

CONSTRUCTION LAW LETTER

Volume 33 • Number 1

September/October 2016

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DEFERRING TO ARBITRATORS: THE RIGHT TO BE WRONG

Popack v. Lipszyc

Ottawa (City) v. Coliseum Inc.

Two Ontario Court of Appeal decisions, *Popack v. Lipszyc* and *Ottawa (City) v. Coliseum Inc.*, have recently reinforced the long-held principle that deference is to be applied by courts when reviewing arbitral awards. Whether domestic or international arbitrations, courts will defer to arbitrators' decisions so long as their decision is reasonable, and interfere only where the decision is not logically justifiable or if it falls into a very narrow category of issues that affect Canadian society more broadly. The latter category is narrow because arbitrations, by definition, are private, and most often confidential, so matters very rarely have any precedent setting value.

In Ontario, grounds for annulling an arbitral award are limited. For international arbitrations, they are confined to the grounds specifically identified in the UNCITRAL *Model Law on International Commercial Arbitration*, which is a schedule to Ontario's *International Commercial Arbitration Act*. Domestic arbitration, governed by the *Arbitration Act, 1991* contains substantively similar, limited grounds.

Under both the *Arbitration Act, 1991* and the *International Commercial Arbitration Act*, there are only three categories of grounds under which an award may be set aside: jurisdictional grounds (*i.e.*, where a tribunal exceeds its jurisdiction or fails to exercise its jurisdiction), substantive

CONSTRUCTION LAW LETTER

Construction Law Letter is published six times a year by LexisNexis Canada Inc., 111 Gordon Baker Road suite, Suite 900, Toronto, Ont., M2H 3R1, and is available by subscription only.

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ISBN 0-433-40930-4 **ISSN 433409304**

ISBN 0-433-44380-4 (Print & PDF)

ISBN 0-433-44664-1 (PDF)

Subscription rates: \$280

\$380 (Print & PDF)

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grounds (*e.g.*, mistakes of law — a very difficult hurdle), or due process grounds (*e.g.*, unfairness in the procedure).

Under the Model Law, if any of these grounds are met, judges still have discretion not to set aside an award. The test for domestic arbitrations in Ontario is substantially the same.

Facts of *Popack*

Popack and Lipszyc had agreed to submit a dispute to arbitration by a New York Rabbinical Court. Under their agreement, the panel was given the discretion to set the procedure for the arbitration. One of the procedural rules stipulated that the parties had a right to appear before the panel at all “scheduled hearings”. Before releasing its decision, the panel met *ex parte* (*i.e.*, without the parties present) with a prior adjudicator of the parties’ dispute.

Popack subsequently applied to have the arbitral award set aside under art. 34(2)(a)(iv) of the Model Law, on the basis that the arbitrators violated the parties’ right to due process. Specifically, art. 34(2)(a)(iv) provides that a court “may” set aside an award if the arbitration was not in accordance with the agreement of the parties. Popack argued that the panel had abused the process by hearing evidence without the parties present.

The application judge found that the *ex parte* meeting did breach the agreed-upon procedure, and that this could provide a ground upon which to set aside the award. However, the application judge also noted that she had discretion under art. 34(2) the Model Law to uphold the award, and after considering several factors relevant to the exercise of her discretion, she decided to uphold the award despite the panel’s acknowledged procedural error. Mr. Popack appealed to the Ontario Court of Appeal, arguing that the application judge drew the boundaries of her discretion far too widely and considered immaterial factors in arriving at her decision, when in fact she should have ruled in line with case law from other jurisdictions under the Model Law to conclude that she must set aside the award.

The Court of Appeal’s Analysis in *Popack*

The Court of Appeal noted that the parties’ choice of private arbitration implied a preference for the outcome arrived at in that forum and a limited role for judicial oversight.

The court then addressed the scope and form of the court’s discretion in reviewing an arbitration award. Popack argued that discretion must be interpreted consistently with the jurisprudence of other countries if commercial consistency and predictability is to be achieved. However, the Court of Appeal disagreed with Popack’s view of the available case law, holding that, in fact, cases to set aside arbitration awards under the Model Law indicated that the scope of discretion under art. 34(2) depended largely on the alleged ground upon which the award was to be set aside. Discretion to set aside an award should be exercised when the issue goes to the substantive heart of the award. If, for example, there was no valid arbitration agreement, then there would be considerably less discretion to uphold the award.

