

# FASKEN

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## Private & Confidential

### By Email

Mr. Patrick McManus  
Ontario Sewer & Watermain Construction  
Executive Director  
5045 Orbitor Drive, Unit 12, Suite 300  
Mississauga, ON L4W 4Y4

Dear Mr. McManus:

### Re: **Managing OHS Legal Risk for Association Members**

Further to our recent discussions, I wanted to highlight for you, your Association and your members several areas of concern regarding enforcement activities of the Ministry of Labour, Training, and Skills Development (“**MLTSD**”) and related regulators arising from the COVID-19 pandemic that affects the entire Ontario construction industry.

On March 19<sup>th</sup>, 2020, the Ontario Ministry of the Attorney General issued an Order suspending limitation periods in Ontario, retroactive to March 16<sup>th</sup>, 2020. The effect of this Order was to stop the time limitations for the laying of regulatory charges under the *Occupational Health and Safety Act* (“**OHS**A”), and related provincial statutes, including, but not limited to, the *Environmental Protection Act* (“**EPA**”), the *Technical Standards and Safety Act* (“**TSSA**”), the *Workplace Safety and Insurance Act* (“**WSIA**”) and the *Employment Standards Act* (“**ESA**”).

With the gradual reopening of the Ontario economy and the Ontario Court of Justice there is still a tremendous backlog in Ontario courts. There have also been a number of ongoing **MLTSD** investigations that have been opened during COVID-19. We have been involved in assisting clients with a number of cases where workers have allegedly been infected by the COVID-19 virus in the workplace and the **MLTSD** is investigating, in addition to incidents, accidents and worker complaints.

Effective September 14, 2020, when the limitation period suspension is lifted, there will be a number of new **OHS**A and other provincial offences charges sworn out and served on employers throughout Ontario, likely including members of your Association.

As you know, many of your members are struggling to maintain profitability during the COVID-19 Pandemic. The industry needs the support of government to rebuild the Ontario economy, not the risk of more **OHS**A and related regulatory charges during the economic recovery.

Now is not the time, in my opinion, for the **MLTSD** to continue its “name, blame and shame” prosecution policy started under previous provincial governments.



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Now is the time for a new approach to improving workplace health and safety in the construction industry.

## What This Means For Your Members

The continuation of *OHSA* and other regulatory prosecutions, after being delayed for 6 months due to the COVID-19 pandemic shutdown together with an additional 6 months of new cases in the courts will strain in the already backlogged court system.

Your members' constitutional right to a trial "within a reasonable period of time", pursuant to Section 11(b) of the *Charter of Rights and Freedoms*, may be in jeopardy. A presumptive "reasonable period of time" has been set by the Supreme Court at 18 months<sup>1</sup> for matters in the Ontario Court of Justice such as charges under the *OHSA* and related provincial statutes. However, a recent decision of the Court of Appeal has held that if a defendant has not consistently objected to delay in the judicial system, their Section 11(b) rights may not be able to be enforced.<sup>2</sup>

We anticipate an unusually high number of continuing old and new *OHSA* prosecutions being pushed into an overburdened court system in the coming months causing further delays and infringement of your members constitutional rights.

## Steps to Take Now Right Now

We recommend the following to protect your members:

1. Advise your members that if they have had an accident that was investigated by the *MLTSD* in the last 12 months, and have not received charges, they are still exposed to *OHSA* charges for another 6 months.
2. Advise your members that if they are currently facing any regulatory charges in court that have been delayed because of the COVID-19 pandemic's court shutdown that their *Charter* right to a trial within a reasonable period of time may be infringed; we recommend they should seek expert, independent legal advice on how to address this issue in their specific case; we can provide this advice on a complementary, *pro bono* basis to your members; please see my bio: <https://www.fasken.com/en/norm-keith/#sort=%40fclientworksorthdate75392%20descending> .
3. Finally, if your members are charged with any regulatory offences within the next 6 months, they should seek legal advice on how to address this issue in their case; we can provide this advice on a reduced fee basis to your members.

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<sup>1</sup> R. v. Jordan, [2016] 1 SCR 631

<sup>2</sup> R. v. Cobra Float Service Inc., 2020 ONCA 527

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Please let me know if there is any other way we can assist you and your members in these challenging time.

Yours truly,

**FASKEN MARTINEAU DuMOULIN LLP**

A handwritten signature in black ink, appearing to read "Norm Keith". The signature is written in a cursive style with a large, sweeping flourish at the end.

Norm Keith\*

\*Practising through a professional corporation

cc Members of the Ontario Sewer & Watermain Association