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Does the Duty of Good Faith Create an Obligation to Agree to Extensions of a Closing Date?

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Since 2014, the Supreme Court has released a trilogy of cases finding and expanding on the duty of good faith in contractual performance. Parties to an agreement of purchase and sale are under a duty to act in good faith and have an obligation to take all reasonable steps to complete the contract.[1] The vast majority of real estate contracts have clauses providing that time is of the essence. This article considers whether the duty of good faith changes parties' obligations on closing of a real estate transaction. When faced with a request to extend the closing date, is the counterparty obliged by the duty of good faith to agree? Is time still of the essence?

The Concept of Good Faith in Contractual Performance Continues to Expand

In 2014, the Supreme Court in *Bhasin v. Hrynew* recognized a duty of good faith in contractual performance that requires parties to "perform their contractual duties honestly and reasonably and not capriciously or arbitrarily".[2] In 2020, the Supreme Court held in *C.M. Callow Inc. v. Zollinger* that the duty to act honestly in the performance of the contract precludes active deception.[3]

In February of 2021, the Supreme Court in *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*[4] held that where a party to a contract exercises its discretion unreasonably, that is, in a manner not connected to the underlying purposes of the discretion granted by the contract, its conduct amounts to a breach of the duty to exercise contractual discretionary powers in good faith.[5]

The General Principle: No Obligation to Agree to Extensions of the Closing Date

In *Deangelis v. Weldan Properties Inc.*,[6] the parties entered into an agreement for the sale of a pre-construction townhome. The agreement contained a time of the essence clause. On July 13, 2016, the purchaser took possession of the property by way of interim occupancy. After the interim occupancy, the balance of the purchase price was to be provided on August 23, 2016, the closing date.

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[1] *Jongazma v. Primont Homes (Heritage Hollow) Inc.*, 2011 ONSC 7091 at para. 50.
[2] *Bhasin v. Hrynew*, 2014 SCC 71 at para. 63.
[3] *C.M. Callow Inc. v. Zollinger*, 2020 SCC 4 at para. 5.
[4] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7 [*Wastech*].
[5] *Wastech*, at para. 111.
[6] 2017 ONSC 4155 [*Deangelis*].

On closing, the purchaser advised the vendor that it would not have the necessary funds to complete the purchase of the townhome that day, and that the funds would be received within the "next few days". The purchaser sought an amendment to the agreement to extend closing by three days. The vendor took the position that the purchaser had anticipatorily breached the agreement, which entitled the vendor to terminate the agreement and forfeit the deposit.

In the lawsuit that followed, the purchaser argued that the vendor arbitrarily exercised the time is of the essence clause, despite knowing that the closing would take place no more than three days later and that the reason the agreement did not close was due to the vendor's exercise of a discretionary term that was taken in bad faith.

At trial, the judge held that there was no evidence of bad faith on the part of the vendor in the performance of its obligations under the Agreement. Reviewing *Bhasin v. Hrynew*, the Court concluded that the obligation to act in good faith does not go so far as to re-write the agreement for the parties. Insisting on compliance with the agreed upon terms of the agreement is not acting in bad faith.[7]

Recent decisions following *Deangelis* in Ontario have been equally clear. There is no obligation to agree to an extension of the closing date,[8] and absent other circumstances, it is not an act of bad faith to insist the closing of a transaction take place on the closing date.[9] For example:

- In *Scott and Brav-Baum v. Forjani*,[10] the purchaser asked several times for an extension to the closing date. The vendors counter-offered with shorter extensions, but the parties did not agree. On the closing date, the purchaser delivered a letter stating she could not close because of serious deficiencies with the property. The vendors disputed the basis for failure to close and put the purchaser on notice that she had breached the agreement. The Court held that the purchaser breached the contract and forfeited her deposits.[11]

- In *Nutzenberger v. Mert*,[12] the purchaser requested an extension five days before closing. The vendors rejected any extension. The Court held that it was "obvious" that the purchaser was not going to close the transaction because of, *inter alia*, communications that he was not going to close, and his request for an extension prior to the closing date. The Court held there was no doubt that the vendors were innocent parties and the purchaser was in default.[13]

- In *2100 Bridletowne Inc. v. Ding*,[14] an issue arose as to whether a vendor was obliged to offer an extension. The Court concluded that where the purchaser fails to close, even when the parties discussed the possibility of extension, the purchaser is in default and

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[7] *Deangelis*, at para. 38.
[8] *Wilson v. Upperview Baldwin Inc.*, 2019 ONSC 4013 at paras. 34–39.
[9] *Time Development Group Inc. (In trust) v. Bitton*, 2018 ONSC 4384 at paras. 74–76.
[10] 2019 CarswellOnt 24288 at paras. 26–38 [*Forjani*].
[11] *Forjani*, at paras. 26–38, 42–43, 54–65.
[12] 2021 ONSC 36 [*Nutzenberger*].
[13] *Nutzenberger*, at paras. 17, 19, 42, 53.
[14] 2021 ONSC 2119 [*Ding*].

must forfeit the deposit.[15] In this case, the plaintiff vendor was the innocent party, and was not obliged to offer the extension.

The Exceptions: When The Agreement of Purchase and Sale is Ambiguous on the Closing Date

Vague or unclear agreements make for nuanced and sometimes confusing decisions, because of the specific context in which the dispute arises.

In *Ju v. Tahmasebi*,[16] the parties had entered into a real estate transaction which did not have a specific closing date as the transaction was contingent on the outcome of a severance application to be brought by the vendor. The agreement required the purchaser to make a second deposit after the vendor provided evidence of severance approval to the purchaser's lawyer, with the closing date to occur 60 days after the vendor received the separate deed from the municipality. The agreement stated that time was of the essence.

