LAW REFORM COMMISSION OF BRITISH COLUMBIA

REPORT ON
PERFORMANCE UNDER PROTEST

LRC 81

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The Law Reform Commission of British Columbia was established by the *Law Reform Commission Act* in 1969 and began functioning in 1970.

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TO THE HONOURABLE BRIAN R.D. SMITH, Q.C.
ATTORNEY GENERAL OF THE PROVINCE OF BRITISH COLUMBIA

The Law Reform Commission of British Columbia has the honour to present the following:

REPORT ON
PERFORMANCE UNDER PROTEST

Where the parties to a contract differ as to the nature or extent of the obligations which it imposes on one of the parties, very often the most beneficial course for all concerned is for that party to perform the contract in accordance with the requirements of the other party but to do so "under protest" purporting to reserve the right to assert a claim for additional compensation at a later date. There is some question, however, how far this course of action is open. The source of this uncertainty is the much criticized decision of the Supreme Court of Canada in *Peter Kiewit Sons Co. of Canada* v. *Eakins Construction Ltd.*, made in 1960.

Even after the passage of 25 years, no consensus has emerged as to the full implications of this case, but on at least one widely held view, it stands for the proposition that performance, even though it is purported to be carried out under protest, constitutes a waiver of any claim the performer might have for additional compensation. In the construction industry, the context in which the *Kiewit* case arose, the uncertainty created is regarded as a particularly serious problem, although the decision may have implications throughout the whole of contract law.

In this Report, the Commission makes recommendations to clarify the right of a party to perform under protest which would provide a statutory right to claim compensation, on a basis akin to *quantum meruit*, in those circumstances.

CHAPTER I SETTING THE STAGE

A. Introduction

Disputes frequently arise concerning what constitutes proper performance of a contract. In the vast majority of cases, the machinery of the law permits these disputes to be adjudicated on their merits so that a binding determination of each party's obligations may be obtained.

For example, a person ("A") may enter into a contract with another person ("B") under which B is to perform services for A for a specified price. After services of some kind have been performed, a dispute arises concerning whether the services were those called for by the contract, each party adopting a differing interpretation of it.

The way in which this dispute will come before an adjudicator such as a cour1 will depend on the state of accounts between the parties.

(a) If B has not been paid for the services, B would commence an action for the payment of the contract price and A would raise, as a defence, B's alleged failure to perform the contract.

or

(b) If B has been paid, A would commence an action against B for damages for breach of contract. By way of defence, B would plead that no breach had occurred and that the contract was properly performed.

Either way the relevant issues are placed before the court: what obligations did the terms of the contract impose on B, and has B's performance satisfied them?

If the differences in the interpretation of the contract arise before the contract is fully performed, the situation is somewhat more complex. For example, A and B might enter into the contract described above and almost immediately a dispute respecting the meaning of its terms arises.

A insists that the contract calls for one course of action while B believes it calls for another. What are B's options in this case?

(1) B might acquiesce in A's interpretation of the contract and perform in accordance with it.

(2) B might perform the contract in accordance with his own interpretation of it and sue for the contract price.

(3) B might tender performance, that is, offer to perform on B's interpretation of the contract, treat A's refusal to accept this offer as a breach of the contract and sue for damages for the breach.

(4) B might perform the contract in accordance with A's interpretation but do so "under protest" whilst reserving a right to claim additional compensation for any services rendered beyond what the contract required of him.

It is useful to consider these options individually.

B. The Options

1. Acquiescence

There are a number of reasons why B might acquiesce in A's interpretation of the contract. First, that course of action may be neutral in its financial consequences to B. If it costs B no more to perform in a way which satisfies A, he may be quite willing to do so. Even if it does cost B something, the long term value of amicable relations with A might outweigh a short term loss. If the industry for which B usually performs services is a small one, he might sustain what he believes to be an unjustified loss simply to avoid a reputation for being "difficult" even though the experience may induce him to eschew any future dealings with A. If B adopts this course of action, he runs no risk of attracting liability for a breach of his contract with A.

2. Unilateral Performance

B might also choose to perform the contract in accordance with his own interpretation of it and sue for the money payable under the contract for the work. If B's interpretation of the contract is held to be correct, B will be paid. If B is wrong, however, the consequences may be drastic.

First, he will not be paid and the time and materials devoted to his purported performance will be "thrown away" to his loss. He will also find himself liable to A for breach of contract from which three kinds of damages may flow.

1. If A has to engage another person (say C) to perform the work B should have done, B will be liable for any increased cost that A must pay to C for the proper performance of the contract.

2. If it is necessary to "undo" what B has done, this may lead to costs which are chargeable to B.

3. Finally, the delay arising from B's failure to perform properly may give rise to consequential losses for which A might recover compensation from B.

These damages could be very great in the context of a construction project where a failure to perform a particular subcontract on time might bring the whole project to a standstill.

It is important to note that B will be able to unilaterally perform the contract according to his own interpretation only where that performance does not require A's cooperation. An example is a contract for B to advertise A's goods in B's newspaper. Adding some details to the example may clarify this concern. B's contract with A is to construct a load bearing concrete wall. B interprets the contract to call for a 6 inch wall while A's interpretation is that the wall is to be 12 inches thick. If B proceeds to build the wall 6 inches thick, A will be faced not only with paying B the contract price (assuming B is correct) but, if the 6 inch wall is useless for A's purposes, paying for the demolition of the 6 inch wall and procuring the construction of a replacement 12 inch wall. The labour and materials that went into the construction and demolition of the 6 inch wall are thrown away. They are an irrecoverable economic loss to society which would not have occurred if B had tendered performance and sued for his loss of profit, although B's net position would be the same.

Although in this example the waste arises through differing interpretations of the contract between A and B, the same issue of principle arises where A simply changes his mind and repudiates his contract with B. It is in the latter context that the issue has been most often discussed. The leading case on repudiation is the decision of the House of Lords in *White & Carter (Councils) Ltd*. v. *McGregor*, [1962] A.C. 413. This case was recently considered by a law reform body in New Zealand. It recommended that no change in the law be made. *See Report of the Contracts and Commercial Law Reform Committee on the rule in White & Carter (Councils)* v. *McGregor*, (1983). On the other hand, if the contract is that B is to manufacture certain goods from materials to be supplied by A, B can perform only if A cooperates by supplying the materials. In such a case B may wish to tender performance. This is the next option discussed.