The Court of Appeal adopted the view, consistent with other international jurisdictions, that discretion under the Model Law is intended to prevent real unfairness and real practical injustice, not some minor procedural irregularities. The essential question of art. 34(2) of the Model Law thus remains the same regardless of how the matter is characterized — what did the procedural error do to the reliability of the result, or to the fairness, or the appearance of fairness, of the process?

The Court of Appeal identified four categories for the test of exercising judicial discretion: relevance or the seriousness of the breach; potential impact of that breach on the result to the fairness of the arbitral proceedings; potential prejudice flowing from the need to redo the arbitration if set aside (which may be less relevant in assessing “real and practical injustice”); and, the parties’ conduct after

learning of the procedural breach, which may be significant in certain instances.

Perhaps most importantly, the Court of Appeal reinforced the main organizing principle of deference to arbitral decision-makers.

Facts of *Coliseum*

Coliseum entered into a long-term lease agreement with the City of Ottawa. A dispute arose that was resolved and produced minutes of settlement. A second dispute later arose that required arbitration under the Ontario *Arbitration Act, 1991* to interpret two provisions of the minutes of settlement. The arbitrator interpreted the provisions in favour of Coliseum, and the City successfully appealed the arbitration award. The application judge disagreed with the arbitrator’s interpretation of the minutes of settlement, substituted her interpretation, and accordingly overturned the arbitrator’s award. Coliseum appealed to the Ontario Court of Appeal, arguing, *inter alia*, that the application judge erred in finding the arbitrator’s interpretation of the minutes unreasonable, and should have exercised a greater degree of deference.

The Court of Appeal’s Analysis in *Coliseum*

The Court of Appeal, citing the recently-decided *Sattva Corp. v. Creston Moly Corp.*, stated that the standard of review on appeal from a commercial arbitration will generally be reasonableness. The court also highlighted the statement from *Popack* that the parties’ selection of their forum implies both a preference for the outcome arrived at in that forum and a limited role for judicial oversight.

A court may deviate from the reasonableness standard only when there are constitutional questions or questions of law of central importance to the legal system as a whole and outside the adjudicator’s expertise.

Quoting *Dunsmuir*, the Court of Appeal stated that “reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions”.

On that basis, the Court of Appeal found it was wrong for the application judge to find that the arbitrator’s decision was unreasonable, since his interpretation of the minutes of settlement was within a range of reasonable outcomes. The trial judge did not have authority to substitute her own interpretation of the minutes simply because she disagreed with the arbitrator’s interpretation.

Discussion

These two recent Ontario decisions re-affirm that Canadian courts will treat arbitrators’ awards with deference notwithstanding obvious procedural errors, or a court’s disagreement with the arbitrator’s findings. The bar for overturning or setting aside an award on the reasonableness standard remains high indeed, so long as the arbitrator’s reasoning is logical and gives rise to a feasible interpretation of the dispute. Essentially, arbitrators have the “right” to be wrong, so long as their reasoning is sound and their decision falls within the spectrum of possible and reasonable outcomes.

Notwithstanding the differences between *Popack* and *Coliseum*, both arrive at the same conclusion, supported by similar reasoning: *Popack* addressed a discretionary question under the Model Law (adopted under the *International Commercial Arbitration Act*), while *Coliseum* addressed a question of contractual interpretation under the domestic *Arbitration Act* of Ontario. Although dealing with

two different issues, both cases were guided by notions of deference. Both relied on the guiding principle that the parties’ selection of their arbitral forum implies both a preference for the outcome arrived at in that forum, and a limited role for judicial oversight of the award made in that forum.

As more and more construction disputes are decided in alternative dispute forums like arbitration, adjudication, and dispute review boards, it should be reassuring to participants in the industry that they can expect certainty and finality in their dispute resolution practices outside of the court room. This is particularly important as we see more non-lawyers playing important decision-making roles. The industry’s continued march toward these alternative forums, with expert decision-makers rather than strictly legal ones, should be viewed as a reflection of a general preference for the efficiencies and benefits of these alternative forums.

