Canadian College of Construction Lawyers

LEGAL UPDATE

L.U. #144

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INSIDE THIS ISSUE:

CRT-Hamel c. Société de transport de Montréal, 2017 QCCS 1711

LUC #144 [2017]

Primary Topic:
XII Tendering
Jurisdiction:
Quebec
Author:
Etienne Paradis and Nadia Tomassini, Zaurrini Advocats

CRT-Hamel c. Société de transport de Montréal

Le 27 avril 2017, la Cour supérieure a rendu une décision en matière d'injonction provisoire, dans un litige concernant la validité d'un contrat public qui a été octroyé à l'un des soumissionnaires.

La demanderesse, CRT-Hamel (ci-après : "Hamel"), recherche l'émission d'une ordonnance d'injonction provisoire pour suspendre l'exécution d'un contrat accordé par la défenderesse, Société de transport de Montréal (ci-après : "STM"), à EDT GCV Civil s.e.p (ci-après : "EDT") pour les travaux d'excavation et de bétonnage relatifs au projet de construction du garage Côte-Vertu (ci-après : le "Contrat").

Hamel soutient que la soumission déposée par EDT en vue de l'obtention du Contrat ne rencontre pas les conditions impératives des documents d'appels d'offres et de la *Loi sur les contrats des organismes publics* (ci-après : "LCOP"), plus particulièrement de la nécessité d'obtenir l'autorisation préalable de l'*Autorité des Marchés Financiers* (ci-après: "AMF").

Sur le fond, les conclusions recherchées visent à faire déclarer inadmissible la soumission d'EDT, à annuler le Contrat accordé par la STM à cette dernière, à déclarer comme étant la plus basse la soumission de Hamel et ordonner à la STM d'octroyer le Contrat à Hamel.

LES PARTIES

Hamel est une société en nom collectif œuvrant principalement dans le domaine des travaux de génie civil ainsi que des travaux d'infrastructure maritime.

La STM est une personne morale de droit public constituée en vertu de la *Loi sur les sociétés de transport en commun* (L.R.Q. chapitre S-30.01). Elle est assujettie aux dispositions de la LCOP relatives à l'autorisation préalable de l'AMF, lorsqu'il est question d'octroyer un public.

La nature et structure corporative d'EDT est au cœur des débats dans cette affaire, en ce que les parties ne s'entendent pas quant à savoir si elle con-

CRT-Hamel c. Société de transport de Montréal

CRT-Hamel c. Société de transport de Montréal,
2017 QCCS 1711

LUC #144 [2017]

Primary Topic:
XII Tendering
Jurisdiction:
Quebec
Author:
Etienne Paradis and Nadia Tomassini, Zaurrini Advocats

QUEBEC

stitue une société en participation ou un consortium. Quoiqu'il en soit, EDT a été constituée dans le seul but de réaliser les travaux de construction pour le projet lié au Contrat. Ses associés sont EBC Inc., Groupe TNT inc. et Dragados Canada inc.

LE CONTEXTE

Le 1er décembre 2016, la STM entame un processus d'appel d'offre public visant l'octroi du Contrat.

Les documents d'appels d'offres, plus particulièrement les articles 9.1.3 et 9.2.3 des instructions aux soumissionnaires indiquent que l'admissibilité des soumissionnaires est assujettie à certaines conditions, incluant celle d'obtenir au préalable l'autorisation de l'AMF en vertu de la LCOP.

Le 9 mars 2017, Hamel dépose sa soumission au montant de 130 805 130$, avec l'autorisation de l'AMF conformément aux dispositions cités ci-dessus et aux documents d'appels d'offres.

Or, le 19 avril 2017, Hamel apprend que la STM accordera le Contrat à EDT, qui n'apparaît pas au registre des entreprises autorisées à conclure des contrats public, et met donc en demeure la STM de renoncer à accorder le Contrat à EDT.

Celle-ci confirme le 20 avril 2017 avoir attribué le Contrat à EDT conformément aux lois applicables, entraînant ainsi Hamel à déposer son recours le 24 avril 2017.

LE JUGEMENT

D'entrée de jeu, afin d'évaluer le bien-fondé d'une requête en injonction provisoire, le Tribunal rappelle que les critères suivants doivent être considérés:

1. L'apparence de droit
2. Le préjudice sérieux ou irréparable
3. La balance des inconvénients
4. L'urgence

Pour les raisons ci-après exposées, le Tribunal a conclu que les critères ne

CRT-Hamel c. Société de transport de Montréal

CRT-Hamel c. Société de transport de Montréal, 2017 QCCS 1711

LUC #144 [2017]

Primary Topic: XII Tendering
Jurisdiction: Quebec
Author: Etienne Paradis and Nadia Tomassini, Zaurrini Advocats

QUEBEC

sont pas remplis en l'espèce: l'injonction provisoire recherchée par Hamel doit donc être rejetée.

1) L'apparence de droit

Pour le Tribunal, tant au stade de l'ordonnance sur le fond qu'à celui de la demande en injonction provisoire, le litige tourne autour de l'interprétation des articles 21.17 et 21.18 de la LCOP, sur la question de savoir s'il y a distinction à faire entre les exigences se rapportant à une société en participation et à celles s'appliquant à un consortium.

