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ENGINEERS & THE LAW: CHANGE ORDERS
TWO COURT CASES IN ALBERTA TELL DIFFERENT STORIES ABOUT CONTRACTORS' CLAIMS

Engineers, acting as consultants under construction contracts between an owner and contractor, will often be asked to deal with contractors' claims for compensation for extra work or schedule extensions. These claims may be due to changes to the scope of work or unforeseen work conditions.

Contractors' claims can be further complicated when notice of the claim has not been given in the manner, or within the time limits, contemplated by the change order provisions of the prime contract. Because the consultant's decision on these matters can have an impact on the parties' contractual rights, the consultant must make the decision reasonably and without bias. Consultants have seen an increasing number of actions against them for allegedly having acted with unreasonable conduct in their role as consultants under these agreements. The consultant must, therefore, approach these issues in a manner consistent with the legal parameters established in previous cases.

The way in which the courts deal with contractors' change order requests that have not been made in strict compliance with the change order provisions of their contracts has been uncertain in recent years. Until recently in Alberta, failure to satisfy change order notice requirements has been seen as fatal to a contractor's claim. Such was the finding in 2000 of the Court of Alberta in *ANC Developments Inc. v. Dilcon Constructors Ltd.*

In the *ANC* decision, the contractor for the construction of a newsprint mill in northern Alberta had made claims for additional compensation under four contracts. The project had suffered delays and growth in scope. After completion, the contractor wrote to the owner describing claims it had for losses arising from the increased scope and at trial was awarded damages in excess of $10 million. The owner appealed the ruling, including the award for loss of productivity, which amounted to approximately $3.8 million.

Common provisions for changes to the work arising from delay were included in the general contract. It specified that if anything occurred which the contractor thought may cause delays to the work, the contractor was obligated to give notice in writing to the owner within seven days of the occurrence. Claims for compensation for such delays had to be submitted in writing no later than six months after the commencement of the delay.

The contractor had raised concerns about delays it was experiencing in site meetings during the course of the work, and such concerns were recorded in meeting minutes. The contractor had also provided written notice of its claim for delay in August 1990. The work had concluded in January 1990.

The Court of Appeal held that the written notice requirements of the contract served several purposes, including the following:

- Although the owner might be expected to know, through its consultant, of delays raised at site meetings, delays caused by the consultant itself might be hidden from the owner in the absence of a written notice;

- Without a written notice, the owner may not be certain if any delay would adversely affect the contractor;

- Written notice crystallized the position of the parties and enabled the parties to deal with the problem immediately, rather than arguing about it later; and

- Written notice enabled the owner to take action to reduce the impact of a delay.

The court found that the contractor did give notice of delay in December 1989, when it first occurred. However, it was not until August 1990, seven months after contract completion, that a claim for costs due to the delay was made. (The court also questioned whether this notice was sufficient to constitute a claim under the contract, as it dealt primarily with other dispute issues.) The contractor had not met the six month deadline for submission of a claim in writing. Notice at site meetings, recorded in the meeting minutes, was not deemed to be sufficient notice of the claim. As such, the court enforced the strict terms of the contract and denied the contractor's $3.8 million claim for loss of production.

On the basis of the *ANC* case, therefore, failure by the contractor to satisfy the strict requirements within a contract for change or claim requests can be fatal to that claim. Recent case law, however, leaves that conclusion in some doubt.

In the 2003 case of *Banister v. TCPL*, the contractor had claimed more than $500,000 for additional work that the contract documents indicated would not be required. The contractor had advised the owner that it intended to proceed with this work. The contractor did not, however, comply with the contractual requirements to provide a written estimate for the cost of the additional work and to obtain written approval from the owner before proceeding. The owner had advised the contractor of the requirement to comply with the change order provisions.

The court found that the provisions of the contract had not been strictly followed. However, the court also observed that:

- Everyone had assumed that the work was an extra to the contract;

- There was some notice in writing of the need for the extra work;

- The owner was always aware that the contractor was doing the work and that it was necessary for the integrity of the work; and

- The owner benefited from the work and would reasonably know that the work would increase the price.

Without referring to the *ANC* decision, the court found that it would be unfair for the owner to approve the work, watch it being carried out, obtain the benefits of the work and then attempt to rely upon the lack of strict contractual compliance to deny the contractor compensation. The court allowed the contractor's claim in full.

