Atlantic Construction Counsel

LEGAL DEVELOPMENTS OF INTEREST TO THE CONSTRUCTION INDUSTRY IN ATLANTIC CANADA

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In this issue

Contractor Held Liable for Business Interruption: *Heyes v. City of Vancouver*, 2009 BCSC 651

Heyes is a recent and interesting case from British Columbia which found a contractor liable for disruption during an infrastructure project.

On May 27, 2009 the British Columbia Supreme Court awarded $600,000 for loss of income to Hazel & Co., a local business in the City of Vancouver (the "City"), after construction of a transit line caused an unreasonable interference with the business. Claims for misrepresentation and negligence were dismissed, but the nuisance action was successful. Ms. Heyes, owner of Hazel & Co., claimed that the disruption to pedestrian and vehicular traffic on Cambie Street caused a significant decline in her business.

The claim in nuisance was dismissed as against the City, Canada, and British Columbia but Translink, CLRT, and InTransit BC were found jointly and severally liable. The City was not liable as it did not have sufficient involvement with, or knowledge of, the specifics of the project that caused the nuisance. Thus, it could not reasonably be expected to have known that its property would be used in a manner that would cause a nuisance when it granted a licence for the construction of Canada Line.

The defendants argued that the magnitude and utility of the Canada Line project outweighed the deleterious consequences to Hazel & Co. The court considered the balancing of competing interests in its decision, but concluded that a reduction of approximately 50 percent in gross profit caused solely by the use of the cut and cover method of construction could not be regarded as a tolerable or acceptable burden and thus that the impact on Hazel & Co. outweighed the social or public utility of the project. The court also concluded that the originally planned bored tunnel method of construction would not have created a nuisance. This ruling has the potential to significantly increase the cost of major projects undertaken by a public body as consideration must be given to whether the use of less expensive construction methods may result in nuisance actions.

Although the City was not liable for the nuisance, the court discussed the defence of statutory authority as outlined by the Supreme Court of Canada in *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201. In *Ryan*, the court stated as follows at para. 54:

> *Statutory authority provides, at best, a narrow defence to nuisance. The traditional rule is that liability will not be imposed if an activity is authorized by statute and the defendant proves that the nuisance is the "inevitable result" or consequence of exercising that authority.*

In *Heyes,* the statutory authority defence failed because there was an alternative to the chosen method of construction which would not have created the nuisance.

What this Case Means to You

While the facts are somewhat unique, this case suggests that contractors will have to consider alternative approaches and attempt to minimize disruption when engaging in infrastructure projects. This in turn could result in higher costs of construction for municipalities and provincial governments as contractors may seek to account for this exposure to law suits in their bids.

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When Can a Tendering Authority Walk Away if Bids are Too High? *Crown Paving Ltd. v. Newfoundland & Labrador,* 2009 NLCA 5

Earlier this year, the Newfoundland and Labrador Court of Appeal issued a judgment on tendering issues in *Crown Paving*. Two companies, Crown Paving and Glenn Corporation, submitted bids in response to a call for tenders by the Department of Transportation and Works (the "Department") for the maintenance of a portion of highway in southern Labrador. Both bids were approximately double the Department's estimated cost for the five-year contract, with Crown Paving submitting the lowest qualified bid. The Department eventually cancelled the tender due to budgetary concerns. Before cancelling the tender, however, the Department began negotiations with Glenn Corporation to have a portion of the work completed by extending the existing contract with that company.

The issue was whether the Department had breached its duty of fairness by cancelling the tender and extending the existing contract with Glenn Corporation. The timing of these events was an important consideration, given that the extension of the contract preceded the cancellation of the tender. The tender documents contained a privilege clause stating that "the owner will not necessarily accept the lowest or any tender." The court noted that the duty of fairness must be assessed within the context of the privilege clause, for the obligation to treat bidders fairly cannot be used to render that clause ineffective.