Like the construction industry, Canadian courts recognize the commercial benefit to parties of timely and efficient dispute resolution practices and that parties willingly balance these benefits against the risk of imperfectly reasoned decisions. But when one party seeks to change that essential bargain, courts have sent the message: you made your bed; you must lie in it. Once a party has committed to final and binding arbitration, the bar will be very high to escape that commitment.

Ontario Court of Appeal

Popack v. Lipszyc
Doherty, G. Pardu, M.L. Benotto JJ.A.
February 18, 2016

Ontario Court of Appeal

Ottawa (City) v. Coliseum Inc.
J.C. MacPherson, K. van Rensburg, B.W. Miller JJ.A.
May 13, 2016



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PUBLIC CONTRACTS: QUÉBEC INTRODUCES THE AUTORITÉ DES MARCHÉS PUBLICS

On June 8, 2016, the Québec government introduced Bill 108 (the Bill) proposing the establishment of the Autorité des marchés publics (AMP) to replace the Autorité des marchés financiers (AMF) as the organization responsible for overseeing all public procurement for public bodies.

Key events leading up to the proposed Bill

- In October 2011, the Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry (Charbonneau Commission) was enacted to investigate potential corruption in the management of public contracts in the Québec construction industry.
- In December 2012, the *Integrity in Public Contracts Act* (the *Integrity Act*) amending the *Act respecting contracting by public bodies* was passed and assented to promote integrity in the public procurement process in the Province of Québec. In accordance with the *Integrity Act*, enterprises must obtain prior authorization from the AMF if they wish to compete in a call for tenders or an awards process for contracts and subcontracts with Québec government departments and agencies and Québec municipalities involving an expenditure equal to or

greater than the thresholds determined by the government.

- In its report released in November 2015, the Charbonneau Commission concluded that the establishment of a provincial public market framework body is key to ensuring the integrity of the tendering, awarding and management processes for public contracts. As such, it recommended the Province of Québec establish the “Autorité des marchés publics”. The recommendation was accepted by the Québec government, which introduced the *Act to facilitate oversight of public bodies’ contracts and to establish the Autorité des marchés publics* (the Act) on June 8, 2016.

Overview of the proposed Bill

Establishment of the Autorité des marchés publics

The Act establishes the AMP, which shall oversee all public contracts, and shall apply the *Act respecting contracting by public bodies* in determining the eligibility for public contracts, granting prior authorization to obtain public contracts or subcontracts, and evaluating contractors’ performance. As such, the AMP assumes all the existing responsibilities that were held by the AMF under the *Act respecting contracting by public bodies*.

In addition, the AMP oversees all other contracting processes determined by the government.

Among other tasks, the AMP must:

- examine the compliance of a tendering or awarding process for a public contract of a public body — the review may be done on the AMP’s own initiative, or after a complaint is filed by an interested person, or on the request of the Chair of the Conseil du trésor or a bidder;
- maintain the register of enterprises ineligible to enter into a public contract or sub-

contract and the register of enterprises authorized to do so; and

- ensure that the contract management of the Ministère des Transports and any other public body the government designates is carried out in accordance with the normative framework to which the body is subject.

Various powers are given to the AMP to conduct audits and investigations and to give subsequent orders and recommendations. These may include, but are not limited to, orders to a public body to amend its tender documents or to cancel the public call for tenders, and to suspend the performance of any public contract or cancel such a contract.

The Bill sets out the AMP's organizational structure and operational rules. It specifies that the AMP is to be composed of a president and one or more vice-presidents appointed by the government. The Bill also requires the AMP to establish a strategic plan, which must be approved by the government, as well as rules of ethics applicable to its staff members.

Amendments to the Act respecting contracting by public bodies and the Tax Administration Act

The Act amends the *Act respecting contracting by public bodies*. According to the amendments:

- Public bodies are required to publish, prior to entering into certain contracts by mutual agreement, a notice of intention. They must also establish a procedure for receiving and examining the complaints filed with them in the course of the tendering or awarding process for a public contract.
- The government may require an enterprise to obtain authorization to contract while it is in the phase of performing a public contract.

