


**COVID-19:  
Legal Issues for Construction  
& Resource Projects**

Presented by Chris Lane, Q.C., Corbin Devlin  
and Dan Bokenfohr

April 1, 2020  
Construction Owners Association of Alberta  
Alberta Chamber of Resources



1

---

---

---

---

---

---


---

---

COVID-19 Legal Issues for Construction & Resource Projects

**Introduction**

- Background
- Commercial Issues
- Labour and Employment Issues
- Questions



2

---

---

---

---

---

---


---

---

COVID-19 Legal Issues for Construction & Resource Projects

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

- 754 reported cases in Alberta, 7,772 in Canada
  - 64 new cases confirmed yesterday
  - 453 cases are in Calgary zone; 187 in Edmonton
  - 48,692 tests in Alberta as of March 29, 2020
  - Community transmission is occurring
- 9 deaths in Alberta; 90 in Canada
- 8,500 hospital beds in Alberta; 2,250 may be required for COVID-19
- Peak of cases may be mid-April



3

---

---

---

---

---

---


---

---

COVID-19 Legal Issues for Construction & Resource Projects

**Public Health Emergency**

- Declared March 17 under *Public Health Act*
- Facility closures and restrictions:
  - Schools, child care, recreation facilities, nursing homes
  - Bars and private entertainment facilities
- More recent business closures and restrictions:
  - “Close contact” personal services prohibited
  - Non-essential retail prohibited
  - Restaurants limited to take-out service only

4 

---

---

---

---

---

---

---


---

4

COVID-19 Legal Issues for Construction & Resource Projects

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

- Isolation & Quarantine Requirements
  - **14 days**
    - International travel; or
    - Close contact to confirmed case of COVID-19
  - **10 days**
    - Confirmed case of COVID-19
    - Experience symptoms
- Public Gatherings & Physical Distancing
  - max 15 people in a group
  - Min 2 metres distance from one another
- Strengthened Enforcement Measures

5 

---

---

---

---

---

---

---


---

5

COVID-19 Legal Issues for Construction & Resource Projects

**Government Economic Response**

- Expanded EI Benefits
- Canada Emergency Response Benefit
  - \$2,000/month for up to 4 months
- Canada Wage Emergency Subsidy
  - 75% of wages for 3 months, as of March 15
  - Must show 30% drop in revenues due to COVID-19
- Other Programs
  - BCAP, Tax Deferral, etc.

6 

---

---

---

---

---

---

---

---

6

COVID-19 Legal Issues for Construction & Resource 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

7 

---

---

---

---

---

---

---


---

7

COVID-19 Legal Issues for Construction & Resource Projects

**Contracts and Claims - Overview**

- Contracts landscape
- Force majeure and frustration
- Claims
- Court closure

8 

---

---

---

---

---

---

---


---

8

COVID-19 Legal Issues for Construction & Resource Projects

**The Contracts Landscape**

- Manpower, supply, site conditions, workflows
- Shutdown?
- Schedule, cost impacts – and project viability
- Claims potential

9 

---

---

---

---

---

---

---


---

9

COVID-19 Legal Issues for Construction & Resource Projects

**Legal Response - Contracts**

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

10 

---

---

---

---

---

---

---

---

---


---

10

COVID-19 Legal Issues for Construction & Resource Projects

**Force Majeure vs. Frustration**

- Force majeure
  - Contractual
  - Requirements
    - Meets contract terms
    - Beyond control,
    - renders performance impossible
- (Pre)Force majeure notices?