Les articles 21.17 et 21.18 de la LCOP prévoient ce qui suit:

> ***21.17*** *Une entreprise qui souhaite conclure avec un organisme public tout contrat comportant une dépense égale ou supérieure au montant déterminé par le gouvernement doit obtenir à cet effet une autorisation de l'Autorité des marchés financiers. Ce montant peut varier selon la catégorie de contrat.*
>
> *Une entreprise qui souhaite conclure tout sous-contrat comportant une dépense égale ou supérieure à ce montant et qui est rattaché directement ou indirectement à un contrat visé au premier alinéa doit également être autorisée. De tels sous-contrats sont des sous-contrats publics.*
>
> *Aux fins du présent chapitre, le mot «entreprise» désigne une personne morale de droit privé, une société en nom collectif, en commandite ou en participation ou une personne physique qui exploite une entreprise individuelle.*
>
> ***21.18*** *L'entreprise qui conclut un contrat avec un organisme public ou qui conclut un sous-contrat public doit être autorisée à la date de la conclusion de ce contrat ou de ce sous-contrat. Dans le cas d'un consortium, chaque entreprise le composant doit, à cette date, être individuellement autorisée.*
>
> *En outre, l'entreprise qui répond à un appel d'offres en vue de la réalisation d'un contrat public ou d'un sous-contrat public doit être autorisée à la date du dépôt de sa soumission sauf si l'appel d'offres prévoit une date différente mais antérieure à la date de la conclusion du contrat.*

CRT-Hamel c. Société de transport de Montréal

CRT-Hamel c. Société de transport de Montréal,
2017 QCCS 1711

LUC #144 [2017]

Primary Topic:
XII Tendering
Jurisdiction:
Quebec
Author:
Etienne Paradis and Nadia Tomassini, Zaurrini Advocats

QUEBEC

> *Une autorisation doit être maintenue pendant toute l'exécution du contrat ou du sous-contrat.*
>
> (Soulignements ajoutés)

Hamel soutient qu'étant une société en participation, EDT devait obtenir une autorisation préalable de l'AMF selon les exigences de l'article 21.17. Or, n'ayant pas obtenue l'autorisation de l'AMF, sa soumission ne serait pas conforme aux normes impératives de la LCOP.

De leur côté, STM et EDT sont plutôt d'avis que c'est l'article 21.18 qui s'applique en l'instance. En effet, EDT étant un consortium, ce serait chacune des entreprises qui la compose qui doit être individuellement autorisée. Cela est le cas en l'espèce, et le Contrat aurait donc validement été octroyé.

Débutant son analyse et prenant acte du fait qu'il n'est nulle part défini au *Code Civil du Québec* ou dans la LCOP, le Tribunal entreprend l'exercice de définir le consortium et retient qu'il serait un contrat innommé qui naîtrait d'une nécessité occasionnelle et momentanée suite à un appel d'offres lancé par un client pour la réalisation d'un ouvrage complexe et d'une grande valeur.[1] Toujours reprenant l'opinion de Me Vincent Karim, il est fait mention par le Tribunal que le consortium n'est pas une société en participation.[2]

Rappelant l'objet de la LCOP, soit de déterminer les conditions applicables aux contrats publics qu'un organisme public peut conclure avec un contractant, le Tribunal est d'avis que l'interprétation des articles 21.17 et 21.18 n'est pas claire à savoir si, dans le cas d'une société en participation qui est aussi un consortium, les entreprises qui la composent doivent obtenir, en plus de leur autorisation individuelle, une autorisation pour la société elle-même.

Le Tribunal en vient donc à la conclusion que l'apparence de droit de Hamel n'est pas claire, mais plutôt douteuse, et rappelle que lorsqu'il s'agit de remettre en cause une décision d'un organisme public, comme l'est la STM, l'exigence de l'apparence de droit est assez rigoureuse, il faut une "solide apparence de droit", ce qui n'est pas le cas ici.

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[1] Vincent KARIM, Le consortium d'entreprises, joint venture : nature et structure juridique : rapports contractuels, partage des responsabilités, règlement des différends, 2e éd. (2016), par 51.
[2] *Id.*

CRT-Hamel c. Société de transport de Montréal

CRT-Hamel c. Société de transport de Montréal,
2017 QCCS 1711

LUC #144 [2017]

Primary Topic:
XII Tendering
Jurisdiction:
Quebec
Author:
Etienne Paradis and Nadia Tomassini, Zaurrini Advocats

QUEBEC

2) Le préjudice sérieux ou irréparable

Dans sa requête, Hamel allègue qu'advenant l'irrecevabilité de la soumission d'EDT, c'est à elle que le Contrat aurait été octroyé.
Pour le Tribunal, cela n'est pas un fait établi au stade de l'injonction provisoire, car il est toujours possible pour la STM de se prévaloir d'une clause de réserve permettant à celle-ci de n'octroyer le Contrat à aucun des soumissionnaires.

3) La balance des inconvénients

Concernant ce critère, le Tribunal en vient à la conclusion que la balance des inconvénients favorise nettement la STM.