- The government may require an enterprise to obtain authorization to contract in order to enter into a public contract involving an expenditure below the applicable authorization threshold.
- The AMP could cancel an application for authorization to contract or suspend such an authorization if the enterprise in question fails to communicate the required information.
- An enterprise that has had its application for authorization to contract cancelled or has withdrawn its application may not file a new application within the year after such cancellation or withdrawal.
- The Conseil du trésor could give permission, "in exceptional circumstances", to an enterprise to enter into or to continue performing a contract by mutual agreement or a public call for tenders despite a negative decision of the AMP.
- A penal offence will be introduced for anyone who communicates or attempts to communicate with a member of a selection committee for the purpose of influencing the member.
- The disclosure of information that allows the number of enterprises that asked for a copy of the tender documents or that tendered a bid to be known, or that allows those enterprises to be identified, is limited.

Yet, the process to obtain prior authorization for public contracts and public subcontracts remains untouched, with the exception that an enterprise must submit its application in the form prescribed by the AMP (formerly prescribed by the AMF).

It is noteworthy that the Bill amends the *Tax Administration Act* to allow the Agence du revenu du Québec to communicate to the AMP information obtained under fiscal laws that the AMP needs for the purposes of prior authorizations.

CASE SUMMARY



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CLAIMS MADE IN WRITING VERSUS WRITTEN NOTICE OF CLAIM: SAME THING?

Ledore Investments Ltd. (c.o.b. Ross Steel Fabricators & Contractors) v. Ellis-Don Construction Ltd.

In 1997, Ellis-Don Construction Ltd. was awarded the prime contract for the rehabilitation of a section of the Bluewater Bridge, spanning the Canadian-American border. Ellis-Don subcontracted the structural steel work to Ross Steel Fabricators & Contractors. The following are two important clauses from the subcontractor agreement:

Article 4 – Should either party fail to make payments as they become due under the terms of this agreement or in an award by arbitration or as ordered by a court, interest at 3 percent per annum above the bank rate on such unpaid amounts shall also become due and payable until payment. Such interest shall be compounded on a monthly basis.

Article 15 – As of the date of the final certificate for payment of the prime contract, the contractor expressly waives and releases the subcontractor from all claims against the subcontractor, including without limitation those that might arise from the negligence or breach of this agreement by the subcontractor, except one or more of the following: (a) those made in writing prior to the date of the final certificate for payment of the prime contract and still unsettled...

During the course of the project, Ellis-Don complained about the delay in work being performed by Ross Steel and sent several letters of complaint

to notify the subcontractor that any associated delay costs would be back charged to Ross Steel. By December 1998, Ross Steel had finished all of its work and sent its final invoice to Ellis-Don for the last payment and holdback release.

The project was completed later than originally planned. In July 1999, Ellis-Don and the owner reached a settlement, whereby the owner waived its claim for liquidated damages from Ellis Don. In August 1999, the owner issued a final certificate of payment.

Despite that, Ellis-Don withheld the release of Ross Steel's last payment as well as its holdback. In response to Ross Steel's claim for the remaining contract amount owing to it, Ellis-Don counter-claimed and alleged that the schedule slippages caused by Ross Steel's work had significant impact on the work of Ellis-Don and its other subcontractors. The parties finally agreed to proceed to binding arbitration.

Deciding on the applicability of the waiver clause (Article 15) was one of the most important issues before the arbitrator, as both parties relied on that clause in asserting their claim. After hearing both sides, the arbitrator found that Ellis-Don was "*barred and estopped*" by the provision of Article 15 of the agreement from asserting any claims based on the alleged delay.

In the opinion of the arbitrator, mere *intention* to make a claim was not the same as an *actual* claim, and the letters relied upon by Ellis-Don "*did not rise to the level of a claim in writing that was still unsettled before the date of the final certificate for payment*" as required by the parties' agreement. In particular, the arbitrator found that the letters by Ellis-Don to Ross Steel in that regard "*were not sufficient to satisfy the requirements of Article 15 of the parties' agreement*".

The arbitrator therefore determined that Ellis-Don had no defence to Ross Steel's claim for

\$742,372.46, and granted partial summary judgment to Ross Steel for that amount. The arbitrator also found that Ross Steel was entitled to interest on that \$742,372.46, calculated at three per cent per annum above the bank rate, compounded on a monthly basis from the beginning of August 1999, until the date of payment. This would result in an interest award to Ross Steel worth approximately \$1,200,000.

On May 4, 2015, Ellis-Don filed a motion to seek leave to appeal the arbitrator's decision. Ellis-Don sought relief including:

1. Leave to appeal the arbitrator's decision that Ellis-Don was contractually barred from asserting its claims based on the alleged delays and failings of Ross Steel;
2. Leave to appeal the arbitrator's decision that the rate of interest referred to in the parties' agreement applied to the amounts found to be owing to Ross Steel.

