

HOW TO OPERATE WHEN YOU COOPERATE

When a major construction project goes wrong, multi-party litigation is often the result. A claim by an owner/developer for damages caused by delay, or failure of components of the building due to design/construction defects, more often than not results in the naming of multiple defendants and by the defendants, multiple third parties. In many of these cases, although not all, two or more of the main defendants or third parties will have a common interest and want to cooperate in defeating the plaintiff's claim. That cooperation is sometimes accomplished simply by way of a common understanding, but in other instances the cooperation is reduced to a written agreement. In the latter case, the agreement will stipulate the way or ways in which the parties have agreed to cooperate and, in many instances will include a "reservation of rights" allowing the parties to resolve any differences between them at a later date, depending on the outcome of the action brought by the plaintiff.

Cooperation Agreements, whether oral or in writing, are a frequent occurrence in multi-party litigation. More often than not the agreement reached remains confidential to the parties entering into the agreement but, as was demonstrated in the recent decision of the B.C. Supreme Court, in other instances there is the prospect that the agreement, or certain aspects of it, might have to be disclosed to the "common enemy".

In the case of *Bilfinger Berger Canada Inc. v. GVWD* (2014) BCSC 1560, the Court was required to address the questions when, if ever, does a Cooperation Agreement have to be disclosed to the parties to the litigation and, if disclosure is required, what must be disclosed: the fact of the agreement, details of its terms, or the whole agreement itself?

Bilfinger was the contractor on a major construction project, and eventually refused to continue work because of what it said were dangerous site conditions. The owner disagreed, and the parties ended up in litigation, each claiming damages against the other. The owner completed the project with assistance from its engineer, HMM.

In the context of the litigation, the owner and HMM decided, for a variety of reasons, to not pursue any claims against each other for contribution and indemnity in the event that Bilfinger was successful against either of them. Instead, they continued to work together on the project and agreed to cooperate in the litigation, and to resolve any remaining residual issues between them at a later date following the Bilfinger action. They also agreed that they would not be bound by any specific findings of fact that arose in the action with Bilfinger. The agreement was in writing.

When Bilfinger learned of the Agreement, it complained to the Court that it was an abuse of process, and that Bilfinger was entitled to have a copy of the Agreement as soon as it was signed. Bilfinger asked the Court to dismiss the owner's claim against Bilfinger, and HMM, and the owner's defences to Bilfinger's claims for the alleged abuse of process.

In her decision, Madam Justice Griffin held the parties were entitled to cooperate with each other, and that they were entitled to enter into an agreement to that effect. However, she went on to observe that where cooperation agreements contained reservation of rights or agreements with respect to evidence, there is an obligation to disclose the agreement or that aspect of the agreement at an early date in the litigation, preferably before the discovery process is complete, and certainly before trial. Otherwise, she found, the Court and the other parties could be misled, leading to a possible abuse of process.

Normally, agreements of this type are privileged and not subject to disclosure to parties adverse in interest, without the consent of the parties entering into the agreement. That privilege can be maintained where the agreement does not contain any provision which would result in either the Court or other parties to the litigation being misled as to the true nature of the dispute between and amongst the parties. The cautioning note of Madam Justice Griffin in this regard must be taken into account in preparing these agreements in complex commercial litigation where cooperation is desirable, but not necessarily immune to disclosure.

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