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# Contract Termination: Considerations in Terminating for Default or for Convenience

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## Editor's Note

The authors have presented an excellent current discussion and analysis of the often-perilous exercise of contract termination in construction projects from both the owner and contractor perspective. Their paper covers the legal and practical considerations that need to be critically assessed as part of any termination decision. Their comparison of the convenience and default termination provisions, and their respective pitfalls and advantages, is well articulated and timely especially in light of our court's now-firmly entrenched insistence on good faith and honest dealing by owners and contractors seeking to rely on pertinent termination provisions within their construction contracts.

## 1. INTRODUCTION

Parties enter into construction contracts with a common goal of building a successful project. Yet industry participants know all too well that hurdles can be encountered during project execution which will challenge the relationship between contracting parties. Many hurdles can be resolved amicably through the mechanisms provided in the contract. However, in certain instances, an owner or contractor may be so dissatisfied with the other party's performance of their contractual obligations that they may view the relationship as unsalvageable and seek to bring it to an end by terminating the construction contract for default. In other circumstances, a party may elect to exercise an express unilateral right to terminate a construction contract for convenience based on its own commercial considerations.

There are multiple factors to consider when contemplating termination and Canadian courts have weighed-in on many of these. The following addresses a number of issues and considerations surrounding contract termination, be it for default or for convenience. Although the rights, remedies and obligations of both parties are unique to each construction contract, the provisions of the Canadian Construction Documents Committee's (“CCDC”) standard form suite of documents, particularly ***62** the CCDC 2--2008 Stipulated Price Contract (“CCDC 2”), will provide a lens through which such rights, remedies and obligations are examined.

The discussion and analysis in this paper focusses on the parties' exercise of the express rights and remedies accorded to them in the construction contract. It also includes references to potential restraints or limitations on these termination rights that may be imposed under the common law. Lastly, the paper addresses some of the practical risks that one should consider when proceeding with either method of termination. As many readers will know, termination of a contractual relationship is not always the end of the story. Moving forward to the successful completion of a project and transitioning from one counterparty to another requires adept planning and forethought. Some practical considerations for achieving a successful transition are discussed as contract termination inevitably leads to a new contractual relationship with its own unique challenges.

## 2. TERMINATION FOR DEFAULT

From the outset, a party considering terminating a construction contract for default must first ensure that they have a complete understanding of their contractual rights before proceeding down such a path. In electing to terminate the contract, a party must exercise care and ensure compliance with the contractual requirements. Since the contractual language is determinative in any discussion of termination for default, the provisions in GC 7 of the CCDC 2 will serve as a template to guide the analysis in this Part II.

The Owner's termination for default rights in the CCDC 2 are set out below:

> 7.1.2 If the Contractor neglects to prosecute the Work properly or otherwise fails to comply with the requirements of the Contract to a substantial degree and if the Consultant has given a written statement to the Owner and Contractor that sufficient cause exists to justify such action, the Owner may, without prejudice to any other right or remedy the Owner may have, give the Contractor Notice in Writing that the Contractor is in default of the Contractor's contractual obligations and instruct the Contractor to correct the default in the 5 Working Days immediately following the receipt of such Notice in Writing.
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> 7.1.3 If the default cannot be corrected in the 5 Working Days specified or in such other time period as may be ***63** subsequently agreed in writing by the parties, the Contractor shall be in compliance with the Owner's instructions if the Contractor:

 

> .1 commences the correction of the default within the specified time, and
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> .2 provides the Owner with an acceptable schedule for such correction, and
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> .3 corrects the default in accordance with the Contract terms and with such schedule.
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> 7.1.4 If the Contractor fails to correct the default in the time specified or in such other time period as may be subsequently agreed in writing by the parties, without prejudice to any other right or remedy the Owner may have, the Owner may:
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> .1 correct such default and deduct the cost thereof from any payment then or thereafter due the Contractor provided the Consultant has certified such cost to the Owner and the Contractor, or
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> .2 terminate the Contractor's right to continue with the Work in whole or in part or terminate the Contract.

From an owner's perspective, GC 7.1.2 describes the circumstances in which the owner is entitled to note the contractor in default under the contract-- when the contractor fails to prosecute the work properly or comply with the requirements of the Contract to a substantial degree. GC 7.1.3 acknowledges the reality that defaults on a construction project often cannot be cured within 5 working days and provides an additional stop-gap in favour of the contractor before the owner's remedies in respect of the default are engaged. Lastly, GC 7.1.4 allows the owner to, among other things, terminate the contract if the contractor fails to correct its default within the applicable timeframe.

 

The Contractor's termination for default rights in the CCDC 2 are set out below:

> 7.2.3 The Contractor may give Notice in Writing to the Owner, with a copy to the Consultant, that the Owner is in default of the Owner's contractual obligations if:
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> ***64** .1 the Owner fails to furnish, when so requested by the Contractor, reasonable evidence that financial arrangements have been made to fulfill the Owner's obligations under the Contract, or
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> .2 the Consultant fails to issue a certificate as provided in GC 5.3 - PROGRESS PAYMENT, or
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> .3 the Owner fails to pay the Contractor when due the amounts certified by the Consultant or awarded by arbitration or court, or
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> .4 the Owner violates the requirements of the Contract to a substantial degree and the Consultant, except for GC 5.1 - FINANCING INFORMATION REQUIRED OF THE OWNER, confirms by written statement to the Contractor that sufficient cause exists.
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> 7.2.4 The Contractor's Notice in Writing to the Owner provided under paragraph 7.2.3 shall advise that if the default is not corrected within 5 Working Days following the receipt of the Notice in Writing, the Contractor may, without prejudice to any other right or remedy the Contractor may have, suspend the Work or terminate the Contract.

 

From a contractor's perspective, GC 7.2.3 describes the circumstances in which the contractor is entitled to note the owner in default under the contract. The most relevant of these circumstances relate to the owner's failure to pay, and to its violations of the requirements of the contract to a substantial degree. Given that the owner's obligations under a construction contract are primarily payment related, it's not surprising that the base language of the CCDC 2 does not provide a stop-gap similar to that provided to the contractor in GC 7.1.3. Lastly, GC 7.2.4 allows the contractor to, among other things, terminate the contract if the owner fails to correct its default within 5 working days of its receipt of the notice of default.