Justice Leach of the Ontario Superior Court of Justice found that the arbitrator's decision raised questions of law that could be reviewed by the court. According to the judge, the arbitrator's decision was based on his threshold view that provisions of a construction contract requiring "claims made in writing" must not be treated the same as the provisions requiring written notice of a claim.

The judge referenced the British Columbia Court of Appeal's decision in *Doyle Construction Co. v. Carling*. The case sets out some general principles, which have been widely accepted and considered by other courts. These principles help to determine what constitutes valid notice to satisfy the contractual provisions. The contractual provisions requiring such notice can be satisfied where:

- the complaint goes beyond "grumblings" to display or indicate an "intention to claim";

- the claimant gives some particulars as to what the complaint is, so that the other party has an opportunity to consider its position and the possibility of taking corrective measures; and
- the complaint is timely; *i.e.*, submitted "in enough time" to permit the other party to take "guarding measures" if it so desires.

The parties in a typical contract can use these principles as a guideline to determine the adequacy of a written notice of claim, where such notice is a prerequisite condition to the advancement of a claim. Whereas *Doyle* has been used as a seminal case to establish the necessary components to satisfy the written notice provisions, the relevant contractual provisions at the centre of the *Doyle* case dealt with the provisional requirements of the claims to be made in writing.

The judge found it arguable that the arbitrator made an error of law when he found that a requirement for "*claims to be made in writing could and should not be treated as provisions requiring written notice of claims*". After reviewing the circumstances, the judge granted a leave to appeal to Ellis-Don based on the following considerations:

- the arbitrator did not apply the general principles in *Doyle* to determine whether or not the contractual requirements of Article 15 had been satisfied, and
- a substantive appeal before a judge may be required to answer the legal question of whether claims made in writing should or should not be treated as the requirements of written notice of claim.

The judge held that *Doyle* arguably provides "*a legal authority for the general proposition that provision requiring claims to be made in writing should be treated as provision requiring written notice of claims*", contrary to the approach taken by the arbitrator.

For these reasons, the judge believed that the first aspect of Ellis-Don's leave to appeal from the arbitrator's decision raised an extricable question of law, in respect of which leave to appeal should be granted, given that the other requirements of s. 45(1) of the *Arbitration Act, 1991* had been satisfied.

However, the judge noted that there was no apparent "*extricable question of law*" raised by the second aspect of the leave to appeal, dealing with the arbitrator's interpretation and application of the interest provision in the agreement. In the judge's view, the interest-related aspects of Ellis-Don's leave to appeal involved a question or questions of mixed fact and law and therefore fell outside the scope of s. 45(1) of the *Arbitration Act*.

In the result, Ellis-Don was granted leave to appeal in relation to its contention that the arbitrator erred in law in finding that the letters sent by Ellis-Don to Ross Steel did not constitute an unsettled "claim made in writing", capable of satisfying the provisions of Article 15.1 of the parties' agreement. Ellis-Don was denied leave to appeal in relation to its contention that the arbitrator erred in finding that the contractual interest provisions applied so as to give rise to "pre-judgment" interest on the principal amount awarded to Ross Steel.

Ontario Superior Court of Justice

I.F. Leach J.
November 4, 2015



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TIME AT LARGE — FIVE YEARS LATER

In a 2011 article in the *Journal of the Canadian College of Construction Lawyers*, Christopher O'Connor and Dirk Laudan presented a detailed

analysis of the principle of "time at large" in Canada. The authors encouraged debate and further legal analysis by fellow construction lawyers. This article addresses some of O'Connor and Laudan's suggestions in light of subsequent case law.

Simply put, if time is at large, the contractor is to complete the contract within a reasonable time rather than a fixed schedule. While time may be at large from the outset of a construction contract, the principle is more interesting and controversial when invoked in respect of a contract with a schedule or fixed completion date. In such cases, time may be placed at large by operation of the prevention principle, *i.e.*, when the owner's conduct prevents the contractor from completing within the specified time.

Bhasin v. Hrynew

The Supreme Court of Canada's recent decision in *Bhasin v. Hrynew* reinforces O'Connor and Laudan's conclusion that time may be placed at large even where the owner has not breached the contract but rather was taking actions specifically permitted by the contract.

