

Contractual Compliance & Claiming Damages

Delays of the completion of construction projects are quite common. Therefore, contracts for such projects often contemplate delays and may prohibit or allow for contractors to recover additional costs that may arise from delays. However, the recent case of *Elite Construction Inc. v. Canada*¹ confirmed that strict compliance with contractual notice provisions is a prerequisite to claiming damages for delay.

In that case, the contractor, Elite Construction Inc. (“Elite”), sought damages for delays and the extra work required to complete the project, and claimed compensation as well as additional expenses for the delays. The owner, Canada, argued that the contractor failed to provide proper notice as required by the contract. Elite argued that it provided notice, or, in the alternative, Canada waived strict compliance with the contractual notice requirement due to its conduct.

A provision in the contract provided that the contractor may apply for an extension of time so long as the application was accompanied by written consent of the bonding company. Elite had submitted two requests; however, the first was not accompanied by the written consent of

the bonding company and the second was submitted after the completion date. With regards to the additional expenses, the contract included a provision which required notice within 10 days of any change order. In this case, Elite failed to provide such notice.

Elite argued that Canada could not rely on the strict terms of the contract because it had waived the ‘time is of the essence’ provision. This was, in part, due to Canada’s alleged delay in responding to change orders. The court disagreed and explained that it had not been demonstrated that Canada had expressed an intention to abandon its right to rely on the provision. Rather, the court found that Elite failed to properly request an extension of time to complete the contract. The court noted that in this case, Canadian taxpayers funded the project, thus Elite knew it was required to strictly adhere to the contractual provisions, particularly regarding time extensions and additional work.

The court found that Elite failed to comply with the delay and additional expense provisions of the contract and emphasized that the notice provisions benefit both parties. The court held

that to rely on such provisions, the contractual requirements must be strictly adhered to.

This case serves to remind parties entering construction contracts to carefully consider how the parties wish to address delay claims, and to review and adhere to the contractual provisions when pursuing such a claim.

For further articles on construction delay claims, see [Under Construction: Concurrent Delay Claims and the Courts](#) and [The Anatomy of Delay Claim](#).

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Kelsey Stuckert



Kelsey Stuckert

604.358.7443

kelsey@civiclegal.ca

Kelsey is an associate lawyer of the firm. She maintains a general municipal law practice with a focus on litigation and environmental law. She provides advice to municipalities and regional districts on regulatory liability,

contract disputes and elections.

During her time at law school, Kelsey was the Social Justice and Public Interest Representative for the Allard Law Student Society Careers Committee. She also volunteered with Pro Bono Students Canada as a researcher for the Canadian Mental Health Association and completed the Indigenous Community Legal Clinic.

Prior to attending law school, Kelsey completed a Bachelor of Arts in the Faculty of Communication, Art and Technology at Simon Fraser University, specializing in political communication.

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.

¹ *Elite Construction Inc. v. Canada*, 2021 ONSC 562

710 - 900 West Hastings Street, Vancouver, BC, V6C 1E5
604.639.3639 | www.civiclegal.ca | [Twitter](#) CivicLegal