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Spring/Summer 2021



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# CHAIRMAN'S REPORT



By Joel Melloul

“You’re on mute!” is likely a main contender for the phrase of the year, although the OGCA has been anything but quiet.

Wishing this was an opportunity to reflect on the glorious AGM and conference we had planned for last October in my home region, but, as we have become accustomed to this past year, things didn’t quite work out as we planned. Instead, we held the first ever OGCA “virtual” AGM, which was a lot less fun than the usual eating and drinking together for three days, but it served its ultimate purpose just as effectively – and with a lot less Advil. Fingers crossed for a return to large in-person gatherings this fall as we have put together a great AGM program in Quebec City at the Fairmont Chateau Frontenac, which we hope will also mark a celebration of a return to normal and an end to these strange days.

My experience so far as Chairman has, of course, been different than the usual norms – mainly due to a lot less in-person face to face time with people and pretty much zero driving into the GTA. However, in most ways, it is still progressing just as the role always has, with frequent collaborations with Giovanni, David, Mary and all the OGCA staff. We are still working just as hard, if not harder, representing and defending General Contractors on the many issues affecting us daily within our industry, with the addition of COVID-19 on top of all that. As I write this article, I realize it has been nearly a year since I have seen my fellow board members in person, yet we have adapted well to governance through virtual means, and we still manage to have great debates and discussions.

One of our first big events this year was the fundraiser we held for Minister of Labour

Monte McNaughton. This was a well-timed event that reinforced the OGCA as a key credible resource for him with reliable industry information. We had a great discussion for an hour or so and talked about many things, reinforcing how well our industry is handling the COVID-19 protocols, our resultant relatively low infection rates on job sites, and how our close working relationship with Ron Kelusky, the Chief Prevention Officer, has been the key to ensuring our industry’s needs are heard and that we are collaboratively solving issues. We discussed the pressing need to support our supers, and that a big step to helping them out would be for the ministry to figure out a more consistent model for their inspectors. This will be an issue that we will not let them forget. Rounding out the event was a discussion on the attention needed to address the ever-present skills gap, which they have thankfully acknowledged loud and clear. There is also the need for governments to open the infrastructure taps so we can help build our province out of the pandemic-induced economic slump and “Build for Recovery.” Government relations will continue to be a big focus for us, and we are in good hands with David and Erich. Funny thing, as I just finished writing this paragraph, I got a call from the PC party, the usual fundraising call, but this time I was happy to hear in their messaging the echoing of a lot of our own initiatives. They’re hearing us!

I’m happy to report that even with the pandemic, our membership numbers have remained stable and engagement has been strong. Thanks to the Safety Committee and the League of Champions for putting together so many informative sessions to keep us all going through these unprecedented (a word I am really starting to hate) times. Another big thanks to our APP members for sticking with us through thick and

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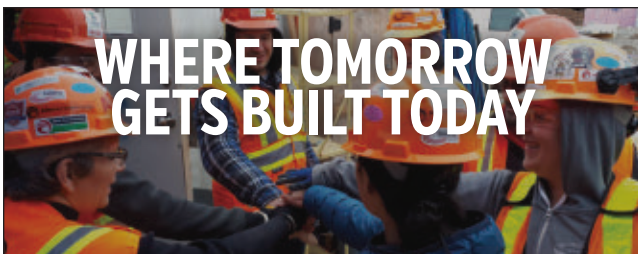
**The new guy, Giovanni, is doing great, and I think we’ll keep him ;). Clive had some pretty big shoes, and Giovanni is filling them well indeed.**

---

thin as we understand it's hard to get full value without the expected face time with our GC members. I imagine when this is over though, there will be a renewed spirit and even an increased willingness by our GC members to get together with old colleagues for as many lunches and sporting events as APP members can dole out.

The new guy, Giovanni, is doing great, and I think we'll keep him ;). Clive had some pretty big shoes, and Giovanni is filling them well indeed. I speak with him on a regular basis, and he has indeed picked up where Clive left off last Spring. We are in good, caring hands and the whole transition to new leadership has gone well, considering all the curve balls of 2020. Building on Clive's solid foundation, Giovanni is bringing our association a new perspective and energy that will help drive this next age for the OGCA, and I am happy and honoured to be helping him get settled in with us.

In closing, I want to reinforce again that the association is here to help, and especially when times are tough, it's nice to know we've got a group of dedicated individuals fighting some of the fights for us while we struggle with our own individual battles within our businesses. I recently read quite a long article on pandemic fatigue in the Harvard Business Review. In fact, it was more focused on keys to leadership when you yourself are exhausted with the pandemic. It was a hard-to-follow, complex academic read on the things needed to tap your own resilience and psychological stamina in order to manage your mind and take charge of your destiny. The key take-away was that the positive mental well-being for you and those around you was most likely energized with the little things, like sharing personal stories, having silly competitions or spicing up those dreary Zoom meetings. It's been a heavy year with lots of big things happening, so go figure, once again a lesson that it's likely the little stuff that will end up getting us all through. I guess we do need that reminder every once in a while. ■



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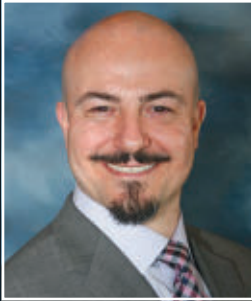
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By Giovanni Cauffilo

## “You’re on Mute!”

I believe that this is one of the most over-used phrases during 2020 and into this year. Understandably, it is simply a statement of fact, but I believe that this seemingly innocuous comment is analogous to a larger and deeper issue we are facing.

Clearly, the phrase “You’re on Mute” highlights the fact that we all needed to go virtual to keep working and that each and every sector was affected by this shift. But this isn’t a talk about the seemingly endless stream of virtual meetings, nor will it be a tutorial on the proper etiquette for these virtual meetings.

This is a dive into the connectivity that we have all lost due to the forced isolation caused by a pandemic. That, and the mental health issues that accompany this, cut into the physical ties that once held us all together.

Let’s face it, the construction industry has had a reputation for a certain amount of “bravado” amongst those in its ranks. The main historical reason has been the overly male dominated workforce. An additional component that we mustn’t overlook is the sense of pride that is connected to the jobsite and the boldness created from working in a team to accomplish the creation of something from nothing. This team concept is what I want to focus on in this discussion.

I know this team concept is self-evident to our sector, and no one person is responsible for the successful completion of any construction project. You may have individuals with a vision, passion and drive, but without the greater team, that individual is useless. The team, your crew, insert company name here; whatever your terminology, it is the unit in its entirety that gets things done, and every component in that team, regardless of size or role, is necessary for the successful execution of a project.

Then along comes a pandemic that completely disrupts the well-oiled machine that

was the construction team. Everyone on that team has questions. They all have concerns, and above all, they have a varied amount of trepidation with this unknown situation. But COVID-19 also uncovered a serious flaw in that team dynamic that no one ever noticed. Individuals in that team were suddenly quiet. For all intents and purposes, they placed themselves on mute.

Remember the bravado I noted above. Well, that bravado went silent. Workers went silent. And the mental health issues of isolation, depression, separation and a new player, COVID fatigue, all came into play.

You see, humans need other humans to feel connected and be part of the greater whole. They need to feel like they are part of something bigger and that they all belong. Although each participant was still employed and figuratively connected to the team, they felt cut-off by the lack of interaction with the entire team. Individuals working remotely and just checking in virtually don’t have the same level of connection as that same person talking to you on site.

This “new normal” has been difficult for many to cope with, and when some people find something difficult, they grow increasingly quiet. They place themselves on mute. Unfortunately, it is exactly the opposite of what we need them to do.

Every construction company wants to hear how their team is doing; how each individual is coping and how, if any, there is a way to make things better for everyone. Silence is worrisome because if you’re not talking about it, then you can assume that workers’ sense of isolation continues to grow exponentially. This may cause workers to seek solace in other outlets that may in turn cause them harm. You may see the symptom, but the underlying cause is still the individual’s state of mental health.

