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A regular publication for legal news and reviews

2021 IN REVIEW

The partners of Civic Legal LLP provide their summaries, views and insights of the legal issues that arose in 2021 and their impacts on the construction industry.

CONSTRUCTION AND PROCUREMENT LAW

SONIA SAHOTA

There are notable trends in procurement and in construction contracting that have seen continued interest by public owner clients that we expect will see continued traction in 2022 (and beyond): social procurement and integrated project delivery.

Social procurement is the practice of leveraging public spending on goods and services to generate positive social impacts/outcomes. For public organizations such as municipalities, that have limited budgets and broad mandates, social procurement offers a creative opportunity to leverage socio-economic development while spending public funds that would be spent in any event. By way of illustration, a local government that is procuring for the construction of an infrastructure project may require as part of such procurement that proponents evidence a commitment to hiring or training individuals from marginalized or under-represented groups in the community, or for resourcing supplies and services for the project from a local SME[1] or social enterprise[2] that provides local value. Such commitments would then factor into the procurement evaluation of the proponent based on a pre-determined evaluation matrix.

The "social" value offered by a vendor may seem novel, but it is simply another facet of evaluating overall value, alongside "economic" value (eg. offering low pricing) and "environmental" value (eg. using green building materials). For owners, social procurement provides an opportunity to obtain further value for the benefit of a community without needing to expend more public funds. For contractors and suppliers, social procurement is an opportunity to build unique and competitively advantageous offerings.

In 2022, I expect that a greater number of public owners in BC, and local governments in particular, will harness the opportunities that social procurement offers to generate overall community value by adopting and implementing social procurement practices. Local governments invest millions of dollars in capital and operational purchasing. It only makes sense that they take whatever measures offer an opportunity to obtain more value for their communities within the same spending limits.

Integrated project delivery (IPD) is a form of project delivery that has more recently captured the attention of owners that may be looking for alternatives to traditional models, such as design-bid-build and design-build. In these traditional delivery models, the compartmentalization of the owner's "intentions", the consultant's "design", and the contractor's "build" inherently creates an environment where the shortcoming of one party in the chain creates an opportunity for another to profit through cost claims. The novelty of an IPD model comes from its complete

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dismantling of the compartmentalized roles and responsibilities that owners, designer, and constructors have traditionally held.

With IPD, the owner, designer and constructor (and sub -contractors possibly) are engaged under a single contract that mandates their respective responsibilities, communal risks, and shared profit margins. The liability of the parties are shared such that parties are incentivized to resolve disputes for the collective good rather than be purely self-serving and adversarial. The parties engage in a lengthy process at the beginning to allow the key parties to collaborate, evaluate risks, address constructability issues, assess base costs and agree on profit before committing further and endeavouring to create a detailed design and undertaking procurement.

For owners, cost certainty is illusive even in a "fixed price" arrangement since those arrangements still permit cost claims for certain instances of delay, scope of work changes and unforeseen conditions. For public owners, in particular, the desire for cost certainty through design-bid-build has been debunked by quickly escalating prices, while design-build carries profit margins that may not be palatable for cost-conscious owners. In the "new-normal" of the post-2020 construction industry, I foresee that IPD will become more appealing to owners, and public owners in particular, looking for new solutions to an age-old problem of cost certainty. For vendors, now is the time to become more familiar about the process and overcome any nervousness about participating so you are ready when owners are ready to engage.

LITIGATION

ADRIENNE ATHERTON

2021 saw a continuation of supply chain disruptions as a result of COVID-19, as well as due to global disasters, including the Texas weather events and resulting electrical grid power crisis, as well as the Suez canal disaster, and, more recently, the local disasters caused by extreme weather events. These events exacerbated supply chain disruptions that were already being experienced in the construction industry due to such things as shortages of shipping containers and labour in the transportation and construction industries. These supply chain disruptions have resulted in both price increases in materials, and delays in delivery. Such uncertainty increases risks in construction and results in more disputes. In addition, global events have hit the insurance industry hard, which has put the insurance market into survival mode. As a result insurers are now looking for ways to reduce their risks. As a consequence, insurers are adding exclusions, or raising premiums for certain coverage, which has put the insurance market in a state of flux. As a result, procurement solicitation documents can include insurance requirements that are not feasible because the product is longer available in the market on the terms set out in the solicitation documents, or it is significantly more expensive than anticipated.