In *Bhasin*, the Supreme Court found that "*in carrying out his or her own performance of the contract, a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner*". Despite being permitted by contract, an owner's action, for example, to instruct extra work or modify the design, can impact the contractor's ability to complete the work on time. By taking such permitted actions under a construction contract but failing to have appropriate regard for the contractor's interests in completing before the date upon which the liquidated damages begin to accrue, one can easily see why the contractor should be released from its obligation to complete within the specified time. In these circumstances, the prevention principle and the general organizing principle of good faith operate hand-in-hand to al-

low a contractor to argue for completion of the work within a reasonable time.

Ross-Clair

O'Connor and Laudan argue that time may also be placed at large as a result of the failure of the contract machinery, including a situation in which the consultant rejects a contractor's application as being unsupported by the contractually required documentation.

The Ontario Court of Appeal recently opined on the level of detail required to support a claim for an extension of time in *Ross-Clair v. Canada (Attorney General)*. In *Ross-Clair*, the contractor submitted a claim for extras incurred as a result of delays. The contract required a written claim with "sufficient description of the facts and circumstances of the occurrence" in order to allow the engineer to determine whether the claim is justified. In this case, the contractor's claim cited "delays due to site conditions, weather conditions, alterations to the contract and disruptions to the original sequence of construction" as the reason for an extension of time and provided a breakdown of the various subcontractors and associated costs. The engineer rejected the claim for insufficient detail.

The Court of Appeal found that the engineer properly refused to consider the claim for extension of time as the claim failed to provide sufficient detail. Following the finding in *Ross-Clair*, a contractor's failure to submit the requisite supporting documents for a claim will unlikely be considered a failure of the contract machinery, triggering the prevention principle.

Gaymark

O'Connor and Laudan discuss a case from Australia, *Gaymark Investments Pty Ltd. v. Walter Construction Group Ltd.*, in which a contractor failed to provide notice required by the contract in respect of a 77-work day delay caused by the owner. The Northern Territory Supreme Court upheld the arbitrator's decision that the owner could not claim

liquidated damages as it would allow the owner to benefit from the delay that it caused. While this is sound equitable logic, the case has received much criticism in the U.K. where its reasoning has been rejected by U.K. courts, and will unlikely be applied in Canada.

We believe that the principles set out in the Supreme Court of Canada decision in *Corpex (1977) Inc. v. The Queen in right of Canada*, and the Ontario Court of Appeal decision in *Technicore Underground Inc. v. Toronto (City)* provide a strong case for the argument that the Australian approach will not be followed in Canada.

In *Corpex* the Supreme Court of Canada rejected a claim because the contractor failed to provide the notice required by the contract. The Ontario Court of Appeal expanded upon the issue in *Technicore* and clarified that while evidence of prejudice to the owner as a result of a failure to provide notice might be important, lack of evidence to show prejudice did not bar an owner's right to a enforce notice provision. Rather, the Ontario Court of Appeal determined that the owner was assumed to have been prejudiced by a claim made by the contractor long after notice was required to have been provided.

The strict adherence by Canadian courts to notice requirements, and the assumption that failing to comply with these requirements causes prejudice, are directly in line with Justice Jackson's comments in *Multiplex Constructions (UK) Ltd v. Honeywell Control Systems Ltd*. In *Multiplex*, Justice Jackson rejected *Gaymark*, noting that contractual notice requirements serve a valuable purpose by enabling matters to be investigated while they are still current and allow the owner the opportunity weigh the financial consequences of its decision.

A simple example which underscores the logic behind this reasoning is the construction of a new hotel by a developer to be leased to a hotel company on a certain date, failing which the developer

will incur financial losses. Accordingly, the developer will seek to include a strict completion date in the construction contract with the contractor with liquidated damages for any delay. If the developer's actions cause delay, but the contractor fails to provide the requisite notice under the contract, the developer is able to continue to rely upon its contractual completion date and liquidated damages to protect himself from liability and losses to the hotel company. If the developer had been provided proper notice, as bargained for, it would have the opportunity to develop mitigation strategies to avoid financial loss as a result of late delivery of the project to the hotel company.

