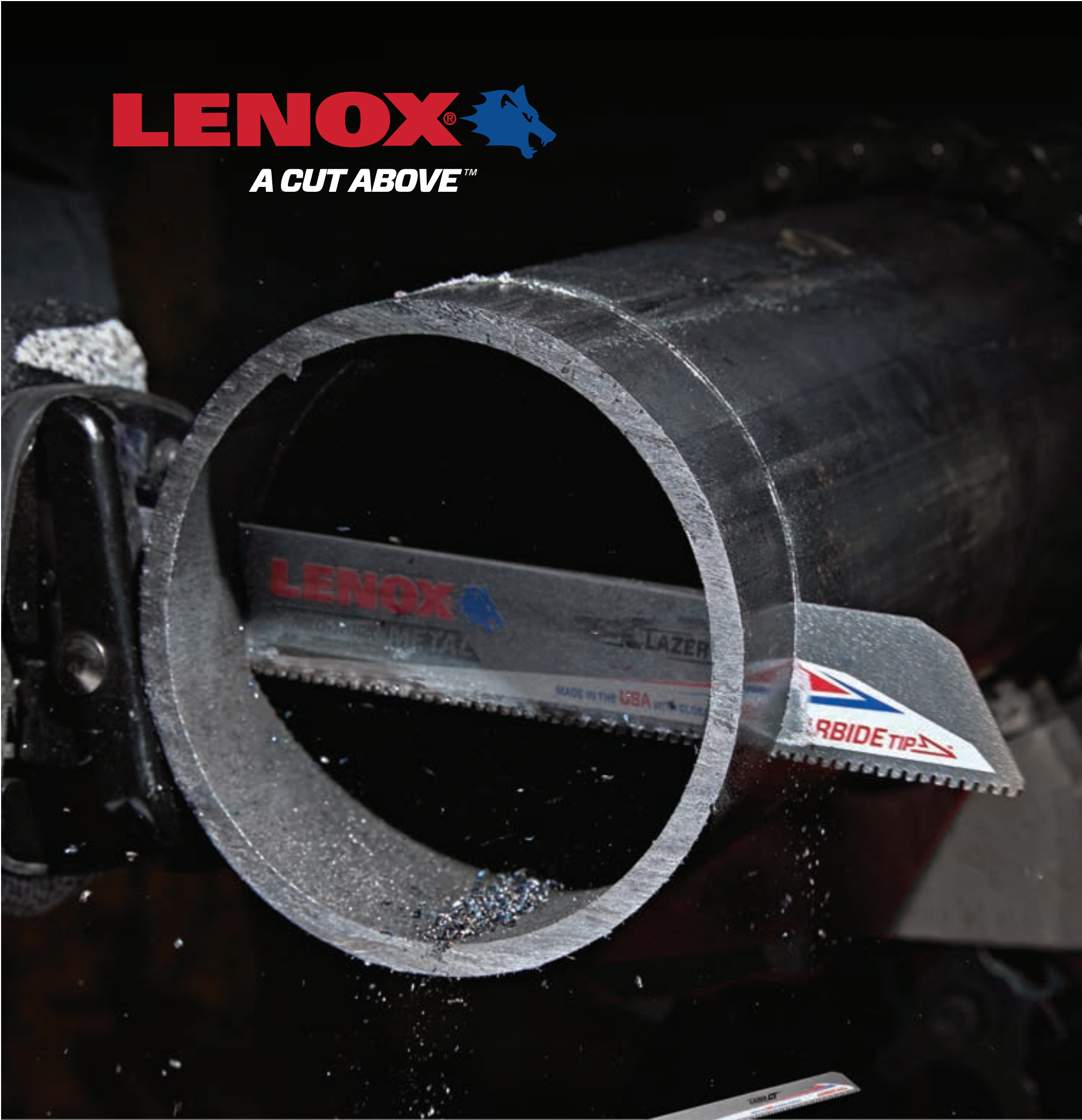
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# Security guards key to Tribute’s pandemic site safety

DAN O'REILLY  
CORRESPONDENT

At Tribute Communities’ recently completed Max and Stanley condominium projects in downtown Toronto, security guards did double duty as elevator operators.

It’s a role they will also perform at the firm’s 25-storey U.C. Tower in Oshawa once the building has been enclosed and finishing trades can begin using its elevators, says health and safety manager Ketan Patel.

At the two Toronto condos, the guards controlled the number of trades entering the elevators, enforced masking/distancing restrictions, and even operated the control panels to reduce the risk of COVID-19 spread, he says.

With the exception of break times, which were covered by company staff, the guards were on duty for the entire work day which normally lasted from 6 am to 4 pm, he says.

In pre-COVID times’ the transition from using hoists, scaffolding, and other lifting devices to elevators is fairly seamless and not an issue. Following the outbreak of the pandemic, however, Tribute began posting a security guard at each of the three elevators in the Toronto towers. “Elevators are, after all, enclosed spaces,” he points out.