The vendor obtained the severance on December 15, 2017, but did not advise the purchaser (despite 5 written inquiries from the purchaser) until March 12, 2018. On June 27, 2018, the vendor advised the purchaser that the application had been granted, requested the further deposit, and advised that the closing date was in 60 days (September 27, 2018). The purchaser requested an extension to close on the basis that the agreement had been outstanding for over two years and the purchaser was out of the country. The vendor refused, insisted that the second deposit be paid, and ultimately advised the purchaser that it was in default and terminated the agreement.

The application judge relied upon established case law which holds that where a party has not acted in good faith, it cannot rely upon a "time of the essence clause".[17] In that context, the Court held (and the Court of Appeal later agreed) that the vendor had violated its duty of good faith by failing to agree to a reasonable extension request.

This case turned on the specific fact that, in light of the matter's history, the vendors behaved unreasonably when faced with a request for an indulgence. That finding is fixed in the vendors' behaviour in the months preceding their sudden insistence upon payment of the second deposit (ignoring the purchaser's requests for an update; the vendor's withholding of information),[18] especially because there was nothing in the agreement demanding the payment by a specific date or within a specific time.

On appeal, the Court deferred to the application judge's conclusion that it was a violation of the principle of good faith to proceed as the vendors did, *i.e.* to ignore the respondent's repeated requests for an update for many months, withhold critical information about the city approval, and then demand immediate payment by an arbitrarily set date when the respondent

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[15] *Ding*, at paras. 66–67.
[16] 2019 ONSC 5821, aff'd 2020 ONCA 383 [*Ju*].
[17] *Ju*, at para. 36.
[18] *Ju*, at para. 23 (Ont. C.A.)

said she was not in a position to pay because she was out of the country and needed an indulgence.[19]

At first blush, *Ju* may appear to suggest that the failure to agree to a reasonable extension request is a failure of the duty to act in good faith. However, *Ju* was distinguished in *Christine Elliott v. Saverio Montemarano*.[20] In *Montemarano*, the vendor claimed that the purchaser breached the agreement of purchase and sale by failing to complete the transaction. The purchaser requested, and the vendor agreed to, many extensions of the closing date. Finally, the vendor was not prepared to provide any additional significant extensions without the payment of an additional deposit, which the purchaser refused to provide. The vendor tendered, and the purchaser failed to close.[21]

The Court held that unlike in *Ju*, the parties in *Montemarano* had a specific closing date defined in the agreement and there was no evidence that during the performance of the agreement, the vendor had failed to act honestly or failed to provide the purchaser with any information necessary for him to perform his obligations.[22]

Montemarano, in following *Deangelis*, confirms this simple principle: insisting on compliance with a term of the agreement of purchase and sale is not, absent other circumstances, an act of bad faith. *Ju* should not be taken as imposing a new obligation to agree to extensions of time where agreements have fixed closing dates.

Conclusion

The duty of good faith has not changed the ordinary operation of real estate contracts with fixed closing dates. The obligation to act in good faith does not go so far as to rewrite the agreement for the parties.[23] Where a party advises they cannot close and seeks an extension which is not granted, that party is the defaulting party when the transaction fails to close.[24]

However, where an agreement of purchase and sale does not have a fixed closing date, this creates ambiguity and room for interpretation on the reasonableness of the actions of the parties in their negotiations and whether those actions were in good faith.

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[19] *Ju*, at para. 24 (Ont. C.A.)
[20] 2020 ONSC 6852 [*Montemarano*].
[21] *Montemarano*, at paras. 21–24.
[22] *Montemarano*, at paras. 64–66.
[23] *Deangelis*, at para. 38.
[24] *Nutzenberger*, at para. 36.

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Lessons from *St. Marthe*: The Admissibility of Expert Evidence and Counsel's Gatekeeper Function

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Expert evidence has generated significant controversy in modern civil litigation. It constitutes an exception to the general rule that witnesses testify to facts as they are perceived, not the inferences — that is, the opinions — that they drew from them.[1] Although expert evidence is an integral part of the trial process, it is not admissible without careful scrutiny. While expert evidence has the potential for high probative value, it poses an equally high risk of prejudice if misused. Without proper controls in place, expert evidence can distort the fact-finding process and dramatically increase the cost of litigation. As a result of these dangers, the courts and civil justice reform initiatives seek to balance the utility of expert evidence with its risks.

Given this balancing act, working with expert evidence requires care. The Ontario Court of Appeal's recent decision of *St. Marthe v. O'Connor* ("***St. Marthe***") illustrates how one moment in the pressure-cooker that is the cross-examination of an expert can derail an entire trial strategy.[2] To help advocates avoid such moments, this paper reviews the different types of expert evidence and the rules applicable to each. Using *St. Marthe* as a case study, we explore how the different types of experts require different handling. Counsel has a critical gatekeeping function when it comes to expert evidence and our mistakes in performing that function can disproportionately impact the trial.

St. Marthe: The Trial

St. Marthe considered a car accident: The appellant's car hit the respondent's bicycle, and the respondent claimed he suffered a soft tissue injury that rendered him incapable of continuing to work in construction.

At the request of the respondent's accident benefits insurer, Dr. Mussett, an orthopaedic surgeon, assessed the respondent in November 2014. In a report dated December 11, 2014, Dr. Mussett confirmed the respondent's injury resulted in an inability to perform expected duties at work without experiencing pain and that it was reasonable and necessary that the respondent receive additional treatment due to the accident. Dr. Mussett did not see the respondent, nor review his medical reports, after the assessment in 2014.

Four years later, the case went to trial by jury. The respondent's counsel called Dr. Mussett as a non-party expert. In examination-in-chief, Dr. Mussett testified about the contents of his report, including that the respondent's treatment plan was reasonable and necessary. On cross-examination, however, counsel repeatedly questioned Dr. Mussett on whether the injury was

[1] *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 at para. 14.
[2] *St. Marthe v. O'Connor*, 2021 ONCA 790 ["***St. Marthe***"].

not disabling and would not have prevented him from working. Respondent's counsel objected, and the trial judge allowed Dr. Mussett to be re-examined.

