CASE SUMMARY

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THE ROLE OF FUNDAMENTAL BREACH IN CCDC 2 CONTRACTS

Urbacon Building Groups Corp. v. City of Guelph

When and under what circumstances does default by a contractor in meeting time milestones for the work in a construction project entitle the owner to terminate the contract and cause the contractor and its agents to be removed and barred from the site?

General Condition 7.1.2 of CCDC 2 Construction Contracts states that if a contractor neglects to

"prosecute the work properly" or otherwise fails to comply with the requirements of the contract to a *substantial* degree, upon notice from the Consultant that sufficient cause exists to justify such action, the owner may notify the contractor that they are in default of their obligation and must correct said default within five working days. If the contractor fails to correct the default in time, the owner may then terminate the contractor's right to continue with the work in whole or in part or may terminate the contract.

Justice MacKenzie dealt with the interpretation of this clause in *Urbacon Building Groups Corp. v. City of Guelph*, an action stemming from the termination of the construction contract between the City of Guelph and Urbacon.

Background

In July 2006, Urbacon and Guelph entered into a CCDC 2-1994 contract for the construction of a civic administration complex in the City of Guelph. The contract was comprehensive, befitting of a project of this scale—the contract price was $44,520,000.00 inclusive of GST.

The Consultants on the project were Moriyama and Teshima Architects ("MTA"). The scheduled commencement date was July 4, 2006, with substantial performance scheduled for December 15, 2008, subject to any adjustments in the time for the completion of the contract. Suffice it to say, adjustments in the time for the completion of the contract were required.

Delays

By late summer 2007, various delays had arisen, mostly as a result of what Justice MacKenzie described as "ordinary" issues considering the magnitude of the project. Urbacon complained that the design drawings and specifications were vague and incomplete, that other design drawings and specifications conflicted with each other, that the design drawings required substantial changes or improvements and that, when these changes were made and affected the scope of work, Guelph and MTA failed to give appropriate direction to proceed with any changes in a timely fashion, thereby contributing to the overall delay.

The parties arrived at a settlement in December 2007 in which Guelph agreed to pay Urbacon an additional $534,600.00 representing damages occasioned by the delays and agreed to extend the substantial completion date for the Project by 119 days (a compromise from Urbacon's estimate of 150 days). Additionally, the settlement dictated that turnaround time on the critical issues raised by MTA was to be five days, rather than the original ten set out in the contract.

Despite this extension agreement, the work did not move any more efficiently through 2008. The Project became mired in miscommunication in regards to required changes and how best to proceed with said changes. By June, the situation had become so bad that Urbacon requested project mediation in accordance with the Dispute Resolution Process ("DRP") outlined in General Condition 8 of the contract. However, amongst other issues, the parties could not agree on a mediator, and so no mediation took place.

On August 15, 2008, the revised substantial completion date, the Civic Administration Complex was still not occupancy ready. MTA assessed scheduled delay impact claims issued by Urbacon and approved an additional extension of 15 days, recognizing that the number of days was subject to change upon receipt of further information.

Interference with the Consultant

When Urbacon did not meet this further extended deadline, the City sent an email to MTA. As described by Justice MacKenzie, this email was but one of a series of pieces of evidence that related to the impartiality (or lack thereof) of the Consultant. The email sent from the City to MTA read, "Here is some potential wording for MTA's letter to the City and Urbacon concerning the breach of

contract that we have discussed with our lawyer". The email included a draft of the Consultant's notice of default, which the City asked MTA to send to Urbacon to the effect that that there was sufficient cause to place Urbacon in default of their contractual obligations. The email concluded by informing MTA that upon issuing their letter, Guelph would place Urbacon on Notice of Default in accordance with G.C. 7.1.2, which allowed the Owner to terminate the Contractor's right to continue with the work or terminate the contract if a list of deficiencies was not remedied within five working days.

MTA sent the Notice of Default letter as instructed, and it contained essentially the same words as set out in the City's email. Guelph's Notice of Default was issued two days later. Urbacon replied with a schedule for correcting the deficiencies, but Guelph rejected it as unacceptable. On September 19, 2008, Guelph terminated the contract and notified staff in Urbacon's on-site workshop that they were required to vacate the building site immediately.