On the positive side, the barriers to the construction industry talking about mental health

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**Silence is worrisome because if you’re not talking about it, then you can assume that workers’ sense of isolation continues to grow exponentially.**

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have greatly diminished. In September 2010, Bell Canada launched a new campaign about mental health entitled, "Bell Let's Talk." Its purpose was to eliminate the negative stigma surrounding mental health and allow people, workers and all team members that necessary avenue to vent about how they were feeling. It made being silent and remaining mute the problem. It allowed people to talk out their feelings, misgivings and fears without judgement.

Fast forward to today, and this campaign is even more necessary during this period of disconnection that we are all facing. Over the course of this pandemic, think about all the people on your team, your crew, your company, that have suddenly placed themselves on mute. This is a signal that they need you to reach out to them because they may be suffering silently with mental health issues. That isolation may lead individuals to other outlets as a coping mechanism. And these coping mechanisms may in turn lead to issues with the individual being "Fit for Duty" on the construction sites.

Mental health is linked to construction since it ties directly into our "Fit for Duty" policies and procedures for all contractors. Mental health is another aspect that we need to ensure is understood and openly discussed so that underlying issues do not become overt issues for our contractors. Where this subject was once taboo, it is now openly discussed in companies, regardless of the industry, and supported from the top management through the entire company to ensure that all the workers have access to assistance.

We need to reconnect with all the aspects of our teams. We need to reassure them that everything is alright, and if they need to talk, there are people to help. You personally may not be able to assist, but at least you can connect with them. If you sense an issue, then the construction industry is not without its resources to assist in coping with any situation. Please ensure that your team, your workers and your work family are not on mute.

Should any of our members require specific assistance on the subject of mental health, or any assistance from the OGCA, please contact me directly at [giovanni@ogca.ca](mailto:giovanni@ogca.ca) or via phone at 905.671.3969. ■



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## Its Time to Rebuild Our Economy



By David Frame, Director,  
Government Relations

The Government of Canada and the Province of Ontario are preparing to present their second pandemic budgets in March. Budget legislation from both levels of government will aim to assess the impact of the pandemic on critical industries and propose legislation aimed at economic recovery. There is a lot of work to be done.

Problems in the vaccine supply continue to impact the timeline of when widespread restrictions will end. Due to our strong health and safety record, the OGCA is optimistic that governments will begin re-opening construction-aligned businesses earlier than other industries that have been closed. Travel restrictions, supply chain issues, and personal and business support programs will likely remain for several months. The continued impact of COVID-19 has shown that setting the conditions for economic recovery is critical.

When government budgets are under pressure, the first response is often to reduce capital investment to maintain program spending. We know the Trudeau government has spent hundreds of billions of dollars to support businesses and workers during the pandemic, but all levels of government continue to delay infrastructure projects of all sizes across the country. To date, investment hasn't been a priority despite the wealth of evidence that it is the best form of economic stimulus.

### Has construction survived the pandemic only to be left out of the recovery?

Statistics Canada reported that Canada's GDP contracted 5.1% in 2020, the worst since the data has been collected. The Ontario construction industry fared better, but it still experienced a 3.2% GDP reduction, the first in 11 years. Both Federal and Provincial governments now face a pressing challenge – how to emerge from the economic restrictions and grow our economy while maintaining appropriate regulations to keep transmission rates as low as possible before mass vaccinations.

The prospect for construction in 2021 is not encouraging. ICI permits are off 6.5%,

industrial is down 21.6% and institutional is down by 19.4%. COVID-19 has caused owners to reconsider or cancel projects in the pipeline. All levels of government, and particularly municipalities, have been stunned by reductions in taxes and users' fees, pulling back their capital budgets to meet payrolls and support transit and social services. Cross-jurisdictional support has been provided, but COVID-19 continues to wreak havoc on our industry.

### The Need for Infrastructure Investment

Our sister association, the RCCAO, recently updated projections of industry activity in a publication called "Averting a Crisis," in which it warned that 41,000 direct Ontario construction jobs are at risk due to the projected downturn of the construction economy. The multiplier's effect of this loss will also put a total of 117,000 jobs at risk. This isn't painting a picture of economic recovery.

Last year, both levels of government delivered the Safe Restart Program, an agreement to support municipalities hit hardest by the pandemic. This program provided the funds needed to keep capital spending and allowed them to keep infrastructure projects. These projects will provide jobs and opportunities when we are struggling with a staggering level of unemployment. The second phase of this program could quickly and efficiently fund the high priority projects, but it lacks funding.

If we look at previous economic crises, governments have shown that they can work together to use construction to effectively renew the economy. The 2009 recession was not as severe in Canada because the federal government partnered with the provinces to deliver infrastructure.

Our municipalities need the financial support to maintain infrastructure and provide facilities for growing communities. It is also a chance for the province to speed up priority projects, including high-speed internet, public transit, schools, roads and clean water. The Federal government's next step must be to provide support for economic activity that re-engages the construction industry, brings vital infrastructure online soon, and



supports communities and employees, many of whom are still without employment.

The OGCA is working hard to get the Provincial Budget to embrace our vision of building for recovery.

### Build for Recovery

The message is simple. The time is now for the government to support construction employment by expanding our infrastructure and building our communities. Ontario needs to kick start its economy and aggressively invest in infrastructure and communities as the fastest, most effective route to take.

In January, the OGCA joined the CCA's "Build for Recovery" campaign focused on convincing all levels of government to implement an aggressive plan to invest in infrastructure and our communities. Participation is easy: simply send a letter to your locally elected MP and MPP with the tool provided. The OGCA encourages all OGCA members and construction stakeholders to participate in this campaign.

The OGCA also submitted a submission to the Ministry of Finance for the upcoming 2021 Ontario Budget. To further reinforce our message, OGCA members are encouraged to make their Budget Submission using our Lobby Tool. The OGCA member template submission, written from a general contractor's perspective, can be sent quickly to the Minister of Finance and your local MPP.

Thank you to all who have taken the time to make their submission to the government. The more we engage, the greater the understanding that our industry is vital to the economic recovery. We will continue to increase our engagement and advocacy across all levels of government over the next year.

I want to recognize the talent and dedication of Erich Schmidt, OGCA Government Relations Associate. He has built the components, fine-tuned the messaging and applied it to our unique technology to allow you reach out to government and your local representatives. Every day, Erich is helping OGCA effectively get the message to the decision-makers, and he and I will be back to you soon to talk about the next steps. ■

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# Disentangling the Impacts of COVID-19

By Seán Hollywood  
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## State of Play

Since March 2020, the construction industry, like many other industries, has had to adapt to the changes resulting from the COVID-19 pandemic. There have been project suspensions, states of emergencies, delays to projects, border shutdowns, and shortages

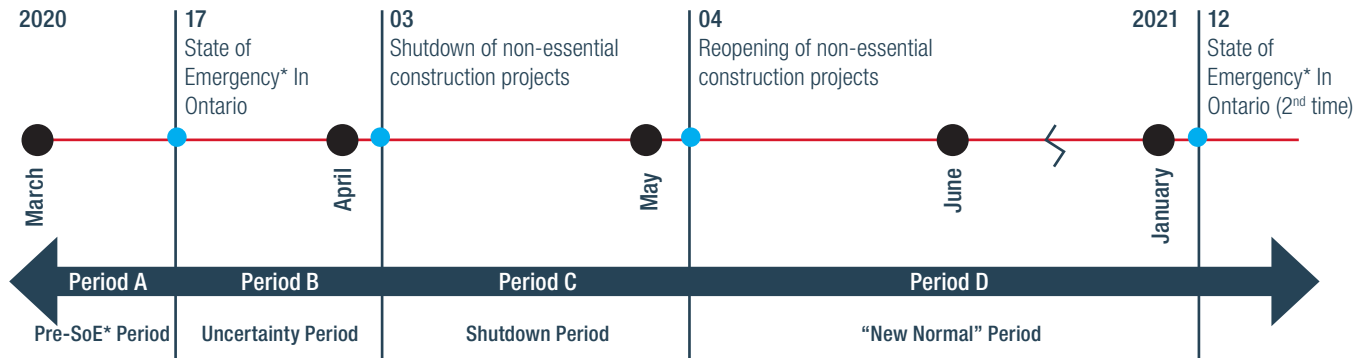
of materials and key resources. As a graduate Quantity Surveyor (some 24 years ago), I was asked why I joined the construction industry, and one of the reasons I gave was this: where else could you work on bespoke, diverse and interesting projects? What I have since learned, like others over the last year,

is that the construction industry is incredibly resilient and adaptable.

