

April 14, 2020



Keith Burkhardt



COVID-19 and CONSTRUCTION: IDENTIFYING ISSUES and MANAGING RISK



Rob Kennaley

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COVID-19 and Construction: Identifying Issues and Managing Risk

COVID-19 and Construction

❖ This Week's Topics:

amendment to the Order suspending limitation periods	what you can, and can't do in the office of a business not deemed essential
an update on what motions, applications and trials will be heard by our Courts	layoffs and termination: what happens when the emergency is lifted?
amendment to the Order closing all non-essential businesses	Other OHSA, WSIB, employment and labour issues and developments
Enforcement of Orders under the <i>EMCPA</i>	Questions

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Construction Act Limitation Periods

- ❖ An Order under the *EMCPA* had suspended all limitation periods in Ontario, effective March 16, 2020
- ❖ On Friday, the Attorney General announced that Regulation 73/20 will be amended to expressly remove the “limitation periods and procedural time periods under the *Construction Act*” from the scope of the prior Order, effective April 16, 2020

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Construction Act Limitation Periods

❖ With respect to lien expiry:

if a lien claimant had a number of days remaining to preserve or perfect a lien (or to obtain a trial date in a lien action) so as to avoid lien expiry as at March 16th, he or she will now have the same number of days to do so commencing April 16th

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Construction Act Limitation Periods

❖ With respect to lien expiry:

if a lien claimant had a number of days remaining to preserve or perfect a lien (or to obtain a trial date in a lien action) so as to avoid lien expiry as at March 16th, he or she will now have the same number of days to do so commencing April 16th

those with liens should consider the pros and cons of waiting to preserve liens or give a Written Notice of Lien

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Construction Act Limitation Periods

❖ With respect to holdback:

holdback may (and at times must) be released once all liens that could be preserved against it have either expired or been discharged or vacated under the Act;

any delay in the release of holdback due to the Order suspending limitation periods will now be limited to no more than 31 days (the number of days between March 16 and April 16).

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Construction Act Limitation Periods

❖ Participants Must Beware of Other Issues!

the announcement is that **all** “procedural time periods under the *Construction Act*” will be excluded from the Order’s operation

this may have significant impact for construction industry participants

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Construction Act Limitation Periods

❖ Other procedural time periods under the *Act*:

the 21 days to respond to a request for information made under s. 39 of the *Act*;

the 7 days' notice upon which a cross-examination on a claim for lien can be scheduled;

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Construction Act Limitation Periods

❖ Other procedural time periods under the *Act*:

where the *Act*'s pre-July 1, 2018 provisions apply, the time within which a landlord must respond to a contractor's written notice that the landlord will be subject to liens as would an Owner;

if the *Act*'s July 1, 2018 amendments apply, the time to give a "notice of non-payment of holdback" and "notice of termination of contract"

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Construction Act Limitation Periods

❖ Other procedural time periods under the *Act*:

if the Act's October 1, 2019 amendments apply:

- i. the mandatory prompt payment timelines applicable for notices of non-payment and for payments to be made; and
- ii. the mandatory adjudication timelines for the appointment of an adjudicator, the giving of adjudication materials and the time within which an adjudicator must make a determination.

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Construction Act Limitation Periods

❖ Other procedural time periods under the *Act*:

all of the procedural timelines applicable in a lien action

these will vary depending on whether or not the July 1, 2018 amendments apply

Under both the pre and post July 1, 2018 amendments, the *Act's* procedural requirements prevail over the Rules of Civil Procedure

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Construction Act Limitation Periods

❖ Other procedural time periods under the *Act*:

to obtain a trial date (ie. deliver a trial record or obtain an Order from the Construction Lien Court

to serve a Statement of Claim, Statement of Defence, Counterclaim or Cross-claim

A notice of settlement meeting or of trial

Appeal timeframes

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An Update of Civil Procedure

- ❖ Since mid-March, our Courts have only been hearing urgent motions and applications

Motion and application materials that a party believes should be heard urgently must be submitted in writing and remotely

the Construction Lien Masters continue to accommodate motions to vacate claims for lien.

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An Update of Civil Procedure

- ❖ Since April 6, our Courts have begun to open up to (remotely) hear non-urgent matters.

