

FEATURE

Disentangling the Impacts of COVID-19

By Seán Hollywood FRICS, FCIOB, MCI Arb, PQS, MSc Construction law, BSc (Hons) Quantity Surveying Senior Director, Construction Solutions FTI Consulting



State of Play

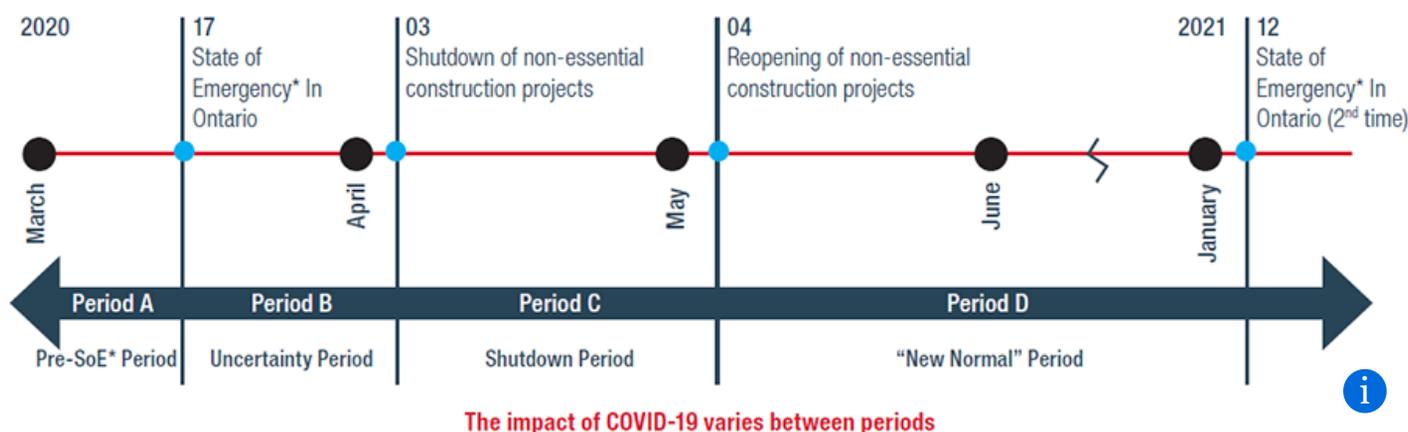
Since March 2020, the construction industry, like many other industries, has had to adapt to the changes resulting from the COVID-19 pandemic. There have been project suspensions, states of emergencies, delays to projects, border shutdowns, and shortages. Disentangling the Impacts of COVID-19 By Seán Hollywood FRICS, FCIQB, MCI Arb, PQS, MSc Construction law, BSc (Hons) Quantity Surveying Senior Director, Construction Solutions FTI Consulting of materials and key resources. As a graduate Quantity Surveyor (some 24 years ago), I was asked why I joined the construction industry, and one of the reasons I gave was this: where else could you work on bespoke, diverse and interesting projects? What I have since learned, like others over the last year, is that the construction industry is incredibly resilient and adaptable.

It is inspiring to see government and both public and private sector organizations collaborating to manage the wide variety of risks associated with COVID-19. The world has pivoted to focus on ways to manage the unprecedented impact of this pandemic and the risks it poses to organizations. However, significant guidance is still needed, especially where there are several "unknowns."

During this difficult period of uncertainty, it is paramount that organizations enhance operational efficiencies and improve cost effectiveness. FTI Consulting is best placed to assist clients to come to terms with the "new norm" of working under COVID-19 guidelines and restrictions.

We have the expertise, tools and personnel to help organizations manage their projects through this crisis. Our team of diverse professionals can develop key strategies to perform delay and cost impact assessments, loss of productivity analyses, acceleration, and quantum analyses.

Ontario Timeline



Effect on Projects

Figure 1 above outlines four periods that have been influenced by the COVID-19 Pandemic; these periods have had differing effects on General Contractors (GC) and their supply chain(s).

The project suspensions, states of emergencies, delays to projects, border shutdowns, shortages of materials and key resources issues do not even consider the impact of additional health and safety measures, physical distancing on worksites and loss of productivity.

Worksites, in an effort to quickly adapt, have had to introduce additional welfare trailers, canteen facilities and other logistic measures such as additional buses to bring workers to and from the job site. Some vertical sites have had to introduce additional elevators/hoists to ensure that the physical distancing requirements are adhered to by workers. To ensure the safety of their work force, supplementary cleaning measures have been deployed, in conjunction with essential health check screenings prior to entering each worksite or place of work, and extra PPE requirements. These items and resources all cost money, which was not initially envisaged at the time of tender nor contract award.

