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LAVERY, DE BILLY
BARRISTERS AND SOLICITORS

1 Place Ville Marie
Suite 4000
Montréal, Québec
H3B 4M4
Tel.: (514) 871-1522
Fax: (514) 871-8977

925 chemin St-Louis
Suite 500
Québec, Québec
G1S 1C1
Tel.: 1-800-463-4002
Tel.: (418) 688-5000
Fax: (418) 688-3458

45 O'Connor Street
20th floor
World Exchange Plaza
Ottawa, Ontario
K1P 1A4
Tel.: (613) 594-4936
Fax: (613) 594-8783

Associated Firm:
Blake, Cassels & Graydon
Toronto, Ottawa,
Calgary, Vancouver,
London (England)

A REVIEW OF 1994 JURISPRUDENCE IN THE FIELD OF CONSTRUCTION LAW

A presentation by the Lavery, de Billy construction and surety law team of significant judgments rendered in 1994 dealing with various aspects of construction law.

1. BIDS

- ***A bid cannot be refused by reason of unimportant lacunas therein.***

A bid made by Gestion de Construction Novel Inc. was refused by a school commission on the ground that it was not in proper form since, in respect of three categories of the work, the names of the sub-contractors were not specified.

However, the successful bidder had indicated that it would act as its own sub-contractor for two categories of the work indicating that its sub-trades would be named at a later date. The school commission pleaded that it had followed the recommendations laid down by the Department of Education.

Mr. Justice Claude Tellier acknowledged that a school commission had a right to require strict observance of the conditions contained in a call for tenders, but, he added, a commission also had available to it a certain flexibility, particularly with respect to minor omissions which did not substantially affect the terms of a contract.

In this case the Judge considered that the requirement to designate all of the sub-trades was unimportant. In fact, the call for tenders required only the names of ten of forty-eight sub-trades; no investigation of these sub-trades was

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made and the commission did not even check the existence of the bodies named. The school commission having chosen to act inflexibly, as it was entitled to do, it was incumbent upon it to treat all persons in the same way, which it did not do. It therefore committed a delict with regard to Novel, making it liable to indemnify Novel for the amount of reasonable profit the latter would have made on the contract.

This decision has been taken to appeal.

Gestion de Construction Novel Inc. v. Commission Scolaire St-Jérôme, [1994] R.J.Q. 1946 (S.C.), Judge Tellier.

- ***A bidder must be the holder of a contractor's permit.***

The City of Chicoutimi called tenders for the restoration of one of its buildings. Only two bids were received. The low bid was refused since the bidder had not renewed its contractor's permit when the public opening of the bids took place.

The Court of Appeal upheld the position taken by the City of Chicoutimi. No one can use the designation of contractor nor act in such a capacity if it does not hold the appropriate permit. Therefore, only a permit holder can deposit a valid bid. The fact that a permit was obtained subsequently does not validate the bid since the permit does not have a retroactive effect.

Chicoutimi (Ville de) v. Meubles du Québec Inspiration XIXe Ltée, J.E. 94-1398 (C.A.), Justices Tyndale, LeBel and Baudouin.

- ***It is not sufficient to hold a permit from the Régie du Bâtiment du Québec when the tender documents call for additional qualifications.***

The instructions to bidders forming part of a call for tenders required that the general contractor and the specialist

THE LAVERY, DE BILLY CONSTRUCTION AND SURETY LAW TEAM

About twenty lawyers practice in the field of construction and suretyship. Their expertise has been developed in acting not only for insurers in the construction industry, but also for contractors, owners, surety companies and professionals.

In fact, for over twenty years Lavery, de Billy has represented the principal professional liability insurer in Canada, as well as a significant number of construction surety companies. The lawyers on this team have been involved in numerous large-scale construction projects in Quebec and in the rest of Canada, as advisors to insurers, professionals and owners.

Moreover, the team's lawyers have taken part in the preparation of construction contracts and contracts for services in respect of a considerable number of projects, which has led to the development of a specialized practice relating to planning and performance of construction projects, as well as in management techniques such as risk management and alternative methods of resolving disputes related to a contract or its performance. All the team's lawyers are active before the Courts and they regularly participate as panelists or resource staff in conferences and information sessions directed at those who work in the construction and surety fields or home warranty programs.

