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Update on the Law of Notice

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**Editor's Note**

This is one of two articles in the 2019 issue of the CCCL Journal on the subject-matter of contractual notice of claims. It approaches the issue from a different perspective than the article authored by Msrs Scheibel and Vetsch.

As with Scheibel and Vetsch, the analysis begins with the two early leading cases representing the high water mark of strict enforcement, being the 1982 decision of the Supreme Court of Canada in *Corpex* and the decision of the B.C. Supreme Court in *Doyle Construction*. However, at this point the analysis diverges from the approach taken by Scheibel and Vetsch.

The authors, CCCL Fellow Brendan Bowles and his co-author Madalina Sontrop, discuss the different results and approaches as between provinces and highlight the common underpinnings of the different approaches. For example, the courts in British Columbia have historically taken a more lenient attitude toward compliance, beginning with the decision of the B.C. Supreme Court in *First City Development Corp v. Stevenson Construction Co.* in the mid-1980s. In subsequent BC cases, the same court showed its willingness to accept less formal forms of notice, such as meeting minutes, and relied upon constructive notice to underpin the result. Significantly, the B.C. cases emphasized the issue of prejudice, or lack thereof, as an important factor.

In contrast, the courts in Alberta are more inclined than the courts in British Columbia to require strict compliance with notice provisions. The “Alberta” section of the article begins with an analysis of the court's decision in *Dilcon*, which is in stark contrast to the B.C. approach that allows for meeting minutes to be considered as adequate notice. But, as noted in the article, there are exceptions to this strict approach in Alberta, including the *Banister* case, in which the court found for the contractor on the basis of unconscionability.

In Ontario, there is less consistency in the jurisprudence. The article considers some recent Ontario decisions, including *Bemar Construction*, *Technicore*, *Ross-Clair*, *Ledore*, *Limen*, and *Clearway*. In their overview of the Ontario cases, the authors note that more recently the courts have \*2 shown “an inclination to look at the substance of the transaction”, and that the recent trend is that lack of strict compliance does not always lead to dismissal of the claim.

At the conclusion of their analysis, the authors correctly observe that because of the importance of this issue both to the law and to the construction industry in Canada, and in light of the different trajectories taken by courts in different provinces, it would be worthwhile for the Supreme Court of Canada to clarify the law in relation to strict compliance with notice provisions. Finally, the authors suggest several factors that the courts could use, in whole or in part, to create a legal test on this issue, including whether the conduct of the parties evidence an agreement to dispense with strict compliance, whether there is actual knowledge and absence of prejudice, and whether application of the strict compliance rule would result in an unconscionable result.

**1. INTRODUCTION**

It is oft said that “hard cases make bad law”. The Canadian approach to contractual notice of delay claims reflects this aphorism. Such clauses are ubiquitous; rarely is a construction contract silent as to the requirement to give notice of a delay claim. One could be forgiven for thinking the issue has already been settled by our Supreme Court in 1982, on the basis that compliance with a contractual notice provision was henceforth a condition precedent to a claim. This article will show that, over the last 36 years, the courts have been hesitant to treat compliance with such requirements as determinative of a delay claim. The cases are often driven by the facts, and there are conflicting approaches, not just between various provinces, but sometimes even within the same province.

A reason for this disparity is likely founded in a desire to “do right” by the parties. It looks unfair when a party is deprived of an opportunity to pursue an otherwise meritorious claim over a missed deadline, when their contracting partner had ample opportunities to mitigate the delay, was well aware that the project was behind schedule, and that a claim was going to be advanced against them as a result. Likewise, it is unfair that a party should be caught by surprise and prejudiced by an “after the fact” delay claim. While this may appear sufficiently simple in theory, in practice, given construction site dynamics, notices of delay “... will often damage the relationship with the owner and/or its consultant. A notice of delay instantly puts the owner and/or its consultant on the defensive against a claim, which can have the effect of reducing the collaboration of all parties in finding a solution to avoid the very claim \*3 they are concerned about”.<sup>1</sup> Evidently, much is at stake for both owners and contractors dealing with notices of delay claims. Moreover, given the construction industry's prominent position in the Canadian market, there is a public interest in a fair and consistent application of legal principles. Nonetheless, it remains uncertain whether conventional technical breaches of notice provisions will receive the same treatment as blatant, egregious breaches.

With statutory adjudication bound to make its debut in Ontario in October 2019, it is inevitable that this issue will be put to adjudicators in real time, presumably without a publicly searchable database of adjudication decisions.<sup>2</sup> How are counsel to advise their clients? Do the requirements of the contract matter, or do they not? The transactions that clients seek guidance on are not minor, either in the sense of the actual dollar amounts at stake or in terms of the relative importance of these projects to the Canadian economy. We therefore believe that both branches of the test for leave to appeal to the Supreme Court of Canada are satisfied in respect of this issue: first, there is conflicting case law; and second, this is a matter of national importance. Hopefully the right case will come along to enable the Supreme Court to resolve the discrepancies we identify in this article, and make “good law” that will have positive repercussions for this important sector of the economy, in both common and civil law jurisdictions across Canada.

In view of this background we seek to show that recent case law suggests that notice of apparent lack of compliance is not always determinative of a construction delay claim. We propose, based on recent case law in Ontario, and on drawing parallels with other provincial courts, that the judiciary is increasingly taking an approach of equity rather than strict compliance. This is demonstrated in cases where judges are assessing other extrinsic factors such as meeting minutes and communications between the parties to make a determination with respect to a contractor's delay claim. However, other courts have focused their attention on more technical breaches. Some of this variance in approach is reflected in differing outcomes between different provincial appellate courts.

\*4 Ultimately, we believe it will be of benefit for the Supreme Court of Canada to determine whether this trend should continue. Should a purposive or technical approach be taken in respect of this national issue? If the approach is to be purposive, should the Supreme Court establish national guidelines for when strict compliance is to be disposed with? For example, should strict compliance in terms of contractual requirements of form and timing of the notice be a condition precedent or a starting point? If the latter is the preferred approach, there should be a rational, predictable basis on which courts relieve from failure to comply strictly. Based on existing case law, these factors could include: a) conduct which would evidence that the parties have dispensed with or renounced strict compliance with the contract; b) actual knowledge of a claim and a lack of prejudice to the recipient; or c) unconscionability. In *Tercon*,<sup>3</sup> the Supreme Court of Canada clarified an area of uncertainty in the law by upholding the use of exclusion clauses in a call for tenders, but enunciated a test to determine when claims for breach of Contract A may proceed even in the face of such a clause. The last three and a half decades of Canadian case law on the applicability of notice clauses to delay claims should provide the Supreme Court with a similar opportunity to clarify this uncertain area of law. In

short, it is time to revisit a seminal 1982 decision in light of conflicting provincial authority, and the stakes for this important segment of the Canadian economy.

### 1.1 *Corpex (1977) and its Application in Doyle Construction*

The Supreme Court of Canada's 1982 landmark decision in *Corpex (1977) Inc. v. Canada*<sup>4</sup> established that notice clauses in construction contracts represent a condition precedent to a claim--contractors were to adopt a strict compliance approach if they wished their claims to be successful.

The facts of *Corpex* are worth reviewing. The contractor entered into a contract with the federal government to build a dam across a river. The initial stage of the contract required the dewatering of the river, which the contractor estimated on incorrect information regarding the nature of the soil contained in the plans and specifications. After the pumping commenced, it became evident that the pumping equipment obtained for the job was not up to task, and that additional pumps would have to be installed. The contractor, however, did not give notice to the government that it would claim these additional costs resulting from the mistake as \*5 to the nature of the soil conditions. Nonetheless, it proceeded to sue the government, claiming damages of \$489,277.89.

The Supreme Court found that the contractor did not give notice of its claim as required by Clause 12 of the General Conditions (GC), which stated that:

12. (1) No payment shall be made by Her Majesty to the Contractor in addition to the payment expressly promised by the contract on account of any extra expense, loss or damage incurred or sustained by the contractor for any reason, including a misunderstanding on the part of the Contractor as to any fact, whether or not such misunderstanding is attributable directly or indirectly to Her Majesty or any of Her Majesty's agents or servants (whether or not any negligence or fraud on the part of Her Majesty's agents or servants is involved) unless, in the opinion of the Engineer, the extra expense, loss or damage is directly attributable to

(a) a substantial difference between information relating to soil conditions at the work site, or a reasonable assumption of fact based thereon, in the plans and specifications or other documents or material communicated by Her Majesty to the Contractor for his use in preparing his bid and the actual soil conditions encountered at the work site by the Contractor when performing the work, ...<sup>5</sup>

For the court, Justice Beetz held that compliance with the notice provision was a condition precedent to legal proceedings:

... a contractor cannot claim in a court of law benefits similar to those which clause 12 would have guaranteed if he had not himself observed that clause and given the notice for which the clause provides. Otherwise, he would be depriving the owner of the benefits which he guaranteed by [clause 12].<sup>6</sup>

This meant the contractor was barred from asserting its claim in respect to the additional costs incurred due to pumping, for it failed to give the notice required by clause 12. The law was set. As long as the contract provided that notice be given to the owner, the contractor was bound by such a clause and would have no claim against the owner without giving the requisite notice, and, in due time. Importantly, a provision such as clause 12, operated to benefit both the owner and the contractor:

\*6 The contractor is practically certain of being compensated for additional costs either during the work or later, if he complies with the provisions of [clause] 12, and in particular, if he gives the notice provided for in that clause.

[ ... ]

An owner who is thus informed of a mistake as to the nature of the soil knows that the contractor will probably not drop his claim, and he is enabled to reconsider his position. He can in practice be assured that the work will go forward if he wishes .... He may conclude another agreement with the same contractor or some other. If he prefers for the work to continue under the new circumstances, he may make arrangements to monitor quantities and costs of additional work so that the payments due the contractor ... can be made.<sup>7</sup>

From a contractor's point of view, the judgment in *Corpex* fell shy of explicitly requiring proof of prejudice. However, the above quoted excerpt shows that the underlying thought behind this strict enforcement approach drew on considerations and possible negative impacts for the owner. The assumption was that, had the contractor provided the owner with its delay claim within the time stipulated under clause 12, the owner would have had the opportunity to make arrangements as it saw fit.

It appears that the basis for strict enforcement is premised on the maintenance of a level playing field amongst the contracting parties; while the contractor is entitled to bring a delay claim, it must do so in accordance with the contract, to allow the owner the opportunity to respond to the claim; or, in other words, to avoid prejudicing the owner, which is what the B.C. Court of Appeal held in the follow-up from *Corpex*.

*Doyle Construction Co. v. Carling O'Keefe Breweries of Canada Ltd.*<sup>8</sup> was the first application of the *Corpex* judgment. While this was not a Supreme Court case, it is important to discuss it here rather than in the section dealing with case law from specific provinces, for *Doyle* has become an important national precedent, and represents a crucial judicial interpretation of the underlying principles of strict enforcement.

In *Doyle*, the contractor was engaged to build an expansion onto the owner's brewery. The contractor contracted on the assumption that equipment would not be installed until after the construction was completed. However, a mistake was discovered, and a new construction \*7 schedule had to be crafted. When the work was finished, the contractor submitted its claim for the additional costs incurred due to the delay.