3. Tender of Performance

If B is unable to perform the contract unilaterally, the closest thing to that is to tender performance. If B adopted this course, he would offer to perform the contract but on his own interpretation of it. He would then treat A's refusal of this offer as a repudiation of the contract and sue A for damages.

Even if B's interpretation of the contract is held to be correct, his right to recover damages is qualified in two ways. First, the damages to which he is entitled are measured by his loss of profit on the contract. This will often be a different amount than the price payable under the contract for the work and the evidentiary burden on B will be somewhat more difficult to discharge.

Secondly, B's right to recover his loss of profit is subject to a duty to "mitigate" that loss. Thus it might be shown that B could have realized a similar profit (or did in fact realize a similar profit) through performing under a like contract for C which B could not otherwise have undertaken. In that case, B's recovery from A may be reduced accordingly.

While a tender of performance introduces certain vagaries into B's right of recovery that do not exist when he unilaterally purports to perform the contract, his exposure to liability if he is wrong is somewhat reduced. The time and the expense of his purported performance are not thrown away. Since the question of "undoing" his work does not arise, that source of expense and wastage of time does not increase consequential losses as it may with unilateral performance.

Because the consequences for B are less drastic if he is wrong, B might prefer to tender performance even if he could perform unilaterally.

4. Performance Under Protest

A final course of action B might wish to adopt is to perform the contract in accordance with A's interpretation of it but to do so "under protest" with an explicit reservation of his rights. At the conclusion of the work B would commence an action against A for compensation for work done by B beyond what the contract required of him.

That action would not be based on rights under the contract. By definition, B is claiming for something done outside the contract. Rather, B's claim rests on a body of law known as restitution. Such an action would ordinarily be framed as one in *quantum meruit, quantum valebat*, or for work and materials supplied. Such actions are based on the proposition that to deny relief to B would result in an unjust enrichment to A.

On the face of it this course of action is one that best suits the interests of both A and B. For A, the contract is performed according to his expectations and he loses nothing if those expectations accord

with the correct interpretation of the contract. If A is wrong, he may end up liable for more than he expected to pay, but B's protest at least put him on notice that his interpretation of the contract is in question and gives him an opportunity to consider his position.

Moreover, performance is preferable to an inchoate right to damages. If B chooses one of the two previous courses of conduct (unilateral performance or tender of performance according to B's own interpretation of the contract), A may have a right of action against B if A's interpretation is correct. That right of action, however, may be a hollow one if B has no money to satisfy a judgment. If B performs, albeit under protest, A's position is not subject to the vagaries of B's solvency.

From B's perspective, performance under protest may also be the preferable course of action. If he adopts it he runs no risk that he will be in breach of the contract and thus attract the potentially substantial liability that might result if he wrongly failed to perform. By reserving his rights he has not waived a claim to additional compensation for work done beyond the requirements of the contract. Moreover, B may find, while actually performing the contract in accordance with A's wishes, that this course is not so troublesome or expensive as it first appeared.

C. The Problem

In the previous section, performance under protest was identified as a course of conduct which generally provides an appropriate balance between the competing interests of A and B when they disagree as to what constitutes proper performance of their contract. Developments in Canadian jurisprudence, however, cast doubt on how far this course of action is open to B.

CHAPTER II THE *KIEWIT* CASE

A. The Facts

One principal case casts doubt on "performance under protest" as an option available to a party in the circumstances described in the previous chapter. That is the decision of the Supreme Court of Canada in Peter *Kiewit Sons Co. of Canada* v. *Eakins Construction Ltd.*, hereafter referred to as the Kiewit case, on appeal from British Columbia.

1. The Contracts

The action arose out of the contract for the construction of the Second Narrows Bridge across Burrard Inlet. The "owner" of the project was the British Columbia Toll Highway & Bridges Authority (hereafter "the Authority") who engaged Kiewit as general contractor to build the substructure, approach viaduct and northern approach road to the bridge. Eakins was a subcontractor engaged by Kiewit to drive timber piles for the substructure of certain piers.

Eakins made its tender for the subcontract having regard to the plans and specifications for the job and the terms of the principal contract between Kiewit and the Authority. The principal contract specified that:

> Piles shall be driven truly vertical and to the lines and levels shown on the plans. Piles shall be driven with standard equipment, steam or drop hammers, approved by the engineer, to a minimum bearing capacity of 20 tons based on ... [a formula set out.]

The plans referred to in the specifications contained the following note:

> 6. All timber bearing piles to be driven to a safe bearing capacity of 20 tons.

The subcontract contained the following provision.

> It is understood that all of the specifications of the Authority under which we [Kiewit] are bound, apply equally to you [Eakins] as a Material Supplier. This involves not only the plans and specifications, but the contract terms regarding responsibility and insurance ...

The subcontract was signed on January 10, 1956.

Some time in February 1956 the resident engineer employed by Kiewit added the following note to the plans which formed part of the principal contract.

> 10. Bottom of timber bearing piles to be below bottom of sheet piling.

No corresponding change was made in the subcontract.

Certain other provisions of the principal contract between the Authority and Kiewit should also be noted to complete the contractual background of the case. These provisions are set out in full in Appendix A to this Report and their effect is summarized below. All of these provisions concerned the status of the resident engineer who was, essentially, an agent of the Authority.

The principal contract provided that Kiewit's performance under it should be "to the satisfaction of the engineer" and under his general direction. It also provided for the situation where something necessary for the proper performance of the contract was omitted or misstated in it. At the direction of the engineer, Kiewit was required, at its own expense, to do whatever needed to be done as though provision for it had been made in the contract. This power was characterized as one for the correction of errors; its exercise was not be deemed to be an addition to, or deviation from, the terms of the contract.

A further clause of the principal contract provided for "extras." The engineer might, in writing, call for additional work or materials not covered by the contract to be done or provided. The decision of the engineer as to the amount to be paid was to be final.

The engineer was also given the authority, in the specifications, to make reasonable alterations to the drawings or to furnish additional or amended drawings.

2. The Dispute

The dispute which arose out of those contractual arrangements concerned the change to the specifications to the principal contract and the rights of the parties arising from it.