- ❖ in most court locations the Courts will now hear:

Pre-trial conferences that have a settlement objective and that were previously cancelled

consent motions, in writing

“Rule 7 Motions” to approve settlements

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An Update of Civil Procedure

❖ Since April 6, our Courts have begun to open up to (remotely) hear non-urgent matters.

❖ Also, in Toronto:

Select Commercial List Matters

Class action motions in writing and other select motions

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An Update of Civil Procedure

❖ Since April 6, our Courts have begun to open up to (remotely) hear non-urgent matters.

❖ Also, in the Divisional Court:

time sensitive matters

other matters if resources are available

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COVID-19 and Construction

- ❖ On April 3 and April 6 we released two blogs on these issues:
- ❖ *Construction Has Been Ordered Substantially Shut Down in Ontario: Who bears the costs of delay, and what might those be?* Issued April 3rd ; and
- ❖ *What Construction Can Continue in Ontario after April 4, 2020?* Issued April 6th

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Enforcement of *EMCPA* Orders

❖ Charter Issues? mobility rights?

- ❖ The *EMCPA* provides that Orders cannot violate rights entrenched in the Charter of Rights and Freedoms
- ❖ These rights, however, are subject to “such reasonable limited as can be demonstrably justified in a free and democratic society”

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Enforcement of *EMCPA* Orders

- ❖ OHS Issues?
 - ❖ The *EMCPA* provides that where the *EMCPA* and the OHS conflict, the OHS prevails
 - ❖ This gives the Ministry of Labour continued authority over construction sites in Ontario

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Enforcement of *EMCPA* Orders

- ❖ The role of Municipal Inspectors?
 - ❖ Under the *EMCPA*, municipalities can declare their own state of emergency.
 - ❖ Toronto, Ottawa, Kingston, Peterborough, Barrie, Newmarket, Mississauga, London, Guelph and others have done so
 - ❖ this gives the Municipality the authority to enforce their own emergency response plans.

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Enforcement of *EMCPA* Orders

- ❖ The role of Municipal Inspectors?
 - ❖ In addition, under the *Provincial Offences Act*, “offences” include everything from parking fines to speeding tickets to by-law enforcement to more serious offences
 - ❖ also include any under an *Act* of the Legislature or under a regulation or by-law made under the authority of an *Act* of the Legislature (ie. *EMCPA* and the Orders passed by regulation under *EMCPA*)

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Enforcement of *EMCPA* Orders

- ❖ The role of Municipal Inspectors?
 - ❖ Municipal inspectors are appointed and authorized to inspect and lay charges under the *Provincial Offences Act*
 - ❖ there are Part I, Part II and Part II offences
 - ❖ Part II are parking offences (n/a for today’s discussion)

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Enforcement of *EMCPA* Orders

- ❖ The role of Municipal Inspectors?
 - ❖ Part I are where an offence notice (ticket) or summons is issued and set fines are established which you can or elect to challenge. There is no potential jail time associated with these offences

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Enforcement of *EMCPA* Orders

- ❖ The role of Municipal Inspectors?
 - ❖ Part I set fines under *EMCPA* (March 18, 2020)

Item	Offence	Section	Set Fine
1.	Fail to comply with an order made during a declared emergency	7.0.11 (1) (a)	\$750.00
2.	Obstruct any person exercising a power in accordance with an order made during a declared emergency	7.0.11 (1) (a)	\$1000.00
3.	Obstruct any person performing a duty in accordance with an order made during a declared emergency	7.0.11 (1) (a)	\$1000.00

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Enforcement of *EMCPA* Orders

- ❖ The role of Municipal Inspectors?
 - ❖ Part III offences are more serious and the charge are commenced by laying an “information”. These can resemble criminal charges. These will also be prosecuted based on an “Order to Comply”.
 - ❖ Maximum fines are set, along with potential jail time

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Enforcement of *EMCPA* Orders

- ❖ If an information is laid under Part III:
 - ❖ individuals may be fined up to \$100,000.00 and imprisoned for up to one year;
 - ❖ while a corporation may be fined up to \$10,000,000.00;
 - ❖ corporate officers and directors may each be fined up to \$500,000.00 and, also, imprisoned for up to one year.

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