It is inspiring to see government and both public and private sector organizations collaborating to manage the wide variety of risks associated with COVID-19. The world has pivoted to focus on ways to manage the unprecedented



## Ontario Timeline



### The impact of COVID-19 varies between periods

Figure 1 – Ontario COVID-19 Impact Timeline – FTI Construction Solutions.

impact of this pandemic and the risks it poses to organizations. However, significant guidance is still needed, especially where there are several “unknowns.”

During this difficult period of uncertainty, it is paramount that organizations enhance operational efficiencies and improve cost effectiveness. FTI Consulting is best placed to assist clients to come to terms with the “new norm” of working under COVID-19 guidelines and restrictions.

We have the expertise, tools and personnel to help organizations manage their projects through this crisis. Our team of diverse professionals can develop key strategies to perform delay and cost impact assessments, loss of productivity analyses, acceleration, and quantum analyses.

### Effect on Projects

Figure 1 above outlines four periods that have been influenced by the COVID-19 Pandemic; these periods have had differing effects on General Contractors (GC) and their supply chain(s).

The project suspensions, states of emergencies, delays to projects, border shutdowns, shortages of materials and key resources issues do not even consider the impact of additional health and safety measures, physical distancing on worksites and loss of productivity.

Worksites, in an effort to quickly adapt, have had to introduce additional welfare trailers, canteen facilities and other logistic measures such as additional buses to bring workers to and from the job site. Some vertical sites have had to introduce additional elevators/hoists to

ensure that the physical distancing requirements are adhered to by workers. To ensure the safety of their work force, supplementary cleaning measures have been deployed, in conjunction with essential health check screenings prior to entering each worksite or place of work, and extra PPE requirements. These items and resources all cost money, which was not initially envisaged at the time of tender nor contract award.

Furthermore, with the requirements for extra PPE, welfare, physical distancing and logistics measures, there are other implications that have had to be considered, such as: loss of productivity, delays from long lead items, supply chain disruption and absenteeism from COVID-19 positive cases in specialized work gangs.

In the coming months and years, there are likely to be a number of highly intelligent and differing arguments from members of the legal fraternity over the precise nature of what could have reasonably been envisaged in the contract, what happened during the pandemic and what the contemporaneous records state.

FTI Consulting experts have been key in assisting clients with the appropriateness of their records, and they have the tools to assist with the collection of contemporaneous records to enable our clients to have the most favourable outcome possible, such as disentangling the causes and effects of COVID-19 through Delay Analysis and/or Quantum Analysis.

Some of the effects seen on projects relate to the additional time taken to source materials, transport plant and resources to site, and deliver them to the work front. For example,

some of our clients have found that their vertical projects have been more heavily impacted by physical distancing requirements because they typically have a smaller site footprint than their horizontal projects. Specifically, these vertical projects have pinch points, less overall space and higher footfall in central areas. Some of our clients have gone as far as having to stagger the sequence of work trades to minimize the overall loss of productivity and ensure the safety of their workforce.

In relation to resources on site, the implication of additional time required for screening and physical distancing of resources on projects has understandably reduced productivity on site. Moreover, there have been other impacts resulting from supply chain disruption and the restriction of movement of material coming from other countries.

Fundamentally, these issues have resulted in a supply and demand situation whereby prices have been driven higher. Inevitably, this will increase the cost to complete the overall project.

### Contract Provisions

At present, there are various types of construction contracts in the Canadian market; each of these have different mechanisms associated with variation and claim submissions. Some of these will envisage the GC producing a claim before the pandemic has ended, and in turn, GCs will have to consider an appropriate level of risk to be applied. The pricing of risk could mean that the parties become entrenched and inevitably, delay can occur as the parties look to see how the pandemic continues.

Over the last year, FTI Consulting experts have seen an increase in the use of claim processing mechanisms from International standard forms of contracts. With our vast experience with these standard forms of Contract on mega-projects in various countries and regions, we are perfectly placed to assist GCs.

**Records**

With FTI's expertise, tools and personnel, we found that we are able to assist and help organizations manage their projects through this crisis and collate the most appropriate

**The world has pivoted to focus on ways to manage the unprecedented impact of this pandemic and the risks it poses to organizations.**

contemporaneous records, which assist clients being more informed and therefore will provide more fulsome negotiations.

As Abrahamson (Engineering Law and the ICE Contracts, 4th Edition, 1979), wrote:

*"A party to a dispute, particularly if there is an arbitration will learn three lessons (often too late): the importance of records, the importance of records and the importance of records."*

Our teams are also highly experienced with vast expertise in project data collection and analysis, preparation of owner and/or (sub) contractor claims, claim defenses, and liaising with external legal counsel as required to help disentangle the impacts of COVID-19.

**Lessons Learned**

From the lessons learned over the last year and going forward, new contract negotiation will now need to include items to accommodate for the pandemic (i.e., cleaning, physical distancing requirements, etc.), and to assist existing projects to readily adapt to the "new norm." GCs will also need more qualitative contemporaneous and robust record keeping. FTI Construction Solutions is able to assist clients to adapt to the "new norm" and can provide advice from contract inception onwards.

In general, both parties to the contracts will still have the ability and appetite to complete projects for the betterment of Ontario's construction industry, but now, maybe more than ever, there will need to be a more collaborative nature to the contracts that are to be executed in the future. ■

*Seán Hollywood is a Senior Director with FTI Consulting Forensic & Litigation Consulting in Toronto, Canada. Mr. Hollywood has over 25 years' extensive International experience in both the public and private sectors throughout the UK, Ireland, Middle East and Canada for Major International Contractors, Project Management Companies and Government Organizations, specializing in Commercial, Quantum and all aspects of Contractual Management and Cost Analysis. He is a member of the Dispute Board Federation, a Fellow of the RICS, Fellow of the CIOB, Member of the CI Arb, PQS and since 2010 has been an RICS-Accredited Counsellor for the Assessment of Professional Competence. He graduated with a MSc Construction law and Dispute Resolution from Kings' College London, UK in 2013.*

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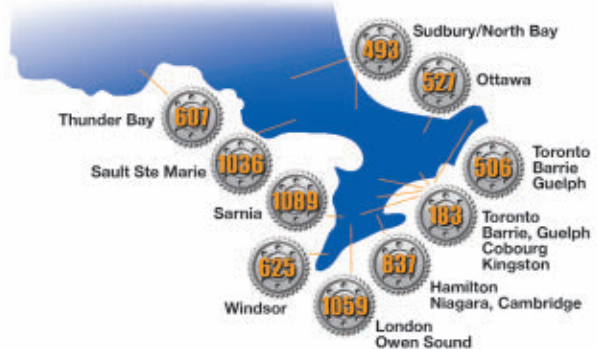
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# Leading Indicators vs. Lagging Indicators – What Will Help You With COR™?

By Sobi Ragunathan, IHSA External COR™ Auditor & Compliance Partner at 4S Consulting Services Inc.

