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MANUAL OF CONSTRUCTION LAW

Howard M. Wise

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This publication provides a practical step-by-step explanatory approach through every phase of a construction project, from the preparation stages to the completion of the project. A complete set of forms and precedents for use in construction projects is also included.

Release 2025-5 keeps you current with the addition of new case digests and adds valuable case law and commentary to Chapter 1 (The Construction Team), Chapter 2 (The Tendering Process), Chapter 3 (Contracts), Chapter 4 (Dispute Resolution), and Chapter 5 (Construction Liens).

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Highlights

Recent case law introduced with this release include the following:

● **The Tendering Process—Plans and Specifications—Public Body—Specifications Requiring Bidder to Have Authorization to Bid on Call for Tender—Lowest Bidder Not Having Authorization—Legislation Mandating Authorization Where Expenditure of $5 Million or Over—Expenditure Less Than Minimum Threshold—City Able to Waive Specification—**Although the successful bidder did not have the authorization required for tendering a bid for a call for tender by a public body, and despite the tender specifications requiring such authorization, the *Loi sur l'intégrité en matière de contrats publics* [Act respecting contracting by public bodies], LQ 2012, c. 25 (LCOP), did not apply as the amount of the expenditure was below the minimum threshold of $5 million imposed by the legislature, and the city also had discretion to waive the specification. In this case, H Ltd., a construction company, submitted a bid to the city for the purpose of carrying out stabilization work. This bid was submitted as part of a call for tenders initiated by the city, which included a condition that all bidders must be authorized to contract by the Autorité des Marchés Financiers (AMP) [Financial Markets Authority] no later than the date of submission of their bid. H Ltd. had the authorization, and its bid was the second lowest. The city awarded the contract to the lowest bidder, 9267 Inc., even though 9267 Inc. did not hold the contracting authorization required by the city at the time. As the second bidder, H Ltd. argued that the contract should have been awarded to it since the successful bidder did not meet, and still did not meet this essential condition of the call for tenders. In doing so, the city allegedly deviated from the principle of fair treatment of bidders, and breached the integrity of the call for tenders process. H Ltd. was therefore claiming from the city the loss of profits that would have been generated ($450,000 subject to completion) if the contract had been duly awarded to it. H Ltd. brought a motion seeking damages from the city. The city, for its part, submitted that it was not required to ensure compliance with the condition related to the authorization to contract, which would only be applicable to a bid involving an expenditure of $5,000,000 or more according to the LCOP, and the government decree establishing this threshold. Having accepted 9267 Inc.'s offer of approximately $4,200,000, the city argued that it was not required to ensure compliance with the condition of the call for tenders relating to authorization to contract with a public body. Following a severance in the proceedings ordered by this court with the consent of the parties, the dispute currently concerned only the city's liability to H Ltd., if any. H Ltd.'s motion was dismissed.

● A reasonable reader of the tender's specifications would be justified in believing, at least at first glance, that this authorization was required without regard to the amount of expenditure for which the contract would eventually be awarded. This appeared to be a qualification condition which applied regardless of the value of the contract. However, the reader could

not conclude that the city chose to ignore the minimum threshold of $5,000,000 applicable under the decree by insisting that authorization to contract be obtained regardless of the amount of the bid. The LCOP could not apply to the bid selected by the city since the amount of this bid ($4,213,795) was below the minimum threshold imposed by the legislature. The fact that other municipal bodies had chosen to formulate specifications, requiring that authorization be obtained from the AMP for amounts below the threshold of $5,000,000, which differed from those set out in the LCOP, and the decree did not lead to the conclusion that they were entitled to do so. It must be concluded that the contradiction between clause 35 of the specifications, and the regulatory framework arising from the LCOP and the decree must be resolved in favour of the application of this regulatory framework. Keeping in mind that a client (the city) retained a certain discretion when awarding contracts following a call for tenders, this dispute could also be resolved by concluding that the city was entitled to waive the application of clause 35 of the specifications by noting that the lowest bid was for an amount below the threshold of $5,000,000. Conversely, there was no doubt that the city could not have exercised such discretion with respect to a bid of more than $5,000,000, which would necessarily have had to be rejected: *L.A. Hébert Ltée c. Ville de Lorraine*, 2023 CarswellQue 6029, 2023 QCCS 1020, 37 C.L.R. (5th) 195, [2023] J.Q. no. 2354 (C.S. Que.).