At trial, it was held that the contractor failed to give notice within a reasonable time, as required under the contract. The B.C. Court of Appeal dismissed the contractor's appeal and determined that compliance with the notice provision was a condition precedent to the claim brought by the contractor. The contractor failed to give the notice required under the contract, and such failure deprived the owner of rights that could have addressed cost reduction measures:

Building and engineering contracts frequently contain provisions requiring a contractor to give notice within a reasonable time of events occurring which he considers may entitle him to claim additional payment under the terms of the contract. Since the purpose of such provisions is to enable the employer to consider the position and its financial consequences, and by cancelling or authorizing a variation, for example, he may be in a position to reduce his possible financial commitment if the claim is justified, and since special attention to contemporary records may be essential either to refute or regulate the amount of the claim with precision,

there is no doubt that in most cases the courts will be ready to interpret these obligations of the contractor as conditions precedent to a claim and failure to give the notice may deprive the contractor of all remedy.<sup>9</sup>

Locke J.A. went on to state that:

The provision for notice is useless unless it gives some particulars to the owner as to what the complaint is. It must surely also be given in enough time so that he may take the guarding measures pointed out in “*Corpex*” if he so desires. An early notice also leaves the owner free to negotiate either under this provision or under any other provision of the contract which may assist in the resolution of the problem. From the standpoint of the contractor, he may not, of course, know precisely what the monetary effect of accumulation of delays may bring about, but an early notification of his concern will also enable him to get himself into a negotiating position as to the method of solution of the problem, and to raise his concerns under the contract.

The grumblings of this contractor, recorded though they may be in site minutes, display no intention to claim until \*8 December, 1983. Even then, no claim was actually advanced, but intent was indicated. But no details were given: an owner would be hard put to know exactly what it is to meet, and hence what it is to do. The purpose of the notice is to give the owner an opportunity of considering his position and perhaps taking corrective measures, and he is **prejudiced** by not being able to do it.<sup>10</sup> [our emphasis]

*Doyle* followed the Supreme Court’s judgment in *Corpex*--strict compliance was, and remained the applicable test; however the introduction of the “prejudice” component, which at the time seemed to be more of an afterthought, rather than the core of the legal analysis, added another layer of scrutiny or possible investigation into the relationship between the contractor and the owner. Recently, the adoption of prejudice in the analysis of notice of delay claims has created opposing “trajectories”<sup>11</sup> in the case law, not only inter-provincially but within Ontario itself as well. In both *Corpex* and *Doyle*, prejudice was not, explicitly, a requirement to determine whether a notice provision barred a contractor from claiming additional funds in relation to construction delays. Nevertheless, given its implicit mention in these influential decisions, certain courts have not shied away from adopting it in their reasons. On that note, lack of prejudice is not the only factor some courts have considered in refusing to enforce strict compliance; some have gone even further and looked at the issue from the contractor’s perspective in addressing whether it would be unconscionable to deny the claim. While we do not favour one approach over the other, we strongly believe that the proliferation of these underlying theories has caused uncertainty in the law.

The following sections will examine the aforementioned varying case law in depth to determine, not only the extent of the variation, but also ways through which these diverging legal trajectories can be reconciled in light of public policy considerations.

## 2. JURISPRUDENCE IN ONTARIO

Ontario is a special case in itself; its jurisprudence not only diverges from that of Western provinces, it also diverges within its own intra-provincial interpretation. Detailing all the cases which have applied *Corpex* in Ontario would be a Herculean task, and beyond the scope of this article; however, we have selected a number of relatively recent decisions, \*9 including: *Bemar Construction*,<sup>12</sup> *Technicore*,<sup>13</sup> *Ross-Clair*,<sup>14</sup> *Ledore*,<sup>15</sup> *Limen*,<sup>16</sup> and *Clearway*<sup>17</sup> to showcase the evolution of this issue in Ontario jurisprudence, in an attempt to portray a clearer picture of the current state of the law in the province, particularly in light of the recent *Clearway* decision.

### 2.1 *Bemar Construction (Ontario) Inc. v. Mississauga (City)*

*Bemar Construction* concerned the renovation and subsequent conversion of the Cawthra Elliot Estate House into a conference centre (“the project”) to be used by the municipality for its own purposes or for renting to outside groups. Bemar was awarded the contract following a tendering process, and called for a start date of October 22, 1990, with a completion date of April 15, 1991. The project was not completed by the date indicated, and, in fact, the municipality terminated Bemar on April 1, 1992, almost a year after the originally contracted for completion date. The delay period was among one of the many issues considered by Fragomeni J. The notice requirement under General Conditions (GC) 4.4 provided that: “no extension [was] to be made for delay unless written notice of claim [was] given to the consultant no later than 14 days after the commencement of delay ...”<sup>18</sup> Further, GC 22.2 stated that “claims ... [were] to be made in writing to the party liable within reasonable time after first observance of such damage ...”<sup>19</sup>

At the trial level, Fragomeni J. applied a very narrow interpretation, in holding that Bemar failed to provide its written notice within the required 14 days: “the schedules [did] not change the terms of the contract. The contract clearly state[d] that the completion date [was] May 24, 1991. I conclude, therefore that the delay period commence[d] on May 25, 1991.”<sup>20</sup> By rejecting the contractor's argument that it would include the claims for delay at the end of the project, the court looked at the approach the contractor took with respect to another project, whereby his damages were included in his costs of extras and in change orders. In addition, the court also found that given the deteriorating \*10 relationship between the parties, it was unreasonable that the municipality would have instructed the contractor to proceed with additional work, and to wait until the end of the project in order to determine the final costs--in other words, it was highly unlikely the parties maintained such discussions. While there was no direct reference to the prejudice incurred by the municipality, the court relied on and affirmed the principles enunciated in *Doyle* as being at the centre of its analysis.

The court in *Bemar* did not step away from strict compliance, but perhaps started to recognize that extra-contractual factors existed and that, in one way or another, would play a role in interpreting contractual provisions.

## 2.2 *Technicore Underground Inc. v. Toronto (City)*

*Technicore* has been cited as the start of the “modern period in Ontario's notice jurisprudence.”<sup>21</sup> This case concerned the building of a 5.88 km long water main. The City of Toronto (“City”) entered into a construction contract with Clearway Construction Inc. (“Clearway”), a contractor who single-handedly seems to be shaping the current status of the law in Ontario, as we will see later. For the project at issue, Clearway, in turn, subcontracted with the claimant, Technicore Underground Inc. (“Technicore”) to perform the underground tunnelling work using a boring machine. During the excavation of the tunnel, there was a flood which directly affected the contracted work. Technicore had to refurbish and rescue the boring machine. As a result, Technicore claimed \$800,000 plus G.S.T. against Clearway for damages arising from the February 2007 flood. In March 2007, Clearway submitted its claim to the city for additional payment under the contract to cover the costs incurred as a result of the flood, seeking approximately \$1,270,000 in indemnity for Technicore's claim plus a \$400,000 claim of its own costs. However, Clearway noted the possibility that “some costs [were] not yet identified” and “reserve [d] the right to claim payment for work(s) not specifically mentioned [t]herein”.<sup>22</sup>

The proceedings commenced in July 2008 with Technicore's action against the city for damages suffered as a result of the flood. The city defended and brought a third party claim against Clearway for contribution and indemnity, and additional damages; Clearway in turn defended and counterclaimed in March 2010, seeking indemnity for the \*11 Technicore claim, plus \$1 million in damages. In August 2010, Clearway sent the city a claim repeating the amount it initially sought in March 2007, and adding new claims related to the flood in excess of \$3 million. Clearway amended its defence and counterclaim in June 2011, and continued to seek indemnity for the Technicore claim, but increased its damages claim to over \$3.4 million.

The city's motion for partial summary judgment, seeking dismissal of parts of the counterclaim in excess of the March 2007 claim, was successful. Since the “Notice Provision” under the General Conditions stated that the “contractor [was to] submit detailed claims as soon as reasonably possible and in any event no later than 30 days after completion of the work affected by

the situation”,<sup>23</sup> the motion judge concluded that Clearway was limited to the March 2007 claim, and granted the city's motion for partial judgment in December 2011.

The motion judge examined the state of the law with respect to notice provisions and determined that not only did the notice clauses “allow [the] owner the opportunity to limit or regulate their liability by having available current claims documentation”, but also that the time limit “[had] the potential benefit of reducing prejudice to the owner that could arise as a result of the contractor filing their claim late.”<sup>24</sup> Clearway appealed.

First, it was Clearway's position that a notice clause must contain the “failing which” language, which would notify a claimant that, should the claim be made outside the claim period, such a claim would be denied. Since the notice clause did not contain that language, Clearway argued that it should not be interpreted as a bar to its claim. Second, Clearway argued that an owner must establish prejudice as a result of the claim being outside the notice period, and submitted the city had failed to do so.

The Court of Appeal unanimously dismissed Clearway's appeal. The court found that the notice provision did not need to include a “‘failing which’ clause in order for it to bar the August 2010 claim.”<sup>25</sup> The court considered previous case law, including *Corpex, Doyle, First City*<sup>26</sup> (a B.C. Court of Appeal case discussed below), and *Bemar* in its analysis of the motion judge's decision. This previous case law did not address provisions which included the “failing which” language, as was \*12 Clearway's argument. Although in *First City* the B.C. Court of Appeal stated that “if a party to a building contract is to be deprived of a cause of action, this is only to be done by clear words”,<sup>27</sup> this case was distinguished on significant contextual differences, and more importantly, on the fact that there was no express time requirement in the *First City* provision. In *First City*, the relevant contractual clause provided that a claim was to be made in “writing within a reasonable time after the first observance of such damage and not later than the time of final certificate”<sup>28</sup> where no final certificate of completion was ever issued. Additionally, the Court of Appeal noted that *First City* made no mention of *Corpex* in its judgment, and that *Doyle* was decided after *First City*, which meant that the B.C. Court of Appeal must have been cognizant of its previous decision in rendering the *Doyle* judgment.

Irrespective of whether the contract between the city and Clearway contained a “failing which” clause, the Ontario Court of Appeal ruled in *Technicore* that “compliance with a notice provision is a condition precedent to maintain a claim in the courts.”<sup>29</sup>

A second point of contention in *Technicore* was the absence of prejudice to the city. Clearway argued that *Doyle* and *Bemar* stood as authorities for the proposition that the purpose of notice clauses was to bar claims only in situations where there was evidence of prejudice to the owner due to non-compliance with the clause. The Court of Appeal found, categorically, that *Corpex* did not “stipulate that prejudice must be proven in order for an owner to rely on a notice provision.”<sup>30</sup> Rather, *Corpex* made it clear that one purpose of a notice clause was to “enable the owner to consider its position and the financial consequences of the contractor providing additional work”.<sup>31</sup> Similarly, *Doyle* and *Bemar* did not “stand for the proposition that the owner [had] to show prejudice in order to rely on a notice provision”.<sup>32</sup> Moreover, the court went on to state that Fragomeni J.'s reference to prejudice did “... not suggest that prejudice must be established before non-compliance with notice provisions will bar a claim”.<sup>33</sup> Instead, in concluding that the contractor in *Doyle* did not comply with the relevant notice provisions, Fragomeni J. “made no finding of prejudice on the part of the city”.<sup>34</sup>

\*13 Speaking for the court, Gillese J.A. clearly determined there was “no onus on the City to lead evidence of prejudice”, but that as the owner, “the City [was] assumed to have been prejudiced by a multimillion dollar claim being made years after the Contract permitted and long after the City could consider its position and take steps to protect its financial interest”.<sup>35</sup>

Tracing back through the cases that have been discussed thus far, *Technicore* is the first Ontario case, in our survey, to make reference directly to prejudice. As mentioned, “although the *Corpex* decision did not require prejudice, that decision was inexorably linked to the Court's belief that there was prejudice”.<sup>36</sup> It became clear, following *Technicore*, that a claim submitted outside the time required by a notice provision created an assumption of prejudice on part of the owner.

Where did *Technicore* leave us? It seems that in *Technicore*, the Ontario bench recognized that all along, there was another layer to the Supreme Court's *Corpex* analysis-- the assumption of prejudice. Indeed, Clearway's argument that the owner was required to prove prejudice was clearly anathema to the Court of Appeal. However, one wonders if the result would have been different had Clearway adduced evidence that the city was not prejudiced.