Leading up to this pandemic, it was common to see owners seeking to allocate as much risk as possible onto the successful proponent through the contract documents. However, it appears that public entities are recognizing that during uncertain times such as these, when foisting risk onto the successful proponent, the public entity risks potentially limiting its pool of bidders or receiving bids with higher prices (i.e. paying for that risk assumption) or, during the project, there may be an increase in the risk that the successful proponent may have performance issues as a result of cash flow or other problems, or worse case, defaults or becomes insolvent, all of which increase the complexities of the project, including the cost and time. As a result, a number of public entities are considering a different allocation of risk in their contract documents than they had previously. More public entities are considering alternative delivery models, such as Integrated Project Delivery (IPD) as a tool to share risk. We also saw in 2021 (for example in ***Crosslinx v. Ontario Infrastructure*** – our article on this case can be found here) that the Courts were willing to adopt a purposive analysis of construction agreements to achieve a fair result when construction projects under those

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agreements were unexpectedly 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. This 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 onto the contractors.

As a litigator, I have seen increased issues involving contract interpretation for change orders due to the impacts of supply chain disruptions, and issues arising from cash flow problems of the contractor, which cause delays in payments to subcontractors and material suppliers, and liens being filed on title to the property. Where a contractor is on the verge of insolvency and makes a proposal in bankruptcy to restructure to save it from insolvency, there is a need for all parties to work cooperatively and creatively to ensure that the project is completed on time and on budget, all parties are paid, and the contractor is successful in avoiding bankruptcy.

In closing, I provide some top tips to minimize construction risk and delays and to secure the effective delivery of a construction project for all participants.

Tip 1: Use Construction Contract Drafting As A Risk Management Tool

The purpose of the construction contract is to set expectations between the parties to ensure that the objectives of each party are met, address how anticipated issues will be handled, and properly allocate risk. Parties to a construction project have an opportunity at the outset of their relationship to minimize potential disputes if they take proactive steps at the time the contract is drafted.

There exists a suite of standard form contracts in construction that are an excellent and cost-effective starting point. However, they may not be the best end point. It is recommended at the outset of the relationship to select the appropriate template, and then draft supplemental conditions to customize the template to suit the situation. Examples of supplemental conditions that can assist in the current climate include requirements to purchase materials early in the project, with the owner supplying or paying for storage, clauses to expressly address the allocation of risk (i.e. both time and cost) in the event of delays in the delivery of materials or increases in costs, inclusion of a process to identify alternative materials, an option for the owner to pay extra to expedite delivery, or an alternative expedited dispute resolution process for certain identified issues to minimize potential delays to the schedule during a dispute.

An issue that arises at the contract stage that often leads to later disputes is the drafting of contractual provisions without the assistance of, or review by, a legal professional. All too often, contract interpretation disputes arise because clauses were cut and pasted from other previously used contracts, and do not work properly together. Legal review at the outset may seem expensive, but it is a deal compared to the potential delays and costs that arise if there is a later dispute.

Tip 2: Clearly Define Scope

Many construction disputes are related to claims that work is outside scope. Changes, extra work and delay determinations are based on the agreed upon scope of work set out in the contract. Therefore, care should be taken at the outset to ensure that the parties have clearly documented in the contract the agreed upon scope of work, and what are the "contract documents". Drafting consistencies throughout the contract are important to avoid interpretation disputes later.