**C**ertificate of Recognition (COR™) is key for construction businesses developing and sustaining a strong safety culture. That said, culture cannot be developed overnight.

Companies need to give it time to evolve. Generally, employers start seeing results in three years. However, full fruition of efforts can take five or more years. Slow, but more importantly steady, wins the race!

COR™ requires employers to create and maintain a strong occupational health & safety management system (OHSMS). This is done through procedures, training and more importantly, a functioning process that ensures safety in activities is running consistently.

In our experience as IHSA Associate External COR™ Auditors and COR™ Consultants, Senior Management's commitment, engagement, and consistency of systems and processes lead a company toward a safety culture. Leading key performance indicators (KPIs) are crucial for companies to adopt a more proactive approach toward building their OHSMS. A proactive approach allows a company to create a predictive outcome, just as it would in OHSMS.

On the other hand, lagging indicators are a reactive approach toward building your OHSMS. Employers are required to measure, at a minimum, lagging indicators to build their continuous improvement plan. That said, for achieving and maintaining COR™, just doing the minimum will

make maintaining COR™ a huge challenge and will not be enough. Companies need to identify and measure leading indicators to be proactive in developing their OHSMS rather than being reactive.

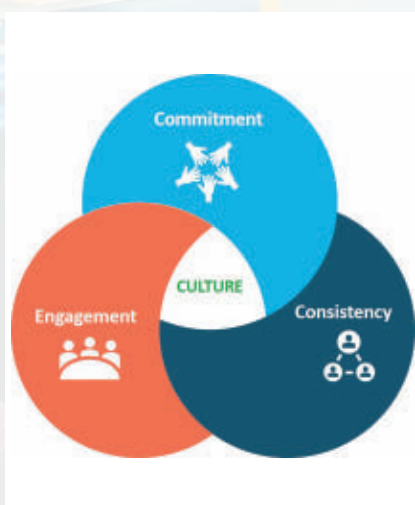
## Pillars of Safety Culture

Companies must ensure they continuously work toward strengthening three pillars that make up safety culture.

**The First Pillar: Commitment** starts with the senior management and flows all the way down to employee accountability. Right from the senior management participating in regular team meetings and training sessions to leading by example by following what's written in the program, commitment is infectious.



To be successful with COR™, gaining top management's shift in thinking and their commitment is the juice that drives the middle management toward smooth and effective implementation and maintenance of OHSMS.



When we interview employees during an audit, we get the full picture of the senior management's commitment or lack of it. Commitment spreads the right message across the organizational hierarchies to build the culture.

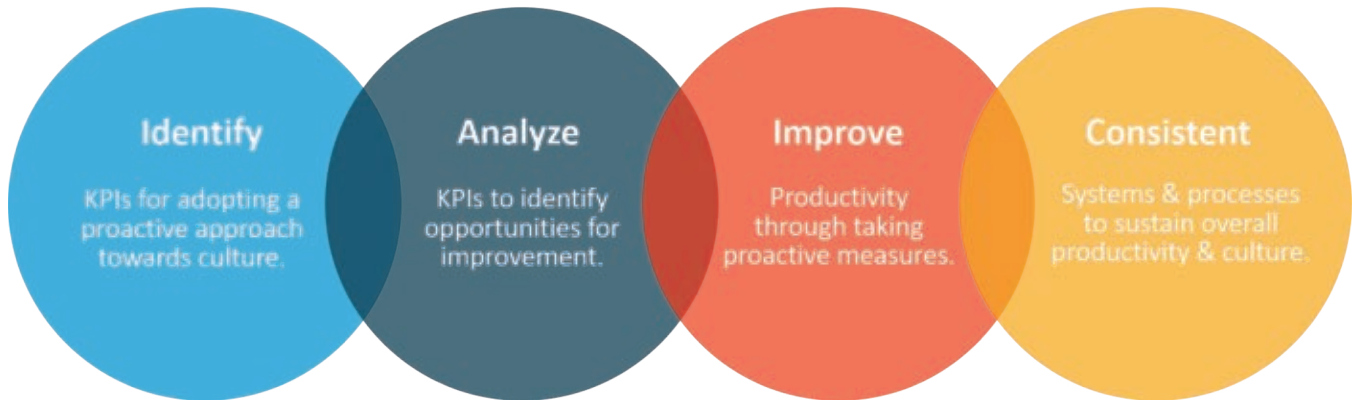
On the contrary, lack of commitment from the senior management can have a devastating cascading effect across the organization leading to a breakdown of the entire OHSMS. People do what they can get away with if it is not in their company culture.

**The Second Pillar: Engagement** is the barometer to measure how well the employees are understanding, assimilating and implementing the company's goals. It is the glue that connects or, if not done right, disconnects the

organization with its employees. Well-engaged employees will become the engine that drives the health and safety management system. We can easily pick this up during an external audit.

**The Third Pillar: Consistency** refers to creation of strong systems and processes to sustain safety culture; we call this the "company ecosystem." It's one thing showing the commitment and employee engagement to build a culture. However, an organization must ask itself how it will sustain that culture. Consistency through processes and systems is the "company's ecosystem." Technology can play a big role for an organization in making the systems and processes easy and effective to keep their OHS program alive.

# Why use leading indicators for COR™?



## Leading indicators vs. lagging indicators, what will help you with COR™

Let's look at examples of two companies using a storytelling approach to understand leading indicators vs. lagging indicators from the lens of COR™:

- Struggler Construction Inc. (SCI) – A struggling story of a company that only focuses on gathering lagging indicators and ignores identifying and measuring relevant leading indicators
- Awesome Construction Inc. (ACI) – A success story of a company that focuses on identifying and measuring leading indicators



### Struggler Construction Inc. (SCI)

SCI is a construction company. Its owners just want to know by how much their bank balance has increased after completing a project. As long as project costs are covered by the earnings from the project and the company has more money than they started with, it makes the ownership happy.

Their approach toward business is unidimensional – make money or lose money. For SCI, health and safety merely means meeting mandatory safety compliance while measuring and monitoring lagging indicators such as accidents/incidents. This would come as no surprise given the leadership's attitude and lack of commitment.

However, from the COR™ lens, this attitude from leadership would mean site supervisors and health and safety (H&S) coordinators will be held completely responsible for COR™.

The supervisors and H&S coordinators will surely feel targeted, overwhelmed, and most importantly, disengaged. This lack of commitment shown by SCI's leadership will have a cascading effect leading to little-to-no progress on COR™ with constant blaming and passing the buck.

To be successful with COR™, gaining top management's shift in thinking and their commitment is the juice that drives the middle management toward smooth and effective implementation and maintenance of OHSMS. What makes matters worse is even if they appoint a highly experienced third-party COR™ consultant to help them, the results will be no different unless the management changes its attitude. Just looking at lagging indicators, such as zero accidents/incidents, coupled with achieving minimum compliance, SCI will surely drop guard and start assuming things.

differentiates ACI from SCI is their senior management's attitude toward health and safety and all its other processes in the company. ACI's leadership engages consistently with its middle management, participates in team training sessions and leads by example. From the COR™ lens, this is the required attitude, which will not only ensure everyone is well-engaged, but will also improve their employees' accountability and productivity.

ACI measures leading indicators such as number of site inspection forms filled out, number of near misses reported at each site, and number of weekly toolbox talks.

