



PERSPECTIVE

Covid-19: The legal fall-out

By [Divya Shahani](#) 01-04-2020

With production across North America grinding to a halt, what are the key legal issues emerging from the coronavirus pandemic?

The sudden and dramatic spread of the coronavirus has brought disruption to every facet of the entertainment industry, up-ending events, travel, production and post-production for almost everyone working in film and TV.

For entertainment lawyers such as myself, this has resulted in a broad range of issues landing on our desks, as producers, distributors, creatives and institutional clients turn to firms such as Miller Thomson to assess their options.

While a variety of problems have emerged from the pandemic, we are seeing three central issues come to the fore:

Force majeure and breach of contract

The first major problem is breach of contract situations, where there may or may not be a 'force majeure' clause in place. A force majeure event is basically an unforeseen and extreme circumstance that interrupts, frustrates or prevents the performance of one's contractual obligations.

We have heard of the ominous expression 'acts of God' in this context, but more concrete examples also include a war, natural disaster, riots, strikes, and – you guessed it – a global pandemic. So, such a clause is usually invoked to defend someone's inability to deliver or perform under a contract due to events out of their control.

Typically, we are seeing both sides of this battle: those wanting to enforce a contract to get what they bargained for, notwithstanding an event of force majeure, and those trying to suspend or terminate a contract due to an event of force majeure. For example, if a producer cannot deliver a film to their distributor or network per the delivery timelines in the agreement due to Covid-19, they may be able to raise a force majeure defence.

The considerations here tend to be whether there is a force majeure clause, and if so, whether that covers Covid-19. You would think that a pandemic would certainly be covered by a force majeure clause, but you would be surprised, as I have seen some that do not.

These are clauses that people often tend to throw into contracts as a kind of legal necessity, without realising that they are very important for the parties' risk allocation. The best-case scenario is a mutually enforceable clause – a mirror force majeure clause so that both parties are protected from liability – but of course, from a lawyer's perspective, you at least want to make sure it's covering your client and that they won't be penalised for breach or non-performance due to this pandemic.

TODAY'S CORRESPONDENT

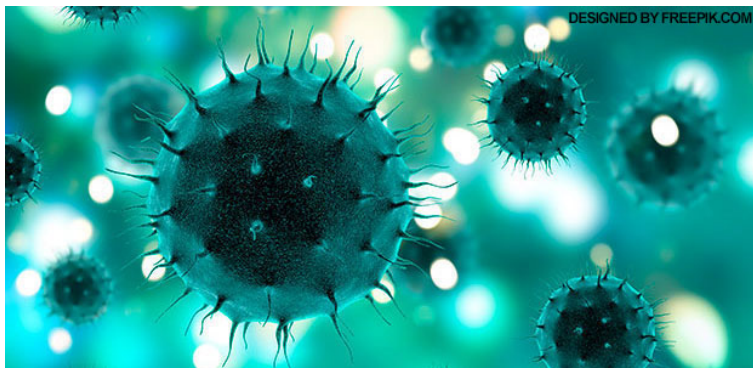
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Divya Shahani is an associate in the Toronto office of Miller Thomson LLP, a national

Canadian law firm, and focuses on transactional, corporate, financing and intellectual property matters in the entertainment industry.

Having cut her teeth on the business side of entertainment as an executive producer on various feature film projects, Divya's legal advice to her entertainment clients is informed by business strategy and practical realities.



It is important to note that a force majeure clause can also be used to suspend a contract rather than terminate it entirely, and in most cases we are seeing that producers would rather suspend their contracts until the end of this crisis. In some cases, it is not desirable to pull the plug on a contract, as that would mean potentially jeopardising financing for a production.

It may be in the producer's interest to suspend and prolong the contract, until such time as they can resume and deliver their production. Note that, in this case, it's important to see if there is a maximum length in the contract for such a suspension period, as it is hard to say how long it will take for things to go back to normal right now.

Lay-offs

As most of us know, a lot of people in the entertainment industry are hired as independent contractors and not as employees. It can be ephemeral work; it's gig culture. Those people don't necessarily have the protection of the Employment Standards Act (ESA), they're just going from contract to contract.

The issue of lay-off doesn't come up here because a company can't use the ESA to lay off non-employees. So, if a company is in the middle of a production with an independent contractor – a make-up artist, set designer or wardrobe assistant, say – and a pandemic like Covid-19 occurs, the company is looking at the contract to see if they can either suspend or terminate the services based on an aforementioned force majeure clause.

However, for an entertainment company with lots of employees – the people in the office all year long – it can use the ESA to temporarily lay off staff, which it may have to do in a bid to stop burning cash and reduce overhead.

Now, a temporary lay-off under the ESA is allowed under very prescribed terms. And in Ontario, a laid-off employee can tap into Employment Insurance (EI) or other government programmes designed to support Canadian workers who have lost their employment due to Covid-19.

Most laid-off employees are simply hoping and praying that this will blow over, and that they will qualify for EI or another benefit programme for support in the meantime. There may also be reluctance to pursue legal action if there is a possibility that they will be re-employed eventually. And practically speaking, it is also a challenge to launch a claim in this environment given the disruption that has hit the court system.

When the dust settles and production resumes, the best-case scenario would be that all workers are reinstated. In addition, the landscape for employment matters continues to change rapidly; take, for example, Canadian prime minister Justin Trudeau's promise on March 27 to increase the wage subsidy, initially put forward for small and medium-sized businesses hit by the pandemic, from 10% to 75%.

Development

The phone calls coming our way aren't all negative. It's about survival of

the adaptable right now, and as people are adjusting to this new normal – and that’s understandably taking some time – what we’re seeing is that the resilient producers in our industry are going deep into development.

They’re really using this time as an opportunity to develop, because when the fall rolls around, there’s going to be a major shortage of content.

No one’s shooting anything, so the only thing one can really do in one’s isolation or quarantine is creatively develop more. And on the legal front, development deals are still going full steam ahead. We are seeing a lot of development work coming our way: creatives partnering together, developing new feature films or series; option agreements between creators and production companies; licensing deals. We’re also seeing an increase in very interesting shortform work being produced for Instagram, Facebook, YouTube and TikTok.

Creators are doing what they can with limited resources and – on an optimistic note – this is resulting in a whole new genre of work that is cathartic and gritty. People are allying and, hopefully, setting themselves up for success once the pandemic passes.

As told to Adam Benzine.

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