When work under the subcontract came to the piers in issue, the resident engineer ordered the piles driven to a much greater depth than the 20 tons bearing capacity provided in the specifications. The cost of doing so, to Eakins, would substantially exceed the cost of driving them to a 20 ton capacity. This additional work was referred to as "overdriving." The engineer refused to authorize the overdriving as an "extra" for which additional compensation would be payable.

Eakins, after some protest and after some pressure was applied by Kiewit, complied with this order and then sued for compensation for the overdriving.

B. The Decision

At this point, it should be noted that the Supreme Court of Canada was divided in this case. The author of the majority decision, Judson J., and the dissenting judge, Cartwright J., reached dramatically different conclusions. In the course of their respective decisions, the emphasis given particular facts and

particular provisions of the contract vary significantly.

Initially, Eakins's claim was asserted on a number of alternative legal bases including frustration, novation, and *quantum meruit*. It was with respect to Eakins's recovery on the basis of *quantum meruit* that the court divided.

Cartwright J., in his dissent, would have allowed recovery in *quantum meruit* (and apparently thought it unnecessary to consider the alternative claims). In his judgment he offered the following observations:

> In my opinion the evidence supports the view expressed by the learned Chief Justice of British Columbia in the following paragraph:
>
> > The evidence is clear that what the appellant (i.e. Eakins Construction Limited) contracted to do and what it actually did while at all times taking the position that the work done was not within the scope of its contract, was so different from that contemplated that in my view the subcontract ceased to be applicable and the work done by the appellant should be paid for as though no contract had been made, on a *quantum meruit*.
> >
> > It can scarcely be denied that the work done by the respondent, under continuing protest, was done under circumstances of practical compulsion ... The appellant (who held what turns out to be a mistaken view as to the meaning of the subcontract) threatened the respondent with what might well amount to financial ruin unless it did the additional work which the subcontract did not obligate it to do. To say that because in such circumstances the respondent was not prepared to stop work and so risk the ruinous loss which would have fallen on it if its view of the meaning of the contract turned out to be erroneous the appellant may retain the benefit of all the additional work done by the respondent without paying for it would be to countenance an unjust enrichment of a shocking character, which, in my opinion can and should be prevented by imposing upon the appellant the obligation to pay to which I have referred above.
> >
> > The case appears to me to be analogous to those in which a person who has paid money, under protest and under circumstances of practical compulsion, to another who was not in law entitled to the payment can recover it back by action ...
> >
> > I can discern no difference in principle between compelling a man to pay money which he is not legally bound to pay and compelling him to do work which he is not legally bound to do; in the one case money is improperly obtained, in the other money's worth. The remedy in the former case is to order repayment of the money; the remedy in the latter case should be, in my opinion, to order the person who has compelled the doing and has reaped the benefit of the work to pay its fair value. It would, I think, be a reproach to the administration of justice if we were compelled to hold that the courts are powerless to grant any relief to a plaintiff in such circumstances.

The majority decision, delivered by Judson J., has been summarized as follows:

> The majority held, in effect, that the contract under which the subcontractor was working provided that no payment for extra work would be made without written authorization from the engineer. The subcontractor, therefore, could not claim payment in the absence of that written authorization whether the work was in fact extra or not. In addition, since the existing contract covered the situation, there could be no possibility of implying a new contract either in fact or in law and therefore no basis for the claim of *quantum meruit*. The Court's advice to the subcontractor was that when the engineer refused to authorize the work as an "extra", it should have stopped work and sued for breach of contract. Having done the work, even under protest, without authorization, it was precluded by the terms of the contract from claiming.

That view flows from these comments of Judson J.:

> Nothing could be clearer. One party says that it is being told to do more than the contract calls for. The engineer insists that the work is according to contract and no more, and that what is asserted to be extra work is not extra work and will not be paid for. The main contractor tells the subcontractor that it will have to follow the orders of the engineer and makes no promise of additional remuneration. In these circumstances the subcontractor continues with the work. It must be working under the contract. How can this contract be abrogated and another substituted in its place? Such a procedure must depend upon consent, express or implied, and such consent is entirely lacking in this case. Whatever Eakins recovers in this case is under the terms of the original subcontract and the provisions of the main contract relating to extras. The engineer expressly refused to order as an extra what has been referred to throughout this case as 'overdriving'. The work was not done as an extra and there can be no recovery for it on that basis. When this position became clear, and it became clear before any work was done, the remedy of the Eakins Company was to refuse further

performance except on its own interpretation of the contract and, if this performance was rejected, to elect to treat the contract as repudiated and to sue for damages. In the absence of a clause in the contract enabling it to leave the matter in abeyance for later determination, it cannot go on with performance of the contract according to the other party's interpretation and then impose a liability on a different contract.

C. Criticism of the Decision

The majority decision has been subjected to two lines of criticism. The first is that it failed to recognize the realities of the construction industry and the expectations of the participants in it:

> It is the writer's respectful submission that the Supreme Court of Canada in this decision has done three things deserving of critical attention. The first is its acceptance of the principle that where a building contract provides that payment for extra work will only be made on the production of written orders from the engineer, the possession of those orders is a condition precedent to any claim by the contractor, even in the face of a real dispute over what constitutes extra work and the refusal by the engineer to issue the necessary orders. The second is its interpretation of the subcontract so as to import into it the principal contract's term regarding extras. The third is its failure to give reasons for doing the first two. It is the writer's thesis that the first, while legally supportable, may not have been an inescapable conclusion and is one which imposes an unjust burden on a contractor and is contrary to the best interests of the community; that the second, when viewed in the light of its necessary implications in contrast with long established and well understood practices of the construction industry, is most unrealistic; and that these two taken with the third the Court's failure to give reasons on these two points reflect a lack of understanding and knowledge of the workings of the construction industry on the part of the Court.
>
> By holding that a contractor is precluded from bringing an action for compensation for extra work in the absence of written orders, and must, therefore, either accede to the engineer's view of what constitutes extra work or stop work and immediately bring an action for breach of contract, the Court has in effect denied the contractor his recourse to the courts. It is virtually a practical impossibility for any contractor to stop work and bring such an action. In the first place, the amount of work involved in a dispute over extras in most cases will be small in proportion to the total amount of work covered by the contract. By taking court action, the contractor risks losing all the benefits due him under the contract should the action fail. He would, therefore, be gambling at long odds on the uncertain outcome of a court action a gamble that no businessman is apt to take. Secondly, and perhaps more important, it is a wellrecognized fact of life in the construction industry that a company which pulls out of a job over a contract dispute is very unlikely to get any further contracts. Mr. T. Eakins, the respondent's managing director, put it very effectively when he was asked in cross examination why, if he thought he was right, he had not stopped work. His answer was: "I mean as regards contractually speaking, you quit a job you never work for anybody again. I mean anybody knows that. You just can't walk off a job and say, 'well, the inspectors or engineers are wrong'."
>
> In addition to the fact that this decision puts a contractor in an impossible position, it is, as previously stated, contrary to the best interests of the community. It is in the community's interest that construction projects be completed with as few delays as possible. The completed job is a benefit to the economy and the more quickly it becomes available for use the more benefit will be derived. A delayed project means temporary unemployment, inefficient use of expensive construction equipment, and it probably stands as an eyesore in the community.