À cet égard, pour le Tribunal, le respect des échéances est primordial eu égard au projet, considérant la déclaration sous serment de Sylvain Paquet, directeur du projet à la STM, à l'effet que l'augmentation de l'achalandage et du nombre de trains requis sur la ligne Orange du métro de Montréal crée une situation pressante pour l'aménagement d'un espace où les trains pourront être garés.

En outre, considérant l'intérêt public, le Tribunal est d'avis que le Contrat a été conclu en vue d'améliorer le système de transport en commun de Montréal et de ses environs et que les inconvénients qui résulteraient de la suspension du Contrat affecteraient grandement les utilisateurs du réseau.

4) L'urgence

Sans trop élaborer sur ce critère, le Tribunal retient que le critère d'urgence est respecté.

CONCLUSION

Finalement, le Tribunal rejette donc la demande puisque les critères pour accorder une injonction provisoire ne sont pas rencontrés. Plus particulièrement, le Tribunal est d'avis que la demanderesse Hamel ne semble pas fondée en droit dans sa position à l'effet qu'EDT devait elle-même être autorisée par l'AMF, même si chacune des entreprises qui la compose ont été individuellement autorisées.

En outre, le Tribunal est d'avis qu'Hamel n'a pas fait la preuve d'un préjudice sérieux et que la balance des inconvénients favorise la STM dans l'éventualité où le Contrat serait suspendu.

CRT-Hamel c. Société de transport de Montréal

CRT-Hamel c. Société de transport de Montréal, 2017 QCCS 1711

LUC #144 [2017]

Primary Topic: XII Tendering
Jurisdiction: Quebec
Author: Etienne Paradis and Nadia Tomassini, Zaurrini Advocats

QUEBEC

Rival bidder's injunction attempt, based on a technical argument as to whether successor bidder was qualified, fails.

On April 27, 2017, the Superior Court of Quebec was asked to issue a provisional injunction regarding a dispute between the parties concerning a public contract that was awarded.

The Applicant, CRT-Hamel ("Hamel"), sought the issuance of the injunction in order to suspend the execution of a contract awarded by the defendant, Société de Transport de Montréal ("STM"), to EDT GCV Civil s.e.p ("EDT"), for the excavation and concrete work related to the construction of the Côte-Vertu garage, which will be used to store some of the metro trains ("Contract").

Hamel submitted that EDT's tender did not meet the mandatory requirements of the *Act respecting contracting by public bodies* ("ACPB") and those stipulated in the tender documents, particularly the necessity to obtain prior authorization from the *Autorité des marches financiers* (the "Authority") to enter into a contract with a public body. Hamel sought to declare EDT's tender inadmissible, to invalidate the contract awarded by the STM to EDT, to declare Hamel to be the lowest bidder in conformity and to order the STM to award the contract to Hamel.

THE PARTIES

Hamel is a general partnership engaged primarily in the field of civil engineering works and marine infrastructure works.

The STM is a legal person constituted by virtue of the *Act respecting public authorities* (L.R.Q., chapter S-30.01) and is therefore subject to the application of the provisions of the ACPB, specifically those regarding the procurement of a prior authorization from the Authority in order to enter into a contract with a public body.

The nature and corporate structure of EDT is subject to debate. The parties were not in agreement as to whether it is an undeclared partnership or a consortium. In either case, EDT was formed for the sole purpose of carrying out the construction work set forth in the Contract and is composed of three

CRT-Hamel c. Société de transport de Montréal

CRT-Hamel c. Société de transport de Montréal,
2017 QCCS 1711

LUC #144 [2017]

Primary Topic:
XII Tendering
Jurisdiction:
Quebec
Author:
Etienne Paradis and Nadia Tomassini, Zaurrini Advocats

QUEBEC

(3) corporate partners, which are EBC Inc., Groupe TNT Inc. and Dragados Canada Inc.

THE CONTEXT

On December 1, 2016, the STM began a call for tenders for the granting of the Contract.

The tender documents, particularly sections 9.1.3 and 9.2.3, stated that the eligibility of the bidders was subject to certain conditions, including the requirement to obtain prior authorization from the Authority, as stipulated in the ACPB.

On March 9, 2017, Hamel submitted it's tender in the amount of $130,805,130 along with its authorization from the Authority, in accordance with the provisions of the ACPB hereinabove cited and the tender documents.

However, on April 19, 2017, Hamel learned that the STM would award the contract to EDT. EDT was not listed as authorized to conclude public contracts by the *Register of Enterprises*, and therefore Hamel put the STM formally on notice to relinquish granting the Contract to EDT.

On April 20, 2017, the STM confirmed that it awarded the Contract to EDT which, it maintained, was done in accordance with the applicable laws. As a result, Hamel instituted its legal proceedings on April 24, 2017.

THE RULING ON THE PROVISIONAL INJUNCTION

Firstly, in order to assess the merits of the provisional injunction, the Court was required to analyse the following criteria:

Is there a serious issue to be tried?

Will the applicant suffer irreparable harm if the injunction is not granted?

Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits?

Is there urgency?

