CROSSLINX V. ONTARIO INFRASTRUCTURE: TURNS OUT THE PANDEMIC IS AN EMERGENCY...

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On May 17, 2021, the public sector's hardline view of risk allocation in public-private partnership (P3) contracts suffered a serious setback with the release of the Ontario Superior Court of Justice's decision in *Crosslinx v. Ontario Infrastructure*.[1] In his reasons, Justice Koehnen ruled that the private sector partners of the Eglinton Crosstown LRT Project were entitled to forward a relief claim under the Emergency provisions set out in the Project Agreement due to the impact of the COVID-19 pandemic on the Project's construction schedule.

Justice Koehnen's decision raises three important points parties should consider in assessing the contractual obligations in a P3 project:

1. While all parties to P3 contracts are sophisticated entities with independent legal advice, the words of the agreement need to be read with the project process in mind – namely, the "partnership" part of a P3 means that collaboration should play a role in addressing new issues and disputes.
2. Once-in-a-lifetime events like a global pandemic should not be seen as a "normal" risk allocated to a party through general risk language.
3. While the logic of deferring disputes until Substantial Completion may make sense for certain types of matters, deferring disputes about rights related to Substantial Completion itself should be dealt with as they arise.

It is not known at the time of writing whether Justice Koehnen's May 17 decision will be appealed, but private sector participants in the P3 market no doubt see the decision as a vindication of arguments they have been making for some time.

Background: The Case

On July 21, 2015, Crosslinx Transit Solutions General Partnership ("**Project Co**") and Ontario Infrastructure and Lands Corporation and Metrolinx (collectively, the "**Authority**") entered into a project agreement (the "**Project Agreement**") to design, build, finance, maintain and rehabilitate a new light rapid transit line known as the "Eglinton Crosstown LRT Project" (the "**Project**").[2] Project Co, together with its primary construction contractor, Crosslinx Transit Solutions Constructors (collectively, the "**Project Parties**"), essentially assumed the

obligations under the Project Agreement for the design and construction of the Project on a fixed price and fixed schedule basis (subject to limited relief available under the Project Agreement).

In March 2020, the Province of Ontario declared a state of emergency under the *Emergency Management and Civil Protection Act*[3] as a result of the COVID-19 pandemic. In response, the Project Parties identified and proposed to the Authority a number of safety measures to mitigate the spread of the COVID-19 virus at the Project site. The Ontario Ministry of Labour subsequently issued health and safety protocols for construction sites (the "**Construction Protocols**"), many of which overlapped with the earlier proposals made by the Project Parties. The Project Parties implemented the Construction Protocols which inevitably caused delays to the Project, as none of these additional measures were contemplated in the original Project schedule.

The Project Parties sought schedule relief under the Project Agreement for the delays stemming from implementing COVID-19 safety measures (including the Construction Protocols). They accordingly requested that the Authority recognize the pandemic as an "Emergency" (as defined in the Project Agreement), and that it direct the Project Parties to implement the Construction Protocols as "additional or overriding procedures", which would permit the Project Parties to claim for a schedule extension under the Project Agreement's Variation procedure. The Authority denied the Project Parties' request for relief.

It is worthwhile to note why the Project Parties did not pursue what one might consider a more straightforward path of relief through a force majeure clause. There is a key difference between a standard force majeure clause as found in the CCDC form of construction contracts and that within the Project Agreement. The force majeure clause in the CCDC forms affords constructing parties schedule relief for a number of enumerated items and, by virtue of a basket clause, any cause beyond their control. However, the force majeure clause within the Project Agreement was limited to a finite list of events and with no basket clause. Like many project agreements in the pre-pandemic world, such list did not include pandemic or epidemic events, effectively barring Project Co from claiming schedule relief via the more straight forward force majeure claims process.

Entitlement to a Variation Claim

The heart of the Project Parties' claim was that the pandemic constituted an Emergency under the Project Agreement. As such, the additional safety measures (including the Construction Protocols) that the Project Parties implemented at the Project site were "additional or overriding procedures" for which schedule relief could be sought under the Variation procedure.[4]

The Authority did not dispute that the pandemic constituted an Emergency under the Project Agreement. However, the Authority argued that it did not *require* Project Co to comply with "additional or overriding procedures" which was essential to the Project Parties' entitlement for a Variation. As this element was

missing, the Authority claimed that no Variation could be sought. The Authority also argued that the Construction Protocols were "Applicable Laws" (as defined in the Project Agreement) and the Project Parties are required to comply in all respects with such laws. Therefore, any direction that the Authority may have made requiring Project Co to comply with the Construction Protocols was simply a reiteration of Project Co's existing obligations under the Project Agreement.

The Court rejected the Authority's arguments and, on the facts, determined that

i. the COVID-19 pandemic was an Emergency;
ii. the Authority did require Project Co to comply with the Construction Protocols; and
iii. such Construction Protocols were "additional or overriding procedures" and not Applicable Laws.

Accordingly, the Court held that the threshold for the Variation procedure was triggered, permitting the Project Parties to claim for an extension of the Substantial Completion Date.

The Court's decision rested partly on the finding that the Construction Protocols were not Applicable Laws. While not discussed in Justice Koehnen's reasons, the ultimate outcome of the case may not have differed even if the Construction Protocols were determined to be "Applicable Laws" as understood under the Project Agreement. While the Project Agreement requires Project Co to comply at all times with Applicable Laws, this assumption of risk does not preclude Project Co from claiming relief through other provisions of the Project Agreement, where new Applicable Laws or changes to Applicable Laws are a direct consequence of an underlying Emergency or supervening event.