Tip 3: Communicate Frequently

Misunderstandings are a common symptom of a lack of effective communication. One area where this has a large impact is in relation to the construction schedule. It is important to ensure that the contract requires the provision of a schedule with critical dates at the outset,

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as well as regular updates. It is equally important that the schedule and regular updates actually are prepared and circulated. The schedule is used as the basis to ascertain delays and their causes. Regularly updated schedules are needed by all parties to support or defend delay claims

Tip 4: Follow Processes Set Out in the Contract

There have been many occasions when I have been engaged in a construction dispute and discovered that the parties have been conducting themselves without regard for the requirements and processes set out in the contract. While this may be fine when the parties are able to quickly resolve the issues, if the dispute is not resolved, this practice increases the complexity for finding resolution. Therefore, it is recommended that a copy of the contract be provided to all key players and a copy should be kept on site throughout construction. The key players should review the contract at the outset and periodically throughout construction. As the Supreme Court of Canada made clear early in 2021 in ***Wastech Services Ltd. v Greater Vancouver Sewerage and Drainage District*** (our article can be found here), it is important for the parties to perform their contractual obligations and exercise their contractual discretion honestly and in a manner that is loyal to the bargain that had been reached.

It is important to be aware of and comply with contractual notice requirements. When a dispute arises, make use of the tools and remedies contained in the contract. Early legal advice to address issues as they arise during construction can avoid a costly lawsuit later.

Tip 5: Keep Records

Keeping clear and complete contemporaneous records of communications and events may not avoid a dispute, but will reduce the costs of the dispute, as those documents are the strongest evidence to prove one's version of events, and will reduce time spent by the lawyers. Photos at various stages of construction (with the date marked) are also provide excellent evidence if there is a dispute.

Conclusion

In my years of experience, I have seen some common themes in construction disputes including:

1. Lack of clarity in the contract language;
2. Parties acting without reference to the contract language;
3. Lack of clear communications between the parties; and
4. Lack of complete/accurate records of communications or events.

These issues are preventable through the proper drafting and use of the provisions in the construction contract, as well as effective communication between the parties and record keeping throughout the project.

Land And Development Law

Pam Jefcoat

Real estate development is a multi-step process that can be complicated, lengthy and risky (and often highly profitable). Given the complexity of the development approval process, coupled with supply chain issues noted above, it can take years to bring a project from the initial planning stage through construction to final completion. The longer the proposed construction takes, the more risks there are involved. Such risks include, but are not limited to, land value risks (e.g. the value of acquired land changes due to changed market circumstances), revenue risks (e.g. changes to yields, sale prices, inflation, interest rate fluctuations, demand and supply, labour or material etc.), planning and permitting risks (scope of approvals, delays etc.), construction risks (e.g. changes to pricing, design, quality and possible delays), political risks (changes due to a change in government, regulations, building codes etc.), and legal risks (e.g. objections to zoning

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changes, liability risks, contract risks etc.). Further, expectations of development continue to change and expand, resulting in increased complexity and cost. For example, affordable housing, climate mitigation and the delivery of public amenities, or cash contributions in lieu thereof, are now becoming the norm for most medium to large scale development projects.

In this context it is not uncommon for developers who have had approvals denied or delayed to challenge local government land use decisions or the regulatory process used to reach those decisions. Notably, the courts have long-shown deference to local government decisions in recognition of the broad legislative powers delegated to local governments, as well as the fact that Councils are democratically elected, autonomous and accountable to the electorate. The courts have, however, been far less hesitant to set aside local government decisions on procedural grounds.

While there have not been any seminal land use decisions from the BC courts in 2021, there have been a couple of recent cases in BC and Ontario worthy of note. These cases serve to illustrate the deference accorded to local government decision making, as well as the refusal (to date) of the higher level courts to find that local governments owe developers a private law duty of care when making regulatory decisions. Accordingly, it is important for developers to understand these concepts to fully assess the scope of their overall project risk.

The first case of note is ***Charlsesfort Developments Limited v. Ottawa (City)*, 2021 ONCA 410** [*Charlesfort*]. We had previously reported on the trial decision in this case in 2019, which decision has now been overturned by the Ontario Court of Appeal. At issue in this case was whether the City of Ottawa was legally required, as part of a site-specific rezoning process, to advise the developer, Charlesfort Developments Ltd., of the risks of developing next to critical municipal infrastructure that was located in an adjacent municipal easement. The property adjacent to the development site contained an easement in favour of the City of Ottawa, within which a high-pressure water main was located. At the time of rezoning, Charlesfort was under the mistaken belief, based on discussions with the City, that the easement contained only a trunk sewer. During the site plan approval process Charlesfort learned that the easement contained both the trunk sewer and a critical water main and as a result, Charlesfort could not carry out the construction of its project as originally conceived. The project suffered considerable construction delays and Charlesfort incurred significant increased costs as a result. At trial, the Trial Court found that the City was negligent in providing Charlesfort with inaccurate information and that Charlesfort reasonably relied on such misinformation to its detriment. Charlesfort was awarded almost $4.5 million in damages and pre-judgement interest.

