



**COVID-19: Managing Construction Projects, Claims and Disputes in Uncertain Times**  
 April 17, 2020  
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Construction Projects: COVID-19 Update

**Introduction**

- Background
- Commercial Issues
- Contracts Landscape
- Claims
- Court Closures
- Questions



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Construction Projects: COVID-19 Update

**COVID-19: Where are we now?**

- 2,158 reported cases in Alberta, 30,106 in Canada
  - 162 new cases confirmed yesterday (up)
  - 1,242 cases are in Calgary zone; 402 in Edmonton
  - 85,502 tests in Alberta as of April 16, 2020
  - Community transmission is occurring
- 50 deaths in Alberta; 1,048 in Canada
- 8,500 hospital beds in Alberta; 2,250 may be required for COVID-19
- Peak of cases may be mid-May



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**Public Health Emergency**

- Declared March 17 under *Public Health Act*
- Public Health Restrictions include:
  - Schools and child care closed
  - Restrictions on visiting nursing homes
  - Recreation facilities and private entertainment facilities closed
  - Bars closed
- You can still go outdoors, but observe 2 m physical distancing

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**Public Health Emergency (cont'd)**

- Most recent measures (as of March 27)
  - Maximum private or public gatherings of 15
  - “Close contact” personal services prohibited
  - Non-essential retail prohibited
  - Restaurants limited to take-out service only
  - Restrictions on evicting tenants for non-payment
  - Vehicle access to public parks and lands restricted
- Enforcement: Tickets for \$1,000 per event
- Courts can fine between \$100,000-\$500,000
- Greater restrictions may be coming

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Managing Construction Projects

**What's Happening?**

- The impact of COVID-19 on construction projects is primarily being dealt with at the Provincial level of Government
- As of March 30, 2020, construction projects in Alberta can continue
- Other Provinces have taken different approaches

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Managing Construction Projects

**Essential Services: Construction**

- Healthcare sector
- Critical infrastructure
- Work and services in the industrial, commercial, institutional and residential sectors
- Work and services that supports health and safety environmental rehabilitation projects
- “Any other construction project that can safely abide by the CMOH Public Health guidelines/directives”

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Managing Construction Projects:

**The Contracts Landscape**

- Manpower
- Supply
- Site conditions, workflows, schedule impacts
- Shutdown?

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Managing Construction Projects:

**We Have a Problem**

- Schedule, cost impacts – and project viability
- Potential Civil Claims:
  - Delay claims
  - Builders’ Liens
  - OHS
  - Other contractual breaches

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Managing Construction Projects:

**Legal Response - Contracts**

- Contract review – risk allocation
  - Force majeure
  - Suspension, termination
  - Delay
  - Indemnities
- Varied responses, project by project

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**Force Majeure**

- Contractual
- *Example 1:* A party shall not be held liable for failure to perform its obligations under this Agreement if such failure is the result of an act of God, such as earthquake, hurricane, tornado, flooding, or other natural disaster, or in the case of war, action of foreign enemies, terrorist activities, labor dispute or strike, government sanction, blockage, embargo, or failure of electrical service.

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**Force Majeure (cont.)**

- *Example 2 (CCDC2):* If the Contractor is delayed in the performance of the Work by [...among other things...] any cause beyond the Contractor's control other than one resulting from a default or breach of Contract by the Contractor, then the Contract Time shall be extended.... The Contractor shall not be entitled to payment for costs incurred by such delays unless such delays result from actions by the Owner...

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**Force Majeure (cont.)**

- *Example 2 (CCDC2 cont.):* If the Contractor is delayed in the performance of the Work by a stop work order issued by a court or other public authority ...then the Contract Time shall be extended ...The Contractor shall be reimbursed by the Owner for reasonable costs incurred...

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**Frustration**

- Common Law (non-contractual)
  - "a situation has arisen for which the parties made no provision in the contract and the performance of the contract becomes a thing radically different from that which was undertaken by the contract"
- Renders performance impossible
- All contracts can be "frustrated"
- Results in termination of contract

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**Delay (and other) Claims**

- Contract review and risk assessment
- Notices and communications
- Contract administration
- Extra contractual considerations

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**Delay Claims**

- Who bears the risk?
  - Review contracts carefully
  - Make sure to give proper notice
  - Contractors have an onus to mitigate
- What cost can be recoverable?
  - Varies by contract and situation
  - Track costs to make claims easier

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**Making Sure You Get Paid**

