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## 2021 — Release 1

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Howard M. Wise

# Manual of Construction Law

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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 2021 - 1 keeps you current with the addition of new case digests and adds valuable case law and commentary to Chapter 2 (The Tendering Process), Chapter 3 (Contracts), Chapter 4 (Dispute Resolution), Chapter 5 (Construction Liens), and Chapter 6 (Bonds).

**Case Law Highlights:**

Recent case law introduced with this release include the following:

**The Tendering Process — Action for Damages — Barred from Bidding on Future Projects — Loss of Future Profits — Speculative —** Where the mining company sued the demolition contractor for breach of contract, and the contractor counterclaimed for damages for*, inter alia*, lost future profits as it was barred from

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bidding on six expected further projects, this part of the counterclaim was struck out as disclosing no cause of action. In this claim, the mining company hired the contractor to demolish a building at its mining facility in Sudbury. The parties signed a contract on March 23, 2018, which defined the scope of the work that the contractor was to perform. The contractor started work on the project in April 2018. In May 2020, the company terminated the contract for cause. The company alleged the contractor repeatedly violated the safety requirements for the project. The company commenced an action in July 2020 for breach of contract. The contractor denied that the company had grounds to terminate the contract, and claimed that the company terminated the contract in bad faith. The contractor delivered a statement of defence and counterclaim. In its counterclaim, the contractor sought $2.413 million for work performed under the contract for which it has not been paid. In addition, the contractor sought more than $6 million damages for lost profits in relation to six demolition projects that the contractor was expected to tender in the future. The contractor pleaded that those six projects had an estimated value of $212,400,000. The contractor pleaded that it could have bid on those six contracts if it was not barred by the company from doing so. The contractor pleaded that it had a positive working relationship with the company for 20 years until the current project. The contractor also pleaded that it had a success rate of 14.64 per cent when bidding on the company's projects over that 20-year relationship, and had earned, on average, a profit of 20 per cent on the company's projects. The contractor, therefore, pleaded that it was entitled to damages in the amount of $6,219,072 in lost future profits, which represented 20 per cent of 14.6 per cent of the total estimated value of the six identified projects. The company brought a motion to strike the portion of the contractor's counterclaim for lost future profits on the basis that it did not disclose a cause of action. The company's motion was granted.

This part of the counterclaim was entirely speculative. The contractor could not prove that the company would tender any of the identified projects. It was entirely within the company's control whether it proceeded with the six identified demolition projects at all. Even if it did proceed with those projects, it was also entirely within the company's control whether it tendered those projects for bids. The contractor's counsel acknowledged during the hearing that if the company decided not to pursue the identified projects or not to tender those projects for bids, it would have no claim. In essence, the contractor was seeking damages that might never materialize. Alternatively, even if the contractor could prove the company would tender the six identified projects, and that the contractor was barred from bidding on those projects, the contractor could not prove that any profits it might "lose" were the result of a breach of the current contract. That contract did not contain a renewal clause, nor did it give the contractor any rights to bid on or perform work for the company in the future. Whether the company had a broader duty to act in good faith in terminating the current contract, and whether it breached that duty were issues to be decided at trial. Even if the parties to a contract have a longstanding relationship, the duty of good faith did not require parties to negotiate

new contracts when the contract between them did not contain an automatic renewal provision; *Best Lifestyle v. Country of Simcoe*, 2019 ONSC 6619 at paras. 80 — 84: *Vale Canada Ltd. v. Priestly Demolition Inc*. 2020 CarswellOnt 16985, 2020 ONSC 6763 (Ont. S.C.J.).

**Contracts —Breach of Contract — Contractor — Delay — Liquidated Damages — Request for Additional Work - Responsibility for Delay on Main Contract Not Affected —** Where the contractor was the successful bidder on a highway project, and the contract with the MTO contained a liquidated damages clause for delay caused by the contractor, the fact that the MTO made a request for additional line painting work did not affect the contractor's responsibility for delay on the main contract. In this case, the contractor was a full-service general contractor. In January 2016, the contractor successfully bid on a contract tender published by the Ontario Ministry of Transportation (MTO). The contractor agreed to perform road resurfacing work on a highway, including drainage, paving, grading, electrical work and the installation of an automated traffic-management system (ATMS). The total contract price was $7,862,000, and the scheduled completion date was September 30, 2016. If the work was not completed on time, the contract allowed the MTO to charge $5,000 in liquidated damages for each day beyond September 30, 2016. On September 29, 2016, MTO requested the contractor perform additional work in form of line painting. On October 24, 2016, the MTO cancelled the line painting work. The contractor submitted a request for an extension of time that was denied by the MTO. As of September 30, 2016, the contractor had not installed the permanent ATMS system. The MTO charged liquidated damages in the amount of $370,000. The parties subsequently agreed line painting work, did to reduce the claim for liquidated damages to the amount of $70,000. The contractor brought an application for payment of $71,760 for breach of contract, and a declaration that MTO's claim for liquidated damages was unenforceable. The contractor's application was dismissed.

