



Our CDBI tutorials often emphasize the importance of contract review and contract management in any construction or design-build project. The following article discusses the importance of understanding your contract and enforcing the provisions of that contract to best protect your firm when contract termination is threatened.

The Risk Management Committee of the Canadian Design-Build Institute will continue to circulate articles of this nature to members as they become available. We trust this will be found to be of interest and beneficial to the members.

Breaking up Is Hard to Do

By Krista Johanson, Borden Ladner Gervais

A recent Ontario court decision illustrates the expected – and unexpected – challenges that arise when one party wishes to end a contractual relationship. In *Bombardier Transportation Canada Inc. v. Metrolinx*, 2017 ONSC 2372, Bombardier had entered into a \$770 million contract with Metrolinx to design and build a fleet of light rail transit vehicles for new transit lines in Toronto. After a series of very public delays in meeting milestone deadlines, Metrolinx put Bombardier on notice that it was in default of the contract and then terminated the contract. Bombardier objected to the termination, saying that it had cured the default by developing a new schedule it was confident it could meet.

In most cases where a right to terminate for default is disputed, the contractor downs its tools and leaves the site, and brings a lawsuit or arbitration for breach of contract. Meanwhile, the owner hires someone else to finish the work. Eventually, the court, or arbitrator, decides whether the owner had a contractual right to terminate under the contract. If the termination was justified, the owner is entitled to damages flowing from the contractor's breach, such as the costs of a replacement contractor. If the termination was not justified, either because the contractor was not in default, or because the owner followed the wrong procedure (for example, by giving the contractor a shorter time to cure the default than set out in the contract) the contractor is entitled to damages flowing from the owner's breach, such as the profit it would have made on the job. At this point, the job is long over.

Bombardier did something different. Bombardier sought an injunction, asking Ontario Superior Court of Justice to order Metrolinx to preserve the status quo by keeping Bombardier on site.

Bombardier based its argument on the dispute resolution procedure set out in the contract. That dispute resolution procedure had several mandatory steps, beginning with a decision by the Engineer, continuing through negotiations, and ending with arbitration. Similar procedures are found in many standard form construction contracts, including the "CCDC 2."

Bombardier argued that this dispute resolution procedure was mandatory for all disputes between the parties, including disputes over termination. Because Bombardier disagreed that it was in default, it contended, Metrolinx was required to go through all the steps of the dispute resolution process before terminating the contract. Metrolinx said this procedure was not applicable, because the clause giving it the right to terminate stated that it applied notwithstanding any other provision.



The Court agreed with Bombardier’s interpretation, finding that the right to terminate was contingent on the Engineer determining that there was a default, and that determination was itself subject to the dispute resolution clause. So Bombardier remains on the job as the parties continue through the dispute resolution procedure.

An injunction is an unlikely tool for a contractor to use to push back against an aggressive owner. Generally, a court will not grant an injunction unless there is a serious question to be tried, the balance of convenience favours the injunction and, most importantly in commercial cases, the party seeking the injunction would suffer “irreparable harm” if the injunction isn’t granted. “Irreparable harm”, to the Courts, means losses that cannot be compensated by a payment of damages. Most business losses can be compensated in this manner.

Bombardier managed to persuade the Court that this case was an exception, due in large part to the size of the Project. Termination for default would affect Bombardier’s ability to bid on future projects, and the damage to Bombardier’s supply chain and potential loss of an expert workforce (which would need to be laid off) would impede its ability to restart the Project should the dispute resolution process determine that there was no default. These losses would be impossible to quantify and therefore not compensable by damages. Most contractors are just not going to have that kind of evidence available to them.

That doesn’t mean that owners should ignore this decision. As set out above, a failure to follow the proper procedure in terminating a contract can result in damages awarded to the contractor, even where the contractor was actually in breach. Owners must now consider, in addition to any cure period, whether the contract dispute resolution procedure is a precondition to termination, or risk having to pay damages for terminating too soon. It’s a nightmare scenario, on a time-sensitive contract, to be stuck with a nonperforming contractor until several lengthy layers of dispute resolution have concluded. (Recognizing this in part, the Court directed Bombardier to take all reasonable steps to expedite that process.) Parties negotiating construction contracts should consider spelling out exactly what mandatory dispute resolution procedures should and shouldn’t apply in the specific event of a termination.

Termination is a complex area of law and the stakes are high. Each contract is unique. Owners considering terminating a contract, and contractors who have received a default notice, or a termination letter, should consult with an experienced construction lawyer in order to understand their risks and their rights.

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