CRT-Hamel c. Société de transport de Montréal,
2017 QCCS 1711

LUC #144 [2017]

Primary Topic:
XII Tendering
Jurisdiction:
Quebec
Author:
Etienne Paradis and Nadia Tomassini, Zaurrini Advocats

QUEBEC

CRT-Hamel c. Société de transport de Montréal

For the reasons hereinafter exposed, the Court concluded that the criteria was not met, and that, consequently, that there was no reason to order the suspension of the execution of the Contract.

1) Serious Issue to be Tried

For the Court, both at the provisional stage and on the merits, the crux of the dispute revolved around the interpretation of sections 21.17 and 21.18 of the ACPB, on whether there is a distinction to be made between the requirements applying to an undeclared partnership and to a consortium.

Sections 21.17 and 21.18 of the ACPB provided the following:

"**21.17.** *An enterprise that wishes to enter into a contract with a public body involving an expenditure equal to or greater than the amount determined by the Government must obtain an authorization for that purpose from the Autorité des marchés financiers (the Authority). The amount may vary according to the category of contract.*

An enterprise that wishes to enter into a subcontract that involves an expenditure equal to or greater than that amount and that is directly or indirectly related to a contract described in the first paragraph must also obtain such an authorization. Such subcontracts are public subcontracts.

For the purposes of this chapter, "enterprise" means a legal person established for a private interest, a general, limited or undeclared partnership or a natural person who operates a sole proprietorship.

21.18. *An enterprise that enters into a contract with a public body or that enters into a public subcontract must hold an authorization on the date the contract or subcontract is entered into. In the case of a consortium, every enterprise in the consortium must hold an authorization on that date.*

Moreover, an enterprise that responds to a call for tenders for a public contract or subcontract must hold an authorization on the date it submits its bid, unless the call for tenders specifies a different date which precedes the date the contract is entered into." (Emphasis Added)

CRT-Hamel c. Société de transport de Montréal

CRT-Hamel c. Société de transport de Montréal,
2017 QCCS 1711

LUC #144 [2017]

Primary Topic:
XII Tendering
Jurisdiction:
Quebec
Author:
Etienne Paradis and Nadia Tomassini, Zaurrini Advocats

QUEBEC

Hamel argued that as an undeclared partnership, EDT was required to obtain prior authorization from the Authority in accordance with the requirements of section 21.17. Thus, given EDT's failure to obtain said authorization, its bid was therefore not in compliance with the mandatory standards of the ACPB and the tender documents.

On the other hand, the STM and EDT submitted that it is not section 21.17 that is applicable in this instance but rather section 21.18. EDT, being a consortium, would not be required to procure an authorization from the Authority; however, each corporation composing the consortium would, as was the case at hand. Consequently, the STM and EDT submit that the Contract was validly awarded to EDT.

The Court, however, at first glance, had difficulty in reconciling the respective positions put forth by the parties. As was pointed out by the Court, the notion of a "consortium" is nowhere defined in the ACPB nor the *Civil Code of Quebec*. Therefore, the Court undertook to define the term "consortium" and it concluded that it is an innominate contract that would arise from an occasional and momentary necessity following a call to tenders issued by a client for the construction of a large scale project.[1] Reiterating the opinion of Me Vincent Karim, the Court maintained that a consortium is not an undeclared partnership.[2]

Recalling the purpose of the ACPB, which is to determine the conditions relevant to entering into public contracts with a public body, the Court determined that the interpretation of sections 21.17 and 21.18 of the ACPB are not clear on whether or not, in the case of an undeclared partnership which is also a consortium, that in addition to the individual authorization required by each of the corporate partners, an authorization for the undeclared partnership itself was also mandatory.

As a result, the Court concluded that the seriousness of Hamel's case is not clear, but rather doubtful, and recalled that when it came to calling into question a decision made by a public body, as is the case with the STM, this criteria is held to a more rigorous application and a higher standard and therefore, the Court requires a strong *prima facie* case, which was not satisfied in this instance.

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[1] Vincent KARIM, Le consortium d'entreprises, joint-venture: nature et structure juridique: rapports contractuels, partage des responsabilités, règlement des différends, 2e éd. (2016), par 51.

[2] *Id*.

CRT-Hamel c. Société de transport de Montréal

CRT-Hamel c. Société de transport de Montréal,
2017 QCCS 1711

LUC #144 [2017]

Primary Topic:
XII Tendering
Jurisdiction:
Quebec
Author:
Etienne Paradis and Nadia Tomassini, Zaurrini Advocats

QUEBEC

2) Serious and irreparable harm

In its application, Hamel submitted that, in the event that EDT's tender was to be declared inadmissible, the Contract would be awarded to it.

For the Court, this was not an established fact at the provisional injunction stage, as it is always possible for the STM to avail itself of a clause enabling it to award the Contract to none of the tenders.

Furthermore, the Court declared that should Hamel possibly suffer an injury, it would be possible to be compensated by way of the awarding of damages.

3) The Balance of Convenience

With regards to this criterion, the Court came to the conclusion that the STM will suffer the greater harm should the court grant Hamel's provisional injunction.

In the eyes of the Court, meeting the deadlines set forth for the completion of the project was paramount, especially considering the affidavit of the director of the STM, to the effect that due to the increase in ridership, the number of trains required for the operation of the orange line of the Montreal metro system created an urgent need to build an area where said trains can be parked.

