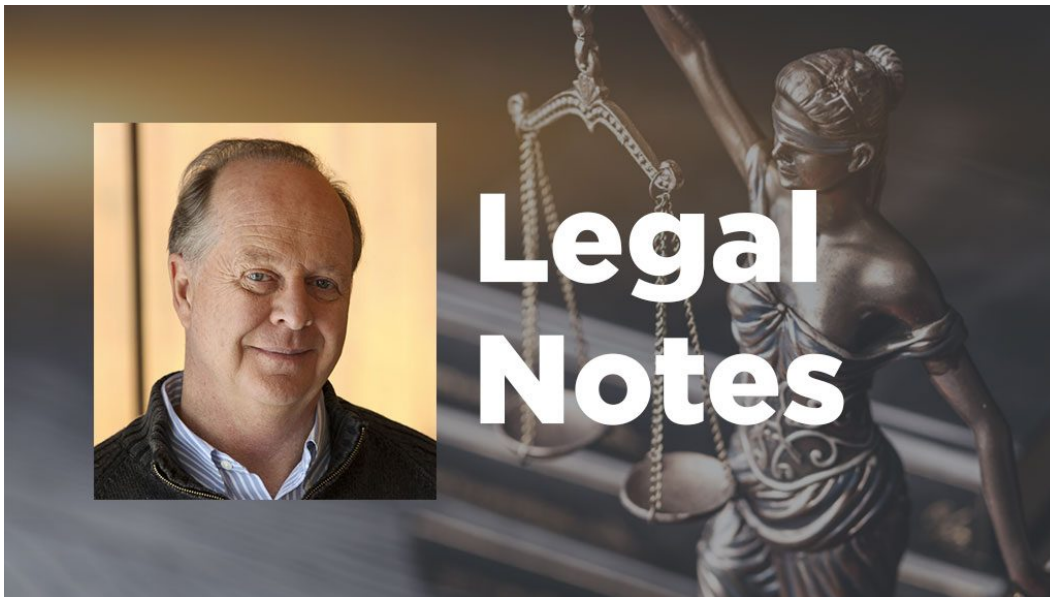


Legal Notes: Four ways COVID-19's legacy will impact, contracts, litigation and labour



COVID-19 is destined to have a significant impact on building contracts, litigation and labour negotiations for years to come. Owners, designers, and builders need to understand the fundamental legal issues. Here is a review of some of its key impacts:

Force Majeure

Force majeure had been buried in contract fine print for years. No longer. Today and going forward, all parties must recognise its implications.

A force majeure (FM) clause in a construction contract can offer protection from liability in connection with delays or failures to perform contractual obligations resulting from unforeseen circumstances, says Jill Snelgrove of Pallet Valo LLP. COVID-19 has been a perfect example.

“A force majeure clause generally operates to relieve a party from its obligations when a supervening event beyond the control and reasonable foresight of the

party's delays, otherwise adversely impacts or makes performance impossible." However, the clause should be carefully negotiated.

The FM clause must set out the triggering event or events and outline the threshold of interference with the contractual obligation that must be met before the clause is invoked and the resulting relief being made available, says Snelgrove. For example, is it sufficient if the specified event "substantially hinders" performance or must it render performance "impossible"?

Often a FM clause will list specific triggering events, like a "pandemic", followed by more generally worded references, such as "events beyond the control of a party". However, Snelgrove cautions against using a catch-all clause after a list of specific triggering events. "This could be interpreted narrowly to capture only the type or class of the specific triggering events that precede it."

A force majeure clause must also address the effect of the triggering event. Consequences can range from a suspension of obligations during the event, such as an extension of time to perform, to a complete termination of the contract with or without compensation for costs resulting from the triggering event.

The importance of communication and documentation

Commercial disputes can quickly become unwieldy and expensive. Mitigating the risk of legal actions during and after the COVID-19 pandemic will require all parties on any construction project to recognise each other's concerns, says Canadian law firm Bennett Jones. Clear lines of communication can avoid costly and time-consuming litigation.

For example, reviewing, understanding and complying with Notice Requirements are critical, whether contractual obligations, change orders or the application of force majeure provisions. Careful contract review can reveal any vulnerabilities and possible courses of action for relief from both cost provisions and schedules not always accounted for under force majeure.

In order to update schedules and mitigate any delay implications, contractors need to maintain comprehensive documentation, including all steps taken to mitigate and overcome any delays, says Bennett Jones. "It is important that owners ensure they are receiving and reviewing such documentation which will allow them to assess the contractor's performance, costs and potential impacts of the pandemic."

Being proactive in addressing pandemic-related claims as they arise is much better than leaving claims resolutions to the end of the project.

Be prepared for video court hearings

Should a dispute end up in Court, parties must be ready for hearings using video conferencing. While not a new concept, the COVID-19 pandemic has now made virtual hearings vital to the continuation of Court proceedings. However, those inexperienced with the process could find it disorienting.

The positive result of e-litigation, suggest Faren Bogach, Mike Brown and Kartiga Thavaraj of WeirFoulds LLP, is its potential to improve access to justice, particularly in terms of efficiency and witness participation.

“If correctly planned for, volumes of bankers boxes can be reduced to one USB key, zip folder or drop-box, eliminating the time and expense of producing and riffling through paper materials, and hearings, examinations or mediations can be conducted with multiple parties in different rooms, or cities.” Witnesses, even in foreign countries, can be walked through presentations of complex shop drawings and make their own highlighted responses and clarifications to these and other documents in real time.

Labour negotiations will change

It's also important to remember the evolving nature of labour agreements going forward. Designated collective agreements in the ICI sector and those in other sectors of Ontario's construction industry are approaching their midway point, says Keith Burkhardt of Sherrard Kuzz LLP. He suggests parties review the potential impact of COVID-19 on 2022 bargaining and offers three key elements to be considered.

First are collective agreements outlining start and finish times and pay premiums for work performed outside those times. “Employers may want to negotiate the ability to implement flexible or staggered start times with the similar changes for break, lunch and quitting times. Employers should also consider the feasibility of makeup time — ideally at straight time rates — if a jobsite is closed due to a government order or virus outbreak.”

Burkhardt also suggests that sick time and benefits, along with any need to self-isolate or quarantine even if not sick, might find their way into new collective agreements as broadly defined sick pay. “Keep in mind, Ontario already has legislation allowing for protected unpaid leave in these circumstances.”

Lastly, he reminds employers the cost of any mandated contact tracing, screening protocols, PPE and other safety initiatives will add to employer costs. These need to be considered when wage packages are negotiated.

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