In any event, two considerations can be taken away from this case: 1) that the assumption of prejudice was not a new principle in the interpretation of the notice provisions; it was merely identified, for the first time, as an underlying theory in support of requiring strict compliance with notice clauses; and 2) that *Technicore* did not stray away from the established legal test. Rather, *Technicore*, in a way, clarified that prejudice was a natural supposition in the application of strict compliance to the contractor's requirement to provide a notice prior to submitting a delay claim. Nonetheless, "it seemed that Ontario's jurisprudence with respect to notice of claims in construction contracts had started to bend toward a regime of strict compliance".<sup>37</sup>

On a different note, *Technicore* raised concerns regarding the application of a limitation period to Clearway's claim, advanced in an action that was started outside the two-year limit. While *Technicore* can arguably be seen as an example of the "hard cases make bad law" aphorism, if one \*14 sets the actual result aside, the Ontario Court of Appeal showed it was open to undertaking a more fact based analysis, and that the interpretation of notice requirements was not just black and white--something we noted above in *Bemar*.

### 2.3 *Ross-Clair v. Canada (Attorney General)*

Fast forward to 2016, when, while presented with a more factually intricate situation, the Ontario Court of Appeal assessed claims from a new perspective-- it approached the matter taking into account the factual matrix surrounding the parties' dealings.

The contract in *Ross-Clair* involved the construction of building management offices at a maximum security institution in Ontario. The notice provisions in General Conditions (GC) 35 directed that the contractor was required to give written notice of intention to claim extra expenses through a two-step process: first, "within 10 days of the actual soil conditions being encountered ...";<sup>38</sup> and second, where a notification was issued within 10 days, "the contractor [was] required ... to give the Engineer a written claim for extra expenses or loss or damage within thirty (30) days of the date that a Final Certificate of Completion ... [was] issued and not afterwards".<sup>39</sup> This provision was to be read in conjunction with GC 35.4 which directed that:

A written claim referred to in GC 35.3 shall contain a sufficient description of the facts and circumstances of the occurrence that is the subject of the claim to enable the Engineer to determine whether or not the claim is justified and the contractor shall supply such further and other information for that purpose as the Engineer requires from time to time.<sup>40</sup>

This clause established that the contractor was to submit its claim in writing, and further, that this claim had to be supported by sufficient information to enable the engineer to make a determination which was to be binding and subject to the dispute resolution conditions outlined in the contract.

At trial, Lederer J., determined that the contractor, in issuing a December 2008 letter, properly delivered its notice within the first stage, 10-day window; additionally, the contractor provided second stage notices regarding delays in March 2009 and March 2011, well in advance \*15 of the February 2012 effective date of the final certificate of completion. The March 2009 letter made reference to the December 2008 letter and included an "additional cost summary" which identified subcontractors and the nature of their work, as well as the general contractor's work and the additional cost in the amount of \$1,436,976. The March 2011 letter stated that additional costs incurred amounted to \$766,700 for a "total revised claim of \$2,204,676" and detailed that "additional information, as required [would] be provided by Ross Clair in support of our claim".<sup>41</sup> However, no



further information was sent until May 2013, when the contractor submitted a report to support its delay claim. Naturally, this was well beyond the second stage 30-day window, which was February 10, 2012, the date on which the Final Certificate of Completion became effective.

The issue before Lederer J. was to determine whether the contractor's second stage notices, the March 2009 and March 2011 letters met the requirements of GC 35.4 with respect to their content. The March 2011 notice could not be recognized, for it did nothing more than “increase the amount of the claim from \$1,437,976 found enclosed with the letter of March 2, 2009 to \$2,204,676 ... No description of the facts or circumstances explaining the increase was included. There [was] nothing on which the Engineer could base a decision”.<sup>42</sup> Relying on *Technicore*, Lederer J. determined that the 2013 report could not comprehensively meet the notice requirements for it was delivered past the 30-day limit. However, while the contractor was not entitled to claim the \$2,204,676, it delivered a proper notice for the claim for additional work in the amount of \$1,437,976, and was entitled to its claim in that amount.

In considering whether the engineer had rendered a decision on the claim in respect of which Ross-Clair properly delivered its notice, the application judge noted that an October 2009 reply letter from the owner did not constitute a decision, but that because the proper, requisite notice was given by Ross-Clair, the engineer should have made such a decision. Thus, the blame was not on the contractor, who had evidently complied with the notice provisions. The application judge ordered the engineer to make a decision on Ross-Clair's \$1,437,976 claim.

On appeal, Justice Epstein, writing for the court, reversed the application judge's decision and found that Ross-Clair was barred from claiming any extra payment. On a correctness standard of review, the court found that the application judge erred in interpreting GC 35.4 in \*16 isolation; the application judge should have taken into account the “context of rest of the Contract ...”<sup>43</sup>

Since GC 35.4 required more than what was contained in the letters issued by Ross-Clair, “even though the word “detailed” was not included in GC 35.4, the requirement that a contractor submit a claim in writing sufficient to enable the engineer to determine whether the claim [was] justified [could not] be interpreted in a manner other than that it [should have been] supported by detailed information.”<sup>44</sup> For the engineer to determine the validity of the \$1,437,976 claim, more was required from Ross-Clair than the contents of the December 2008 and March 2009 letters. This was in spite of “the application judge's implicit finding that the Engineer was intimately familiar with the Project”.<sup>45</sup> In fact, these two letters provided “little if any support for the ... claim”,<sup>46</sup> and failed to deliver the relevant information related to the nature of the owner's responsibility for the delay, and whether the additional expenses fell within a class of expenses compensable under GC 35.3.

Furthermore, the court found that the Engineer and the owner repeatedly asked Ross-Clair to provide information of its claim to enable a decision to be made, solidifying the conclusion that the requirements of GC 35.4 were not met. Accordingly, the information provided in the 2008 and 2009 letters was not sufficient; this information was in turn, not provided until the 2013 report, which was issued 16 months after the deadline in the second stage notice provision.

This case built “on the important precedent of [*Technicore*]. It firmly [entrenched], in Ontario law, the principle that contractual notice requirements, including requirements to give detailed accounts of claims, are enforceable, and ought to be take[n] seriously”.<sup>47</sup> The Court of Appeal went further, by looking outside the notices provided by the contractor, at informal communications about the claim in determining whether Ross-Clair complied with the strict requirements, and also whether Ross-Clair provided the engineer with sufficient information to make a determination. One cannot help but wonder whether in *Ross-Clair* the Court of Appeal set the bar too high in reading into the contract a requirement to provide details in support of additional amounts claimed in respect of a notice of delay.

**\*17 2.4 Ledore Investments Ltd. (Ross Steel Fabricators & Contractors) v. Ellis-Don Construction Ltd.**

The Ontario Court of Appeal was confronted with the notice issue yet again in 2017. The project in *Ledore* involved a major bridge construction in southwestern Ontario. Delays were incurred in the course of the project, and the main dispute arose out of the contract between the general contractor and the subcontractor.

On the issue of whether the parties were estopped from claiming delay costs under Article 15 of the subcontract, the arbitrator found that while the general contractor may have contemplated a delay claim in 1999, and may have discussed a strategy to assert a \$400,000 claim for delay, it did not do so. An “intention to claim is not the same as a claim”.<sup>48</sup> The general contractor was required to assert its delay claim “in writing” before the final certificate of completion. Leach J. granted the general contractor's leave to appeal the arbitrator's decision, and in allowing the appeal, the appeal judge determined that the arbitrator failed to apply “the general principles established in *Doyle* ... to determine whether or not the requirements of Article 15.1(a) [were] satisfied”.<sup>49</sup>

The subcontractor, Ledore, appealed that decision. In a *per curiam* decision, the Court of Appeal granted the subcontractor's appeal. The arbitrator's interpretation of Article 15.1(a) was reasonable. The question before the arbitrator was whether the general contractor properly advanced a claim for delay in writing within the time permitted under the subcontract. Accordingly, the arbitrator did precisely what he was supposed to do, which was to interpret Article 15.1(a) to decide whether the language contained in the subcontractor's 1999 letter was sufficient to constitute a claim.

While prejudice remained a constant assumption for notices of delay claims, *Ross-Clair* and *Ledore* introduced yet another standard for consideration-- sufficiency. In many ways there appears to be a natural progression; contracts became more detailed and general conditions more demanding, hence the expansion of the test and the need for sufficiency in assessing a notice of delay delivered pursuant to contractual requirements.

#### **\*18 2.5 *Limen Structures Ltd. v. Brookfield Multiplex Construction Canada Ltd.***

A lower court decision from 2017 reflects an openness to a more liberal approach in Ontario, at least on a summary judgment motion. Limen, the subcontractor in a project concerning the construction of an office tower in Toronto, incurred a project delay due to a decision by Brookfield Multiplex, the general contractor, to change the crane that was to be used for Limen's work.

The original subcontract, at paragraph SCC 6.6.3, as amended by SC-26, provided that:

The party making the claim shall submit within a reasonable time within 10 days to the other party a detailed account of the amount claimed and the grounds upon which the claim is based.<sup>50</sup>

Limen issued a series of written communications from May 2013 to September 2013 as contractual delay notices, and further documents between October 2013 and November 2013 with the same purpose.

Master Albert dismissed the general contractor's motion for summary judgment on grounds that there was a genuine issue for trial with respect to the general contractor's knowledge of delay and its response to delay on the project. Master Albert was satisfied that the general contractor was aware of the delays it caused to Limen's performance of the subcontract, and the issue for trial would become whether this knowledge, absent a technically compliant notice, would suffice to allow Limen to advance its claim for delay.

Interestingly, Master Albert established that one of issues requiring trial was to determine whether Limen provided sufficient notice for the general contractor to be able to consider its claim and to take the required steps in its own investigation. Master Albert went on to state that “such an analysis may result in a finding that even if Limen failed to comply with the strict technical contractual notice requirements, such non-compliance [would] not be fatal to its delay claim.”<sup>51</sup>

## 2.6 *Clearway Construction Inc. v. The City of Toronto*

The claimant in *Technicore* was before the Ontario courts again in 2018, with notice being, once more, the determinative issue. In *Clearway*, the \*19 City of Toronto's motion for summary judgment to dismiss the contractor's action for payment of additional compensation was dismissed. In 2009, the city and the contractor entered into a contract involving the construction of sewers in Toronto. The contractor alleged that the conditions encountered were substantially different than those identified by the Geotechnical Report, which is said to have provided that the subsurface soil condition in the area of the proposed sewer installation was "of a nature that was not problematic for jack and bore with casing operations".<sup>52</sup> The contractor brought a claim for additional costs allegedly sustained in completing the work.

The contractor prepared a document in May 2010 setting out the basis for its \$1,079,726.64 additional compensation claim. This document stated that the subcontractor identified "unexpected voids, rocks, concrete and debris in the subsurface construction area in May 2009".<sup>53</sup>

The city produced June 2009 meeting minutes which confirmed that subsurface soil conditions were known as of June 2009, but there was a lack of clarity concerning what the parties had discovered by that point and what damages were thought to have resulted from this discovery.

The relevant contractual provision, General Condition (GC) 3.14.03 stated:

### GC 3.14.03 Claims Procedure

.01 The Contractor shall give oral notice to the Contract Administrator of any situation which may lead to a claim for additional payment immediately upon becoming aware of the situation and shall provide written notice to the Contract Administrator of such situation or of any express intent to claim such payment, within seven Days of the commencement of any part of the work which may be affected by the situation or will form part of the claim.

.02 Not used.

.03 The Contractor shall submit detailed claims as soon as reasonably possible and in any event no later than 30 Days after completion of the work affected by the situation.

The detailed claim shall:

a)

Identify the item or items in respect of which the claim arises;

**\*20** b)

State the grounds, contractual or otherwise, upon which the claim is made; and

c)

Include the Records maintained by the Contractor supporting such claim.

In exceptional cases the 30 Days may be increased to a maximum of 90 Days with approval in writing from the Contract administrator.