A tendering authority is entitled to rely on a privilege clause to cancel the tender and walk away where the bids are too high, provided it acts fairly and in good faith. Where the tender is cancelled due to budgetary concerns and no contract is awarded, or where negotiations to extend an existing contract are commenced following the cancellation of the tender, it seems unlikely that the tendering authority will be considered to have acted unfairly. On the other hand, where negotiations are commenced and an existing contract extended before the tender is cancelled, as was the situation in *Crown Paving*, the actions of the tendering authority will be examined closely to ensure the duty of fairness is not breached.

Justice Welsh, writing for the majority, concluded that the Department did not breach its duty of fairness to Crown Paving despite the timing of the cancellation and the negotiations. She held that, generally, the option of extending an existing contract will not have the effect of undermining the tendering process. In this case, the contract was extended, not renewed, as is permitted by

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section 5 of the *Public Tender Act*, R.S.N.L. 1990, c. P-45, and further, the extension was a bridging measure intended to permit the Department time to assess alternatives for dealing with work that could not be postponed in the face of bids that were significantly over budget.

Justice Welsh rejected Crown Paving's submission that the Department engaged in bid shopping, holding that the facts did not support the conclusion that the tender was used as a negotiating tool to drive down the cost of the work. Neither did the Department breach the more general manifestation of the duty of fairness by compromising the integrity of the bidding process, such as by putting one company at an advantage or disadvantage in relation to competitors as a result of the tendering process. The Department's delay in notifying Crown Paving that the tender was cancelled was not seen to result in any unfair treatment to that bidder.

Interestingly, the Nova Scotia Court of Appeal recently addressed a similar fact situation in *Port Hawkesbury (Town) v. Borcherdt Concrete Products Ltd.*, 2008 NSCA 17. Justice Welsh distinguished the *Port Hawkesbury* decision on the basis that it "dealt not with an extension of an existing contract but with a realignment of the work and awarding of contracts to complete the work without regard to a tender that was still in effect". It was considered by Justice Welsh as an example of a tendering authority relying on a privilege clause to award something other than Contract B to another bidder or party, in breach of its duty of good faith.

In *Port Hawkesbury*, the municipality was held to have acted unfairly when it allowed the sole bidder (whose bid was significantly over budget) to remain at risk under its tender offer while the municipality engaged in post-closing negotiations in which the bidder was not included. The court commented that the municipality should have notified Borcherdt that its bid was rejected or should have included Borcherdt in the negotiations. In the circumstances, the municipality's conduct was held to amount to bid shopping. Notably, the court was assisted by the Nova Scotia Construction Contract Guidelines which specifically deal with the effect of bids higher than the estimated contract value and encourage owners in such situations to negotiate with bidders and make changes to the scope of work. Although a 15% threshold is referenced in the Guidelines for negotiations with the lowest compliant bidder, the trial judge found that, at a minimum, the municipality should have advised Borcherdt that there was to be a change in the scope of the work.

Also of note, the bidder in *Port Hawkesbury* appears to have remained at risk for an indefinite period of time, until the municipality eventually informed it that the bid was rejected. In *Crown Paving* the original "at risk" period was 30 days, following which the tender was extended for an additional 30 days with Crown Paving's consent. The Department notified Crown Paving that its bid was rejected well before the expiration of the additional 30 days, thereby minimizing any negative impact of delay.

In contrast, Justice Rowe, the dissenting opinion in *Crown Paving*, came to a conclusion similar to *Port Hawkesbury*, holding that the Department had breached its duty of fairness by negotiating the extension while the tender remained opened. In order to comply with its duty of fairness and avoid a finding of bid shopping, the Department should have ended the tender before negotiating the extension with Glenn Corporation.

What This Case Means For You

Crown Paving is consistent with the pro-owner trend established in the 2007 Supreme Court of Canada decision *Double N Earthmovers Ltd. v. Edmonton (City)*, 2007 SCC 3, which gave a broad interpretation to various clauses in the tender documents, including a clause which permitted the owner to engage in post-closing, pre-award negotiations with the "lowest evaluated tenderer".