While *Gaymark* has not yet been addressed in Canada, Canadian courts are unlikely to allow a contractor the benefit of the prevention principle to place time at large as a result of its failure to provide requisite notice.

Liquidated damages as a cap to delay damages when time is at large

If time is placed at large, liquidated damages provisions no longer apply. They may, however, act as a cap to damages for delay.

As stated above, when time is at large, the contractor must still complete its work within a reasonable time. An owner can then make claims for delay caused by the contractor beyond this "reasonable time". In the 1978 Supreme Court of Canada decision in *J.G. Collins Insurance Agencies Ltd. v. Elsley*, the Court found the liquidated damages were equivalent to a penalty and therefore unenforceable against the contract, but that the owner was still entitled to its actual losses arising from the contractor's delays. However, the Supreme Court of Canada capped the damages recoverable by the owner at the amount of the liquidated damages, or penalties, on the basis that the owner should not be entitled to obtain the benefit of the intimidating penalty clause and then ignore it when it is advantageous to do so.

The same logic should apply in the case of the prevention principle. If the liquidated damages provisions do not apply as a result of time being at large due to the owner's conduct invoking the prevention principle, the owner should not benefit. To hold otherwise would open up the opportunity for owners to purposefully invoke the prevention principle, which actions would be contrary to the principles established by the Supreme Court of Canada in *Bhasin*.

CASE SUMMARY



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TENDERING: CURABLE IRREGULARITY OR SHARP PRACTICE?

True Construction Ltd. v. Kamloops (City)

The decision of the British Columbia Court of Appeal in the recent case of *True Construction Ltd. v. Kamloops (City)* is a reminder to contractors that it is essential to carefully review tender requirements when submitting a bid. The case also reminds owners to ensure instructions are clear in order to avoid future confusion and exposure to potential liability. *True Construction* provides an illustration of how courts determine which defects or errors in a bid can be waived, potentially resulting in a determination that the bid is "materially non-compliant" and therefore unacceptable.

Background

On September 27, 2010, the City of Kamloops issued a call for tenders for the construction of the Aberdeen Fire Hall. The Invitation to Bid included "Instructions to Bidders" which required bidders to place a completed bid form in a sealed envelope

and deliver it to the City prior to the 2:00 p.m. deadline on November 3, 2010.

The City did stipulate in its Instructions to Bidders that the bidders could revise their bids in person or by fax by using Appendix F, which allowed revisions to the list of subcontractors and subcontractor pricing.

True Construction Ltd. submitted its bid form prior to the deadline. True did not, however, include the two-page portion of Appendix 'A' which required the bidder to list subcontractors not bid through the bid depository system. This was intentional as True wanted to delay its selection of subcontractors until it had received all relevant pricing information. True later faxed the missing portion of Appendix 'A' under cover of Appendix F.

Once the deadline for submission of bids had passed, the City reviewed all submitted bids and determined that True was the low bidder. Nevertheless, the City decided to disqualify True's bid as non-compliant and accepted the second lowest bid of Tri-City Contracting (B.C.) Ltd.

Although the City knew it could waive an irregularity, it had concluded that the defects in True's bid were critical and materially non-compliant with the tender documents, since the completed appendices had not been included with the original sealed bid. The City also determined that choosing True's bid would have damaged the City's ability to attract quality bidders for future projects, given the advantage True had obtained by delaying submission of its selection of subcontractors.

The main reason the City gave for its decision was the fact that the vast majority of the work on the fire hall project would be performed by subcontractors. In addition, if subcontracts were not governed by the bid depository system in place, bidders could negotiate pricing directly with subcontractors. The City, therefore, concluded that True had gained a greater advantage in obtaining lower prices from subcontractors in

their bid by delaying submittal of subcontractor pricing.

True commenced an action, arguing that its bid was substantially compliant and that the missing appendices, which had been rectified by the faxed submissions, should only be considered an irregularity, making the bid acceptable.

Decision of the Lower Court

The British Columbia Supreme Court focused on the question of whether True's bid was compliant. True took the position that its bid was compliant, as the tender documents were silent on whether the bidders were required to complete the appendices, place them in the sealed envelope, and deliver them to the City. The City argued that in order to be compliant, a bid had to include all relevant appendices.

The court found that the tender documents clearly stated that the appendices were part of the bid form, and that Appendix F only allowed for revision of the price of the bid, and not addition of materials that should have been included in the bid itself.

