



COVID-19 and Construction: Identifying Issues and Managing Risk




Patrick Ganley



SHERRARD KUZ LLP
Employment & Labour Lawyers

April 21, 2020

COVID-19 and CONSTRUCTION: IDENTIFYING ISSUES and MANAGING RISK



Rob Kennaley

Kennaley Construction Law

COVID-19 and Construction

❖ This Week's Topics:

delays in the performance of the Work due to <i>EMCPA</i> orders under CCDC, CCA1, OPSS and similar clauses	The suspension of limitation periods: amendments under the <i>Planning Act</i> and <i>Niagara Escarpment and Planning and Development Act</i>
Issues surrounding the “20 Working Day” timeframe under such clauses	Other OHSA, WSIB, employment and labour issues and developments
updates re: Order 82/80 closing all non-essential businesses	Questions

Kennaley Construction Law

30 Quarry Ridge Rd
Barrie, Ontario
L4M 7G1
705.881.1515

Wincey Mills
305 – 31 Mechanics St.
Paris, Ontario
N3L 1K1
519.805-8186

First Canadian Place
5700 - 100 King Street West
Toronto, Ontario
M5X 1C7
416.700.4142

58 Peel Street
Simcoe, Ontario
N3Y 1S2
519.426.2577

COVID-19 and Construction: Identifying Issues and Managing Risk

Delays Due to EMCPA Orders

❖ CCDC2 – GC6.5.2:

If the Contractor is delayed in the performance of the Work by a stop work order issued by a court or other public authority and providing that such order was not issued as the result of an act or fault of the Contractor or any person employed or engaged by the Contractor directly or indirectly, then the Contract Time shall be extended for such reasonable time as the Consultant may recommend in consultation with the Contractor. The Contractor shall be reimbursed by the Owner for reasonable costs incurred by the Contractor as the result of such delay.

- ❖ similar clauses in most CCDC contracts, in CCA1 subcontracts and under OPSS contracts

Kennaley Construction Law

Delays Due to EMCPA Orders

❖ CCDC2 – GC6.5.2 (additional compensation):

If the Contractor is delayed in the performance of the Work by a stop work order issued by a court or other public authority and providing that such order was not issued as the result of an act or fault of the Contractor or any person employed or engaged by the Contractor directly or indirectly, then the Contract Time shall be extended for such reasonable time as the Consultant may recommend in consultation with the Contractor. The Contractor shall be reimbursed by the Owner for reasonable costs incurred by the Contractor as the result of such delay.

- ❖ Issues:
 - ❖ has Work performance actually been delayed?
 - ❖ Has notice been given under GC6.6 or similar?

Kennaley Construction Law

COVID-19 and Construction: Identifying Issues and Managing Risk

Delays Due to EMCPA Orders

❖ CCDC2 – GC6.5.2 (additional compensation):

If the Contractor is delayed in the performance of the Work by a stop work order issued by a court or other public authority and providing that such order was not issued as the result of an act or fault of the Contractor or any person employed or engaged by the Contractor directly or indirectly, then the Contract Time shall be extended for such reasonable time as the Consultant may recommend in consultation with the Contractor. The Contractor shall be reimbursed by the Owner for reasonable costs incurred by the Contractor as the result of such delay.

❖ Issues (Notice under GC6.6):

If the Contractor intends to make a claim for an increase to the Contract Price, or if the Owner intends to make a claim against the Contractor for a credit to the Contract Price, the party that intends to make the claim shall give timely Notice in Writing of intent to claim to the other party and to the Consultant.

Upon commencement of the event or series of events giving rise to a claim, the party intending to make the claim shall:

- .1 take all reasonable measures to mitigate any loss or expense which may be incurred as a result of such event or series of events, and
- .2 keep such records as may be necessary to support the claim.

The party making the claim shall submit within a reasonable time to the Consultant a detailed account of the amount claimed and the grounds upon which the claim is based.

Kennaley Construction Law

Delays Due to EMCPA Orders

❖ CCDC2 – GC6.5.2 (additional compensation):

If the Contractor is delayed in the performance of the Work by a stop work order issued by a court or other public authority and providing that such order was not issued as the result of an act or fault of the Contractor or any person employed or engaged by the Contractor directly or indirectly, then the Contract Time shall be extended for such reasonable time as the Consultant may recommend in consultation with the Contractor. The Contractor shall be reimbursed by the Owner for reasonable costs incurred by the Contractor as the result of such delay.

❖ Issues:

- ❖ what, if any, are the reasonable costs incurred?
- ❖ contrast with *force majeure* clauses – where the delays are generally non-compensable
- ❖ potential legislative approaches to the issues?