• **Contract—Interpretation of Contracts—Cost-Plus Construction Contract—Schedule Listing Budgeted Items—*Consumer Protection Act* Applying—"Consumer Agreement"—Whether Items Constituting "Estimates"—Whether Item Amounts Exceeded—**Where the owners hired the builder to construct a new home, and the contract was a cost-plus contract, it was determined that the *Consumer Protection Act, 2002, S.O. 2002, c. 30, Sched. A*,, applied to the contract, as it was a "consumer agreement", but there was a genuine issue whether the individual line items in the schedule to the contract were "estimates" and, if so, the extent of any breach of the CPA by the builder, namely whether there was any express or implied agreement to amend any of the disputed item amounts in the schedule and extent to which those amounts had actually been exceeded. In this case, the builder was hired to build a new residential house for the owners who were married spouses. A written costs-plus contract was signed between the builder and the husband. The contract was prepared by the builder. One of the schedules to the contract contained three pages of cost-coded line items, each having a task description, and a specific dollar amount listed in a column titled "Budget". The work proceeded between June 2016 and December 2018. During that time, it was undisputed that some changes and extras were agreed upon and performed. It appeared that the builder was aware that the project would be over-budget well before it advised the owners of that fact. The parties' relationship broke down. One of the many disputed issues in was the extent to which the owners were aware of and approved changes, extras, or cost increases that exceeded the budget amounts in the schedule to the contract, and the extent to which the builder was required to obtain approval to exceed those listed amounts. The owners brought a motion for partial summary judgment, seeking a determination on whether the CPA applied to their residential construction contract. If it did apply, the owners also sought an order requiring the builder to pay damages to the husband

under the CPA equal to the amounts paid in excess of the listed amounts for 49 items in the schedule to the contract. The owners' motion was granted in part.

● The court was satisfied that there was no genuine issue requiring a trial that the CPA applied to the parties' construction contract and that the contract was a "consumer agreement" as defined in the CPA. However, the court found there were genuine issues requiring a trial on whether the individual line items in the schedule to the contract were "estimates" and, if so, the extent of any breach of the CPA by the builder, namely whether there was any express or implied agreement to amend any of the disputed item amounts in the schedule, and the extent to which those amounts had actually been exceeded. This was not a case where it was in the interests of justice to decide those issues on the record before the court using the enhanced powers available to it. In addition, determining those issues was necessary to deciding the other disputed issue of whether or not to exercise its discretion under the CPA to deny repayment of any overcharge. That too was accordingly a genuine issue requiring a trial: The *Fifth Wall Corp. v. Tonelli*, 2022 CarswellOnt 16879, 2022 ONSC 6590, 37 C.L.R. (5th) 267, [2022] O.J. No. 5142 (Ont. S.C.J.).

● **Dispute Resolution—Appealing Arbitrator's Decision—Question of Law—Whether Claim Statute Barred —Arbitrator Erring in Determining When Claim Discovered—Subjective/Objective Analysis Required—**Where the arbitrator was called upon to determine whether the claim was statute barred under s. 8(d) of the *Limitation Act*, S.B.C. 2012, c. 13, based on when the subcontractor discovered its claim against the contractor, the contractor was granted leave to appeal the arbitral award as there was a question of law whether a subjective/objective analysis was required. In this case, the subcontractor entered into a subcontract with the contractor for some drilling work. Part of the subcontracted work required the subcontractor to drill into the ground. The subcontractor encountered a buried obstruction while drilling. The drilling tool implement it was using became lodged in the ground, and could not be removed. The contractor agreed to the subcontractor's change order request, ultimately directing it to abandon the tool and use an alternate tool. The subcontractor was not paid for the cost of the lost tool. On December 17, 2019, the subcontractor filed a notice of civil claim (NCC). On February 10, 2020, the contractor filed a notice of application, seeking to stay the action on the basis that the dispute was subject to an arbitration agreement. On March 9, 2020, the parties entered into a tolling agreement to suspend the limitation period until 30 days after the stay application was decided. On June 10, 2021, the application judge stayed the action. No appeal was taken from that order, and on July 8, 2021, the subcontractor filed a notice of request to arbitrate. At the arbitration, the contractor argued that the subcontractor was time-barred from seeking relief. It was the position of the contractor that the subcontractor discovered its claim on December 18, 2017, when it was directed to abandon the tool. The subcontractor submitted that it had not discovered its claim until February 8, 2019, when the contractor communicated its refusal to pay the costs of the lost tool. The arbitrator determined that the requirements in ss. 8(a)-(c) of the *Limitation Act*, S.B.C. 2012, c. 13, were established as of December 17, 2017, when the subcontractor requested the change order. However, after reviewing the language of s. 8(d), as well as jurisprudence from Ontario, the

arbitrator found that s. 8(d) was not engaged until February 8, 2019. The contractor applied for leave to appeal the arbitral award made under the *Arbitration Act*, S.B.C. 2020, c. 2. Leave to appeal was granted, limited to an appeal of the arbitrator's interpretation of s. 8(d) of *Limitation Act.*

