

SPECIAL FEATURE

# COVID-19 2020 RESOURCE GUIDE

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## **Legal Notes**

# Four ways COVID-19's legacy will impact, contracts, litigation and labour

JOHN BLEASBY

COLUMNIST

OVID-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

#### 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 Legal Notes specific triggering events, like a John Bleasby "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.

John Bleasby is a Coldwater, Ont. based freelance writer. Send comments and Legal Notes column ideas to editor@ dailycommercialnews.com.



**SHUTTERSTOCK** 

# Canadian equipment manufacturers feeling the COVID-19 crunch

**GRANT CAMERON** 

CORRESPONDENT

OVID-19 has taken its toll on contractors, construction companies and workers. It's also having a devastating effect on Canadian equipment manufacturers, with no end in sight for the foreseeable future.

Nearly half of Canadian companies that responded to a survey by the Association of Equipment Managers (AEM) indicated it will take one year or longer to get back to pre-pandemic business levels and 50 per cent say they have used or intend to use the federal COVID-19 assistance program to help their business.

"The COVID-19 pandemic has clearly impacted equipment manufacturers and the communities we proudly serve across Canada," said Alexander Russ, director of government affairs for AEM. "From new orders drying up to supply chain disruptions, this unprecedented crisis has caused many companies to reduce their immediate financial outlook.

"AEM continues to help our industry navigate these challenging times to come back stronger and fuel Canada's economic recovery."

The survey was conducted between June and August to get the lay of the land and a rundown on what the future looks like for the industry. Twenty-four respondents weighed in on the effect of the COVID-19 pandemic on the economy, the industry, their companies, supply chain and manufacturing operations.

The survey also explored their financial expectations, as well as the challenges they continue to face. Respondents detailed the challenges that they face as a result of the pandemic and specific ways the Canadian government can keep equipment manufacturing strong and help ensure the country's economic

Companies participating in the survey were AEM members based in Canada. The companies included those that build or manufacture equipment and parts used in construction, utility, mining, agriculture and forestry.

The results painted a bleak picture for the industry going forward, with 24 per cent indicating it will likely be the second quarter of 2021 before their company recovers to pre-COVID business levels. Fourteen per cent said it would take until the first quarter of 2021, 10 per cent said the third quarter of 2020, and five per cent said it would take until the fourth quarter of 2020.

More than three out of four Canadian equipment manufacturers identified a decrease in new orders as the primary impact of COVID-19 on their business and manufacturing operations while four out of 10 identified supply chain issues as a major

See AEM, Pg. C-4





Our lawyers understand the profound impacts and changes that the COVID-19 pandemic has brought to our construction community. We help our construction clients and greater industry navigate through and resolve challenges posed by the changed realities of delay and disruption, risk allocation and compensation, and worker safety. We would be pleased to speak with you.

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## Construction sector ramps up tech acceptance under COVID-19 restrictions

IAN HARVEY CORRESPONDENT

**7**ith the requirement to cut travel and extend social distancing the construction industry is discovering remote collaboration technology.

In a sector not known for its early adopter stance on technology, the virus crisis has triggered some fast retooling to manage challenges such as site visits, progress monitoring and in office meetings as projects progress.

Luckily, there's an abundance of remote meeting technology available, from Skype for Business, to Zoom and Microsoft's team.

The demand has also created a boom for a Calgary start up which has a mobile platform to allow video and voice connection.

ICwhatUC's co-founder and chief revenue officer Luke Krueger says the company launched in 2018 but and originally intended to target consumers and service companies.

"It's really frustrating to call for service and then have to make an appointment two days later and be home between 12 and 6 p.m.," he

The idea was to connect the customer with a service help desk which could then use the video and audio connection to diagnose an issue such as re-lighting a furnace pilot light and walk the end user through the process. Research told them the majority of calls could be and wouldn't need a service call making customer service response more efficient.

"It's the 80-20 rule, 80 per cent of calls don't require a technician," he says.

If a service call was required, he says, the technician would already know what the issue was and would have the necessary tools and parts. Research also suggested in many cases they don't have the required tools or parts once they arrive and that further delays the repair.

As interest grew they launched a new version in January 2020 now garnering interest in



SHUTTERSTOCK

the construction sector. It debuted just before COVID-19 and scored immediate hits with their first customers being Brookfield and

"It's exploded since we started, going from zero to half a million in revenues in eight or nine months and with more deals on the table that should continue to grow," Krueger says, nothing they just closed a round of financing in June and are ready to close another as demand continues to ramp because of COVID-19. We've also made some acquisitions."