Kennaley Construction Law

COVID-19 and Construction: Identifying Issues and Managing Risk

Delays Due to EMCPA Orders

❖ CCDC2 – GC7.2.2 (rights of termination):

If the *Work* is suspended or otherwise delayed for a period of 20 *Working Days* or more under an order of a court or other public authority and providing that such order was not issued as the result of an act or fault of the *Contractor* or of anyone directly or indirectly employed or engaged by the *Contractor*, the *Contractor* may, without prejudice to any other right or remedy the *Contractor* may have, terminate the *Contract* by giving the *Owner Notice in Writing* to that effect.

- ❖ again, similar clauses in most CCDC contracts, in CCA1 subcontracts and under OPSS contracts

Kennaley Construction Law

Delays Due to EMCPA Orders

❖ CCDC2 – GC7.2.2 (rights of termination):

If the *Work* is suspended or otherwise delayed for a period of 20 *Working Days* or more under an order of a court or other public authority and providing that such order was not issued as the result of an act or fault of the *Contractor* or of anyone directly or indirectly employed or engaged by the *Contractor*, the *Contractor* may, without prejudice to any other right or remedy the *Contractor* may have, terminate the *Contract* by giving the *Owner Notice in Writing* to that effect.

- ❖ Issues:
 - ❖ has Work been suspended “under” an Order of a Court or other public authority?
 - ❖ has Work been delayed “under” an Order of a Court or other public authority?

Kennaley Construction Law

COVID-19 and Construction: Identifying Issues and Managing Risk

Delays Due to EMCPA Orders

❖ CCDC2 – GC7.2.2 (rights of termination):

If the *Work* is suspended or otherwise delayed for a period of 20 *Working Days* or more under an order of a court or other public authority and providing that such order was not issued as the result of an act or fault of the *Contractor* or of anyone directly or indirectly employed or engaged by the *Contractor*, the *Contractor* may, without prejudice to any other right or remedy the *Contractor* may have, terminate the *Contract* by giving the *Owner Notice in Writing* to that effect.

❖ Issues:

- ❖ if applicable, it appears the contractor / subcontractors controls the timing of termination
- ❖ If applicable, this is in addition to their right of claim additional compensation

Kennaley Construction Law

Delays Due to EMCPA Orders

❖ CCDC2 – GC7.2.2 (rights of termination):

If the *Work* is suspended or otherwise delayed for a period of 20 *Working Days* or more under an order of a court or other public authority and providing that such order was not issued as the result of an act or fault of the *Contractor* or of anyone directly or indirectly employed or engaged by the *Contractor*, the *Contractor* may, without prejudice to any other right or remedy the *Contractor* may have, terminate the *Contract* by giving the *Owner Notice in Writing* to that effect.

❖ Issues:

- ❖ calculating the 20 Working Day period: which Order might apply?
- ❖ State of Emergency declared March 17, 2020

Kennaley Construction Law

COVID-19 and Construction: Identifying Issues and Managing Risk

Delays Due to EMCPA Orders

❖ CCDC2 – GC7.2.2 (rights of termination):

If the *Work* is suspended or otherwise delayed for a period of 20 *Working Days* or more under an order of a court or other public authority and providing that such order was not issued as the result of an act or fault of the *Contractor* or of anyone directly or indirectly employed or engaged by the *Contractor*, the *Contractor* may, without prejudice to any other right or remedy the *Contractor* may have, terminate the *Contract* by giving the *Owner Notice in Writing* to that effect.

❖ Issues:

- ❖ calculating the 20 Working Day period: which Order might apply?
- ❖ First version of 82/20 (closing non-essential businesses) effective March 24, 2020

Kennaley Construction Law

Delays Due to EMCPA Orders

❖ CCDC2 – GC7.2.2 (rights of termination):

If the *Work* is suspended or otherwise delayed for a period of 20 *Working Days* or more under an order of a court or other public authority and providing that such order was not issued as the result of an act or fault of the *Contractor* or of anyone directly or indirectly employed or engaged by the *Contractor*, the *Contractor* may, without prejudice to any other right or remedy the *Contractor* may have, terminate the *Contract* by giving the *Owner Notice in Writing* to that effect.

❖ Issues:

- ❖ issue may be establishing that the Work has been suspended or delayed by the Order(s)
- ❖ Issue may be whether or not the contractor or subcontractor stopped construction that fit within paragraphs 20 or 27-31 as essential

Kennaley Construction Law

COVID-19 and Construction: Identifying Issues and Managing Risk

COVID-19 and Construction

❖ This Week's Topics:

delays in the performance of the Work due to *EMCPA* orders under CCDC, CCA1, OPSS and similar clauses

The suspension of limitation periods: amendments under the *Planning Act* and *Niagara Escarpment and Planning and Development Act*

Issues surrounding the “20 Working Day” timeframe under such clauses

Other OHSA, WSIB, employment and labour issues and developments

updates re: Order 82/80 closing all non-essential businesses

Questions

Kennaley Construction Law

Limitation Periods

❖ The Order made the following amendment in relation to the *Construction Act*:

Construction Act

4. On and after April 16, 2020, sections 1 and 2 do not apply to provisions of the *Construction Act* or of the regulations made under it if the provisions establish a limitation period or period of time within which any step must be taken in a proceeding, including an intended proceeding. O. Reg. 137/20, s. 3.