ACI's proactive approach would have meant that they would have constantly measured the number of near misses at each site. Hence, they would be in a much better position to look for consistent opportunities for improvement. Adopting leading indicators has clearly helped ACI make their program stronger, keeping employees safe, and implementing strong systems and processes to maintain their OHSMS. ■

### Awesome Construction Inc. (ACI)

ACI is also a highly experienced construction company in Ontario. However, what





# How One Mother Found Hope After Construction Tragedy

**New League of Champions partnership with Threads of Life ensures action for prevention**

By Scott McKay, Director Partnerships, [smckay@threadsoflife.ca](mailto:smckay@threadsoflife.ca), and Susan Haldane, Manager Marketing and Communications, [shaldane@threadsoflife.ca](mailto:shaldane@threadsoflife.ca)

Johanna LeRoux was at work, just returning from her lunch break, when the phone call came - the call every parent dreads, and the call that would change her life forever. Johanna's son Micheal, 22, had fallen from a roof and was being rushed to Toronto's Sunnybrook Hospital with severe head injuries.

"The police officer 'asked if I had someone who could drive me to Sunnybrook,'" Johanna said, "because he didn't think it was a good idea for me to drive there myself. I told him I would find a way to get there, and I hung up the phone to go to the ladies room and throw up. I had never been so afraid in my life."

Micheal was a construction labourer who had been working in the roofing industry for a year and a half and as a framer for two years before that.

After six days sitting by Micheal's side in the intensive care unit, Johanna and her family had to decide whether to continue the many medical interventions that were keeping his body functioning. "We were told that Micheal was going into multiple organ failure," she said. "I had to let him go. There is no worse nightmare than having to give permission to turn off the life support that is keeping your child alive."

Recent fatalities in Ontario's construction sector have many looking closely at the statistics and trends. Across all sectors in Canada, roughly three workers die every working day due to traumatic injury or occupational disease. Every number in those statistics represents a family, friends and co-workers devastated by loss. Threads of Life, a national Canadian charity, works closely with those families to help them cope and ultimately, to give them a voice in prevention of future tragedies. Thanks to a new partnership between Threads of Life, the Ontario General Contractors Association and the League of Champions, construction and contracting firms have a new outlet to support families affected by workplace tragedy and to take action to prevent future tragedies.

When a fatality or serious injury happens on the job, the worker's family often feels alone and overwhelmed by the confusing process of investigations and inquests, unsure how to cope with their grief. Threads of Life offers help in the

form of one-on-one peer support, gatherings where families can learn and connect, and now, regular online workshops to provide information and community.

Through Threads of Life, Johanna found ways to work through her overwhelming grief at Micheal's death and to make peace with her "new normal." Like many Threads of Life families, Johanna wanted to be able to support others going through what she experienced and to be able to prevent future fatalities and injuries. Today, she serves as a Volunteer Family Guide, offering one-on-one peer support for other families affected by workplace tragedy. She also speaks publicly through the Threads of Life Speaker's Bureau, telling Micheal's story with the goal of ensuring that others don't have to live through the same horror. She also volunteers each year with Steps for Life - Walking for Families of Workplace Tragedy.

In addition to its services for those directly affected by tragedy, Threads of Life offers ways for individuals and employers to help families and boost the importance of workplace health and safety. One of the key opportunities is through Steps for Life. Steps for Life is the main fundraiser for Threads of Life, and it acts as a positive way for companies and communities to take action on behalf of prevention. Steps for Life events are planned across Canada this May. Individuals can participate and raise money to help families. Companies can enter teams in the Steps for Life Team Challenge or sponsor Steps for Life at a local or national level.



Threads of Life family member Johanna LeRoux volunteers each year with Steps for Life-Walking for Families of Workplace Tragedy.

A number of construction-sector firms are already on board as Threads of Life partners and Steps for Life sponsors.

"As a supplier to the fast-paced construction industry, we are well aware of the dangers faced by our customers and employees every day," said Jim Mitrakos, President and CFO of Modu-Loc Fence Rentals, a national sponsor of Steps for Life. "When we found Threads of Life, it became clear that a partnership made perfect sense - after all, Safety & Accountability and Family & Well-being are two of our Core Values. We are proud to be champions for a cause that strives to achieve workplace safety in all industries."

"This partnership has underscored our own commitment to safety," Mitrakos added, "and helped to reinforce our internal safety initiatives and processes. This has been an incredible experience for our teams coast-to-coast."

In addition to participating in Steps for Life, companies can get involved by arranging Threads of Life speakers like Johanna to share their personal story at safety events, either virtually or in-person when conditions permit. It's a powerful reminder for all employees of the importance of safety and the heart-breaking consequences when something goes wrong.

Johanna stresses that the grief after a work-related fatality doesn't go away, but over time, with the right supports, people can learn to cope with it in healthy ways and even to smile and laugh again.

"I'm learning to allow some contentment and some happiness back into my life," Johanna said. "And I'm learning to heal through helping others and working to bring about the changes that we hope will someday make workplace injuries and fatalities non-existent."

To learn more about Threads of Life and Steps for Life, visit the association's web site at [www.threadsoflife.ca](http://www.threadsoflife.ca). For information about partnership or sponsorship opportunities, contact Threads of Life's Director of Partnerships and Fundraising, Scott McKay at [smckay@threadsoflife.ca](mailto:smckay@threadsoflife.ca) or call toll-free to 1-888-567-9490.

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# Client Alert: The Ransomware Epidemic

## Aon's Cyber Solutions and Cytelligence (A Stroz Friedberg Company) Incident Response

**R**ansomware is, by multiple measures, the top cyber threat facing businesses today.<sup>1</sup> In recent years, ransomware attacks have been impacting Canadian companies, of all sizes and across all industries, with little to no discretion. In most cases, a data breach is a precursor to the attack. Any company that either requires access to critical data or faces loss or hardship in the event of business interruption is a potential ransomware victim.

### The Attack Evolution

In a ransomware attack, threat actors gain unauthorized access to company networks and files using malicious software or malware. After access is gained, cybercriminals establish a foothold in the environment (referred to as persistence) and quickly move to one of two actions. In the first, cybercriminals encrypt files, making them inaccessible, and demand a ransom payment in cryptocurrency in exchange for the digital key code(s) to decrypt the files. In the second approach, which has become the de-facto approach, the attack includes an additional step prior to encryption where the cybercriminals seek specific types of data, looking for particular information such as social insurance numbers, health card information, tax files such as T4/accounting information, legal documents, and other confidential information. Once these documents have been identified, the cybercriminals then collect and steal them before executing the malware to encrypt the data on the systems.

Canadian companies are considered an attractive target for cybercriminals since they are viewed as affluent and protected. Many carry insurance coverage that can assist not only in covering some of the costs associated with such attacks, but can also help in rapidly connecting victims with digital forensics and incident response companies that provide guidance in responding to such catastrophic events. A


rapid response means faster time to contain the incident and begin recovery. Rapid response could limit the risk of data theft and the overall impact on an organization.

Ransomware attacks are intentionally perpetrated by cybercriminals. It is important to distinguish these attacks from a malware infection, which may happen for a number of reasons that do not necessarily involve people. These cybercriminals are sophisticated, very motivated, and have spent a significant amount of time and resources to ensure they understand both the way in which technology environments are constructed and the possible vulnerabilities within such environments.

As companies have begun to improve their defenses, these cybercriminals have also become more advanced in their approach, including taking pre-emptive measures intended to coerce ransom payment, such as targeting and destroying data backups to prevent restoration and stealing data prior to encryption with the threat of public release. This leaves many victims with the difficult choice of either permanent loss of data and an extended business disruption or paying a ransom to regain access and restore operations.

Within Canadian organizations, and specifically in some industries, there is a tendency to build technology environment in a "tried and tested" or "cookie-cutter" approach. That means that many organizations use the same consulting resources to design and implement technology infrastructure. While this is an efficient approach to gaining functionality, it also means that, in many cases, companies across verticals may have the same security gaps or vulnerabilities that cybercriminals can exploit to gain access and conduct a ransomware attack.





For many ransomware victims, paying the ransom may seem like the only viable option. The possible consequences of business disruption and loss or public exposure of sensitive data are severe and can include loss of revenue, breached contracts, missed deadlines, failure to meet customer or client expectations, damage to goodwill, or even, in the most extreme examples – such as those involving healthcare providers – possible loss of life.