> *Local governments do not owe developers a private law duty of care when carrying out their regulatory approval functions.*

The Ontario Court of Appeal has now overturned the Trial Court's decision. The Court of Appeal assessed the nature of the City's mandate in carrying out the rezoning approval process and found that, where the City is discharging a statutory duty of care (to consider a rezoning application), this does not give rise to a private law duty of care. Importantly, the Court found that the City, in processing Charlesfort's rezoning application, had not undertaken to provide Charlesfort with accurate information about municipal infrastructure in the adjacent property, nor was the City responsible to protect Charlesfort's economic interests to construct the project as planned. Here, the Court noted that rezoning approval was only one stage of the development approval process and the City had no responsibility in guaranteeing that the project would ultimately be profitable. To find otherwise would, in the Court's view, "in effect, render municipalities insurers of developers' profits" and would "create a

potentially limitless liability."

The decision in *Charlesfort* is consistent with BC case law. See, for example, the BC Court of Appeal's decision in ***Wu v. Vancouver (City)*, 2019 BCCA 23**, where the court refused to establish a duty for municipal officials to make decisions on development permits within a reasonable period of time. In *Wu* the BC Court of Appeal reminded us that it is difficult to convert public duties to private law duties, where the public law duties exist to promote a public good, rather than the private interests of the development community. Our summary of this case can be found here.

The second case of note is the BC Supreme Court's decision in ***G.S.R. Capital Group Inc. v. The City of White Rock*, 2020 BCSC 489** [*GSR*], which provides a good example of the deference that the Courts will afford local governments when applying the reasonableness standard of judicial review, as set out by the Supreme Court of Canada in ***Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65**.

GSR dealt with the judicial review of a decision by the City of White Rock to withhold a building permit for a 12-storey building from the developer, notwithstanding that the City had previously issued a development permit to the developer for the same development. Here, subsequent to Council's issuance of the development permit, there was a general election and the newly elected Council took immediate steps to amend the Official Community Plan and Zoning Bylaw for the property in question to reduce the maximum allowable building height to 6 storeys. GSR was advised of the council resolutions passed and of the "7-day window" to submit a building permit application, as contemplated in section 463 of the *Local Government Act* (LGA). Because GSR's project was considered a complex building under the City's Building Bylaw, GSR was required to apply for a foundation permit, which required obtaining a geotechnical report, building code analysis and sealed engineering drawings. Given the scope of work required to complete the permit application, GSR was unable to submit a completed foundation permit during the 7-day window. GSR's application was not submitted until several weeks after the 7-day window had expired. The City subsequently withheld GSR's building permit and then City passed the bylaw amendments and took the position that GSR was not permitted to proceed with the development approved under the development permit but would have to comply with the newly enacted bylaws. Litigation ensued. The Court held that the City's decision to withhold GSR's building permit was reasonable, was not done illegally or in bad faith and that GSR was afforded the appropriate procedural fairness in the circumstances. The Court also rejected GSR's argument that the possession of the development permit entitled it to non-conforming use protection. In the Court's view, because the building permit had not been issued, GSR's building could not be said to be "lawfully under construction", as required under section 528 of the LGA.

There are several "take-aways" from these decisions:

1. There are always inherent risks with complex construction projects, both for the developer undertaking the project and the local authority issuing approvals. However, local governments do not owe developers a private law duty of care when carrying out their regulatory functions. Thus, there is no local government duty to process applications within a "reasonable" period of time. There is often a scarcity of resources local government can deploy in processing applications, especially given the volume of applications and the competing, shifting priorities local governments face in discharging their responsibilities. Developers, to the greatest extent possible, should anticipate and account for the uncertainty in the timing of issuance of regulatory approvals.