The team is so organized that internal discussions are encouraged and, of course, are privileged. Files are distributed with a view to the service to be rendered in order to ensure the best possible result, in the briefest possible delay at reasonable cost. To safeguard quality, each file is under the supervision of a partner.

sub-trades hold permits issued by the Régie du Bâtiment du Québec. Another provision, which specifically related to roofers, required them to be members in good standing "of provincial and national associations which regulate the trade". The roofer of the lowest bidder was not a member of either the Quebec Master Roofing Association nor the Canadian Roofing Contractors' Association. Nevertheless, its bid was accepted. The next lowest bid was deposited by Marin, whose roofer was a member of both the Q.M.R.A. and the C.R.C.A. Marin therefore took the position that its bid should have been accepted since it was the only one which met the requirements of the tender call. The owner and its architect, on the contrary, argued that the requirement demanded of roofers dealt only with the permit issued by the Régie du Bâtiment du Québec and that it was not necessary for the roofer to be a member of the two Associations.

Mr. Justice Pierre Viau rejected this defence and upheld the position taken by Marin. If indeed all the parties involved must hold a permit from the Régie, it must be understood from the text that the instructions to bidders required also that the roofer must be a member of the Associations and that this constituted a mandatory requirement.

The Judge therefore condemned the school commission to pay to Marin the amount of the profit it would have made had it been awarded the contract. He then condemned the architect to reimburse to the school commission the amount paid by it to Marin on the ground that it was the architect who had prepared the pertinent documents and who had recommended acceptance of the lowest bid.

This judgment has been taken to appeal.

Les Constructions J.P. Marin Ltée v. La Commission Scolaire Pierre Neveu, (S.C. 500-05-012240-915), November 14, 1994, Judge Viau.

- ***The Code of the Quebec Bid Depository System must be respected, but there are exceptions.***

The Corporation of Master Electricians of Quebec claimed from Electro System P.L. Inc. a penalty for having obtained a contract without respecting the *Master Electricians Act*, and the *Code of The Quebec Bid Depository System* (Q.B.D.S.).

There was no doubt that what Electro System did, namely submit a bid without going by way of the Q.B.D.S., was prohibited by the legislation and that the only way for Electro Système to escape responsibility was to prove that it had taken all necessary precautions.

The bid submitted was subject to the *Code of the Quebec Bid Depository System*. However, the President of Electro Système, upon an analysis of the tender documents, realized that he could not respect the provisions of the Code and, at the same time, accede to the request that his bid be sent directly to the owner. Judge André Biron shared Electro Système's point of view. Electro Système's President tried various approaches to the project manager and the Corporation for assistance and advice. No solution could be found which would permit Electro Système to respect the Code of the Q.B.D.S. and, at the same time, satisfy the owner's wishes.

Faced with this dilemma, Electro Système decided to submit its bid directly to the owner. It was awarded the contract.

The Court decided that Electro Système had taken all reasonable precautions in making repeated and pressing ap-

proaches to the Corporation and to the Q.B.D.S. in order to prevent a violation of a regulation adopted under a law of public order. The Corporation and the Q.B.D.S. decided to remain neutral in the debate. The only alternative left to Electro Système was to disregard the regulation or risk losing a large contract. Electro Système was therefore exonerated.

Corporation des Maîtres Électriciens du Québec v. **Électro Système P.L. Inc., J.E. 94-1260 (S.C.), Judge Biron.**

2. Liability

- ***A reservoir can be considered a building within the meaning of article 1688 C.C.L.C. and therefore damages cannot be limited by contract.***

A reservoir collapsed after it had been built. It was a large permanent structure, built according to plans and specifications. Taking into account the liberal interpretation that is generally given to the word "building", the Court of Appeal, with one dissent, held that the damages to the reservoir fell within the scope of the liability set out in article 1688 C.C.L.C.

Consequently, the article being one of public order, a clause limiting the contractor's liability was deemed not to exist.

In the present context the damages which can be claimed are not limited to the replacement of the reservoir, but extend to other damages which are a direct consequence of the fault, such as the loss of the contents of the reservoir, damages caused to other equipment or installations, the cost of emergency measures taken to limit the damage and loss of use.

General Signal Ltd., Division Ceilcote Canada v. **Allied Canada Inc., Division Allied Chemical, J.E. 94-1091 (C.A.), Justices Proulx, Delisle and McCarthy (dissenting).**

> The liberal interpretation of the word "building" in article 1688 C.C.L.C. has been sanctioned by the legislature in article 2118 of the new Civil Code of Quebec.

- ***A parking lot is a building within the meaning of article 1688 C.C.L.C., which article, in certain situations, can apply from the time of provisional acceptance and taking possession.***

The drainage system of the exterior parking lot of two apartment buildings was defective, which created subsidences of such significance that the owner felt obliged to close it to traffic. The Court made it clear that the parking lot was a building within the meaning of article 1688 C.C.L.C.

The defects had caused localized subsidences of the lot which seriously compromised its stability and which constituted ruin within the meaning of the article.

There had been provisional acceptance and taking of possession by the owner. This is sufficient, in the circumstances, to apply article 1688 C.C.L.C., it being understood that the work had been completed.

