Delay and frustration: COVID-19's impact on the construction industry in Ontario

March 31, 2020

On March 17, 2020, the Government of Ontario (Ontario), in response to the novel Coronavirus (COVID-19) pandemic, declared a state of emergency under section 7.0.1(1) of the *Emergency Management and Civil Protection Act* (EMCPA).[1]

On March 24, 2020, Ontario, pursuant to its powers under the EMCPA, mandated the closure of all non-essential businesses as at 11:59 p.m. on Tuesday March 24, 2020. The construction sector, in large part, was deemed an "essential business". On April 3, 2020, Ontario scaled back the types of construction projects which are deemed to be essential. The full list of essential businesses can be found here.

At the same time, Ontario's job sites will remain subject to the public health measures and social distancing requirements set forth by the province. While many construction projects will continue in the ordinary course because they fall within one of the enumerated exceptions, even those projects may be impacted by supply chain issues, labour disruptions, among other things.

Recent developments continue to increase the risks associated with project delay and disruptions to the work, and may lead to eventual delay claims, among other things. Whether caused by a decline in the availability of manpower, interruptions in the delivery of key supplies or the reduced capacity of municipalities to issue necessary work permits, owners, general contractors and subcontractors should be preparing to take necessary steps to prepare for the impact of these potential disruptions of construction projects.

Frustration by impossibility of performance

Frustration of contract typically arises as a result of physical impossibility or impossibility resulting from a legal development that has rendered the contract unlawful. An example of the former would be where the subject matter of the contract has been lost or destroyed, and an example of the latter is where a government ordered shutdown occurs.[2]

In order to determine impossibility of performance, the courts examine all circumstances surrounding the contract, including whether any reasonable measures were taken or ought to have been taken to foresee and guard against the event.[3]

The common law doctrine of frustration is triggered upon the occurrence of a supervening event. The supervening event must meet all of the following criteria in order for frustration to be found:

1. The event must have occurred after the formation of the contract;
2. The event must have been unforeseen, such that the parties to the contract could not have contemplated its occurrence (e.g., by including such an event in the force majeure clause of the contract. Further, the parties must not have made the decision to deliberately exclude the occurrence of the event out of the contract;[4]

3. It must cause performance of the contract to become "a thing radically different from that which was undertaken by the parties."[5] In this instance, it will not be sufficient if the event simply renders the performance of the contract more costly, onerous, or eliminates one party's advantage under the contract; [6]
4. The event must cause a disruption that is "permanent, not temporary or transient. The change must totally affect the nature, meaning, purpose, effect and consequences of the contract so far as it concerns either or both parties"; [7] and
5. It cannot be caused by either party.[8]

The onus to prove the constituent elements to establish frustration is on the party claiming the contract has been frustrated.[9] If these requirements are established, the remedy for frustration is to relieve the parties from any further obligation to perform the contract. Courts will consider the experience of the parties – where sophisticated parties are involved, courts are less likely to view a frustration claim favourably.[10]

Potential impacts of COVID-19

Based on the province's current declaration of "business as usual" for the construction industry, there has not yet been a frustration of contract for many parties to construction contracts in Ontario. Indeed, even in the context of a province-wide COVID-related stop work order, an argument that a construction contract has become frustrated may fail on account of the third and fourth factors, particularly given that a stop work order is likely to be of a limited duration. Whether frustration is made out will depend on the circumstances of each case.

The potential impacts of COVID-19, including delays on the planned construction schedule, arise in any number of scenarios, including labour disruptions, critical supply chain disruptions, a delay or inability to obtain required permits and unforeseen events impacting the availability of financing, each of which is beyond the control of the parties.

In the context of the COVID-19 pandemic, the most obvious potential source of delay arises from a full project shutdown following, for example, a government directive to suspend all construction, giving rise to increased costs associated with additional demobilization and remobilization of construction forces once work resumes, among other things. Suppliers should also anticipate incurring additional costs resulting from acceleration measures that may be requested to make up for lost time once construction resumes, which costs they will seek to pass along to the other contracting party. It is also possible that projects will encounter other indirect costs caused by the need to re-sequence portions of the work to account for supply chain disruptions, and the costs of maintaining both idle workers and equipment during a work stoppage.

How to prepare for these impacts?