- Invoice promptly
- Strictly follow notice provisions; if there is no notice provisions, provide written notice anyways
- Registering a Builders' Lien or *Public Works Act Claim*
  - Can the Contractor issue a Certificate of Substantial Performance

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**Making Sure You Get Paid (cont'd)**

- Room to renegotiate? Obtain security for payment?
- Maintain good relations, communications

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**Continuing Work vs. Shutting Down a Project**

- Occupational Health and Safety reasons
  - Provincial Orders
  - Employer obligations
- Ongoing liability
  - Safety and site security concerns
  - Site access
  - Site meetings

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Construction Projects: COVID-19 Update

**Continuing Work vs. Shutting Down a Project**  
(cont'd)

- Health authorities best practices and industry consensus
  - Stop the spread of infection
- Balancing contract and financing considerations
  - Review contracts, obligations and payment terms
  - Insurance coverage
  - HR implications
  - Closure plans

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**Business Interruption Insurance**

- Are you covered?
  - Need to review specific policy language
- Owner or contractor's typical business interruption insurance policy will not provide coverage for a COVID-19 related shutdown
- Specialty coverage for pandemics is uncommon and expensive

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Construction Projects: COVID-19 Update

**Dispute Management, Court Closures, etc.**

- Court of Queen’s Bench of Alberta and Provincial Court of Alberta have limited operations
- Queen’s Bench:
  - Hearings scheduled until May 1, 2020 adjourned indefinitely
  - Filing deadlines under *Alberta Rules of Court* suspended until May 1, 2020
  - Email and fax filing expanded
  - Only hearing emergency and urgent matters
  - Continuing to accept desk applications

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Construction Projects: COVID-19 Update

**Dispute Management, Court Closures, etc.**  
(cont'd)

- Provincial Court:
  - All litigation matters scheduled until May 22, 2020 adjourned indefinitely
  - Only hearing urgent matters
  - Filing restrictions
- Public has restricted access to courthouse
- Expect limited operations beyond May 2020
- Virtual opportunities
  - E.g., Questioning, mediation, arbitration, affidavits
  - E.g., Jim Lebo and Peter Major at McLennan Ross

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**Dispute Management, Court Closures, etc.**  
(cont'd)

- Lien Claims
  - Land Titles office open for filings
  - Court closed but can pay security in by consent
    - Or place money in trust

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**Dispute Management, Court Closures, etc.**  
(cont'd)

- Limitation period and other deadlines
  - Ministerial Order suspends certain limitation periods (not *Builders' Lien Act*) from March 17 to June 1, 2020
  - Ministerial Order also suspends, from March 17 to June 1, 2020, "Any period of time within which any step must be taken in any proceeding or intended proceeding" (scope unclear)
  - Best practice is to continue to comply with the *Builders' Lien Act*

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Construction Projects: COVID-19 Update

**Precautions Required**

- There are calls to shut down construction
- Important to take precautions, such as
  - Limit crew sizes to 15, if possible
  - Physical separation of workers
    - Spread out on work sites
    - Stagger shifts
    - Stagger break times
    - Add lunch trailers
    - Limit access to and #s in trailers
    - Limit #s in smoking areas
    - Limit #s in vehicles

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Construction Projects: COVID-19 Update

**Precautions Required (cont'd)**

- Allow office workers to work remotely
- Reduce number of shift changes
- Screen employees
- Promote good hygiene
  - Regularly disinfect trailers, washrooms, vehicles, tools, etc.
  - Have cleaning stations around site
- Have masks available, especially if working close
- Assist access to benefits
- Canadian Construction Association has standardized protocols
  - Website: <https://www.cca-acc.com/>

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**What to do if Someone Tests Positive**

- Coordinate COVID-19 issues through a designated contact person
- Confirm whether tested positive or presumed positive
- Remove from site and/or self-isolate
- Offer support
- Conduct hazard assessment

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**What to do if Someone Tests Positive (cont'd)**

- Advise people who were in close contact with employee
  - Be careful of privacy issues
- Consider temporary site closure
- Remediate the site, as needed
- Coordinate with AHS, and stay alert to guidance from the authorities

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**When Normal Resumes – Contract Considerations**

- Resume projects
  - Remobilization
  - Availability of contractors
  - Replacement of trades
- Increased costs?
  - Consider project delivery model
  - Review contract for relief

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**Conclusion**

- We are in a new normal
- Laws, rights, and obligations are in flux
- Important to:
  - Be flexible
  - Be informed
  - Offer support to employees and subtrades
  - Communicate effectively with employees, subtrades and others on worksites

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**Thank you!**



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