CROSSLINX V. ONTARIO INFRASTRUCTURE: TURNS OUT THAT NOTICE MEANS ACTUAL NOTICE...

Posted on April 4, 2022

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In *Crosslinx v Ontario Infrastructure*,[1] the Ontario Court of Appeal has again emphasized the importance of complying with contractual notice provisions when advancing construction delay claims.

In this case, the Court of Appeal was asked to consider whether certain emergency provisions of the parties' construction contract had been triggered such that the contractor could claim for additional time to complete its work because of COVID-19 safety protocols.

The Court of Appeal focused its ruling on one issue: notice.

Background: The Case

The case centres on the construction of the Eglinton Crosstown Light Rapid Transit line (the "**LRT**"). In 2015, Crosslinx Transit Solutions General Partnership ("**Project Co.**") entered into a contract (the "**Project Agreement**") with Ontario Infrastructure and Lands Corporation and Metrolinx (collectively, the "**Authority**") to construct a 19-kilometer LRT line in Toronto (the "**Project**").[2] Project Co., together with its primary contractor, Crosslinx Transit Solutions Constructors (collectively, the "**Project Parties**"), 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 contractual relief under prescribed circumstances).

In March 2020, Ontario declared a state of emergency as a result of the COVID-19 outbreak. In response, the Project Parties proposed a series of additional safety protocols to curb the spread of COVID-19 at the Project site, and subsequently, the Ontario Ministry of Labour followed-suit with its own health and safety protocols for construction sites (the "**COVID Protocols**").

The Project Parties implemented the COVID Protocols, which inevitably caused delays to the Project. The Project Parties accordingly sought schedule relief from the Authority under the Project Agreement. The Authority denied the request, and the Project Parties responded by applying to the Ontario Superior Court for relief.

The Lower Court Decision[3]

In May 2021, Justice Koehnen of the Ontario Superior Court ruled in favor of the Project Parties. Justice Koehnen decided that the emergency provisions of the Project Agreement had been triggered such that the Project Parties could bring a claim for an extension of time to complete the work.[4]

Specifically, Justice Koehnen held as follows:

1. the COVID-19 pandemic constituted an “Emergency” as defined by the Project Agreement;
2. the Authority notified the Project Parties that compliance with the COVID Protocols was required; and
3. the COVID Protocols were not "Applicable Laws" but were "additional and overriding procedures" that the Project Parties could claim for time in implementing.

With respect to notice, Justice Koehnen held that an internal email within the Authority dated March 25, 2020 (the “**March 25 Email**”) had notified the Project Parties of the required compliance with the COVID Protocols and thus triggered the Project Parties’ right to make a claim for time resulting from delays caused by implementation of the COVID Protocols.

The Authority appealed Justice Koehnen’s decision.

The Court of Appeal: Holding

The Court of Appeal focused its decision on the threshold issue of notice. Specifically, the Court of Appeal considered whether the March 25 Email had notified the Project Parties of the required compliance with the COVID Protocols. Without such notice, the Project Parties could not make a claim for additional time to complete the work resulting from implementing the COVID Protocols.[5]

The Court of Appeal found that the March 25 Email was in fact an internal email from the Authority that was not sent to the Project Parties. As such, the March 25 Email could not have notified the Project Parties of the required compliance with the COVID Protocols and thus could not be used a basis for the Project Parties to claim for additional time for delays caused by implementing the protocols. In the result, the Court of Appeal remitted the matter back to Justice Koehnen for a rehearing.[6]

Perhaps most importantly for the construction industry, the Court of Appeal emphasized that the parties had not made submissions regarding the notice provision contained in the Project Agreement. Any analysis on the issue of notice must start with the notice provision itself. Without submissions on the point, the Court of Appeal could not assess whether other communications exchanged between the parties had triggered the right of the Project Parties to make a claim.[7]

Takeaways

The Court of Appeal’s decision confirms the importance of complying with notice provisions in construction

contracts. It stands as an important reminder to the industry that even complex construction disputes can turn on compliance with basic contractual obligations – including providing proper notice under the construction contract.

[1] 2022 ONCA 187.
[2] A redacted version of the Eglinton Crosstown LRT Project Agreement can be found at Ontario Infrastructure's website and can be accessed here.
[3] *Crosslinx v Ontario Infrastructure*, 2021 ONSC 3567.
[4] For more details on the Superior Court decision see here.
[5] 2022 ONCA 187, para 20.
[6] 2022 ONCA 187, para 38.
[7] 2022 ONCA 187, paras 29-31.

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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.