The Applicable Law

Justice MacKenzie evaluated the witnesses for both sides and concluded that the evidence of Urbacon was to be preferred and accepted over the evidence of the City. Crucially, Justice MacKenzie also found that the City had directed and controlled MTA in the preparation of the Notice of Default, thereby nullifying the impartiality and independence of MTA as Consultant under the contract. The City's actions in this regard "were the fundamental cause of the termination of Urbacon in the project".

As Justice MacKenzie succinctly put it,

> The question that is central to the disposition of this case is not whether Urbacon may have been in breach of its obligation under the Contract but whether the acts comprising any breach or breaches were in law a fundamental or substantial breach by Urbacon of its obligations under the Contract.

The distinction between a breach of the contract and a fundamental breach of contract was summarized in *Goldsmith on Canadian Building Contracts* as follows:

> If the breach is so serious and fundamental as to go to the root of the contract, the other party may elect to treat the contract as at an end…
>
> This exceptional remedy is available only in circumstances where the foundation of the contract has been undermined, where the thing bargained for has not been provided for.

For a termination of a contract to be justified at law, this is the standard of breach that would be required. As Urbacon noted in its submissions,

> Did the delay, assuming it was exclusively Urbacon's fault, take away the very thing that Guelph contracted for? At most Guelph would get the [building] late […] but Guelph led no evidence on the costs or repercussions of the delay. In fact, by the very act of terminating, they knowingly accepted additional delay; this cannot be reconciled with the concept of fundamental breach.

Under this understanding, for a delay in occupancy to be equated with a fundamental breach, the delay would have to be "intolerable" and the Owner as an innocent party would need to have no alternative but to terminate the contract in order to avoid the delay in occupancy. This standard is of particular note, since a sizeable portion of the decision was dedicated to the extent of the deficiencies on the Project and when effective Notice of those deficiencies was delivered. G.C. 7.1.3 states that if the default cannot be corrected in the five working days specified, the Contractor will be in compliance with the Owner's instructions if the Contractor commences the correction of the default within the specified time, provides the Owner with an acceptable schedule for such correction, and corrects the default in accordance with such schedule. Urbacon's submission of a schedule for remedying the deficiencies seemed to satisfy that requirement.

Urbacon's compliance with the contractual provisions, combined with the City's drafting of the Consultant's Notice of Default, made it difficult for any judge to believe that there was sufficient cause to place Urbacon in default of their obligations.

Furthermore, the delays noted above were all part of the ongoing construction process and for the most part would be described as "ordinary" considering the size of the Project.

Conclusions

First, *Urbacon* demonstrates that the relationship as between an Owner and their Consultant is always going to be fraught with the perception of bias, considering the fact that the Consultant is, for all intents and purposes, in the employ of the Owner. To that end, Owners and Consultants alike should be cautious of "rubber stamping", or drafting the Consultant's letters, since doing so may fatally undermine the very position the letter is intended to address.

Second, while the language of G.C. 7.1 may appear to be a standalone statement of the Owner's rights, in reality it is confined and informed by the principle that only a fundamental breach, not a simple contractual breach, will justify termination of a contract.

Finally, if an Owner wishes to terminate the contract under G.C. 7.1, it is clear that the contractual notice requirements must be strictly adhered to and that the definition of what is an "acceptable" schedule for correcting the deficiencies as found in G.C. 7.1.3.2 will be evaluated in a holistic manner.

Contractors, consultants and owners alike would do well to review the facts of the case. No doubt they will recognize many of the factors leading to delays and the behaviour of the parties involved as typical of a large construction project. The "ordinary" nature of many of these issues—be they unanswered requests for change orders leading to delays or the Owner drafting of correspondence to be sent out under the Consultant's letterhead—makes this case of particular note should a party attempt to terminate a contract by relying on G.C. 7.1 of a CCDC 2 contract.

A CCDC 2 contract is designed with an eye on the realities of a construction project. *Urbacon* lends further credence to the understanding that CCDC 2 contracts are aimed at ensuring the project is completed first and foremost and that deficiencies, delays or other damages that can be remedied through cost awards will be remedied in that manner.

Ontario Superior Court of Justice
MacKenzie J.
June 17, 2014