Furthermore, with the requirements for extra PPE, welfare, physical distancing and logistics measures, there are other implications that have had to be considered, such as: loss of productivity, delays from long lead items, supply chain disruption and absenteeism from COVID-19 positive cases in specialized work gangs.

In the coming months and years, there are likely to be a number of highly intelligent and differing arguments from members of the legal fraternity over the precise nature of what could have reasonably been envisaged in the contract, what happened during the pandemic and what the contemporaneous records state.

FTI Consulting experts have been key in assisting clients with the appropriateness of their records, and they have the tools to assist with the collection of contemporaneous records to enable our clients to have the most favourable outcome possible, such as disentangling the causes and effects of COVID-19 through Delay Analysis and/or Quantum Analysis.

Some of the effects seen on projects relate to the additional time taken to source materials, transport plant and resources to site, and deliver them to the work front. For example, some of our clients have found that their vertical projects have been more heavily impacted by physical distancing requirements because they typically have a smaller site footprint than their horizontal projects. Specifically, these vertical projects have pinch points, less overall space and higher footfall in central areas. Some of our clients have gone as far as having to stagger the sequence of work trades to minimize the overall loss of productivity and ensure the safety of their workforce.

In relation to resources on site, the implication of additional time required for screening and physical distancing of resources on projects has understandably reduced productivity on site.

Moreover, there have been other impacts resulting from supply chain disruption and the restriction of movement of material coming from other countries.

Fundamentally, these issues have resulted in a supply and demand situation whereby prices have been driven higher. Inevitably, this will increase the cost to complete the overall project.

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Contract Provisions

At present, there are various types of construction contracts in the Canadian market; each of these have different mechanisms associated with variation and claim submissions. Some of these will envisage the GC producing a claim before the pandemic has ended, and in turn, GCs will have to consider an appropriate level of risk to be applied. The pricing of risk could mean that the parties become entrenched and inevitably, delay can occur as the parties look to see how the pandemic continues.

Over the last year, FTI Consulting experts have seen an increase in the use of claim processing mechanisms from International standard forms of contracts. With our vast experience with these standard forms of Contract on mega-projects in various countries and regions, we are perfectly placed to assist GCs.

Records

With FTI's expertise, tools and personnel, we found that we are able to assist and help organizations manage their projects through this crisis and collate the most appropriate contemporaneous records, which assist clients being more informed and therefore will provide more fulsome negotiations.

The world has pivoted to focus on ways to manage the unprecedented impact of this pandemic and the risks it poses to organizations.

As Abrahamson (Engineering Law and the ICE Contracts, 4th Edition, 1979), wrote:

"A party to a dispute, particularly if there is an arbitration will learn three lessons (often too late): the importance of records, the importance of records and the importance of records."

Our teams are also highly experienced with vast expertise in project data collection and analysis, preparation of owner and/or (sub)contractor claims, claim defenses, and liaising with external legal counsel as required to help disentangle the impacts of COVID-19.

Lessons Learned

From the lessons learned over the last year and going forward, new contract negotiation will now need to include items to accommodate for the pandemic (i.e., cleaning, physical distancing

requirements, etc.), and to assist existing projects to readily adapt to the "new norm." GCs will also need more qualitative contemporaneous and robust record keeping. FTI Construction Solutions is able to assist clients to adapt to the "new norm" and can provide advice from contract inception onwards.

In general, both parties to the contracts will still have the ability and appetite to complete projects for the betterment of Ontario's construction industry, but now, maybe more than ever, there will need to be a more collaborative nature to the contracts that are to be executed in the future.

Seán Hollywood is a Senior Director with FTI Consulting Forensic & Litigation Consulting in Toronto, Canada. Mr. Hollywood has over 25 years' extensive International experience in both the public and private sectors throughout the UK, Ireland, Middle East and Canada for Major International Contractors, Project Management Companies and Government Organizations, specializing in Commercial, Quantum and all aspects of Contractual Management and Cost Analysis. He is a member of the Dispute Board Federation, a Fellow of the RICS, Fellow of the CIOB, Member of the CI Arb, PQS and since 2010 has been an RICS-Accredited Counsellor for the Assessment of Professional Competence. He graduated with a MSc Construction law and Dispute Resolution from Kings' College London, UK in 2013.
