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MAY A CONTRACTOR BE BARRED FROM BIDDING ON A PUBLIC PROJECT?

A not so common topic, but one that is nonetheless essential to consider for any client who bids on public projects, is the possibility the government agency may debar a contractor from bidding on its projects. One particular factor government agencies have considered in their debarment decisions is whether it and the bidding contractor have ever engaged in litigation.

The Superior Court of Quebec in *Uniroc Inc. c. Ville de Saint-Jérôme* reiterated the finding of the Quebec Court of Appeal in *Cris Construction & Development Co. James Bay Development Corp.*, where it was decided that a clause in a government agency's call for tenders, prohibiting bids from contractors who were suing or being sued by the government agency, contravened "*the principle of the rule of law and is contrary to public order*" [English translation].

However, courts in British Columbia and Ontario have reached the opposite conclusion. In *J. Cote & Son Excavating Ltd. v. City of Burnaby*, the British Columbia Supreme Court held that "*a municipality is entitled to insert a term as part of its public bidding process which bars bids from contractors who are engaged in litigation with the municipality, as long as there is no indication of bad faith and the clause lies within the municipality's power*". The British Columbia Court of Appeal affirmed this decision, with leave to appeal to the Supreme Court of Canada being denied.

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In *Interpaving Ltd. v. City of Greater Sudbury*, the Ontario Divisional Court considered whether procedural fairness was provided to a construction contractor when the City of Greater Sudbury, pursuant to a newly instituted by-law, debarred Interpaving Ltd. from bidding on City contracts for a period of four years, for, among other reasons, Interpaving's legal action against the City. Interpaving sought a declaration that the by-law was in whole or in part contrary to law and the rules of natural justice.

In a majority decision, the court upheld the City's debarment decision and ultimately found the City's decision-making process procedurally fair.

Factual Background

Interpaving and its related companies had provided its services to the City for over 40 years through contracts amounting to approximately $19 million per year. In 2014, the City instituted its debarment by-law, which provides, in part, that:

a) a Bidder or Supplier may be excluded from eligibility to submit bids or quotes or a submitted bid or quote may be rejected where the applicable City personnel agree either: the Bidder or Supplier has been involved with Litigation with the City; there is documented evidence of poor performance; and the Bidder or Supplier has demonstrated abusive behaviour or conduct towards City employees, agents or representatives;

b) in arriving at its determination, the City will consider whether the circumstances are likely to affect the Bidder or Supplier's ability to work with the City and whether the City is likely to incur increased staff time and legal costs in dealing with the Bidder or Supplier; and

c) based on the severity of the events, the applicable City personnel establish the duration of the debarment period.

By letter, the City notified Interpaving that it was debarred from bidding on City projects for four years, and provided Interpaving with three reasons for its decision: (i) Interpaving had issued a statement of claim against the City; (ii) seven orders had been issued by the Ministry of Labour noting health and safety legislation violations by Interpaving; and (iii) Interpaving had a significant history of abusive behaviour and threatening conduct towards City employees since 2003.

The parties subsequently met on two occasions to discuss the rescindment of the debarment letter. At the end of the second meeting, the City requested that Interpaving formally request the City's reconsideration of the debarment decision and provide written submissions with respect to same. Interpaving provided its written submissions to the City, addressing, among other things, the grounds provided in the debarment letter; the retrospective operation of the by-law; notice of the City's concerns; and the alleged differential treatment of Interpaving relative to other bidders on City projects or contracts.

Two weeks later, the City replied to Interpaving upholding the debarment. Notably, in its reasons, the City supported its own argument by providing additional examples of Interpaving performance issues, which the City had not previously detailed in its debarment letter.

The Issues

The issues determined by the court were the following:

1. Was the City by-law valid and enforceable?
2. Was Interpaving denied procedural fairness?
3. Was the debarment decision reasonable?
4. If Interpaving was denied procedural fairness, what was the appropriate remedy?

Was the By-Law Valid and Enforceable?

Interpaving posited that the by-law was not valid and enforceable as it: (i) contravened *The Agreement on Internal Trade* (AIT); and (ii) a governmental body should not be able to debar a party because that party has commenced legal proceedings against it. However, the court held that the by-law was valid as there was no evidence it contravened the AIT and, citing the Supreme Court of Canada in *Shell Canada Products Ltd. v. Vancouver (City)*, "*a municipality has essentially the same right as a business person to decide with whom it will do business*". Therefore, a governmental body has the option to debar a party because litigation was commenced against it.

Was Interpaving Denied Procedural Fairness?

