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Thomas Heintzman is counsel at McCarthy Tétrault in Toronto. His practice specializes in litigation, arbitration and mediation relating to corporate disputes, shareholder's rights, securities law, broadcasting/telecommunications and class actions.

He has been counsel in many important actions, arbitrations, and appeals before all levels of courts in many Canadian provinces as well as the Supreme Court of Canada.

Thomas Heintzman is the author of *Goldsmith & Heintzman on Canadian Building Contracts,* 4th Edition which provides an analysis of the law of contracts as it applies to building contracts in Canada.

Goldsmith & Heintzman on Canadian Building Contracts has been cited in over 183 judicial decisions including the two leading Supreme Court of Canada decisions on the law of tendering:

M.J.B. Enterprises Ltd. v. Defence Construction (1951), [1999] 1 S.C.R. 619 and
Double N Earthmovers Ltd. v. Edmonton (City), [2007] 1 S.C.R. 116

When The Contractor Plays Hard-Ball What Does A Sub-Contractor Do; *Peter Kiewit* Redux?

An age-old problem arising from a tender on a construction project is: what does a sub-contractor do when it is the successful bidder but believes that the work is different than shown in the tender documents and the contractor says: Those are the conditions: Take 'em or leave 'em. But if you back out of your bid, I am going to sue you!
Should the sub-contractor perform the work and sue later, or leave the job? That is the issue that, once again, the Superior Court of Ontario faced in *Asco Construction ltd. v. Epoxy Solutions Inc.*

Asco was the general contractor and Epoxy was the successful bidder for the concrete floor subcontract on a theatre construction project. As part of the tender process, the

subcontractors were provided with a sketch of the floor levels. After signing a letter of intent, Epoxy had a surveyor check the elevations on the site and found that the elevations were substantially different than represented in the sketches.

Asco demanded that Epoxy proceed with the job, asserting that Epoxy should have checked the levels before bidding. Epoxy asserted that Asco was in breach of the terms of the tender. In the result, Epoxy refused to sign the formal subcontract or proceed with the job. Asco retained a new subcontractor and sued Epoxy for the higher cost of that subcontract, and Epoxy counterclaimed for damages for breach of the tender.

The trial judge quoted from the harsh and oft-cited judgment of the Supreme Court of Canada in *Peter Kiewit Sons' Co. v. Eakins Construction Ltd*, [1960] S.C.R. 361. Showing little sympathy for the predicament of the subcontractor in this situation, the Supreme Court said:

> "Nothing could be clearer. One party says that it is being told to do more than the contract calls for. The engineer insists that the work is according to contract and no more, and that what is asserted to be extra work is not extra work and will not be paid for. The main contractor tells the sub-contractor that it will have to follow the orders of the engineer and makes no promise of additional remuneration. In these circumstances the subcontractor continues with the work. It must be working under the contract. How can this contract be abrogated and another substituted in its place?... Whatever Eakins recovers in this case is under the terms of the original sub-contract and the provisions of the main contract relating to extras.
> …The work was not done as an extra and there can be no recovery for it on that basis. When this position became clear, and it became clear before any work was done, the remedy of the Eakins company was to refuse further performance except on its own interpretation of the contract and, if this performance was rejected, to elect to treat the contract as repudiated and to sue for damages."

Following that approach, the trial judge in the present case held that Epoxy had only two options.

<u>One</u> was to sign the formal contract, and renounce any claim for additional payment or damages.

<u>The other</u> was to renounce its bid and refuse to proceed with the sub-contract.

The trial judge found that the elevation conditions were materially different than represented in the invitation to tender, and therefore the contractor had repudiated Contract A arising from the tender process. The sub-contractor was entitled to accept that repudiation, terminate that contract and recover damages.

In arriving at that conclusion, the trial judge relied upon *Goldsmith & Heintzman on Canadian Building Contract (4thed)* at pages 1-60, 4-19 to 21, 5-8 and 7-4.

The decision of the subcontractor to terminate the contract was a gutsy one. After all, the subcontractor is exposing itself to a claim by the contractor for substantial damages. But the other choice was to proceed with the sub-contract under apparently changed circumstances, which might have been equally onerous. Is there no better solution?

Surely there should be a better solution than these two stark alternatives. One would think that, in the 50 years since the *Peter Kiewit* decision, Canadian construction law would have come up with one.

At least three solutions are apparent.

One solution would be to permit the subcontractor to deliver a notice stating that it was performing the work under protest, and asserting that the claim for extra payment is to be resolved later. That notice would contradict the suggestion that the subcontractor was agreeing to perform the work in accordance with the contract. In other fields of business, performance or acceptance under protest has been held effective to contradict the assertion that the party giving the notice had agreed to perform under or accept the terms of the contract.

But to date, there is no evidence that Canadian courts will give effect to such a notice in the field of construction law. Some might say that allowing the dispute to remain open under such a notice does not fit in with the need for consensus on the job site during the project. But this objection seems unreasonable since the parties would still accept that the project was proceeding under the terms of the contract, and they would only be reserving their financial position until later. Moreover, this sort of solution might encourage the parties to settle their differences immediately.

Another solution is to have the parties agree that the subcontractor will proceed with the job on the basis that its claim for further payment will be dealt with later. This solution could only be implemented with the consent of both parties and would have the same effect as performance under protest in terms of delaying the resolution of the dispute to later.

The third solution is to have the dispute resolved immediately by a process in which the parties have confidence. It may be unlikely that the parties would have confidence in the consultant chosen by the owner. But other means of immediate resolution of the dispute are certainly available. However, parties to most construction projects seem unwilling to put this sort of an interim dispute resolution regime in place during the project.

Whatever the solution, it certainly seems that the hard-ball approach of *Peter Kiewit* is out of step with the modern approach to dispute resolution and the efficient performance of building contracts.

Building Contract - Tender - Repudiation - ADR:

Asco Construction ltd. v. Epoxy Solutions Inc., 2011 ONSC 2454.

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