The most recent statistics on ransomware are staggering. The total number of global ransomware reports increased by 715.8% from 2019 to 2020.<sup>2</sup> Ransom payments have risen as well, making a 60% leap in payment value since last year.<sup>3</sup> Some of the most sophisticated ransomware attacks and malware variants are now averaging over \$780,000 per payment.<sup>4</sup> At these rates and amounts, it is no surprise that the predicted damages from ransomware are expected to be \$20 billion in 2021.<sup>5</sup>

### The Payment Conundrum

Amid this cyber crisis, law enforcement has remained mostly neutral on the issue of ransom payments. Generally, law enforcement provides cautionary guidance around the risks associated with paying a ransom, warning that either the supplied decryption files may not work or that the payment of a ransom may attract further exploitation. But, there is also consensus across law enforcement that those experiencing ransomware events are victims.<sup>6,7</sup> Not surprisingly, to date there is scant record of prosecutions, much less convictions, of ransomware victims who have chosen to pay a ransom to recover critical files or restore the operation of critical systems.

Until recently, the challenge facing victimized entities (or those companies participating in incident response activities) was not deciding whether there was a legal risk in paying a ransom. Rather, the primary focus in the ransomware conundrum was whether it made business sense to pay the ransom and, if so, how to both engage with the threat actor to negotiate and to simultaneously navigate the often-unfamiliar cryptocurrency landscape to facilitate payment. Post-payment, the most difficult issue typically facing a victimized entity was the often time-consuming and technically difficult decryption process.

If law enforcement was involved or notified by a victimized entity at any point throughout

this process, it was generally in the hope of receiving guidance (based on experience with similar previous attacks) or obtaining justice (if law enforcement could identify the ransomware threat actors). While law enforcement remained eager to work with victimized companies, the increase in ransomware attacks forced the selective prioritization of which cases to handle. Those cases that law enforcement could take on were appropriately focused on their mandate of criminal investigation and prosecution. This ongoing mandate, combined with the deluge of ransomware matters, means that victimized entities that notify and work with law enforcement still handle most aspects of the incident response investigation themselves, including root-cause analysis of the incident, the scope of the intrusion and the restoration of the business.

### The “Evil Corp” Effect

The ransomware payment landscape began to change when a sophisticated, Russian-based threat actor group called “Evil Corp” (per some of its known individual members), as well as several other cyber criminals, first appeared on the U.S. Treasury Department’s Office of Foreign Assets Control (OFAC) Specially Designated Nationals (SDN) list. Like other sophisticated threat actors, Evil Corp moved into the easy monetization of ransomware. What separated Evil Corp from many other criminal enterprises, however, was their self-developed, sophisticated malware. Evil Corp’s malware was generally thought by the threat intelligence community to be singularly used by Evil Corp and unshared with other criminal enterprises. Specifically, the effective “WastedLocker” malware variant used in many devastating ransomware attacks is believed by many within the threat intelligence community as belonging solely to Evil Corp.

OFAC SDN diligence had previously focused on whether easily changeable cryptocurrency wallets used to receive ransom payments could be tied to specific threat actor groups that might appear on the OFAC SDN list. Generally, they could not, so very few ransomware payments were impacted by OFAC diligence. But, where WastedLocker malware was part of the ransomware attack, OFAC SDN diligence might conclude the ransom recipient was a blocked person or entity without separately determining that the cryptocurrency wallet used by the attacker to receive the ransom payment was associated with Evil Corp or any other known SDN.





In Canada, many insurance carriers continue to require compliance with U.S. OFAC regulations, so it is important that companies understand the processes required to ensure compliance with both U.S. and Canadian sanctions processes before deciding on/or making a payment to cybercriminals.

### Treasury and Justice Departments' Advisories

Recently, the United States federal government released two significant documents focused on cryptocurrency and the facilitation of ransomware payments. These were likely issued in response to the increasing pressure on law enforcement and the business community by the magnitude of the ransomware epidemic, mounting questions around potential payments to blocked persons or entities, and the need for guidance on prepayment diligence and collaboration with law enforcement and regulators.

On October 1, 2020, the Department of the Treasury issued an advisory notice related to facilitating ransomware payments. It reminded the public of several important, pre-existing provisions relevant to incident response with respect to a ransomware event.

On October 9, 2020, the Department of Justice issued its Cryptocurrency Enforcement Framework outlining, in part:

How cryptocurrency technology is currently used and illustrating how malicious actors have misused that technology;

Laws and regulations that exist at the federal level as it relates to cryptocurrency transactions; and

Public safety challenges related to cryptocurrency.

Key takeaways from both advisories include:

- Law enforcement will continue to treat entities affected by ransomware as victims. These advisories signal no intent to the contrary. This is true within Canada as well.
- Cryptocurrency has both legitimate and illegitimate uses. Impermissible transfer of funds to entities on the OFAC SDN list – along with money laundering and tax evasion – is specifically identified as an illegitimate use of cryptocurrency.
- Cryptocurrency transactions, whether as part existing regulations, are implicated. However, in exercising this discretion, companies should consider the benefits of working with law enforcement (and notifying them of

payment), including taking advantage of law enforcement experience with threat actor(s) across many incidents and industries.

- While considered best practice, there is no new requirement for entities to notify law enforcement if victimized by ransomware or in connection with payment of a ransom as part of a ransomware event. The choice to notify appears to remain within a victim organization's discretion.
- OFAC SDN and blocked-jurisdiction diligence must be a critical part of any organization's process prior to making a ransomware payment in both the U.S. and Canada.
- Should it be determined that a ransom payment will likely be made to an entity on the OFAC SDN list, the Treasury Department's guidance is clear: proceed having been warned. At this point, it would be imprudent to even consider making a ransom payment without first engaging with legal counsel, law enforcement, and relevant government agencies.
- The Treasury Department's advisories appear to tacitly acknowledge that an entity may unknowingly make a ransom payment to an OFAC SDN. If it is later determined that such payment occurred, mitigating factors would likely include the involvement and notification of law enforcement, as well as the existence and quality of the OFAC SDN diligence performed prior to the ransom payment. In Canada, it would be highly advisable that legal advice be obtained from a qualified legal counsel specializing in such ransomware events.
- Left unanswered is the most difficult scenario in which a ransomware victim performs diligence and determines that the attacker involved is, or is likely to be, on the OFAC SDN list. In that instance, the victim is left with the impossible choice of either making a payment that may be considered unlawful or face the risk of unrecoverable systems that could lead to material business injury or demise. In these situations, a victimized entity's best course would be to: (i) engage and work with legal counsel and (ii) notify and work with appropriate law enforcement and regulators. In doing so, there is the possibility the victim entity could mitigate or possibly avoid severe prosecution if it ultimately pays a ransom under duress to an OFAC SDN.



## Risk Mitigation Strategies

Ransomware attackers often operate with the same discipline and approach of a traditional business, except they do so in a criminal venture and with criminal intent. Threat actors typically choose the path of least resistance to achieve their business goals, attacking vulnerable companies and taking advantage of common exploits, or a lack of cyber defense and preparedness. To help mitigate the risk of falling victim to ransomware and to better prepare for a ransomware incident, consider these eight tips:

**1 • Be proactive:** Being victimized by ransomware is a jarring experience. It tests an organization's emotional response to crisis, and its escalation procedures, technical prowess, business continuity preparedness, and communication skills, especially because the organization must sometimes interact directly with the attackers. Ensure that the incident response (IR) plan/playbooks, and/or business continuity plan/disaster recovery plan has been recently assessed, reviewed and updated. Most importantly, test these plans and playbooks through simulated practice across realistic scenarios to help improve resilience.