Moreover, the Court was of the opinion that the Contract was concluded to improve the Montreal transit system and its surroundings and was therefore in the public interest. As such, the suspension of the Contract would deeply disadvantage and affect the users of the transit system.

4) Urgency

Without going any further, the Court maintained that there was urgency.

CONCLUSION

In conclusion, the Court rejected Hamel's application for a provisional injunction. The Court determined that Hamel did not demonstrate a strong

CRT-Hamel c. Société de transport de Montréal

CRT-Hamel c. Société de transport de Montréal,
2017 QCCS 1711

LUC #144 [2017]

Primary Topic:
XII Tendering
Jurisdiction:
Quebec
Author:
Etienne Paradis and Nadia Tomassini, Zaurrini Advocats

QUEBEC

prima facie case in support of its position that EDT itself should have obtained a prior authorization from the Authority, despite the fact that each of the corporate partners of the undeclared partnership and/or consortium had each obtained their individual authorization. Furthermore, the Court was of the opinion that Hamel had failed to demonstrate its irreparable harm and also, that it would suffer a greater harm than the STM in the event that the suspension of the Contract would not be granted.

Diplomatic Immunity Protects Saudi Cultural Center in Ottawa from Lien Claim

Construction Excedra v Kingdom of Saudi Arabia, 2017 ONSC 105

LUC #144 [2017]

Primary Topic:
IX Construction and Builders' Liens
Secondary Topic:
V Payment of Contractors and Subcontractors
Jurisdiction:
Ontario
Author:
Ken Crofoot, Goodmans LLP

ONTARIO

The Plaintiff entered into a contract with the Defendant in 2010 to construct a cultural center on lands owned by the Defendant. The work proceeded over three years and a dispute arose as to the amount owing. The Plaintiff filed a lien for $964,150 against the property and sued based on the lien claim and also on the basis of breach of contract and unjust enrichment. The Defendant defended the lien claim and the monetary claim on the basis that the property was diplomatic property and protected by diplomatic immunity and also that the monetary claim was also barred by state immunity. The Defendant brought a motion to discharge the lien claim with the issue of the propriety of the monetary claim to be dealt with at a later time.

The decision of Madam Justice Corthorn delves into the interesting world of diplomatic property and the protection afforded to it under domestic law and international treaties. In this case, the property in question had been acquired in 2005 for the purpose of a cultural center largely to serve the increasing number of students from Saudi Arabia studying in Canada. At the time of the acquisition, the Department of Foreign Affairs issued a note stating:

> *The Department of Foreign Affairs presents its compliments to the Royal Embassy of Saudi Arabia and has the honour to refer to its Note No. 502/93/81/747 dated September 16, 2005, seeking Canada's approval for the acquisition (by purchase) and development of a property located at 2101 Thurston Drive, Ottawa, Ontario, to be eventually used as the exclusive premises of the Cultural Section forming part of the Embassy. The Department, having noted that no portion of this property will be used for commercial activities, is pleased to authorize its acquisition and development, subject to applicable laws.*

Long after the lien claim was registered, two certificates were issued by the Department of Foreign Affairs in 2015 and 2016. The 2015 certificate stated:

> *In accordance with the powers which have been delegated to me by virtue of Section 11 of the Foreign Missions and International Organizations Act, I hereby certify under the authority of the Minister of Foreign Affairs that the property located at 2101 Thurston Drive, Ottawa, Ontario constitutes diplomatic premises of the Royal Embassy of Saudi Arabia in Ottawa and has privileges and immunities under this Act.*

The 2016 Certificate was similar but referenced various articles of the *Vienna Convention on Diplomatic Relations*.

Diplomatic Immunity Protects Saudi Cultural Center in Ottawa from Lien Claim

Construction Excedra v Kingdom of Saudi Arabia, 2017 ONSC 105

LUC #144 [2017]

Primary Topic:
IX Construction and Builders' Liens
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Jurisdiction:
Ontario
Author:
Ken Crofoot, Goodmans LLP

ONTARIO

Justice Corthorn reviewed the provisions of the Foreign Missions and International Organizations Act and the *Vienna Convention on Diplomatic Relations* as well as the *Vienna Convention on Consular Relations*. From these, she reached the conclusion that if the property was a diplomatic property within their provisions, it was exempt from attachment or enforcement. This fact was not disputed by the parties. What was disputed was the effect of the 2005 Note and the 2015 and 2016 Certificates. The Plaintiff argued that the certificates only governed forward from the date of their issuance and that the 2005 note did not sufficiently characterize the property as being under the statutory exemption.

The Court felt that the Certificates had to be accepted as conclusive evidence of the diplomatic status of the property and that it would make no sense if that designation process under the legislation only applied going forward. The Court also felt that the 2005 Note should be read as extending to the property the privileges and immunities accorded a diplomatic mission and that the Certificates acted to reconfirm this status throughout the elapsed time.

Madam Justice Corthorn concluded by noting that her decision was based on diplomatic immunity that protects diplomatic personnel and property from the reach of Canadian law and courts. She noted that state immunity is different concept that governs the jurisdiction of domestic courts over foreign countries. Presumably she noted this distinction because state immunity will likely arise when the monetary claim issue comes back to the Court.