The Court determined that the initial decision of the City in the debarment letter was a breach of procedural fairness. In reaching this finding, the Court considered the following, among others:

a) the debarment decision was an administrative decision that involved the exercise of discretion;

b) a municipality is allowed to discriminate against a supplier, provided it does so within the enabling legislation and without contravening the Charter or prevailing legislation;

c) while private entities are free to discriminate against the parties with whom they contract, public bodies have different considerations to apply as they utilize public funds;

d) the by-law affords the decision-makers with "absolute sole discretion" to decide on debarment, with no right to appeal;

e) the importance of notice and the individual's entitlement to know the case to be met; and

f) the reasons offered must be sufficient to explain what was decided and why.

Given the importance of the decision to Interpaving, combined with the lack of appeal mechanism in the by-law, the court found that the City should have provided the following to Interpaving: (i) notice of its intention to debar and the proposed penalty; (ii) a summary of the grounds for the proposed decision; (iii) the opportunity for Interpaving to respond; and (iv) reasons for its decision to debar.

Though the court found the debarment letter was procedurally unfair, it held the City's reconsideration process cured the procedural defects inherent in the debarment letter, in accordance with the principal asserted by the Ontario Court of Appeal in *Khan v. The University of Ottawa*. The City's reconsideration process included, among other things, the meetings held between the parties after the debarment letter, the City's review of Interpaving's submissions, and the City's subsequent deliberations on the matter.

In assessing the fairness of the reconsideration process, the court found Interpaving was provided notice and grounds for the proposed decision after having received the debarment letter. As a result of this notice, Interpaving was able to put forward its evidence and submissions in its response to the City. Although the City provided additional grounds for disbarment in its reconsideration correspondence, the court held it did not vitiate the debarment decision because the grounds for debarment were set out in the debarment letter and both the debarment letter and the reconsideration correspondence stated the grounds relied upon for debarment were not limited to those stated in the letters.

Moreover, the court noted that there was no evidence the reconsideration process would have been any different if notice was first provided, or that the City's decision-makers did not keep an open mind during the reconsideration process. Citing the Ontario Court of Appeal in *McNamara v. Ontario Racing Commission*, the court determined that it was appropriate for the same City officials to opine on both the initial and ultimate decision as long as what took place was "*a fresh consideration of the events*".

Was the Debarment Decision Reasonable?

Interpaving claimed the debarment decision was unreasonable as, among other things, the by-law was applied retrospectively to include incidents that predated the enactment of the by-law and the City's decision-makers failed to consider the performance records of other bidders for City projects or contracts in making the debarment decision. The court disagreed.

First, the court cited the Supreme Court of Canada in *Barry v. Alberta (Securities Commission)* in determining "*the presumption that the legislature does not intend to confer on a municipality a power to make by-laws that operate retrospectively does not apply in this case… Where the purpose of the By-Law is to protect the public, the presumption against retrospective application is rebutted*". This is supported by the notion that the by-law's purpose was to protect the public rather than to punish Interpaving, as the by-law was meant to prevent the unnecessary expenditure of public funds and to protect City personnel and members of the public.

Second, the court determined that the City did not need to consider the records of other bidders before deciding to debar Interpaving.

The Dissent

Justice Ellies disagreed with the majority on two grounds: (i) In order to fulfill its duty of procedural fairness, the City should have disclosed the docu-

mentary evidence it relied on to Interpaving; and (ii) The procedural unfairness of the initial debarment decision was not cured as it was unfair for the City to rely on any additional grounds to substantiate its debarment decision.

With respect to documentary disclosure, Justice Ellies cited a provision in the by-law stipulating disqualification is allowed where "*there is documented evidence of poor performance*". In Justice Ellies's opinion, these documents should have been disclosed and, given the importance of the decision to the taxpayers and Interpaving, *all* of the documentary evidence should have been disclosed.

Justice Ellies did not agree that Interpaving and the City thoroughly canvassed the issues in their subsequent meetings after the debarment letter, particularly when the parties did not discuss the length of the debarment. Moreover, the application record had contradictory statements about what occurred during the meetings and there was no discussion about some of the grounds of the debarment. Further, Interpaving did not have notice and did not have the opportunity to address the additional grounds the City relied upon in the reconsideration correspondence. Interpaving only replied to the grounds stated in the debarment letter. All of these factors combined resulted in a procedurally unfair process.