Respondent's counsel then brought a motion for an order discharging the jury. The respondent argued that the cross-examination of Dr. Mussett was unfair, unexpected, and elicited opinion evidence from Dr. Mussett on matters that were not included in his report.

The trial judge determined that the evidence elicited on the cross-examination of Dr. Mussett was improper and therefore inadmissible. The trial judge also discharged the jury on the basis that the cross-examination was too impactful for the jury to disregard. The trial judge concluded that justice would be best served by continuing the trial before the judge alone.

St. Marthe: The Appeal

The issues on appeal were twofold: (a) whether the trial judge erred in holding that appellant's counsel improperly elicited inadmissible opinion evidence from Dr. Mussett regarding the respondent's ability to work, and (b) whether the trial judge erred in discharging the jury.

On the first issue, the Court of Appeal held that Dr. Mussett's evidence exceeded the bounds of admissible non-party expert evidence as his opinion was not formed at the time of his treatment of the respondent. The Court stated that Dr. Mussett could not have meaningfully assessed the respondent's ability to return to work because he had not seen the respondent for four years and had not been provided with any medical documentation. As such, the Court held that Dr. Mussett's opinion at the time of trial went beyond the scope of his observations at the time of his assessment and that the prejudicial effect of his evidence outweighed its probative value. In addition, the opinion had not been disclosed; rather, it was expressed for the first time on cross-examination.

On the second issue, the Court held that the trial judge correctly exercised his discretion to discharge the jury. The Court dismissed the appeal.

Three Types of Experts

The starting point in counsel's gatekeeper function is to identify the type of expert. According to the Court of Appeal for Ontario in *Westerhof v. Gee Estate* ("***Westerhof***"), there are three types of experts: litigation experts, participant experts, and (the closely related) non-party experts.

- *Litigation Experts* are experts engaged by or on behalf of a party to provide opinion evidence in relation to a proceeding.[3]

[3] *Westerhof v. Gee Estate*, 2015 ONCA 206 at para. 6 ["***Westerhof***"].

- *Participant experts* are witnesses with special skill, knowledge, training, or experience who provide opinion evidence based on their participation in the underlying events rather than because they were engaged by a party to the litigation to form an opinion.[4]

- *Non-party experts* are similar to participant experts but are distinguished by the fact that they are retained by a *non-party* to the litigation, such as an accident benefits insurer. Non-party experts form their opinion based on personal observations or examinations relating to the subject matter of the litigation for a purpose other than the litigation.[5]

Rule 53.03 and the Different Types of Experts

Participant and non-party experts are subject to different rules than litigation experts.[6] Litigation experts must conform with Rule 53.03 of the *Rules of Civil Procedure* ("***Rules***"). This Rule requires every party who intends to call a litigation expert at trial to serve, on every party to the action, an expert report no less than 90 days before the pre-trial conference.[7] This report sets limits on the expert testimony and ensures that all parties have proper notice of the opinion evidence to be provided.[8] Subrule 53.03(2.1) prescribes the information to be contained in an expert report,[9] limiting the risk of prejudice and preventing trial by ambush.

Interestingly, before 2010, Rule 53.03 provided limited direction on the contents of an expert's report.[10] However, following the recommendations of the Honourable Coulter Osborne contained in his review of the civil justice system, *Civil Justice Reform Project: Summary of Findings & Recommendations* (the "**Osborne Report**"),[11] the *Rules* were amended to include Rule 4.1.01 (which sets out the overriding duty of experts to provide opinion evidence that is fair, objective, non-partisan, and within their area of expertise),[12] and Subrule 53.03(2.1) (which specifies the information to be included in an expert's report).[13] These amendments were consistent with the Osborne Report's call for adequate disclosure of the basis for an expert's opinion.[14]

Despite the clarity brought by the amendments to Rule 53.03, it remained unclear whether the Rule applied to participating and non-party experts until the Court in *Westerhof* provided guidance. As explained in *Westerhof* (and reaffirmed in *St. Marthe*), participant and non-party experts are *not* required to comply with Rule 53.03 where (a) the opinion to be given is based on the witness' observation of or participation in the events at issue; and (b) the witness formed

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[4] *Westerhof* at para. 6.
[5] *Westerhof* at para. 6.
[6] *St. Marthe* at para. 23.
[7] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 at Subrule 53.03(1) ["***Rules***"].
[8] *Bruff-Murphy v. Gunawardena*, 2017 ONCA 502 at para. 62, leave to appeal refused, [2017] SCCA No. 343 ["***Bruff-Murphy***"]; *St. Marthe* at para. 22.
[9] *Rules* at Subrule 53.03(2.1).
[10] *Westerhof* at para. 30.
[11] Civil Justice Reform Project: Summary of Findings & Recommendations, Toronto: Ontario Ministry of the Attorney General, 2007 ["**Osborne Report**"].
[12] *Rules* at Rule 4.1.01.
[13] *Rules* at Subrule 53.03(2.1).
[14] Osborne Report at section 2.9: Expert Evidence.

the opinion to be given as part of the ordinary exercise of his or her skill, knowledge, training, and experience while observing or participating in such events.[15]

However, where the opinion evidence extends beyond the witness' observation of or participation in the events or if the opinion was not formed while observing the events, the expert must comply with the requirements in Rule 53.03 with respect to the portion of the opinion that exceeds these limits.[16] It is not an error for a trial judge to prevent a participant or non-party expert from giving opinion evidence that goes beyond the expert's observations and comments at the time of the events if the opinion was not disclosed well in advance of trial.[17]

Compliance with Rule 53.03 is generally not required for participant and non-party experts because disclosure problems do not exist in relation to their opinions.[18] In many instances, these experts will have prepared documents summarizing their opinions about the matter contemporaneously with their involvement and such summaries may be obtained in the discovery process.[19] Even if these experts did not prepare summaries, it is open to a party, as part of the discovery process, to seek disclosure of any opinions, notes or records of participant and non-party experts that the opposing party intends to rely on at trial.[20]