A second line of criticism is that the majority decision was inconsistent with broader developments in the law of unjust enrichment:

> The second type of case is where the plaintiff has gone beyond what the contract requires. Basically the same principles apply. Again however the courts have not always appreciated the issues involved. The judgment of the majority of the Supreme Court of Canada in *Peter Kiewit and Sons Ltd.* v. *Eakins Construction Co*. is very much in point ... If the contract covered the work that undoubtedly was the end of the case; if it did not, the subcontractor, having made his protest but continuing to work in face of the engineers insistence that the contract covered the work, had to be treated as accepting that view of the contract. On this last point it is suggested the Supreme Court was wrong. On the supposition that the work was not within the contract, apply the threefold test referred to earlier:
>
> (1) Did the subcontractor intend to make a gift? The answer is clearly no. Any presumption of payment which would operate is supported by the facts of the case.
>
> (2) Did the main contractor benefit by the work? The answer is clearly yes.
>
> (3) Had the main contractor the opportunity of accepting or rejecting the work? Not only had he such an opportunity, he insisted on the work being done. It is true he thought he was securing performance of his contract, but the doubt as

to that was clearly and forcefully brought to his attention. If in the circumstances he required the work to be done, then surely the risk of it not being within the contract lies with him, and if it is not he should pay.

D. Present Status of the Kiewit Case

The present status of the *Kiewit* case is not easily described. There is no universal agreement among those who have considered the case as to precisely what it decided and what it stands for. This reflects, in part, the view one takes of the facts of the case. When, and how vigorously, did Eakins protest? Two quite different views of what was essentially a question of fact emerged in the majority and the dissenting judgments.

Varying views have been expressed by the academic commentators who have considered the case. On one view, the case concerns economic duress and is merely an illustration of how far a person may go in applying pressure to another without giving rise to a right of recovery in restitution. It is the economic duress aspect of the *Kiewit* case that many observers who come to it for the first time find most striking.

On a second view, the case is one which provides guidance as to when dealings between two persons will be governed by a contract between them rather than a body of law which is independent of the contract. This is the characterization adopted by Fridman and McLeod in their work on *Restitution*. After describing the majority and dissenting judgments, they observe:

> The distinction between the two judgments is clearly whether or not the work done fell within the contractual provisions. Where the work done does fall within the terms of the contract it is clear as per the judgment of Judson J. that no restitutionary relief will be possible. Where on the other hand the work falls outside the scope of the contract, relief may be claimed on a *quantum meruit* basis.

A third view is that in performing the contract as he did, albeit under protest, Eakins acquiesced in the contractor's interpretation of it and he could not later be heard to claim compensation. This third view reflects the statement of Mr. Justice Judson set out earlier in this chapter. It leaves the clear implication that the only effective form of protest is a refusal to perform and that to perform as required necessarily implies a submission to or acquiescence in the other interpretation of the contract.

It is worth noting that from whatever viewpoint the *Kiewit* case is being considered, commentators have been uniformly critical of the majority decision and where it chose to draw the line between recovery and nonrecovery. The unease voiced by these commentators is well founded, particularly insofar as the case can be viewed as one of economic duress. It is unsettling that one party to a contract should, without legal justification, be able to threaten the other with economic ruin and then, without compensation, reap the benefits of the performance extorted in this way. Cartwright J. aptly observed that to deny recovery in such a case is "a reproach to the administration of justice."

The *Kiewit* case has been cited or referred to in a number of later decisions. These have not been helpful in identifying what *Kiewit* stands for, and no definitive analysis has emerged. Trends are discernible, however, in those cases which, on their facts, bear some similarity to the *Kiewit* case. In the years shortly after the decision emerged, it was applied regularly. More recently, however, the courts have displayed a greater willingness to distinguish the *Kiewit* case. This probably reflects, at least in part, an increasing acceptance by the courts of the principles of unjust enrichment.

An example of a more recent case is *Re Municipal Spraying and Contracting Ltd*. The facts of the case are set out in the headnote:

> The province had called for tenders on the two jobs and M's tender was accepted. The tender documents specified the length of the portions of road on which the work was to be done. The notice to bidders stated that excavation quantities were approximate and that excavated materials in excess of the 210,000 cubic yards expected to be used for grading were to be hauled to disposal sites as directed by the engineer. It was expected that about 265,000 cubic yards would be excavated but the actual quantity was approximately 385,000 cubic yards. After completion of the grading job, M had approximately 80,000 cubic yards of unused excavated material. The province directed M to use it to re-

construct more of the second road and a third road, a total additional distance of 12,750 feet. M refused on the basis that this was not part of the contract nor "extra work" or a "change" under the contract. The province took the position that its request was covered by the provision of the contract dealing with disposal at the direction of the engineer.

M, the contractor, performed as required and then sought compensation for the extra work.

The trial judge, Goodridge J., considered the *Kiewit* case at some length and concluded that its facts were sufficiently different to distinguish it. He then analyzed the situation in terms of unjust enrichment and concluded that the contractor was entitled to compensation from the extra work.

Not everyone would agree that *Kiewit* was as readily distinguishable on its facts as Goodridge J. suggested, but the outcome itself is wholly defensible.

