Featured Article, June 2008

Nav Canada v. Greater Fredericton Airport Authority Inc., 2008 NBCA 28

The decision of the New Brunswick Court of Appeal *in Nav Canada* released on March 20, 2008 settled a $223,000 dispute between Nav Canada and GFAA over who should pay for some new navigation equipment installed in the course of a runway extension project (subject of course to potential appeal to the Supreme Court of Canada.) Nav Canada ended up with the bill. The resolution of the dispute by the Court of Appeal has provided a potentially significant "incremental" change in the common law, one which is of note for construction lawyers.

In a nutshell, it has long been held that the performance of a pre-existing obligation would not qualify as fresh or valid consideration to vary an existing contract: *Stilk v. Myrik* (1809), 2 Camp. 317, 170 E.R. 1168. The rule in *Stilk* required that fresh consideration be a condition precedent to the enforceability of any contract variation. In reasons which thoroughly analyze the common law history of the doctrine requiring fresh consideration, Robertson, J.A. held:

> [7] … I conclude that the arbitrator erred in finding that the variation was supported by fresh consideration. As a matter of law, however, I am prepared to recognize and adopt an "incremental" change in the traditional rules by holding that a variation unsupported by consideration remains enforceable provided it was not procured under economic duress.

Nav Canada and GFAA were parties to an Aviation Services Facilities Agreement ("ASF Agreement") which included terms governing responsibility for certain capital expenditures. As part of the $6,000,000 runway extension project, GFAA requested that Nav Canada relocate an instrument landing system to the runway being extended. Rather than relocate existing equipment, Nav Canada concluded that it made better economic sense to replace the navigational aid with another type labelled a distance measuring equipment or a "DME". It was GFAA's position that Nav Canada should pay the acquisition costs of $223,000 for the DME. In a letter to the Authority, Nav Canada stated that it would not provide for the purchase of the DME in its fiscal budget unless GFAA agreed to pay the acquisition cost. Justice Robertson held that the practical effect of that letter was to force GFAA to pay, in light of the fact that GFAA had already expended $6 million, and Nav Canada's refusal amounted to a threat to hold up the use of the extended runway for at least another year.

GFAA wrote to Nav Canada on February 20, 2003, indicating it would pay, but "under protest". On the basis of that letter, Nav Canada completed the work, and incurred the $223,000 expense. GFAA refused to pay.

The dispute was referred to arbitration. The arbitrator held that there was nothing in the ASF Agreement entitling Nav Canada to claim reimbursement for the costs of acquiring the DME. However, the arbitrator held that the subsequent exchange of correspondence between the parties gave rise to a separate and binding contract that was supported by consideration, and that Nav Canada was entitled to recover the

acquisition costs on that basis. The arbitrator rejected the argument that the words "under protest" were sufficient to negate contractual liability.

The decision was appealed to the Court of Queen's Bench, where it was set aside. The appeal judge found that the "under protest" letter could not be interpreted as giving rise to a separate agreement that the Airport Authority would pay for the DME, but rather that the Airport Authority would pay only if it were found to be contractually responsible under the ASF Agreement. The appeal judge held that Nav Canada was not entitled to reimbursement for the cost of the navigational aid.

The Court of Appeal characterized GFAA's "under protest" letter promising to pay for the DME as a variation to the existing contract. That is, the finding of the arbitrator that there was no obligation on GFAA to pay for the DME was correct. "In short, Nav Canada promised nothing in return for the Airport Authority's promise to pay for a navigational aid that it was not contractually bound to pay for under the ASF Agreement." (para. 19). Robertson, J.A. found that the arbitrator had erred in finding that the variation was supported by fresh consideration (and constituted therefore a binding agreement). Thus, if the traditional rule requiring consideration applied, the GFAA promise to pay was not binding. The Court of Appeal took the opportunity, however, to examine in detail whether the traditional rule requiring consideration should provide the answer, or whether there was good reason to move away from the strict application of the rule. Robertson, J.A. offered several reasons for doing so:

1. the doctrine in *Stilk v. Myrick* was an unsatisfactory way of addressing the enforceability of post-contractual modifications. "…The reality is that existing contracts are frequently varied and modified by tacit agreement in order to respond to contingencies not anticipated or identified at the time the initial contract was negotiated. As a matter of commercial efficacy, it becomes necessary at times to adjust the parties' respective contractual obligations and the law must then protect their legitimate expectations that the modifications or variations will be adhered to and regarded as enforceable.";

2. the Courts should openly recognize that while some gratuitous promises are not bargains supported by consideration, there may be other sound reasons for enforcement. "…the consideration doctrine and the doctrine of promissory estoppel work in tandem to impose an injustice on those promisees who have acted in good faith and to their detriment in relying on the enforceability of the contractual modification." (para. 29); and

3. "…the doctrine… developed centuries before the recognition of the modern and evolving doctrine of economic duress. The doctrine of consideration and the concept of bargain and exchange should not be frozen in time so as to reflect only the commercial realities of another era. If the courts are willing to formulate and adopt new contractual doctrines, they are equally capable of modifying the old. To the extent that the old doctrines interfere with the policy objectives underscoring the new, change is warranted." (para. 30).

Thus, the Court accepted that a post-contractual modification, unsupported by consideration, may be enforceable as long as it is established that the variation was not procured by economic duress. This latter condition is of particular note in the construction field, where pressure can be exerted to secure agreement to changes in many contexts. Robertson, J.A. sets out a thorough review of the developing doctrine of economic duress and held at paragraph 55 that:

> "It is a central feature of the doctrine that a plea of economic duress will fail unless is it established that the promisor (victim) had no practical alterative but to capitulate to the demands of the promisee (coercer). …If the evidence establishes that other practical alternatives were available to the victim, the plea of economic duress must fail at the threshold stage. On the other hand, if the evidence establishes a lack of practical alternatives, the law requires the analysis to continue before a finding of economic duress is warranted. In short, the absence of practical alternatives is evidence of a lack of consent, but is not conclusive of the issue. The law is still concerned with the

> possibility that the contractual variation may have been consented to for reasons that the promisor alone deems sufficient. This leads us to ask how one goes about assessing the presence or absence of "consent"

The Court found that in the circumstances of the case, GFAA had no practical alternatives. Nav Canada had exerted pressure to obtain what amounted to a contractual modification of the ASF Agreement. It was held that GFAA did not consent to the variation irrespective of the circumstances. In that regard, the Court noted both the "under protest" language and the absence of any evidence that GFAA otherwise acquiesced.