### 2.1 Determining if a Default under the Contract has Occurred

The first step in the analytical framework of determining whether a party is entitled to terminate the contract for default is to determine if the other party is actually in default. The state of the law on this question is somewhat unsettled as, when faced with contractual language requiring ***65** "substantial" or "material" breach or non-compliance with the terms of the contract to note a party in default (similar to that of GC 7.1.2 and 7.2.3.4 above), courts have applied differing analyses. Some courts have applied a fundamental breach standard, and seemingly ignored the default and cure process set out in the contact, while others have measured the alleged breach against the standard set out in the contract to determine if the party was in default.

In *Urbacon Building Groups Corp. v. City of Guelph* [1] the Court turned to the law of fundamental breach to determine whether Guelph's termination of its contract with Urbacon was improper and unlawful. Urbacon contracted with Guelph to undertake the construction of a civic administration complex under the 1994 version of the CCDC 2 (the relevant provisions of which closely mirror those set out above).

When Urbacon began work, it encountered various issues with the design drawings and specifications. While the parties agreed to settlement of certain delay issues in mid-December 2007, the progress of the work did not move efficiently into the new year. In September 2008, Guelph's representative provided the consultant (via email) with potential language to include in the written statement required to be delivered by the consultant under GC 7.1.2. The eventual notice of default replicated the language provided by Guelph to the consultant and stated that the consultant had found that Urbacon failed to comply with the contract to a substantial degree (see further details regarding the notice, below). Guelph terminated the contract two weeks later.

After laying out a number of the provisions of the contract, the trial judge set out the applicable law and framed the central issue in the case as follows:

 

> The question that is central to the disposition of this case is not whether Urbacon may have been in breach of its obligation under the Contract but whether the acts comprising any breach or breaches were in law a fundamental or substantial breach by Urbacon of its obligations under the Contract. If such acts or omissions were not at law a substantial or fundamental breach by Urbacon, then Guelph as the other contracting party would only have a remedy in damages against Urbacon. The distinction between breach of contract and fundamental breach of contract is at the heart of the liability issues in this case. [2]

***66** Interestingly, the trial judge framed the issue without expressly referencing or interpreting the language of GC 7.1.2 that described what constituted a default under the contract.

The Court then referred to *Goldsmith* in explaining fundamental breach:

> If the breach is so serious and fundamental as to go to the root of the contract, the other party may elect to treat the contract as at an end ... This exceptional remedy is available only in circumstances where the foundation of the contract has been undermined, where the thing bargained for has not been provided for. [3]

Next, the Court applied the Supreme Court of Canada's decision on misrepresentation, *Guarantee Co of North America v. Gordon Capital Corp,* [4] quoting paragraph 44: "A breach that is "substantial" that "goes to the root of" the contract is often also described as a material breach." The Court in *Urbacon* also relied on an Ontario Court of Appeal decision "in which the Court uses the term "substantial breach" interchangeably with "fundamental breach"." [5] The trial judge, "on the evidence and the application of the above decisions" concluded that "the onus was on Guelph to establish that Urbacon was in fundamental breach of its obligations under the Contract. Guelph has failed so to do. In such a situation Guelph's termination of Urbacon was not justified." [6]

Importantly, the Court in *Urbacon* also found that "the contrivance by [Guelph's representative] in orchestrating [the Consultant] in the preparation and issuance of the notice of events of default" was a failure by Guelph to perform its obligations in good faith and that failure "invalidate[d] any justification for Guelph's termination of Urbacon." [7]

Interestingly, the application of a fundamental breach analysis was also made in *Contura Building Corporation v. 0772551 Ltd.* [8] --a termination decision involving the standard form CCDC 14--

  

Design-Build Stipulated Price Contract ("CCDC 14"). In *Contura*, the CCDC 14 was used for the construction of a maintenance and fabrication facility. In this case, the owner was slow to provide authorizations required to initiate the permit process, slow to provide the final geotechnical report and failed to pay progress claims when due. The design-builder delivered ***67** notice of default, and subsequently, notice of termination pursuant to GC 7.2 (which closely mirrors GC 7.2 of the CCDC 2 set out above).

In setting out the legal framework applicable to the case, the trial judge turned to fundamental breach stating "in [Urbacon] the Court considered the question of a fundamental, substantial or material breach of a CCDC stipulated-price contract" [9] and quoted the principles discussed above. The Court concluded that the design-builder was entitled to terminate the contract finding that the owner's "actions amounted to breaches that were so serious and fundamental that they went to the root of the Contract in the sense that the foundation to the Contract has been undermined because the thing bargained for has not been provided." [10] This decision provides another example of a court examining the alleged defaults against the fundamental breach standard rather than merely interpreting the express language of the contract relating to what constitutes a default.

The decision in *Crescent Hotels and Resorts Canada Company v. 2465855 Ontario Inc.*, [11] while not a case involving a construction contract, provides a contrasting approach wherein the Court of Appeal of Ontario scrutinized the alleged defaults against the default provisions in the contract. In this case, the owner entered into a hotel management agreement with Crescent Hotels. After several notices of events of default, the owner terminated the agreement. The Court described the termination for default provisions as follows:

> The Owner contended that it was entitled to terminate for "Cause-Manager" which, under the Agreement, was defined to include "the occurrence of a default under this Agreement of which [Crescent] receives written notice (as provided in Section 12.5), that is not cured prior to the lapse of any applicable notice and grace periods set forth in Section 12.11. [ ... ]
>
> As noted, s.12.11(a) of the Agreement defined events of default as including the failure of a party to "perform, keep or fulfill a covenant ... in any material respect" and the continuance of such a failure for more than 30 days after receipt of a notice of default. [12]

  

The trial judge, quoting *Guarantee* (the same case relied on by the trial judge in *Urbacon*), held that a "[m]aterial breach is one that is material, substantial and goes to the root of the contract". [13] While the Appeal ***68** Court upheld the trial judge's decision, the Court noted that the trial judge misinterpreted the phrase "in any material respect" as requiring a breach rise to the level of one that goes to the root of the contract in order for the owner to raise it as an event of default. The Court said:

> We accept that the motion judge misinterpreted the term "in any material respect" in the Agreement. Her contractual interpretation analysis ignored the very language of s. 12.11(a)(i) of the Agreement, which contemplates that a party could assert, as an event of default, the failure to perform a covenant yet the defaulting party could cure the breach upon receipt of a notice of event of default. Breaches capable of being cured under s. 12.11(a)(i) therefore could include ones far less serious than a breach going to the root of the contract. [14]

The Court of Appeal's reasons indicate the importance of considering the alleged defaults against the standard set out in the contract. Where a material breach is defined to include an event of default that has not been cured within the required timeframe, the *Crescent Hotels* decision suggests that the breach does not necessarily have to go to the root of the contract in order to warrant termination. Given the various judicial decisions on this issue, parties may want to consider defining the standard applicable to breaches in their contracts to provide more clarity from the outset of the contract.

