

CONSTRUCTIVE VIEWS

ASSISTING CLIENTS IN THE BUILT ENVIRONMENT



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Crisis Management Bulletin: Construction Contracts and COVID-19

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Introduction

COVID-19 was declared a pandemic by the World Health Organization (WHO) on March 11, 2020, and shortly thereafter, an emergency nationally in Canada, and an emergency regionally in Ontario.

The impact of this pernicious pandemic has affected us in our homes and in our businesses, and across many industries, including the construction industry. This is a time for leadership and collaboration, to mitigate social and economic impacts, as we fight off the effects of this pandemic.

In order to limit the contagion, different governments have taken up action, to and including locking down cities and borders, restricting non-essential travel, imposing quarantines, and effecting various business closures, in accordance with the best medical advice available. For the construction industry, this global interruption in business operation will inevitably mean a shortage of materials and labour and consequent delay in the completion of contracts already underway or in the planning stages. Already we are seeing slowdown notices.

This short legal bulletin raises some of the key legal considerations in managing the rapidly evolving impacts of the COVID-19 pandemic in our construction industry. It also urges all of us to take a collective deep breath, and pause, to work together to continue economic activities vital to the health of our nation.

Proactive Steps:

Pull out your Contract and read it

The specific words of each contract should guide how delays from the impact of the COVID-19 pandemic should be managed and as such a review of the contract is recommended as a first step. The impacts of COVID-19 pandemic may be classified as excusable delay or a delay falling under the category of a force majeure event, or depending on the circumstances a compensable delay event.

¹ www.healandco.com, the assistance of Maria Le Hunte, Associate at Heal & Co. LLP is gratefully acknowledged.

An excusable delay is a delay that is not the fault of any party and which may or may not be compensable, but it allows a party to extend the time for completion. Expenses incurred as a result of excusable delays are also generally not lienable,² unless they meet the new 2018 extended definition of “price” which now expressly includes certain direct costs caused by extended supply durations.³ Excusable or compensable delays may include:

“... acts of municipal and government authorities, acts of God or Force Majeure, delays... arising from unforeseen events caused beyond the control and without the fault or negligence of the contractor, subcontractor or suppliers...”⁴

You should consider whether a force majeure notice letter, or even a more detailed “standstill” and cost mitigation arrangement is prudent and advisable in your situation, either as the performing contractor or trade contractor, or the owner/payer of an improvement to real property in Ontario.

Read the terms of the Governmental Directives

Within the context of the COVID-19 pandemic, acts of municipal and government authorities may include mandatory orders effecting widespread lockdowns. Note that the “shelter in place”⁵ orders contain exceptions for “essential businesses” which are typically NOT going to include construction, unless vital or important to the delivery of otherwise defined “essential business” services.

A force majeure event generally means an event beyond the control of the contracting parties. A force majeure clause in a contract may excuse parties from non-performance, and protect them for the consequences of late or delayed performance not from price increases which make completing the contract more expensive. In order to rely on such a clause, the event must have been unforeseen and not an allocated risk at the time of contract formation. It should be noted that all force majeure clauses are not all worded the same. With respect to the COVID-19 pandemic, most force majeure clauses will not literally include the words “epidemic” or “pandemic”⁶; however “unavoidable labour shortages” or similar wording may be sufficient to trigger force majeure.

Parties should also pay attention to contract notice provisions. Under the CCDC 2, a delay requires the contractor to give prompt notice of a delay claim within 10 working days of the commencement of the delay to rely on an extension under the contract.

Many contracts state that a delay must affect the critical path activity to be entitled to an extension. Consequently, it is important to check the contract wording, and take steps accordingly.

² Selectra Inc. v. Penetanguishen (Town) 2016 ONSC 2293 at para. 27

³ Construction Act, RSO 1990, c.C-30, as amended, and note the extended definition of “price” which now includes “any direct costs incurred as a result of an extension of the duration of the supply of services or materials to the improvement for which the contractor or subcontractor, as the case may be, is not responsible”, s.1(1).