Further, participant and non-party experts are not required to provide a Rule 53.03 expert report because they are not paid an expert's fee to write the report contemplated by Rule 53.03. Rather, they testify because they were involved in underlying events and, generally, have already documented their opinions in notes or summaries that do not comply with Rule 53.03. To require participant and non-party experts to comply with Rule 53.03 would only add to the cost of the litigation and create the possibility of delay because of potential difficulties in obtaining Rule 53.03 compliant reports from persons not expecting to have to write such reports (e.g., emergency room physicians, surgeons, family doctors etc.).[21]

In light of the above principles, counsel must understand, from the outset, the type of expert testifying as that will determine the applicability of Rule 53.03, discovery obligations, and the proper scope of direct and cross-examination. The key questions are:

- Did the expert's involvement arise solely as a result of the litigation and for no other purpose? If yes, the expert is a litigation expert and compliance with Rule 53.03 is required.

- Has the expert formed a relevant opinion based on personal observations or examinations relating to the subject matter of the litigation for a purpose other than

[15] *Westerhof* at para. 60; *St. Marthe* at para. 26.
[16] *Westerhof* at para. 63; *St. Marthe* at para. 28.
[17] *Hoang v. Vicentini*, 2016 ONCA 723 at para. 30.
[18] *St. Marthe* at para. 27.
[19] *Westerhof* at para. 85.
[20] *Westerhof* at para. 85.
[21] *Westerhof* at para. 86.

the litigation? If yes, the expert is a participant or non-party expert and is not bound by Rule 53.03.

- Is the participant or non-party expert providing an opinion that extends *beyond* personal observations or examinations? If yes, the participant or non-party expert must comply with Rule 53.03 for the portion of the opinion that exceeds the opinion formed during their observations.

Cross-Examining an Expert: A Lesson from St. Marthe

The outcome reached in *St. Marthe* — a discharged jury and a lost appeal — demonstrates the importance of knowing the type of expert engaged in the litigation early in the legal process. As *St. Marthe* illustrates, the onus of knowing the type of expert falls not only on the party relying on the expert's opinion, but also on the party seeking to cross-examine an expert, because the type of expert will determine the bounds of the cross-examination.

In *St. Marthe*, the Court upheld the trial judge's finding that Dr. Mussett's opinion evidence elicited on cross-examination went beyond the opinion he was permitted to explain as a non-party expert. As a result, that opinion evidence was inadmissible and the trial judge's decision to discharge the jury was appropriate. The offending opinion was that the respondent's muscle spasm condition did not prevent him from returning to work.[22] This opinion was not part of Dr. Mussett's assessment in 2014.[23] As a non-party expert, Dr. Mussett's evidence was limited to his opinions based on the skill and knowledge he exercised while observing the respondent in 2014.[24] If one of the parties sought to elicit more opinion evidence than that disclosed in his 2014 assessment, that party was obliged to provide a report pursuant to Rule 53.03. As no such report had been prepared, the evidence was not admissible.

The Litigator as a Gatekeeper

St. Marthe highlights the importance of identifying the type of expert and the nature of the evidence each expert is asked to provide so that counsel can comply with the associated pre-trial disclosure obligations. While appellate courts have repeatedly stated that trial judges have a gatekeeper role when it comes to the admissibility of expert opinion evidence,[25] that gatekeeping begins with counsel. As advocates, we must assess whether the expert evidence we seek to adduce — in direct and in cross — complies with the rules that exist to protect the integrity of the justice system. If there is doubt, it may be prudent to submit an expert report pursuant to Rule 53.03 to limit the risk of prejudice. The Court's decision in *St. Marthe* provides guidance for managing our experts' evidence carefully to avoid issues of fairness and keep our trials and trial strategy on track.

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[22] *St. Marthe* at para. 36.
[23] *St. Marthe* at paras. 37-38.
[24] *St. Marthe* at para. 33.
[25] *Bruff-Murphy* at para. 2.

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Notice of Claim Provisions in Construction Contracts and Summary Judgment: *Elite Construction v. Canada (Attorney General)*, 2021 ONCA 803

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Introduction

Generally, notice of claim provisions in construction contracts must be strictly complied with to successfully claim for additional compensation such as delay damages.[1] One might think that in the absence of strict compliance with a contractual notice requirement that a motion for summary judgment by the owner would be appropriate. However, the case law has historically been inconsistent in allowing for such relief.[2] The Ontario Court of Appeal's decision in *Elite Construction v. Canada (Attorney General)*[3] provides guidance on the circumstances where a summary dismissal due to non-compliance with notice requirements will be granted. *Elite Construction* follows the Court of Appeal's prior decision in *Technicore Underground Inc. v. Toronto (City)*,[4] which also granted a summary dismissal where the contractor had failed to give timely notice of a claim. This may support that in Ontario the trend is towards strict compliance.

Overview: *Elite Construction*

In *Elite Construction*, the Government of Canada (the "**Owner**") contracted with Elite Construction Inc. (the "**General Contractor**") to construct an addition to a federal penitentiary in Kingston, Ontario. Following substantial completion, the General Contractor sought compensatory and punitive damages, based on negligence, breach of contract, *quantum meruit* and unjust enrichment, in respect of alleged delays and extra work.

The Owner moved for summary judgment alleging that, among other things, the General Contractor's claims were barred because the General Contractor did not provide a proper notice

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1 *Corpex (1977) v. The Queen in Right of Canada*, 1982 CanLII 213 (SCC) [hereinafter *Corpex*]. See also *Clearway Construction Inc. v. The City of Toronto*, 2018 ONSC 1736 ("the purpose of the Notice Provision is to allow the [owner] the opportunity to decide whether to have the additional work performed by the same contractor or by another, and also allows for an opportunity to monitor the work" at para. 37) [hereinafter *Clearway*].