Application

It appears that it is possible for a public body to debar bidders from future projects based on conduct that pre-dates the institution of the debarment legislation. This conduct can include engagement in prior or current legal proceedings. However, in deciding to debar bidders, the public body must do so in accordance with its duty to conduct a procedurally fair process. In order to best ensure this duty is met, the public body and the bidder should ensure: notice of debarment was provided; the notice contains grounds for asserting debarment, and provides the bidder with sufficient particulars to know the case to be met; the public body provides disclosure of the documented evidence for the grounds of debarment, particularly when the by-law references the provision of documented evidence; the bidder is provided the opportunity to respond to the grounds asserted; and sufficient reasoning is provided to explain what was decided and why. It is necessary for the public body to fully assess the procedural fairness of its decision-making process. In the absence of any of the foregoing, the public body's debarment decision may undergo judicial challenge by the debarred party.

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CONSTRUCTION EMPLOYER'S REPORTING OBLIGATIONS TO REPORT A COVID-19 WORKPLACE EXPOSURE

Employers in the construction industry have numerous and complex legal reporting obligations for a workplace exposure of a COVID-19 infection of a worker. The three primary areas of inquiry, about the duty in Ontario to report a confirmed or presumptive case of COVID-19 to various regulators, include occupational health and safety, worker's compensation, and public health regulators.

Ontario's Occupational Health and Safety Act (OHSA)

An occupational illness is defined under s. 1(1) of the OHSA as:

> *... a condition that results from exposure in a workplace to a physical, chemical or biological agent to the extent that the normal physio-*

> *logical mechanisms are affected and the health of the worker is impaired thereby and includes an occupational disease for which a worker is entitled to benefits under the* Workplace Safety and Insurance Act, 1997.

Infectious diseases acquired in the workplace fall within this definition and have historically referred to tuberculosis, hepatitis, norovirus, influenza, and chickenpox. COVID-19 is an infectious disease of a similar nature and would be considered an occupational illness if an employee were to acquire an infection as a result of exposure in the workplace. Employers would consequently be subject to reporting obligations in accordance with ss. 52(2) and 52(3) of the OHSA, and applicable regulations.

Subsections 52(2) and 52(3) of the OHSA outline the employer's reporting obligations. The former is relevant for current workers, while the latter is applicable to former workers. Once an employer is notified in a manner specified in those subsections, the employer must report in writing within four days to the Director of the Ministry of Labour, to the joint health and safety committee or a health and safety representative, and to the trade union (if applicable). The construction regulation, Ont. Reg. 213/91 requires the following information to be provided:

> 9(2) A notice under subsection 52(2) of the Act (information and particulars respecting a worker's occupational illness) shall contain the following information:
>
> 1. The employer's name, address and type of business.
> 2. The nature of the illness.
> 3. The worker's name and address.
> 4. The name and address of any legally qualified medical practitioner by whom the worker was or is being attended for the illness.
> 5. The name and address of each medical facility, if any, where the worker was or is being attended for the illness.
> 6. A description of the steps taken to prevent a recurrence or further illness.

According to Health Canada, symptoms for COVID-19 can appear in as little as a few days or as long as 14 days after being exposed to someone with the disease. As well, laboratory confirmation may take longer than four days. The requirement to report under ss. 52(2) and 52(3) does not necessitate laboratory confirmation of an occupational illness. They have in no way specified that a confirmed diagnosis is required before reporting. This interpretation is supported by the Ontario Health Care Health and Safety Committee in their Guidance Note for Occupational Injury and Illness Reporting Requirements.

As a best practice, employers should not wait for laboratory confirmation before reporting because they risk violating ss. 52(2) or 52(3) if it were to take longer than four days to produce. Employers should report suspected cases and then subsequently follow-up with laboratory confirmation, elimination, or additional evidence as appropriate. Penalties for failure to report include a fine for a corporation of no more than $1.5 million.

Ontario's Workplace Safety and Insurance Act (WSIA)

The WSIA imposes obligations to report to the Workplace Safety and Insurance Board (WSIB) on both the employer and employee to manage COVID-19 workers' compensation claims in Ontario.

Section 21(1) of the WSIA provides:

> *An employer shall notify the Board within three days after learning of an accident to a worker employed by him, her or it if the accident necessitates health care or results in the worker not being able to earn full wages.*

COVID-19 infection is characterized in Ontario as an "*accident*", which is defined under s. 2(1) of the WSIA as:

> *(a) a wilful and intentional act, not being the act of the worker,*
>
> *(b) a chance event occasioned by a physical or natural cause, and*
>
> *(c) disablement arising out of and in the course of employment.*

The WSIB policy #15-02-01 defines a "*chance event*" in (b) as an identifiable unintended event which causes an injury. It defines "*disablement*" in (c) as including a condition that emerges gradually over time, or an unexpected result of working duties. The definitions under both (b) and (c) capture the contraction of illnesses such as COVID-19.