⁴ Ibid

⁵ Eg. Santa Clara County, California, USA, https://mcusercontent.com/b7704d67c212a9bf7f81ccf82/files/a030398c-3dc5-458b-962f-af507aca04c7/Final_Signed_SCC_Order_to_Shelter_in_Place.pdf?mc_cid=cfdedb3fdb&mc_eid=08a07752be

⁶ More modern non-standard form construction contracts often include express reference to “epidemic” as a defined “force majeure”, event in Ontario. While not express, both the current CCDC2 2008 and CCA 1 (subcontract) forms define a potential compensable “delay event” to include a “stop work order... issued by other public authority” provided it was not caused by the contractor/subcontractor. This also supports a collaborative and cautious approach to working with COVID-19, and the need for regard to “shelter-in-place” orders if any are imposed in Ontario.

The Ultimate Delay: Contract Frustration

The doctrine of frustration applies where there is a supervening event that causes the performance of the contract to become something radically different from that which was undertaken by the contract. Simply put, it applies when performance is impossible. Impossible is a high threshold. Even if this threshold is met parties are still under a duty to mitigate. The doctrine of frustration, when successfully applied, relieves parties of their bargain because a supervening event has occurred without the fault of contracting parties⁷. It is still likely too early to conclude the pandemic or even the acts of government have completely frustrated contractual performance. Moreover, we are all better off regarding the current economic situation as “hitting the pause” button, but should also recognize that pause should not mean economic activities cannot resume.

As with the application of force majeure, the timing of entering into the contract is an important consideration. “A contract is not frustrated if the supervening event was contemplated by the parties at the time of contracting and was provided for or deliberately chosen not to be provided for in the contract”⁸

Record Keeping

Only short weeks ago, on March 13, 2020, the China Council for the Promotion of International trade issued over 4,000 force majeure certificates covering a total contract value of 330.8 billion yuan which is over \$66 billion CDN⁹.

In order to evidence the impact of the COVID-19 pandemic in Canada, particularized and contemporaneous records which detail how the COVID-19 pandemic impacted performance of a construction contract may provide a measure of protection to construction industry participants who may wish to advance delay claims, or to resist them.

There should be a monitoring system to record all effects in project areas, governmental actions such as quarantines, travel bans, or “shelter in place” orders, impacting a construction project and any supply shortages due to the COVID-19 pandemic.

The party seeking to be excused from performance under the contract, has the burden to prove entitlement to excused performance.

Duty to Mitigate

Regardless of a force majeure event, frustration or excusable delay, parties are under an obligation to take all reasonable steps to recover any losses or prevent additional losses.

Duty to Act in Good Faith

At the date of writing, we are in the early stages in Canada of really feeling the impact of the COVID-19 pandemic. Each day, we hear of new COVID-19 cases around the world and new government measures aimed at mitigating the number of deaths and allowing healthcare facilities to cope with the number of patients. No one can speculate with any real accuracy the magnitude of the impact of the COVID-19 pandemic. Crisis management is time sensitive and parties may wish to enter into a formal “standstill” agreement which may suspend administrative obligations and promote cooperation in solving problems rather than fighting about the allocation of risk. Such an agreement may not be necessary to comply with the duty to act in good faith but may assist in showing that parties made best efforts to act in good faith.

7 Naylor Group Inc. v Ellis-Don Construction Ltd. 2001 SCC 58, 2001 at paras 53-55

8 Perkins v Sheikhtavi 2019 ONCA 925 at para 16

9 http://en.ccpit.org/info/info_40288117668b3d9b0170d2952a7f0799.html

Conclusion

From a legal contract management perspective, some appropriate steps to consider in the context of this COVID-19 pandemic are to check the contract for wording that deals with delay and the already agreed to consequences of particular delay events, outside the control of one or more of the parties. The next step is look for notice provisions regarding any delay provisions in the contract and to diarize and comply with notice provisions. Thirdly, develop internal protocols aimed at accurate and contemporaneous record keeping of the impact of the COVID-19 pandemic on your construction business. Fourthly, keep the lines of communication open with your construction counterparties and if possible, proactively engage in efforts to seek agreement on collaborative efforts to mitigate the impacts of the COVID-19 pandemic to the greatest degree reasonable and practicable in your particular circumstances.

If you have any questions, contact us at www.healandco.com.

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