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HEINTZMAN, WEST AND GOLDSMITH ON CANADIAN BUILDING CONTRACTS

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Heintzman, West and Goldsmith on Canadian Building Contracts provides a systematic analysis of the law of contracts as it applies to building contracts in Canada. The work includes all relevant court decisions dealing with the formation, material provisions, breach and remedies for breach of construction contracts. Separate chapters deal with construction lien legislation, subcontractors, architects and engineers, bonds and arbitration.

This release includes updates to Appendix B, Legislation B13 Saskatchewan including updates to Appendix § B13:1 *The Builders' Lien Act*—amended by 2024, c. 4, s. 32(1) (Sched. 1), (2) (Sched. 2). This release also features updates to Appendix C Annotated CCDC 2 Stipulated Price Contract.

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Highlights

Annotated CCDC 2 Stipulated Price Contract—Change Orders—200 relied on GC 6.1.2, which expressly provide that LMB shall not perform a change in its work without either a change order or a change directive. No formal change directive was ever issued by 200. Since LMB alleged that it was directed by LCL and/or 200 to perform various changes, 200 argued that LMB was required to comply with GC 6.2.1 governing change orders. That clause essentially requires that, after receiving a description of the proposed change from LCL, LMB was to provide a quote for the requested change. Once prepared, and if agreed between 200 and LMB, a change order would then be issued. The Court was not convinced that anything ousted the common law on varying the change terms of a contract, particularly since GC 1.3.2 was expressly deleted from the contract. LMB's arguments for why the Court should find waiver in the circumstances were compelling. The Court concluded that the parties, by their conduct, did vary the contract such that the contractual formality of having changes approved in writing was not required. The Court noted that most changes invoiced by LMB, namely 165 of the 232 change invoices submitted, were paid in full by 200, less holdback. The Court concluded that the principals of 200, the Riedels, were wilfully blind to the fact that changes were being invoiced despite non-compliance by LMB with the change requirements of the contract, on which LMB was entitled to rely as approval of those claims for extras. The Court was satisfied that 200 waived strict compliance with the change provisions. The Riedels were aware that changes in LMB's scope of work were occurring, knew or ought to have known that those changes were being included in draw requests approved by LCL for payment, and informally communicated an intention to waive compliance with the contract by ongoing payment of extras submitted for payment without a change order, a change directive, or prior notice in writing of an intent to claim the extras: *Elembe (LMB) Mechanical Ltd. v. Two Hundred Inc.*, 2025 ONSC 1571, 2025 CarswellOnt 3107 (Ont. S.C.J.), additional reasons 2025 ONSC 4655, 2025 CarswellOnt 12941 (Ont. S.C.J.).

Annotated CCDC 2 Stipulated Price Contract—GC 8.2 Negotiation, Mediation and Arbitration—The motion judge concluded that the process outlined in the contract was followed by CKP. Marrbeck prepared and submitted applications for payment, which included work required pursuant to authorized and approved COs. The applications were promptly reviewed by CKP and thereafter, CPs were issued. CKP had the obligation to review the value of the work completed and certify whether to approve an application for payment or revise the amount claimed and issue a CP not later than ten calendar days after receiving an application (GC 5.3.1). The contract also contained a dispute resolution process. The process required the parties to turn to CKP to resolve disputes. When WCC 40 and Marrbeck did not agree on the difference in value between the work performed and the work called for by the contract when the work is defective, the dispute is referred to CKP for determination (GC 2.4.3). If the dispute is not resolved promptly, CKP "will give such instructions as in [its] opinion are necessary for the proper performance of the *Work* and to prevent delays pending settlement of the dispute" (GC 8.1.3). The contract also dealt with claims for a change in the contract price (GC 6.6). Marrbeck is required to give notice and, if there is no agreement, CKP decides on the claim within

thirty working days (GC 6.6.5). If a party does not accept the decision of CKP, the dispute is settled in accordance with the dispute resolution provisions. The dispute resolution provisions state that CKP decides all disputes at the first instance. If the dispute is not resolved, CKP provides instructions that, in its opinion, are necessary for the proper performance of the work and to prevent delays pending settlement of the dispute (GC 8.1.3). GC 8.2.2 was important, as a party is conclusively deemed to have accepted the finding of CKP under GC 2.2 and to have expressly waived and released the other party from any claims in respect of the particular matter dealt with in that finding, unless within five working days after receipt of that finding, the party sends a notice of dispute to the other party and CKP that contains particulars of the matter in dispute. Supplementary conditions amended the time frame to five working days from fifteen days. In the Court's view, the determinations made by the motion judge were made without palpable and overriding error. There was no error in concluding that CKP had authority to approve COs, that WCC 40 approved or acquiesced in the work confirmed by way of COs and that WCC 40 was liable to pay Marrbeck for the extra work required as authorized by CKP and/or Towers. The motion judge concluded that WCC 40 was aware of the changes required and either approved some of the COs through its designation of Towers as having authority on COs or acquiesced in the provision of the extra work required and did not give notice of its objection. The contract required CKP to review all claims and make determinations. The Court saw no palpable and overriding error in the motion judge's conclusion that WCC 40 stood by, approved and took the benefit of the work that was being completed and, therefore, was liable to pay for such work. Further, if WCC 40 was disputing the COs and any determinations made by CKP, it had recourse under the dispute resolution mechanism in the contract, but it did not exercise the right to do so. The contract had a mechanism to deal with claims, COs, change directives and to resolve disputes. It was CKP's duty and responsibility to make decisions and once those decisions were made, they were final unless a notice of dispute was sent. No evidence was led that notices were sent pursuant to GC 8.2.2 giving notice of dispute respecting a decision made by CKP: *Transcona Roofing Ltd v. Marrbeck Construction Ltd*, 2024 MBCA 83, 2024 CarswellMan 380 (Man. C.A.), leave to appeal refused *Winnipeg Condominium Corporation No. 40 v. Marrbeck Construction Ltd., et al.*, 2025 CarswellMan 151, 2025 CarswellMan 150 (S.C.C.).