11 

---

---

---

---

---

---

---

---

---


---

11

COVID-19 Legal Issues for Construction & Resource Projects

**Force Majeure vs. Frustration (cont'd)**

- 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

12 

---

---

---

---

---

---

---

---

---


---

12

COVID-19 Legal Issues for Construction & Resource Projects

**Delay (and other) Claims**

- Contract Review and Risk Assessment
- Notices & Communications
- Contract Administration
- Extra contractual considerations

13 

---

---

---

---

---

---

---


---

13

COVID-19 Legal Issues for Construction & Resource Projects

**Court Closures**

- Impacts new and ongoing claims
- Court of Queen's Bench of Alberta and Provincial Court of Alberta closed
  - Only hearing emergency applications
- Hearings scheduled between now and May 1, 2020 adjourned indefinitely
- Expect Court closure beyond May 1, 2020.
- Remote dispute resolution options

14 

---

---

---

---

---

---

---


---

14

COVID-19 Legal Issues for Construction & Resource Projects

**Lien Claims**

- Land Titles office open to lien registration
- Court closed to lien discharge
  - Place money in trust/escrow
- Holdback/cash flow issues
- Extending lien period? (other jurisdictions)

15 

---

---

---

---

---

---

---


---

15

COVID-19 Legal Issues for Construction & Resource Projects

**What's Next - Contracts**

- Government response
  - Not done yet
- Existing contracts
  - Ongoing contract admin.
  - Slowdown/stoppage, remobilization
  - Mitigation, renegotiation
- New contracts
  - Refocus on schedule, delay, force majeure
- Future contracts...

16 

---

---

---

---

---

---

---


---

16

COVID-19 Legal Issues for Construction & Resource Projects

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

- Public Health Orders & Essential Service Listing
  - Infrastructure Projects (healthcare, energy, transportation, transit, etc.)
  - ICI and Residential
  - Any project that can abide by CMOH guidelines/directives
- Safety and Security Considerations
  - Provincial Orders
  - Employer OHS obligations
  - Dormant site concerns

17 

---

---

---

---

---

---

---


---

17

COVID-19 Legal Issues for Construction & Resource Projects

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

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

18 

---

---

---

---

---

---

---


---

18

COVID-19 Legal Issues for Construction & Resource Projects

**Business Interruption Insurance**

- Are you covered?
- Typical business interruption insurance policy will not provide coverage for a COVID-19 related shutdown
- Specialty coverage for pandemics is very expensive

19 

---

---

---

---

---

---

---


---

19

COVID-19 Legal Issues for Construction & Resource Projects

**Workplace Issues**

- A. Essential Services and Precautions to Take
- B. What to do if Someone Tests Positive
- C. Sick and Self-Isolating Employees
- D. Temporary Layoffs
- E. Group Terminations
- F. Issuing Records of Employment
- G. Cost Saving Measures
- H. Workplace Refusals
- I. Family Status Accommodations

20 

---

---

---

---

---

---

---


---

20

COVID-19 Legal Issues for Construction & Resource Projects

**Walking a Fine Line**

- There are calls to shut down construction
- Important to take precautions, such as
  - Limit crew sizes to 15, if possible
  - Physical separation of workers (2 m, if possible)
    - 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

21 

---

---

---

---

---

---

---


---

21

COVID-19 Legal Issues for Construction & Resource Projects

**Walking a Fine Line (cont'd)**

- **Precautions (cont'd)**
  - Allow office workers to work remotely
  - Reduce number of shift changes
  - Screen employees
    - Ask questions
    - Taking temperatures an option
  - Ensure employees self-isolate
  - Promote good hygiene
    - Regularly disinfect trailers, washrooms, vehicles, equipment, tools
    - Have cleaning stations around site
  - Have masks available, especially if working close
  - Assist access to benefits

22 

22

---

---

---

---

---

---

---

---


---

---

COVID-19 Legal Issues for Construction & Resource Projects

**What to do if Someone Tests Positive**

- Designate a contact person to deal with COVID-19 issues
- Confirm whether tested positive or presumed positive
- Notify public health authorities
- Remove from site and/or self-isolate
- Offer support to employee

23 

23

---

---

---

---

---

---

---

---


---

---

COVID-19 Legal Issues for Construction & Resource Projects

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

- Conduct hazard assessment
- Identify people in close contact with employee
  - They must watch for symptoms
  - They should self-isolate for 14 days
  - Be careful of privacy issues
- Consider temporary site closure
- Remediate the site, as needed
- Return to work when allowed by AHS
  - Min 10 days from start of symptoms, or until symptoms resolve