Part of the inspiration came from his father who is a general contractor in British Columbia's lower mainland. He's used it to get an engineer to sign off on glass balcony railing installations in Langley, saving a four-hour round trip in notorious traffic from downtown.

ICwhatUC is not an app, he says, it's a web platform that automatically records every interaction in the cloud and works on all mobile devices.

"There's no app to install," he says. "You just

set up an account and then send the customer a link and they are connected."

It also provides augmented reality, allowing for someone to write on or highlight something in the image.

With COVID-19 things really ramped up, Krueger says.

"Epcor in the U.S. called us and said, just send us the contract we're in," he says.

On the other side of the collaborative technology coin there's Microsoft Teams, which PCL Construction in Edmonton has fully

Steven Forester, a senior manager in PCL's technology group, say they first started with Skype for Business for cross team collaboration but had been looking at Microsoft Team before COVID-19 hit.

They had rolled out a soft adoption to about 20 per cent of PCL employees but when COVID-19 hit it soon ramped to 100 per cent across the country.

"That was probably the first week," he says. "It has so many features beyond telephony. We had planned to go 100 per cent anyway but we were growing it organically until then."

He says the key to Microsoft Teams' acceptance is a gentle learning curve and the benefits of real time collaboration with the group working on shared documents at the same time and updating them without have to pass them around one by one.

It also links to programs like Autodesk which is invaluable in construction and it's been used on soft aspects of PCL culture such the fireside chats in which a group including everyone from the jobsites and offices gathers to discuss issues and other concepts that are often beyond engineering and construction and more about human interaction.

"The fireside chats are an important part of the PCL culture," he says. "So, for those working at home or on site, we've been able to maintain that."

Site reports are also plugged in with live video walk through enabling discussion that would have required a site visit, something that's become more problematic with travel restrictions and social distancing requirements.

It's also led to more frequent online collaboration because the meetings tend to be more efficient and faster, he says, while existing applications and platforms started to be used more often as well because they worked better as a suite of tools and solved many of the challenges posed by COVID-19 restrictions.

The shift to digital collaboration won't change the pointy end of construction which will remain physically anchored to job sites, Forester says, but corporate cultures in the sector will continue to evolve.

"It's the ability to reply on that technology which will change things," he says. "People will realize that they don't have to travel as much and rely on the technology. It will slowly change the idea of what is a standard work week and we're more flexible. People will still get their work done and we've proven that. Working from home does work and people can be relied on."

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## AEM lays out their requests of government for help

Continued from Pg. C-2

The next largest impacts were employee absenteeism at 43 per cent, a decline in company financial situation at 43 per cent, cancellation of orders at 38 per cent, reduction in employment levels at 29 per cent, and layoffs at 29 per cent.

In light of the situation, the AEM is calling on the Canadian government to help the equipment manufacturing industry and provide economic assistance to businesses as well as invest more federal money in infrastructure projects.

"AEM continues to lead the industry's response to the COVID-19 pandemic and is working closely with Canadian officials to keep the equipment manufacturing industry in Canada strong and ensure the nation's economic resilience," the organization said in a statement.

"AEM is calling for bold action by the Canadian government to incentivize the further development of the equipment manufacturing industry in Canada, and to provide additional economic assistance to businesses of all sizes."

To help equipment manufacturers during the COVID- 19 crisis, the AEM has laid out a laundry list of requests.

Sixty-five per cent of manufacturers who responded indicated they want the federal government to recognize the critical importance of Canadian manufacturing capacity and implement measures to increase the competitiveness of the sector and to reward innovative Canadian manufacturers.

Sixty per cent suggested investing more federal money in infrastructure projects, including increasing the federal portion of funding for provincial and municipal

Meanwhile, 60 per cent also suggested creating a program to replace older equipment with new, lower-emission equipment through tax credits or government grants and loans.

Additional actions that the Canadian government should be taking, according to the equipment manufacturers, include expediting the permitting process for new infrastructure and resource development projects and working with the provinces and municipalities to remove duplication in their processes.

Thirty-five per cent of

respondents suggested setting up a Canadian Secured Credit Facility to help businesses invest in capital equipment and 30 per cent felt government should provide greater support in exporting to foreign markets. Fifteen per cent recommended reducing interprovincial trade barriers and regulations.

Of those who indicated they used or intend to use the federal COVID-19 assistance programs, all said they would use Canada's Emergency Wage Subsidy (CEWS), while 10 per cent indicated they would use the temporary 10 per cent Wage Subsidy, and 10 per cent stated they would use Canada's Work-Sharing program.