The Court therefore discharged the lien claim from the property and dismissed the lien claim from the action.

This case highlights the difficulty of contracting with a foreign government, even where the work is to be done in Canada. Counsel and their clients should essentially treat the contract as if the work is being done outside the country and attempt to secure the owner's payment obligations with a bond or letter of credit. It should not be assumed that that payment will be automatically forthcoming in response to invoices as there may be a dispute or change of circumstance or control in the contracting country. Failure to adequately secure the owner's payment obligations could result in there being no way of pursuing the debt.

Town breaches contract "A" but unsuccessful bidder still loses on its claim for damages

Graillen Holdings Inc v Orangeville (Town), 2017 ONCA 520

LUC #144 [2017]

Primary Topic: XII Tendering
Jurisdiction: Ontario
Author: Andrew Salvador[1], student at law, Glaholt LLP

ONTARIO

Graillen Holdings Inc v Orangeville (Town), 2017 ONCA 520, is a recent Ontario Court of Appeal decision dealing with an unsuccessful bidder's claim for damages, as a result of the project owner's breach of its "Contract A" tendering obligations.

In the trial decision, Justice Stinson found that the appellants, Region of Huronia Environmental Services Ltd. ("Rohe") and Graillen Holdings Inc. ("Graillen"), were not entitled to damages for the owner, the Town of Orangeville's ("Town"), breach because "they had failed to demonstrate that they would have been awarded the contract by the Town". Instead, the trial judge found that it was more probable that the Town would have re-tendered the contract. The Court of Appeal accepted that, on the evidence, it was open to the trial judge to reach this conclusion.

The contract subject to these proceedings was for the collection, haulage, storage and disposal of the Town's biosolids waste. Prior to the tendering process, the appellants jointly provided these services. Rohe provided the collection, haulage, and disposal services, and Graillen provided the storage.

In 2010, the Town put these services out for tender, and entered into a conditional agreement of purchase and sale with Graillen for lagoons to store the Town's biosolids waste. The purchase and sale agreement contained a termination clause, which the Town could exercise at its sole discretion after "due diligence investigations of the purchase's financial impact and economic viability and advisability". The tendering documents had also disclosed that the Town preferred adopting a "dewatering process", which would obviate the Town's need for storage of its biosolids waste.

In response to the 2010 tendering process, the Town received bids from Rohe and Entec Waste Management ("Entec"). Entec's bid adopted the dewatering process, and was slightly lower than Rohe's bid. As a result, the Town awarded the contract to Entec and exercised its termination clause in the Graillen purchase and sale agreement.

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[1] Editor's note - It should be noted that Andrew Salvador was the winner of the first Stephen Tatrallyay prize, announced at the Quebec City conference in May of 2017.

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LUC #144 [2017]

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Jurisdiction: Ontario
Author: Andrew Salvador[1], student at law, Glaholt LLP

ONTARIO

The Court of Appeal accepted the finding of the trial judge that the Entec bid was non-compliant, without getting into the specifics. However, it elaborated on the issue of damages. The Court of Appeal cited the following facts in support of the trial judge's finding that it was more probable than not that the Town would have re-tendered the contract, and would not have awarded it to Rohe:

1. the Entec bid had disclosed to the Town that its preferred option of de-watering was viable and could be the subject of a new and different tendering process;

2. the Rohe bid, while compliant, contained issues which, in 2005, led to a re-tendering of the 2005 contract;

3. the Town had time to re-tender since the current service contract did not expire until the end of 2010 and the appellants indicated that they were agreeable to an extension beyond that date; and

it was unnecessary for the Town to specifically plead that it would have re-tendered had it known the Entec bid was non-complaint.

The Court of Appeal cited *Kamloops Office Systems Ltd. v Kamloops/ Thompson*, 2003 BCSC 619, for the authority that it would have been open to the Town to reject the bids, cancel the tendering process, and re-tender with different specifications for its legitimate needs. With respect to the agreement of purchase and sale, the Court of Appeal accepted that the Town's exercise of its termination option was made for legitimate business reasons.

Graillen Holdings Inc v Orangeville (Town) reminds us of the intricacies involved in quantifying damages flowing from a breach of "contract A". Prior to a court analyzing a plaintiff's expectation damages, the plaintiff must establish that, but for the owner's breach, it would have been awarded the contract. As illustrated in this case, this process is not as simple as showing that you are the next lowest bidder. It involves carefully analyzing the tendering documents and substantial findings of fact.

Ontario Court of Appeal highlights ongoing gatekeeper role of trial judge in relation to expert evidence

Bruff-Murphy v. Gunawardena, 2017 ONCA 502

LUC #144 [2017]

Primary Topic: I General
Jurisdiction: Ontario
Author: Lena Wang, Associate, Glaholt LLP

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In *Bruff-Murphy v. Gunawardena*, 2017 ONCA 502, the Ontario Court of Appeal emphasized the importance of the ongoing role of a trial judge as a gatekeeper, even after an expert is qualified to testify. In this case, the trial judge identified concerns that the expert witness crossed the line from an objective witness to an advocate for the defence. However, the trial judge did not exclude the opinion evidence or alert the jury about the problems with the witness's testimony. As a result, the fairness of the trial was irreparably compromised. The Court of Appeal allowed the appeal and ordered a new trial.