2 See generally Brendan D. Bowles & Madalina Sontrop, "Update on the Law of Notice" (2019) 1 J. Can. College of Construction Lawyers (WL Can).

3 2021 ONCA 803 [hereinafter *Elite Construction*].

4 2012 ONCA 597 [hereinafter *Technicore*].

of intent to claim as required by the contract.[5] Citing to *Hryniak v. Mauldin*[6] and Rule 20 of Ontario's *Rules of Civil Procedure*,[7] the motion judge granted the motion for summary judgment and stated that "there are no material facts in dispute"[8] and that "[b]oth parties presented extensive material on the motion and there are no issues requiring a trial."[9]

On appeal, the Ontario Court of Appeal upheld the summary judgment. The Court found no palpable and overriding error in the motion judge's finding that the General Contractor "had not provided the notice required under the contract for any claim for extra expenses or losses"[10] and "never issued a Notice of Dispute as required by the contract regarding any Change Orders."[11] The Court noted that these findings of fact were grounded in an extensive motion record.[12] Accordingly, and citing to *Hryniak*, the Court of Appeal found that "[i]t was open to the motion judge […] to conclude that he could reach "a fair and just determination" of the issues raised by the parties, especially the effect of the terms of the contract on the [General Contractor]'s claims".[13] In dismissing the General Contractor's alternative claims on the equitable bases of *quantum meruit* and unjust enrichment, the Court of Appeal stated that "there was no room for either of those equitable principles to apply where the parties were operating pursuant to a contractual agreement between them."[14]

On its face, the Court of Appeal's decision in *Elite Construction*, appears to indicate that where a party to a construction contract fails to comply with the claim notice requirements included therein, that party's claims may be decided on summary judgment where no material facts are in dispute. Such a finding is strengthened where the Court has the benefit of an extensive motion record. Generally, equitable principles will not be available to save such claims that are summarily dismissed.

State of the Law: Notice of Claim Provisions and Summary Judgment

In respect of the law related to the enforcement of notice provisions in construction contracts, the motion decision in *Elite Construction* cited primarily to: *Corpex (1977) v. The Queen in Right of Canada*,[15] *Doyle Construction Co. v. Carling O'Keefe Breweries of Canada Ltd.*,[16] and

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5 *Elite Construction Inc. v. Canada*, 2021 ONSC 562 at paras. 6, 31–32 [hereinafter *Elite Construction (Motion)*].
6 2014 SCC 7 (there will be no genuine issue requiring a trial where the motion for summary judgment process "(1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result" at para. 49) [hereinafter *Hryniak*].
7 R.R.O. 1990, Reg. 194 under *Courts of Justice Act*, R.S.O. 1990, c. C.43.
8 *Elite Construction (Motion)*, *supra* note 5 at para. 57.
9 *Ibid.*
10 *Elite Construction*, *supra* note 3 at para. 3.
11 *Ibid.*
12 *Ibid.* at paras. 2–3.
13 *Ibid.* at para. 2.
14 *Ibid.* at para. 4.
15 *Corpex*, *supra* note 1.
16 1988 CanLII 2844 (BC CA) [hereinafter *Doyle*]. See also *Bemar Construction (Ontario) Inc. v. Mississauga (City)*, 2004 CanLII 34321 (ON SC) (applying and following *Doyle*).

Technicore Underground Inc. v. Toronto (City).[17] Per Justice Pinto, *Corpex* and *Doyle* stand for the general principle that "compliance with a notice provision is a condition precedent to maintaining a claim in the courts",[18] which was applied and enhanced in *Technicore* such that "an owner does not need to prove prejudice in order to rely on failure to comply with the notice provision as a bar to the claim."[19] Additionally, Justice Pinto referred to the 2001 decision of the British Columbia Supreme Court in *Northland Kaska Corp. v. Yukon Territory*[20] for the principle that "[t]he "grumblings of a contractor" are not sufficient to constitute notice".[21] One pertinent case not cited in Justice Pinto's decision is the Ontario Court of Appeal's decision in *Ross-Clair v. Canada (Attorney General)*.[22] *Ross-Clair* enhances the general principle of strict compliance with contractual claim notice provisions by requiring the submission of "detailed information" where a description of the facts and circumstances surrounding the claim are required to be included in the notice.[23]

The outcome in *Elite Construction*, a granting of summary judgment against a contractor as a consequence of its failure to comply with a claim notice provision, was also reached in *Urban Mechanical v. University of Western Ontario*[24] and *Tower Restoration v. Attorney General of Canada*.[25] However, and notwithstanding that this line of cases appears to set Ontario precedent for an owner's entitlement to summary judgment, there are established and surviving exceptions that may operate to disentitle an owner from strict reliance on a notice of claim provision and, accordingly, preclude summary judgment.

Exceptions

First, where the owner has actual or constructive knowledge of the claims advanced by the contractor, such knowledge may be found to satisfy the contractual claim notice provisions in a constructive manner.[26] Of course, such a position would be assessed by the Court in the light of the factual circumstances and context of the case, especially the language of the contract at issue. The contractor must lead affidavit evidence in support of its position.[27] Second, where an owner, through its conduct, varied the terms of the notice provisions of the contract, the owner may no longer be able to strictly rely on the express language of such provisions.[28] Generally, to benefit from this second exception, the contractor must lead evidence "of a

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17 *Technicore*, *supra* note 4.
18 *Elite Construction (Motion)*, *supra* note 5 at para. 67.
19 *Ibid* at para. 68.
20 2001 BCSC 929.
21 *Elite Construction (Motion)*, *supra* note 5 at para. 122.
22 2016 ONCA 205 [hereinafter *Ross-Clair*].
23 *Ibid* at paras. 33, 61.
24 2018 ONSC 1888 [hereinafter *Urban Mechanical*].
25 2021 ONSC 3063 [hereinafter *Tower Restoration*].
26 *Clearway*, *supra* note 1 at para. 36; *Limen Structures Ltd. v. Brookfield Multiplex Construction Canada Limited*, 2017 ONSC 5071 at paras. 38–39, 64–67 [hereinafter *Limen*].
27 *Clearway*, *supra* note 1 at para. 36.
28 *Ibid* at paras. 38–39. See *Colautti Construction Ltd. v. Ottawa (City)*, 1984 CarswellOnt 731 (CA) at paras. 28–30 (WL Can).