.04 Within 30 Days of the receipt of the Contractor's detailed claim, the Contract Administrator may request the Contractor to submit any further and other particulars as the Contract Administrator considers necessary to assess the claim. The Contractor shall submit the requested information within 30 Days of receipt of such request. <sup>54</sup>

The contractor's May 2010 report was non-compliant with the contractual notice provision reproduced above. However, there was an underlying question concerning the knowledge of the city with respect to the subsurface issue that was identified, the steps taken thereafter by the city, and the question of whether the pattern of conduct between the city and the contractor varied the terms of the contract. Therefore, the triable issue to determine was whether the city was disentitled from asserting strict compliance with the notice provision on basis of a pattern of conduct of deviation from strict compliance with the clause. There was also a triable issue with respect to the city's knowledge regarding the underlying facts of the claim. Put another way, while

Clearway's claim in *Technicore* failed on basis of a failure to comply strictly with notice, it nevertheless survived a similar challenge in 2018, where knowledge and conduct by the city tilted the balance in favour of a more equitable approach.

### 3. SUMMARY OF THE LAW IN ONTARIO

In *Limen* and in *Clearway*, both which resulted from motions for summary judgment, the courts have shown an inclination to look at the substance of the transaction, and have been reluctant to grant summary judgment where a detailed analysis of facts was required. This certainly represents a shift from the strict compliance trend engaged in *Technicore* and *Ross-Clair*. The latter are Court of Appeal cases and binding on the \*21 former; however both the *Limen* and *Clearway* decisions were decided after these appellate authorities, and the courts explicitly took these authorities into account. The results in *Limen* and *Clearway* would support the position that answering the question of strict compliance is insufficient on its own to dispose of these cases. Given the realities of the “vanishing trial” in modern litigation, and the preponderance of arbitration as a dispute resolution mechanism in major construction and infrastructure contracts, these recent lower-level court decisions on summary judgment are important “guide posts” as to the state of the law in Ontario. On a high level at least, it would appear that Ontario courts are shying away from applying the “strict compliance” standard that *Technicore* and *Ross-Clair* would appear to require.

One way to reconcile these distinct “trajectories” would be to treat *Clearway* as clarifying “that the harsh conclusion reached in *Technicore*-- dismissal of the contractor's claim on summary judgment--was a function of the facts of the case, and that applying the *Technicore* analysis to different facts will lead to different results”.<sup>55</sup>

While we can distinguish *Clearway* and *Limen* in that these decisions determined questions to be heard at trial following a summary judgment motion, without ultimately disposing of the notice issue, it is nevertheless important to note the evolution of the legal test in Ontario. Based on the recent case law in Ontario, and as will become evident from other Canadian jurisdictions, where strict compliance fails to capture the contractual matrix, the dealings between the parties, and the true circumstances that lead to the delay claim, the courts in Ontario are willing to consider the impact of other factors in determining whether a contractor's delay claim can be entertained. As we have seen thus far among those factors, the courts have looked at informal communications between the contracting parties, whether the notices given were sufficient, and per *Limen*, whether the owner had knowledge of the delay.

Over time, the courts have certainly followed or at the very least, commenced their legal analysis on the premises of strict compliance; however, the Ontario construction bench has moved from merely considering notice clauses in a vacuum. *Limen* and *Clearway* are recent and quite convincing proof that the courts will undertake a more holistic approach rather than dismissing a construction delay claim altogether where notice is not provided, or where it is not sufficient. In other words, \*22 the determination of a delay claim in the construction industry in Ontario now focuses on more than just the black and white letter of the delay notice clause. However, as argued at the start of this article, given that these decisions have arisen at differing judicial levels provincially, and have tended to conflict with other Canadian jurisprudence, it is desirable, for the sake of certainty, and ultimately the sake of an industry which contributes dearly to the national economy, that a higher court provide definitive guidance to contracting parties. In order to make that case, we now turn to the other Canadian provinces.

### 4. JURISPRUDENCE IN WESTERN CANADA--ALBERTA AND BRITISH COLUMBIA

This section of the article will not be as chronologically detailed as the analysis provided for Ontario. The main reason is that a general survey of the legal developments in British Columbia and Alberta has shown that the courts in these provinces have followed the same line of reasoning in delivering opinions regarding the law on notice. By contrast, in Ontario, we noted a trend of strict compliance at the Court of Appeal level, followed by a more comprehensive, fact based analysis in motions for summary judgments. The Western provinces have been rather consistent in their own, internal interpretation of the law. This interpretation, as will be illustrated in the following pages, heavily relies on the consideration of whether there has been prejudice to the owner due to the contractor's failure to issue the notice in due time.

#### 4.1 British Columbia

a) *First City Development Corp. v. Stevenson Construction Co.* <sup>56</sup>

In this mid-1980s B.C. decision, the notice clause, as outlined in Article 36 of the contract, stipulated that a delay claim may be made within a reasonable time following the first observance of damage, and not later than issuance of the final certificate. The construction was supposed to be completed on January 31, 1982, however, substantial completion was not certified by the architect until May 25, 1982. The contractor advanced its claim for damages for delay in March of 1983. On a preliminary determination of whether the contractor was entitled to proceed with its actions, Meredith J. found the timing of the claim to be “reasonable because the delay, if any, and the timing thereof [did] not \*23 prejudice the [owner] in the least”. <sup>57</sup> The trial judge also concluded that the owner was not misled and was “well aware that completion of the contract was delayed. It had every reason to believe that a claim would be advanced”. <sup>58</sup>

The B.C. Court of Appeal dismissed the owner's appeal and determined that art. 36 did not provide a “bar to proceedings in the absence of a final certificate of completion. [And that] in this case, no final certificate of completion was ever issued by the architect”. <sup>59</sup> Surprisingly, instead of relying on *Corpex*, which was issued in 1982, or three years prior, the B.C. Court of Appeal chose to draw on an English decision <sup>60</sup> and on an Ontario Court of Appeal decision <sup>61</sup> to find that the requirement that written notice be given within a reasonable time was “not a clause of time limitation for bringing of an action ...” <sup>62</sup>

*First City* was subsequently considered by the Ontario Court of Appeal in *Technicore*, and was ultimately distinguished on the ground that the notice clause in *Technicore* identified a clear and unambiguous 30-day time limit, rather than a mere assertion of “within reasonable time”.

Undoubtedly, one way to distinguish these cases would be to separate them into cases that deal with specified time limits as opposed to those which deal with “reasonable” or unspecified timed limits. The courts have certainly considered this to be a sufficiently distinguishing factor, and surely it has made some difference in how some they have applied the strict compliance test. The authors recognize that this distinction exists. For purposes of this research and our legal survey, we seek to undertake a higher level analysis, a “bird's eye view” of the case law, as it were, to try to underpin the varying judicial trends.

b) *Doyle*

We identified a 1987 B.C. Court of Appeal case, *Doyle*, early on in this article as one of the seminal cases in relation to the law on notice. We noted that although it was not a Supreme Court decision, *Doyle* remains among the first to apply the *Corpex* ratio, and it is often cited outside of British Columbia. Importantly, *Doyle* was the first Canadian case to enunciate the underlying principle of prejudice as being at the core of the analysis of the need to provide notice prior to issuing delay claims. *Doyle* undertook the strict compliance approach adopted by the Supreme \*24 Court, but its significance is in the identification of the philosophy guiding the strict compliance test--prejudice. Interestingly, in *Technicore*, the Ontario Court of appeal expressly stated that *Doyle* did not make prejudice a necessary element. In contrast, prejudice was a recurring factor in the analyses employed by B.C. courts, as we explore below.

c) *W.A. Stephenson Construction Western Ltd. v. Metro Canada Ltd.* <sup>63</sup>

The contract in *W.A. Stephenson* concerned the building of the Advanced Light Railway Transit System in Vancouver. A substantial completion certificate was issued on October 4, 1984. The contractor claimed it was delayed or forced to accelerate construction because it was held to the milestone dates, while not being given access to the construction site because of the owner's breaches of contract. The claim totalled over \$4.5 million.

Pursuant to s. 13.1.1 of the contract, the contractor was to provide written notice no later than five days following the occurrence of any such cause leading to a delay. The court considered both *Corpex* and *Doyle* and found that while both cases were distinguishable from the matter in question, they were applicable. Locke J. made reference to the many minutes of meetings and “... consider[ed] them to be notice”: <sup>64</sup>

A reading of the minutes [was] very revealing: they were obviously regarded by everyone as a method of formally communicating their concerns to the other party. Reading them is rather discouraging; in almost parrot-like fashion entries, the contractor's concerns regarding access to the site, structures, utilities both under and above grounds, and topics such as strikes or weather, appear with monotonous regularity seemingly from beginning to end.<sup>65</sup>

Ultimately, Locke J. determined that claims which were not covered by specific notices were covered by the minutes, and that ultimately all the claims in the action were covered. In other words, “the owner had actual or constructive knowledge of the claims through various communications and minutes of meetings ...”<sup>66</sup>

\*25 The underlying basis for Locke J.'s conclusion was the presumption that the owner did not suffer for it “had all necessary information in good time to consider it. The position [was] purely technical”.<sup>67</sup>

As early as 1987, only five years following the release of *Corpex*, the B.C. courts were determined not to examine the failure to provide notice within the vacuum of strict compliance. There was a strong case to be made for the consideration of evidence of knowledge of the claim on the part of the owner, particularly where the relationship between the parties was such that the contractor constantly raised the problem of delay at weekly meetings. The early post-*Corpex* jurisprudence in British Columbia should be contrasted with the Ontario cases we have reviewed above. The Ontario courts were far more reluctant than their Western counterparts, initially, to adopt non-compliant notice as proof that notice was provided to the owner. The Ontario analysis indeed boiled down to a technicality--was the notice provided within the time required under the contract? Where the answer was no, early Ontario jurisprudence did not venture outside the confines of the four points of the contract. It was not until the so-called “modern” trajectory of Ontario cases that the courts began to consider elements in addition to contractual requirements. In *Ross-Clair*, Epstein J.A. held that the notice provisions were to be read in context of the entire contract, while in *Limen*, Master Albert went on to consider the owner's knowledge *vis-à-vis* delay notices, in a decision that did not consider, but strongly echoed *W.A. Stephenson* in emphasizing the importance of evidence of knowledge of the claim. However, this movement was not present in Ontario until the late 2010s--well over 20 years after *W.A. Stephenson* was determined.

One cannot help but to note this gap, and additionally, to question the reasons. It is also important to note that Ontario courts have not been completely blind to the existence and possible application of contractually external factors such as communication between the parties. These forms of evidence were certainly presented before Ontario courts, even in earlier jurisprudence; however, Ontario judges were not quite ready to take the leap to allow them to replace a lack of compliant notice.

Prejudice, while not always explicitly referenced, appears to be have been the core of many decisions, if not, arguably, all decisions respecting the law of notice. Sure enough, prejudice also underpinned the previously discussed B.C. cases. Nevertheless, *W.A. Stephenson* presumes to present another underlying reason-- unconscionability, not towards the owner, but towards the contractor. Whereas prejudice is viewed from the point of the owner, i.e. was the contractor's non-compliance prejudicial to the \*26 owner, the aforementioned idea of unconscionability is targeted at the contractors--i.e. would it be unconscionable to disallow a delay claim due to a mere technical non-compliance with the notice provision where the contractor has clearly made the owner aware of a claim that is not devoid of merit?

It might be useful to pause here. One rather simplistic approach to distinguish, and even reconcile these lines of thinking would be to identify the differing theories from a basic perspective: certain courts have adopted a more pro-owner view through the application of implicit or explicit prejudice, while others have adopted a more pro-contractor view by engaging in a contextual analysis in assessing extrinsic factors rather the strict compliance with a contractual clause.