Who Takes Health and Safety Risks?

Justice Koehnen discussed at length the Authority's argument that the Project Agreement allocates all health and safety risk to the private partner including, by extension, any Emergency. In other words, schedule delays or cost overruns as a result of Project Co's compliance with health and safety laws are risks borne by the Project Parties. However, in rejecting the Authority's argument, His Honour noted that a narrow and "stark" reading of the Project Agreement's provisions was not reasonable; the entitlement to seek relief for delays and the interpretation of risk allocation between the parties must be read in light of the purpose of the contract. The broad definition of Emergency and the existence of mechanisms in the Project Agreement to allow extensions to the Substantial Completion Date as a result of Emergencies do not support the argument that the private partner is expected to take on all health and safety risk. In fact, the inclusion of these provisions and mechanisms to adjust project schedule and price as a result of an Emergency suggests that there are certain health and safety matters that are not intended to be passed fully to the private sector.

The Emergency provisions in Section 62 of the Project Agreement and its related defined terms are not unique

to the Project; they appear in most, if not all, recent forms of project agreements involving Metrolinx and Infrastructure Ontario. Thus, the finite list of force majeure events in similar project agreements may not be so fixed after all. The definition of "Emergency" in the Project Agreement is broad and includes "any situation, event, occurrence or circumstances that constitutes or may constitute a hazard to or jeopardizes or may jeopardize or pose a threat to health and safety of any persons."[5] It is conceivable that other "force majeure-like" events could fall within this definition. It then stands to reason that upon the occurrence of an event that threatens health and safety, and under the right circumstances, the private partner can rely on the Emergency provisions to claim relief for schedule delays, notwithstanding that such event may not be an express "force majeure" event as set out in the project agreement.

Dispute Resolution Procedure: No Stay of Proceedings and Waiver of Privilege

The Authority had also brought a preliminary motion for a stay of proceedings, on two grounds:

i. that the Project Agreement expressly provides for a postponement of all proceedings until Substantial Completion and
ii. that Project Parties failed to comply with preconditions prescribed in the Project Agreement's Dispute Resolution Procedure to advancing the application.

The motion for a stay was dismissed by the Court.

On the first argument, the Court pointed to other provisions of the Project Agreement which makes an exception to the general postponement of proceedings rule, in each case where a delay of claims would cause irreparable harm to one of the parties. The Court expressly noted that delaying a dispute related to schedule relief to the Substantial Completion Date would cause irreparable harm to the party claiming such relief.

In addition to the tangible adverse consequences identified in his decision (including payment of liquidated damages, loss of financing, termination of the contract, insolvency and loss of reputation), Justice Koehnen also noted that irreparable harm would come to Project Co through the loss of its contractual rights. In other words, postponing disputes about the Substantial Completion Date to Substantial Completion cuts across the very mechanisms within the Project Agreement that are intended to be used for schedule extensions. A dispute regarding the Substantial Completion Date may make achievement of Substantial Completion impossible before termination of the contract.[6] In such cases, the parties may be postponing a matter to a date that will never arrive – true irreparable harm.

In respect of its second argument, the Authority argued that the Project Parties were not entitled to advance the dispute to litigation proceedings because they failed to participate in the prescribed preceding step of negotiations with Senior Officers. In rejecting the Authority's argument for a stay, the Court noted that the

Authority refused to attend a negotiation with Senior Officers until the Project Parties provided the Authority with detailed information, which the Authority claimed it required in order to adequately assess Project Co's claims. Moreover, the Court also considered evidence of an offer to settle that the Authority had made to Project Co. With such an offer to settle having been made, the Authority's position that it required additional information to consider Project Co's claims could not be accepted.

The Authority argued that the settlement offer was subject to settlement privilege and should not have been produced. While in the normal course such offers to settle are protected by a settlement privilege, implicit waiver of privilege is possible, rooted in the underlying principle of fairness and consistency. In this case, the Court held that the Authority, regardless of its intent, had implicitly waived such privilege by voluntarily putting its state of mind at issue: "By taking the position that they had inadequate information to proceed to Senior Officer discussions, the respondents put their state of mind at issue."[7] As such, Project Co was permitted to test the Authority's position of the sufficiency of the documents by admitting the offer to settle into evidence.

The Court also noted that excessive requests for document production could be used to create roadblocks to what ought to be a speedy advancement of the dispute under the Project Agreement. Justice Koehnen suggested that a preferable approach to document requests would be to ask the Independent Certifier to order further documentation or to argue before the Independent Certifier that the Project Parties' disclosed information was insufficient.[8]

[1][ps2id id='1' target='/] 2021 ONSC 3567.
[2][ps2id id='2' target='/] A redacted version of the Eglinton Crosstown LRT Project Agreement can be found at Infrastructure Ontario's website and can be accessed here.
[3][ps2id id='3' target='/] RSO 1990, c. E.9.
[4][ps2id id='4' target='/] See Section 62.1 of the Project Agreement.
[5][ps2id id='5' target='/] Section 1.178 of Schedule 1 (Definitions and Interpretation) to the Project Agreement.
[6][ps2id id='6' target='/] All forms of project agreements in Ontario prescribe a "Longstop Date" – a date by which Substantial Completion must be achieved before the project company is in an event of default.
[7][ps2id id='7' target='/] Supra Note 1 at 32.
[8][ps2id id='8' target='/] Under the Dispute Resolution Procedure, the dispute would have been determined by the Independent Certifier following unsuccessful resolution of the dispute by the Senior Officers.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.