Cassels

Notice to the Industry - Contractual Notice Provisions Require Strict Compliance

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The closure of workplaces during the height of the COVID-19 pandemic was not something that anyone could have predicted. Some construction sites, although not impacted for the same duration as other businesses, were closed for a month or longer. It is anticipated that, as a result of site closures, there will be a significant increase in the number of claims made for impacts allegedly resulting from the stoppage of work, or from changes in the way that work progressed on site.

As these claims emerge, it will be critical for all affected parties to consider whether their contract contains notice requirements, and whether notice was properly given in accordance with those provisions. Courts have previously held that a failure to strictly comply with contractual notice requirements can be fatal to a claim, so both claimants and claim recipients need to fully consider this issue.

What are Notice Provisions?

Notice provisions are used in contracts so that parties can take steps to mitigate damages once they receive notice of an event that could give rise to a claim. The notice itself informs the receiving party of a claim or loss that has occurred, or is occurring, on a project. A party receiving proper contractual notice will presumably react to the receipt of notice by immediately assessing the financial impact of the event and taking corrective measures to mitigate loss.[1]

Because of their importance in preventing uncontrolled damages, notice provisions are typically drafted using language that makes the provision of notice a necessary precondition to a party's ability to make a claim. Where a notice requirement is unambiguous, courts have held that strict compliance with contractual notice provisions is a condition precedent to a claim.[2] In other words: if a party does not comply with the notice provision prior to advancing a claim, that party's claim could fail.

Among other things, courts have held that parties were barred from advancing claims for failing to:

- provide notice where the provision of notice was required under the contract;[3]
- provide notice within the timelines required or within a reasonable amount of time;[4] and
- provide sufficient detail with respect to a claim.[5]

Whether or not notice is strictly required by a contract, but especially when it is, parties are well-advised to

provide notice to their contracting counterparty as soon as they anticipate having to make a claim associated with the contract price or the contract time. In situations where notice is not expressly required, the provision of notice is still often recommended on the basis that it provides the claimant with a more defensible situation, having provided the recipient with an opportunity to mitigate its damages upon receipt of the notice.

When providing notice, parties should carefully review the contract's notice requirements. Contracts typically provide that where notice in writing is required, the notice must be given in a particular manner. Among other things, the contract may stipulate:

- the method in which notice is required to be provided (e.g., written correspondence, e-mail, fax, etc.);
- when the notice is deemed to be received (i.e., by each transmission method);
- what information the notice is required to convey, including any requirement for detailed accounts of claims; and
- the timing for delivery/receipt of notice.

Each of these can be critical to the success of a notice and any subsequent claim. Notice that is given but not given in accordance with the requirements of the contract, could still result in a court finding that an underlying claim is barred.

It is recommended that parties review and ensure familiarity with the entirety of a contract at the outset of a project. In doing so, parties should carefully consider what events require notice and when notice is required to be given. Having a quick-reference guide to contractually-prescribed notice requirements, and ensuring compliance with those requirements, can help to preserve claims.

Example: Notice Provisions Under a CCDC 2 - 2008 Stipulated Price Contract

The CCDC 2 – 2008 stipulated price contract sets out several instances where parties are required to provide written notice. Among others, the following clauses requiring notice are already being argued[6] in claims arising from the closure of construction sites in Ontario:

- **Claim for delay:** GC 6.5 can allow for additional contract time where work on a project is delayed under certain circumstances, including the occurrence of a *force majeure*[7] However, before a party is entitled to advance a delay claim under this provision, they must have provided notice in writing within 10 working days of the commencement of the event of delay.[8]
- **Claim based on changes in law:** GC 10.2.7 can allow a party to make a claim where, after bid

closing, a change in the law affects the cost of the work. The contract requires that the parties follow the procedure for a change in the contract price under GC 6.6. Among other things, GC 6.6 requires a party to provide notice in writing of its intent to claim and a detailed account of the amount being claimed including the grounds to support such a claim. In addition, GC 6.6 requires that where an event gives rise to a claim, the parties are required to take steps to mitigate any potential loss and maintain documentation for the claim.

Summary

The importance of contractual notice provisions is not new but will certainly be in the spotlight as COVID-19 related claims continue to emerge. Parties that have given, or continue to give, proper contractual notice will be in a better position to advance those claims. Similarly, recipients of such claims should consider whether there are contractual defences available as a result of their counterparty's failure to have provided proper notice.

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[1] *Doyle Construction Co. v Carling O'Keefe Breweries of Canada Ltd.*, [1988] BCJ No. 832 (BCCA) [*Doyle*].
[2] *Corpex (1977) Inc. v Canada*, [1982] 2 SCR 643 [*Corpex*]; *Technicore Underground Inc. v Toronto (City)*, 2012 ONCA 597 [*Technicore*]; *Doyle, supra*, note 1.
[3] *Corpex*, *supra*, note 2.
[4] *Doyle, supra*, note 1.
[5] *Ross-Clair v Canada (Attorney General)*, 2016 ONCA 205 [*Ross-Clair*].
[6] Note that this article does not intend to suggest any probability of success of the use of these clauses, and instead simply notes that these clauses have been seen to be used by claimants.
[7] See GC 6.5.3 in the CCDC 2, subject to change by way of supplementary conditions.
[8] See GC 6.5.4 in the CCDC 2. subject to change by way of supplementary conditions.
