

Important Issues to Consider Prior to Terminating a Construction Contract: *3065448 Manitoba Ltd. v. Bolay*

Authors: Jarrod Sundmark

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A 2022 decision from the Manitoba Court of King's Bench highlights the potential consequences owners face in wrongfully removing a contractor from a project. In *3065448 Manitoba Ltd. v. Bolay*, the Court awarded the plaintiff contractor damages as a result of the defendant owner's wrongful termination of the contract - despite the owner's concerns relating to delays and deficient work on the part of the contractor.



Facts

3065448 Manitoba Ltd. (the "Contractor") and Etienne Bolay (the "Owner") entered into a contract (the "Contract") for the construction of a concrete foundation for a chicken coop (the "Project"). The Contract contained an estimated completion date for the Project.

The Contractor began work on the Project. On the estimated completion date, the Owner issued a stop work order and denied the Contractor's employees access to his property before ultimately refusing to allow the Contractor to continue to work on the Project. The Owner cited concerns with a) the Contractor's ability to complete the Project on time and b) the quality of work completed by the Contractor to date (alleging certain deficiencies with the manure pit walls).

The Contractor sued the Owner for breach of contract, claiming the amounts it was owed for its work on the Project. The Owner counterclaimed for the costs of having a different contractor complete the Project, including remedying the alleged deficiencies in the work completed by the Contractor.

Issue

The issue central to the case was whether the Owner was entitled to terminate the Contract as a result of either the Contractor's a) delays and/or b) deficient work.

Analysis

In determining this, the Court considered whether the actions of the Contractor amounted to

a “repudiation” of the Contract. A repudiation is generally viewed as a substantial or fundamental breach that goes to the root of the contract. Parties will be found to have repudiated a contract when they are exhibiting behaviour that shows an intention to abandon or no longer be bound by the contract. A contractor will be found to have repudiated a contract when it is clear that they are not in substance able or willing to perform the work. Mere bad or defective work will not in general entitle an owner to terminate the contract. However, if the work is so bad as to amount to essentially a failure or refusal to carry out the work, that may be a repudiation.

In this case, if the Contractor had repudiated the Contract, then the Owner would have been able to accept that repudiation and properly terminate the Contract. If the Contractor had not repudiated, then the actions of the Owner in removing the Contractor from the Project would itself be a repudiation of the Contract and the Contractor would be entitled to damages.

The Court initially considered the Owner’s first ground for termination – the Contractor’s delay in completing the Project. The Court found that the completion date in the Contract was an estimated date, not a guaranteed date. As there was no guaranteed completion date, the Owner could not terminate the Contract on that basis. Further, the Contractor’s failure to meet the completion date was not a substantial enough breach to amount to a repudiation.

The Court then moved to the Owner’s second ground for termination – the alleged deficiencies in the Contractor’s work. Here, the Court reiterated the principle that when it comes to deficiencies, the workmanship must be “so defective as to constitute a substantial default before the homeowner can repudiate the contract.”

The Court found that the deficiencies complained of by the Owner were not of “such a poor quality or so defective so as to amount to a repudiation of the Contract” by the Contractor.

The Court noted that if there was evidence that the Contractor was unable or unwilling to correct the deficiencies then that might amount to a repudiation on the part of the Contractor. However, the evidence established at trial was that there existed reasonable means of correcting the deficiencies that the Contractor was both willing and able to carry out.

As such, the Court held that the Contractor had not repudiated the Contract, and the Owner was therefore unable to terminate the Contract.

The Court awarded the Contractor damages in the amount of \$83,865.00, being the total value of the work completed on the Project to date, less amounts it had already received from the Owner as a deposit. Had the Contractor put forth evidence of the profit lost on the remaining scope of work, it may have been entitled to those amounts as well.

The Court last considered the Owner’s claim for damages. The Owner claimed for, among other things: the deposit originally paid to the Contractor, the costs of a replacement

contractor to complete the Project and the costs of the replacement contractor related to repairing the deficiencies of the Contractor.

Given that the Owner had wrongfully terminated the Contract, the Court noted that the Owner could not recover against the Contractor for the uncompleted work, but could claim a set off against the Contractor for the deficiencies in the work completed. The Owner was entitled to these costs whether or not that repair work had been completed, as the defective work had “no value” and had to be deducted from what was owed to the Contractor. The Court set these damages at \$21,000.00, the cost of a proposed repair put forth by an engineer. As a result, the Contractor was entitled to damages in the final amount of \$62,665.00.

Key Takeaways

Key takeaways from this case for both owners and contractors include:

- Owners can terminate a building contract where there has been a *substantial* breach of the contract by the contractor which amounts to repudiation.
- A repudiation will occur when it is clear that the contractor is not, in substance, willing or able to perform the work.
- Mere bad or defective work will not, in general, entitle an owner to terminate a contract. The contractor's work must be so bad or so defective as to amount, in substance, to a failure or refusal to carry out the contract work, and thus amount to repudiation.
- A contractor's inability or unwillingness to correct deficiencies may amount to a repudiation of the contract.
- If a breach by a contractor is not serious enough to amount to repudiation, an owner's only remedy is for damages and cannot invoke termination. Likewise, if the owner terminates a contract without the right to do so, the contractor will be entitled to damages as a result of the owner's repudiation.
- When an owner repudiates a building contract, the contractor's damages are normally the value of the work completed to that point, plus the loss of profit on the unfinished balance.
- An owner who wrongfully terminates a contract cannot recover against the contractor for uncompleted work, but may properly claim for defects in the work of the contractor. This defective work has no value and the owner is able to have that amount credited against the amounts outstanding to the contractor. These amounts must be reasonable.

Jarrold Sundmark is a Winnipeg-based lawyer with a practice focused in the areas of civil and commercial litigation, with a primary emphasis on construction litigation and dispute resolution.

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