### 2.2 Sufficiency of Notice

In a dispute over the wrongful termination of a contract, if the terminating party is successful in establishing that the terminated party was in default under the construction contract and such default was not remedied in accordance with the terms of the contract, a court will then consider whether the notice of default delivered by the terminating party was sufficient. The recent case of *Contura* surveyed a number of earlier decisions on the issue of notice of default (including the judgments in *Urbacon* and *Kingdom Construction Limited v. Regional Municipality of Niagara* [15] ) and summarized the important requirements: "notice must clearly and precisely communicate the nature of the default upon which the delivering party relies and which the receiving party must remedy" and such "clarity should leave no doubt in the mind of the other party of the possible unexpected consequences of noncompliance". [16]

 

***69** Importantly, the Court in *Contura* also clarified that a party delivering a notice of default cannot thereafter justify its termination of the contract on the basis of breaches of contract that were not accurately and clearly specified in the notice of default. [17] In *Urbacon*, discussed above, Guelph sought to validate an insufficient notice of default on the basis of deficiency lists that were prepared *after* it delivered the impugned notice of default to Guelph. [18] In rejecting the argument that deficiency lists created after termination could be used to justify the sufficiency of the notice of default, the Court provided further support for the proposition that notices of default cannot be buttressed by evidence after the fact. [19]

The trial judge in *Contura* then went on to explain the significant consequences of delivering a notice lacking the clarity required by law: "The result of delivering an improper notice is that the time period set out in the notice never begins to run, and the termination by the delivering party at the end of that period is wrongful." [20] *Contura* also stands for the proposition that, from a procedural perspective, the party delivering the notice of default bears the burden of proof of clearly identifying the breaches upon which it relies, rather than the receiving party being required to satisfy the court that it failed to understand the notice. [21]

The facts in *Contura,* on the issue of the notice of default, were are as follows. On January 6, 2015 Contura Building Corporation, the design-builder, delivered a formal notice of default to 0772551 Ltd., the owner, pursuant to GC 7.2.3.4 of the CCDC 14. The notice described various issues of default in relation to the owner's failure to: (1) produce a complete geotechnical report; (2) provide requested information in relation to a conservation permit and letter of authorization in a timely manner; and (3) pay progress claims when due. The notice also confirmed that the owner had five working days to correct such defaults or the design-builder might suspend or terminate. The owner took no steps to resolve any of the issues and did not respond to the request for a meeting. The design-builder gave notice of termination on January 26, 2015, on the basis that the owner had failed to cure the defaults set out in the notice of default.

***70** When the trial judge applied the requirements outlined above to the circumstances at hand, he concluded that the notice of default was clear and unambiguous. The reference to the geotechnical report clearly referred to the owner's failure to provide a final version of a preliminary report--something it had agreed would be done--and the reference to a failure to pay progress claims when due was also clear as the due date for one of the progress draws had come and gone by the date the notice was delivered.

The decision in *Kingdom* (cited in *Contura*) can provide some further factual context as to how courts interpret and apply the requirements for a notice of default. *Kingdom* illustrates the importance of clarity and precision when noting a party in default and subsequently terminating the contract. In *Kingdom*, the contractor ("Kingdom") entered into a fixed price contract with

  

the Niagara for the construction of a wastewater facility. After commencing work, Kingdom encountered subsurface conditions that impacted its dewatering operations, which Kingdom viewed as changed site conditions necessitating a formal change order. The following are the relevant provisions of the contract:

> 4.05.01 If the Contractor ... should neglect to prosecute the Work properly or otherwise fails to comply with the requirements of the Contract and if the Contract Administrator has given a written statement to the Owner and Contractor that sufficient cause exists to justify such action, the Owner may, without prejudice to any other right or remedy the Owner may have, notify the Contractor in writing that the Contractor is in default of the Contractor's contractual obligations and instruct the Contractor to correct the default in the 5 Working Days immediately following the receipt of such notice.
>
> 4.05.01 The Contractor shall have the right within the 5 full Working Days following the receipt of a notice of default to correct the default and provide the Owner with satisfactory proof that appropriate corrective measures have been taken.
>
> 4.10 Where the Contractor is in default of the Contract the Owner may, without prejudice to any other right or remedy the Owner may have, terminate the Contract by giving written notice of termination to the Contractor, the Surety, and any trustee or receiver acting on behalf of the contractor's estate or creditors of the Contractor. [22]

***71** During the course of the project, the third-party contract administrator sent an email to Kingdom on behalf of Niagara on October 1, 2014 stating that Niagara had sufficient cause to note Kingdom in default of its contractual obligations. The email stated in part (without further detail) that Kingdom was in non-conformance with four specified general conditions of the contract (3.07,03, 3.13.01, 4.05.01, 7.01.13). Kingdom responded in an October 3, 2014 email that it was prepared to proceed with its contractual work, but that it could not proceed with dewatering because it was a changed condition requiring direction from Niagara. On October 3, 2014, Niagara sent notice of default to Kingdom stating that Kingdom was in default of its contractual obligations, and noting that Kingdom had expressly indicated it was not prepared to continue work which

  

constituted an event of default irrespective of the other items identified in the October 1st letter of the contract administrator. Niagara issued a forbearance letter on October 19, 2014, stating that it would not be taking steps to terminate the Contract "at that time" reserving to itself the right to do so in the future in its sole discretion. Finally, on January 21, 2015 Niagara sent a notice of termination to Kingdom stating that the defaults identified in the October 1st letter of the contract administrator had not been remedied.

