PRIVATE SECTOR CONTRACTS: WHEN A NEW GOVERNMENT CHANGES THE PLAYING FIELD

Effective July 18, 2017, BC had its first change of governing parties in over 16 years and the NDP now has the opportunity to direct government policy for so long as it retains the support of the Green Party. This potential for policy change as a result of a new governing party raises concerns for those in the private sector who have ongoing contractual relationships created on the basis of expectations formed under pre-existing government policies. Changes in government policy could produce hardships or windfalls for those in pre-existing contractual relationships depending upon how the change shifts the playing field. In the forest industry, for example, previous changes in governing parties have brought about new timber harvesting regulations with cost implications for providers of logging services subject to pre-existing contracts and rates.

The first point is that these changes can, and often do, occur without any change in governing party. For example, the enabling legislation for so-called "Bill 13 contracts" under the *Timber Harvesting Contracting and Subcontracting Regulation* (the "Regulation") was brought into force during the last days of the last Social Credit government. Private sector actors who operate in highly regulated fields such as forestry should always remain mindful of the implications that potential changes to governmental policy may have for their contractual relationships (not just when there's a change in governing party).

The second point that follows is any properly drafted services or supply contract will manage the risk of changes in government policy, whether due to a change in governing party or otherwise. Some of the provisions that the Regulation lawfully requires in a Bill 13 contract provide a helpful illustration. Under Section 14 of the Regulation, a Bill 13 contract must include "flexibility to address change" modelled on a "standard provision" included in Schedule 5 of the Regulation. Under this provision, a tenure holder may require a contractor under a Bill 13 contract to make certain changes to timber harvesting services provided under the contract, including changes necessary to comply with requirements imposed by government. If the contractor does not wish to accept the required changes, it is permitted to terminate the contract without any liability to the tenure holder. If the contractor accepts the changes (as is more likely the case under a Bill 13 contract), then either party is permitted to require a rate review that can lead to an arbitrated resolution, if necessary, to ensure that the rate appropriately accounts for the implications of the change in policy.

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Similarly, under Section 22 of the Regulation, a Bill 13 contract must address "events beyond control" of the parties (commonly referred to as events of "force majeure") modelled on the standard provision included in Schedule 13 of the Regulation. Under this provision, a tenure holder is not liable to the contractor for a failure to provide the amount of work required under the contract, and the contractor is not liable for a failure to perform the amount of work allocated to the contractor under the contract, if the event that leads to the failure is beyond the reasonable control of the tenure holder or the contractor, as the case may be. Such events specifically include "changes in law."

While Bill 13 contracts are lawfully required to include provisions that address risks associated with changes in government policy (among other things), any properly drafted services agreement or supply agreement should also have similar provisions to address these risks. If not, then a contracting party at risk on account of a particular change in government policy might take the position that the contract includes an "implied term" that addresses the change in policy (perhaps, for example, that the parties will adjust rates to account for substantial changes to operating conditions that result from unforeseen changes in government policy). Or a contracting party might take the position that the change in government policy is so substantial and beyond the range of risks the parties would have contemplated so as to "frustrate" the contract and bring it to an end without further liability between the parties. The difficulty with reliance upon such "common law" or "judge-made law" is it evolves on a case-by-case basis. Consequently, there is a much higher degree of uncertainty than if the parties had simply reduced their intentions to writing. The contractual tools exist for contracting parties to protect themselves from unforeseen changes in government policy—they simply need to open the tool box and use them. Of course, the parties should ensure that they have a tool box—a well drafted and negotiated contract—in the first place.

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