

IMPACTS ON CONSTRUCTION PROJECTS ACROSS CANADA

IN THE CONTEXT OF
COVID-19



WEBINAR: TUE. MARCH 31, 2020

12:00 P.M. – 1:00 P.M. EDT

 GOWLING WLG

LEGAL DISCLAIMER

- The presentation today is not intended as legal advice.
- Because this is a high level overview, it is impossible to cover all relevant details, and your available rights and remedies will depend on the unique facts of each situation, your applicable contract or subcontract, or the nature of your project.
- For specific advice, please contact your qualified legal counsel before making any decisions or taking any action. This is of particular importance as every province and territory has its own legal regime.
- As you know, the situation is extremely fluid and is changing on a daily basis. As things evolve, your best course of action could also evolve. Please follow up to date and reliable sources for your information.

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CROSS-COUNTRY ROUND UP

*What Each Province Is Doing In
The Construction Sector*

MARK FERBERS, KERRY POWELL, TED BETTS, GUY POITRAS

MARCH 31, 2020



CROSS-COUNTRY ROUND UP – WHAT EACH PROVINCE IS DOING IN THE CONSTRUCTION SECTOR

- **Mark Ferbers – British Columbia**
- **Kerry Powell – Alberta**
- **Ted Betts – Ontario**
- **Guy Poitras – Québec**
- **Ted Betts – Federal Government and rest of Canada**

CROSS-COUNTRY ROUND UP – BRITISH COLUMBIA

- January 28 – First case of COVID-19 in BC
- March 17 – Declared public health emergency
- March 23 – Declared provincial state of emergency
- March 23 – City of Vancouver declared a state of emergency

CROSS-COUNTRY ROUND UP – BRITISH COLUMBIA

- The BC Government, in consultation with the Provincial Health Officer (“PHO”), has designated the construction industry an essential service that should and is encouraged to remain open.

<https://www2.gov.bc.ca/gov/content/safety/emergency-preparedness-response-recovery/covid-19-provincial-support/essential-services-covid-19>

- Owners and Contractors must follow the orders and guidance provided by the PHO to ensure safe operations and reduce the risk of transmission of COVID 19.

<https://news.gov.bc.ca/releases/2020EMBC0002-000542>

www.gov.bc.ca/COVID19

- WorkSafeBC inspectors will enforce virus-transmission prevention at construction sites, including social distancing requirements.

CROSS-COUNTRY ROUND UP – ALBERTA

- March 5 – First case of COVID-19 in Alberta
- March 13 – Suspension of all jury trials
- March 17 – Declared public health emergency
- March 23 – Declared provincial state of emergency

CROSS-COUNTRY ROUND UP – ONTARIO

- January 27 – First case of COVID-19 in Ontario
- March 17 – Declared state of emergency
- March 20 – Suspension of limitation periods (retroactive to March 16) and non-emergency court hearings
- March 23 – Declared shut down of all “non-essential workplaces”
- March 20-25 – GTA cities declare states of emergency

CROSS-COUNTRY ROUND UP – ONTARIO

- “Essential workplaces” includes:
 - ***Supply chains***
 - #1. Businesses that supply other essential businesses or essential services with the support, supplies, systems or services, including processing, packaging, distribution, delivery and maintenance necessary to operate.
 - ***Construction***
 - #26. Construction projects and services associated with the healthcare sector, including new facilities, expansions, renovations and conversion of spaces that could be repurposed for health care space;
 - #27. Construction projects and services required to ensure safe and reliable operations of critical provincial infrastructure, including transit, transportation, energy and justice sectors beyond the day-to-day maintenance;
 - #28. Construction work and services, including demolition services, in the industrial, commercial, institutional and residential sectors;
 - #29. Construction work and services that supports health and safety environmental rehabilitation projects.
 - ***Business Regulators and Inspectors***
 - #74. Organizations, including Administrative Authorities, that regulate and inspect businesses.