This interpretation is supported by WSIB policy #15-01-02, which states that if a worker is claiming to have developed a disease as a result of workplace exposure, the employer is required to report to the WSIB. Thus, if an employee contracts COVID-19 in the workplace, it will be considered an accident and the employer will be subject to s. 21(1) reporting obligations.

The illness must have occurred in the course of employment by way of place, time, and activity. If the employer is unsure whether the injury or illness is work-related, it should still be reported to the WSIB. This suggestion is consistent with the WSIA Tribunal's liberal interpretation of "*accident*" in s. 21(1) of the WSIA, and the intent of the subsection to encourage the reporting of all work-related accidents whether they are obviously, or more tenuously, work-related. It is the Board and the Tribunal, based on the parties' reporting of the accident, which then determine whether the illness is work-related or not.

The employer is responsible for reporting an injury or illness of anyone they employ in their business including family, seasonal or temporary employees, certain domestic employees, people doing construction work, students, apprentices, and training participants. "*Worker*" is defined under s. 2(1) of the WSIA as "*a person who has entered into or is employed under a contract of service or apprenticeship …*". WSIB policy #12-02-01 and *Decision No. 2311/09* of the WSIA Tribunal provide guidance for the determination of whether a person is a "*worker*" or an "*independent operator*". A person must be characterized as a "*worker*" to be entitled to claim benefits under the WSIA.

The fact that an employee is infected with COVID-19 would trigger the employer's obligation to report the illness to the WSIB within three days of learning about the infection. With regards to the worker requiring treatment from a health care professional, it is not required that the employer agree that the health care sought by the worker is needed or appropriate.

Even if the employee does not require treatment from a health professional, they will be subject to the province's public health policy which imposes self-isolation for 14 days. This means that they will either be absent from work or there will be modified work while they recover from the illness, which will last for more than seven days.

Any claims received by the WSIB will be adjudicated on a case-by-case basis, taking into consideration the facts and circumstances, in accordance with their *Adjudicative approach document* for COVID-19 claims. The construction employer may object to the claim in writing to the WSIB and prove that the injury occurred outside of work or not in the course of employment, but that is a matter of determination of their claim. The employer's right to object does not relieve them of their initial duty to report the illness. Once Form 7 has been submitted, s. 21(4) imposes a duty on the employer to give a copy of the notice to the worker at the time the notice is given to the Board.

Employers may face a financial penalty as well as prosecution for not reporting, reporting late, not

giving all the details requested, giving false or inaccurate details, and discouraging their employees from reporting a workplace injury or illness.

Furthermore, s. 152(3) of the WSIA provides that an employer who fails to comply with s. 21 is guilty of an offence, and s. 158(1) exposes a person convicted of an offence liable to the following penalty:

> *1. If the person is an individual, he or she is liable to a fine not exceeding $25,000 or to imprisonment not exceeding six months or to both.*
>
> *2. If the person is not an individual, the person is liable to a fine not exceeding $500,000.*

Section 158(2) states that any fine paid as a penalty for a conviction under the WSIA shall be paid to the Board and shall form part of the insurance fund.

Reporting for COVID-19 Infection at Work

If a worker contracted COVID-19 while at work and they have a diagnosis or symptoms of COVID-19, they must inform their employer immediately about their illness and any medical treatment they received. They may further file a claim to determine if they are eligible for WSIB coverage. A diagnosis of COVID-19 will be needed to support a claim.

If a worker believes they were exposed to COVID-19 while at work, but they are not ill at that time (they do not have a confirmed diagnosis or symptoms of COVID-19), the WSIB is asking that they do not file a claim. The WSIA does not provide coverage for workers who are symptom-free even when quarantined or sent home on a precautionary basis.

Ontario's Health Protection and Promotion Act (HPPA)

The HPPA does not specifically address reporting obligations for construction employers, but rather addresses broader reporting obligations imposed on health care professionals and other specified individuals. Part IV of the HPPA (ss. 25-31) imposes legal reporting obligations on specific groups of individuals, such as physicians, practitioners, nurses, hospital administrators, superintendents of institutions, school principals, and laboratory operators. Pursuant to the HPPA, these individuals must report to public health authorities when they encounter a patient who has or may have a disease of public health significance or a communicable disease.

