



Construction & Design Alliance of Ontario

Association of Registered
Interior Designers of Ontario
www.arido.ca

Consulting Engineers
of Ontario
www.ceo.on.ca

Heavy Construction Association
of Toronto
www.hcat.ca

Mechanical Contractors
Association of Ontario
www.mcao.org

Ontario Association
of Architects
www.oaa.on.ca

Ontario Association
of Landscape Architects
www.oala.ca

Ontario Electrical League
www.oel.org

Ontario General
Contractors Association
www.ogca.ca

Ontario Home
Builders' Association
www.ohba.ca

Ontario Road
Builders' Association
www.orba.org

Ontario Sewer & Watermain
Construction Association
www.oswca.org

Ontario Society of
Professional Engineers
www.ospe.on.ca

Residential Construction
Council of Ontario
www.rescon.com

Residential and Civil
Construction Alliance
of Ontario
www.rccao.com

Surety Association of Canada
www.suretycanada.com

CDAO Briefing Note: COVID-19 and Force Majeure

Issue:

On March 17, 2020, in response to the ongoing COVID-19 pandemic, the Government of Ontario declared a state of emergency under s 7.0.1 (1) the *Emergency Management and Civil Protection Act*. In their announcement, the Government of Ontario did not include construction with other non-essential services. This means projects are expected to continue responsible operations while implementing enhanced precautions to minimize the spread of the COVID-19 virus.

Contractors and owners have already taken steps to address the pandemic challenges but labour supply, material supply chains, approvals processes and servicing are being impacted. A few worksites have suspended their operations. Others could follow. In the construction industry, much of the economic impact of COVID-19 will fall by default upon the shoulders of Ontario's contractors. To protect the parties, we are encouraging the Government of Ontario to implement a standardized definition of *force majeure* that lists "quarantine restrictions," and/ or "epidemics".

Discussion:

The Provincial Government needs to enable owners, contractors, professional service providers and consultants to protect themselves. Many contractors are feeling the pressure to continue operating due to substantial financial damages because of the legal liabilities associated with closing a site. Owners can claim compensation for a long list of damages and seek delay claims against contractors and by contractors against professional service providers and subcontractors.

Construction contracts often include a *force majeure* clause to protect contractors, professional service providers and consultants. This clause excludes liability for a party's failure to perform its contractual obligations in the face of a *force majeure* event. These clauses are an essential tool for risk allocation and frequently amended to industry-specific and project-specific risks that render performance impossible (or in some contracts, imprudent, substantially more difficult, or considerably more expensive). With a *force majeure* clause, parties are generally excused from penalties or damages due to failed or delayed performance. Although some *force majeure* clauses explicitly list "diseases," "plagues," "quarantine restrictions," and/ or "epidemics" as triggering events, many do not. In these cases, COVID-19 may still be captured in a broader category, such as "emergency" or "any cause beyond the Contractor's control." Importantly, there are no Canadian judicial decisions that have considered *force majeure* in the context of a severe outbreak or epidemic. In any case, the Government of Ontario will have to determine whether the risk of infection on construction sites warrants closure and the steps that would need to be taken should a site become infected.

Recommendation:

To protect construction workers, the Executive Council of Ontario should adopt a transparent and standardized *force majeure* clause retroactively into all contracts under the *Emergency Management and Civil Protection Act* that includes "quarantine restrictions," and / or "epidemics" as triggering events. By taking this action, the government would be able to protect the parties while allowing them to continue to build under extremely difficult and uncertain conditions. None of the parties should be penalized as a result of delays arising from this unprecedented event.