2. Local governments, in issuing regulatory approvals, will not be held responsible to protect developers' economic interests to construct any project as planned or to guarantee that any project will ultimately be profitable. Developers may not be

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able rely on communications with local government staff members regarding the feasibility of, and risks associated with, their projects, even where local governments have access to information not available to the developer. As noted in the *Charlesfort* decision above, local governments may not be held liable for the provision of inaccurate information, even if a developer suffers quantifiable damages as a result. Accordingly, developers should undertake their own studies and investigations with respect to both site development and the impacts on adjacent properties. Engineers, planners and other specialists should be consulted early and detailed plans and studies should be prepared and reviewed early in the approval process, such that key risks are identified early, before approvals are issued and significant expenditures are incurred.

3. Last, but certainly not least, BC civic elections will be held in October 2022. This could result in a change of direction of many municipal councils and local government priorities (e.g. affordable housing, increase taxes and fees, a change in view of preferred density etc.). Local government legislation provides municipalities and their councils with the flexibility to determine the public interest in the communities and to respond to the different needs and changing circumstances in their communities. As the *GSR* decision illustrates, Courts will be deferential to changing Council priorities, notwithstanding the impact on previously secured development rights. Also note that "down-zoning" is not compensable, except in very limited circumstances. Thus, the risks of developing in an election year should be considered for both mid-stream projects and new projects being considered.

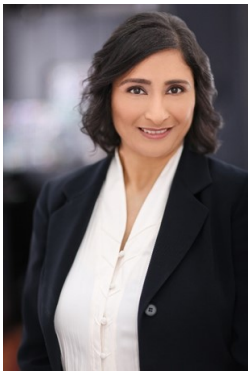
   - For mid-stream projects, remember that a development permit does not guarantee the issuance of a building permit, nor does it provide non-conforming use protection under the LGA. As such, consider getting the necessary building permits in place and taking the necessary steps (i.e. shovels in the ground) to ensure that your project may be considered "lawfully under construction" before council priorities change in the fall of 2022.

   - For new projects, if the project will be phased or have a long-term build out, you may wish to consider proceeding with a Phased Development Agreement (PDA) under the LGA. The effect of a PDA is to grandfather a phased development project against changes to the specified zoning provisions or specified subdivision servicing provisions while the PDA is in effect. Note, however, that this protection does not apply to other bylaws, such as development cost charge bylaws. From a developer's perspective, the key advantage of proceeding with a PDA is the measure of zoning and subdivision servicing certainty provided (which may be particularly important if there is an election looming or the project is controversial). This certainty may reduce business risk and therefore the cost of development. Zoning certainty is also important if no physical alteration of the land is planned for a time, such that "commitment to use" cannot be established to get non-conforming use protection under the LGA.

January, 2022

1 Small and Medium-sized Enterprises

2 A business that embeds a social, cultural or environmental purpose into its operations.



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Sonia is a founding partner of Civic Legal LLP, and practises in the are-as of procurement, construction and land development, with a particular focus on tendering law, procurement fairness, construction contracting and use of standard form construction contracts. Sonia routinely provides advise on structuring and administering public tenders and competitive RFPs, managing contractor performance and lien issues and securing land tenure. She practised as a professional engineer for 10 years and worked on civil and geotechnical design and construction projects in British Columbia and abroad. She provides legal advice with practical insight by drawing upon her unique professional understanding of construction and engineering projects. Sonia keeps a watchful eye on technological disruptions to the construction industry, and how these may impact the traditional relationships between parties, such as with the use of BIM technology and smart contracts.

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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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Pam is a founding Partner at the firm and brings over 20 years of combined legal experience in local government and commercial real estate matters with a focus on land use planning, subdivision, rezoning and redevelopment of residential, mixed-use and industrial properties. Pam has worked on numerous large-scale development projects throughout the Province and provides strategic and practical advice on project development, infrastructure financing and transactional matters. Pam also has a Master's Degree in Public Administration and is a seasoned advisor for local governments in all aspects of their legislative authority, including bylaw development, constitutional jurisdiction, conflict of interest and FOIPPA.

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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