Regulation 135/18 (Designation of Diseases) distinguishes between three types of diseases: (1) a disease of public health significance, (2) a communicable disease, and (3) a virulent disease. COVID-19 would fall in the category of "*diseases caused by a novel coronavirus (such as SARS and MERS)*", which the Regulation characterizes as both a disease of public health significance and a communicable disease. Thus, all of ss. 25-31 are applicable in the context of COVID-19 reporting.

There is a distinction between a "*disease of public health significance*" and a "*communicable disease*". All communicable diseases are diseases of public health significance, but not all diseases of public health significance are communicable diseases. At first glance, this distinction may seem insignificant in the context of COVID-19 reporting since COVID-19 is characterized as both.

The importance of notifying public health authorities of the existence or suspicion of a disease of public health significance or communicable disease does not turn on the location of the patient nor the type of health care practitioner in question. Any health care practitioner licensed under a governing body should be responsible for reporting. These distinctions only serve to impede public health authorities in their ability to protect the public. Thus, as a best practice, health care practitioners who may fall within the two gaps in reporting obligations should report anyway.

Under s. 100(2) of the HPPA, any person who contravenes a reporting obligation of Part IV is guilty of an offence, and s. 101(1) holds such person liable on conviction to a fine of not more than $5,000 for every day or part of a day on which the offence occurs or continues.

The Ontario Ministry of Health released its *COVID-19 Guidance: Essential Workplaces* on May 2, 2020 and its comprehensive *Public Health Management of Cases and Contacts of COVID-19 in Ontario* guidance on March 25, 2020. The City of Toronto has similarly released its *COVID-19 Guidance for Employers, Workplaces and Businesses* which provides guidance to protect employees and customers from COVID-19 in a non-health care workplace or place of business.

These guidelines are essentially the same. They encourage employers to instruct their workers to self-isolate immediately at home and to self-monitor for symptoms if they suspect a COVID-19 infection. These workers should contact their health care provider or Telehealth, who will then report the case to Toronto public health. If a worker has tested positive for COVID-19, their local public health unit will contact them to perform case management and contact tracing.

These guidelines do not impose an obligation on employers to report the employee's suspected case of COVID-19 to public health authorities. Rather, the employers' legal duties to report to public health comes from the *Occupational Health and Safety Act*.

Elsewhere, the World Health Organization and Centers for Disease Control and Prevention have released their guidelines for contact tracing for COVID-19. They encourage those with a suspected case of COVID-19 as well as their close contacts to report their symptoms to the health department. These guidelines also do not impose a legal obligation on employers to report their employees' suspected cases to public health authorities.

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IMPORTANT CLAUSES IN CONSTRUCTION CONTRACTS IN LIGHT OF COVID-19

The arrival of the full effects of COVID-19 to North America has provided a sobering reminder of why certain provisions are included in construction contracts. These provisions may not be ones that parties would focus on in ordinary times; however these are not ordinary times. This article discusses the *force majeure*, pay-when-paid, and termination provisions commonly seen in construction contracts and provides some insight into what they can mean for a project when faced with the effects of the current pandemic.

Force Majeure

> **Force Majeure**: *Force majeure* clauses are generally included in contracts to allow for circumstances where a party is unable to perform the contract due to circumstances beyond its control.

A *force majeure* clause in a construction contract may provide that the obligations of the owner or contractor or both are suspended during the period of a certain event or, as such clauses often state, an event beyond the party's control.

Force majeure can only be declared for the circumstances specified by each specific contract. If a contract contains a *force majeure* clause, whether it will apply to the COVID-19 pandemic depends on the express terms contained in the contract.

Words to look for include "epidemic", "pandemic", "disease", "government intervention", "act of government" or references to "economic" or "market" conditions. If none of these express terms are present, it is possible that a broad term like "any cause beyond the Contractor's control" may cover the effects of the current pandemic. In all cases whether the *force majeure* provisions apply will depend on the impact the condition has on the party required to perform.

In addition to considering whether a *force majeure* has occurred, the notice requirements and relief provided by the provisions also warrant specific comment.

Notice

If a party is considering invoking the *force majeure* provisions under a contract, that party must ensure it complies with the applicable notice provisions. Generally, the contract will provide that the affected party must notify the other party within a specified period of time of the commencement of the *force majeure* event. The notice may also be required to contain certain facts, such as why a certain event has made performance impossible, and the notice must be served on the other party or party representative in a specified manner.

Relief

Invoking the *force majeure* provision, if otherwise applicable, may not provide compensation for the costs incurred as a result of the event. The provision may provide for an extension of time to complete the work under the contract only, or may also contemplate adjusting the contractor's fee as a result of any delay. It is important to review the specific provisions of the contract to see what relief is contemplated.

