LAW REFORM COMMISSION OF BRITISH COLUMBIA

c/o British Columbia Law Institute
1822 East Mall, University of British Columbia
Vancouver, British Columbia V6T 1Z1
Voice: (604) 822 0142 Fax: (604) 822 0144 E-mail: bcli@bcli.org
Website: www.bcli.org

Backgrounder

LRC 81—Report on Performance Under Protest

Date: May 1985

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, as to how far this course of action is open as a result of the 1960 decision of the Supreme Court of Canada in *Peter Kiewit Sons Co. of Canada v. Eakins Construction Ltd*. The implications of the decision in the case form the basis of this report.

The action in the case arose out of the contract for the construction of the Second Narrows Bridge across Burrard Inlet in Vancouver. Eakins was a subcontractor engaged to drive timber piles for the substructure of certain piers. Eakins made its tender for the subcontract on the basis of the principal contract, which required the piles to be driven to a depth for a minimum bearing capacity of 20 tons. There was also an "engineer clause" in the principal contract that provided that the engineer might call for additional work or materials not covered by the contract to be done or provided. When the work came to the piers in issue, the resident engineer ordered the piles be driven to a much greater depth than the 20-ton capacity. The engineer refused to authorize the additional work as an "extra" for which additional compensation would be payable. Eakins, after some protest and after some pressure was applied by the principal contractor, complied with this order and then sued for compensation for the extra work involved.

The Supreme Court of Canada was divided in its decision. The majority view was that Eakins could not recover for the additional work, as it had not been authorized as an extra under the terms of the contract. The court's advice to the subcontractor was that when the engineer refused to authorize the additional work as an extra, the subcontractor should have stopped work and sued for breach of contract. The minority view was that the subcontractor had been compelled to do work which it was not legally bound to do. The other party had benefited from the work and should therefore pay its fair value.

The report discusses the criticism that the decision in this case has attracted. There are two main lines of attack. First, it is said that the decision failed to recognize the realities of the construction industry and the expectations of the participants in it. Second, others have argued that the decision is inconsistent with broader developments in the law of unjust enrichment. An attempt is made to evaluate the present status of the case but the conclusion reached is that there is no universal agreement as to what it stands for. Some academic commentators believe it concerns economic duress, while others view it as dealing with the legal principles of restitution or acquiescence.

The report goes on to outline its own concerns arising from the decision in the case. The first concern relates to 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. The report is critical of the court's interpretation of the engineer clause. The second concern with the case is whether the decision is confined to construction law or whether it cuts across the whole of the law of contract. On at least one view, the effect of the decision is that part performance under protest is impossible. If the decision were to affect the whole of the law of contract then it could have far reaching implications.

The final part of the report considers whether some form of legislative intervention is required to dispel the uncertainty created by the decision. A recommendation is made that legislation should be implemented setting out 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. It is also suggested that the party seeking compensation be required to notify the other party that his performance is under protest, within a reasonable time of the performance having been required. It is recommended that a provision incorporating these principles be added to the *Law and Equity Act*. Draft legislation is included within the report.

Further Developments

See *Miscellaneous Statutes Amendment Act (No. 1), 1987*, S.B.C. 1987, c. 42, s. 51 (now *Law and Equity Act*, R.S.B.C. 1996, c. 253, s. 62).