From an owner or contractor's perspective, it is clear that a tendering authority can rely on a privilege clause to walk away from a tender if the bids are too high, but must be careful to act fairly and in good faith. The situation becomes complicated when an owner is contemplating extending an existing contract and/or negotiating with bidders or third parties other than the lowest compliant bidder. *Crown Paving* suggests that it is safer to cancel a tender before engaging in such negotiations, or otherwise the tendering authority may be faced with difficult questions of whether it complied with its duty of fairness. Owners and contractors should look to the governing legislation, industry guidelines and local practices when evaluating their options and proposed actions, particularly where the new contract is similar to the original bid.

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Drug and Alcohol Testing in the Construction Industry

Drug and alcohol abuse is an unfortunate fact of life in Canadian society. It is also an unfortunate reality that drug and alcohol abuse in the workplace creates a significant risk to health and safety. This is probably more true in the construction industry than in any other, due to the particular characteristics of the industry. Owners, project managers, contractors, subcontractors and supervisors all have legal obligations to take all reasonable measures to ensure the health and safety of their workers and others having access to their project sites. These legal obligations, under provincial occupational health and safety legislation, extend to the adoption and implementation of workplace drug and alcohol policies, including policies on drug and alcohol testing.

Testing has been shown to be an effective means of reducing the incidence of workplace accidents. According to a Cornell University study, U.S. companies that tested workers and job applicants for drugs experienced a 51 percent reduction in injury rates within two years of implementing a drug-testing program, compared with only a 14 percent decline in injury rates in the average construction company during the same two-year period.

The right of employers to take effective measures to address drug and alcohol abuse in the workplace is tempered by the impact of human rights legislation and privacy concerns. Because alcohol or drug dependence is considered a disability under human rights legislation, in some instances testing, particularly random testing, has been found to violate employees' human and privacy rights. These competing interests provide significant challenges to the implementation of effective testing programs in the construction industry.

Several recent decisions of Canadian courts highlight the challenges of dealing with drug and alcohol testing in the workplace and provide guidance in successfully developing and implementing a drug and alcohol testing program.

Imperial Oil Limited v. CEP Union, Local 900, 2009 ONCA 420

Imperial Oil has been concerned with drug and alcohol testing for many years and its random drug testing policy had been successfully challenged in previous human rights (and court) proceedings. Imperial subsequently adopted a new means of testing for drug (cannabis) impairment by way of an oral fluid swab at its petroleum refinery in Nanticoke, Ontario and a union grievance followed.

An arbitration board held that the random drug testing of employees without "reasonable cause" violated a collective agreement provision that required the employer to treat workers with "respect and dignity". It also concluded that random testing could not be justified "on a responsible application of the balancing interests approach in a safety sensitive environment". Imperial Oil sought judicial review at the Divisional Court level and subsequently in the Ontario Court of Appeal.

In May 2009, the Ontario Court of Appeal upheld the arbitration award and concluded that Imperial Oil's policy of random drug testing (using the new oral swab testing process) of employees in safety-sensitive positions was a violation of Imperial Oil's collective agreement with its union. It upheld the arbitrator's decision that random testing violated the collective agreement provision that required the parties to foster a workplace where individuals were treated "with respect and dignity". The court also noted that the arbitration board found no apparent problem of drug use in the plant that would justify the testing and observed that, unlike the breathalyser test for alcohol impairment, the saliva swab method used did not provide an immediate reading of drug impairment as the results were only available after a few days.

Alberta (Human Rights and Citizenship Commission) v. Kellogg Brown & Root (Canada) Co., 2007 ABCA 175

This case arose out of a complaint by an individual who was a casual user of marijuana – but admittedly not drug dependent. He had accepted a position with KBR on the Syncrude expansion project in Fort McMurray. His offer was conditional upon successfully passing a pre-employment drug screen. He actually started employment before the results were available; however, when the test revealed marijuana use he was terminated.

He complained to the Human Rights Commission, which dismissed his complaint on the basis that he was not drug dependent and, thus, not protected by human rights legislation. The Alberta Court of Queen's Bench quashed this decision and concluded that he was perceived as addicted and thus treated in a discriminatory manner. The Alberta Court of Appeal reversed this deci-

sion and noted that "extending human rights protections to situations resulting in the placing the lives of others at risk flies in the face of logic".