Let's look at some standard form construction contracts by way of example:

- In CCDC 2, a stipulated price contract, the *force majeure* provision is contained in GC 6.5.3. This provision allows for a reasonable extension of time for delays beyond the contractor's control, but does not allow for termination of the contract due to a *force majeure* event. It also requires the contractor to provide notice to the owner within 10 working days of the commencement of the delay. Under GC 6.5.3 the contractor is not entitled to any additional costs incurred by such delay.
- CCA 1, a stipulated price contract, mirrors the provisions of CCDC 2; however, the notice is required to be delivered within seven working days of the commencement of the delay.
- CCDC 3, a cost-plus contract, has the same provisions as above, a 10-day notice requirement, but allows the contractor's fee to be adjusted as a result of the delay.

Even if you were to have a standard form contract, two other important considerations to keep in mind are:

(1) standard form contracts often have supplemental conditions. It is important to review these conditions and determine if they have adjusted the standard provisions; and

(2) subcontracts often incorporate the prime contract in their terms. If this were to be the case for a project it is important to review the prime contract (including any supplemental conditions) and any order of precedent provisions to see if the prime contract has an applicable *force majeure* clause.

A final consideration is that companies relying on *force majeure* to temporarily relieve them from performance may also have a requirement to mitigate the effects of the *force majeure* event. If you were to see something that may be an issue for your work on the project, consider what steps to

take to ensure the work can continue; for example, are you able to use a different subcontractor or supplier?

Pay When Paid

In times of economic uncertainty it may be relevant to look at your contract to see if there is a "pay-when-paid" provision. Such provisions in construction contracts typically exist where there are layers of subcontractors working on a project. A pay-when-paid clause often states that a contractor does not have an obligation to pay a subcontractor until the contractor is paid by the owner of the project.

However, the wording of these provisions is important because pay-when-paid provisions can be drafted in a number of ways. The provision may provide alternatives for when payment is due other than when the contractor has received payment. For example some pay-when-paid provisions may state that payment is due the earlier of when the contractor is paid, the contract is terminated, or the project is stopped. In this example, there are two other times when payments may become due, other than when the contractor has been paid, that could apply if the construction site is shut down.

Termination

If a site is shut down by an owner, government authority or otherwise due to the pandemic, contractual rights to terminate the contract may come into play.

For example, in a CCDC 2 contract, GC 7.2.2 gives the contractor the right to terminate the contract if the work is suspended or delayed for a period of 20 working days under an order of a court or other public authority, provided the order was not issued as a result of an act or fault of the contractor or its subcontractors. The contractor may terminate in such instance by giving notice to the owner of its intention to do so. If the contractor were to terminate under this clause, it is entitled to be paid for work performed, including a reasonable profit, and for damages sustained as a result of the termination. CCA 1 contains substantially the same provisions.

In a CCDC 3 contract, GC 7.1 provides that the owner may terminate the contract for certain stated reasons including contractor bankruptcy; however, under GC 7.1.7 an owner may also terminate "*if conditions arise which make it necessary*". If the contract is terminated under GC 7.1.7, the owner has an obligation to pay the contractor for all work performed up to the termination date, termination or suspension costs, and a reasonable amount for anticipated loss of profit. The contractor also has the right to terminate the contract if the work is suspended for 20 working days under an order from a court or other public authority (GC 7.2.2). If the contractor terminates for this reason, it is entitled to the same compensation as if the owner had terminated pursuant to GC 7.1.7 (GC 7.2.5).

As an alternative to termination, your contract may have other provisions which may provide guidance in the event of project delay. For example, in a CCDC 2 contract, GC 6.5.2 contemplates that if a contractor is delayed by a stop work order issued by a court or other public authority, the contract time is to be extended and the contractor is to be reimbursed by the owner for reasonable costs incurred as a result of the delay.

The construction industry is facing unprecedented circumstances right now. Review the provisions of your contract to determine what your rights are in case of a government mandated shut down, termination by the owner, or termination by a contractor or subcontractor due to the effects of COVID-19.

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NOTICE REQUIREMENTS IN CONSTRUCTION CONTRACTS (PART 2 OF 2)

In my last article which appeared in the July/August issue of the *Construction Law Letter*, vol. 36, no. 6, I explained that courts will generally enforce contractual notice requirements contained in construction contracts. This article will explore the circumstances in which courts have permitted claims to advance despite a lack of strict compliance with notice requirements.