A somewhat different approach to ameliorating the effects of the *Kiewit* decision emerged recently in British Columbia in *Westcoast Paving Co. Ltd.* v. *British Columbia and Siu.* This case involved a highway construction contract under which certain decisionmaking powers were given to a supervising engineer. As a result of directions given by the engineer concerning the way the contract was to be carried out, the cost of performing the contract, to the paving contractor, was unexpectedly increased. The paving contractor sued and, on the facts, the court might well have applied *Kiewit* to deny him any recovery. Instead, the court held that the contract contained an implied term that directions issued by the engineer to the paving contractor would be "in accordance with proper engineering and construction practice." The court held that the conduct of the defendant was in breach of that implied term and awarded damages.

Whether the future will see a continuing erosion of the authority of the *Kiewit* case is difficult to gauge. At worst, it will continue to be applied and yield results which merit the criticism which has been levelled at it. At best, it will be distinguished or avoided on a haphazard basis which does nothing to alleviate the present uncertainty in the law.

CHAPTER III CONCLUSIONS

A. Analysis

In the first chapter we suggested that performance under protest was a preferred approach to resolution of certain types of contractual disputes. Not only does it appropriately balance the competing interests of the parties to the contract, but it serves a wider social interest through the avoidance of delay and economic waste.

We are not alone in this view. In *Unjust Enrichment* Professor Klippert observes:

> The view of Goodridge J. in *Re Municipal Spraying and Contracting Ltd*. was that "the prudent course for him (the contractor) is to do the act and seek redress later." From a policy point of view there is much to be said for this approach. It facilitates the completion of work. Projects are not left halfdone while the parties litigate the fine points of construction. Also, it minimizes the potential scope of the contractor's liability. The contractor who elects to stop work on the basis that he believes what has been demanded is radically different from what was contracted for or falls entirely outside the contract, may be subject to damages for breach himself if it turns out that the defendant's construction of the contract was correct. The damages will be based on the cost of bringing in a second contractor to do the work, and in most cases that cost will be greater than completion by the contractor who is already on the site. The first contractor in those circumstances ends up paying a profit margin charged by the second contractor. Also it is possible that a penalty clause in the contract may be invoked for late performance.
>
> But to complete the contract and then argue that the extra work falls outside the contract limits the contractor's liability to the costs of the unsuccessful litigation, and his outofpocket expense in carrying out work as directed. Such approach avoids the further problem of establishing the defendant's repudiation of the contract. Repudiation is a matter of intention. Moreover, in the Commonwealth, "it is a general principle of the law of contract that the court will not readily infer from a party's insistence on a wrong construction of a contract that he is unwilling to perform it according

to its true construction." The placing of the risk obviously becomes heavily weighed against a contractor electing to refuse performance in cases such as *Re Municipal Spraying and Contracting Ltd*.

There are two aspects of the *Kiewit* decision which we find disturbing. Our first concern arises out of the "engineer decision clause" and its relationship to the rule that there can be no restitutionary recovery where the rights of the parties are governed by a contract between them. Here the issue arises most acutely with respect to construction contracts where it is common that a supervising engineer or design authority (hereafter referred to as the "performance supervisor") be given certain decision making powers in relation to performance under the contract.

The law concerning engineer decision clauses is not fully developed. In some ways they are analogous to contractual provisions which specify arbitration as the means by which disputes between the parties are to be resolved with a specific arbitrator named in the agreement. They are different, however, in that in most cases a conventional arbitrator is not closely identified with the interests of one of the parties and is not involved on a day today basis with the performance of the contract. A performance supervisor is, normally, an agent or employee of the owner and has continuing duties in relation to the construction process. Moreover, the legal means by which a decision of an arbitrator may be reviewed by the court are illsuited to the review of decisions by a performance supervisor.

We do not quarrel with the need or desirability of entrusting certain types of decisions under a construction contract to a performance supervisor. Questions will arise on a daytoday basis as to whether a contractor or a subcontractor has done what he has agreed to do and it would be intolerable if every dispute of this character had to be litigated or processed through a more formal arbitration procedure.

As far as we are able to ascertain, the decision making powers of performance supervisors are almost always exercised in a fair and evenhanded manner without bias toward the interests of the party that employed him. This is regarded as a matter of professional responsibility. The performance supervisor, however, may well be wrong in his decision and it is here that difficulties emerge. How readily should the law intervene on behalf of a party to correct what is asserted to be a wrong decision?

The decisions made by a performance supervisor in this context seem to fall into two general categories. The first consists of decisions in the nature of "what does the contract require of a party and what is the scope of his obligation?" The second category of decisions concern the question whether or not the obligations imposed on a party have, in fact, been met. While the distinction between the categories of decisions may be somewhat blurred, we find it useful for the purposes of analysis.

It is arguable that the willingness of the courts to intervene might depend on whether one characterizes the decision in issue as falling into the first or second category. Here a useful analogy with certain administrative law concepts might be made. The legislature will frequently create a statutory tribunal and entrust certain decision making functions to it. The legislation creating the tribunal will often include a provision which purports to insulate the tribunal's decisions from judicial review. The general approach of the courts is to respect the decisions of tribunals which fall within their proper jurisdiction, but to intervene to correct any erroneous decision which the tribunal may have made as to the extent of its jurisdiction.By analogy, a decision of a performance supervisor in the first category (the scope of a party's obligations under the contract) is, arguably, jurisdictional in character and, as such, should be more readily amenable to judicial review than a decision falling into the second category (whether obligations have been performed).

The particular difficulty arising out of the *Kiewit* case was the court's refusal to look behind the engineer's decision on what was, essentially, a jurisdictional issue. The majority appeared to accept the proposition that the scope of Eakins's obligations were what the resident engineer chose to say they were. They insulated his decision from review in a way which would not have been countenanced had the dispute arisen in an administrative law setting.

Moreover, that decision was insulated from review only because the dispute arose in the way it did. If Eakins had, as Judson J. suggested, treated the contract as repudiated, ceased work, and then sued for damages, the correctness of the engineer's decision as to the scope of Eakins's obligations would have been squarely in issue and would have been determined by the court. It is anomalous that the power of the court to give relief should require Eakins to take an unrealistic course of action.

Our second concern lies in the breadth of the *Kiewit* decision and its potential intrusion into areas of commercial activity and aspects of contract law wholly remote from its origins in the construction industry. As noted in the previous chapter, on at least one view, the effect of *Kiewit* may be that performance under protest is, *per se*, impossible. If this is what *Kiewit* in fact stands for, it raises concerns which cut across the whole of the law of contract. The kinds of things which might be done under protest are not confined to the provision of work and materials. A party purporting to rely on his contractual rights might as easily demand the payment of money, the assumption of liability, or the transfer of property, and that party may be in a position to bring intense pressure to bear on the other to comply. Is the effect of *Kiewit* such that a party who complies, but does so under protest, has no right of recovery where the demand was unfounded?