**2 • Educate employees on cyber security and phishing awareness:** Phishing is still a leading cause of unauthorized access to a corporate network, including as the entry point for ransomware attacks. Training users to not only spot a phishing email, but to also report the email to their internal cyber security team, is a critical step in detecting the early stages of a ransomware attack. Companies must create a culture where all employees feel responsible for enterprise security and are encouraged to participate in the proactive detection of, and defense against, threats, risks and attacks. Phishing awareness is a critical cornerstone to a cyber secure culture.

**3 • Employ multi-factor or "two-step" authentication:** Multi-factor authentication (e.g., a password: something employees know, plus an authentication key: something employees have) across all forms of login and access to email, remote desktops, external-facing or cloud-based systems and networks (e.g., payroll, time-tracing, client engagement) should be a requirement for all users. In many, but not all, instances, the presence of multi-factor authentication may even prevent the exploitation of stolen login credentials because the attacker does not also possess the necessary second piece of the login process, the authentication key. It is important to ensure proper multi-factor configuration. Multi-factor access controls can be even more effective if coupled with the use of virtual private network (VPN) interaction.

**4 • Keep systems patched and up-to-date:** The rudimentary cyber hygiene activity of system updates and patching often falls by the wayside, especially as operations and security teams are stretched, systems and endpoints age and move towards legacy status, and new systems, hardware, and applications are introduced as businesses grow, mature, merge, and divest. There are, and will continue to be, major unpatched vulnerabilities that allow attackers to compromise corporate networks. Attackers can often identify a vulnerable system with a simple scan of the Internet using free tools. They engage in this exercise broadly and indiscriminately, looking for exploitable systems on which to unleash ransomware and other cyber-attacks.

**5 • Install and properly configure endpoint detection and response tools:** Tools that focus on endpoint detection and response can help decrease the risk of a ransomware attack and are useful as part of incident investigation and response. However, many entities that invest in these tools fail to properly configure them to be of assistance in the event of a cyber event and investigation. Properly configured security tools give a much greater chance of detecting, alerting on, and blocking threat actor behavior.

**6 • Design your networks, systems and backups to reduce the impact of ransomware:** Ensure your privileged accounts are strictly controlled. Segment your network to reduce the spread of adversaries or malware. Have strong logging and alerting in place for better detection and evidence in the event of incident response. Having a technical security strategy that is informed by architects that know the latest attacks and adversary trends is important, as is the use of continuous threat intelligence monitoring in open source and on the dark web.

**7 • Consider risk transfer options:** Because a ransomware attack can threaten an entity's reputation and goodwill, the complete risk of ransomware can never be fully mitigated or transferred. However, in practicing ransomware preparedness, organizations should consider obtaining appropriate cyber insurance coverage. In doing so, organizations should review how coverage addresses indemnification for financial loss, business interruption, fees and expenses associated with the ransom and incident response, and considerations for service providers, such as the ability to work with incident response providers of choice.



# 8

**Pre-arrange your third-party response team:** An effective ransomware response will often include all or some third-party expertise across the disciplines of forensic incident response, legal counsel, crisis communications, and ransom negotiation and payment. Seeking out, vetting and engaging with these professionals during a ransomware incident places additional burden on an already strained enterprise and is ineffective and inefficient when every second counts and every decision is critical. As time is of the essence, it is critical to pre-vet and pre-engage a team of professionals to monitor and be ready to respond to a ransomware attack as soon as it happens. ■

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## About Aon Cyber Solutions

Aon Cyber Solutions offers holistic cyber risk management, unsurpassed investigative skills and proprietary technologies to help clients uncover and quantify cyber risks, protect critical assets and recover from cyber incidents.

## About Aon

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# COVID-19 Vaccination – Implications for Business

Immunizations for COVID-19 have begun around the world, with over 87.1M dosages administered since initial approvals.<sup>1</sup> The scale and rate of further immunization will depend on the inbound supply of vaccines. Like many other countries, Canada has signed agreements – known as advance purchase agreements (APAs) – with different pharmaceutical companies to proactively secure COVID-19 vaccine supply. All vaccines in Canada are procured by the federal government, which then allots vaccines to the provinces.

To date, Canada has signed APAs with seven vaccine manufacturers for a total of 400 million doses. Canada impressively ranks number one globally (vaccine courses per capita), with enough vaccines secured to vaccinate the entire population 5 times over. Canada has sought to procure such high doses as there is no guarantee that all candidates will be safe, effective and approved by Health Canada. To date, only the Pfizer and Moderna vaccines have received Health Canada approval.

## Vaccine Distribution

The vaccine rollout follows the national COVID-19 vaccination strategy that prioritizes *four general key population groups for the first wave of vaccination*. These groups include (i) those at risk of severe illness and death from COVID-19, (ii) those most likely to transmit COVID-19 to those at risk of severe illness, (iii) those contributing to essential services, and (iv) those living and working in settings that put them at high risk of infection (e.g., shelters, prisons, Indigenous communities). While the above provides national strategic guidance on the ordering of vaccination, there are differences in the specifics and pace of vaccine rollout at the provincial/territorial level.

The first doses of vaccine were distributed to hospitals across the country, with doses given mostly in hospital-based facilities themselves. More recently, vaccines have been distributed to long-term care homes with mobile vaccination teams. The accessibility of vaccine clinics has been limited by the storage considerations of the vaccines themselves. The two vaccines approved in Canada (i.e., Pfizer, Moderna) both need to be stored at very low temperatures, challenging distribution of the vaccine across broader locations.

## Vaccine Supply

While the total doses procured are high, it is unclear how quickly Canada will receive vaccine

doses relative to other countries that negotiated APAs. Canada is expecting to receive 6 M doses through the end of Q1 March (2 M of Moderna and 4 M of Pfizer), enough to vaccinate 3 M Canadians. Supply is expected to ramp up further in Q2, with 15-19 M additional doses. In Q3, the government is expecting to have sufficient supply to vaccinate the entire population.

The above timeline presents a best case scenario, without any manufacturing delays. However, delays are expected. Already on January 15th, the government announced that expected Pfizer supply would be cut by about 50% over the next month with no doses arriving during the week of the 24th.

For further complications, the European Union is considering imposing tighter export rules on vaccines due to shortages in their region. This may also delay Canadian supply as our Moderna and Pfizer vaccines come from European plants.

## Vaccine Hesitancy

Vaccine confidence is a spectrum, and people may exist anywhere on the continuum from staunch anti-vaxxers to unquestioning acceptors.<sup>2</sup> Anti-vaxxers are a very small segment of the population. As of January, 60% of Canadians are willing to take a vaccine as soon as it becomes available to them, and only 12% do not want to get it at all.<sup>3</sup> This number of willing Canadians has increased dramatically as more information on the vaccines have become available.

Most Canadians who are hesitant about the COVID-19 vaccine, are in the “movable middle” section of this spectrum, having beliefs or fears that are amenable to being “moved” towards vaccine acceptance. However, there may be pockets of high rates of hesitancy as numbers vary widely across sections of society. For example, 35% of rural Americans say they will not get the vaccine versus 26% of urban Americans.<sup>4</sup>

Some vaccine hesitancy is informed by historical and contextual factors that understandably lead some groups to feel that typical authorities, including the government, do not care about their wellbeing. Community-based partnerships and allies are needed to ensure messaging is appropriate to local context and is delivered by or with the support of community leaders. Education campaigns must be specific to the communities they are targeting to ensure the messaging resonates.

## What Organizations Can Do

Despite delays in vaccine rollout, it is expected that people in the general population will start receiving the vaccine in the coming months. As products with less onerous storage and handling requirements become available, it is expected that community vaccine providers (e.g., family doctors, pharmacists) will play a critical and growing role in COVID-19 vaccination. As with influenza immunization clinics, there may be **opportunities for workplaces to partner with local community vaccine providers to offer in-workplace vaccine clinics** that help facilitate workers getting vaccinated.

