

Potential Impacts of COVID-19 on Construction Projects in Canada

The COVID-19 pandemic has been a considerable source of discussion and, despite multiple publications, numerous questions and uncertainties remain. Will the COVID-19 pandemic be considered a force majeure event? How will COVID-19 impact construction projects in Canada? How can contractors and owners prepare themselves for eventual discussions on the impact of COVID-19? In this article, we provide our thoughts on these questions.

Will the COVID-19 pandemic be considered a force majeure event?

Leading law firms in Canada have been publishing articles answering this question. The general consensus is: it depends. The application of a force majeure clause will depend on the specific language used in the contract, on the geographical location of the project, and the temporality of the signature of the contract. As some provinces in Canada have ordered a shutdown of construction projects while other provinces have deemed construction an essential service, the application of the force majeure clause may also rely on how the provincial governments react to COVID-19. In other words, a government-ordered stoppage of work may be considered a force majeure while a contractor's decision to stop work prior to such orders may not constitute a force majeure.

Whether or not COVID-19 will be considered a force majeure, construction projects will be impacted by this rapidly evolving pandemic. As such, contractors need to be prepared to document the actual impacts which will likely be more significant than the duration of the government-imposed shutdowns.

How will COVID-19 impact construction projects?

Before we get into how the COVID-19 pandemic will impact construction projects in Canada, we should first think about when COVID-19 may have started to impact projects. It is likely that the impact of COVID-19, to some extent, started before the World Health Organization declared the COVID-19 outbreak a pandemic on March 11, 2020. The impact of complete shutdowns of construction projects will be relatively straightforward to identify and quantify. However, the impacts of COVID-19 may be less obvious, such as availability of labour, reduced labour productivity, late responses by owner's engineers and architects, and late equipment deliveries.

- The availability of labour may be impacted due to school closures, sicknesses and refusals to work. As schools have closed for ill-defined periods of time and with scant childcare options, some labourers may be obliged to stay home to care for their children. The availability of labour was already a struggle in some provinces with the recent proliferation of public and private development projects. Moreover, general contractors will need to navigate the varying decisions by the different parties to a construction project. While some contractors have continued work on site, absent provincial orders to stop work, some subcontractors may decide otherwise. There have already been instances of labour unions disagreeing with the continuation of construction projects.

- The spread of COVID-19 in our communities may cause a reduction in labour productivity on construction sites. This does not mean that the virus necessarily has to be contracted by someone on a project for labour productivity to be affected. One of the main control measures implemented by governments around the world has been to limit the physical distance between people. These physical distancing requirements may contribute to less efficient execution of work. Moreover, contractors have introduced several additional measures to protect workers such as additional sanitation facilities and personal protective equipment requirements which may also reduce labour productivity.
- Contractors may experience slower response times from architects and engineers as professional firms adjust to remote work where offices have been closed. Even the most sophisticated corporations with robust business continuation plans will encounter some disruption to the flow of work. Construction projects are dynamic and often require timely responses to requests for information or clarifications. The late issuance of responses and reduced site visits may have a direct impact on the execution of work.
- As our world has become more globalized, developers and contractors source equipment from around the world. China, the largest supplier of manufactured goods in the world, has closed some manufacturing sites since early February. Other large manufacturers throughout the United States and Europe have also shut down their manufacturing plants. Over the next several weeks, we are likely to see several manufacturing plants retooled for the production of medical supplies and equipment. These changes to the supply chain will be less obvious and may result in late deliveries or lack of supplies on construction sites.

These examples are not meant to be an exhaustive summary of potential impacts to construction projects in Canada. Rather, they are intended to provide some examples of the less obvious impacts that COVID-19 may have on ongoing projects. As projects are unique endeavors, some of the impacts caused by COVID-19 will be unique to each project.

How can contractors and owners prepare themselves for eventual discussions on the impact of COVID-19?

Disputes between parties on construction projects were commonplace before the arrival of COVID-19. The impacts of COVID-19, as described above, will likely contribute to disputes between parties. For example, delays due to COVID-19 may occur alongside other unrelated delays. Similarly, contractors and owners may disagree with the extent to which COVID-19 impacted ongoing projects. To prepare for eventual discussions on the impact of COVID-19 to your projects with relevant parties, our recommendations are similar to general best practices, such as satisfying notice requirements, detailed record keeping, following health and safety guidelines, implementing mitigation measures, and preventing cash flow issues.

- Contractors should endeavor to comply with the requirements of the contract regarding giving timely notices, submission of claims, and supporting documentation. Your preferred construction lawyer is still working, albeit remotely, so request legal advice to ensure that you are complying with the contract.
- Keeping accurate and comprehensive contemporaneous records will be the go-to source for identifying and quantifying the impact of COVID-19 on projects. These records will also be important to provide the other contracting party informed with regular updates. In particular, the records should provide relevant and accurate data on schedules and productivity. When it comes to project schedules, contractors will need to update their schedules with the knowledge they have at the time. As developments, particularly provincial restrictions, are changing frequently, contractors will need to ensure that the schedules reflect the then-current understanding of the environment. Contractors also need to bear in mind the impact of COVID-19 on weather-sensitive work, and not simply shift their schedule by a given period. If schedules do not include the timing of material and equipment deliveries, we strongly recommend including them as activities, since planned delivery dates may be affected by local and global supply chain disruptions. The calculation of productivity

is seldom a simple task. However, it is now especially important that contractors ensure they are maintaining the records required to measure productivity. Should an eventual dispute arise due to a disagreement on the impact of COVID-19, these records will be required to demonstrate a clear impact.

- Following revised health and safety guidelines will also be crucial to protect workers and to prevent any delays resulting from not complying with these new guidelines. While these guidelines may contribute to a loss of productivity, the health and safety of workers should not be compromised. The provincial ministries of labour will be taking a hard line for enforcing these guidelines and may even shut projects down for not complying.
- When possible, contractors and owners alike should work towards mitigating the impact of COVID-19. In particular, it is important for contractors and owners to maintain strong communication channels to prevent any supply chain issues from impacting the execution of work. Once we gain control over the spread of COVID-19, the impact of the virus does not necessarily stop. The duty of the contractor and owner to mitigate costs will continue after the spread of COVID-19 is under control.
- Finally, contracting parties should address the matter of cash flow openly. Most contractors will resume work with serious cash flow deficits and owners should proactively

plan to assist contractors during the ramp-up of operations to minimize the risk associated with cash flow issues.

Once again, there may be other preparations required for a particular project that are not discussed here. It is important to complete a thorough review of projects to identify risks and implement new measures to prevent or mitigate the impact of these risks.

Resolving disputes related to the impact of COVID-19 will not be easy

The successful execution of construction projects is inherently complex. Naturally, the spread of COVID 19 will introduce another hurdle for which industry stakeholders will manage and mitigate the impact. Absent COVID-19, construction projects are often affected by a myriad of factors, such as design changes and unforeseen site conditions, which result in delays and cost overruns. Complications will arise when the impact from these common factors will be experienced at the same time as the impact of COVID-19. Disentangling the effect of different causes occurring concurrently is difficult, but not impossible. The successful analysis of the effect of disruption events is largely dependent on the quality of project records. To that end, this may be an optimal opportunity to review the current project documentation and introduce improvements that will help tomorrow and beyond.

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