GOWLING WLG

# COVID-19: FORCE MAJEURE AND CONSTRUCTION – A COMMON LAW PERSPECTIVE

See our COVID-19 resource centre

20 March 2020

On March 11, 2020, the World Health Organization declared the COVID-19 virus a worldwide pandemic. Governments in Canada and its provinces, and across the world are declaring states of emergency and implementing dramatic health and safety measures daily.

Gowling WLG's Infrastructure & Construction Sector Group is publishing a series of articles and hosting webinars to help the construction sector through these very trying times. Please visit our COVID-19 website hub at https://gowlingwlg.com/en/topics/covid-19/overview/ for all of our articles and other resources to help you and your business in these challenging times.

This Building Brief bulletin examines force majeure on construction projects in Canada's common law provinces and in common law-based construction contracts. A concurrent Building Brief article examines force majeure under the Civil Code of Québec.

## Start with the relevant clause from your construction contract:

- Force Majeure Clause;
- Excusable Conditions/Delay Clause;
- Rights in the events of unforeseen conditions;
- Relief in circumstances outside of the parties control; and
- Does your contract provides relief if any local, regional or federal government exercises

statutory powers which directly affects the execution of works.

# Will COVID-19 constitute a force majeure event?

The concept of force majeure refers to when a contract can no longer be fully executed or adhered to because of extraordinary or extreme circumstances, often referred to as “acts of God” and typically include natural disasters (or other “acts of God”), fires, flood, war, labour disputes, strikes, and lockouts.

Some force majeure clauses explicitly list “diseases”, “plagues”, “quarantine restrictions” and/or “epidemics” as triggering events, many do not. One example is the Canadian Construction Documents Committee (CCDC) 5B construction management contract and CCDC 2 stipulated price contract, which lists items such as labour disputes, strikes, lock-outs, fire, abnormally adverse weather conditions, and any cause beyond the contractor's control other than one resulting from a default or breach of contract.

For example, a contractor may seek an entitlement to extensions of time and/or additional payment in the event that:

1. shortages of labour as a result of preventative measures to alleviate the outbreak spreading;
2. shortages of materials arise due to delays in their importation or transportation;
3. the site being closed or access is restricted as a result of measures to contain the COVID-19 outbreak.

When “Force Majeure Events” occur, the force of a portion, if not all, of the liability for damages arises from the breaching party. In order to successfully rely on a force majeure clause, the relying party has the burden of establishing Force Majeure Event and proving that the Force Majeure Event has effectively prevented the party from fulfilling its obligations under the construction contract.

The courts in the common law provinces of Canada look to several elements when considering the applicability of a force majeure clause:

1. Whether the event qualifies as force majeure under the contract,
2. Whether the risk of non-performance was foreseeable and able to be mitigated, and
3. Whether performance is truly impossible.

In order to rely on a force majeure clause, performance of the contract must become impossible due to an unexpected event beyond the control either party. With respect to

impossibility of performance, economic considerations are generally not a relevant factor, and an alternate method of performance – even if much more costly – could prevent a party from relying on a force majeure clause. As an example, are the party's employees ill due to the virus and unable to work, or simply afraid to work and choosing not to attend?

# Further items to consider:

1. Provide compliant notice under the contract;
2. Consider suspension and termination clause;
3. If the workers are not coming onto site, is the construction site being left in a safe and secure state
4. Check whether your insurers have any relevant policy guidance requirements;
5. What are trade contractors' unions advising the workers;
6. Duty to mitigate;
7. Document Schedule and Cost impact under the contract as a result of COVD-19; and
8. Regularly monitor announcements from local health and safety/workers compensations and WSIB authorities.

# What if the contract does not provide for force majeure?

Where an express force majeure provision does not exist in your construction contract, the courts' default treatment has been to apply the more general doctrine of frustration. The doctrine of frustration, also historically known as the doctrine of discharge, originated in English courts to serve as an equitable remedy for extreme events that destroyed the very basis of the contract. In Canada, this core concept has been preserved but its interpretation has evolved throughout its rich case history.

The Doctrine of Frustration applies where, "a situation has arisen for which the parties made no provision in the contract and the performance of the contract becomes 'a thing radically different from that which was undertaken by the contract.'" This statement can be broken down into three considerations:

i. The Situation: Similar to how force majeure clauses trigger upon force majeure events, the doctrine of frustration is activated by a supervening event that occurs through no fault of either party.

ii. The Absence of Contractual Provision: The lack of a contractual provision, generally referring to an express force majeure clause, is a prerequisite for the general doctrine of frustration to apply.
iii. The Radically Different Performance of Contract: this can be interpreted as a situation which "renders the performance of the contract substantively different than the parties had bargained for".

# Contracts currently in negotiation phase

Parties currently in negotiations should consider including amendments expressly allocating the risks, including delay and any associated additional cost of contract works, arising as a result of COVID-19 and indeed perhaps epidemics and pandemics more widely. In the interest of mitigating the risk of ending up in court or arbitration, parties would be well advised to meet in advance and attempt to reach a consensus on what project-related occurrences and impacts are foreseeable in light of the Coronavirus, and capturing same within the contract.

* * *

These are very challenging times and even more so for construction projects. The health and safety of construction personnel is always paramount in construction, now more than ever.

Please check back to Gowling WLG's COVID-19 website hub as we update the sector on new developments, new announcements and best practices. Our Infrastructure & Construction Sector Group is publishing a series of articles and hosting webinars to help the construction sector through these very trying times.

The information provided in this article is solely informative and does not constitute a legal opinion.

NOT LEGAL ADVICE. Information made available on this website in any form is for information purposes only. It is not, and should not be taken as, legal advice. You should not rely on, or take or fail to take any action based upon this information. Never disregard professional legal advice or delay in seeking legal advice because of something you have read on this website. Gowling WLG professionals will be pleased to discuss resolutions to specific legal concerns you may have.

**Related** Construction & Engineering, Construction, COVID-19: How will coronavirus impact your business?

## Author

# Sahil Shoor

Associate - Waterloo Region

Email

sahil.shoor@gowlingwlg.com

Phone

+1 519-571-7604

vCard

Sahil Shoor