



COVID-19 - What should I do on my construction project, right now?

Canada | March 18 2020

On March 11, 2020, the World Health Organization declared the COVID-19 virus a worldwide pandemic. Governments in Canada and its provinces, and across the world are declaring states of emergency and implementing dramatic health and safety measures daily.

The impacts on our world, our families, businesses and markets is and will continue to be significant and somewhat unpredictable. What are the specific impacts on construction projects across Canada? More importantly, what should owners, contractors and trades be doing right away to protect their personnel and their projects? What are the best practices in the industry to deal with the pandemic?

Gowling WLG's Infrastructure & Construction Sector Group will be publishing a series of articles and hosting webinars to help the construction sector through these very trying times.

This *Building Brief* bulletin is focused on some of the steps and actions that should be taken **right now** to ensure the success of construction projects and the health and well-being of those working on them.

Health and Safety

- Review your health and safety policies and protocols. Enforce them on the site and in the office. If they don't specifically address disease and hygiene protocols, update them as soon as possible, drawing on the best practices of industry leaders published in many places online, including the Ministry of Labour in your province.
- Regularly monitor for public health announcements and orders from applicable government agencies and regulators. The Ontario Ministry of Labour has created a COVID-19 website here, for example: <https://www.ontario.ca/page/2019-novel-coronavirus>. Other provinces and the Federal government are doing the same.
- Immediately implement best hygiene practices on site: enforce hand washing requirements, hold project meetings by videoconference, post applicable protocols and circulate by email, make sanitizer readily available, consider arranging for additional temporary washing stations with soap and extra sanitizer, confirm who might be coming in from outside the country and needs to be quarantined or self-isolated, remove or check personnel exhibiting symptoms, etc.
- If you are a "constructor" or "prime contractor" or equivalent under applicable provincial occupational health and safety rules, review your obligations for disease and other environmental hazards.



- Consider re-sequencing and re-organizing workflow and schedule to minimize the number of personnel on site at any given time, and to allow maximum social distancing while at site.

Project Management

- Consider re-sequencing and re-organizing workflow and schedule to also mitigate delays to the critical path: allow for early ordering and delivery of materials if the supply chain is at risk; store more deliveries off-site if possible; and delay crowded people-intensive work if possible.
- If work on all or a part of the project must be suspended, make sure completed work or work in progress, and the project site are properly and adequately protected and secured. Establish an appropriate level of monitoring as the pandemic may endure for an extended period of time.
- Check that all payment processes are still in place so the payment cycle is not impacted. Are payment certifiers still planning to attend on site to certify work or is some accommodation required? If cheques need to be issued, are signing authorities readily available or working off-site? Can you switch to electronic transfers? If your project is in Ontario, are the strict payment timelines of the new prompt payment rules impacted?
- It appears that, at this moment, building, fire and other inspectors in most municipalities are continuing their operations, but may have implemented health protocols. Check with inspectors regularly and make appropriate accommodations for their visits.
- If construction work has not commenced, seriously consider the personnel, economic, and schedule risks of commencing the work at this time.
- **Document document document!** COVID-19 will have wide-sweeping and significant impacts, but make sure you carefully and precisely track the impact chain of the pandemic on specific work on your project. Establish the paper trail early and maintain it consistently. When were notices received? What specific work is actually being delayed? What was changed to allow work to proceed? It will be important to segregate COVID-19 related changes, delays and impacts. Consider maintaining a daily impact record noting “due to COVID-19” where appropriate. There are two key parts of a change or delay claim that will need to be demonstrated: (1) the right and entitlement to an extension of time or cost increase; and (2) the actual character and amount of the delay and cost increase specifically related to the event.



Force Majeure Clauses

- Most construction contracts have a “force majeure” or allowable delay clause of some sort, a provision that allows for delays that are outside the control of a party. In the standard CCDC contract documents, this is set out in GC 6.5.1 (for government orders) and GC 6.5.3 (for events beyond the contractor’s control). COVID-19 could trigger a delay claim under such provisions.
- Check your contract terms to understand the specific definitions of what is a force majeure event or allowable delay and what is not. The occurrence of a pandemic will typically not be sufficient for a claim on its own: there must be an actual delay, and there must be direct causal link between the event and specific work. Typically, the event must render the work “impossible” to perform.