**d) *Foundations Co. of Canada Ltd. v. United Grain Growers Ltd.***<sup>68</sup>

This case arose out of a major renovation at the owner's grain terminal. The general contractor retained a sheet metal subcontractor for the fabrication and installation of dust control ducting and spouting in relation to the project.

The subcontractor alleged it was prevented from installing its spouting as planned due to delays in site preparation, and due to the delivery and installation of equipment deemed necessary to connecting spouting runs. The general contractor, in turn advanced these claims, amongst many others, against the owner. The general contractor's primary complaints were that it, and its subcontractor, were seriously delayed due to: late delivery of major equipment components pre-selected by the owner; late access to the administration building being constructed for the owner by another party; and late project design and the volume of timing of drawing deliveries during the project.

At the trial level,<sup>69</sup> the learned judge found substantially in favour of the general contractor and subcontractor, dismissing the owner's counterclaim. The trial judge apportioned 75% of the responsibility for the general contractor's four months of delay against the owner and a firm of engineers, and 25% against the general contractor. This 25% was found against the general contractor due to its own inefficiencies. As such, for most heads of claim where the subcontractor was successful, the general contractor was entitled to indemnity from the owner and the architecture firms up to 75% of its liability.

\*27 The B.C. Court of Appeal focused on several points raised on appeal by the owner and the firms of architects, many which were dismissed. For purposes of this research, our focus will be on the court's reasons with respect to the trial judge's finding that sufficient notice, as required under the contract, was given by the general contractor to the owner.

Two contractual provisions operated to enable the general contractor to forward its claim for delays. First General Condition (GC) 4.1 and 4.4 provided "... the when the work is delayed, the contractor may seek an extension of the contract time upon giving appropriate notice within 14 days of the commencement of the delay".<sup>70</sup> Second GC 22.1 provided:

If either party to this Contract should suffer damage in any manner because of any wrongful act or neglect of the other party or of anyone for whom he is responsible in law, then he shall be reimbursed by the other party for such damage<sup>71</sup>

The general contractor brought its action for damages under GC 22.1; the main difference between GC 22.1 and GC 4.1 was that GC 22 required a notice of claim was to be given "within a reasonable time", as opposed to the specific 14 days provided for in GC 4.1.

The B.C. Court of Appeal upheld the lower court's determination that not only did the lack of notice not reflect the outcome of a delay claim, but moreover, the form of the notice did not have any impact whatsoever on the true purpose of the notice itself.<sup>72</sup> The trial judge determined that there was sufficient evidence based on a reading of the minutes of site meetings, many of which discussed, and complained about the delay to the work. The question turned on whether the general contractor had given sufficient notice of its intention to initiate a claim. In this respect, the trial judge found that the form of notice was not important--a point which has also been deliberated in Ontario jurisprudence.

In juxtaposition with Ontario case law, the trial judge held that whether or not the substance of the notice was sufficient would be determined in light of the purpose for giving said notice. In Ontario the courts have been, or perhaps were initially, stringent in maintaining strict compliance, even regarding the form of the notice. By contrast, the B.C. courts, very early on, determined that not only did the lack of \*28 notice not reflect the outcome of a delay claim, but moreover, that the form of the notice did not have any impact whatsoever on the true purpose of the notice itself. This test of sufficiency is significantly different from Ontario's which, while adding an element extrinsic to mere strict compliance with the relevant notice clauses, still relied on the accompanying contractual provisions. In *Foundations Co.*, the B.C. courts looked at the purpose of the notice. These are truly differing legal analyses, ultimately pointing to strict and purposive interpretations on opposite ends of the country.

#### e) *Centura Building Systems Ltd. v. Cressey Whistler Project Corp.*<sup>73</sup>

In *Centura*, the litigation arose from disputes related to the construction of the Westin Whistler Resort during 1999-2000. The defendant corporation was the construction manager for the project and its subsidiary was the owner/developer. The plaintiff



contractor was to supply and install exterior framing, “outsulation”, and steel studs/structural roofing for the project. The contractor brought an action for damages for costs due to delays and unpaid contract price. The subsidiary owner counterclaimed for damages related to delays caused by the contractor, and for back charges.

It should be noted that *Centura* is a case concerning the notice required from the owner, and not the contractor. Interestingly, as reflected in this article, the vast majority of reported cases deal with notice of claims by a contractor. However, contractual notice clauses often “cut both ways” and the same analysis and principles should apply in our view, to claims that an owner is required to provide notice of to a contractor. *Centura* is distinguishable from this perspective, but nevertheless important to a complete understanding of the trajectory of the B.C. courts and their engagement with notice clauses in the construction industry.

General Condition 9.2.2 of the contract stipulated that timely notice was required from an owner to a contractor. In this case, the court found that a 2000 letter from the owner was the only notice of the delay claim given to the contractor. In light of *Foundation* and *W.A. Stephenson*, it was critical “that the notice provide sufficient particularity to ensure that the recipient [understood] a claim [would] be advanced against it for costs related to delays”.<sup>74</sup>

On the motion for summary judgment, the issue to determine was whether the course of dealings between the parties during the project resulted in the provision of adequate notice to the contractor. Given the \*29 extent and the financial impact of the delays by both parties, the motions judge found there were issues of credibility regarding not only the parties' evidence and interpretations, but also regarding the signing of the contract, which raised sufficient grounds to move this action onto trial.

The point to be taken is that even in a reverse situation, wherein the owner is required to provide notice to the contractor, the B.C. courts refused to simply rely on the contractual notice, and fully recognized the need to account for extrinsic factors such as the course of dealings between the parties. In other words, a late formal notice was certainly not determinative of a delay claim, especially not on a motion for summary judgment. As of 2002 such a purposive approach was well established in British Columbia. It took Ontario courts much longer to expand their analysis to consider more than notice provisions.

We have not cited every reported case from British Columbia with respect to notice provisions; nevertheless we have reviewed the most cited, quoted, and, therefore, at least from an outsider's perspective, the most influential cases in this area of law. We sought to show that in British Columbia, as early as *W.A. Stephenson*, the courts looked beyond the contractual clauses to determine a claim, particularly meeting minutes, in what has become known in the literature as “constructive notice”.<sup>75</sup> Ontario has struggled with reaching such conclusions, or rather with letting go of strict compliance, at least until more recent decisions such as *Limen* and *Clearway*.

What is evident, however, is that Western Canada, as last insofar as British Columbia is concerned, has adopted a more factual and contextually based approach to the interpretation of notice clauses in delay claims-- something which appears to be the new trend in Ontario as well, at least at trial level. In order to maintain some sort of uniformity and to provide a consistent, conclusive answer to the contracting parties, there must be cohesiveness in the way the law is applied across the provinces.

## 4.2 Alberta

Where does Alberta stand in relation to the outlined distinctions? In this next section, we will briefly undertake to identify the main line of analysis that has arisen out of Alberta.

### \*30 a) *Dilcon Constructors Ltd. v. ANC Developments Inc.*<sup>76</sup>

Dilcon was awarded four contracts for the construction of a newsprint mill for the owner. Work commenced right after contracts were awarded, while the design and drawings were still incomplete, using information from Dilcon's previous projects to make the necessary predictions. As the project matured it became clear that the original estimates were inadequate.

After the project was completed, Dilcon requested compensation for the growth in the scope of its work; the owner counterclaimed for overpayments and sought an accounting. The trial judge found in favour of Dilcon on the majority of claims.

In a *per curiam* decision, the Alberta Court of Appeal ruled on several issues including the trial judge's damages award for loss of productivity due to delay.

In respect of the delay claim, the trial judge noted that Dilcon gave no evidence of official notice under delay provisions following its December 1989 notice, until January 1990.

While the trial judge<sup>77</sup> looked at the minutes of field meetings he never dealt with whether Dilcon actually complied with the delay provisions set forth in General Condition (GC) 27:

27.1 The CONTRACTOR shall immediately notify the ENGINEER in writing of any occurrence which, in the opinion of the CONTRACTOR, has caused or which he anticipates may cause a substantial delay to, or which shall affect, the performance of the WORK according to the CONSTRUCTION SCHEDULE or the completion date for the entire WORK; and in any event shall notify the OWNER in writing not later than seven (7) days after the occurrence of the delay.

[ ... ]

27.4 Claims made by the CONTRACTOR pursuant to G.C.27.2 or G.C.27.3, may be included in the CONTRACTOR'S notice of delay pursuant to G.C.27.1 or may be submitted to the ENGINEER in writing at a later date when the extent of the alleged delay has been determined by the CONTRACTOR, but in any event shall be submitted not later than the earlier of a) 6 months after the commencement of the alleged delay or b) seven (7) days after the date on which the full extent of the alleged delay or the full amount of the \*31 additional field overhead costs could reasonably be determined, and shall be restricted to the facts specified in the notice pursuant to G.C.27.1; otherwise such claims shall be rejected.<sup>78</sup>

The Court of Appeal found that time limits were important.<sup>79</sup> GC 27 was to work in sync with GC 36, which stated that “no claim for reimbursement may be made in respect of ... cost unless before the costs were incurred the contractor gave notice in writing to the engineer of its intention to incur the costs and make the claim.”<sup>80</sup> According to the court:

53 Written notice crystallizes the position of the parties on the issue of delay. Written notice informs the owner that the contractor considers that the delay warrants an extension of time and/or damages. If notice is given, an owner is able to take action to reduce the delay, or to alter the work plan to mitigate or allow for any likely damage. This is exactly what [the owner] did when it ordered acceleration in December of 1989. Furthermore, written notice allowed the parties to deal with the problems as they arose, rather than arguing about it afterwards.<sup>81</sup>

The court determined that:

60 To conclude that Dilcon complied with the notice provisions, we would have to conclude that the complaints Dilcon made at the site meetings, which are recorded in the minutes, are sufficient to constitute

notice of delay as required under the contract. In relation to the requirement of a subsequent claim within stated time limits, we would also have to conclude that Dilcon's request for compensation constituted a sufficient follow-up to the "notice" of delay.

61 Such an interpretation flies in the face of both the contract and the facts. The contract clearly stipulates not just that the notice be *recorded* in writing, but that it be *given* in writing. Dilcon was clearly aware of this, as it wrote letters of complaint giving notice of delay. Furthermore, although referring to delays, the August 1990 settlement letter quoted above - too late to be within the six-month time limit - clearly focusses on compensation for increased scope of work, rather than for loss of productivity due to delay. One of the real issues \*32 in the dispute was responsibility for the growth in piping. [The owner] said that it was Dilcon's responsibility under the fixed price contract and they were successful on that point. Therefore, we cannot accept an interpretation that Dilcon gave notice within the meaning of the contract. To hold that Dilcon has complied with the provisions makes a mockery of the clear time limits and notice requirements set out in the contract itself. <sup>82</sup>

Ultimately, the Alberta Court of Appeal decided to adopt a strict compliance approach much like the Ontario Court of Appeal in *Technicore*, and focused specifically on the provisions set forth in the contract. It is also apparent that the court was concerned that a failure to give timely notice would deprive the parties of an opportunity "to deal with the problems as they arose, rather than argue about it afterwards". Although not explicitly stated as such, this is essentially the prejudice concern, articulated in *Doyle*, as a justification for the strict compliance standard.

**b) *Banister Pipeline Construction Co. v. TransCanada Pipelines Ltd.*** <sup>83</sup>

Nevertheless, Alberta courts have not been uniform in requiring strict compliance. A trial decision issued just three years after *Dilcon* took a very different approach. In *Banister*, Justice Hawco found that where the owner was always aware of the claim, it would be unconscionable for the court to dismiss the contractor's claim for extras for work outside contractual provisions as a result of a "technical non-compliance." <sup>84</sup>

It is worthy to note that *Banister* analyzed a situation whereby the contract did not include the provision for a particular work, and where the court decided it would be unconscionable for the owner to disallow the contractor's claim in relation to this work, particularly given that the contractor actually informed the owner of the need to perform said work. However, *Banister* has been cited as "still relevant to the delay claim scenario as it indicates that courts may be willing to look past strict compliance with notice requirements where the contractor can show that the owner had actual or constructive knowledge of the delay event". <sup>85</sup>

The action in *Banister* arose in context of the owner's alleged failure to disclose certain information about the job, information which, according to \*33 to the contractor would have enabled it to submit a higher bid for the project.