pattern of conduct by which the parties had varied the terms of the contract"[29] such that the owner "communicated an "unequivocal and conscious intention to abandon" its right to rely on the Notice Provision or to otherwise waive strict compliance with its terms."[30] Third, where an owner is unable to discharge the evidentiary burden of establishing that the contractor did not comply with the notice provisions of the contract, summary judgment is not appropriate. This is because a material fact would remain in dispute and, accordingly, there would be at least one genuine issue requiring a trial.[31] Finally, and in addition or in alternative to the foregoing, a contractor might also advance arguments that a claim notice provision is not effective under general principles of contract law due to unconscionability, illegality, or some other established ground.

Conclusion

The decisions in *Elite Construction*, *Urban Mechanical* and *Tower Restoration* may support an emerging trend towards strict compliance with notice provisions in Ontario. A contractor's failure to comply with a notice of claim provision under a construction contract raises a significant risk that the owner will be entitled to summary judgment in its favour should the contractor decide to proceed with the claim despite its failure to give timely notice. However, in our view even the most recent case law from the Ontario Court of Appeal does not completely "close the door" where the contractor can show, through evidence, that it constructively complied with the claim notice provision or that the owner waived strict compliance with such provision through conduct. Additionally, summary judgment will not be available where the Court determines that there is a genuine issue requiring trial or that that the provision itself is unenforceable.

Cases relied on by contractors for applying a standard lower than strict compliance are often from other provinces, particularly British Columbia. It remains to be seen if a notice case will progress beyond a provincial Court of Appeal so that our Supreme Court can weigh in on whether strict compliance with contractual notice provisions in construction contracts should be a national standard. For now, in Ontario, the safest course is to assume that strict compliance will be required, absent narrow exceptions that must be firmly established in the evidence, or, at a minimum, raise issues which require a trial.

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29 *Clearway*, *supra* note 1 at para. 39.
30 *Technicore*, *supra* note 4 at para. 64.
31 *Hryniak*, *supra* note 6 at para. 49; *Limen*, *supra* note 26 at paras. 38–39, 67, 82–83; *Elite Construction (Motion)*, *supra* note 5 ("there are no material facts in dispute […] and there are no issues requiring a trial" at para. 57).

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Government liability for policy decisions following *Nelson (City) v. Marchi*

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A recent major winter storm dropped approximately 55 cm of snowfall across Toronto in 16 hours.[1] As pedestrians navigated high snow banks, it brings to mind the recent case of *Nelson (City) v. Marchi*, 2021 SCC 41 (CanLII), where the Supreme Court returned to the issue of how to distinguish a "core policy" decision from government activities that could be subject to negligence claims. The case arose from a typically Canadian event — the creation of a snowbank in the City of Nelson after a heavy snowfall in January 2015. Under Canadian tort law, governments may be held liable for damage caused by their negligence in appropriate circumstances in the same way as private defendants.

At the same time, however, governments are generally protected from negligence claims that relate to public policy decisions. Governments set priorities and balance competing interests with finite resources. They make difficult public policy choices that impact people differently and sometimes cause harm to private parties. In the Supreme Court of Canada's words, "Accountability for that harm is found in the ballot box, not the courts."[2]

The tension that plays out in the courts concerns the precise scope of government decision-making that should remain free from the judicial scrutiny of what standard of care must be met. The seminal case of *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, identified "core policy" government decisions that were shielded from liability in negligence, namely "decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors."

In the *Nelson* case, the City started plowing and sanding the streets to respond to the snowfall, including the clearing of snow in angled parking stalls on a street located in the downtown core. Employees plowed the snow to the top of the parking spaces, creating a snowbank along the curb that separated the parking stalls from the sidewalk. Having created the snowbank, the City did not clear an access route to the sidewalk for drivers parking in the stalls.

The plaintiff parked in one of the angled parking stalls on a block of a downtown street in the City of Nelson and was attempting to access a business, but the snowbank created by the City blocked her route to the sidewalk. She decided to cross the snowbank. As her right foot stepped onto it, however, she dropped through the snow, stepped directly into an area which bent her forefoot up, and seriously injured her leg.

[1] https://www.toronto.ca/news/city-of-toronto-continues-snow-removal-operations/
[2] Nelson at para. 1

The plaintiff sued the City for negligence. The parties agreed that she had suffered $1 million in damages.

The City disputed liability however. Since 2000, the City relied on a written document called "Streets and Sidewalks Snow Clearing and Removal" (Policy), which broadly stated that snow removal, sanding, and plowing will be carried out "on a priority schedule to best serve the public and accommodate emergency equipment within budget guidelines." The Policy set out priorities regarding emergency routes and the downtown core; transit routes; plowing hills; cross streets; and dead end streets.

The Policy provided specific guidelines that snow plowing will occur during the early morning hours and that snow removal may be carried out as warranted by buildup levels. It did not specifically mention clearing parking stalls or creating snowbanks.

In addition to the written Policy, the City had several unwritten practices such as plowing, sanding, and removing snow from the designated sidewalk route and the various stairs located in the City. It focused on the streets in the downtown core for snow removal, but to ensure safety, City workers begin to remove snow from other areas, including the civic centre and around schools, when the downtown core starts to get busy (typically around 11:00 a.m.). The City did not remove snow from the downtown core overnight due to noise complaints received in the past as well as the cost of overtime.