24 

24

---

---

---

---

---

---

---

---

---


---



COVID-19 Legal Issues for Construction & Resource Projects

**Sick and Self Isolating Employees**

- COVID-19 Leave Regulation
  - Enacted March 17 retroactive to March 5
  - Provides for 14-day unpaid leave to employees under isolation or quarantine
    - All employees are eligible
      - No need to be employed for 90 days
      - No need to provide medical certificate
    - Protects against termination
    - Is in addition to other leaves

25 

25

---

---

---

---

---

---

---

---


---

---

COVID-19 Legal Issues for Construction & Resource Projects

**Temporary Layoffs**

- No layoff or termination notice for site construction ees
- ESC permits temporary layoffs for 60 days in 120 days
- Specific written notice or pay in lieu must be given
  - Specific form required
  - 1 week if employed less than 2 years
  - 2 weeks if employed 2 years or more
  - Exception for unforeseeable circumstances
  - Check collective agreements
  - After 60 days, employee is deemed terminated
- Legislative tweaks could be coming

26 

26

---

---

---

---

---

---

---

---


---

---

COVID-19 Legal Issues for Construction & Resource Projects

**Temporary Layoffs (cont'd)**

- Can be extended if employer makes regular payments of wages, employee pensions, or benefits and the employee agrees to these payments during layoff period
- Temporary layoffs do not supersede common law entitlements
  - Employers may still be required to pay common law notice at termination
- Employers should assess need for temporary versus permanent measures

27 

27

---

---

---

---

---

---

---

---

---

---

COVID-19 Legal Issues for Construction & Resource Projects

**Group Terminations**

Alberta *Employment Standards Code*:

- 50 employees or more at a single location within a 4-week period
- Minimum notice must be given to employees and Minister of Labour:
  - 8 weeks - 50 or more employees but < 100
  - 12 weeks - 100 or more employees but < 300
  - 16 weeks - 300 or more employees
- Exceptions for term or task employment or unforeseeable circumstances

28




---

---

---

---

---

---

---

---

---

---

28

COVID-19 Legal Issues for Construction & Resource Projects

**Issuing ROEs**

- For full time employees:
  - when a disruption in earnings in excess of 7 days occurs or if Service Canada requests an ROE
- For part time, on-call or casual employees:
  - employee requests due to interruption of earnings
  - employee is no longer on employer's active list
  - Service Canada requests an ROE
  - no work done or earnings by employee for 30 days
- Consider impact on Government benefits

29




---

---

---

---

---

---

---

---

---

---

29

COVID-19 Legal Issues for Construction & Resource Projects

**Managing Business Hardship**

- Many options to reduce costs
  - Layoffs
  - Terminations
  - Work sharing
  - Unpaid leave
  - Reassignment
  - Reducing wages or other compensation
  - Reducing hours
  - Requiring use of vacation or banked time
  - Renegotiate collective agreements
- Risk – constructive dismissal

30




---

---

---

---

---

---

---

---

---


---

30

COVID-19 Legal Issues for Construction & Resource Projects

**Reducing Wages**

- Benefits:
  - Retaining employees
  - Risk of constructive dismissal may be less than for layoffs where
    - State for a limited time – i.e. 90 days
    - Reduction is modest - 20 to 25%

31 

---

---

---

---

---

---

---

---

---


---

31

COVID-19 Legal Issues for Construction & Resource Projects

**Reducing Wages (cont'd)**

- Consider in conjunction with other government benefits:
  - Canada Wage Emergency Subsidy
    - At least 30% reduction in revenue due to pandemic
    - Up to 75% of wages for first \$58,700 in salary, 847/wk
    - Up to 3 months of wages retro to March 15
    - Further details to come:
      - Payroll deduction or government reimbursement?
      - % of subsidy on sliding scale based on revenue loss?
    - Re-evaluate strategies used to date?