● The contractor established the existence of a question of law. The question of law was whether s. 8(d) of the *Limitation Act* required a subjective/objective analysis for discoverability. The leave to appeal ought to be granted on the basis that the point of law having been raised, the proper interpretation of s. 8 of the *Limitation Act*, was of general or public importance. There was no need to address the appellants' arguments with respect to s. 59(4)(a) or s. 59(4)(b) of the *Arbitration Act*. There was no dispute the current *Arbitration Act* applied, as the notice of request to arbitrate had been filed in July 2021, but s. 12 of the *Arbitration Act* could not retroactively apply to toll the limitation period from the filing of the NCC in December 2019. The dispute turned on the proper interpretation of s. 8(d) of the *Limitation Act:* The *Graham-Aecon Joint Venture, Graham Infrastructure LP, v. Malcolm Drilling Company Inc.*, 2022 CarswellBC 2569, 2022 BCCA 319, 37 C.L.R. (5th) 182, 84 B.C.L.R. (6th) 290, [2022] B.C.J. No. 1747 (B.C. C.A.).

● **Construction Liens—Interlocutory Motions—Summary Judgment—Builders' Lien by Subcontractor—Conflicting Evidence Whether Subcontractor Paid—Summary Judgment Set Aside—Trial Necessary to Resolve Factual Dispute—**Where the subcontractor obtained a summary judgment confirming entitlement to the amount of its builders' lien, but there was conflicting evidence whether the subcontractor was paid, the summary judgment was set aside as a trial was necessary. In this case, the defendant owner owned a multi-use commercial and residential development. The owner and associated QM companied engaged G Inc. as its contractor for the supply and installation of a glazed aluminum curtain wall and panels for the construction project. The contractor entered into an installation subcontract with the plaintiff subcontractor for a portion of the work under the prime contract. During the course of the project, disputes arose between the owner and the contractor with the result that in February 2022 the contractor terminated the prime contract. This had the effect of terminating the subcontract as well. The subcontractor's work under the subcontract was incomplete. On April 13, 2022, the subcontractor registered a builders' lien under the *Builders' Lien Act*, R.S.N.S. 1989, c. 277 ("the *Act*") against the project. The amount claimed was $848,583. The subcontractor then brought an action seeking a declaration that it was entitled to the builders' lien against the owner's lands in amount of $848,583 plus interest and costs. The owner filed a defence on June 27, 2022 disputing the builders' lien claim and cross-claiming against the contractor for any amounts it was required to pay the subcontractor. The defence alleged there were deficiencies in the work of the contractor and the subcontractor. The lien was vacated by a consent order between the subcontractor and the owner after the owner posted security pursuant to s. 29(4) of the *Builders' Lien Act.*

● The subcontractor brought a motion for summary judgment against the owner with respect to its claim for the amount owed to it pursuant to the builders' lien holdback retained by the owner. The holdback was approximately $2.2 million. The subcontractor's motion was granted. The

hearing judge found there was no genuine issue of material fact concerning the creation and perfection of the statutory lien. The hearing judge found 93.88 percent of the work under the fixed price portion of the subcontract had been completed. The hearing judge found there were no issues of law raised by the owner that required a determination, including no payment of the holdback mandated by the Act; the application of the trust provisions, the contractual breaches by the contractor and the subcontractor; the deficiencies of work; that the lien was already discharged; and that the agreement between the contractor and the subcontractor on the amount owing under the subcontract was a material change in the litigation. Summary judgment was granted in favour of the subcontractor in the amount of $815,206. The owner and its associated QM companies appealed, and their appeal was allowed.

● The hearing judge erred in granting summary judgment. The hearing judge erred in concluding there was no genuine issue of material fact regarding the amount due to the subcontractor. The conflicting evidence between the contractor's statutory declarations that all subcontractors had been paid, and the affidavit of the contractor's officer, which indicated the sum of $815,206 was owing to the plaintiff subcontractor. The hearing judge set out the conflicting evidence and then concluded, without explanation, that there was no factual issue in dispute with respect to amount due. Moreover, the agreement between the subcontractor and the contractor did not bind the owner for purposes of quantifying the builders' lien claim against the holdback. The court found that the hearing judge should have considered the conflicting evidence and concluded that a trial was necessary to resolve the factual dispute*: Queen's Marque Developments Ltd. v. Guildfords Inc.,* 2025 CarswellNS 102, 2025 NSCA 7 (N.S. C.A.), reversing *Guildfords Inc. v. Gamma Windows and Walls International Inc.* (2024), 2024 CarswellNS 406, 2024 NSSC 158 (N.S. S.C.).