Constructive Notice

Constructive notice arises when a claimant is able to show that, formalities aside, the party against whom the claim is being made had all of the requisite knowledge of the claim.

For example, in *W.A. Stephenson Construction (Western) Ltd. v. Metro Canada Ltd.*, the B.C. court allowed the contractor's claim despite its failure to comply strictly with the contractual notice requirements. It distinguished *Corpex (1977) Inc. v. Canada* and *Doyle Construction Co. v. Carling O'Keefe Breweries of Canada Ltd.*, and found that the owner had actual or constructive knowledge of the claims through various notices issued throughout the course of the project, as well as "meticulous" meeting minutes documenting the contractor's concerns.

In *Centura Building Systems Ltd. v. Cressey Whistler Project Corp.*, the B.C. court refused to dismiss a claim despite a lack of technical compliance with a contractual notice requirement. The court held that the notice requirement constituted a condition precedent for a successful claim, but stated at para. 54 that:

> *The weight of authority favours the defendants' view that it is the substance rather than the form of the notice under GC 9.2.2 that is important. The course of dealings between the parties may provide the required notice: Foundation at paras. 455-456, 484, 489-498; TNL Paving Ltd. v. British Columbia (Ministry of Transportation & Highways) (1999), 46 C.L.R. (2d) 165 (B.C.S.C.) at p. 260; W.A. Stephenson Construction (Western) Ltd. v. Metro Canada Ltd. (1987), 27 C.L.R. 113 (B.C.S.C.), at pp. 180-182. <u>What is critical is that the notice provide sufficient particularity to ensure that the recipient understands a claim will be advanced against it for costs related to delays</u>.* [emphasis added]

The Alberta court held it was necessary to explore the entire factual scenario to determine if the owner received "adequate notice" of the claim, and found that a trial was required to resolve the issue.

In *Banister Pipeline Construction Co. v. TransCanada Pipelines Ltd.*, the contractor claimed for a significant amount of additional work performed outside the scope of the contract, but failed to strictly comply with the change order procedure. The Alberta court allowed the claim regardless, holding that the owner "was always aware" of the extra work being carried out, and that it would be "unconscionable" to deny payment in the circumstances. The court stated at para. 122 that:

> *TCPL benefited from the work. It had to know that it would increase the cost. It is simply not fair for it to approve the work, watch it being carried out, sign off on the work as it was being done, obtain a better result because of it and then attempt to rely on the fact that Banister failed to follow the provisions of the contract after all of the work was carried out.*

In *Limen Structures Ltd. v. Brookfield Multiplex Construction Canada Ltd.*, the Ontario court refused to summarily dismiss the contractor's claim despite the presence of evidentiary issues with the form of notice provided. It cited the case of *Mar-King Construction Co. v. Peel (Regional Munici-*

pality) for the proposition that "*strict compliance with notice provisions may not be required where there has been some timely notice*", and that a "*practical, common-sense approach to the interpretation of contracts*" is preferable over technical rules of construction. The court held that a trial was necessary to assess both parties' evidence on the notice issue.

In *Architectural Millwork & Door Installations Inc. v. Provincial Store Fixtures Ltd.*, the Alberta court allowed a claim for damages stemming from continuing delay. The contractor had provided initial notice as required by the contract, but the owner alleged that the fact it had issued partial payment for this delay required the contractor to resubmit notice of its claim. The court stated at para. 503:

> *The purpose of the notice is to inform the Owner there are delay problems and the contractor intends to make a claim, and allow it a reasonable opportunity to take remedial steps or make financial or other arrangements to address them ... The substance of the notice is what is important, not the form: Cressey, para 54. The notice must be given in writing, rather than recorded in other writings such as meeting minutes: Dilcon (ABCA), para 60 - 61.*

The court rejected the owner's argument that fresh notice was required, concluding that "[t]*he purposes of the notice provision are to ensure the Owner knows the issues and the potential claims and make whatever arrangements as are appropriate, not to create technical barriers to compensation*".

These cases show that, in certain circumstances, Canadian courts will permit claims despite a lack of strict compliance with contractual notice requirements if the owner is provided with constructive notice of the claim. However, constructive notice is "*intensely fact driven*", and courts will examine all of the surrounding circumstances and the contents of the purported notice in order to determine if the owner had sufficient notice of the claim.

Reservations in Change Documents

Similar to constructive notice is reservations in change documents that clearly state a party's intention to seek additional compensation for new work. Construction contracts commonly contain two mechanisms for changing the scope of work or contract time: Change Orders and Change Directives. Typically, a Change Order is used when the owner and contractor agree on the change in contract price (or method to adjust it), and on the change in contract time. If the change is urgent or the parties are unable to agree, the owner may issue a Change Directive requiring the contractor to commence work promptly. If the parties subsequently reach an agreement on the adjustment to the contract price and time stemming from the change, they record their agreement in a Change Order.