- Review the exact wording of your delay-related contract terms. Each force majeure clause or allowable delay clause will be different, be triggered by different events and have their own different procedures. Courts will not deem or read into a contract that there is an automatic right to extend the schedule just because of events beyond a party's control. They will enforce the agreed terms of the contract.
- Check and carefully follow the notice requirements of the contract. Prompt notice is likely required in order to be protected by a force majeure clause. Courts will enforce these notice requirements. Usually, there is no requirement for multiple notices for a continuing force majeure event, but there is a need to be precise. Simply providing notice that the COVID-19 pandemic will or could result in project delays is probably not going to be adequate. Many contractors are proactively providing a "head's up" notice of possible delays. These are prudent and good practice, but may not constitute a proper and compliant notice triggering the contract's delay provisions.
- Make sure you take appropriate actions to mitigate any delays or damage to the project. Courts and most contracts will require you to have made a reasonable some effort to avoid or minimize the consequences of the impact of COVID-19. If a certain supply of goods is at risk of being cut-off in the supply chain, did you consider stockpiling or seeking alternatives, for example?
- Even if the contract provides for an entitlement to schedule extension, it may not allow for additional costs related to the extension or it may only allow for "reasonable" direct costs. Again, you will want to check the specific wording of your specific contract in order to best know and understand your rights, entitlements and obligations.
- **Document document document!** Record every action, notice, identified risk to the critical path, meetings where COVID-19 and schedule were discussed, etc. When did you first become aware of jeopardy to the critical path of the schedule? When did you first give notice? What responses did you get from others? What remedial action plans discussed, rejected and implemented? As noted above, consider segregating or specifically identifying COVID-19 related changes, delays and impacts in a daily impact record noting "due to COVID-19" where appropriate. Track and aggregate the actual, direct impact to schedule and costs.
- Gowling WLG has published several articles on force majeure and allowable delay provisions in contracts. These explore in more detail the legal interpretation and application of such clauses. They will be valuable if you would like to gain a deeper understanding of such provisions.



Construction Contracts

- Force majeure and delay clauses are not the only important contract terms to consider.
- Most standard construction contracts will allow either party to suspend or even terminate all or a part of the scope of work, or the entire contract, if delays outside of anyone's control persist for an extended period of time.
- Consider the indemnification and limitation of liability clauses for potential damage claims.

What is your responsibility and risk for the conduct of subcontractors and suppliers? If any one of them suspends or terminates their subcontract, what are the risks to the whole project? Will it fall like a stack of cards, or do you have plans in place to mitigate the impact?

Insurance

- Check your existing insurance policies to verify if there is any coverage available for COVID-19 impacts, including builder's risk and business interruption policies.
- As with your contracts, insurance policies will require notice and these may be strictly enforced.
- Insurers will also require clear and demonstrated causal connection between COVID-19 and the claimed loss. So, once again, it will be essential to maintain accurate records of events and impacts. **Document, document, document** everything.

Proactive Communications Strategy

- The pandemic is very quickly evolving with new information and reactions in the market and industry almost hourly. Any plan of action or state of affairs will need constant re-checking and re-evaluating.
- Knowing your contractual and other legal rights and obligations is important, and if and when it may be necessary to enforce those rights, but the most important actions to take for the success of construction projects in this quickly evolving COVID-19 situation will be to making sure all project parties involved are working together in the best interests of the workers on site, their own personnel, the communities in which the project is being undertaken, and the ultimate completion of the project, rather than being focused on strictly enforcing their technical rights and remedies.
- Best practices in this environment would be to proactively communicate and coordinate with the entire project team on an established regular, even daily basis.
- Don't forget to communicate beyond the project team to landlords, tenants, shippers, disposal sites, and others in the larger supply chain.
- It would be prudent to collect emergency contact information, including cell phone numbers and alternate contacts.
- It is fair to say that no one saw this coming, and no one yet knows how it will continue to develop or impact projects. Communication and alignment of strategies and efforts between owners, contractors, consultants, the trade contractors and regulators will be essential. Key relationships can be strengthened through a cooperative and emphatic approach.

* * *

These are very challenging times and even more so for construction projects. The health and safety of construction personnel is always paramount in construction, now more than ever.

Gowling WLG - Edward (Ted) G. Betts

Powered by
LEXOLOGY.