At first, this extra layer of security did generate some frustration among the trades. “But they became use to it.”

If a subcontractor previously required 15 minutes for transporting employees and material to get to a specific

area, then they allocated 25 minutes. The goal was not to slow the pace of construction and to keep a project on schedule, staggered starting times were used. Trades with a high number of employees entering the towers also had first priority over those with only a handful, he says.

“Like most in the industry we were caught unprepared (by the pandemic),”

Ketan Patel  
Tribute Communities

There was also increased emphasis on scheduling work so that various trades would have a floor to themselves to maintain the physical separation. For example, tile setters might be working on one floor, trim carpenters on the floor below, and cabinet installers on the subsequent floor.

Depending on the size of a Tribute project, the trades typically work on a “cycle”. For example, if a four-day cycle is in, each trade moves up a floor every four days, he says.

Signage also plays a key part in pandemic control and at the U.C. Tower there are a number of passive screening, elevator capacity, distancing, and hand washing signs, says Patel.

The use of security guards and the elevators and the strict separation of the trades was one of a number of measures the company has implemented. In the early days of the pandemic, its COVID-19 Response Team, in conjunction with other members of RESCON, also volunteered to participate in the Ontario Provincial Antigen Screening Program. Through the program, rapid antigen screening tests are distributed to enhance existing routine screening measures. Weekly testing at Tribute’s sites was conducted by a third party health and safety consultant, he says.

There is less focus on the rapid testing with the full roll-out of vaccines and the feedback Tribute has been receiving from its subcontractors is that most of their employees have been double vaccinated, says Patel.

“Like most in the industry we were caught unprepared,” says Patel on the company’s initial response to the pandemic.

However, a one page Pandemic Response Plan developed in the early days of the pandemic has evolved into a 38-page document with sections devoted to preventative, detection, and response measures, plus a return to work protocol, he says.



TRIBUTE COMMUNITIES  
The photo above captures how Tribute Communities displayed its COVID-19 safety policies at work sites.

# Worksite COVID tests do not violate LIUNA contracts: OLRB

IAN HARVEY  
CORRESPONDENT

Construction workers should expect to be tested for COVID on the spot more often following an Ontario Labour Relations Board decision (OLRB), says Toronto lawyer Norm Keith.

Keith, a partner with KPMG Law who takes on Occupational Health and Safety Act cases, says a recent decision by the OLRB arbitrator holding up EllisDon Construction’s right to test workers twice a week at 47 sites as part of a pilot program merely echoes a trend.

“This is another decision and every decision from Human Rights Commissions to the Labour board has always favoured employers in any dispute involves safety pitted against privacy rights or anything else,” says Keith.

“Safety is a priority.”  
The grievance was brought by the LIUNA (Laborer’s International Union of North America) Local 183 after EllisDon

brought in a twice weekly testing program of workers at 47 job sites.

The testing began in February 2021 and was part of a pilot program initiated by the Ontario Ministry of Health in collaboration with Public Health Ontario to assess the efficacy of the Abbott Panblo rapid antigen test which gives results in 15 minutes on the spot.

As part of the protocol all workers were required to submit to the test before they could enter the job site. In all there were more than 500 workers at the 47 sites. The test is minimally invasive, taking a swab sample from the lower nostril and throat unlike the PCR test which requires swab insertion deep into the upper nose passage. The PCR test also takes up to two days or more to get a result.

On showing a positive result the employee would be told to get a PCR test and to isolate and all workers who came into contact with that person would also be told to get tested and isolate.

By May 2021 EllisDon had seen more than 100,000 tests with 179 positive results of which 118 were confirmed by PCR test and 41 still pending at that time.

Multiple positive also forced the shut down of several sites by Toronto Public Health .

On May 11 LIUNA 183 filed a grievance claiming the mandatory testing was a violation of the collective agreement and unreasonable. Also, it claimed, even rapid testing is invasive and violates employee privacy while being “experimental” and triggering false positive results.

EllisDon countered that despite strict protocols — and disciplining of workers who violated them — it wasn’t enough to prevent COVID infections at site.

Arbitrator Robert W. Kitchen agreed: “COVID spread remains a threat to the public at large and those working at EllisDon construction sites. When one weighs the intrusiveness of the rapid test against the objective of the Policy, preventing the

spread of COVID-19, the policy is a reasonable one.”

Workplace Safety and Insurance Board Ontario statistics show 245 people died in 2021 as a result of workplace injury or illness and of those 28 were COVID related, says KPMG Law’s Keith.

He says unions are making a losing argument telling their members not to reveal if they are vaccinated or to refuse tests.

“This is a once in 100-year event, these are extraordinary circumstances,” he says. “There’s no access to medical information or privacy issues here.”

Further, he says, Section 28 of the Occupational Health and Safety Act

Requires no one shall work in a manner to put themselves or others in danger,

“Dragging yourself in when you’re sick and coughing because you have COVID might put someone at risk,” he says. “Workers have a duty to themselves and others, a broad duty because construction sites are dangerous places.”