The Canadian Construction Association has released guidelines to help "*contractors, consultants and owners in the valuation of changes*" in the performance of work under a contract. The checklist in the Guidelines recommends analyzing, among other things, the impact costs associated with the interruption of planned work. The Guidelines also contain a Model Change Order Quotation for use by contractors faced with a proposed change. It contains a provision stating that the contractor "*reserve*[s] *th*[e] *right to assess the impact of the change at a later date and to submit any costs related thereto*".

Some decisions have hinted that including an appropriately worded reservation in Change Documents may allow claimants to avoid the strict operation of contractual notice requirements. This is of particular importance in the context of delay and impact claims, where claimants are often unable to quantify their losses until the conclusion of the project, making it difficult to provide de-

tails of the amount claimed in accordance with the contract.

In denying a claim in *Doyle*, B.C. Associate Justice Locke made note of the fact that "*not one of the 50 change orders contained a reservation or indication of the fact that further costs, direct, indirect, or cumulative, could be attributable to the specific item being dealt with*". This statement suggests that an appropriately worded reservation of rights could have satisfied the notice requirement and impacted the outcome of the case.

Relying on this, the Alberta court in *Graham Construction & Engineering (1985) Ltd. v. LaCaille Developments Inc*. found that a reservation in Change Orders could provide sufficient notice to satisfy the contractual notice requirements. The contract contained a provision stating that Change Orders represented the total cost of the work in relation to the Change Order, and that "[n]*o other claim for additional costs will be considered by the Owner unless a written statement is made at the time of issue of the change order that a claim will be made and the reasons for it given*". Partway through the project, the contractor began placing a reservation in all Change Orders reserving "*the right to claim any additional costs incurred as a result of this change, in conjunction with the other changes on the project*". The court held that this reservation constituted sufficient notice under the contract, and allowed the contractor's claim from the point it began including such language in its Change Orders.

Waiver

In a similar vein, courts have allowed otherwise non-compliant claims to continue on the basis that the owner's conduct prevented it from insisting on the strict interpretation of the contract.

In *Clearway Construction Inc. v. Toronto (City)*, the Ontario court interpreted the same notice requirement that was strictly applied by the Ontario Court of Appeal in *Technicore Underground Inc. v. Toronto (City)*. The owner denied additional payment on the grounds that the contractor failed to bring a claim within 30 days from the completion of the work, and sought summary dismissal of the claim.

The court held that *Technicore* left open the possibility that a party may waive its right to rely on the notice provisions in a contract if it demonstrates an intention not to be bound by its terms. It found that, despite the lack of technical compliance with the notice requirement, there was sufficient evidence to suggest that the owner had routinely deviated from the strict terms of the contract. As such, there was a genuine issue requiring trial as to whether this pattern of conduct was sufficient to disentitle the owner to require strict compliance with the notice requirement.

Conclusion

Canadian courts have routinely held that contractual notice requirements benefit both owners and contractors, and that compliance with them is a condition precedent to bringing a claim. However, courts have also shown a willingness to examine the factual circumstances to determine whether the owner received adequate notice or is otherwise disentitled from strictly relying on the terms of the contract.

Constructive notice occurs when a claimant is able to demonstrate that, notwithstanding a lack of compliance with contractual notice requirements, it provided the owner with sufficient notice of the details of its claim. Reservations involve a contractor expressly reserving its right to make a claim for additional compensation in change documentation. Waiver looks at the conduct of the owner to determine whether it is entitled to strictly rely on the notice provisions of a contract.

It is important for both owners and contractors to be aware of the timing, form and substance of notice called for in construction contracts. Those hoping to advance claims should communicate

them as clearly and as early as possible. Those hoping to resist claims by relying on notice requirements should avoid conduct that could impact their right to strictly enforce the contract.

CITATIONS

Architectural Millwork & Door Installations Inc. v. Provincial Store Fixtures Ltd., [2017] A.J. No. 623, 2017 ABQB 390, 67 C.L.R. (4th) 13

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Shell Canada Products Ltd. v. Vancouver (City), [1994] S.C.J. No. 15, [1994] 1 S.C.R. 231

Technicore Underground Inc. v. Toronto (City), [2012] O.J. No. 4235, 2012 ONCA 597, 354 D.L.R. (4th) 516

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