The issue of the additional work was entirely irrelevant to the question of delay responsibility. The additional work had no impact on the ATMS work, and therefore MTO did not cause a concurrent delay. The additional work had no bearing on the contract time calculations. The best evidence was that the contractor alone caused the delay in the completion of the ATMS work. There was no evidence that the MTO was concurrently responsible for this delay. The contract clearly and indisputably entitled the MTO to charge liquidated damages: *Fermar Paving Limited v. MTO*, 2020 ONSC 2603, 2020 CarswellOnt 5802 (Ont. S.C.J.).

**Dispute Resolution — Appeal From Arbitrator's Decision — Interpretation of Contract in Context of Factual Matrix — Mixed Question of Fact and Law — Leave to Appeal Denied —** Where the arbitrator awarded the subcontractor the profit associated with its increased costs on a construction project, and interest on this amount, and the general contractor sought leave to appeal those aspects of the award, the contractor's application was dismissed as interpreting the contractual

provisions in the context of the factual matrix gave rise to questions of mixed fact and law, not of law alone. In this case, the general contractor hired the subcontractor to provide services relating to the mechanical, electrical, plumbing and fire protection part of the construction work required in the construction of a hospital. The subcontractor incurred significantly greater expenses than expected, but the contractor refused to reimburse the subcontractor for the increased cost of doing the work. The subcontractor pursued a contractual resolution of the dispute through arbitration. The arbitrator awarded the subcontractor the sum of $11,996,964 for the increased cost of doing the work, $1,439,872 for the profit associated with the increased cost, and interest on both amounts. The contractor took issue with the profit award, and the start dates for the interest. The contractor sought leave to appeal those aspects of the arbitrator's award. The contractor's application was dismissed.

Where the parties were not conducting themselves in accordance with the contractual terms, the interpretation of the contract required a consideration of the circumstances, namely a consideration of the factual matrix. Neither issue raised a question of law as required by s. 45(2) of the *Arbitration Act, 1992*, S.S. 1992, c. A-24.1. In considering the interest question, the arbitrator referred to the appropriate contract provisions. He did not ignore them, and did not apply the wrong contractual terms. Rather, he interpreted and applied those terms, in the context of the factual matrix, as was necessary. Thus, the interest question was a question of mixed fact and law, not a question of law alone. Similarly, the profit award question required interpreting the contracts in the context of the factual matrix. Therefore, the profit award question was a question of mixed fact and law, not of law alone: *Graham Design Builders LP v. Black & McDonald Ltd.* 2019 CarswellSask 339, 2019 SKQB 161, 1 C.L.R. (5th) 108, [2019] S.J. No. 254 (Sask. Q.B.).

**Construction Lien — Reference to Master — Motion for Summary Judgment — Master Having "Powers of a Judge" — Master to Release Report and Not Judgment —** Where no judgment or reference report was issued prior to the motion before the master to enforce a settlement agreement or for summary judgment, the case was still before the master on a construction lien reference at the time of the motion, and in this situation, the master had "all the powers of a judge" to hear and decide the case. However, the master's decision was be released in a report, rather than a judgment. In this case, the moving party in a lien action sought to enforce a settlement made between itself and the.respondent party. The respondent claimed it had substantially complied with the settlement terms. The respondent made payments in installments, but did not complete the payments. The moving party moved to find that respondent was non-compliant, and to compel full payment. The respondent had not honoured the terms of the settlement. The moving party did not take advantage of respondent. Nothing prevented full payment by the respondent from taking place. The moving party's motion was granted; judgment was granted for $611,061 less payments of $325,000 already made. The respondent appealed from the judgment for the net total of $286,061, granted on the motion whether

characterized as a motion to enforce the settlement under R.49 or for summary judgment under R.20. The appeal was allowed as the master granted a judgment, rather than issuing a report.

The master had jurisdiction to hear the motion. An order for a construction lien reference was previously made in this case in 2013. No judgment or reference report was issued prior to the motion before the master, so the case was still before the master on a construction lien reference at the time of the motion. In this situation, the master had "all the powers of a judge" to hear and decide the case: *Construction Lien Act*, RSO 1990, c. C.30, s.58.This included the power to decide a motion under R.49 or under R.20. However, in this instance, there was a problem. As a construction lien reference master, the master was required to embody his findings in a report, which would then be subject to confirmation in the Superior Court of Justice pursuant to the *Rules of Civil Procedure*. The distinction between a judgment and a report mattered: it determined the routes by which the master's decision might be reviewed and appealed. In particular, once the master issues his report, it was for an objecting party to move before a single judge of the Superior Court to oppose confirmation of the master's report. The judge's decision on the motion to oppose confirmation was then subject to appeal to a panel of the Divisional Court. An appeal from a final order granted by the master was to a single judge of the Divisional Court, and thereafter to the Court of Appeal, with leave. In this case, the master erred in granting a judgment, rather than issuing a report. This error materially affected the respondent's review and appeal rights, and the judgment could not be allowed to stand for that reason. The case was remitted back to the master to issue a report in accordance with his findings on the motion. The parties were directed to prepare a draft report for the master's consideration. As the respondent would be moving to oppose confirmation of the master's report, it should do so promptly after release of the master's report: *Prasher Steel Ltd. v. Maystar General Contractors Ltd.* 2020 CarswellOnt 15646, 2020 ONSC 6598 (Ont. Div. Ct.), reversed, 2019 CarswellOnt 18748, 2019 ONSC 6590, 96 C.L.R. (4th) 193 (Ont. Master),