Throughout the snowfall, the City's public works supervisor followed the Policy and made decisions about how many employees should be on snow removal shifts. Her evidence was that all streets in the City are first cleared of snow, and snowbanks are only removed after all snow plowing is complete. The downtown core was completely cleared of snow, and all snowbanks were removed, three days after the plaintiff's injury.

The trial judge dismissed the action in part on the basis that the matter of snow removal was a "core policy" decision. The trial judgment was overturned by the British Columbia Court of Appeal and the matter found its way to the Supreme Court of Canada.

On appeal to the Supreme Court of Canada, the central issue was whether the City owed the plaintiff a duty of care relating to the snow removal decisions or whether such decisions were immune from negligence liability.[3]

In Canada, a duty of care for the purpose of negligence is founded on the "neighbour principle" established in *Donoghue v. Stevenson*, 1932 CanLII 536 (FOREP), [1932] A.C. 562 (H.L.), under which "parties owe a duty of care to those whom they ought reasonably to have in contemplation as being at risk when they act".[4]

[3] The decision also involved the issues of the standard of care and causation which this paper shall not address.
[4] *Rankin (Rankin's Garage & Sales) v. J.J.*, 2018 SCC 19, [2018] 1 S.C.R. 587, at para. 16.

The neighbour principle applies to private and public defendants, subject to any contrary statutory provision or common law principle.[5]

In order to determine whether a duty of care arises, the first issue to be addressed is whether the plaintiff's claim falls within or is analogous to an established duty of care or whether the claim is novel because proximity has not been recognized before (the "*Anns/Cooper* test").[6]

If there is sufficient proximity to ground a *prima facie* duty of care, it is necessary to proceed to the second stage of the *Anns/Cooper* test, which asks whether there are residual policy concerns outside the parties' relationship that should negate the *prima facie* duty of care.[7]

In the case at hand, the Supreme Court determined that the City owed the plaintiff a *prima facie* duty of care based on the earlier decision of *Just v. British Columbia*, 1989 CanLII 16 (SCC), [1989] 2 S.C.R. 1228, where a plaintiff was injured by a boulder that fell from a slope above a public highway onto his car.

In *Just*, the Court affirmed that users of a public highway are in a sufficiently proximate relationship to the province because in creating public highways, the province creates a physical risk to which road users are invited. Further, the province or department in charge can also readily foresee a risk to road users if highways are not reasonably maintained.

At the second stage, the Court in *Just* found that the duty of care should apply to public authority defendants unless there is a valid basis for its exclusion based on any applicable statutory provisions that exempt the defendant from liability, or immunity for "true" policy decisions.

While true policy decisions are generally exempt from negligence claims, the operational implementation of policy may be subject to a duty of care in negligence. Examples of "operational" rather than "true policy" decisions in *Just* were stated to include decisions like the frequency of inspections for trees and the manner in which cutting and scaling operations were carried out — essentially the *implementation* of the policy decision.

For the Court, it was most important that immunity for core policy decisions made by government defendants be well understood and fully explore where the nature of the claim calls for it. The onus is on the public authority to establish that it is immune from liability because a core policy decision is at issue rather than a decision that relations to the operation or implementation of the policy.

The question, then, is what is a "core policy" decision? The Supreme Court affirmed its earlier definition of core policy decisions as "decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided

[5] *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537, at para. 22.
[6] *Cooper*, at para. 36.
[7] *Cooper*, at para. 30.

they are neither irrational nor taken in bad faith."[8] Put another way, the focus is on the fundamental nature of the decision at issue.

Core policy decisions are immune from negligence liability because the legislative and executive branches of government have core institutional roles and competencies that must be protected from interference by the judiciary's private law oversight. A court must consider the extent to which a government decision was based on public policy considerations and the extent to which the considerations impact the rationale for core policy immunity.

The Court acknowledged that there is no magic formula or litmus test to determine whether a government decision is part of core policy or merely operational. However, the Court provided a new framework analysis to aid in the determination. In order to assess whether a decision was "core policy" rather than operational, the Supreme Court unanimously set out four factors to assess the nature of a government's decision:

(1) the level and responsibilities of the decision-maker;

(2) the process by which the decision was made;

(3) the nature and extent of budgetary considerations; and

(4) the extent to which the decision was based on objective criteria.

In *Nelson*, the City did not claim any statutory exemption from a duty of care, and there was no suggestion that it acted irrationally or in bad faith. Accordingly, the Court turned to the assessment of whether there was immunity based on the nature of the decision challenged by the plaintiff.

The City argued that its written and unwritten snow clearance and removal policies were core policy decisions because they involved allocating scarce resources in circumstances where not all stakeholders can be satisfied at once.

Conversely, the plaintiff argued that the claim was not about the written policy's priority schedule for plowing and sanding or the City's snow clearance and removal policies generally, which are unchallenged. Rather, at issue is the clearing of snow from the parking stalls on the street in question and the creation of a snowbank along the curb without ensuring safe access to sidewalks. The plaintiff argued that even assuming that the City's written snow clearing policy was "core policy," the clearing of parking stalls and the creation of snowbanks was not mandated by any of the City's documents; it was the operationalization or implementation of snow removal.

The Supreme Court agreed with the plaintiff. In the Court's view, the City's clearing of snow from the parking stalls by creating snowbanks along the sidewalks — thereby inviting members of the public to park in those stalls — without concurrently ensuring direct access to sidewalks,

[8] *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 90.

was not the result of a core policy decision immune from negligence liability. Rather, this was a routine part of the City's snow removal process, to which little thought appeared to have been given.

Further, the City's decision bore none of the "hallmarks" of core policy. Firstly, the implementation of the City's snow clearing operations was made by the City's public works supervisor rather than a democratically-elected official. Secondly, the method of plowing the parking stalls did not result from a deliberative decision involving any prospective balancing of competing objectives and policy goals by the supervisor or her superiors. There was no evidence suggesting an assessment was ever made about the feasibility of clearing pathways in the snowbanks. Thirdly, while budgetary considerations were involved, these were not high-level budget decisions but rather the day-to-day budgetary considerations of individual employees. Lastly, the City's chosen method of plowing the parking stalls could be readily assessed based on objective criteria.