In finding that Niagara wrongfully terminated the contract, the Court held that the notice of default issued by Niagara was not sufficiently clear and precise and as such the cure period never began to run. The Court reasoned that the notice of default did not include any details of alleged defaults, and only referred to the "statement of sufficient cause" October 1st email from the contract administrator.[23] Furthermore, the statement of sufficient cause email itself did not set forth particulars of work Kingdom was alleged to have not prosecuted properly or obligations that it was alleged to have breached, but simply listed four provisions of the contract. The court stated:

> It was not sufficient for HMM, on behalf of the Region, to simply list a series of General Condition provisions in its "statement of sufficient cause" (which was later incorporated, without further particularization, into the Region's Notice of Default), but rather the Region was required, in the Notice of Default, to clearly and precisely communicate the nature of the default or defaults upon which it relied and which it required Kingdom to remedy within the specified time.[24]

***72** The Court also held that in the event it was incorrect on the issue of sufficiency of notice, Niagara had still wrongfully terminated the contract because it was not entitled to rely upon the notice of default delivered on October 3, 2014 to terminate the contract on January 21, 2015 as too much time had elapsed since the notice of default. In reaching this conclusion, the Court stated the following proposition from an earlier case:

> In the case of *Conway v. Coty Construction Co.* 1989 CarswellNfld 33 (Nfld. S.C.) it was held at paras. 46 and 47 that, if an owner seeks to rely upon a notice of default containing a cure provision to terminate a contract, action must be taken to terminate the contract within a reasonable time following passage of the specified rectification period. If the owner takes no such action within a reasonable time and allows the contractor to continue working, it will be considered to have acquiesced

  

> in the contractor continuing to perform and a subsequent termination will be found to be an unlawful repudiation of the contract.
>
> What is to be considered a reasonable time within which an owner must deliver a notice to terminate following expiry of a cure period after the giving of a default notice will depend upon the circumstances of each case. [25]

When applied to the facts, Niagara was found to have not delivered its notice of termination within a reasonable time since, even if calculated from the date of the forbearance letter, ninety-seven days had passed between the date of the forbearance letter and the date of termination. The Court's conclusion is an important reminder that in the absence of an express contractual provision entitling a party to reserve or defer a right of termination, a party should act within a reasonable time when exercising a right of termination flowing from a default under the contract.

While this Part II has focused on the substantive requirements under the common law for a party to be noted in default and the sufficiency of such notice, parties must still be mindful of the need to comply with all of the substantive and procedural requirements of the default provisions in their contracts so as to avoid or minimize potential claims for improper termination. For example, before either the owner or contractor can note the other party in default, the CCDC 2 requires ***73** the project's consultant to indicate in writing that sufficient cause exists to justify such action.

### 2.3 Enjoining of Termination for Default Rights

In addition to satisfying the express requirements of the termination for default provisions in its contract, a party seeking to terminate a contract for default may encounter a challenge to the validity of the notice of default. Should the defaulting party dispute the validity of the notice of default, in certain circumstances the terminating party could be enjoined from terminating the contract. The 2017 case of *Bombardier Transportation Canada Inc. v Metrolinx*, [26] provides an example of a supplier being granted an injunction to prevent an owner from terminating a contract.

Bombardier Transportation Canada Inc. (“Bombardier”) entered into a $770 million contract with Metrolinx to design and supply light rail vehicles (LRVs). In 2016, Metrolinx claimed that Bombardier was in material default under the contract because of its “persistent inability to deliver on its contractual obligations”. [27] Metrolinx served a notice of default and sought to rely on its right to terminate the contract for material default. Bombardier disputed that it was in material default and assured Metrolinx that it would deliver the LRVs in accordance with the revised delivery schedule agreed to by the parties. The contract contained a mandatory multi-step dispute

  

resolution process culminating in arbitration. Bombardier sought an interlocutory injunction to prevent termination of the contract and require Metrolinx to follow the dispute resolution process in the contract to determine the validity of the notice of default before Metrolinx could terminate the contract for material default.

The Judge on the application held that the contract's dispute resolution provisions applied to all disputes that arose under the contract, including the right to terminate the contract for material default. He held that because material default was one of the most serious disputes that could arise under a contract, it would be "commercially unreasonable" to exclude Metrolinx's right to terminate the contract for material default from the mandatory dispute resolution process in the contract.[28] The Judge concluded that Bombardier met the legal test for granting injunctive relief finding that: (1) there was a meaningful risk that Bombardier would suffer irreparable harm if the contract was terminated for material default since its ability to successfully bid on ***74** future LRV projects would be adversely affected; and (2) the balance of convenience favoured maintaining the status quo between Bombardier and Metrolinx since Metrolinx did not appear to have a contingency plan and seemingly did not actually intend to terminate the contract (and rather "was using the threat of termination for negotiating purposes").[29] Bombardier was granted the injunction and the question of Bombardier's material default was to proceed to dispute resolution under the contract.

The bar for granting an injunction is a high one and the case of *Graham Infrastructure LP v. Whitefish Lake First Nation #459*[30] provides a contrasting result to *Bombardier Transportation*. Graham Infrastructure LP ("Graham") sought a mandatory injunction against Whitefish Lake First Nation #459 ("Whitefish") to prevent the termination of their construction contract for a water treatment plant. During the relevant period, the residents of the Whitefish First Nation were under a boil water advisory which would remain in place until the plant was completed.

In concluding that Graham had not met the legal test for granting injunctive relief, the Court found that: (1) any evidence of the irreparable harm that Graham would suffer from reputational damage and difficulty in retaining trades people was speculative; and (2) the balance of convenience favoured not granting the injunction because the presence of the boil water advisory meant that the project could not afford to suffer protracted delays as a result of litigation between the parties and the fact that the parties' commercial relationship had completely broken down, virtually guaranteeing future conflict.

In *Graham* the Court distinguished *Bombardier* on the basis that "Whitefish intended to terminate the agreement and was not posturing in an attempt to improve its contract bargaining position."[31] Accordingly, the *Graham* decision may provide some solace to a party with clear intentions to terminate its contract that it may have a persuasive argument in the event the defaulting party seeks to block such termination.

  

## 3. TERMINATION FOR CONVENIENCE

Though not contained in CCDC 2, many construction contracts include another type of termination right--a termination for convenience provision. A termination for convenience provision entitles a party to ***75** unilaterally terminate the contract without cause. Unlike termination for default, termination for convenience is "expressly not conditioned on any breach or event of default" of the other party and is exercisable at the discretion of the relevant party. [32]

A termination for convenience right is most often reserved for owners and is rarely a remedy available to contractors. As Elliot Smith states in *The Canadian Construction Contracts Guidebook*, "[i]t is called "for convenience" because the owner may execute this right without any external need to justify it, though in practice it is far from convenient for the owner to terminate a contractor once the contractor has been engaged." [33] The extensive disruptions to a project that may result from a termination for convenience act as a deterrent to an owner from exercising the right except where the circumstances justify it. [34] A termination for convenience right is often used where no default has occurred or where it is not clear which party is responsible for the default. Nevertheless, a party wishing to exercise a termination for convenience right should ensure compliance with the terms of the contract and be mindful that the common law may require such rights to be exercised honestly and in good faith, as discussed below.