The court did note, however, that its finding was based on the fact that the individual concerned was not drug dependent. A finding of drug dependency would have raised issues as to whether he should have been accommodated in some manner as an alternative to termination.

SCEP (Local 143) v. Goodyear Canada Inc., 2007 QCCA 1686

Goodyear had implemented a comprehensive drug and alcohol policy at its tire plant in Valleyfield, Québec. The union filed a grievance alleging that the policy contravened the collective agreement, the *Civil Code of Québec* and the *Charter*. An arbitrator ruled that a modified policy that permitted random testing of individuals could be justified. The union unsuccessfully applied to the Quebec Superior Court to quash the decision, and subsequently appealed to the Quebec Court of Appeal.

In its appeal, the union did not challenge testing when there was reasonable and probable cause to believe that employees are working under the influence of either alcohol or drugs, but claimed that random alcohol and drug testing was an excessive intrusion on privacy and other individual rights, even for safety-sensitive positions.

The Court of Appeal agreed with the union and struck down the clause in the modified policy that permitted random testing of employees in safety-sensitive positions, and found that random alcohol and drug testing was more that a minimal infringement of their human rights. The court endorsed a number of the basic principles accepted by labour arbitrators and concluded that drug and alcohol testing in safety sensitive positions will be considered a reasonable restriction on an employee's right to privacy in situations involving "reasonable and probable cause", following an accident or incident, or following an absence related to the consumption of drugs or alcohol.

This case was analyzed by the court under the provisions of the *Quebec Charter of Human Rights and Freedoms* dealing with the employee's right to privacy and integrity of the person. Again, this illustrates the intersection between occupational health and safety policies and human rights and privacy issues.

UA Local 488 v. Bantrel Constructors Co., 2009 ABCA 84

Bantrel was awarded a contract at a Petro-Canada refinery which required it to comply with Petro-Canada's alcohol and drug use policy. After commencing work on site, Petro-Canada implemented a pre-access drug testing policy and advised Bantrel that failure to adhere to the policy could result in the termination of its contract. Bantrel then incorporated Petro-Canada's requirements into its drug and alcohol policy without negotiating these new requirements with its unions.

A grievance was filed under the relevant collective agreements claiming that this action violated the collective agreements by implementing a unilateral requirement. The collective agreements had incorporated the 2001 Canadian Model rules which did not, at the time, specifically address pre-access drug testing.

The arbitration board found that the policy did not violate the collective agreements and was justifiable in the context of the work site and its history.

The unions applied to the Court of Queen's Bench of Alberta which dismissed the challenge; however, the Alberta Court of Appeal found that the policy did violate the collective agreements because the Canadian Model policy included in the collective agreements did not deal with pre-access testing. Although the court specifically stated it was aware of the "importance to all concerned of efforts to improve safety in the workplace, especially at hazardous work sites such as the one involved here", it was restricted to dealing with the matter on the basis of the collective agreements' language. Because the Canadian Model did not, at that time, deal with pre-access testing, it was not permitted by the collective agreements. It is important to note that the Canadian Model has since been amended to address this.

What This Means for You

It is clear from this brief survey of cases that drug and alcohol testing remains a highly controversial issue, particularly in the construction industry. Owners are increasingly requiring contractors to comply with their drug and alcohol policies. This is clearly indicated in the *Bantrel* and *Kellogg Brown & Root* cases. Further, the courts are not taking a consistent approach to these issues; with divergent views emanating from Alberta and Ontario courts. It is also evident that arbitrators, human rights tribunals and courts are vigilant in their enforcement of employee human rights and privacy issues.

These various elements indicate the value of developing comprehensive, well thought out drug and alcohol policies, that take into account regional differences and local requirements. By taking these steps, employers in the construction industry can fulfill their obligations to ensure workplace health and safety.