The contractor claimed some \$500,000 related to well-pointing. When the contractor began working on a certain portion of the contract, it found the conditions were too wet to secure a safe working environment without well-pointing. The court conducted an extrinsic analysis in finding that, although well-pointing was extra to the contract, the owner was always aware of what the contractor was doing and it was discussed in numerous progress meetings. "The work clearly had to be carried out, not only for the safety of the crews, but for the integrity of the job". <sup>86</sup> The court went on to state that the owner benefitted from the work, and that non-payment was "... unconscionable .... there was knowledge of and consent for the work and a clear waiver of the provisions of the contract relating to change orders". <sup>87</sup>

The jurisprudence in Alberta is certainly not as expansive as in Ontario and in British Columbia; however, this does not undermine its overall purpose in the grand scheme of this article. Not only do we seek to demonstrate that there has been a variety of judicial opinions across Canada, but that even in strict compliance jurisdictions, the courts have overlooked a failure to comply strictly in circumstances where the owner's demonstrable knowledge of a claim would belie the presumption of prejudice.

## 5. EXECUTIVE SUMMARY ON COMMON LAW JURISPRUDENCE

We addressed and examined three common law jurisdictions in Canada--Ontario, British Columbia, and Alberta--each with their own approach regarding the failure to comply with the provision of delay notices. Ontario was definitely a case study on its own. We went from the early days of a literal application of the strict compliance *Corpex* test up to and including *Technicore*, to the consideration of extrinsic elements such as the contractual matrix in *Ross-Clair*, the sufficiency of the notice in *Ross-Clair* and *Ledore*, the knowledge of the opposite party as reflected in *Limen*, and the consideration of meeting minutes in *Clearway*. This rather holistic approach seems to have always been the case in British Columbia, where the courts appear to have operated on the basis of both prejudice and unconscionability (though not explicit) to consider, as early as 1984 in *First City*, the owner's knowledge and belief that a claim would be advanced; meeting minutes and constructive \*34 knowledge of the owner in *W.A. Stephenson*; the purpose for giving a notice per *United Grain*; and the parties' course of dealings in *Centura. Doyle*, one of the first cases, if not the first to apply *Corpex* in light of its underlying assumption of prejudice, also a B.C. case, adhered to the strict compliance standard. While that is certainly something to take note of, rather than causing a sort of internal misapprehension of the legal test, the B.C. courts have applied the underlying prejudicial approach set out in *Doyle* to expand their analysis outside the confines of the strict compliance test. The Alberta model, rather scarce in terms of volume, demonstrated that although the strict compliance doctrine was still very much alive and applicable, trial judges could be disinclined to do so where it would be "unconscionable" to defeat a claim where the opposing party had actual knowledge of the claim, if not formal notice.

To circle back to our earlier statement, the assessment of these three jurisdictions truly demonstrates that across common law practices, the courts have been divided and have adopted different standards or included several extrinsic factors in their analysis, beyond not only the *Corpex* ratio, but in some cases beyond their own provincial higher courts. Not only are there different approaches to this problem between provinces, there are differing approaches within certain provinces. The construction industry is one the pillars of the Canadian economy and legal uncertainty has led not only to the proliferation of litigation, but also to disagreements between contracting parties, which, in the long term, could have a significantly adverse effect to the detriment of relationships between parties. The ripple effect of legal uncertainty cannot be underplayed or disregarded when the stakes are this high.

## 6. JURISPRUDENCE IN QUEBEC

Having analyzed the common law jurisprudence, it is appropriate to briefly explore case law from Quebec, particularly given our argument that this is a matter of conflicting jurisprudence and national importance worthy of Supreme Court attention. As it is governed by civil law, many Quebec decisions will rely on provisions of *Quebec Civil Code*, rather than on precedent; that is not to say, however, that the Quebec courts have been blind to the *Corpex* decision or its developments. Rather, the distinction goes to show that there is a hierarchy in the analysis of Quebec courts, one which must be disclosed prior to the examination of the case law.

In light of this, art. 1426, 1617, and 2116 of the *Code* state:

**1426.** In interpreting a contract, the nature of the contract, the circumstances in which it was formed, the interpretation which \*35 has already been given to it by the parties or which it may have received, and usage, are all taken into account.

[ ... ]

**1617.** Damages which result from delay in the performance of an obligation to pay a sum of money consist of interest at the agreed rate or, in the absence of any agreement, at the legal rate.

The creditor is entitled to the damages from the date of default without having to prove that he has suffered any injury.

A creditor may stipulate, however, that he will be entitled to additional damages, provided he justifies them.

[ ... ]

**2116.** The prescription of rights to pursue remedies between the parties begins to run only from the time that work is completed, even with respect to work that was subject to reservations at the time of acceptance of the work.

It is clear that, from the most basic premises, Quebec courts ought to be mindful to the necessity to consider contractual clauses in light of the factual matrix and negotiations giving rise to the contract in the first place. In other words, clauses to a contract were never meant to be read in a vacuum or in isolation of other significant provisions.

It was almost trite law in Quebec, following the judgment in *Morin Inc.*<sup>88</sup> which came only a few years after *Corpex*, that failure to give notice on time was fatal; and more recently, where the Quebec Court of Appeal recalled “the imperative character of the procedure which [forced] the contractor to respect the letter of the formalities foreseen by the necessity to submit a notice for extra costs”.<sup>89</sup>

This section will look at five cases which have upheld these principles, and which have clearly established that in Canada's only civil law jurisdiction, strict compliance remains the ruling authority, albeit with an important exception.

**\*36 6.1 *Paul Savard, entrepreneur électricien inc. c. Construction Infrabec inc.***<sup>90</sup>

The contractor and the Quebec Ministry of Transportation entered into an agreement, for the redevelopment and installation of a road lighting system on a highway. The contractor, in turn, subcontracted with Paul Savard's company. There was no question that the contractor was subjected to the terms of the contract entered between it and the Quebec government. However, the question in this case was whether the subcontractor itself was also subject to the same terms and conditions.

In accordance with clause 9.10 of the main contract, the contractor was to send a “notice of claim” to the Ministry, via registered mail, within 15 days following the occurrence of any difficulties in the execution of the contract, or 120 days following the date of receipt of the final estimate of the work.<sup>91</sup>

As it happened, the subcontractor incurred a number of expenses, which the contractor refused to pay. At one point, the subcontractor was ordered to remove lampposts from their base--something which was not included in the contract specifications. The subcontractor placed the lampposts in a ditch near the foundation blocks, and informed the contractor of the risks involved in leaving them there, in a memorandum, stating it would not "... be responsible for breakage and thefts of the lampposts".<sup>92</sup> Unfortunately, the subcontractor's fears materialized and about 40 lampposts were stolen from the site. The subcontractor assigned responsibility for ensuring the protection of lampposts to the contractor, while the contractor held the subcontractor fully responsible; the owner agreed with the subcontractor and held the contractor responsible for \$49,866.96, a debt which the contractor later transferred onto the subcontractor.

The subcontractor completed the electrical work, the owner signed the final cost estimate and the project ended. The contractor admitted it did not submit a registered letter to the owner to state his intention to claim additional sums for compensation, in other words, it did not provide the required notice. The contractor also admitted the subcontractor submitted its claims in a timely manner, with a copy to the owner. The trial judge agreed, finding that the subcontractor did in fact meet the requirements of clause 9.10. The trial judge dismissed the contractor's motion to dismiss the subcontractor's claim for payment, holding that the subcontractor's expenses were reasonable and justified, and that the \*37 subcontractor was not bound by the claim procedure outlined in clause 9.10. Ultimately, the contractor was required to pay the almost \$50,000 he was withholding from the subcontractor as collateral for the stolen lampposts. The trial judge, however, did not grant all of the subcontractor's requests, and rejected due compensation of the delay caused by the owner's request for a certain, specific installation procedure, as it concluded that the specifications required the provision of the latter.

On appeal, the Quebec Court of Appeal held that clause 9.10 did not contravene art. 2884 of the Code, which stated that "no prescriptive period other than that provided by law may be agreed upon"<sup>93</sup> because the time period stipulated in the clause did not constitute a limitation period. The court proceeded to undertake an analysis of the legality of the clause and determined that only after the claim was correctly submitted in the required form and within the 120-day period, the owner's right of action crystallized; it was only after the end of this period that the limitation period began to run. "Formalities must be respected to give rise to the contract's right of action. If these formalities are not respected, we cannot say that the right of action was extinguished because this right of action was never 'born'".<sup>94</sup>

Even before making a determination as to whether or not clause 9.10 was complied with, the Court of Appeal adopted a strict compliance approach. The clause must be read in conjunction with the Code, and where clause 9.10 is legal in that sense, it must be adhered to in a literal, strict interpretation.

Having held this, the court went on to find, on the basis of *Corpex*, and the previous Quebec Court of Appeal decisions in *Morin* and in *Industries Falmeac*, that the contractor failed to demonstrate that the parties' common intention was met when the subcontractor submitted its notice, copying the Ministry/the owner. In fact, the Minister never received a detailed claim consistent with the requirements in clause 9.10, and furthermore, certainly had no duty, particularly in light of good faith, to go as far to remind the contractor of its duty to pursue it. Having been put on notice by the subcontractor when it submitted its notice, the contractor had the sole obligation to notify the owner of its own corresponding delay claim, which it failed to do.

The Quebec Court of Appeal was quite cut and dry in its analysis of the clause and of the clear requirement to provide the notice in due time. \*38 Even in 2012, where other provinces had begun to look outside the four corners of the contract and consider extrinsic evidence, the Quebec judges determined that a contractor must provide the notice in due time, without regard to external evidence.

## 6.2 *Danny's Construction Co. c. Birdair Inc.*<sup>95</sup>

It is interesting that notwithstanding the predominance of strict compliance with contractual notice of delay claims in Quebec, there is scope for departure from this standard in appropriate circumstances. Significantly, the Quebec Court of Appeal has

departed from a strict compliance, but only where the Code provided for such a departure. *Birdair*, next in the line of Quebec litigation, concerned the renovation of the roof of Montreal's iconic Olympic stadium.

There were several delays across the works and Birdair, the contractor, wrote several times to express its concerns about delays and lack of progress by Danny's Construction, the subcontractor. The situation for the subcontractor was quite dire, financially. The subcontractor itself, however, also wrote to the contractor, expressing its dissatisfaction with delays in the delivery of materials, which it alleged prevented it from effectively performing work under the subcontract. At the date of termination, the subcontractor had completed 67.97% of the work.

In respect of the claim arising from the delays incurred, the court cited *Corpex* and made it clear that compliance with the formalities stipulated in the contract determined a contractor's claim for delays.<sup>96</sup> However, the court also recognized the parties' rights to renounce the strict contractual formalism. The Court of Appeal upheld the trial judge's determination on the basis of their relationship and their interaction--the parties had relaxed the terms and conditions of the subcontracting agreement.<sup>97</sup> Therefore, by looking at the circumstances and the behaviour of the parties, the court determined that they could set aside the formalities through their actions. In other words, the renunciation may be implied. This may be another way of rephrasing what the courts in Ontario and British Columbia have been saying lately: that non-contractual factors can be considered in determining where a delay claim can proceed. However, departure from strict compliance is the exception, not the rule, since the Quebec Court of Appeal required that parties come to an "unequivocal"<sup>98</sup> agreement that they are renouncing \*39 the clause requiring notice, which would not go as far as allowing one party to disregard notice provisions and still claim delay.