Ten per cent said they would use Canada's Summer Jobs Program, another 10 per cent indicated they would use Canada's Deferral of Customs Duty and Sales Tax for importers, and 10 per cent said they would use Canada's Deferral of Taxes and GST/ HST Remittances.

Of the equipment manufacturers in Canada accessing CEWS, 55 per cent said it was "easy" while 22 per cent said it was "relatively easy," and another 22 per cent indicated it was "moderately difficult."



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<u>Refresher training</u> with COVID protocols since this program is not possible to deliver in virtual classrooms. We also work with clients who have implemented COVID-19 safety protocols to offer other essential programs, like our popular suite of equipment operator programs, in-house.

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# Construction can access CMHA mental health tools

DAN O'REILLY

CORRESPONDENT

n addition to the risk of physical injury, construction workers deal with considerable mental stress, which has been exacerbated by COVID-19 and, in particular, the shutdown of sites for a period earlier this year.

Fortunately, the Canadian Mental Health Association (CMHA) provides a number of services to assist workers and others to deal with mental health challenges. And with the onslaught of the pandemic, CMHA Ontario moved quickly to add to its program inventory.

By the beginning of April a COVID Resources tab had been added to the website of Mental Health Works, a social division of the association which delivers workplace training.

"It was identified that workplaces, workers, and their families would experience high levels of anxiety and uncertainty," says CMHA Ontario's health and safety advisor program manager, Lawrence Blake.

A series of free webinars dealing with issues of social isolation and loneliness were also posted online during April, attracting 10,000 viewers.

The information presented during those webinars has now been incorporated into its 'Product Suite Catalogue' of training modules.

In response to a question about the specific assistance that can be provided to contractors, Blake says that Mental Health Works recognizes, "the vital role construction plays in our increasingly integrated economy—it is a vital part of society."

It has worked with construction unions and last year it conducted an onsite workshop for AECON, plus holding a second one for Senate Construction earlier this year before the pandemic struck.

Asked about the nature and content of the construction-specific workshops, Blake says its facilitators cover topics such as stress, resiliency, and operational stress injury.

The overall objective of all its workshops is to pass on "tactics, techniques, and procedures" management and staff can utilize in order to improve psychological health and safety on the workplace.

While those onsite sessions have been replaced by virtual ones, there has not been a slowdown or a stop in their delivery, he says. "Our calendar is booked solid until the end of the year."

"We had a 48 per cent enrollment increase and a 22 per cent increase in referrals in August compared to the same period last year,"

Dr. Deanne Simms Ontario Structured Psychotherapy Program

Less uncertain is the resumption of a two-day Certified Psychological Health and Safety Advisor Training program. Offered every two to three months, the sessions usually are attended by at least two to three contractor and/or construction union representatives, he says.

"Right now this program is paused due to travel requirements and the enclosed workspace of groups. We hope to resume in person training shortly," says Blake, noting that an opening date depends on the advice of public health officials.

Another CMHA Ontario aid is BounceBack, a free guided self-help program, in which people over the age of 15 who are dealing with mild-to-moderate anxiety or depression or issues such as stress or anger, can find help though telephone coaching, skill-building workshops, and online videos.

First developed in Scotland, the program was launched as trial pilot in 2015 in the geographic area served by CMHA Ontario's York/South Simcoe branch and then implemented throughout the province as fully-funded Ministry of Health service in 2017.

That provincial roll-out came after the pilot showed strong results in terms of high referral and enrollment numbers, high participant satisfaction and improvements in scores of depression, anxiety and quality of life, says Dr. Deanne Simms, Ontario Structured Psychotherapy Program clinical director.

First step in accessing the service is obtaining a referral from a nurse practitioner, a doctor or other medical professional such as physiatrist or "they can refer themselves online," says Simms.

For those with limited or no English skills, there is a box on the referral form where the user or their primary care provider can indicate they prefer coaching in another language.

"If an individual requires a language outside of our available languages, then a coach has access to an interpretation service that will act as a third party on the phone calls."

There is an initial telephone screening process before a client can enroll in the program which includes a maximum of six, 20- to 25-minute long session with a coach. All the BounceBack coaches receive 'robust' nine- to 12-week training delivered by clinical psychologists who provide them with regular, ongoing support, and oversight, she says.

It is not mandatory for participants to talk with the coaches and they can complete the other components of BounceBack on their own, says Simms. "But the coaches make the program come alive."

With some doctors' office closed or partially closed during the pandemic, the promotion of BounceBack has been more challenging, even while the need for the service is more crucial, she says.