Further, employers can play a significant role in addressing vaccine hesitancy and increasing uptake:

- **Understand your employees' intentions and views.**<sup>5</sup> Questions and concerns about the vaccines should be invited. When people are dismissed, they may be more likely to engage with misinformation
- **Provide your employees with access to clear, reliable information** on vaccination, including summaries from government (Health Canada) in multiple languages
- **Consider hosting or facilitating access to vaccine Q&A sessions**<sup>6</sup>. Supportive statements from credible and trusted sources play a key role
- **Consider implementing enabling policies** - sometimes hesitancy reflects lack of access; actions taken by corporations to improve access, such as paid leave to get the vaccine and guaranteed sick pay if vaccine leads to side effects, may be helpful<sup>6</sup>
- **Ask employees to be agents of positive change** - once immunized, ask them to consider posting on social media and talking to their colleagues about their experience<sup>6</sup> ■

## Last updated January 29, 2021

1. Bloomberg, COVID-19 vaccine tracker
2. Vaccine, Vaccine hesitancy: definition, scope and determinants, 2015
3. Angus Reid survey, in response to the question: if a vaccine against coronavirus became available to me, I would get it (July-January)
4. KFF, The challenge of vaccine hesitancy in rural America, January 2021
5. HBR, Employers have a crucial role to play in COVID-19 vaccination
6. McMaster Forum, COVID-19 vaccine hesitancy



# Mandatory COVID-19 Vaccine Policy Primer for General Contractors

By Patrick Groom, Victor Kim and Fiona Wong (Articled Student)



After a year since the onset of COVID-19 (“COVID”) in Canada, vaccinations are finally starting to reach our most vulnerable populations. However, the availability of vaccines has raised new considerations for employers in deciding whether to implement a mandatory COVID vaccination policy (“Vaccination Policy”). These considerations include the characteristics of the workplace and workforce and the demographic of customers, if any. Does the workplace require close physical proximity between its employees? Can intruding into the worker’s privacy be justifiable under mandatory COVID protocols and/or Vaccination Policy? Depending on the answers to these questions, a Vaccination Policy in the workplace may face challenges.

Employers have the duty to ensure a safe workplace, the duty to accommodate to the point of undue hardship, and the duty to respect the workers’ privacy. COVID protocols and Vaccination Policies require a balance between these three obligations to ensure they can withstand judicial scrutiny.

This article focuses on providing bottom-line guidance to Ontario construction employers, including general contractors who often have the overall responsibility of ensuring health and safety at jobsites as a “constructor.” Although the law has recently favoured employers in certain industries, such as the health care sector, in terms of relaxed expectations of privacy for their workers, the courts may take a different approach to construction employers. In other words, the requirements to enforce a Vaccination Policy in a construction jobsite may be more stringent than those in other industries.

The main concerns for a construction employer are as follows:

## 1 Can construction employers require their own workers and subcontractors’ workers to undergo regular COVID testing?

There are legitimate safety concerns such as close contact due to the physical requirements of the construction industry. In light of the severity, uncertainty and infectiousness of COVID, while requiring an employee to receive a nasal swab regularly (i.e. every 14 days) may be considered intrusive, it may be reasonable when balanced against preventing the spread of COVID and ensuring a safe workplace. For example, the need for persons to work closely together in confined spaces for long periods of time may justify regular testing, or a repair or renovation project being performed in or near an active long-term care facility may justify regular testing of employees.

## 2 Can construction employers implement a Vaccination Policy?

A mandatory Vaccination Policy is an intrusive measure; it requires employees to undergo a specific medical procedure that may produce adverse reactions in some employees, be contrary to an employee’s religious beliefs, or contrary to certain medical conditions/restrictions. This is perhaps why the Ontario government maintains a public policy that the COVID vaccine will be voluntary rather than mandatory.

An employer considering a Vaccination Policy should consider the full effects of the policy, especially with respect to any disciplinary measures for non-compliance. For any Vaccination Policy, in either a unionized or non-unionized setting, an employer should consider how the policy satisfies the below criteria:

1. The policy must be reasonable and consistent with the employment agreement or collective agreement;
2. The policy must be clear, unequivocal and brought to the attention of the workers affected before the employer can act on it;
3. The workers concerned must be notified that a breach of the policy could result in discipline or removal from site (if the policy is to be used as for such action), and;
4. The policy should be consistently enforced.

For a construction employer, the first criteria is the most crucial consideration. Is mandatory vaccination reasonable considering the personal protective equipment (“PPE”), social distancing, crew scheduling, and other measures implemented to date to prevent the spread of COVID? Requiring employees to be vaccinated may be reasonable for projects or specific jobs that are on hold because they cannot be performed safely or efficiently under current protocols. However, this analysis is very fact-specific, and counsel should be consulted.

Employers should also be aware of potential liability arising from an employee having an adverse reaction to the vaccine, as well as the potential for human rights claims by employees who may allege discrimination if accommodation options are not considered. Accordingly, employers should develop a strategy to accommodate individuals who have a valid reason not to receive the COVID-19 vaccine. This strategy should also consider how subcontractors will react and whether they are able to comply with a general contractor’s Vaccination Policy.

To preclude challenges, an employer may consider incentivizing workers to receive a COVID vaccine as opposed to unilaterally mandating the same. Incentives could include favourable schedules or work assignments because vaccinated

employees can work without social distancing, bonuses or monetary rewards, or other perks that may motivate employees to be vaccinated.

### 3 If an employee refuses to undergo regular COVID testing or follow the Vaccination Policy, what options are available to construction employers?

Employers have a duty to accommodate until the point of undue hardship where its workers have a legitimate reason for not getting

the vaccine (i.e. due to religious beliefs or adverse allergic reactions). As such, employers may be required to make accommodations (i.e. shift scheduling), find alternative work, and/or consider whether enhanced PPE that may not be required under current health and safety protocols would permit the employee to continue working. Ontario law considers an employer's cost, outside sources of funding, and health and safety requirements when assessing whether an employer faces undue hardship. Otherwise, employers may risk discrimination allegations.

If work accommodations cannot be found, employers may offer unpaid leaves of absence for employees who have legitimate reasons to not be tested or vaccinated. However, if the worker's unpaid leave becomes indefinite, the employer may face a grievance or a civil claim, depending on if the worker is unionized.

### 4 What are some privacy considerations for construction employers in implementing the Vaccination Policy?

As the Vaccination Policy is highly intrusive, construction employers must take extra care into implementation and enforcement. The ultimate test is to balance workplace safety with employee privacy. Some privacy considerations, which are beyond the scope of this article, include whether an employer can inquire about a worker's status of vaccination, require proof of vaccination, and make hiring decisions based on a worker's vaccination status. In addition, an employer must also prudently consider how to safeguard vaccination information properly once received.

While there continues to be little guidance from the courts and labour tribunals on whether a Vaccination Policy is permitted, workers should be encouraged to be vaccinated voluntarily. As we enter the second year of the pandemic, courts and labour tribunals will hear more COVID cases and offer more clarification in the future. ■

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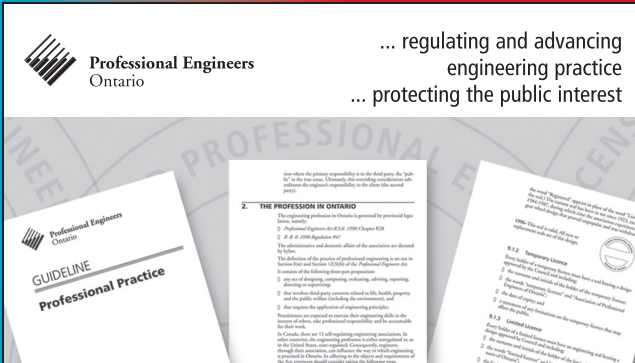
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