CONSTRUCTION LAW LETTER

Volume 40 • Number 1 September/October 2023

Dragana Bukejlovic
Dentons Canada LLP, Toronto

Karen Groulx
Dentons Canada LLP, Toronto

Ekin Cinar
Dentons Canada LLP, Toronto

COMPLYING WITH CONTRACTUAL NOTICE REQUIREMENTS: LESSONS FROM *CROSSLINX TRANSIT SOLUTIONS v. ONTARIO*

The Ontario Court of Appeal's decision in *Crosslinx Transit Solutions General Partnership v. Ontario (Economic Development, Employment and Infrastructure)* emphasized the importance of providing proper notice, pursuant to contractual requirements, to obtain relief for an alleged breach of contract.

The case involved a dispute over a "variation enquiry", which, if granted, could have allowed for an extension of the substantial completion date.

The variation enquiry provision in the project agreement stated that the owner had to declare an emergency and provide notice of additional and overriding procedures. The court found that proper notice had not been provided and that the application judge had made a palpable and overriding error.

While the Ontario Court of Appeal's decision highlights the importance of complying with contractual notice requirements, the lower court in *Crosslinx v. Ontario Infrastructure* dealt with an application seeking declarations that the COVID-19 pandemic was an emergency under the project agreement; the Ontario Infrastructure and Lands Corporation and Metrolinx (the owners) required compliance with additional and overriding measures to protect public health, and Project Co. was entitled to a variation enquiry under the pro-ject agreement.

FACTUAL BACKGROUND

The Eglinton Cross Light Rapid Transit line (ECLRT) project involves the construction and maintenance of a 19-kilometre light rapid transit line, 10 kilometres of which will be underground.

The owners signed a project agreement with Project Co. consisting of four of Canada's largest construction companies, represented by Crosslinx Transit Solutions General Partnership.

The project agreement set a substantial completion date and provided for penalties if the date was not met. The project agreement also allowed the owners to require Project Co. to implement "additional or overriding procedures" in case of an emergency.

In such a scenario, Project Co. was able to invoke a variation enquiry which, in return, lead to an evaluation of whether the implementation of such measures should result in an extension of the substantial completion date.

Following the declaration of a state of emergency by the government of Ontario in March 2020, Project Co. requested that the owners declare an emergency under the project agreement in order for Project Co. to take additional measures to ensure the health and safety of workers at the project site.

The owners responded indicating that they were waiting for the Ministry of Labour's construction protocols and expected Project Co. to implement them. In subsequent correspondence, the owners confirmed that they had not declared an emergency and took the position that they would not declare one because the province had already done so. Project Co. was required to implement the measures under the *Occupational Health and Safety Act* and local laws.

Project Co. then commenced an application in the lower courts seeking declarations that the COVID-19 pandemic was an emergency under the project agreement; the owners were required to direct Project Co. to implement additional and overriding measures to protect public health and worker safety; and the owners have a contractual obligation to provide Project Co. with a variation enquiry under the project agreement.

SUPERIOR COURT'S DECISION

The lower court held that the core issue between the parties was whether Project Co. was entitled to invoke the variation enquiry procedure under the project agreement that could result in an extension of time.

The Motion to Stay

First, the court dealt with the owners' motion to stay the application. The owners argued that the project agreement provided for a stay of all litigation until after the substantial completion date and Project Co. had failed to comply with the variation enquiry process.

Upon review of the case, the Superior Court found that, although the project agreement provided a valid dispute resolution provision that required a stay of litigation, it also contained a number of exceptions for situations where waiting until after the substantial completion date to resolve a dispute would result in irreparable harm to a party.

Additionally, the court referred to a provision that explicitly established a process for Project Co. to modify the Substantial Completion Date. It would not be logical to defer disputes regarding extensions to the substantial completion date until after its achievement. The court found that such a delay would subject Project Co. to detrimental consequences, such as liquidated damages, loss of financing, contract termination, insolvency and damage to its reputation.

Regarding Project Co.'s alleged failure to comply with the variation enquiry process, the court found that Project Co. had indeed followed the appropriate procedure, while the owners were attempting to frustrate the process. Project Co. had served the necessary notices and taken all required steps leading to a variation enquiry. The owners had attempted to slow down the process by demanding excessive documentation before allowing senior officers to meet and discuss the dispute, a mandatory step in pursuing a variation enquiry. The Superior Court concluded that, even if Project Co. had provided the information requested, it would not have facilitated the dispute discussions. Moreover, evidence of an offer to settle by the owners indicated that they had enough information to consider Project Co.'s claims, without requiring further documentation.