As with termination for default, it is always a good starting point for a party considering termination to examine their construction contract. As mentioned, the CCDC 2 does not include a termination for convenience right, however, parties are, of course, free to add such a right to their agreement--which in the CCDC context is typically done through supplementary conditions. Below is an example of a termination for convenience provision in favour of the owner taken from the American Institute of Architects' Document A201-2017 General Conditions of the Contract for Construction ("AIA A201-2017"):

> **§14.4.1** The Owner may, at any time, terminate the Contract for the Owner's convenience and without cause.

Generally, a termination for convenience provision will specify that the owner may immediately terminate for convenience, at any time, without cause, upon a specified time period, with written notice. Compliance with the express terms of the provision, particularly any notice requirements (as discussed above), is important as courts may interpret rights like these narrowly in order to achieve what they view as a fair ***76** result. As previously mentioned, termination for convenience rights are typically reserved for owners. Given that the completion of construction projects is often

 

of critical importance to most owners, it is understandable why owners rarely accord a contractor the discretion to walk away from a project once it has commenced.

Nonetheless, there are important factors to consider in the exercise of termination for convenience rights including factors regarding the manner in which the right is exercised, namely: good faith and honesty.

### 3.1 The Exercise of Termination for Convenience Rights

#### 3.1.1 Good Faith and the Duty of Honest Performance in Contract

Recent authority indicates that good faith and the duty of honest performance apply to the exercise of termination for convenience provisions. In 2014, the Supreme Court of Canada recognized in *Bhasin v. Hrynew*[35] that good faith contractual performance is a general organizing principle of Canadian contract law and that parties are under a duty to act honestly in the performance of their contractual obligations. *C.M. Callow Inc. v. Zollinger*,[36] a recent decision of the Supreme Court of Canada, clarified the duty of honesty in contractual performance. The *Callow* decision provides important insights into conduct that may be considered by courts when assessing the exercise of a termination for convenience right.

#### *C.M. Callow Inc. v. Zollinger*

In *Callow*, Baycrest was a group of condominium corporations--each with its own board. Collectively, the condominium corporations established a Joint Use Committee ("JUC") to make decisions regarding their shared assets. C.M. Callow Inc. ("Callow"), owned and operated by Mr. Callow, provided maintenance to Baycrest under a winter maintenance agreement which had a term from November 1, 2012 to April 30, 2014. Clause 9 of the agreement entitled the condominium corporations to terminate the winter maintenance agreement if Callow failed to give satisfactory service in accordance with the terms. Clause 9 also included termination for convenience language:

> if for any other reason [Callow's] services are no longer required for the whole or part of the property covered by this Agreement, then the [condominium corporations] may ***77** terminate this contract upon giving ten (10) days' notice in writing to [Callow[37]

In early 2013, the JUC voted to terminate the winter maintenance contract on the advice of the new property manager, Zollinger. Baycrest chose not to inform Mr. Callow of its decision at that time. Mr. Callow began discussions throughout the spring and summer of 2013 with Baycrest regarding a renewal of the winter maintenance agreement including with Mr. Peixoto--a condominium

  

corporation board member. The trial judge found that, following these conversations, "Mr. Callow thought that he was likely to get a two-year renewal of his winter maintenance services contract and they were satisfied with his services."[38]

While performing the summer contract in the summer of 2013, Callow performed extra "freebie"[39] landscaping work in the hope that this would encourage Baycrest to renew the winter contract. Mr. Peixoto wrote to another board member regarding this work stating:

> "It's nice he's doing it but I am sure it's an attempt at us keeping him. Btw, I was talking to him last week as well and he is under the impression we're keeping him for winter again. I didn't say a word to him cuz I don't wanna get involved but I did tell [Ms. Zollinger] that [Mr. Callow] thinks we're keeping him for winter again."[40]

Baycrest did not inform Callow about the decision to terminate the winter maintenance agreement until September 12, 2013--nearly six months later. Callow claimed breach of contract, alleging that Baycrest acted in bad faith by accepting free services while knowing Callow was offering them in order to maintain their future contractual relationship.

Importantly, the Supreme Court of Canada stated that the "dispute does not turn on whether the clause represented a fair bargain between the parties. There is also no issue about the meaning of the termination provision. The dispute turns rather on the manner in which the respondents (collectively "Baycrest") exercised the termination provision. Acknowledging that 10 days' notice was given the appellant, C.M. Callow Inc. ("Callow"), argues that Baycrest exercised the termination provision contrary to the requirements of good faith set forth by this Court in *Bhasin v. Hrynew*, 2014 SCC 71 (*"Bhasin"*), in particular the duty to perform the contract honestly."[41]

***78** The trial judge in the case applied *Bhasin* and concluded that Baycrest breached the duty of honest contractual performance by "actively deceiv[ing]" Callow between the date the termination decision was made and the date of the notice of termination. The Court of Appeal overturned the trial judge's decision.

A five member majority of the Supreme Court of Canada--joined by three judges concurring in result, with Justice Côté dissenting--ruled that the duty of honest performance precludes parties from lying or otherwise knowingly misleading each other about matters directly linked to the performance of the contract, and that Baycrest breached this duty by knowingly misleading Callow into believing that the winter contract would not be terminated. While the contract at issue is a

 

maintenance contract, the decision nevertheless is instructive in understanding the limits on the manner of exercising a termination for convenience provision.

Justice Kasirer, writing for the majority in *Callow*, held that the applicable good faith doctrine in this case is the duty of honesty in contractual performance and that no expansion of the law set forth in *Bhasin* is necessary to find in favour of Callow.

The Court indicated that the duty of honest performance in contract applies "both to the performance of one's obligations and to the exercise of one's rights under the contract."[42] The duty of honesty means "simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract".[43] The Court held that "whether or not a party has "knowingly misled" its counterparty is a highly fact-specific determination, and can include lies, half-truths, omissions, and even silence, depending on the circumstances."[44] The duty of honest performance applies "even where--as in our case-- the parties have expressly provided for the modalities of termination given that the duty of good faith "operates irrespective of the intentions of the parties". No contractual right, including a termination right, can be exercised dishonestly and, as such, contrary to the requirements of good faith."[45] Importantly, the Court reaffirmed that there is no positive duty of disclosure. However, the majority stated that "where a party lies to or knowingly misleads another, a lack of a positive obligation of disclosure does not preclude an obligation to correct the false impression created through its own actions."[46]

***79** Justice Kasirer noted that the duty of honest performance is limited by the requirement that the dishonesty must be directly linked to the performance of the contract.[47] Callow argued that Baycrest could not exercise the termination for convenience clause in a manner that breached the duty of honesty, however absolute that right appeared on its face.