As a result of human rights policy and jurisprudence on this issue, the following should be kept in mind when developing and maintaining an effective drug and alcohol testing policy:

- Tailor the policy to the work environment – avoid "precedent" standardization;
- Policies that provide an automatic termination or reassignment for positive testing may not be upheld unless they have regard to the personal circumstances of each case;
- Review available alternatives to deal with an employee's substance abuse problem (e.g. reassignment to non-safety sensitive positions or addiction treatment program) in order to meet the duty to accommodate;
- Drug and alcohol testing must be carried out by accredited individuals and confidentiality must be ensured;
- Consider less intrusive testing that may have the same result;
- Consider consulting unions during policy development and implementation and ensure policies are consistent with terms of collective agreements; and
- Ensure that the drug and alcohol testing policy is a part of a comprehensive approach to safety, treatment and accommodation.

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Failure to Submit Unit Prices Results in Non-Compliant Tender: *Halifax Regional Municipality v. England Paving & Contracting Limited*, 2009 NSSC 224

This case arose out of a call for tenders issued by Halifax Regional Municipality ("HRM") for certain roadwork. The contract was to be a Unit Price contract. HRM issued an addendum ("Addendum 1") issuing a new Schedule of Quantities and Unit Prices, which bidders were to insert into their bid packages. At the close of bidding, HRM staff opened all the packages. The lowest total bid price was submitted by England Paving and Contracting Limited ("England Paving") at $1,194,333.16 and the second lowest by Dexter Construction Company Limited ("Dexter") at $1,529,082.10. However, upon examination of the bid packages, HRM staff noticed that England Paving's bid response had certain deficiencies:

1. "Addendum 1" was not physically incorporated into the tender binder;
2. The total tender price on the bid summary page had been altered with whiteout, but not initialled; and
3. While the total bid price had been submitted, the Schedule of Quantities and Unit Prices was not enclosed.

Faced with these deficiencies, HRM applied to the Nova Scotia Supreme Court for a declaration that England Paving's tender was "substantially compliant" and could be accepted.

Justice Goodfellow found the first two deficiencies to be insignificant, ruling they did not render the bid materially non-compliant. The fact that the required addendum was loosely combined with the bid document instead of having been physically added to the binder was held to be unimportant. It was sufficient that such material was inserted into the material without being bound. With regard to England's failure to initial the altered total bid price, this might have been fatal to its bid had there not been sufficient information in the rest of the bid document to make the intended total clear. The same total

price was found in other parts of the tender and was consistent throughout. The court found that this small deficiency was of the type contemplated by clause 17 of "Information to Tenderers", Section 00100, ("the Privilege Clause") which stated:

> *Notwithstanding the foregoing, the owner shall be entitled, in its sole discretion, to waive any irregularity, informality, or non-conformance with these instructions in any tender received by the owner.*

However, on the third and most important issue, the court accepted Dexter's argument and found that the failure of England Paving to submit the Schedule of Quantities and Unit Prices was not a mere "informality" but was material non-compliance. The court cited *Double N Earth Movers v. Edmonton (City)*, 2007 SCC 3 for a definition of "informality":

> *Generally, an informality would be something that did not materially affect the price or performance of contract B.*

Justice Goodfellow then stated the law with regard to unit prices:

> *The determination in a unit price contract is a fundamental feature of the tender. When a fundamental feature has not been complied with, such non-compliance cannot be considered substantial compliance.*

Finally, the court considered whether the Privilege Clause in the tender was broad enough to allow HRM to accept a bid that was substantially non-compliant. Justice Goodfellow found that the wording in the clause was similar to wording that has been used in construction tenders for decades. To exclude its implied obligations an owner would have had to use such drastic language that the document could no longer fit the definition of a "call for tenders" as understood in Canada. Such a document would be better described as a request for expressions of interest.

The failure of England Paving to submit the Schedule of Quantities and Unit Prices amounted to substantial non-compliance with a fundamental feature of the unit price contract, which the Privilege Clause did not allow HRM to waive. The application by HRM was dismissed.

What This Case Means for You

Despite the existence of a privilege clause, courts will be unlikely to excuse non-compliance with a contractual term as fundamental as price. The fundamental feature of a unit price contract is that the total contract could change depending upon the actual quantities. In such circumstances, the unit price is so fundamental to the final determination of the contract price that its omission cannot be excused.

Colin D. Piercey is a partner in our Construction & Infrastructure Practice Group and represented Dexter on the application. He was assisted by Articled Clerk Joshua E. Bearden.

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