In light of the court's findings, the motion to stay was dismissed.[1] The court proceeded with the Project Co.'s application for declarations.

Application for Declarations

In order to receive a variation enquiry, Project Co. was required to demonstrate that an emergency had occurred as defined in the project agreement, and that the owners had requested the implementation of "additional and overriding measures".

The main point of contention between the parties was whether the owners had asked or should have asked Project Co. to implement additional or overriding measures. The owners contended that they did not require Project Co. to implement any measures because Project Co. was already obligated to comply with applicable laws, including construction protocols and public health measures. Any direction from the owners would have been a restatement of Project Co.'s existing obligation. Furthermore, the owners argued that the contract assigned all health and safety risks to Project Co., and pointed to Project Co.'s emergency response plan as evidence that emergencies were under Project Co.'s responsibility.

The Superior Court found that:

- the COVID-19 pandemic qualified as an emergency under the project agreement, and it required "additional and overriding measures";
- the owners notified Project Co. that they required compliance with "additional or overriding procedures" with their email of March 25, 2020;
- while Project Co. had obligations under the *Occupational Health and Safety Act*, this did not imply that Project Co. had accepted all the risks associated with the pandemic when entering into the project agreement. The existence of a mechanism to extend the substantial completion date due to an emergency implied that Project Co. was not anticipated to shoulder all the risk.

Finally, the court held that the Ministry of Labour's construction protocols were not applicable laws that Project Co. was required to follow under the project agreement. Therefore, the owners' requests for Project Co. to comply with new construction protocols were considered "additional and overriding measures" and not a reiteration of existing obligations.

The court granted Project Co.'s application and declared that the owners had a contractual obligation to provide Project Co. with a variation enquiry.

The Court of Appeal's Decision

The issue in the appeal was whether the application judge erred in concluding that s. 62.1(c), the emergency provision of the project agreement, was triggered such that the parties were required to engage in a variation enquiry.

In the court's view, to determine the appeal, it was sufficient to consider whether the application judge made a palpable and overriding error in finding that the owners, by their email of March 25, 2020, actually notified Project Co. under s. 62.1(c) that they required compliance with additional or overriding procedures.

The court held that the application judge erred in finding that the owners' March 25, 2020, email was sent to Project Co. There was no dispute that this email was an internal email that was never directed to or sent to Project Co.

Project Co. argued that the application judge's finding that they were notified by s. 62.1(c) can be supported by replacing the March 25, 2020, internal letter with the owners' letter of April 21, 2020.

The Court of Appeal saw several difficulties with this proposition. First, the April 21, 2020 letter was "at best ambiguous". The owners in that letter did not require any "additional and overriding measures" from Project Co., in addition to those already undertaken to comply with health and safety obligations as required by law. Second, Project Co. never stated that the owners' letter of April 21, 2020, or any other correspondence,

constituted actual notification under s. 62.1(c) of the project agreement. Rather, they argued that the owners "should" declare an emergency and direct them to implement additional or overriding procedures.

Finally, the court considered what constitutes notification as required by s. 62.1(c) and whether such notification would constitute notice under s. 61.1(a) of the project agreement. The court held that a notice must be in writing and delivered by registered mail, facsimile transmission followed by registered mail, or personal service. There was no evidence as to whether the April 21, 2020, letter met these requirements.

The appeal was allowed by the Court of Appeal, but the application was not dismissed. Instead, the application was returned to the Superior Court for a rehearing. In doing so, the Court of Appeal referred to the application judge's consideration that the main issue was whether the owners had asked or should have asked Project Co. to implement additional or overriding procedures.

KEY TAKEAWAYS

The importance of giving proper notice in construction projects has been emphasized in court decisions and this ruling from the Court of Appeal reaffirms the significance of adhering to notice provisions in construction contracts. For example, this outcome may have been different had Project Co. responded to the letter promptly and taken the position with the owners that they were interpreting the letter to mean that the COVID-19 pandemic constituted an emergency as defined in the project agreement.

The Superior Court's decision was one of the first to deal with the COVID-19 pandemic and its implications to a large-scale project such as the ECLRT. It indicated that, when it comes to COVID-19, standard contractual terms in relation to health and safety shifting all responsibility to the contractor, may not be seen as effective.

1. The owners' motion for leave to appeal this order was denied by the Divisional Court in [2021] O.J. No. 4663, 2021 ONSC 5905.

Ontario Court of Appeal

Crosslinx Transit Solutions General Partnership v. Ontario (Economic Development, Employment and Infrastructure)
P.S. Rouleau, K.M. van Rensburg and L.B. Roberts JJ.A.
March 7, 2022