It does not appear that the courts have yet adopted this more liberal rationale in subsequent jurisprudence in Quebec. However, the case is relatively recent and its dispensing with the strict compliance is founded in the Code. It seems that even in Quebec, the "door is ajar", through appellate jurisprudence, to consider all of the factual circumstances in resolving the notice issue.

### 6.3 *Dawcolectric Inc. c. Hydro-Québec*<sup>99</sup>

Hydro-Québec, the owner, sought to rehabilitate a power generating station and Dawco, the contractor, obtained the contract, following the tender of offers in 2001. The contract also included a risk sharing agreement with Solimec Construction Inc. ("Solimec"), which was described as a subcontractor in the tender. The contractor and Solimec pooled their resources together, however Solimec actually carried out most of the work covered by the contract. At the time, Solimec could not bid directly for the contract because it did not have the ISO 9000 certification.

Several problems arose on the construction site, resulting in over 400 change orders being issued by the owner, and substantial delays to the project. The contractor's claim for damages was allowed in part. The trial judge found that the owner caused 60% of the delays and attributed the remaining 40% to the contractor. The trial judge dismissed the contractor's claim for the impact damages suffered by Solimec, on basis that the contractor's claim covered the impacts costs and subsequent consequences. In respect of Solimec's action, the trial judge concluded there was no contractual relationship between Solimec and the owner, and Solimec could not apply the prescription provided for in art. 2116 of the Code, noted up above.

On appeal, the Quebec Court of Appeal, among others, looked at the starting point for the calculation of interest and additional indemnity. It found that the trial judge fixed the starting point as the time when the complaint for claim "P-3" was submitted; this complaint, in the judge's opinion, amounted to a formal notice.

According to clause 19 of the contract, Dawco was to give notice as soon as a problem arose:

#### **\*40 B. Contractor Notice**

As soon as a problem arises concerning the interpretation or execution of the Contract, the Contractor shall give written notice to the representative of Hydro-Québec and must inform him of its intention, if appropriate, to present a claim.

As soon as possible after the notice, the contractor should detail in writing the arguments in support of its claim and, where applicable, its methods of calculation. It shall submit with this detailed account all the supporting documents.<sup>100</sup>

With respect to whether there was a formal notice, the Quebec Court of Appeal held that a so-called “P-3 Claim” did not constitute formal notice within the meaning of art. 1617 of the Code. In other words, submitting a claim did not constitute the same thing as submitting a notice which is to be followed by a detailed claim. While the situation in this case turned on several other matters which are outside the scope of the work presented here, it is worth mentioning that the Court of Appeal did cite *Corpex*, but did not thoroughly engage with the jurisprudence or previous comments made in this respect. Nonetheless, it goes to show, once again, that Quebec jurisprudence, as a rule, holds the contractor to a strict compliance standard in respect to contractual notice requirements for delay claims.

#### **6.4 Construction Kiewit Cie c. Hydro-Québec<sup>101</sup>**

In what appears to be a saga of cases arising from Hydro-Québec's projects (this concerned the construction of a hydroelectric dam), Hydro-Québec appealed a judgment ordering it to pay the contractor some \$27 million less the amount paid by it during the proceedings, for a total of over \$14 million. The contractor cross-appealed and sought that Hydro-Québec be ordered to pay \$41 million. In a trial requiring 74 days, the trial judge found that clause 19B imposed a duty upon the contractor to give written notice to Hydro-Québec and a detailed, accompanying, written statement of claim as soon as possible.

The notice provision in this case read exactly like clause 19 noted above in *Dawco*. The Court of Appeal found that a letter accompanying the request for compensation and requesting a mediation did not constitute notice under the contract and was not sufficient to trigger the \*41 applicability of art. 1600, 1617 and 1618 of the Code, entitling the creditor to interest and indemnity from the date of notice. As in *Dawco*, the case did not turn on the requirement of notice; in other words, notice in delay clauses was not the driving contention on appeal.

It is also interesting to note that both *Dawco* and *Kiewit* were released on the same day, and considered by the same panel of judges, with certainly similar factual scenarios. Naturally, they would both draw on the same logic and apply analogous principles.

#### **6.5 Catalogna & Frères ltée c. Construction DJL Inc.<sup>102</sup>**

This recent Quebec Superior Court case held that the Quebec “Court of Appeal has repeatedly stated the formalities of the construction complaint system must be strictly observed in order for the contractor to be able to rely on it ...”<sup>103</sup> However, the judge also recognized that the parties may waive these formalities so long as the waiver, which although implied, must be unequivocal as to the intention to acquiesce or renounce the notice provision.<sup>104</sup>

Overall, in Quebec, strict compliance is law, so long as the parties have not reached an unambiguous and unmistakable agreement that they are willing to renounce the provisions of the notice clause. In making this determination the courts will look at communication between parties and at the circumstances-- even if the ultimate renunciation was implied. In spite of this



possibility, the Quebec courts have not proceeded to add an extra layer of analysis to the strict compliance test as the courts in Ontario have done. However, the possibility for lack of strict compliance to be overcome through the parties renouncing their duties is now mirrored by the recent, more liberal approaches to notice provisions adopted in Ontario in *Limen* and in *Clearway*.

## 7. A MODEST PROPOSAL

The courts across Canada stand divided on the subject of strict compliance with notice of delay clauses. Clarity is needed. While we certainly do not purport to opine on how the Supreme Court should deal with this issue, should it come before the court, we do think the justices should take that opportunity if it presents itself, by granting leave to appeal in an appropriate case.

\*42 Earlier in the article, we alluded to the idea of a purposive interpretation, and in this section we modestly undertake to outline how such test would develop under this approach. The starting point would always be the *Corpex* strict compliance test. While it would be open to the Supreme Court to end its analysis there, that would effectively render years of case law in multiple jurisdictions across the nation difficult to reconcile, and risk continuing the trend of inconsistent results we have identified in the case law. As a practical matter, these are often “hard cases”, where judges try to do right by the parties on what is repeatedly a detailed and complex factual narrative. Simply put, the problems that arise in these situations do not seem, and often cannot be, satisfactorily resolved through a “black and white” application of the case law.

We have shown trends, even in strict compliance provinces such as Ontario, Quebec, and Alberta, whereby the judges have followed a purposive approach, often centered on the question of prejudice. Beginning with *Doyle*, the courts developed this concept in a manner that built on Justice Beetz' reasons in *Corpex*.

As such, at the outset of this article, we drew an analogy to *Tercon*, a seminal 2010 Supreme Court decision on tendering. In *Tercon*, the use of exclusion clauses in calls for tender was upheld by the majority. Although the minority would have ended it there, the majority articulated a purposive test for when an exclusion clause would not be enforced to defeat a claim by an aggrieved bidder.

Hence, we propose that, while courts might start with *Corpex*, thereby commencing their analysis with strict compliance of contractual notice requirements as the standard in assessing if a delay claim should be allowed to proceed (this would involve a determination of whether the notice was on time, sufficient, and adequately detailed), the courts should then proceed to consider the following:

- (a) whether there was conduct evidencing an agreement, even if implied, to dispense with strict compliance of contractual procedures;
  
  
  
  
  
  
  
  
  
  
- (b) whether the claimant can establish actual knowledge and absence of prejudice on the part of the other party; and
  
  
  
  
  
  
  
  
  
  
- (c) whether, ultimately, it would be unconscionable to disallow the claim to proceed.

With respect to part (a), conduct, the key factor would be the establishment of a pattern reflecting an agreement amongst parties not to require strict compliance with contractual procedures. For example, in *Bemar*, Fragomeni J. looked at the parties' conduct in finding that it \*43 was highly unlikely that the municipality would have directed the contractor to wait until the end of the

project to determine its final costs. In *Centura*, Nielson J. found that it was important to consider the parties' course of dealings in determining whether a strict compliance approach ought to be adopted. Additionally, in Quebec, the parties can rely on codified provisions of “renunciation”, a renunciation that can be evidenced through the unequivocal conduct of the parties.<sup>105</sup>

Under part (b), the concept of knowledge was considered in several of the decisions we have surveyed. In Ontario, where strict compliance is the test,<sup>106</sup> a discussion of knowledge arose in *Ross-Clair*,<sup>107</sup> *Limen*,<sup>108</sup> and in *Clearway*.<sup>109</sup> Likewise, knowledge was prevalent in legal analyses in British Columbia *W.A. Stephenson*<sup>110</sup> and *Foundations Co.*<sup>111</sup> It is evident that the existence of actual knowledge of the party claiming the delay will serve not only to discredit the alleged prejudice suffered by the party whom did not receive a timely notice, but also to estop them from claiming a strict application of the contractual provisions. Moreover, insofar as the timing of notice is relevant, for example, whether it is delivered during the project or near its end, can also be viewed as a question of prejudice. Late notice is more likely to cause prejudice where it is delivered at the end, after the owner could have meaningfully mitigated. Similarly, where notice has been missed by a matter of days or even weeks, and opportunities to mitigate delay were presented, the existence of prejudice is far less credible.

Lastly, under part (c), we propose that where the court, having started with a strict compliance approach, and having addressed whether parties' conduct or knowledge could excuse a lack of adherence to the test, a claiming party might still be able to rely on the principle of unconscionability to succeed on its claim. In our study of the law, the principle of unconscionability only arose once, explicitly, in an Alberta decision, *Banister*. However, as we noted earlier, this was not a case which concerned the provision of notice of a delay claim, and it was distinguished as such. The analogy to be made, however, is that the \*44 courts have unconscionability as a readily available tool in their arsenal of equitable remedies, and that where the circumstances demand the use of such a tool, the courts should not shy away from creatively applying it. To a certain extent, we might even see unconscionability as an underpinning reason for the motion judges' decisions in *Limen* and *Clearway*.

Naturally, the proposed test is nothing more than that--a proposal, and a modest one, at most. We merely seek to underline a set of possible parameters which the Supreme Court might wish to rely on, should it decide to rule on this status of the strict compliance test in Canada. These parameters would uphold *Corpex*, and affirm strict compliance as the standard, but would provide a rational and predictable set of factors which Canadian judges have already considered in making their determinations. We therefore propose that, given their recurrence in the surveyed case law, they become established, national norms against which to conduct a determinative and cohesive legal analysis.

On the whole, this modest proposal is more aligned with the B.C. approach than Ontario. However, as demonstrated by our review of the cases, all of the provinces we have reviewed go beyond strict compliance in varying degrees. What is missing is a uniform national standard to bring order to this body of case law.

## 8. RECONCILING LEGAL TRAJECTORIES AND PUBLIC POLICY

We have made several references to the need for the Supreme Court to consider and establish a clear test on the application of notice clauses in light of delay claims. Courts all over Canada have certainly adopted their own, varying interpretations and have, if nothing else, caused reservations among contracting parties as to their rights and duties.

In Ontario, the courts have embraced a more holistic approach to the interpretation of notice clauses in certain, the Ontario Court of Appeal has tended to follow a stricter path and has yet to rule on these extrinsic circumstances that the courts have allowed on motions for summary judgment. The B.C. courts, on the other hand, have focused on prejudice, and an apparent unconscionability at the core of their analysis, in considering other factors where it would be unfair for the delay claim to fail. Meanwhile, in Quebec, we have had a very different approach, where strict compliance has been the rule. Although in Quebec the courts have identified a possibility for the parties to explicitly or impliedly repudiate the requirement for such a notice, they have not fully come to a conclusion that failure to comply with said notice would \*45 no longer be determinative of a delay claim. The Quebec courts have also been systematically reluctant to ensure compliance with the *Quebec Civil Code*, which forms a different basis than common law jurisprudence, and also to ensure compliance with the privity of contract between the parties.

