By Matthew Swanson & Bill Woodhead

Is the sky the limit?

A look at limitation of liability clauses

It is not uncommon for contracting parties to attempt to put express limits on the types of risk or damages that they may be liable for should they encounter problems on a project. In such situations, one or more of the contracting parties may seek to include a limitation of liability clause in the contract. To the extent a party wishes to incorporate such a clause into a contract, it is of fundamental importance that they take all necessary care to ensure the clause actually covers the broad array of events where liability could arise. A recent decision of the Alberta Court of Appeal underscores the importance of why care must be taken in drafting limitation of liability clauses. It also provides a clear reminder that these sorts of clauses will be strictly construed.

In the case of *Swift vs. Tomecek Roney Little & Associates Ltd., 2014 ABCA 49*, the Alberta Court of Appeal considered the application of a limitation of liability clause that purported to cap the liability of an architect and its sub-contracting engineer to $500,000 for design issues. The clause in question was contained in a contract between only one of the two owners of the land and an architect. The clause provided that the limitation of liability would apply to any and all claims arising "solely and directly" out of the duties and responsibilities outlined in the architectural design agreement.

In the beginning stages of the project, issues arose with respect to whether the seismic design of the project, which had been subcontracted by the architect to an engineer, complied with the applicable building code. The engineer made representations that revisions had been made to the design to bring it into compliance. Unbeknownst to the contracting and non-contracting owners, the revisions to the design did not actually comply with the code. As a result, the contracting and non-contracting owners sued the architect and the engineer. The contracting owner sued the architect for breach of contract and the contracting owner and the non-contracting owner sued the engineer for, amongst other things, negligent misrepresentation.

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In this context the court had to consider two primary issues. First, the court was required to consider whether the limitation of liability clause applied to the non-contracting owner. Second, the court had to consider whether the limitation of liability clause covered claims for negligent misrepresentation.

With respect to the first issue, the court found that the protection afforded by the limitation of liability clause did not extend to the non-contracting owner. The non-contracting owner was not seen to have expressly agreed to the limitation of liability and was not otherwise bound by the contracting owner's agreement, through agency principles or otherwise.

With respect to the second issue, the court found that the limitation of liability clause did not cover claims for negligent misrepresentation. The court held that it would be unreasonable to conclude that negligent misrepresentation was contemplated as being something that arose "solely and directly" out of the duties and responsibilities enumerated in the contract. Whereas negligent work was covered, the negligent misrepresentation was separate and caused certain damages that were distinct from, but overlapping with, damage caused by negligent engineering work, which was covered by the limitation of liability clause.

The decision in *Swift v. Tomecek* acts as a clear reminder that limitation of liability clauses will be strictly construed. Parties attempting to negotiate limitation of liability clauses should, to the extent possible, ensure that all parties for whom work is being performed are a party to the contract. Parties should also ensure that limitation of liability clauses extend to and are clearly drafted to cover all actions that they wish to limit liability for. Spending the time to carefully negotiate and draft these clauses could avoid costly future claims.

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Matthew Swanson is a partner at Borden Ladner Gervais LLP (BLG). Bill Woodhead is an associate lawyer at the firm. The authors acknowledge the assistance of Michelle Wilkinson, articled student at Borden Ladner Gervais LLP. Send comments to editor@on-sitemag.com