COMMERCIAL LITIGATION

COVID-19 and *Force Majeure*: Radical Rethink Required

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In this COVID Spring[1], little is as it was before. Our present reality is, in the truest sense, "unprecedented".

All over the world, businesspeople and lawyers are scrutinizing their contracts, as they try to manage the upheaval of COVID-19. "*Force majeure*" is a term increasingly used, though little understood.

As its French name suggests, *force majeure* was born as a civil code doctrine. The common law does not always look kindly upon foreign imports, and has tolerated, but not necessarily loved, this doctrinal cousin from across the English Channel.[2] Common law contract textbooks barely mention *force majeure*. It is accepted as a matter of freedom of contract – parties can stipulate for *force majeure* if they wish – with its applicability and effect being determined by the wording of the contract itself. The one "common thread", as the Supreme Court of Canada held in the *Atlantic Paper* decision, is "that of the unexpected, something beyond reasonable human foresight and skill", involving a "supervening, sometimes supernatural, event, beyond [the] control of either party", rendering performance impossible.[3]

A review of *force majeure* jurisprudence in the Canadian common law jurisdictions shows many more defeats than victories for the doctrine.[4] In the past, at least, the facts have only rarely lived up to the high test required in *Atlantic Paper.* However, that review of caselaw also serves to remind us of the happy normalcy of the pre-COVID world. In most cases, *force majeure* was invoked due to economic impracticality of performance (eg., a sudden rise in the price of oil, or other materials[5]) rather than *outright*

[1] Let us all hope it remains just a COVID "Spring", and not more.

[2] Treitel, *Frustration and Force Majeure*, (1st Ed., 1994) at para. 12-017.

[3] *Atlantic Paper Stock Ltd. v. St. Anne-Nackawic Pulp & Paper Co.*, [1976] 1 S.C.R. 580.

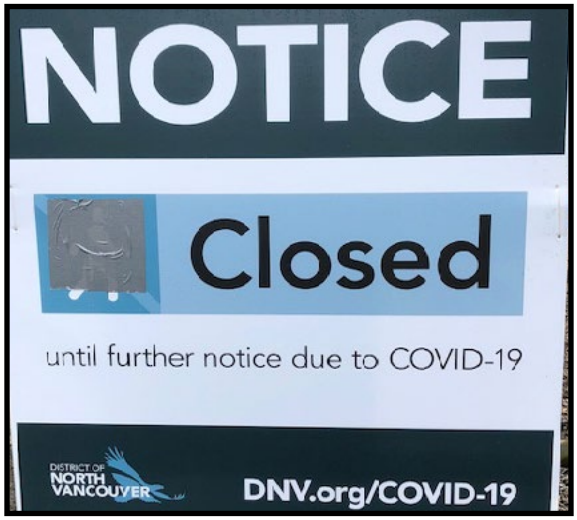
[4] It is arguably not even a doctrine in the common law. Several decisions note that "*force majeure*" is not a term of art but, rather, is whatever the contract stipulates it to be – see, eg., *Tandrin Aviation v. Aero Toy,* [2010] EWHC 40.

[5] See, eg., *Thames Valley Power Ltd. v. Total Gas and Power Ltd.*, [2005] EWHC 2008, or *Domtar Inc. v. Univar Canada Ltd.*, 2011 BCSC 1776

impossibility of performance. By contrast, in this COVID Spring, freedom of mobility and assembly are suddenly radically curtailed, throughout all of Canada and much of the world. Many contracts – including virtually all contracts in the restaurant, hospitality and tourism industries – are based on a core assumption of at least some degree of freedom of mobility and assembly.

Our concepts of reasonableness, fairness and good faith are based, at least in part, upon our idea of what is "normal". For the time being, normal is no more, in many aspects of our lives.

The present pandemic represents an enormous challenge for lawyers and the judiciary.[6] One challenge, among others, is determining where the losses should fall for this unexpected "supervening … supernatural event". Losses that will, in many instances, be economically catastrophic. For many businesses and industries, we are now well into the extreme fact pattern described by the Supreme Court of Canada in *Atlantic Paper*. A radical rethink – indeed, a reinvigorated approach – to the law of *force majeure* will be a necessary part of addressing this challenge.



[6] Not the least of which is the unprecedented, but no doubt necessary, temporary closing of courthouses.

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