

Goodmans^{LLP} Update

COVID-19 and *Force Majeure* on Construction Projects

The World Health Organization declared a Public Health Emergency of International Concern regarding the global outbreak of the 2019 novel coronavirus (COVID-19). The first presumptive case of COVID-19 in Ontario was identified on January 25, 2020.

This update will discuss the potential impact of COVID-19 on construction projects in Canada, specifically in the context of *force majeure* clauses. COVID-19 has already disrupted supply chains and reduced labour forces in Canada and across the globe, and has the potential to significantly adversely affect construction projects.

Force Majeure Clauses

On every construction project, there is potential for an unexpected event outside of the parties' control. These events are commonly referred to as *force majeure* events, and typically include natural disasters (or other "acts of God"), fires, flood, war, labour disputes, strikes, and lockouts.

Most construction contracts include a *force majeure* clause that excludes liability for a party's failure to perform its contractual obligations in the face of a *force majeure* event. These clauses are an important tool for risk allocation, and are often tailored to industry-specific and project-specific risks that render performance impossible (or in some contracts, imprudent, substantially more difficult, or substantially more expensive). With a *force majeure* clause, the parties are generally excused from penalties or damages due to failed or delayed performance.

The leading decision on *force majeure* clauses is *Atlantic Paper Stock Ltd. v. St. Anne-Nackawic Pulp and Paper Company Limited*, in which the Supreme Court of Canada described the purpose of *force majeure* clauses as follows:

An act of God clause or *force majeure* clause generally operates to discharge a contracting party when a supervening, sometimes supernatural, event, beyond the control of either party, makes performance impossible. The common thread is that of the unexpected, something beyond reasonable human foresight and skill.

A *force majeure* clause typically includes: (a) a list of the *force majeure* events that trigger the clause; (b) terms that define the duration of the *force majeure* events; (c) a notice provision describing how a declaration of *force majeure* is to be communicated; and (d) a description of the effects a *force majeure* event will have on the parties' contractual obligations.

Epidemics/Diseases in *Force Majeure* Clauses

Although 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) 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.

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In these cases, COVID-19 may still be captured in a broader category such as “emergency” or “any cause beyond the Contractor's control”, but that classification may be open to challenge by an adverse party.

Importantly, there are no Canadian judicial decisions that have considered *force majeure* in the context of a serious outbreak or epidemic. In future cases, courts will likely look to Atlantic for guidance, which established a number of legal considerations including whether the *force majeure* event was “so radical as to strike at the root of the contract”.

Recommendations

The COVID-19 outbreak will continue to impact all levels of the supply chain, including the availability and prices of materials, manufacturing, logistics, and manpower. Furthermore, as we have seen over the past few weeks, different levels of government have provided guidance and recommendations addressing how to conduct oneself both inside and outside of the workplace. This includes limiting the size of crowds and “social distancing”. These recommendations will affect the workplace, including construction sites. A vibrant construction site often includes more than fifty people, and sometimes hundreds. It is possible these scenarios may broaden the scope of what may constitute a *force majeure* event. If borders are closed to goods or supply-chain disruptions, these too could potentially amount to *force majeure* events.

Regardless of the outcome of COVID-19 and the time it takes for the situation to abate in Ontario, it is clear that contractors and owners should carefully review their contract documents and *force majeure* clauses as part of assessing business risk. Requisite notices should be given promptly and in accordance with the contract to ensure contractual rights are protected.

Moving forward, stakeholders should:

- carefully review their contract documents and *force majeure* clauses (if any);
- contact suppliers to ascertain the status of current and future deliveries, and plan for contingencies;
- contact members of the workforce (including unions and trades) to determine whether any stoppages or reductions in manpower are anticipated, and plan for contingencies.

Finally, to a large degree, we are navigating uncharted waters. While the legal issues will play out over the weeks and months ahead, we should not lose sight of the fact we will all be affected by this pandemic. Irrespective of contractual terms, cooperation in the workplace will be required to ensure the health and safety of all of those involved in the construction industry.

For further information, please contact the authors or any member of our [Construction and Infrastructure Group](#).