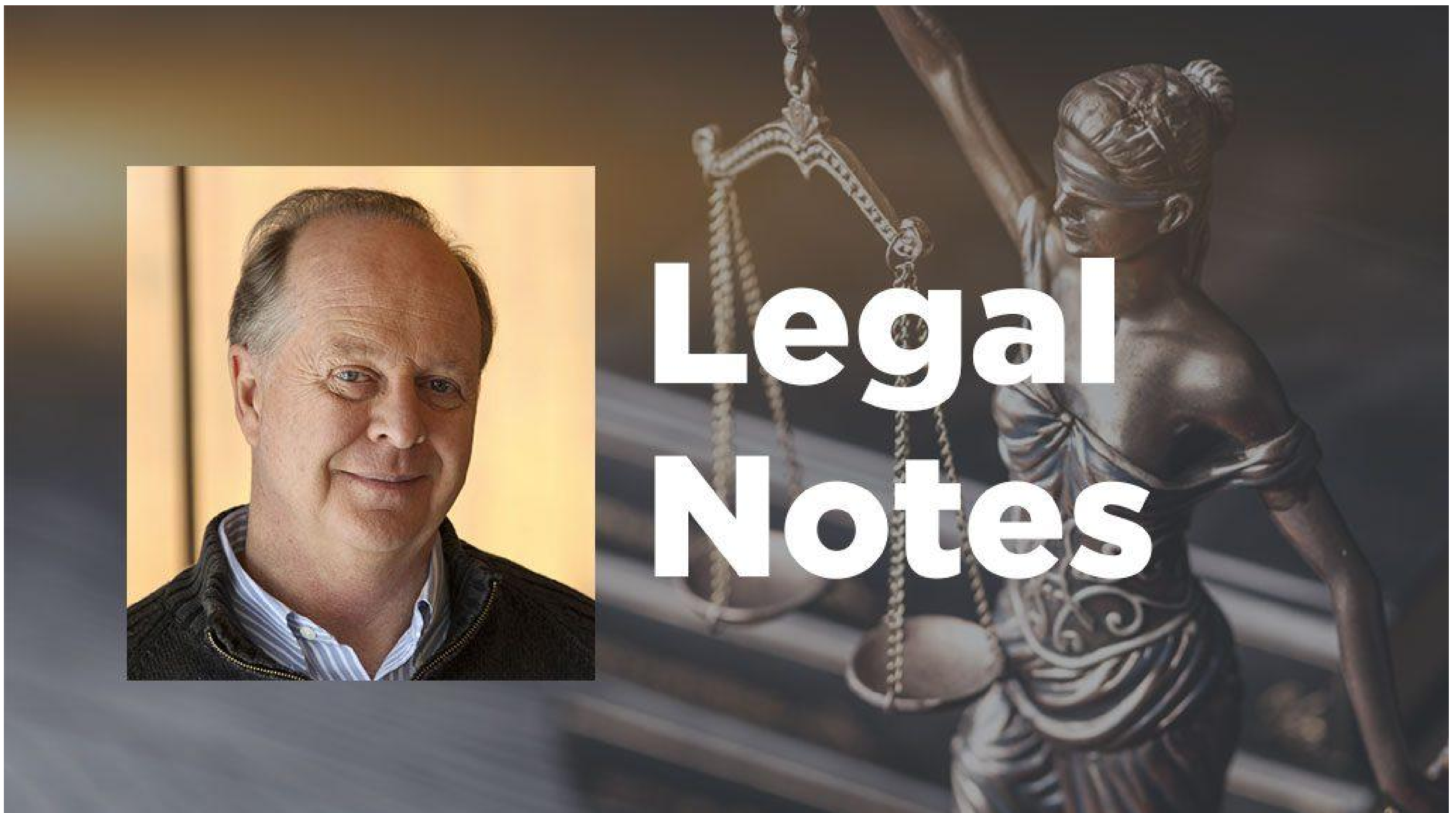
GOVERNMENT

Legal Notes: Crosstown LRT partners entitled to claim relief due to COVID ‘emergency’

John Bleasby June 7, 2021



The Ontario Superior Court has ruled that a “stark” reading of a P3 project agreement was unreasonable, opening the door for a partner’s claim for relief due to the COVID pandemic’s impact on the project’s construction schedule.

In question was Toronto’s Eglinton Crosslinx LRT project, and the 2015 fixed-price design and construction agreement made between Crosslinx Transit Solutions General Partnership, the Ontario Infrastructure and Lands Corporation, and Metrolinx (the

"Authority").

When Ontario declared a state of emergency under the Emergency Management and Civil Protection Act in March 2020, the P3 parties responded with a number of safety measure proposals to help contain any spread of the virus. This was followed shortly by them meeting new construction health and safety protocols issued by the Ministry of Labour.

Of course, the pandemic was not contemplated when the original agreement was made. Therefore, none of the safety measures suddenly required by the construction industry could have been anticipated. In this case, the required measures resulted in delays to the schedule. The private partners requested the Authority grant them schedule relief. That request was denied.

As Julie Han, Jason Annibale, Timothy John Murphy and Ahsan Mirza of law firm McMillan explain in their detailed report, the usual list of force majeure provisions allowed under CDCC contracts did not apply here because the force majeure list outlined in the project agreement was limited and without a "basket clause." Nevertheless, the partners argued that COVID was an "emergency" that required the partners to follow mandated protocols that constituted "additional or overriding procedures" for which relief was allowed under the contract's variation procedure.

While the Authority did not disagree that the COVID pandemic was an emergency, it maintained that complying with "additional or overriding procedures" was not required by the partnership and that government protocols were "applicable laws." They maintained that, under their contract, partners must comply with any "applicable laws," not with "additional or overriding procedures." Therefore no relief could be sought.

Justice Markus Koehnen of the Ontario Supreme Court rejected the Authority's arguments. In his ruling, he wrote that COVID-19 was indeed an "emergency," and that the Authority did require the project company to comply with the mandated construction protocols. They were, in his view, "additional or overriding procedures" that could trigger the variation clause. Therefore, a claim for schedule extension would be allowed.

"His Honour noted that a narrow and 'stark' reading of the project agreement's provisions was not reasonable; the entitlement to seek relief for delays and the interpretation of risk allocation between the parties must be read in light of the purpose of the contract," the McMillan legal experts write. "The broad definition of emergency and the existence of mechanisms in the project agreement to allow extensions to the substantial completion date as a result of emergencies do not support the argument that the private partner is expected to take on all health and safety risk. In fact, the inclusion of these provisions and mechanisms to adjust project schedule and price as a result of an emergency suggests that there are certain health and safety matters that are not intended to be passed fully to the private sector."

The McMillan team also point out the definition of “emergency” is sufficiently broad that any number of events or occurrences could fall within standard force majeure provisions.

“It then stands to reason that upon the occurrence of an event that threatens health and safety, and under the right circumstances, the private partner can rely on the emergency provisions to claim relief for schedule delays, notwithstanding that such event may not be an express ‘force majeure’ event as set out in the project agreement.”

They also suggest that parties to P3 agreements keep in mind the concept of “partnership.”

“Collaboration should play a role in addressing new issues and disputes. Once-in-a-lifetime events like a global pandemic should not be seen as a ‘normal’ risk allocated to a party through general risk language.”

John Bleasby is a Coldwater, Ont. based freelance writer. Send comments and Legal Notes column ideas to editor@dailycommercialnews.com.

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