Owners, general contractors and subcontractors must be mindful of the heightened risks of delay in this unique environment, and knowledgeable of ways in which to prepare for delay in the context of a specific project. In these circumstances, we recommend the following:

1. Understand your rights and obligations - review the contract: On complex projects, liability for delay will depend on the specific wording of the contract at issue. Parties should understand their rights and obligations (as well as those of their contracting counterparties), as it concerns the potential causes for delay.

a. For example, the CCDC-2 Stipulated Price Contract includes the following provisions:
   i. **GC 6.5.2**: "if the Contractor is delayed in the performance of the Work by a stop work order issued by a court or other public authority and providing that such order was not issued as the result of an act or fault of the Contractor …then the Contract Time shall be extended for such reasonable time as the Consultant may

recommend in consultation with the Contractor. The Contractor shall be reimbursed by the Owner for reasonable costs incurred by the Contractor as a result of such delay." (emphasis added)

ii. **GC 7.2.2:** If the Work is suspended or delayed for a period of 20 Working Days or more **under an order** of a court or **other public authority** and providing that such order was not issued as the result of an act or fault of the Contractor…the Contractor may, without prejudice to any other right or remedy the Contractor may have, terminate the Contract by giving the Owner Notice in Writing to that effect. [emphasis added]

2. Understand notice requirements: Well-drafted construction contracts will require that a party asserting a delay or impact claim must provide written notice, usually within a matter of days after the delay or impact first arose. The specific form and requirements for proper notice also may be prescribed by the contract. Failure to strictly comply with the contractual notice requirements may be fatal to advancing a delay or impact claim in the future.

a. **For owners:** Avoid inadvertently waiving compliance with contractual and notice obligations.
b. **For contractors/subcontractors:** Be vigilant about the possibility of lapse.

3. Documentation: Consistent, organized and frequent (daily) documentation is critical for the clear presentation and quantification of a delay claim. If delay issues are discussed at regular site meetings, ensure that minutes are kept and circulated to those in attendance. Parties asserting delay claims should document causes of delay (i.e.,manpower issues, lost workdays, material shortages, re-sequencing of work). If litigation becomes necessary, organized reporting of the impact of delay will reduce the time and money associated with advancing a delay claim.

a. **Examples of documentation:**
   i. Daily site diaries, plan of the date meeting notes, meeting minutes, reports, work sheets, applications for payment and payment certificates, material delivery records, and photographs.
   ii. Financial documentation should be kept, including head office expenses, overhead, financing, equipment and insurance costs, as well as the impact on other projects.

b. **Additional notes:**
   i. Keeping proper records is important for parties asserting or responding to a delay claim arising from COVID-19 (or an anticipated delay claim). For owners, it may be particularly important to document other potential causes of delay unrelated to COVID-19, such as improper sequencing of the work by the contractor, unrelated labour disruptions and/or workmanship issues.
   ii. Specific contracts may require that written notice of delay also include details of the records that the contractor is required to maintain to substantiate its claim for extra time or compensation, as well as a description of mitigation efforts.

4. Scheduling: Parties should assess the implications of delay, and measure against the project baseline and critical path. Parties should identify the extent to which the delayed work has affected the scheduling of other work, or alternatively, whether the delayed portion is unlikely to impact other aspects of the projects.

Knock-on effect: Be aware that delays on an existing project may result in delays to others. As well, acceleration measures may result in an overall decline in productivity arising from overcrowding the site and overworking the workforce. It is widely accepted that the average efficiency of workers declines during periods of acceleration or "over-crowding," frequently referred to as "trade-stacking". As a result, good record-keeping practices should be continued beyond the initial period surrounding the delay event.

For more information, please contact Karen Groulx, Fraser Mackinnon Blair, Dragana Bukejlovic or another member of Dentons' Construction group.

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1. RSO 1990, c. E.9. ↩
2. e.g., see *Taylor v Caldwell*, (1863), 122 ER 309.↩

3. Marel Katsivela, The Concept of Force Majeure in Quebec and its Common Law Equivalent, 2012 CanLIIDocs 114 at p 85↩
4. *Perkins v Sheikhtavi*, 2019 ONCA 925 at paras.16-17.↩
5. *Peter Kiewit Sons' Co. v Eakins Construction Ltd., [1960] S.C.R. 361, per Judson J., at p. 368, quoting Davis Contractors Ltd. v Fareham Urban District Council, [1956] A.C. 696 (H.L.), at p. 729.*↩
6. GHL Fridman, The Law of Contract in Canada, 5th ed. (Toronto: Carswell, 2006) at 667-71.↩
7. *Folia v Trelinski* (1997), 36 BLR (2d) 108 at paras 18-19 (BCSC).↩
8. *Peter Kiewit Sons' Co.,* , supra note 6 at para 55.↩
9. *Bang v Sebastian*, 2018 ONSC 6226 (Ont. S.C.J.), at para. 30.↩
10. Marel Katsivela, The Concept of Force Majeure in Québec and its Common Law Equivalent, 2012 CanLIIDocs 114 at p 85.↩

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