The Court agreed, stating that:

> [T]he duty of honesty as contractual doctrine has a limiting function on the exercise of an otherwise complete and clear right because the duty, irrespective of the intention of the parties, applies to the performance of all contracts and, by extension, to all contractual obligations and rights. This means, simply, that instead of constraining the decision to terminate in and of itself, the duty of honest performance attracts damages where the manner in which the right was exercised was dishonest. [ ... ] Stated simply, no contractual right can be exercised in a dishonest manner because, pursuant to Bhasin, that would be contrary to an imperative requirement of good faith, i.e. not to lie or knowingly deceive one's counterparty in a matter directly linked to the performance of the contract.[48]

  

Applying this to the facts, the Court stated that the focus is "on the *manner* in which the termination was exercised [and] should not be confused with *whether* the right could be exercised."[49] The majority considered the civil law of Quebec--and the doctrine of abuse of rights--to illustrate how dishonesty is to be directly linked to contractual performance. The majority held that "the direct link exists when the party performs their obligation or exercises their right under the contract dishonestly."[50] With this in mind, and applying *Bhasin*, the majority found that "the alleged dishonesty in this case was directly linked to the performance of the contract because Baycrest's exercise of the termination right provided to it under the contract was dishonest."[51]

The majority then turned to consider whether Baycrest's conduct amounted to dishonesty within the meaning of the duty of honest performance. The majority concluded that the "parties are "not free to exclude" the duty altogether. Even if the parties, as here, have agreed to ***80** a term that provides for an apparently unfettered right to terminate the contract for convenience, that right cannot be exercised in a manner that transgresses the core expectations of honesty required by good faith in the performance of contracts."[52] The Court noted that the duty of honesty in performance goes further than prohibiting outright lies--that "misleading one's counterparty [ ... ] will in some circumstances capture forms of silence or omissions."[53]

With this in mind, the majority in *Callow* concluded that "[w]hen Baycrest deliberately remained silent, while knowing that Mr. Callow had drawn the mistaken inference the contract was in good standing because it was likely to be renewed, it breached the duty to act honestly."[54] The majority held that Mr. Callow had been led to believe the renewal was likely, that Baycrest knew he was under this false impression, and having failed to correct this misapprehension, Baycrest breached the contract in the exercise of its right of termination. The majority awarded expectation damages, stating that "if Baycrest's dishonesty had not deprived Callow of the opportunity to bid on other contracts, then Callow would have made an amount that was at least equal to the profit it lost under the winter maintenance agreement."[55]

Justices Moldaver, Brown and Rowe concurred in result (though disagreeing on the approach for calculating damages--stating that Callow should receive reliance damages) but held that disposing of the present case was a simple matter of applying the duty of honest performance as set out in *Bhasin*. The concurring Justices held that the case can be readily decided by applying the common law, and that the majority's "resort to the civil law as a "source of inspiration" is inappropriate."[56] The concurring Justices also stated that "the majority's focus on the wrongful exercise of a right distorts the analysis mandated by *Bhasin* and undermines the independent character of the various common law good faith duties identified therein."[57]

  

Finally, it is of interest to note Justice Côté's dissenting opinion. Justice Côté effectively summarizes the core of her reasons as follows:

> In this case, the respondents ("Baycrest") bargained for a right to terminate *at any time* and *for any other reason than unsatisfactory services* upon giving 10 days' notice. Baycrest made the decision to terminate, but it chose to wait before ***81** sending the notice, as it did not want to jeopardize the performance of other work that was being done by [Callow]. In the meantime, Baycrest became aware that its counterparty was entertaining hopes of a renewal, although it did not say or do anything that materially contributed to those hopes. Baycrest did nothing to discourage them; such conduct may not be laudable, but it does not fall within the category of "active dishonesty" prohibited by the contractual duty of honest performance.[58] [emphasis in original]

While Justice Côté's dissenting opinion is of interest, parties to construction contracts will, of course, need to pay heed to the reasons of the majority when considering the exercise of a termination for convenience provision. While the specific fact scenario is always of utmost importance, the Supreme Court's decision in *Callow* speaks to the limits on a party's exercise of a termination for convenience right and raises many key takeaways.

Contractual rights and obligations--however absolute they appear on their face--must be exercised in line with the duty of honest performance, a good faith doctrine which parties are not free to exclude. A party terminating for convenience can comply completely with the terms of the contract but may still be found liable if the manner in which the right is exercised is in breach of the duty of honest performance. The dishonest conduct must be directly linked to the performance of the contract to give rise to a claim. The duty of honest contractual performance prohibits not only lying but knowingly misleading your counterparty through actions, half-truths, omissions and, in some cases, silence.

While there is no positive duty of disclosure, the duty of honesty may require a party, in certain circumstances, to correct the other party's misapprehension or false impression. While the Supreme Court's decision is directly related to the exercise of a termination for convenience right--the decision references that "no contractual right, including a termination right, can be exercised dishonestly and contrary to the requirements of good faith."[59] As such, the Court's clarification of the duty of honest performance in *Callow* would appear to be germane to the discussion of termination for default, as well as other rights under a contract.

  

## *82 4. COMMERCIAL AND OTHER CONSIDERATIONS IN TERMINATING

### 4.1 Termination for Default vs. Termination for Convenience

Where a construction contract contains both termination for convenience and termination for default rights, an owner considering termination will have to consider the particular circumstances and the precise terms of the contract (as well as the factors discussed in Parts I and II, above), before deciding which right to exercise. Given the rarity of termination for convenience rights for contractors, the analysis in this Part IV will proceed from an owner's perspective.

The rights and remedies available to the owner arising from a termination for default are often broader than those arising from a termination for convenience. However, termination for default carries with it the risk that a court or arbitrator may find that an owner wrongfully terminated the contract, which could expose the owner to claims by the contractor for damages suffered as a result of the termination. Parties should therefore be cautious when making the decision to terminate for default. To the extent the contractual language does not refer to “material” or “substantial” or other language of similar import, and simply requires breach or non-compliance, a party may be more comfortable adopting a less conservative approach. Nevertheless, caution should be practiced in all circumstances.