The court also considered whether the issues with True's bid were technical in nature such that the City could waive the irregularity and accept the bid, or whether the defects rendered the bid "materially non-compliant". The court concluded that the "discretion clause" in the bid documents allowed the City to waive irregularities in a bid form, but only if those irregularities were minor or technical.

The court finally concluded that True's bid was materially non-compliant and that the City was right to reject True's bid and accept Tri-City's second lowest bid. The trial judge held that "material non-compliance" consisted of "anything that might impact the reasonable expectation of the parties or undermine the integrity of the tendering process ...", including defects potentially providing a competitive advantage to a bidder.

The court found that True used the period between submission of its sealed bid and the completed Appendix A to continue negotiations with subcontractors in order to secure a better price. True's inclusion of these prices in Appendix A in a non-sealed format after submission of the sealed bid had the potential to impact the fairness of the bid process.

Court of Appeal

The Court of Appeal decision was unanimous and accepted much of the trial judge's findings. The court held that the tender documents when read in their entirety were "clear and unambiguous". It also held that Appendix A should have been submitted along with the two-page bid form in the sealed bid.

The court agreed with the trial judge that True's bid contained defects that rendered it substantially non-compliant. Specifically, the court found that Appendix A was a "material component" of the tender, as it directly impacted the price and schedule of the contract, so that to waive such a defect would "...beget uncertainty and unfairness, contrary to the policy rationales behind the tendering process".

The last issue the court dealt with was whether the substantially non-compliant bid could later be "cured" by faxing the missing documents prior to the deadline. The court held that this was not possible, as True had obtained an "objective competitive advantage" from the manner in which it submitted its bid. The court distinguished an incomplete bid, later made complete by faxing further documents, from the submission of a complete and sealed bid that is subsequently revised. In the second case, the bidder would be bound to perform the contract if its bid were accepted. True's competitive advantage, it was held, arose from the opportunity it gained to avoid the risk of being bound to perform by potentially arguing that its sealed bid was not compliant in the event it failed to negotiate favourable subcontractor pricing.

Conclusion

True Construction again confirms that an owner should be able to take into account the selection of subcontractors when awarding a bid, because subcontractor work accounts for a significant portion of many tenders. The Court of Appeal's discussion of the "discretion clause" confirms that an owner can consider more than just price in deciding which bidder to select, and that an examination of the facts may need to be undertaken to determine if a bid is "materially non-compliant".

Interestingly, the City relied on the discretion clause to waive an irregularity in Tri-City's bid, as Tri-City's faxed revision to its price was submitted 11 minutes before it had delivered its completed sealed bid in person.

The case also highlights the attention of Canadian courts to ensuring that the bidding process remains fair and honest. It sends a message to bidders that while attempts to gain competitive advantage may be imagined by the bidder to be within the bid regulations, they may be interpreted otherwise by courts.

True Construction clearly demonstrates that bidding instructions need to be drafted without ambiguity to avoid possible liability, that the bidder needs to read the bidding instructions carefully, and that it is safer to inquire with the issuer of the bid if there seems to be an ambiguity. The case certainly shows that courts are alert to sharp practice behind irregularities.

The Court of Appeal's focus on the wording of the actual tender documents also shows the court's emphasis on the contract itself in determining whether True's irregularity was minor or material, and whether Appendix 'A' was part of the bid form. The court was focused, as it should have been, on contracts and commercial relationships, which are at the heart of any tender process.

British Columbia Court of Appeal

D. Smith J.A., Harris J.A., Goepel J.A.
April 21, 2016

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Harvey J. Kirsh is a recognized authority in construction law, and has over 40 years of experience in the arbitration, mediation and litigation of complex construction claims and disputes arising out of infrastructure, energy, transportation, industrial, commercial, and institutional projects. He is certified by the Law Society of Upper Canada as a Specialist in Construction Law. Harvey has also been designated as a Chartered Arbitrator (C. Arb.), is included in the *Chambers Global* list of Canada's top arbitrators, and is the recipient of the Ontario Bar Association's Award of Excellence in Alternative Dispute Resolution. Harvey is the Founding President and Governor of the Canadian College of Construction Lawyers, and also has the distinction of having been elected a Fellow of both the American College of Construction Lawyers and the College of Commercial Arbitrators.

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