



Case Commentary: *Northland Kaska Corporation v. Her Majesty the Queen In Right of the Territorial Government of Yukon Territory*, 2001, B.C.S.C. 929

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In *Northland Kaska*, the plaintiff contractor began work on a highway reconstruction project for the defendant. During the course of the work the plaintiff encountered water seepage, excess groundwater and soft wet soil conditions, which the plaintiff claimed caused it delay and related costs. When the defendant refused to pay the plaintiff additional compensation, the plaintiff sued and applied for summary judgment in the amount \$1,483,779.55 plus interest and costs, representing what it estimates it incurred in extra expenses and construction delays due to the alleged change in soil conditions. In advancing its claim, the plaintiff argued that it had relied on the pre-tender information supplied by the defendant and the soil conditions it actually encountered differed substantially from the information contained in the pre-tender information and could not have been reasonably assumed.

One of the issues before the court was whether the plaintiff was precluded from bringing its delay related claim by virtue of the operation of the notice provisions in the contract between the parties, which read:

35.1 Subject to GC35.2 no payment, other than a payment that is expressly stipulated in the contract, shall be made by Her Majesty to the Contractor for any extra expense or any loss or damage incurred or sustained by the Contractor.

35.2 If the Contractor incurs or sustains any extra expense or any loss or damage that is directly attributable to



35.2.1 a substantial difference between the information relating to soil conditions at the work site that is contained in the Plans and Specifications or other documents supplied to the Contractor for his use in preparing his tender or a reasonable assumption of the fact based thereon made by the Contractor, and the actual soil conditions encountered by the Contractor at the work site during the performance of the contract, or

...

he shall, within ten days of the date the actual soil conditions described in GC35.2.1 were encountered . . . give the Engineer written notice of his intention to claim for that extra expense or that loss or damage.

35.3 When the Contractor has given a notice referred to in GC35.2.2, he shall give the Engineer a written claim for extra expense or loss or damage within 30 days of the date that a Final Certificate of Completion referred to in GC44.1 is issued and not afterwards.

35.4 A written claim referred to in GC35.3 shall contain a sufficient description of the facts and circumstances of the occurrence that is the subject of the claim to enable the Engineer to determine whether or not the claim is justified and the Contractor shall supply such further and other information for that purpose as the Engineer requires from time to time.

...

35.5 If the Contractor fails to give a notice referred to in GC35.2 and a claim referred to in GC35.3 within the times stipulated, an extra payment shall not be made to him in respect of the occurrence.

When is the Notice Limitation Period is triggered?

The problem with identifying the triggering date of a notice provision has long been a point of debate for courts. On this issue, the court in *Northland Kaska*, held:



“It is not necessary that the contractor realize the full consequences of the change in soil conditions, but once the contractor is aware that the soil conditions might result in a claim under a soil conditions clause, notice must be provided within the prescribed time period. [emphasis added]”

Therefore, from a general standpoint, where there is a notice provision similar to that *Northland Kaska*, a plaintiff should be mindful of the date it becomes aware that a condition it encountered “might” result in a claim to which a particular notice provision would apply.

The application of this principle, however, begs certain questions. In *Northland Kaska*, its application was relatively straightforward, as the plaintiff’s representative had already deposed in an affidavit:

“19. Although Kaska encountered moist soil conditions from the beginning of the project, we believed we could work around the damp conditions. It was not until the last week of July 1992 that Kaska finally concluded that the soil conditions had changed so much that we would be unable to work around the dampness.

20. Prior to July 17, 1992 Kaska had access to all available work. When Kaska encountered damp conditions, men and machines were moved to other areas.

21. There were periods when Kaska literally moved from one end of the job to the other . . . By July 17, 1992 Kaska had completed a substantial portion of the project. At this point, Kaska was unable to move the men and machines to other work sites. Kaska concluded that the soil conditions were substantially different from those expected. [emphasis in original].”



However, the application of the principle in another case, where such clear evidence does not exist, might not be as straightforward. For example, does a plaintiff need “actual” awareness of the condition and its consequences, or is a reasonable standard to be applied in situations where the plaintiff has encountered the condition, and “ought” to have been aware of its consequences, but is not. This question is left unanswered in the *Northland Kaska* decision.

Manner and Form of the Notice:

In *Northland Kaska*, as the plaintiff had failed to provide proper formal written notice within the required 10 days of the July 17th date, the plaintiff contended that strict adherence to the conditions in GC 35.2 was not necessary for it to advance a successful claim; rather, it is sufficient if the “intent and spirit of the provisions” had been complied with. In other words, it would be sufficient if the defendants were found to have “constructive knowledge” of the plaintiff’s intention to make a claim, based on the parties’ past communication and conduct. On this issue, the court set forth two key principles:

1. Knowledge of the owner that the contractor is encountering difficulties is not equivalent to having knowledge, constructive or direct, that the contractor is intending to make a claim. The parties communications must disclose a level of knowledge that the plaintiff would make a claim under the applicable provision; and
2. Sophisticated parties must be held to the terms of the notice provision they have accepted.

In applying these principles to the facts in *Northland Kaska*, the court dismissed the claim of the plaintiff for failure to provide proper notice and held:

“...any notice of a change in soil conditions must be unequivocal in stating the contractor’s intention that:
(1) it has encountered what it considers to be a



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substantial difference in soil conditions than that indicated in the pre-tender information, or a reasonable assumption as to soil conditions based upon the pre-tender information, as the case may be; and (2) that it intends to make a claim under GC35.2 for any extra expense, loss or damage resulting therefrom. This does not mean that the written notice must be overly detailed, as the extent of the change in soil conditions nor the full impact upon the contractor's planned schedule and budget might not yet be fully appreciated. However, the notice should contain such particulars so as to enable the owner to appreciate the contractor's concerns, to consider its position, and to make an informed decision as to how to proceed. Timeliness and certainty of the notice is essential. The contractor may always withdraw its claim if its circumstances warrant, but it should not deprive the owner the opportunity to assess its options in light of the likelihood that contractor will make a claim for extra compensation under GC35.2."

In conclusion, the principles in *Northland Kaska* should prove to be useful in guiding the decisions of Canadian courts when interpreting the notice provisions of a construction contract.