"We had a 48 per cent enrollment increase and a 22 per cent increase in referrals in August compared to the same period last year."

Other resources which may be helpful to the construction industry include a COVID-19 return to the workplace tookit: <a href="https://ontario.cmha.ca/wp-content/uploads/2020/08/CMHA">https://ontario.cmha.ca/wp-content/uploads/2020/08/CMHA</a> ReturnToWorkplace-Toolkit EN-Final.pdf

Also available is a free guide to help employers and employees understand their rights regarding workplace accommodations for mental health: <a href="http://www.mental-healthworks.ca/mental-health-workplace-accommodation-guide-managers-staff/">http://www.mental-health-workplace-accommodation-guide-managers-staff/</a>









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# EllisDon enters long-term partnership with Cleveland Clinic Canada

CORRESPONDENT

a temporary arrangement between EllisDon and medical centre Cleveland Clinic Canada has transitioned into a long-term partnership.

As part of its overall benefit package, the construction company now provides its approximately 3,000 employees with free access to Cleveland's Express Care Online, an express healthcare service for non-emergency medical issues such as coughs, colds, or ear infections. It is available from 7 a.m. to 7 p.m., seven days week.

"Without COVID, we probably would have done this anyways. With COVID, it was a no-brainer,"

Paul Trudel EllisDon

First time use requires downloading an application to a smartphone, tablet or computer and then plugging in a dedicated code number which identifies the user as an EllisDon employee or family member, says the company's senior vice-president of People & Culture, Paul Trudel.

Once that task is completed, patients have speedy access to nurse practitioners who diagnose their condition and make recommendations, he says.

"They don't have to leave their homes/ offices/or sites or wait for an appointment."

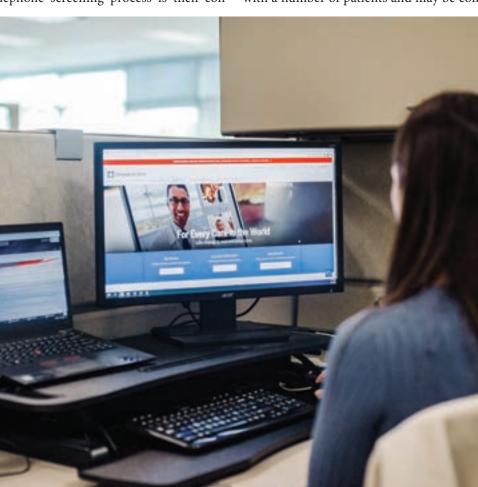
For onsite injuries or ailments an employee would first contact the site safety

supervisor, he says.

As the code is embedded, it doesn't have orn out of the COVID-19 pandemic, to be plugged in for subsequent appointments. Users are prompted to answer preliminary questions about their condition and what part of Canada they live in. A telephone screening process is then con-

ducted by Cleveland to ensure the patient is, in fact, an EllisDon employee. Periodic monitoring will be conducted to avoid abuse of the code, he says.

Not unlike a traditional medical clinic, the virtual healthcare professionals deal with a number of patients and may be con-



EllisDon, as part of its overall benefits, provides its approximately 3,000 employees with free access to Cleveland Clinic Canada's express care service online.

ducting an assessment when the service is accessed.

A colour-identification system indicates the waiting times and, if that period is lengthy one, the user can simply scroll to another clinician, says Trudel.

A major feature is on screen biographies and photographs of the clinicians, which may provide a level of comfort to women who would rather be evaluated by a female health professional, he says.

For a number of years EllisDon had provided emergency care and executive health coverage through Cleveland Canada Clinic, which is part of the global non-profit academic medical centre.

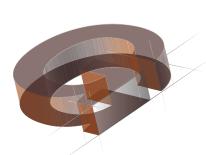
But then COVID-19 struck and Ellis-Don chose to greatly expand that coverage by taking advantage of limited-time free service Cleveland was offering to counter the effects of the pandemic, says Trudel.

"We made this service available for, not only COVID related concerns, but for any non-emergency healthcare needs. This was also done in part to take off some of the strains on our hospitals and local healthcare providers. We just thought it was the right thing to do."

After a trial evaluation of Express Care Online over the spring and summer, which generated a couple of hundred favourable responses from employees, EllisDon signed a long-time delivery agreement with Cleveland in September.

"Without COVID, we probably would have done this (the agreement) anyways. With COVID, it was a no-brainer."

Established in Canada in 2006, it has two physical locations in Toronto and a nationwide virtual network of physicians, nurses, and the nurse practitioners — who are licensed by the provinces they live and



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