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The Ontario Court Placed COVID-19 Risks on Owner

Crosslinx v Ontario Infrastructure

The recent case of *Crosslinx v Ontario Infrastructure*[1], arose out of the effects that the COVID-19 pandemic has had on the construction of the Eglington Crosstown Light Rapid Transit line in Toronto (the **"Project"**). On July 21, 2015, Crosslinx Transit Solutions General Partnership was a consortium of four of Canada's largest construction companies that entered into a P3 agreement (the **"Agreement"**) with the Ontario Infrastructure and Lands Corporation and Metrolinx, representing agencies of the Crown in Right of Ontario (collectively, the **"Crown Agencies"**). Under the Agreement, Crosslinx undertook to design, construct, finance and maintain the Project.

According to the Agreement, if in the case of an "Emergency" (as defined by the Agreement), the Crown Agencies required Crosslinx to comply with "additional or overriding procedures" as determined by the Crown Agencies or any other statutory body, then Crosslinx had the right to initiate a variation procedure (the **"Variation Procedure"**) which could result in an extension of the substantial completion date of the Project.

In March 2020, the government of Ontario declared a State of Emergency under the Emergency Management Act, following which, Crosslinx wrote to the Crown Agencies asking them to declare an Emergency under the Agreement and direct Crosslinx to take "additional and overriding procedures", so that it could seek an extension of the contract schedule under the Variation Procedure. This was important for Crosslinx because the Agreement included penalties for late completion. The Crown Agencies replied that it was awaiting the government's anticipated COVID-19 protocols for construction sites. Once these protocols were issued, Crosslinx implemented them, which resulted in delay to the Project. In a subsequent letter from the Crown Agencies to Crosslinx, the Crown Agencies refused to declare an Emergency under the Agreement on the ground that they did not require Crosslinx to implement any addition or overriding measures in addition to those already ordered by the government and being undertaken by Crosslinx.

Crosslinx applied to the Court for a declaration that COVID-19 was an Emergency that required them to implement additional and overriding measures, and for a declaration that they were entitled to initiate a Variation Proceeding under the Agreement.

The Crown Agencies argued that: (1) the Agreement allocated health and safety risks to Crosslinx; (2) the provisions of the Agreement requiring Crosslinx to have and comply with an "Emergency Response Plan" (as defined by the Agreement) suggested that emergencies were for Crosslinx's account; and (3) the Crown Agencies did not require "additional or overriding procedures" to be implemented.

The Court rejected the Crown Agencies arguments, and granted the application to Crosslinx. In respect of the Crown Agencies' interpretation of the Agreement as allocating all the risk of the pandemic to Crosslinx, the Court held that, by virtue of requiring Crosslinx to comply with all "Applicable Laws" (as defined by the Agreement), including the health and safety laws, such "a stark interpretation" was not intended by the parties when they entered into the Agreement. The Court adopted a purposive interpretation of the Agreement to conclude that the Agreement did not

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support the view that Crosslinx assumed liability for any delays resulting from health or safety concerns of workers as a result of COVID-19. The Court's view was that resting the financial burden of a delay resulting from such circumstances as the COVID-19 pandemic on the contractor would be unfair; it would penalize the contractors that "may be working with heroic efficiency to complete the project in a timely manner even though it is impossible to do so because of circumstances beyond the contractors control." The Court also rejected the argument that the requirement under the Agreement that Crosslinx have and comply with an Emergency Response Plan suggested that Crosslix accepted the risks associated with Emergencies.

Particularly the court noted:

> [71] The purpose of an obligation to substantially complete a project by a given date is to incentivize constructors to keep the project moving forward and to impose a financial penalty if they do not do so. […] Imposing financial penalties for delays caused by the pandemic does not further the purpose of including a Substantial Completion Date in the contract. It merely penalizes a contractor who may be working with heroic efficiency to complete the project in a timely manner even though it is impossible to do so because of circumstances beyond the contractor's control. Imposing financial penalties on contractors for failing to meet substantial completion date in those circumstances only incentivizes them to cut corners and imperil public health and safety.
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> [73] This is a serious pandemic. […] In the circumstances, I do not think it appropriate to adopt an interpretation of a contractual provision that runs contrary to its purpose and that incentivizes constructors to imperil public health.

The Crown Agencies also argued that, in addition to the Agreement provisions, the context of the Agreement supports the Crown Agencies' interpretation that Crosslinx assumed the risks associated with the pandemic. Particularly, they argued that: the Agreement was a sophisticated commercial agreement; it was used as a template for all public infrastructure projects in Ontario; the parties were sophisticated parties that had access to legal advice; and the Agreement's value was over $5.5 billion, suggesting that it was not unreasonable to accept that the contractors assumed the risks of the pandemic. The Court disagreed with the Crown Agencies' argument regarding the value of the contract, noting that a large value of the Agreement was not an indicator for the level of risk assumed by the party. It noted that a large face value may only suggest that the project was expensive to built.