In order to reduce risk, when considering terminating for default, an owner should assess whether it has complied with its own contractual obligations, particularly obligations related to payment. It should also assess whether it has considered the contractor's change orders and claims in a fair and timely manner and, to the extent applicable, whether the consultant has provided any needed direction in respect of contractual issues requiring the consultant's input.

In a simplified situation--where a contractor's default can be proven with relatively little doubt (and the owner bears no responsibility), an owner would likely terminate for default. Below is a GC 7.1.5 of the CCDC 2, which addresses termination for default:

> 7.1.5 If the Owner terminates the Contractor's right to continue with the Work as provided in paragraphs 7.1.1 and 7.1.4, the Owner shall be entitled to:
>
> .1 take possession of the Work and Products at the Place of the Work; subject to the rights of third parties, utilize the Construction Equipment at the Place of the Work;

  

> finish ***83** the Work by whatever method the Owner may consider expedient, but without undue delay or expense, and
>
> .2 withhold further payment to the Contractor until a final certificate for payment is issued, and
>
> .3 charge the Contractor the amount by which the full cost of finishing the Work as certified by the Consultant, including compensation to the Consultant for the Consultant's additional services and a reasonable allowance as determined by the Consultant to cover the cost of corrections to work performed by the Contractor that may be required under GC 12.3 - WARRANTY, exceeds the unpaid balance of the Contract Price; however, if such cost of finishing the Work is less than the unpaid balance of the Contract Price, the Owner shall pay the Contractor the difference, and
>
> .4 on expiry of the warranty period, charge the Contractor the amount by which the cost of corrections to the Contractor's work under GC 12.3 - WARRANTY exceeds the allowance provided for such corrections, or if the cost of such corrections is less than the allowance, pay the Contractor the difference.

The owner's rights and remedies flowing from a termination for convenience are contrasted by the sample provision from the AIA A201-2017 below:

> In case of such termination for the Owner's convenience, the Owner shall pay the Contractor for Work properly executed; costs incurred by reason of the termination, including costs attributable to termination of Subcontracts; and the termination fee, if any, set forth in the Agreement.

Although both a termination for default and a termination for convenience provision would ultimately be subject to negotiation, termination for default and termination for convenience provisions often have different financial implications to the owner as a result of the termination.

 

Under GC 7.1.5, if the owner terminates for default, the contractor would be responsible for any costs incurred by the owner to complete the work that are in excess of the original contract price, provided that the contractor would be entitled to any savings if the owner is able to complete the work for cheaper than the original contract price. Some more owner-friendly contracts may not even entitle the ***84** contractor to receive further payment in the unlikely event the owner was able to complete the work at a cheaper cost. Furthermore, some contracts may expressly entitle an owner to recoup any additional costs, unrelated to the completion of the work, that were incurred by the owner as a result of such termination.

On the other hand, termination for convenience provisions may provide more limited financial recovery to the owner and may delineate specific amounts payable to the contractor, such as payment for work properly completed and costs incurred as a result of the termination, as seen in §14.4.3 of the AIA A201-2017. In circumstances where the contractor has provided a performance bond, an owner may not have the ability to call on the surety to complete the project, if terminating for convenience.

Contractors, in agreeing to the inclusion of a termination for convenience provision, may seek to ensure they are not exposed to an out-of-pocket loss if the owner decides to exercise such a right. Typically, owners will want to avoid agreeing to pay any amounts in relation to the remaining work to be completed (including the contractor's overhead and profit on such amounts), however, in certain circumstances contractors may require the inclusion of a termination fee (as provided for in §14.4.3 of the AIA A201-2017) before accepting the inclusion in the contract of an owner's termination for convenience right.

In cases where the existence of, or responsibility for, the default is less clear cut--an owner may elect to exercise the termination for convenience right as doing so may involve less risk and greater certainty for the owner compared to a termination for default. In such circumstances, terminating for convenience may be less risky because it limits the potential for litigation in which the contractor disputes that it is in default of its obligations and seeks damages for wrongful termination. While a contractor could still sue for wrongful termination, the contractor could not dispute whether or not it was in default--avoiding protracted litigation.

Moreover, a termination for convenience may provide greater certainty in that the provision specifically delineates the payout--making the owner's potential monetary exposure knowable and more certain than the possible damages it could have to pay if a termination for default is eventually found to have been wrongful. For example, termination for convenience provisions may provide certainty to an owner terminating for convenience by setting out that “the Contractor shall not be entitled to any additional reimbursement, remuneration or damages resulting from such termination”.

 

***85** It is worth noting that if an owner terminates a construction contract for convenience, it should not be precluded from raising any defaults of the contractor to support any negotiations or litigation regarding payment obligations. While an owner may be required to make payment in accordance with the terms of the contract, the contractor's default may be relevant to the extent that there is a dispute about amounts owing to the contractor.

This issue was considered in *C.A.E. Aircraft Ltd.* v. *Canadian Commercial Corp.* [60] In that case, Canadian Commercial Corp. ("CCC") had terminated the contract pursuant to a termination for convenience provision. C.A.E. Aircraft Ltd. ("CAE") commenced litigation when the negotiations to settle the payment owing under the contract proved unsuccessful. CCC argued that any costs incurred by CAE in excess of the monies due pursuant to the terms of the contract arose out of CAE's defaults. CAE argued that CCC was prohibited from raising CAE's performance as a defence to the claim. CAE argued that if its performance was deficient, CCC was obligated to terminate for default, and having chosen to terminate for convenience, CCC recognized that CAE's performance was not in issue. The Court rejected this argument and held that CAE was in error in arguing that the decision to terminate for convenience meant that performance could no longer be questioned.

Thus, to the extent that the contractor's performance is relevant following an owner's termination for convenience, the owner would be permitted to question the performance of the contractor and raise any defaults.

### 4.2 Risks and Considerations in Employing either Method of Termination

Whether an owner decides to terminate a contract for default or for convenience, it is important to note that there are risks and considerations to an owner that may arise under either of these termination scenarios.

On most construction projects timely completion is of high importance to the owner. A termination may slow the progress on the project while the owner engages a new contractor to complete the remaining work. Depending on the market conditions at the time, owners may find themselves in a difficult bargaining position in any procurement process for a new contractor, particularly in an active construction market. Once a new contractor is engaged, an owner might encounter additional delays ***86** while that contractor mobilizes and becomes familiar with the project and the partially completed work.