No case has come to our attention in which *Kiewit* has been extended that far. Such cases as do exist suggest a contrary result with the courts showing some willingness to grant a restitutionary remedy with respect to money that has been paid under protest. It would be unsafe, however, to regard a principle that money paid under protest is recoverable as being firmly enshrined in our law. First, the volume of case law on this point is not large. Second, the more important decisions are not Canadian and hence would have been arrived at without reference to the *Kiewit* case.

Whether one characterizes *Kiewit* as presenting problems which are confined to construction law or problems which affect the whole of the law of contract is of some importance in the approach to be taken to the development of reform measures. It is a question to which we will return later in this chapter.

B. The Working Paper

As indicated in the previous chapter, the authority of the *Kiewit* decision appears to have been somewhat eroded by developing case law and in time it may fall into desuetude. In the meantime, however, it remains a doubtful feature of our jurisprudence. At best, it creates confusion and uncertainty. At worst, its application leads to injustice. Over twenty years of judicial decisions have failed to clarify the meaning of the *Kiewit* case and there is no guarantee that further judicial scrutiny will improve matters.

It was this state of affairs which led the Commission to a tentative conclusion that some kind of legislative intervention is called for to remove the shadow which the *Kiewit* decision casts over performance under protest. Accordingly, in May of 1984, a Working Paper was circulated which discussed the case and its implications and set out a proposal for reform. The core concept of the proposal was that the person who, under protest, did more than he was contractually obliged to do should have a statutory right of compensation for the excess a right which could not be ousted through the application of an engineer decision clause or similar provision.

The Working Paper, which was circulated for comment and criticism, attracted a significant volume of response. The submissions which we received fell into three groups. One group, the largest, endorsed the Commission's tentative proposals with no, or only minor, reservations. A second group were sympathetic to the basic aims of the proposals but expressed reservations of one kind or another. A third, much smaller group, expressed vehement opposition to the proposals.

The responses which we received that were critical of our proposal have not persuaded us that a retreat from the principle embodied in it is called for, but they have proved to be most valuable to us in other ways. First, the submissions which we received from those who were opposed to the fundamental thrust of the proposed reform caused us to seriously and critically reexamine our whole approach to this

area. This process has considerably sharpened our views. Second, many of the reservations expressed were directed in essence at matters of drafting. A number of instances were identified in which the proposals did not adequately communicate the scope and nature of what was intended. We were, therefore, able to approach the development of our final recommendations with many very helpful suggestions which enabled us to refine our drafting.

The circulation of our Working Paper also brought to our attention the work of the Canadian Construction Documents Committee (hereafter C.C.D.C.). This body worked for several years toward the development of a standard form of construction contract. Their work culminated in 1982 with the promulgation of such a document, which we understand is gaining acceptance within the construction industry. The implications of the *Kiewit* decision were obviously of concern to the C.C.D.C. since their recommended standard form contract embodies what might be called "anti*Kiewi*t provisions:"

> 7.3 If the matter in dispute is not resolved promptly the Engineer will give such instructions as in his opinion are necessary for the proper performance of the Work and to prevent delays pending settlement of the dispute. The parties shall act immediately according to such instructions, *it being understood that by so doing neither party will jeopardize any claim they may have*. If it is subsequently determined that such instructions were in error or at variance with the Contract Documents, *the Owner shall pay the Contractor costs incurred by the Contractor in carrying out such instructions which he was required to do beyond what the Contract Documents correctly understood and interpreted would have required him to do*, including costs resulting from interruption of the Work.
>
> 7.4 It is agreed that *no act by either party shall be construed as a renunciation or waiver* of any of his rights or recourses, provided he has given the notices in accordance with paragraph 7.2 and has carried out the instructions as provided in paragraph 7.3. (Emphasis added.)

The C.C.D.C. is a broadly based group with representatives from all sectors of the construction industry. Its adoption of a provision which reflects the thinking embodied in our Working Paper reinforces our view that our initial approach was the correct one.

C. Reform

1. The Scope of Reforming Legislation

Earlier in this chapter, we referred to the significance of characterizing the *Kiewit* decision as either a problem confined to the area of construction disputes or as one which affects contract law generally. It is our conclusion that it would be unsafe to regard the *Kiewit* case as relevant only to construction law. There is no doubt in our minds as to the correct result when the question of performance under protest arises in other legal contexts. While it may be that the courts can arrive at the same result without legislative assistance and in spite of *Kiewit*, we believe that a general legislative expression of the correct policy would do no harm and is much more likely to be beneficial.

It is our conclusion, therefore, that any reform measure should be drawn sufficiently broadly that it clearly applies to all contractual relationships. At the same time, it must be recognized that the most fertile ground for its application is, and will continue to be, construction litigation. A reform measure must be drawn with an eye on that reality and, in particular, should be framed in a way which minimizes or eliminates conflicts where the rights of the parties arise out of the standard form construction contract promulgated by the C.C.D.C. It is a matter of concern to us that our recommendations should, as far as possible, be in harmony with the C.C.D.C. forms.

2. The Features of Reforming Legislation

We have concluded that the central feature of any reform measure should be a clear statement that a person who performs under a contract in accordance with the requirements of the other party should be entitled to compensation for things done which go beyond what the contract actually required of him.

The right to compensation should exist notwithstanding a contrary determination made under an engineer decision clause. The efficacy of "true" arbitration clauses should, however, not be affected.

Reforming legislation should, however, also recognize that where there has been a novation (a new contract) between the parties, or where there has been a true submission to and acquiescence in the interpretation of the other party, the statutory right to compensation described above should not be available. Reforming legislation should provide a means by which the court can readily distinguish between cases where such compensation is appropriate and those cases where it is not.

It is our view that this is best achieved through a requirement that the party seeking such compensation notify the other party that his performance is under protest. We think that some sort of notice is necessary in order that the party who may ultimately be called upon to pay the extra compensation will be treated fairly. It is easy to see that real hardship could result to a party who directs that a contract be performed in a particular way, perhaps without giving the contract terms too much thought, if the mere fact of giving that direction was sufficient to expose him to liability. Requiring that the other party provide notice of his protest ensures that the party who gives the direction will have an opportunity to more fully consider it and his position under the contract.

