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Thomas Heintzman is counsel at McCarthy Tétrault in Toronto. His practice specializes in litigation, arbitration and mediation relating to corporate disputes, shareholder's rights, securities law, broadcasting/telecommunications and class actions.

He has been counsel in many important actions, arbitrations, and appeals before all levels of courts in many Canadian provinces as well as the Supreme Court of Canada.

Thomas Heintzman is the author of *Goldsmith & Heintzman on Canadian Building Contracts*, 4th Edition which provides an analysis of the law of contracts as it applies to building contracts in Canada.

Goldsmith & Heintzman on Canadian Building Contracts has been cited in over 183 judicial decisions including the two leading Supreme Court of Canada decisions on the law of tendering:

M.J.B. Enterprises Ltd. v. Defence Construction (1951), [1999] 1 S.C.R. 619 and

Double N Earthmovers Ltd. v. Edmonton (City), 2007 SCC3, [2007] 1 S.C.R. 116-2007-01-25 Supreme Court of Canada

Restitutionary Payment May Be Ordered For An “Ineffective” Construction Contract

Owners and contractors should always avoid undertaking a project without a contract. But if they do build the project without a contract, the British Columbia Court of Appeal has recently recognized in *Infinity Steel Inc. v. B & C Steel Erectors Inc.* that the party which received the benefit of the work or supplies must pay a fair amount to the party which provided them.

This may not be a novel proposition. But what is novel is that the courts now recognize this situation as an “**ineffective transaction**” which falls within a discrete category of **unjust enrichment**.

Background Information:

Infinity made a tender bid to the general contractor, Bird Construction, for the supply and erection of the structural steel for the Search and Rescue Hanger at the Canadian Forces Base in Comox, British Columbia. Infinity entered into discussions with B & C for that company to erect the steel. The companies exchanged written documents which they thought constituted the contract, but each of them had a different view of the price and other elements of the contract. When the job was over 90% finished, Infinity terminated its relationship with B & C and had another erector finish the work. Litigation ensued and it was Infinity’s position that, in determining the fair amount to be paid to B & C, the amount which it paid the replacement erector had to be taken into account.

The trial judge found that the parties had not agreed on the fundamental elements of the contract. Accordingly, he was unable to order a contractual remedy, either by way of damages for breach of contract if a price for the contract had been agreed upon, or by way of contractual **quantum meruit** if no price had been agreed upon. The judge held that a remedy in restitution was available in these circumstances and awarded compensation to B & C. Infinity appealed arguing that the trial judge had not taken into consideration the amount that it had paid to complete the erection after B & C was no longer on the job.

There are two interesting aspects of the decision of the B.C. Court of Appeal which largely upheld the trial judge’s decision.

First, the Court of Appeal held that this situation constituted an “ineffective transaction” which, under a recent decision of the Supreme Court of Canada, was a distinct ground for restitutionary compensation. It said: “[I]t is now firmly established that a claim alleging unjust retention of a benefit conferred in an ineffective transaction is a discrete category of the doctrine of unjust enrichment, which may attract a personal monetary remedy (**Kerr v. Baranow**, 2011 SCC 10 (CanLII), 2011 SCC 10 at para. 31) and that remedy must match, as best it can, the extent of the enrichment unjustly retained by the defendant (at para. 73)”.

Kerr v. Baranow was a family law case, not a construction law case. That case was not about an ineffective contract and the statement at para 31 in the Supreme Court’s judgment had nothing to do with the merits of that case. The Supreme Court simply said, in a part of a sentence dealing generally with the circumstances in which a remedy in unjust enrichment may be ordered, that such a remedy could be awarded in a case of an “ineffective contract”.

Moreover, it is not clear from the decision in *Kerr v. Baranow* what amounts to an “ineffective transaction.” One might have thought that the Supreme Court was thinking of dealings which are otherwise contracts but ineffective as contracts for legal reasons, such as the *Statute of Frauds* or lack of consideration. When the parties simply fail to negotiate a contract, as

happened in *Infinity Steel v. B & C Steel Erectors*, is this an “ineffective” transaction? The B.C. Court of Appeal has held that it is.

While this result may come out of left field so far as construction law is concerned, it is a good one for that branch of the law. It recognizes that an “ineffective transaction” constitutes a comprehensive classification to which the principles of unjust enrichment may be applied. It should not matter whether the contract failed for legal or factual reasons. If one party received a benefit, then the other party should pay for it. Once the benefit is accepted, then the only question is the amount that the benefitted party should pay, and if the parties cannot agree on the amount, then the court will have to fix it. For those propositions, we can now refer to this decision as authority.

The second interesting aspect of the Court of Appeal’s decision is its completely open-ended approach to assessing the appropriate compensation. Again, taking a leaf from the decision in *Kerr v. Baranow*, the Court rejected any formulistic approach. The Court held that, once a trial judge rejects a contractual remedy and finds unjust enrichment, the trial judge’s task is “to determine what measure is appropriate to remedy the unjust enrichment in all the circumstances of the case. in the light of *Kerr*, the appropriate measure for restitutionary *quantum meruit* is to be selected to meet the circumstances of the particular case. Important factors will include but not be limited to, the course of dealings between the parties, any estimates obtained, the costs incurred, the scope of work, the actual work done, the market value of the services provided.”

These are sweeping considerations which will give the Court an unfettered power to award the amount of compensation that is fair in all the circumstances.

So far as the amount to which B & C was entitled for the work it had done, the Court of Appeal held that the trial judge had taken into account the cost of completion by the replacement contractor, and apart from a slight adjustment it upheld the award of the trial judge.

In the result, this decision of the British Columbia Court of Appeal provides a comprehensive basis for a court in Canada to assess equitable compensation if a construction contract is ineffective for any reason.

Construction law - Restitution – *Quantum Meruit* - Ineffective Transaction:

***Infinity Steel Inc. v. B & C Steel Erectors Inc.*, 2011 BCCA 215**

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