Having a new contractor take over could also raise certain difficulties for an owner under the existing contract with the terminated contractor and under any future contract with the new contractor. For example, there may be debates when an owner moves to enforce existing warranties in the original contract, given possible disputes over which contractor was responsible for which portion of the work.

 

In deciding whether to terminate either for convenience or for cause, there are a number of other considerations an owner should undertake. If the owner wishes to engage any of the subcontractors or suppliers of the terminated contractor directly or through the new contractor (either in the interim to maintain site safety and conditions or to complete any of the subcontracted work), it would want to have appropriate assignment rights in its contract with the terminated contractor to deal directly with its subcontractors and suppliers. Importantly, the CCDC suite of documents does not provide any such rights so an owner would need to have negotiated for such rights in its supplementary conditions. If the terminated contract does not provide such rights, any unpaid subcontractors and suppliers would have to be persuaded to rejoin the project or replaced.

An owner should also ensure that the terminated contractor has delivered all design documents and all other documentation and technical information in the possession or control of the contractor necessary for the completion of the work. On design-build projects, an important corollary issue to the delivery of design documents is the owner's intellectual property rights in such documents. Under GC 1.1.7 of the CCDC 14, copyright in the design documents belongs to the consultant that was engaged by the contractor and alteration of the design documents by the owner is prohibited. GC 1.1.8 also provides that any copies of the design documents retained by the owner are for "information and reference in connection with the Owner's use and occupancy of the Work" and "may only be used for the purpose intended and for a one time use". Taken collectively, these GCs mean that an owner terminating a design-builder under an unmodified CCDC contract prior to the completion of the design documents would expect to have difficulty in engaging another architect to complete these design documents and may have to restart the design process.

The remaining balance of the contract price, the percentage of completion of the work and the potential losses incurred by the owner from further delay to the completion of the project are all other ***87** important factors to be considered by an owner in electing to terminate. The progress of the work in relation to the timing of termination is often a critical factor in this consideration as it underlies and impacts many of the risks and considerations discussed above.

## 5. CONCLUSION

Construction projects are typically significant and complex undertakings, involving multiple stakeholders and many moving parts. Construction contracts seek to provide structure and order to the projects and provide mechanisms to address the potential for changing circumstances and the issues and roadblocks that might arise during the life of the project.

This paper has discussed important considerations for parties contemplating a termination. It has explored termination for default, termination for convenience and the commercial and practical risks and considerations of terminating a contract. Though parties enter into construction contracts with the common goal of completing a successful project, there are times when terminating the contract becomes optimal, necessary or unavoidable. Being mindful of the rights, limitations and

 

risks in terminating a contract will ensure that the terminating party has few, if any, surprises following the exercise of its termination rights.

## Footnotes

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1 2014 ONSC 3641 [*Urbacon*].

2 *Ibid.* at paras 141--142.

3 *Ibid.* at para 142, quoting *Goldsmith on Canadian Building Contracts*, 4th ed., 1988 at I-70 and I-71.

4 1999 CanLII 664 (SCC), 178 D.L.R. (4th) 1, (SCC) at para 44 [*Guarantee*].

5 *Urbacon, supra* note 1 at para 148 quoting *968703 Ontario Ltd. v. Vernon*, (2002) 2002 CanLII 35158 (ON CA), 58 O.R. (3d) 215 at para 15.

6 *Urbacon, supra* note 1 at para 153.

7 *Ibid.* at paras 160--161.

8 2018 BCSC 466 [*Contura*].

9 *Ibid.* at para 98.

10 *Ibid.* at para 128.

11 2019 ONCA 268 [*Crescent Hotels*].

12 *Ibid.* at paras 2, 11.

13 *Ibid.* at para 11.

14 *Ibid.* at para 13.

15 2018 ONSC 29 [*Kingdom*].

16 *Contura, supra* note 8 at paras 99, 102. Citing *Pioneer Hi-Bred International Inc. v. Richardson International Limited*, 2010 MBQB 161.

17 *Contura, supra* note 8 at para 105.

18 *Urbacon, supra* note 1 at para 157.

 

19 *Ibid.*

20 *Contura, supra* note 8 at para 104.

21 *Contura, supra* note 8 at para 103.

22 *Kingdom*, supra note 15 at para 109.

23 *Ibid.* at para 96.

24 *Ibid.* at para 75.

25 *Ibid.* at paras 115--116.

26 2017 ONSC 2372 [*Bombardier Transportation*].

27 *Ibid.* at para 3.

28 *Ibid.* at para 50.

29 *Ibid.* at para 76.

30 2018 ABQB 66 [*Graham*].

31 *Ibid.* at para 39.

32 Atkin Chambers, Nicholas Dennys & Robert Clay *Hudson's Building and Engineering Contracts*, 14th ed. (London: Sweet & Maxwell, 2020) at 934 [Hudson].

33 Elliot Smith, *The Canadian Construction Contracts Guidebook* (Toronto: Thomson Reuters Canada, 2019) at 121 [Smith].

34 *Ibid.* at 122.

35 2014 SCC 71 [*Bhasin*].

36 2020 SCC 45 [*Callow*].

37 *Ibid.* at para 8.

38 *Ibid.* at para 11.

39 *Ibid.* at para 12.

40 *Ibid.* at para 13.

 

41 *Ibid.* at para 1.

42 *Ibid.* at para 42.

43 *Ibid.* at para 3 quoting *Bhasin* at para 73.

44 *Callow, supra* note 36 at para 91.

45 *Ibid.* at para 48 quoting *Bhasin* at para 74.

46 *Callow, supra* note 36 at para 38.

47 *Ibid.* at para 51.

48 *Ibid.* at paras 53--54.

49 *Ibid.* at para 55.

50 *Ibid.* at para 67.

51 *Ibid.* at para 74.

52 *Ibid.* at para 84 quoting Bhasin at para 75.

53 *Callow, supra* note 36 at para 89.

54 *Ibid.* at para 103.

55 *Ibid* at para 117.

56 *Ibid.* at para 154.

57 *Ibid.* at para 154.

58 *Ibid.* at para 184.

59 *Ibid.* at para 48.

60 *C.A.E. Aircraft Ltd.* v. *Canadian Commercial Corp.*, [1989] M.J. No. 81 (Q.B.).

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