The appellant was hit from behind by the respondent while stopped in her car. The respondent admitted liability and the sole issue in the 23 day jury trial was what damages, if any, the appellant suffered.

The appellant alleged that as a result of the accident she suffered soft tissue damage in her neck, lower back and right shoulder. In addition, the appellant alleged that the accident left her in a chronic pain condition with attendant anxiety and depression. At trial, the appellant called a number of physicians who testified that she suffered in the manner complained of and the cause of her suffering was the motor vehicle accident. The defence called two medical experts who had been retained to conduct independent medical examinations. The medical expert in question on appeal was Dr. Monte Bail, a psychiatrist.

At trial, counsel for the appellant objected to Dr. Bail's testifying on the grounds that Dr. Bail's report was essentially an attack on the appellant's credibility and that Dr. Bail was biased. The trial judge ruled that Dr. Bail could not testify on certain sections of his report, primarily where Dr. Bail was critical of the reliability of the conclusions reached by other doctors who had examined the appellant. The trial judge also warned Dr. Bail against testifying about the appellant's credibility.

Dr. Bail testified that his methodology was not to review medical records until after the examination. In this case, Dr. Bail met with the appellant for an hour, and subsequently spent 10 to 12 hours reviewing the appellant's medical records, noting discrepancies between what she had told him and her medical records. A large portion of Dr. Bail's report consisted of these discrepancies, which he never questioned the appellant on.

In summary, Dr. Bail's evidence was that the appellant did not develop any psychiatric disorders or limitations as a result of the accident and required no psychotherapy or psychotropic medication in relation to the accident. In

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addition, Dr. Bail testified the appellant's pre-accident psychiatric profile was not exacerbated by the accident and she did not require housekeeping or attendant care as a result of any psychiatric condition.

The Verdict

After the closing submissions, the trial judge delivered his charge to the jury, which had been previously reviewed at a conference by the parties. No objection was made to the charge and no special instructions regarding Dr. Bail's testimony was requested. The trial judge reviewed Dr. Bail's testimony briefly, but did not instruct the jury regarding the duty of expert witnesses or raise any concerns about Dr. Bail's testimony.

The jury assessed general damages at $23,500 and rejected all other heads of damages claimed.

The Court of Appeal applies *White Burgess*

Although the trial judge was highly critical of Dr. Bail's evidence, he allowed Dr. Bail to testify due to the very high threshold established by the Supreme Court in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23. In *White Burgess*, released shortly before the judgment under appeal, the Supreme Court of Canada held that the basic structure for the law relating to the admissibility of expert evidence has two main components. The first component requires the court to consider the four traditional "threshold requirements" for the admissibility of evidence established by the Supreme Court of Canada in *R. v. Mohan*, [1994] 2 SCR 9, being (i) relevance, (ii) necessity in assisting the trier of fact, (iii) absence of an exclusionary rule; and (iv) the need for the expert to be properly qualified.

The second component is a "discretionary gatekeeping step" where the "the judge balances the potential risks and benefits of admitting the evidence in order to decide whether the potential benefits justify the risks". In *White Burgess*, the court held the lack of independence or impartiality on the part of an expert witness goes to the admissibility of the witness's testimony, not just to its weight.

In this case, the Court of Appeal held the trial judge erred in principle by failing to exercise this discretionary gatekeeper role. Instead, he appears to have believed that he was obliged to qualify Dr. Bail once he concluded that

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the witness met the *Mohan* threshold. On a proper balancing, the Court of Appeal concluded that the potential risks of admitting Dr. Bail's evidence far outweighed its potential benefit. In addition to the troubling methodology used by Dr. Bail, the Court held that Dr. Bail viewed his primary role as to expose inconsistencies and not to provide a truly independent assessment of the appellant's psychiatric condition. The task of comparing records to expose inconsistencies is a task for trial lawyers preparing for cross examination, and as the largest portion of Dr. Bail's report consisted of identifying such inconsistencies, the Court of Appeal found his report to offer little probative value.

The court reviewed the steps the trial judge should have taken. Most importantly, the Court cautioned that a trial judge must continue to exercise his gatekeeper function even after the qualification stage. When the eventual testimony of an expert justifies any concerns of impartiality raised during the qualification stage, the trial judge must recognize the acute risk to trial fairness. At this time, the trial judge must take action. The general residual discretion to exclude evidence whose prejudicial effect is greater than its probative value is always available to the court.

In this case, a mid-trial or final instruction that Dr. Bail's testimony would be excluded in whole or in part would have been appropriate. Alternatively, the trial judge could have asked for submissions from counsel on a mistrial, in the absence of the jury, and ruled accordingly. Although counsel for the plaintiff at trial did not seek instructions regarding Dr. Bail's evidence, the Court of Appeal held the admission of Dr. Bail's testimony resulted in a miscarriage of justice so as to warrant a new trial.

[Editor's note – This case has an obvious application to some expert reports tabled in construction cases. Sometimes an expert report essentially performs the role of a document review and assessment of the parties' positions after the fact. We should always question what the expert is bringing to the table in such an analysis that is really the function of the lawyers and the court. On the other hand, given the breadth of documentation in some construction cases, it can be argued that a proper role of the engineering expert is to assist the court by identifying what is relevant to the court's assessment and organizing the material in a meaningful way.]

