



## CONTRACTORS MAY NOT NECESSARILY RELY ON A CHANGE CLAUSE TO RECLAIM WORK

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In general, a party's burdens or obligations under a contract may not be assigned or altered without the consent of the other party. However, most building contracts, particularly those based on unit prices, include a change clause entitling the owner to add or subtract from the work. In subcontracts, it is not unusual for the "upper-tier payer" (normally the contractor) to complete a certain amount of work originally promised to the subcontractor, particularly where a favourable profit margin exists. This process is referred to in the industry as a deduction of units of work.

In some instances, the deduction of units may be so substantial as to amount to a termination rather than a change in compliance with the contract. In *Star Excavating & Grading Ltd*, the Ontario Court of Appeal awarded a subcontractor the profits it would have made had it completed all units contracted for. The decision was based on the following:

1. The work with respect to which the contracts were made came to an end;
2. Over one-third of that work had not been done;
3. The change by deduction, if it could be called that, was not of a nature that would occur from time to time during the life of the contract;
4. The purpose of the letter giving notice of changes or of termination was not for any purpose other than to bring the contracts to an end; and
5. The language of the conditions is that of the [Contractor].

Whether a contract is deemed to have been terminated may depend on whether the unilateral changes were permitted by the contract's change clause. In *C&R Logging Ltd. v. Vancouver (Greater)*, a decision upheld by the British Columbia Court of Appeal, the court found in favour of the subcontractor for lost opportunity because the deduction of work was without an adjustment in the contract price, as required by the change clause.

The foregoing approach makes sense. In addition to the value of the particular work, the negotiation of unit prices also contemplates overhead and profit, since they are the only means of obtaining revenue under the contract. Therefore, a substantial change in units profoundly affects the overall cost position of the subcontractor.

Where there is a deduction of units without cause, the subcontractor should be mindful of an obligation to mitigate damages. A court will determine what steps ought to have been taken as a result of the termination of the contract and whether such steps would be considered reasonable and



prudent. For example, if a subcontractor could have deployed its employees to other projects, the claim for lost profits would be undermined.