CROSS-COUNTRY ROUND UP – QUÉBEC

- January 27 – First case of COVID-19 in Ontario
- March 11-23 – Several public decrees restricting public gatherings and travel
- March 23 – Declared shut down of all “non-essential workplaces” effective at midnight on March 23
- March 27 – Montréal declares public health emergency

CROSS-COUNTRY ROUND UP – QUÉBEC

- On March 23rd, Prime Minister Legault announced in an Order in Council that all activities carried out in the work environment be suspended, except if qualified as essentiel services. This was effective on March 24th.
- The Order in Council provides a list of all services that are considered essential and can therefore continue to operate.
- All construction projects except those described in the list are therefore on hold until 13 April.
- For example, the maintenance of essential public infrastructures in proper working order (bridges, municipal buildings, etc.) and the construction, maintenance or upkeep of essential activities in connection, in particular, with public and private infrastructures that may create a risk for public health and safety are listed as essential.

CROSS-COUNTRY ROUND UP – QUÉBEC

- The list of essential services is in constant evolution and can be amended from time to time by the Government.
- To be added to the list of exceptions in order to continue to operate, a request must be made to the Government of Québec, which will usually be processed within 24 hours.
- The Montreal office has been extremely busy helping clients determining whether their activities fall within the list of exempted essential services and making requests to be added to the list. We have also assisted with the preparation of safe passage letters.

CROSS-COUNTRY ROUND UP – FEDERAL GOVERNMENT & THE REST OF THE COUNTRY

- Federal Government: Series of travel restrictions and federal aid
- States of Emergency: Saskatchewan (3/18), Manitoba (3/20), New Brunswick (3/19), Nova Scotia (3/22), PEI (3/16), NL (3/18), YT (3/18), NWT (3/18), Nunavut (3/16)



FORCE MAJEURE

SAHIL SHOOR
MARCH 31, 2020



FORCE MAJEURE

- A force majeure clause is common in contracts
- Protects parties from impairment caused by extraordinary events (“Acts of God”)
 - Hurricane, flood, war, political unrest, labour disruption ...epidemic
- Relieves parties from some or all obligations/liability if events falling within the definition of force majeure occur

FORCE MAJEURE

- Courts look to several elements when considering the applicability of a force majeure clause:
 - **Qualification:** whether the event qualifies as force majeure under the contract
 - **Impossible Performance Standard:** whether performance is/was truly impossible
 - **Foreseeability:** whether the risk of non-performance was foreseeable and able to be mitigated
 - **Remedy:** what happens if this is a qualifying force majeure event?

ASK: DOES THIS QUALIFY AS A FORCE MAJEURE EVENT UNDER YOUR CONTRACT?

- Force majeure clauses *occasionally* include terms such as “plague” “epidemic” or “pandemic” –often unclear
- Post-SARS, *some* reference “public health emergencies” and “communicable disease outbreaks”
- In general, the terms have not been fully tested by the Courts in Canada
- If disease not covered, does your clause capture **government action/restrictions/regulations** such as ‘Shelter in Place’ orders, border closures?
- Expect new case law to develop as a result of COVID-19
- Expect new clause wording to evolve –i.e. “national health emergency”, “pandemic”, “declared as such by WHO, Toronto Board of ..., Alberta..., etc.”

ASK: DID THE FORCE MAJEURE EVENT CAUSE THE FAILURE?

