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Warranty Provisions and Distribution of Risk

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Contractual warranties are a key component of most construction contracts. Warranties are meant to allocate risk between the parties to a contract, who are free to distribute risk as they see fit through a warranty clause.[2]

A recent cautionary tale from the British Columbia Court of Appeal demonstrates the importance of reading and understanding the warranty provisions in a contract. In *Greater Vancouver Water District v. North American Pipe & Steel Ltd.*,[3] the supply contract contained the following warranty provision:

> The [supplier] warrants ... that the Goods ... will conform to all applicable Specifications ... and, unless otherwise specified, will be fit for the purpose for which they are to be used. ...
>
> The [supplier] warrants and guarantees that the Goods are free from all defects arising at any time from faulty design in any part of the Goods.

While the pipe delivered by the supplier met the contractual specifications, the pipe's design, which was provided to the supplier by the owner, gave rise to defects in the pipe.

The Court of Appeal found that the supplier warranted that the pipe it delivered would meet the owner's specifications and, quite separately, would be free of defects arising from faulty design. The Court of Appeal viewed these provisions as separate contractual obligations, despite any practical conflicts. The Court of Appeal held that as the pipes contained defects resulting from the owner supplied design, the supplier was for the damages caused by those defects. It did not matter whose design gave rise to the defects as there was no qualification in the warranty clause.

The Court of Appeal concluded:

> Clauses such as 4.4.4 distribute risk. Sometime they appear to do so unfairly, but that is a matter for the marketplace, not for the courts. There is a danger attached to such clauses. Contractors may refuse to bid or, if they do so, may build in costly contingencies. Those who do not protect themselves from unknown potential risk may pay dearly. Owners are unlikely to benefit from circumstances where suppliers and contractors are faced with the prospect of potentially disastrous consequences. Parties to construction or supply contracts may find it in their best interests to address more practically the assumption of design risk. To fail do to so merely creates the potential for protracted and costly litigation.

The moral of the story is that the courts cannot be relied upon to extricate a contractor or supplier from an unambiguous and onerous warranty clause. It will be presumed that those involved in the construction industry are sufficiently knowledgeable and experienced to assume the contractual risk they have agreed to and perform the contract, no matter how unfair the bargain turns out to be.

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[2] *0759594 B.C. Ltd. v. 568295 British Columbia Ltd.*, 2013 BCCA 381 2013 BCCA 381

[3] *Greater Vancouver Water District v. North American Pipe & Steel Ltd.*, 2012 BCCA 337