In regard to the Crown Agencies' argument that it did not require Crosslinx to implement additional and overriding procedures so as to trigger the right to initiate a Variation Procedure, the Court noted that there was little doubt that the measures implemented by Crosslinx on the site in compliance with the government health and safety protocols were additional or overriding measures. As such, the Court could not allow the Crown Agencies to avoid liability by saying that they were not required to issue any additional or overriding procedures because Crosslinx already implemented them because to state otherwise would be unfair to responsible contractors implementing such additional measures and imperil the health and safety of workers when contractors do nothing and wait for the project owners or public bodies to require that additional measure be implemented on site.

The Court also found that the protocols for health and safety for construction sites that the government issued did not fall under the Applicable Laws under the Agreement, so

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the Crown Agencies could not absolve themselves of liability for requiring additional measures by stating that Crosslinx was bound to comply with the protocols because they were Applicable Law.

Preliminary Matters

The Crown Agencies took preliminary steps against the application, moving to stay the application on two independent grounds. They argued that the application should be dismissed because (1) the Agreement required all litigation to be stayed until the substantial completion of the Project was achieved; and (2) Crosslinx failed to comply with the Variation Procedure.

1. *Stay of Proceeding until after the Substantial Completion*

The Agreement provided that all litigation in relation to the Project be consolidated into a single litigation proceeding after the substantial completion of the Project. However, the Agreement contained a number of exceptions to this rule, including that a dispute will not be postponed until after the substantial completion, if the postponement will cause irreparable harm to one of the parties. Further, the Agreement gave the parties the right to seek protection from the courts, during the course of construction of the Project, if necessary to prevent irreparable harm.

Dismissing the Crown Agencies' argument, the Court reasoned that it would not make practical sense to require that disputes about extension of the substantial completion date of the Project be postponed until after the substantial completion has been achieved. Such an interpretation of the Agreement would lead to both the loss of a contractual right to invoke a process that could lead to an extension of the substantial completion date and to adverse consequences, such as payment of liquidated damages, loss of financing, termination of the agreement, insolvency and loss of reputation, all of which would amount to irreparable harm.

2. *Alleged Failure to Comply with the Variation Procedure*

The Agreement required that a dispute process be followed by a party seeking relief under the Agreement. Before a dispute between the parties could reach a litigation proceeding, it had to first be heard by an independent certifier. However, to reach the stage of a hearing by the independent certifier, the parties had to first attempt to resolve the dispute through the parties' representatives, and subsequently, through their senior officers. The dispute in this case could not reach the independent certifier stage because the Crown Agencies refused to have its senior officers meet, alleging that Crosslinx did not provide them with all the information they have requested. On the Court's view of the facts, Crosslinx complied with the dispute process, while the Crown Agencies was the party that was trying to stall the process. It found that the document request by the Crown Agencies was used mischievously to frustrate and delay a process that was meant to speed the resolution of disputes. The Court noted that a better approach was to ask the independent certifier to order further production of documents or to argue that there was not enough information to grant an extension for the substantial completion date.

Key Takeaways

To a certain extent this case turned on the specific wording of the Agreement, but there are a few issues that may have broad application.

One may argue that this decision suggests that courts are

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willing to adopt a more purposive analysis of construction agreements to achieve a fair result when construction projects under those agreements are impacted by the COVID-19 pandemic or similar events, encouraging cooperation among the parties to the agreement to proactively address the effects of such events on the project.

The decision also suggests that standard language used in construction agreements addressing emergencies, delays and the allocation of risk in relation to health and safety issues resulting from unforeseen events may not be effective to allocate the risks of the COVID-19 pandemic and similar events on the contractors.

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[1] *Crosslinx v Ontario Infrastructure*, 2021 ONSC 3567 *[Crosslinx]*

Our lawyers combine legal experience in local government, commercial real estate development, and construction law to provide legal services to local governments, owners, builders and developers on a range of projects, from concept to completion, and beyond.

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Adrienne brings over 25 years of legal experience in litigation and dispute resolution representing local governments and other public entities, insurers and corporations, including in-house as Senior Staff Lawyer at Municipal Insurance Association of BC. Adrienne has represented and provided strategic and practical advice in relation to a variety of complex matters, including procurement, construction (including builders' lien, delay and defect claims), environmental, regulatory, expropriation, bylaw and FOIPPA disputes and processes, municipal jurisdiction, procedure, constitutional challenges, judicial reviews, remedial action orders, administrative hearing processes, contract claims, and privacy, insurance and risk management issues. Adrienne has extensive experience at all levels of Court in British Columbia, administrative tribunals, mediations and arbitrations. Adrienne regularly writes and presents on a variety of matters of interest to public entities and the construction industry.

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