- Force majeure clauses are difficult to rely upon
- If a qualifying force majeure has occurred, **ask did the force majeure event cause the non-performance or delay?**
 - Did the product or part originate in an affected region?
 - Are there alternative sources -even if they are more costly?
 - Was the disruption actually due to the virus (ill workers) or was the disruption really due to choices made?
 - Do the circumstances meet the **impossible performance standard?**

TIME IS NOT YOUR FRIEND

- Given the notoriety of COVID-19, it is becoming especially important to prepare for disruptions
- **The ‘Forseeability Window’ is Closing** –i.e. it may become increasingly difficult to argue that COVID-19 disruptions were not foreseeable
- Take steps to mitigate risk/damage in advance
 - Even if these steps do not ultimately mitigate a force majeure situation, we believe they will be relevant in the Court’s analysis

TIME IS NOT YOUR FRIEND

- **Be proactive**
 - Consider whether COVID-19 will affect your ability to meet contract obligations and plan accordingly
 - How will you respond if other parties cannot meet their obligations?
 - If notice of a force majeure is given to you by another party, **respond promptly to create, clarify or correct the written record**

WHAT FM RELIEF IS AVAILABLE?

- **Third, what is the extent of the FM relief available?**
 - Does the force majeure clause specify the form or timing of relief?
 - Is this relief limited to a period of time?
 - Does the clause specify liquidated damages?
 - Are there other provisions relating to contract cancellation or damages more generally?

DOUBLE CHECK THE GOVERNING LAW

- **Remember: jurisdiction matters quite a lot**
 - The governing law of the contract in question may have significant bearing on whether force majeure is available
 - There are significant differences between Canadian, English, American, European and Chinese case law on this topic
 - We have only considered Canadian law in this presentation

NO FORCE MAJEURE CLAUSE?

OTHER RELEVANT CLAUSES FROM YOUR CONTRACT TO CONSIDER:

- 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.

If the contract does not have a force majeure clause, parties can still attempt to rely on other contract law defences

- In particular, Courts may still consider defences based on the foreseeability of the impairing event

NO FORCE MAJEURE CLAUSE?

- **DOCTRINE OF FRUSTRATION**

1. **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.
2. **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.
3. **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”.

RESULT OF A SUCCESSFUL FRUSTRATION CLAIM

- The contract is deemed frustrated and all obligations are extinguished as of the date of the supervening event
- Many provinces have enacted provincial legislation to administer the outcomes of contracts found to be frustrated. For example:
 - Ontario's *Frustrated Contracts Act* applies to any contract that is governed by the law of Ontario and that has become frustrated and consequently discharged.
 - It prescribes the amounts paid or benefits conferred prior to discharge are recoverable. Additionally, it allows the severance of frustrated obligations of a contract if the remainder was substantially performed prior to discharge.



AVENUES OF REDRESS IN QUEBEC

GUY POITRAS
MARCH 31, 2020

THE ORIGIN OF FORCE MAJEURE UNDER QUÉBEC LAW

- There are two sources of force majeure in Québec: the Civil Code and contract.
- Unlike Common Law provinces, force majeure is implicitly incorporated into all contracts concluded under Quebec law as per the Civil Code.
- A contracting party in Québec may invoke this form of impossibility of performing the obligation even in the absence of a clause providing for it in a contract.
- The main differences between “legal” force majeure and “contractual” force majeure are:
 - the elements to be proven in order to be exempted from liability;
 - situations that may constitute a force majeure.

NO CLAUSE: WHAT DO I HAVE TO PROVE?

- **In the absence of a force majeure clause, the Civil Code requires proof of the following:**
 - The event has to be irresistible, exterior and unpredictable;
 - The event has to make the performance of the obligation by the debtor absolutely impossible.

FORCE MAJEURE IN THE CONSTRUCTION INDUSTRY

- The Civil Code contains a force majeure article specific to the construction industry:

"2100. (...)

Where they (contractor and provider of services) are bound to an obligation of result, they may not be relieved from their liability except by proving superior force "

- Construction contracts generally entail an obligation of result.
- The exemption applies to the delay in execution of the obligation.
- The entrepreneur/contractor will be entitled to additional time for performance in the event of force majeure.

CONTRACTUAL FORCE MAJEURE

- **In the presence of a clause to this effect in the contract, the party invoking it must demonstrate:**
 - The clause was not imposed unilaterally to the other contracting party or the clause was negotiated between the parties;
 - The event must correspond to the definition of force majeure as provided for in the contract.
- **The advantages of including a force majeure clause in a contract are:**
 - The burden of proof is less rigorous;
 - Its effect on liability can be predetermined in the contract;
 - The scope of force majeure can be broadened.