The question of how far legislation should go in specifying the form and timing of the notification raises a difficult issue. One possibility is to require that notification of the protest be given before work is actually commenced under the direction in issue. This could work a hardship on the person performing under the direction. The party making the direction may call for performance to start immediately and it may be a matter of hours or even days before the performing party has an opportunity to consult the contract and perhaps take advice. On the other hand, to set no time limit would permit the performing party to commit the other irrevocably to a course of action which, had he known a protest might be made, he would not have called for.

It is our view that the kinds of situations in which a protest might arise are so numerous and variable it is impossible to provide any specific statutory guidelines on the timing of the protest. We think the best that can be done is to call for notification within a reasonable time of the performance having been required, with the issue of reasonableness to be determined on the facts of the particular case. At the same time, legislation should make it clear that the parties are free to agree as to what constitutes reasonable notification for this purpose. Thus, the C.C.D.C. documents would be accommodated.

The legislation should also make it clear that the statutory claim to compensation is without prejudice to compensation on any other basis provided by law. For example, a party entitled to compensation on a *quantum meruit* basis independently of the legislation should not be precluded from asserting a claim of that nature simply because he is precluded from asserting a statutory claim through a defect in the form of his notice relating to the protest.

D. Recommendation

The Commission recommends that a provision be added to the *Law and Equity Act* which reflects the following principles:

1. *(a) Where a dispute arises between the parties to a contract respecting a party's obligations under that contract, then*

    (i) the party whose obligations are in issue (hereafter "first party") may elect to perform in accordance with the requirements of the other party (hereafter "second party"); and
    (ii) the first party is entitled to compensation from the second party for any

(A) service performed,
(B) property supplied or transferred,
(C) liability assumed, and
(D) money paid

by the first party in the course of such performance beyond what the contract, correctly understood and interpreted, would have required him to do.

(b) The first party is entitled to compensation under paragraph (a) only where he has caused the second party to be notified that the performance is under protest, within a reasonable time of the performance having been required.

(c) A contract may, with respect to notification under paragraph (b), stipulate

(i) its form;
(ii) a time within which it must be received by the second party;
(iii) the persons to whom it must be given, and
(iv) the manner in which it is to be given,

and a notification given under paragraph (b) is ineffective unless it is in accordance with such stipulations.

(d) The right of a party to compensation under paragraph (a) is not affected by a decision or determination respecting his obligations made by a person designated in the contract unless that person is an arbitrator who is independent of everyone having an interest in the subject matter of the contract.

2. Nothing in part 1 limits the right of a party to recover compensation on any other basis.

E. Conclusion

It is our view that the implementation of the recommendations set out above would do much to dispel the uncertainty which the *Kiewit* case has cast over our law. The effect of this uncertainty is felt most keenly in the area of construction disputes and we believe that, in that context, it will have a beneficial effect.

In conclusion, we wish to express our great appreciation to all those who responded to the Working Paper which preceded this Report. As we indicated earlier, the responses which we received were both numerous and helpful and greatly assisted in sharpening our views on the relevant issues.

We also wish to acknowledge the contribution of two former members of the Commission who played an important role in this project: Mr. Bryan Williams, Q.C. and Professor Anthony F. Sheppard. Both participated in the development of the Working Paper and their assistance at that stage was of great value in defining and refining our work.

ARTHUR L. CLOSE

RONALD I. CHEFFINS

APPENDICES

Appendix A

Kiewit v. *Eakins*

Provisions of the Principal Contract [at [1960] S.C.R. 361, 3745]

3. The work shall be commenced forthwith on the execution of this agreement, and carried on and prosecuted to completion by the contractor in all the several parts in such manner and at such points and places as the engineer shall from time to time direct, and to the satisfaction of the engineer, but always according to the provisions of this contract ...

4. The works shall be constructed by the contractor under his personal supervision, of the best materials of their several kinds, and finished in a workmanlike manner, and in strict conformity with this contract, and to the complete satisfaction of the engineer.

6. The several parts of this contract shall be taken to explain each other and to make the whole consistent; and if it is found by the engineer that anything is necessary for the proper performance or completion of the work or any part thereof, the provisions for which are omitted or misstated in this contract, the contractor shall, at his own expense, at the direction of the engineer, perform and execute what is necessary to be done, as though provision therefor had been properly made and inserted and described in this contract. The correcting of any such error shall not be deemed to be an addition to or deviation from the terms of this contract.

7. The engineer may, IN WRITING, at any time before the final acceptance of the works, order any additional work, or materials or things, not covered by the contract, to be done or provided, or the whole or any portion of the works to be dispensed with, or any changes to be made which he may deem expedient, in or in respect of the works hereby contracted for, or the plans, dimensions, character, quantity, quality, description, location, or position of the works, or any portion or portions thereof, or in any materials or things connected therewith, or used or intended to be used therein, or in any other thing connected therewith, or used or intended to be used therein, or in any other thing connected with the works, whether or not the effect of such orders is to increase or diminish the work to be done, or the materials or things to be provided, or the cost of doing or providing the same; and the engineer may, in such order, or from time to time as he may see fit, specify the time or times within which such order shall, in whole or in part, be complied with. The contractor shall comply with every such order of the engineer. The decision of the engineer as to whether the compliance with such order increases or diminishes the work to be done, or the materials or things to be provided, or the cost of doing or providing the same, and as to the amount to be paid or deducted, as the case may be, in respect therof, shall be final. As a condition precedent to the right of the contractor to payment in respect of any such order of the engineer, the contractor shall obtain and produce the order, in writing, of the engineer, and a certificate,

in writing, of the engineer, showing compliance with such order and fixing the amount to be paid or deducted in respect thereof.

18 ***Alterations to Drawings***. It shall be understood that the drawings represent the nature of the work to be executed and not necessarily the works exactly as they will be carried out. The Engineer shall, without invalidating the contract, be at liberty to make any reasonable alteration or to furnish any additional or amended drawings which do not radically change the type of construction.

The value of such alterations shall be ascertained by measurement and at the rates set forth in the Schedule of Approximate Quantities and Prices or at the rates to be settled as herein provided and may be added to or deducted from the contract sum as the case may be. [Set out in the specifications in the principal contract.]