It is apparent from this decision that an owner or its consultant cannot simply sit back and take advantage of a contractor's failure to comply with the change order requirements of a contract to deny the contractor's legitimate claims for extra work. It is incumbent upon consultants themselves to be proactive in ensuring that appropriate change order procedures are followed where work is carried out beyond the contract scope.

ABOUT THE AUTHOR

Scott J. Hammel, LLB., B.Sc. (Mech. Eng.), is a partner with the law firm of Miller Thomson LLP in Edmonton, with a practice in construction and professional liability litigation.

Scott J. Hammel
Edmonton
780.429.9726
shammel@millerthomson.com

WHAT'S HAPPENING AROUND MILLER THOMSON

E. Jane Sidnell will be presenting at *The Canadian Institute's* 14th Annual **Western Canadian Construction Superconference** on January 23 - 25, 2006 at the Hyatt Regency Hotel in Calgary. Jane will be presenting on Wednesday, January 25 from 9:00 am to 12:30 pm. Her topic is ***"Advanced Guide to Effectively Negotiating Structuring and Drafting the Construction Contract"***.

As a courtesy to our clients and industry contacts, a 15% discount off the conference registration fee has been arranged. If you or one of your co-workers would like to attend, please call The Canadian Institute at 1-877-927-7936. Be sure to mention Jane Sidnell and quote Priority Service Code 480A06.5 to obtain the discount. More information about the conference is also available online at www.canadianinstitute.com/westconstruction

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REGIONAL CONTACTS

Edmonton

Debra Curcio Lister dcurciolister@millerthomson.com	780.429.9763
Kent H. Davidson kdavidson@millerthomson.com	780.429.9790
Scott J. Hammel shammel@millerthomson.com	780.429.9726
Darin J. Hannaford dhannaford@millerthomson.com	780.429.9714
Sandra L. Hawes shawes@millerthomson.com	780.429.9787
William J. Kenny, Q.C. wkenny@millerthomson.com	780.429.9784
Bryan J. Kickham bkickham@millerthomson.com	780.429.9713
Daniel C.P. Stachnik, Q.C. dstachnik@millerthomson.com	780.429.9761
David N. Thomlinson dthomlinson@millerthomson.com	780.429.9778

Toronto / Markham

Drazen F. Bulat dbulat@millerthomson.com	416.595.8613

Calgary

Michael D. Aasen maasen@millerthomson.com	403.298.2438
Michael J. Bailey mbailey@millerthomson.com	403.298.2411
Morella M. De Castro mdecastro@millerthomson.com	403.298.2458
E. Jane Sidnell jsidnell@millerthomson.com	403.298.2435
Nicole T. Taylor-Smith ntaylorsmith@millerthomson.com	403.298.2453

Vancouver

Wendy A. Baker wbaker@millerthomson.com	604.643.1285
Charles W. Bois cbois@millerthomson.com	604.643.1224
Terrance A. Kowalchuk tkowalchuk@millerthomson.com	604.643.1222
Peter McDonald pmcdonald@millerthomson.com	604.643.1231
Owen D. Pawson opawson@millerthomson.com	604.643.1254

Lloyd D. Cadsby, Q.C. 416.595.8639
lcadsby@millerthomson.com

Peter K. Foulds 416.596.2112
pfoulds@millerthomson.com

William M. Pigott 416.595.8179
wpigott@millerthomson.com

Anthony D. Scane 416.595.2661
ascane@millerthomson.com

Michael T. Tamblyn 416.595.2660
mtamblyn@millerthomson.com

Thomas R. Whitby 416.595.8561
twhitby@millerthomson.com

Michael J. Percival 604.643.1230
mpercival@millerthomson.com

David L. Rice 604.643.1209
drice@millerthomson.com

Brian T. Ross 604.643.1216
btross@millerthomson.com

Stephen R. Ross 604.643.1205
srross@millerthomson.com

Donald J. Sorochan, Q.C. 604.643.1214
dsorochan@millerthomson.com

Paul Verriour 403.298.2430
pverriour@millerthomson.com

Mari A. Worfolk 604.643.1240
mworfolk@millerthomson.com

Waterloo-Wellington

F. Stephen Finch, Q.C. 519.579.3660
sfinch@millerthomson.com

Whitehorse

Murray J. Leitch 867.456.3301
mleitch@millerthomson.com

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