32 

---

---

---

---

---

---

---

---

---


---

32

COVID-19 Legal Issues for Construction & Resource Projects

**Workplace Refusals**

- Expect increase in workplace refusals from employees
- Employee rights:
  - To be informed of workplace hazards
  - To participate in and express HSE concerns
  - To refuse dangerous work
  - To be free from discrimination for exercising rights

33 

---

---

---

---

---

---

---

---

---


---

33

COVID-19 Legal Issues for Construction & Resource Projects

**Workplace Refusals (cont'd)**

- Employers have obligation to maintain safe work environment
- Employers must investigate work refusal concerns
  - JHSC entitled to participate
  - Try and resolve within workplace
  - If unable to agree, investigation by OHS investigator

34 

---

---

---

---

---

---

---

---

---


---

34

COVID-19 Legal Issues for Construction & Resource Projects

**Workplace Refusals (cont'd)**

- Context matters:
  - Employees cannot refuse work if risk regularly falls within their duties of employment and has been reasonably addressed by employer
  - Employer cannot impose discipline because of work refusal
  - Employee must continue to be paid during investigation
    - Can be assigned to alternative duties

35 

---

---

---

---

---

---

---

---

---


---

35

COVID-19 Legal Issues for Construction & Resource Projects

**Workplace Refusals (cont'd)**

- Provide employees with required tools to ensure work environment is safe and to mitigate hazards
- Continually conduct hazard assessments based on updated government and health authority directions
- Communicate regularly with employees

36 

---

---

---

---

---

---

---

---

---


---

36

COVID-19 Legal Issues for Construction & Resource Projects

**Family Status Accommodation**

- The Problem:
  - School and Childcare closures
  - Limited Childcare options
  - Family members ill or in need of isolation
- May trigger a duty to accommodate
- Requires practical solutions
  - Both in short term and longer term

37 

---

---

---

---

---

---

---

---

---


---

37

COVID-19 Legal Issues for Construction & Resource Projects

**Family Status Accommodation (cont'd)**

- Family status is a difficult area of human rights law to navigate
  - Includes an employee's childcare obligations
  - Also includes elder (parent) obligations
- Requests for family status accommodation should be looked at on a case-by-case basis
  - Strike a balance between employee's obligation to make reasonable efforts to find their own alternative and employer's duty to accommodate

38 

---

---

---

---

---

---

---

---

---


---

38

COVID-19 Legal Issues for Construction & Resource Projects

**Family Status Accommodation (cont'd)**

- Possible short-term solutions:
  - Work from home
  - Use vacation or banked time
  - Bring their children to work
  - Modify shift schedules to accommodate co-parenting
  - Unpaid leave for employee
- Personal and family responsibility leave

39 

---

---

---

---

---

---

---

---

---


---

39

COVID-19 Legal Issues for Construction & Resource Projects

**Family Status Accommodation** (cont'd)

- Employers should be asking employees:
  - what steps they have taken to find childcare and how their normal work schedule or duties prevents finding childcare
- Employers should be advising employees they need to make efforts to locate childcare which works with their schedule or duties
- Be practical and reasonable based on current circumstances

40 

40

---

---

---

---

---

---

---

---


---

---

COVID-19 Legal Issues for Construction & Resource Projects

**Conclusion**

- We are in a new normal
- Laws, rights, and obligations are in flux
- Important to:
  - Be flexible
  - Be informed
  - Offer support to employees
  - Designate a person responsible for COVID-19 issues
  - Communicate effectively with employees

41 

41

---

---

---

---

---

---

---

---

---

---

COVID-19 Legal Issues for Construction & Resource Projects

**Thank You**



**Chris Lane, Q.C.**  
Labour & Employment  
[clane@mross.com](mailto:clane@mross.com)  
780-482-9238



**Corbin Devlin**  
Construction Law  
[cdevlin@mross.com](mailto:cdevlin@mross.com)  
780-482-9261



**Dan Bokenfohr**  
Health & Safety  
[dbokenfohr@mross.com](mailto:dbokenfohr@mross.com)  
780-482-9118

[COVID-19 Resource Page](#) [covid19@mross.com](mailto:covid19@mross.com)

42 

42

---

---

---

---

---

---

---

---

---

---