Appendix B

Canadian Construction Documents Committee

GC 7 DIPUTES

7.1 Differences between the parties to the Contract as to the interpretation, application or administration of this Contract or any failure to agree where agreement between the parties is called for, herein collectively called disputes, which are not resolved in the first instance by decision of the Engineer pursuant to the provisions of GC 3 ENGINEER, paragraphs 3.6 and 3.7, shall be settled in accordance with the requirements of this General Condition.

7.2 The claimant shall give written notice of such dispute to the other party no later than thirty (30) days after the receipt of the Engineer's decision given under GC 3 ENGINEER, paragraph 3.7. Such notice shall set forth particulars of the matters in dispute, the probable extent and value of the damage and the relevant provisions of the Contract Documents. The other party shall reply to such notice no later than fourteen (14) days after he receives or is considered to have received it, setting out in such reply his grounds and other relevant provisions of the Contract Documents.

7.3 If the matter in dispute is not resolved promptly the Engineer will give such instructions as in his opinion are necessary for the proper performance of the Work and to prevent delays pending settlement of the dispute. The parties shall act immediately according to such instructions, it being understood that by so doing neither party will jeopardize any claim they may have. If it is subsequently determined that such instructions were in error or at variance with the Contract Documents, the Owner shall pay the Contractor costs incurred by the Contractor in carrying out such instructions which he was required to do beyond what the Contract Documents correctly understood and interpreted would have required him to do, including costs resulting from interruption of the Work.

7.4 It is agreed that no act by either party shall be construed as a renunciation or waiver of any of his rights or recourses, provided he has given the notices in accordance with paragraph 7.2 and has carried out the instructions as provided in paragraph 7.3.

7.5 If the parties have agreed to submit disputes to arbitration pursuant to a Supplementary Condition to the Contract, or by subsequent agreement, then the dispute shall be submitted to arbitration in accordance with the provisions of the *Arbitration Act* of the Place of the Work.

7.6 If no provision or agreement is made for arbitration then either party may submit the dispute to such judicial tribunal as the circumstances may require.

7.7 In recognition of the obligation by the Contractor to perform the disputed work as provided in paragraph 7.3, it is agreed that settlement of dispute proceedings may be commenced immediately following the dispute in accordance with the aforegoing settlement of dispute procedures.

Appendix C

The Working Paper Proposal and Drafting Notes on the Final Recommendation

The tentative proposal for reform which was set out in the Commission's Working Paper that preceded this Report was as follows:

1. (a) Where a dispute arises between the parties to a contract as to the scope of a party's obligations under that contract, then, notwithstanding any provision of the contract

   (i) the party whose obligations are in issue (hereafter "first party") may elect to perform in accordance with the requirements of the other party (hereafter "second party"); and
   (ii) the first party is entitled to compensation from the second party for work performed and material supplied in the course of such performance beyond what should be regarded as fairly and reasonably contemplated by the contract.

   (b) The first party is entitled to compensation under paragraph (a) only where he has notified the second party within a reasonable time of the performance having been requested that the performance is under protest.

   (c) The parties may agree as to form and time limits in which notification under paragraph (b) should be given if it is to be effective.

2. Nothing in clause 1

   (a) limits the right of a party to recover compensation on any other basis, or
   (b) affects the validity of a provision under which an arbitration to which the *Arbitration Act* applies is specified as the method by which, after the contract has been performed, disputes arising under the contract are to be resolved.

A comparison of that proposal with our final recommendation will disclose a number of changes in drafting. Our notes on those drafting changes are set out below.

1. The opening flush of paragraph 1.(a) of the proposal referred to a dispute "as to the scope of a party's obligations ...". The recommendation deletes the words "the scope of." It was suggested to us that they introduce an unnecessary ambiguity. This change should not enlarge the range of disputes to which the recommendation will apply since relief is tied into performance beyond the requirements of the contract.

2. Paragraph 1.(a) of the proposal provided that it operates "notwithstanding any provision of the contract." This language raised concerns that the proposal unduly encroached on freedom of contract.

That proviso was really aimed at the engineer decision clause. The Commission's intent was to make it clear that any decision by a supervising engineer (or person in a similar position of authority), as to the obligations imposed on a party, would not impair the right to compensation if that decision was wrong.
The final recommendation confronts engineer decision clauses more directly in paragraph 1.(d). Incorporated into paragraph 1.(d) is paragraph 2.(b) of the Working Paper proposal, the aim of which was to preserve the right of parties to agree to submit their disputes to arbitration.

This aim gave rise to a drafting problem of distinguishing between a "true arbitration" and the decisionmaking powers which may be given to a supervising engineer. Analytically, those two may be quite similar although functionally they are very different. In the Working Paper proposal, the "true arbitration" was identified through a reference to the *Arbitration Act* and a requirement that it occur after the contract has been performed. A number of comments pointed out that there could be a number of true arbitrations which would not meet the requirements of the proposal.

The final recommendation refers to "an arbitrator who is independent of everyone having an interest in the subject matter of the contract." This formulation should meet the concerns which were raised while, at the same time, drawing the necessary distinction between "true arbitrators" and supervising engineers.

3. In paragraph 1.(a)(ii) of the final recommendation, the range of things for which a first party is entitled to compensation has been broadened from "work" and "materials" which were referred to in the Working Paper proposal. This is to clarify the Commission's intention that the recommendation apply to a broad range of contractual disputes and is not limited to construction contracts.

4. A vexing drafting issue was to identify language which would define a party's contractual obligations. The Working Paper proposal referred to "what should be regarded as fairly and reasonably contemplated by the contract." A number of submissions were uneasy with that formulation and a number of alternatives were suggested.

   In the end, we have adopted the words "the contract, correctly understood and interpreted," for this purpose. This is the formulation adopted by the C.C.D.C. in its standard form construction contract. Our preference for this formulation reflects our concern that our recommendation be in harmony with the C.C.D.C. documents. It would be unfortunate if a party had a claim for compensation under both the contract and our recommendation and inconsistent language was used to describe the circumstances which trigger those rights.

5. In paragraph 1.(c) of the final recommendation, the kinds of stipulations which may be made in a contract with respect to notification have been clarified and extended. This again is aimed at bringing the position of the parties under our recommendation closer to their position under the C.C.D.C. clause.