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**COVID-19 and CONSTRUCTION:  
IDENTIFYING ISSUES and MANAGING RISK**



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Kennaley Construction Law

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## Delay and Impact Claims after COVID-19

- ❖ Delay and Impact Claims are for Changes in the Work
- ❖ They can be difficult to prove
- ❖ This morning we will review:
  - ❖ the types of delay and impact claims that might be asserted
  - ❖ what needs to be proven to successfully pursue such a claim

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## Delay and Impact Claims after COVID-19

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- ❖ Types of Delay and Impact Claims:
  - ❖ straightforward delay
    - ❖ where there was a delay in starting
    - ❖ where the anticipated contract time was extended
  - ❖ changes in sequence or access
  - ❖ acceleration
  - ❖ lost productivity
  - ❖ combinations of the above

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## Delay and Impact Claims after COVID-19

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- ❖ The Starting Point (I) for Delay and Impact Claims:
  - ❖ How does the contract/subcontract allocate the risk?
    - ❖ Most contracts/subcontracts allocate the risks of delay and other impacts
      - ❖ where an extension can be claimed
      - ❖ determining what is compensable vs. what is not
      - ❖ *force majeure* clauses

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## Delay and Impact Claims after COVID-19

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- ❖ The Starting Point (II) for Delay and Impact Claims:
  - ❖ What was the claimant's original schedule/plan reasonable?
    - ❖ The scheduling method (Microsoft Project? Primavera?)
      - ❖ Was a critical path reasonably set out?
      - ❖ What were the assumptions set out re: critical tasks?
      - ❖ How was float dealt with?
      - ❖ Was the sequencing plan reasonable?
      - ❖ What were the manpower loading plans?

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## Delay and Impact Claims after COVID-19

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- ❖ The Starting Point (II) for Delay and Impact Claims:
  - ❖ What was the claimant's original schedule/plan accepted?
    - ❖ who get's to set the targeted finish date?
    - ❖ can a claimant claim on the basis that he or she planned on finishing early?

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## Delay and Impact Claims after COVID-19

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- ❖ What was the cause of the delay / impacts?
  - ❖ Who was responsible for the causes/events?
  - ❖ Who owns the “float” and where was it used?
  - ❖ Have we accounted for concurrent delay
    - ❖ (delays/impacts attributable to causes that are not compensable:
      - ❖ *force majeure* events and other causes that give rise to extensions but not compensation;
      - ❖ causes that are attributable to the claimant itself (ie. where the claimant itself caused delay)

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## Delay and Impact Claims after COVID-19

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- ❖ What *were* the delays / impacts?
  - ❖ Often a detailed critical path analysis is required
  - ❖ Often the entire file is relevant (towards determining whether or not there was concurrent delay)
  - ❖ Various models towards proving the delays/impacts:

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## Delay and Impact Claims after COVID-19

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- ❖ ... back to the contract / subcontract:
  - ❖ Were Notice Provisions and other Conditions Precedent to making the claim followed? Can 'waiver' be established?
    - ❖ *Technicore Underground Inc. v. Toronto (City)*, 2012 ONCA 597
    - ❖ *Ross-Clair v. Canada (Attorney General)*, 2016 ONCA 205
    - ❖ *Jessco Structural Limited v. Gottardo Construction Limited*, 2016 ONSC 2189 (Ont. Div. Ct.)

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## Delay and Impact Claims after COVID-19

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- ❖ ... back to the contract / subcontract:
  - ❖ What does the contract / say about damages?
    - ❖ “rationalization” clauses
    - ❖ clauses limiting or denying damages outright

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## Delay and Impact Claims after COVID-19

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- ❖ Proving Damages:
  - ❖ Site and home office overheads;
  - ❖ Lost profits / lost opportunities;
  - ❖ Did the claimant actually suffer any losses (re COVID?)

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## Delay and Impact Claims after COVID-19

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- ❖ After COVID-19:
  - ❖ Owners will / should address delays associated with pandemics in their contracts;
  - ❖ Owners have been inserting *Technicore* and *Ross Clair* type notice requirements and conditions precedent clauses into their contracts
  - ❖ Contractors and subcontractors must pay attention to how risk is being allocated in the tender documents / prime contract

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## Delay and Impact Claims after COVID-19

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- ❖ After COVID-19:
  - ❖ Contractors and subcontractors must pay attention to how risk is being allocated by those above them in the construction ladder
  - ❖ Contractors and subcontractors should be allocating the risks of delay in general, and pandemics in particular, in their contracts / subcontracts

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## Delay and Impact Claims after COVID-19

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- ❖ After COVID-19 and given Prompt Payment / Adjudication:

**the time is now to revisit your  
tender packages, contracts and subcontracts**

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