Failure to Ground Lien Claim in Contract Terms Results in Reduction of Posted Security

HMI Construction Inc. v Index Energy Mills Road Corp.
2017 ONSC 4075
(Div. Ct.)

LUC #144 [2017]

Primary Topic:
IX Construction and Builders' Liens
Secondary Topic:
V Payment of Contractors and Subcontractor
Jurisdiction:
Ontario
Author:
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In this case, the Plaintiff lien claimant had filed liens totalling over $32 million. The Defendant owner brought a motion to discharge the lien or in the alternative to reduce the security paid into Court. The motions judge determined that the Plaintiff had no reasonable prospect of proving any lienable claim greater that $13,872,154.86 plus HST and accordingly, while refusing to discharge the liens entirely, he reduced the security required to be posted to vacate the liens from title to that sum.

The matter was then appealed to the Ontario Divisional Court. The Court firstly determined that notwithstanding that there are no interlocutory appeals in construction lien matters, it had jurisdiction to hear the appeal on the basis that a reduction of security was a final order in a construction lien proceeding.

The Court then considered that with respect to the reduction of security, it could find no palpable and overriding error of fact and no error in the application of the law to the facts. The Court's reasoning was based on the fact that the contractor had provided no sufficient evidence to ground its claim for all of its costs. Since the contract was a stipulated price contract, the contractor had to ground its claims for extras in the terms of the contract. The Court stated:

There is a "stipulated price contract" between Index and HMI. The price of contract work is measured by the stipulated price contract, not by HMI's costs. The proper calculation of claims for extras may be made in different ways, depending on the nature of those claims and the terms of the contract. HMI also claims that it is entitled to payment for claims such as delay costs. Entitlement and calculation of claims such as delay costs may also subject to the terms of the written contract, depending on the terms of that contract.

The Divisional Court drew an adverse inference from the fact that no Scott schedules were part of the record or the judge's reasoning (though they had been provided to him) and concluded that the claims for the total costs had not been accounted for in a proper manner. The Divisional Court went on to say that where the contract was a fixed price contract, there was no basis for a claim of total costs on a *quantum meruit* basis.

Some of the wording of this case could be argued to enunciate a much broader proposition that any lien claim for an extra has to be grounded in an approved change order based on the Divisional Court approvingly quoting the following from his decision;

With a fixed price contract, in the absence of approved change orders, a contractor cannot include in a claim for lien extra charges for the work included in the fixed price contract simply because costs were more than

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ONTARIO

usual or anticipated.... When a party signs a fixed price contract, the party assumes risks of cost changes. (para. 8)

Such a blanket proposition would be a dramatic new development in lien law and it is unlikely that the Divisional Court or the Motions Court Judge meant to disallow all liens based on unapproved extras and extras in dispute. The Motions Court judge's statement above cannot be applied outside of the context of the case which was a claim for all costs without any apparent breakdown or contractual basis. The Divisional Court's requirement, quoted above, is that claims for extras must be grounded in the provisions of the fixed price contract and cannot just be tabled as extra costs at large. This would presumably be why the Court felt that proper Scott Schedules would have supported the claimed extras, even if they were in dispute. The discussion about Scott Schedules seems to make it clear that an unapproved change could form the basis of a lien if it was based on a change of scope and billed under the terms of the contract. The Court stated:

"...HMI could have liened for disputed amounts owing pursuant to the original contract and for disputed work that was not included in the original contract (extras). Index and HMI had agreed to an approach for valuing and payment of extras that was different than for work that was included in the original scope of the fixed price contract. However, HMI's "costs plus" approach did not differentiate between the original contract work and extras."

It will be interesting to see how this case is applied in the future and whether it represents anything new in the way lien claims arising from fixed price contracts are to be evaluated.

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- Announcements
- Groups
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  - Board of Governors
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LegalUpdate122	2014	122	Full text of newsletter	I. General
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LegalUpdate120	2014	120	Full text of newsletter	I. General
LegalUpdate119	2014	119	Full text of newsletter	I. General
LegalUpdate118	2013	118	Full text of newsletter	I. General
LegalUpdate117	2013	117	Full text of newsletter	I. General
LegalUpdate116	2013	116	Full text of newsletter	I. General
LegalUpdate115	2013	115	Full text of newsletter	I. General
LegalUpdate114	2013	114	Full text of newsletter	I. General
LegalUpdate113	2013	113	Full text of newsletter	I. General
LegalUpdate112	2013	112	Full text of newsletter	I. General
LegalUpdate111	2012	111	Full text of newsletter	I. General
LegalUpdate110	2012	110	Full text of newsletter	I. General
LegalUpdate109	2012	109	Full text of newsletter	I. General
LegalUpdate108	2012	108	Full text of newsletter	I. General
LegalUpdate107	2012	107	Full text of newsletter	I. General
LegalUpdate106	2012	106	Full text of newsletter	I. General
LegalUpdate105	2012	105	Full text of newsletter	I. General
LegalUpdate104	2012	104	Full text of newsletter	I. General