OCCUPATIONAL HEALTH & SAFETY (ONTARIO)

JORDAN SMITH

MARCH 31, 2020



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OCCUPATIONAL HEALTH & SAFETY (ONTARIO)

- COVID 19 and the Duty to Take All Reasonable Precautions pursuant to the *Occupational Health and Safety Act*;
- Actions to be taken in the event of a positive COVID-19 test or diagnosis;
- Work Refusals.

OCCUPATIONAL HEALTH & SAFETY (QUÉBEC)

OLIVER LAMOUREUX
MARCH 31, 2020



HEALTH AND SAFETY – EMPLOYERS' OBLIGATIONS

- The employer's obligations are described in Section 51 of the Occupational Health and Safety Act (the « Act »), in the Safety Code for the construction industry and in the Regulation respecting OHS.
- Section 51 of the Act foresees general obligations for the employer.
- Potential fines for non-compliance with the Act and/or for every person who, by an act or omission, does anything that directly and seriously compromises the health, safety of a worker on the construction site.

HEALTH AND SAFETY – EMPLOYERS' OBLIGATIONS

- Pursuant to section 51 of the Act, an employer must take the necessary measures to protect the health and ensure the safety and physical well-being of his worker:
 - ✓ Must ensure that the organization of the work and the working procedures and techniques do not adversely affect the safety or health of the worker;
 - ✓ Must supervise the maintenance of the workplace, provide sanitary installations and ensure that meals are eaten in sanitary quarters;
- The principal contractor (i.e. person responsible for the execution of all the work on a construction site) has the same obligations as the employer under the Act.

HEALTH AND SAFETY – EMPLOYEES' OBLIGATIONS

- **For their part, employees must notably:**
 - ✓ take the necessary measures to ensure their health, safety or physical well-being;
 - ✓ see that they do not endanger the health, safety or physical well-being of other persons at or near their workplace;
 - ✓ become familiar with the prevention program applicable to them;

HEALTH AND SAFETY – PREVENTION PROGRAM

- An employer must normally prepare and implement a prevention program for a construction site under its supervision.
- The prevention plan must be transmitted to the CNESST in certain circumstances.
- The prevention plan will need to include the specific standards of sanitation and safety for the establishment.

HEALTH AND SAFETY – PREVENTION PROGRAM

- In the context of the Covid-19 pandemic, the prevention plan must incorporate all safety measures identified by the Department of Public Health:
 - ✓ Social distancing standards, if applicable;
 - ✓ Reminder of basic hygiene rules for the workers (hand washing, coughing in elbow, etc.);
 - ✓ Monitoring of symptoms and self-isolation if required.
- Employers need to be particularly diligent to ensure that water, soap, alcohol-based disinfectants and other hygiene products are made available on the site.

HEALTH AND SAFETY – RIGHT OF REFUSAL

- A worker has a right to refuse to perform particular work if he has reasonable grounds to believe that the performance of that work would expose him to danger to his health, safety or physical well-being, or would expose another person to a similar danger.
- Reasonable grounds for such a refusal to work could potentially include:
 - ✓ Obvious disregard of the employer with regard to implementation of hygiene measures on the site;
 - ✓ Absence of a prevention plan;
 - ✓ Negligence by the employer to address a situation where a worker is manifestly presenting symptoms associated with Covid-19.

HEALTH AND SAFETY – EASING MEASURES

- Employers now have until August 31, 2020, to pay their Statement of Account related to the CNESST annual contribution for any Statement produced after March 18, 2020.
- Exceptionally, no penalty or interest will be charged during this extension period.
- The deadline for filing the 2019 Payroll Return is extended until June 1, 2020 (normally: until March 15, 2020).

QUESTIONS?

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