As a result, the Supreme Court found that the City's "core policy" defence failed and that it was not immune from the plaintiff's negligence claim. The plaintiff's appeal was allowed and a new trial was ordered on the issues of whether the City had breached the applicable standard of care and causation of damages.

The decision provides an important framework for assessing whether impugned government conduct is subject to negligence claims or is immune as being a core policy decision.

Going forward, governments will need to develop mechanisms to determine whether a given decision falls within policy immunity. If the decision is determined to be operational, governments will require a proactive due diligence framework to bolster their policy immunity defences claims. These authors suggest that matrix analysis may assist on both these levels.

Risk assessment requires a balancing of two fundamental concepts: "precautions taken to avoid the event" versus "systems to measure potential gravity of impact". The two categories can be used to generate a matrix that directs priorities in the taking of preventative steps.[9] Matrix analysis determines what level of pro-active audit or investigation is appropriate, as illustrated in the following matrix:

[9] *Profiting from Risk Management and Compliance* | by Todd L. Archibald and Kenneth E. Jull (Thomson Reuters 2021) Chapter 3. Compliance: Behavioural Theory, Gender and Diversity II. Applying the Matrix to Organizational Theory in Corporate Management, Figure A. Matrix Planning Applied to Specific Tasks.

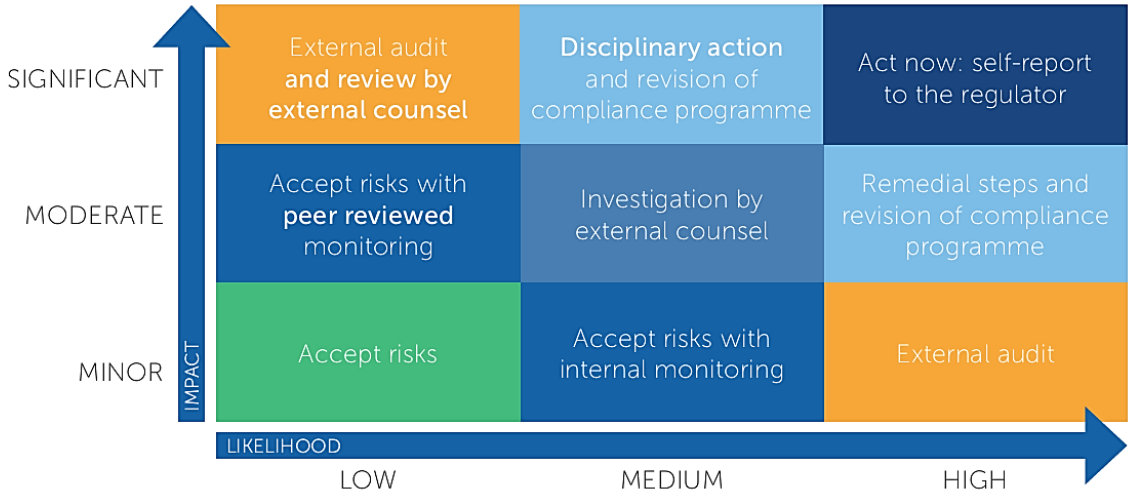

Figure A

The risk management matrix has been widely used within engineering and environmental fields for some time now. Matrix analysis is also used by the federal government. For example, the Treasury Board of Canada has developed a sophisticated corporate risk profile that colour codes a risk matrix and sets out plans of action based on the level of risk.[10]

A risk management matrix is grounded in the concepts of negligence law that form the basis of due diligence defences. Justice Linden summarized the concept with the equation of PL=OC:

> Mr. Justice Learned Hand once attempted to express this notion in algebraic terms. He suggested that liability depended upon whether B is less than PL. P stands for the probability that the risk will eventuate, L represents the gravity of the loss if the injury results and B is the burden of adequate precautions. Professor (now Mr. Justice) Posner has argued that this is an "economic test":
>
> "The burden of precautions is the cost of avoiding the accident. The loss multiplied by the probability of the accident is the cost that the precautions would have averted. If a larger cost could have been avoided by incurring a smaller cost, efficiency requires that the smaller cost be incurred."
>
> This formula is helpful, but a more accurate one would split the burden factor in two—object and cost. The amended equation, therefore, is PL=OC. If the probability multiplied by the loss is greater than the object times the cost, liability ensues; conversely, if the probability times the loss is less than the object times the cost, the conduct is blameless.[11]

[10] https://www.canada.ca/en/treasury-board-secretariat/corporate/risk-management/corporate-risk-profiles.html
[11] A. Linden, *Canadian Tort Law*: 6th ed. (Toronto: Butterworths, 1997), at pp. 116-17.

The mathematical model that underlies the matrix has been applied in determining whether a given employee qualifies as a senior officer within the meaning of the *Criminal Code*.[12] The axis on the matrix juxtaposes the likelihood of an employee exercising a business decision against the severity of the consequences of decisions made by that employee.

The factors identified by the Court in *Nelson* could be grouped into the following competing axis:

> **Y Axis:** Severity of impact: (1) the level and responsibilities of the decision-maker; (2) the nature and extent of budgetary considerations;
>
> **X Axis:** Precautions taken to avoid the event: (1) the process by which the decision was made; (2) the extent to which the decision was based on objective criteria.

If it is determined by matrix analysis that a given decision may fall within the operational sphere, the next level of matrix analysis is to determine the appropriate level of proactive investigation or audit.

The decision in *Nelson* provides the new framework for analysis. We hope that matrix analysis will assist in applying this analysis, at least before the next major storm event.

[12] *Profiting from Risk Management and Compliance* | by Todd L. Archibald and Kenneth E. Jull (Thomson Reuters 2021) § 10:14. A Matrix to Determine Senior Officer Status.