

**CITATION:** Urbacon Building Groups Corp. v. Guelph (City), 2014 ONSC 2618  
**COURT FILE NO.:** 866/08  
Guelph  
**DATE:** 20140425

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

<b>B E T W E E N:</b>	)	
	)	
URBACON BUILDING GROUPS	)	Lori Goldberg for the Plaintiff
CORP.	)	
	)	
Plaintiff	)	
	)	
<b>- and -</b>	)	
	)	
THE CORPORATION OF THE CITY OF	)	Derek Schmuck for the Defendant
GUELPH	)	
	)	
Defendant	)	No one appearing Lien Claimant
	)	Subcontractors

2014 ONSC 2618 (CanLII)

**DECISION**

**D.L. CORBETT J.**

[1] This is a further motion and cross-motion concerning undertakings and refusals. Counsel appeared by teleconference on April 24, 2014.

[2] The parties have now completed phase I of the trial concerning liability. By endorsement dated February 19, 2014, MacKenzie J. granted judgment in favour of Urbacon and dismissed Guelph’s counterclaim. Phase II of the trial, concerning damages, is scheduled to commence in the fall of 2014. In my endorsement of December 21, 2012, I directed that the parties could pursue these issues after the liability trial.<sup>1</sup>

[3] The scope for relevance for outstanding undertakings and refusals is limited to matters that remain to be decided (that is, that are relevant to the damages trial).

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<sup>1</sup> *Urbacon Building Groups Corp. V. Corporation of the City of Guelph*, 2012 ONSC 7502, para. 3.

[4] Further background is set out in my prior endorsements in this case, which I incorporate by reference.

[5] This motion is based on updated motion materials: Guelph's motion record from February 2014 and Urbacon's motion record from April 2014.

### **Guelph's Motion on Undertakings and Objections**

[6] The following Urbacon undertakings remain outstanding:

Q. 853, p.180

Q. 865, p.182

Q. 884, p.194

Q. 1523, p.317

Q. 5589, p. 1163

Q. 5631, p. 1176

[7] These undertakings shall be answered by June 1, 2014, though Urbacon should provide the information one answer at a time as it becomes available, given the deadlines for filing materials in advance of the damages trial.

[8] The remaining issues concern objections.

[9] Question 869, page 183: a "list of all projects that Urbacon has worked on since the Guelph project and the contracts and budgets and the billings received for each of those projects?" The basis advanced for this request is Urbacon's duty to mitigate by undertaking other work after it was terminated from the Guelph job. I raised with counsel the presumption that could apply to a large contractor that its capacity to undertake work would ordinarily exceed its obligations, so that any additional contracts it obtained would not become open to it because of the termination of the Guelph contract. Counsel shall consider this issue, and try to agree on a scope of production both sides can accept in respect to this issue, given the disposition of the other production issues on this motion. If counsel cannot agree then they shall reconvene this motion by conference call.

[10] Question 1025, page 30: "who was the external auditor?": this question is intended as foundational for an inquiry into the assessment given to this lawsuit in Urbacon's financial statements. To this point those statements have not been produced. In the usual course, one would expect financial statements to reference this action as a

contingent liability, in light of the legal expense involved and the potential liability of Urbacon to Guelph prior to the judgment of MacKenzie J. It may be, but is not necessarily the case, that the financial statements contain some sort of assessment of Urbacon's potential recovery if it prevails in the lawsuit. I decline to delve into this issue further until the foundation for this line of inquiry is more developed. In the mean time, Urbacon shall disclose all notes in all financial statements that reference this litigation. This order is without prejudice to any argument Urbacon may have that the notes are irrelevant or are otherwise inadmissible: that issue can be addressed, if necessary, on another day.<sup>2</sup>

[11] Question 1075, p.38: "the date the rate changed?" The "rate" refers to GST rates. GST rate changes are matters of public record. This question need not be answered.

[12] Question 4793, p.944: "who did you consult in regards to expert advice?" The proper question is whether an expert has been "engaged". Urbacon shall advise by May 7, 2014 whether it has engaged any other experts upon whose evidence it may rely, and provide the names and addresses of those experts. This order does not affect the deadlines stipulated by MacKenzie J. for delivery of expert reports.

[13] Production of documents relied upon in the preliminary Crowe Soberman Report (see p.7 of Fletcher Affidavit). Guelph lists ten categories of documents it seeks in paragraph 18 of the affidavit of Jordan Fletcher sworn February 16, 2014 (mis-dated 2013). Urbacon agrees to provide the documents described in the first 5 categories and category 10. It agrees to provide the documents described in the sixth category to the extent that those documents exist. Guelph does not seek production of the documents described in category 9. That leaves categories 7 and 8 in dispute.

[14] In respect to category 7, Urbacon shall produce its financial statements for 2006 to 2012. Urbacon has yet to produce any documents from which Guelph could assess Urbacon's overhead and gross margin charges. It may be that by the end of this phase of the trial, the financial statements will prove to be of limited material value, in light of what Urbacon subsequently produces. However, in view of the current lacuna in the documentary record on these points, I consider that Guelph should have the financial statements.

[15] Category 8: Urbacon has not yet provided a final report that indicates the gross profit margins and treatment of overhead used in calculating its damages claims. Once that has been provided, Guelph will not be restricted in its analysis of these issues by the approach taken by Urbacon. I understand that Urbacon is a large company, and the court

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<sup>2</sup> In paragraph 14, below, I order production of financial statements for 2006-2014. It follows, therefore, that my decision respecting Q.1025 will apply only to years after 2012.

does not want the production obligations to be unduly onerous. However, time is tight (the damages trial is scheduled for October), and Guelph has yet to receive the information its expert would need to assess this issue. Counsel understand my concern. I ask them to confer to try to agree on a scope of disclosure on this issue, failing which this motion shall reconvene by teleconference for further directions.

### **Urbacon's Motion**

[16] Urbacon's motion is restricted to two questions ordered answered and one undertaking, listed at exhibits D and F of the motion materials. During the course of submissions it became clear that counsel has not had a chance to discuss these issues recently. They shall do so and only if they are unable to resolve them will they bring them back to me on a resumed teleconference.

### **Costs**

[17] Guelph has been largely successful on the motion and shall have its costs on a partial indemnity basis fixed at \$3000 plus GST.

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D.L. CORBETT J.