It can therefore be seen that the evolution of the notice issue is very much fact specific and jurisdictional. There is a need for parties to understand their obligations and plan accordingly: is it strict compliance with contractual requirements, or the absence of prejudice that will govern their behaviour? If prejudice is important, who bears the onus of proving the absence or presence of prejudice? Moreover, can patterns of conduct and actual knowledge of a claim override a lack of strict compliance, even in Quebec?

Naturally, the court will be presented with important public policy perspectives: 1) the involvement and interference of the court into parties' contractual relationships; and 2) the need for owners and contractors to contract with clarity, and know the extent of their duties and their rights. We have made note, earlier on, that while certain viewpoints might somehow favour one party over the other, it was never the intention of this article to focus on those distinctions. Rather, our intention was to highlight a divergence in the case law that would benefit from clarification. In doing so, we have gone one step further and have modestly proposed how these divergent cases might be reconciled on a national level by preserving strict compliance as the starting point, but allowing for appropriate exceptions on purposive bases already well-founded in Canadian case law.

#### Footnotes

- 1 Cited from Yonni Fushman, “[Deconstructing Delay Claims](#)” (2014) 27 C.L.R. (4th) 181.
- 2 Subsections 13.13(6) and (7) of the *Construction Act* state that the adjudicator is to release written reasons, which are admissible as evidence in court. However, due to the privacy of adjudication, the authors are of the view these will not be shared on a public database. In addition, in 2016, Sharon Vogel and Bruce Reynolds in *Striking the Balance: Expert Review of Ontario's Construction Lien Act* made the case that due to the privacy of adjudication decisions, these are generally not accessible to the public, page 228, accessed at: <http://www.constructionlienactreview.com/wp-content/uploads/2015/07/Striking-the-Balance-Expert-Review-of-Ontarios-Construction-Lien-Act.pdf>.
- 3 *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)*, [2010] 1 S.C.R. 69.
- 4 [1982] 2 S.C.R. 643, varied 1983 CarswellNat 537 (S.C.C.).
- 5 *Ibid.*, para. 7.
- 6 *Corpex, supra*, note 4 at para. 62.
- 7 *Ibid.*, at paras. 58 to 59.
- 8 1988 CarswellBC 204 (C.A.).
- 9 *Ibid.*, at para. 20.
- 10 *Ibid.*, paras. 77 and 78.
- 11 Cited from Yonni Fushman, “[Ontario's New Trajectory In The Law Of Notice For Delay Claims](#)” (2018) 36 C.L.L. 6.
- 12 *Bemar Construction (Ontario) Inc. v. Mississauga (City)*, 2004 CarswellOnt 222 (S.C.J.), affirmed 2007 ONCA 685.
- 13 *Technicore Underground Inc. v. Toronto (City)*, 2012 ONCA 597.
- 14 *Ross-Clair v. Canada (Attorney General)*, 2016 ONCA 205.
- 15 *Ledore Investments Ltd. (Ross Steel Fabricators & Contractors) v. Ellis-Don Construction Ltd.*, 2017 ONCA 518.
- 16 *Limen Structures Ltd. v. Brookfield Multiplex Construction Canada Ltd.*, 2017 ONSC 5071, additional reasons 2017 CarswellOnt 17894 (S.C.J.).

- 17 *Clearway Construction Inc. v. The City of Toronto*, 2018 ONSC 1736.
- 18 *Bemar*, *supra*, note 12 at para. 179.
- 19 *Ibid.*
- 20 *Ibid.*, para. 178.
- 21 Cited from Yonni Fushman, “Ontario's New Trajectory In the Law Of Notice For Delay Claims” (2018) 34 C.L.L. 6.
- 22 *Technicore* (2012), *supra*, note 13 at para. 9.
- 23 *Ibid.*, para. 17.
- 24 *Technicore Underground Inc. v. Toronto (City)*, 2011 ONSC 7205 at para. 34, affirmed 2012 CarswellOnt 11173 (C.A.).
- 25 *Technicore* (2012), *supra*, note 13 at para. 29.
- 26 *First City Development Corp. v. Stevenson Construction Co.*, 1985 CarswellBC 762 (C.A.), leave to appeal refused 1985 CarswellBC 2798 (S.C.C.).
- 27 *Ibid.*, para. 6.
- 28 *Ibid.*, para. 8.
- 29 *Technicore* (2012), *supra*, note 13 at para. 44.
- 30 *Ibid.*, para. 47.
- 31 *Ibid.*, para. 47.
- 32 *Ibid.*, para. 48.
- 33 *Technicore* (2012), *supra*, note 13 at para. 50.
- 34 *Ibid.*
- 35 *Ibid.*, para. 51.
- 36 Cited from Yonni Fushman, “Ontario's New Trajectory In the Law Of Notice For Delay Claims” (2018), 34 C.L.L. 6.
- 37 Cited from Yonni Fushman, “Will Failure To Comply With The Notice Provisions In A Contract Preclude A Contractor's Claim? It Depends On The Facts” (2018), accessed at: <https://www.oba.org/Sections/Construction-Law/Articles/Articles-2018/June-2018/Will-Failure-to-Comply-with-the-Notice-Provisions>.
- 38 *Ross-Clair v. Canada (Attorney General)*, 2014 ONSC 6551 at para. 22, reversed 2016 CarswellOnt 3854 (C.A.).
- 39 *Ibid.*, para. 8.
- 40 *Ross-Clair v. Canada (Attorney General)*, 2016 ONCA 205 at para. 13.
- 41 *Ross-Clair* (2014), *supra*, note 38 at para. 19.
- 42 *Ibid.*, para. 29.
- 43 *Ross-Clair* (2016), *supra*, note 40 at para. 58.

- 44 *Ibid.*, para. 61.
- 45 *Ibid.*, para. 62.
- 46 *Ibid.*, para. 63.
- 47 Cited from Jay Nathwani, “Do Not Skimp on the Details: Court of Appeal Throws Out Contractor's Claim due to Insufficient Backup” (2016) Construction Law Letter, Vol. 32, No. 5.
- 48 *Ledore Investments*, 2017 ONCA 518 at para. 6.
- 49 *Ibid.*, para. 10.
- 50 *Limen Structures Ltd. v. Brookfield Multiplex Construction Canada Ltd.*, 2017 ONSC 5071, additional reasons 2017 CarswellOnt 17894 (S.C.J.) at para. 18.
- 51 *Ibid.*, para. 67.
- 52 *Clearway Construction Inc. v. The City of Toronto*, 2018 ONSC 1736 at para. 11.
- 53 *Ibid.*, para. 17.
- 54 *Clearway*, *supra*, note 17 at para. 35.
- 55 Cited from Yonni Fushman, “Will Failure To Comply With The Notice Provisions In A Contract Preclude A Contractor's Claim? It Depends On The Facts” (2018), accessed at: <https://www.oba.org/Sections/Construction-Law/Articles/Articles-2018/June-2018/Will-Failure-to-Comply-with-the-Notice-Provisions>.
- 56 1984 CarswellBC 800 (S.C.), affirmed 1985 CarswellBC 762 (C.A.), leave to appeal refused 1985 CarswellBC 2798 (S.C.C.).
- 57 *Ibid.*, para. 7.
- 58 *Ibid.*, para. 5.
- 59 *First City*, 1985 CarswellBC 762 (C.A.) at para. 3.
- 60 *Hancock v. B.W. Brazier (Anerley) Ltd.*, [1966] 2 All E.R. 901 (C.A.).
- 61 *Simpsons Ltd. v. Pigott Construction Co.* (1973), 1 O.R. (2d) 257 (C.A.).
- 62 *First City*, *supra*, note 59 at para. 10.
- 63 1987 CarswellBC 675 (S.C.).
- 64 *Ibid.*, at para. 175.
- 65 *Ibid.*, para. 174.
- 66 Cited from Yonni Fushman, “Deconstructing Delay Claims” (2014) 27 C.L.R. (4th) 181.
- 67 *Ibid.*, para. 177.
- 68 1997 CarswellBC 1021 (C.A.), additional reasons 1998 CarswellBC 308 (C.A.).
- 69 1995 CarswellBC 1113 (S.C.), additional reasons 1996 CarswellBC 683 (S.C.).

- 70 *Foundation Co.*, *supra*, note 68 at para. 57.
- 71 *Ibid.*, para. 58.
- 72 1995 CarswellBC 1113 (S.C.) at paras. 515-19. While this decision was mostly reversed on several grounds of appeal, most outside the scope of this article, with respect to whether the general contractor complied with its obligation to provide a claim in writing, “within a reasonable time”, Benner J.’s determination was incontestably upheld on appeal.
- 73 2002 BCSC 1220.
- 74 *Ibid.*, para. 54.
- 75 Cited from Yonni Fushman, “Deconstructing Delay Claims” (2014) 27 C.L.R. (4th) 181.
- 76 2000 ABCA 223.
- 77 1996 CarswellAlta 524 (Q.B.), additional reasons 1996 CarswellAlta 706 (Q.B.).
- 78 *Dilcon*, *supra*, note 76 at para. 30.
- 79 *Ibid.*, at para. 32.
- 80 *Ibid.*, at para. 30.
- 81 *Ibid.*, para. 53.
- 82 *Ibid.*, paras. 60-61.
- 83 2003 ABQB 599.
- 84 *Ibid.*, para. 123.
- 85 Cited from Yonni Fushman, “Deconstructing Delay Claims” (2014) 27 C.L.R. (4th) 181.
- 86 *Banister*, *supra*, note 83 at para. 121.
- 87 *Ibid.*, at para. 123.
- 88 *Morin Inc. c. Québec (Procureur général)* (1985), [1986] R.J.Q. 104 (C.A.) at para. 35 [our translation].
- 89 *Industries Falmec inc. c. Société de Cogénération de St-Félicien, société en commandite/St-Félicien Cogeneration Ltd. Partnership*, 2005 QCCA 469 at para. 82 [our translation].
- 90 *Paul Savard, entrepreneur électricien inc. c. Construction Infrabec inc.*, 2012 QCCA 2304.
- 91 *Ibid.*, at para. 11 [our translation].
- 92 *Ibid.*, at para. 14.
- 93 Art. 2884 of the *Quebec Civil Code*, accessed at: <http://legisquebec.gouv.qc.ca/en/showdoc/cs/CCQ-1991>.
- 94 *Paul Savard*, *supra*, note 90 at para. 56.
- 95 2013 QCCA 580.
- 96 *Ibid.*, para. 194 [our translation].

- 97 *Ibid.*, para. 90 [our translation].
- 98 *Ibid.*
- 99 2014 QCCA 948.
- 100 *Dawco*, *supra*, note 99 at para. 186 [publisher's translation as found on WestlawNext Canada, *Dawcolectric inc. c. Hydro-Québec*, 2014 CarswellQue 14527 (C.A.)].
- 101 2014 QCCA 947 [*R. c. Parsons*, 2014 CarswellQue 14256 (C.A.) for publisher's translation].
- 102 2018 QCCS 1918.
- 103 *Ibid.*, at para. 81 [our translation].
- 104 *Ibid.*, at para. 82 [our translation].
- 105 *Catalogna & Frères liée c. Construction DJL Inc.*
- 106 As enunciated by the Court of Appeal in *Technicore* and in *Ross-Clair*.
- 107 We noted that in *Ross-Clair*, the Engineer and the owner repeatedly asked the contractor to provide information of its claim in a timely manner.
- 108 In *Limen*, Master Albert definitively found that written communications regarding contractual delay notices constituted knowledge on the part of the general contractor.
- 109 The question in *Clearway* was whether there was a triable issue with respect to the City of Toronto's knowledge regarding the underlying factual basis of the claim.
- 110 In *W.A. Stephenson*, Locke J. considered and analyzed minutes of meetings in his determination that the owner had “constructive knowledge of the claims” (cited above at note 63).
- 111 In *Foundations Co.* the trial judge looked at the parties' minutes of meetings to make a determination regarding notice provisions; this part of the decision was upheld on appeal.

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