Kennaley Construction Law

30 Quarry Ridge Rd
Barrie, Ontario
L4M 7G1
705.881.1515

Wincey Mills
305 – 31 Mechanics St.
Paris, Ontario
N3L 1K1
519.805-8186

First Canadian Place
5700 - 100 King Street West
Toronto, Ontario
M5X 1C7
416.700.4142

58 Peel Street
Simcoe, Ontario
N3Y 1S2
519.426.2577

COVID-19 and Construction: Identifying Issues and Managing Risk

Limitation Periods

- ❖ The Order also made the following amendment in relation to the *Niagara Escarpment and Planning and Development Act*:

Niagara Escarpment Planning and Development Act

3. On and after April 9, 2020, sections 1 and 2 do not apply to provisions of the *Niagara Escarpment Planning and Development Act* or of the regulations made under it if the provisions establish a limitation period or period of time within which any step must be taken in a proceeding, including an intended proceeding. O. Reg. 137/20, s. 3.

Kennalee Construction Law

Limitation Periods

- ❖ The Order also made the following amendment in relation to the *Niagara Escarpment and Planning and Development Act*:
- ❖ this allows applications and appeals, etc., to proceed under that *NEPDA*
- ❖ applicants need to be aware that timelines remain in force
- ❖ if an amendment application is rejected, the 15 day period to object remains in force, for example

Kennalee Construction Law

30 Quarry Ridge Rd
Barrie, Ontario
L4M 7G1
705.881.1515

Wincey Mills
305 – 31 Mechanics St.
Paris, Ontario
N3L 1K1
519.805-8186

First Canadian Place
5700 - 100 King Street West
Toronto, Ontario
M5X 1C7
416.700.4142

58 Peel Street
Simcoe, Ontario
N3Y 1S2
519.426.2577

COVID-19 and Construction: Identifying Issues and Managing Risk

Limitation Periods

- ❖ Ontario Regulation 149/20, issued April 15, 2020 re: the *Planning Act* and the *City of Toronto Act, 2006*:

Non-application of O. Reg. 73/20

3. Despite the *Emergency Management and Civil Protection Act*, Ontario Regulation 73/20 (Order under subsection 7.1 (2) of the Act - Limitation Periods) made under that Act does not apply and is deemed to have never applied with respect to the *Planning Act*, the regulations or section 114 of the *City of Toronto Act, 2006*.

- ❖ these allow planning applications and processes to proceed (for the most part remotely) under a different set of notice requirements
- ❖ many notices will not have to be given until 15 days after the COVID-19 emergency is terminated

Kennaley Construction Law

Limitation Periods

- ❖ Ontario Regulation 149/20, issued April 15, 2020 re: the *Planning Act* and the *City of Toronto Act, 2006*:

Non-application of O. Reg. 73/20

3. Despite the *Emergency Management and Civil Protection Act*, Ontario Regulation 73/20 (Order under subsection 7.1 (2) of the Act - Limitation Periods) made under that Act does not apply and is deemed to have never applied with respect to the *Planning Act*, the regulations or section 114 of the *City of Toronto Act, 2006*.

- ❖ Specific rules apply where such notices were to be given under certain sections between March 2, 2020 and April 15, 2020

Kennaley Construction Law

30 Quarry Ridge Rd
Barrie, Ontario
L4M 7G1
705.881.1515

Wincey Mills
305 – 31 Mechanics St.
Paris, Ontario
N3L 1K1
519.805-8186

First Canadian Place
5700 - 100 King Street West
Toronto, Ontario
M5X 1C7
416.700.4142

58 Peel Street
Simcoe, Ontario
N3Y 1S2
519.426.2577

COVID-19 and Construction: Identifying Issues and Managing Risk

COVID-19 and Construction

❖ This Week's Topics:

delays in the performance of the Work due to <i>EMCPA</i> orders under CCDC, CCA1, OPSS and similar clauses	The suspension of limitation periods: amendments under the <i>Planning Act</i> and <i>Niagara Escarpment and Planning and Development Act</i>
Issues surrounding the “20 Working Day” timeframe under such clauses	Other OHSA, WSIB, employment and labour issues and developments
updates re: Order 82/80 closing all non-essential businesses	Questions

Kennaley Construction Law

30 Quarry Ridge Rd
Barrie, Ontario
L4M 7G1
705.881.1515

Wincey Mills
305 – 31 Mechanics St.
Paris, Ontario
N3L 1K1
519.805-8186

First Canadian Place
5700 - 100 King Street West
Toronto, Ontario
M5X 1C7
416.700.4142

58 Peel Street
Simcoe, Ontario
N3Y 1S2
519.426.2577