

Case Study: North Perimeter v. 6625844 Manitoba Ltd. et al., 2021 MBQB 94

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The dispute in this case centred on a common theme in the construction industry – the parties’ failure to document key terms in writing. As the parties were not able to resolve the many issues between them, a trial was held before Martin J. of the Court of Queen’s Bench of Manitoba. It is important to note that the party who was largely successful in this case had documentary evidence to support its position.



Facts

North Perimeter Construction Limited (“NPCL”) and Russ Paterson (“Russ”), the owner of various companies associated with Northern Meat Services, had a long, mutually beneficial commercial relationship. Russ wanted to build a cold storage facility that would be owned by the defendant numbered company. This company was owned by the holding companies of Russ’ two sons. Despite this arrangement, at all times, Russ was the mind and hands-on driver of every part of the project.

The parties did not formally enter into an executed contract for the project, as the parties had historically worked on “handshake agreements”. NPCL’s scope of work was set out in a written document, and contained a contract price and completion date. This scope changed over time with a number of items added and a few removed, all instructed by way of Russ’ oral instruction and evidenced by North Perimeter’s written change orders. As well, Russ hired and personally directed a number of the main subcontractors on the project.

As the project began, the former principal of NPCL was more or less not involved, but rather his then son-in-law was in charge. From the outset of the project, there was a wide gulf in expectations.

As the project progressed, issues arose between the parties. By the end of the project, the relationship between the parties had completely broken down. Russ blamed NPCL for delays, which NPCL said were caused by Russ’ changes and poor management of the project. Russ refused to pay NPCL’s final accounts, and removed NPCL from the work site. NPCL claimed for the outstanding accounts, and Russ counterclaimed, mainly for alleged deficiencies and loss of revenue.

Issues

Martin J. considered a number of issues in coming to his decision, which included:

- Who was the general contractor;
- Who was responsible for delay;
- The circumstances regarding contract termination;
- Who was responsible for the cost of deficiencies;
- Whether the owner suffered damages;
- Interest on the unpaid invoices; and
- Breaches of the trust provisions of *The Builders' Liens Act*.

Decision

As there was no written agreement, Martin J. looked at the conduct of the parties and determined that, if anyone was the general contractor, it was Russ. Russ gave directions to the various contractors and was generally in charge of the key aspects of the project. Therefore, NPCL was not responsible for the failings of the other contractors. This determination made an impact on findings related to the owner's claim for delay.

On the facts of the case, Martin J. found that the delay of the project was attributable to Russ, not NPCL. In making this finding, Martin J. held that NPCL did not breach its contract with the owner, and that Russ was not entitled to terminate NPCL from the work site.

Aside from one small electrical deficiency, Martin J. held that there was "no cogent evidentiary foundation to prove any essential elements or aspects of th[e] counterclaim". The owner adduced no independent evidence of what the alleged deficiencies might cost, but rather relied on Russ' estimate of damages. As such, Martin J. refused to award damages for anything other than the electrical deficiency.

Martin J. held that as NPCL had not breached the agreement between the parties, it was entitled to the full amount of its unpaid invoices, less the electrical deficiency.

On the question of interest, NPCL argued that it was entitled to 12% per annum, the amount set out in one of the unsigned construction contracts. In the alternative, NPCL argued that it was entitled to 1.5% per month, the amount set out on the numerous paid invoices. In paying the invoices, Russ did not raise an issue regarding the identified interest. Martin J. noted that he would have found interest to be an implied term of the contract and the interest rate would have been the one in the invoices. Critically, however, these invoices did not expressly set out the yearly rate, or interest percentage. In such circumstances, section 4 of the *Interest Act*, R.S.C. 1985, c. I-15 applies and the interest shall not exceed 5% per annum. Accordingly, Martin J. awarded interest of 5% per annum on the net unpaid invoices.

The last issue considered by Martin J. was NPCL's claim that Russ' sons (directors of the numbered company which owned the building) had committed breaches of *The Builders'*

Liens Act (the “Act”). Martin J. essentially found that the conduct of the numbered company amounted to breaches of the trust and holdback provisions of the Act, but failed to find the individual directors personally liable for the judgment as argued by NPCL. This decision was based on the financial strength of Russ’ interrelated companies and their ability to pay the judgment. Had the judgment amount not been paid into the NPCL’s lawyer trust account within 14 days of the judgment, the judgment would have been entered personally against the directors.

In the result, NPCL was awarded very nearly the full amount of its claim, plus an award of interest and costs. Importantly, NPCL had been diligent in providing Russ with documentation throughout, including its scope of work, detailed invoices and change orders, which ultimately supported its position at trial. On the other hand, the owner was largely unsuccessful in proving its counterclaim for deficiencies and delay, which the court found to be unquantified and unsupported by documentary evidence.

Key Takeaways

This case contains a number of key takeaways for contractors and owners in Manitoba. First, written contracts are important to define essential terms such as the roles of the parties, the completion date of the project, and the rights and remedies available to each party on the other party’s default. Secondly, agreement on the interest payable in the event that invoices are unpaid is an essential term of the contract, and failing such agreement, indication of an annual interest rate should be included in invoices to avoid operation of the *Interest Act*.

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