Société d'Habitation du Québec v. **Boulianne, J.E. 94-1761 (S.C.), Judge LaRue.**

- ***An action claiming damages resulting from poor workmanship is subject to the normal prescriptive delay and the owner is under the obligation to mitigate the damages.***

Cracks in the outer facing of a building are the result of poor workmanship which does not bring into play the application of article 1688 C.C.L.C.

An owner whose building is affected by such poor workmanship is not required to bring his action within the short delay which applies to hidden defects discovered after a sale, but within the ordinary prescriptive delay applicable to actions for damages which, in the present case, is thirty years.

However, an owner who had discovered the poor workmanship in 1978 and had not corrected it by 1982 is required to have taken the necessary steps to minimize the damages, and is entitled only to the amount that would have been required to correct the deficiencies if he had acted with diligence.

Gravel & Fils Ltée v. **Gravel, J.E. 95-135 (C.A.), Justices Bisson, Rousseau-Houle and Delisle.**

> Under the new Civil Code of Quebec, an action such as in the Gravel case normally must be taken within three years.

- ***A Cegep is not an expert in construction.***

Even though it had some experience in this type of work, and one of its employees had been involved in the preparation of the plans and specifications, a Cegep is not an expert in the field of renovation of swimming pools. Its vocation is teaching, not construction.

Consequently, a contractor hired by a Cegep cannot exonerate itself from liaility by pleading that the latter is an expert.

Nor can the contractor be exonerated by pleading that the measurements set out in the plans differed slightly from those found on the site, since it could quite easily have taken its own measurements.

This decision has been taken to appeal.

Isotanche Construction Inc. v. **Cegep du Vieux-Montréal, J.E. 94-678 (S.C.), Judge Jasmin.**

3. Duty to inform

- ***The Courts look into the client's duty to inform.***

In 1992, the Supreme Court of Canada rendered a judgment in which it pointed out the existence of a general obligation of good faith owed to each other by the parties to a construction contract. In that case the owner had not respected this obligation since it had not furnished to a sub-trade information held by it which it should have known to be pertinent. It had suppressed this information, which appeared in a geotechnical report, not only at the bid stage but throughout the execution of the work.

In condemning the owner to pay the damages caused by this "conspiracy of silence" the Supreme Court set forth, however, that this was an exceptional case, that its analysis was only within the framework of a large job site, and it upheld the following basic principles:

- except in the case of fraud or bad faith, the bidder bears the risks of a wrong evaluation of costs or of the method of execution of the work;
- among these risks it is recognized that the bidder accepts those relating to the nature and condition of the soil;
- the obligation of good faith must not be given such a broad scope as to eliminate the fundamental obligation of a party to inform itself.

Subsequently, in 1994 the Superior Court rendered two judgments which, relying upon the Supreme Court's decision gave it an extensive scope and awarded damages to contractors who encountered soil conditions different from those expected. In one of these cases the bid documents did not contain a soil test report; in the other the soil test reports supplied were in some regards incomplete and in others not pertinent. In neither of these cases had the owner concealed any useful information in its possession. There was neither fraud nor bad faith, but simply ignorance on both sides.

Taking into account the exceptional conditions set forth by the Supreme Court to go beyond the clauses relating to soil conditions found in most construction contracts, it might be imprudent, for the time being, to rely upon these judgments of the Superior Court in order to interpret tender documents and construction contracts. Besides, both judgments have been taken to appeal.

Banque de Montréal v. **Bail Ltée, [1992] 2 S.C.R. 554;**

GMC Construction Inc. v. **Terrebonne, (S.C. Terrebonne 700-05-001914-898), September 19, 1994, Judge Duval-Hessler;**

Janin Construction (1983) Ltée v. **Régie d'Assainissement des Eaux du Bassin de Laprairie, J.E. 94-1559 (S.C.), Judge Croteau.**

4. Legal hypothec

- ***A school building, owned by a School Commission, can be the object of a privilege (or a legal hypothec).***

The Quebec Court of Appeal held that a supplier of materials' privilege registered on a school building belonging to a school commission is valid. This judgment decides between two opposing schools of jurisprudence and rejects that which supported the view that school commissions, being dedicated to a public function, formed part of the public domain and, consequently property belonging to them, was exempt from seizure and not subject to privilege.

The Court of Appeal held that although school commissions had a public duty to teach, article 216 of the *Education Act*, clearly set out that the property of a school commission falls within the private domain since it may be hypothecated, pledged or sold.

This decision follows earlier cases which decided in the same manner regarding immovables belonging to Cegeps.

Commission Scolaire Port-Royal v. **L. Martin, (1984) Inc., [1994] R.J.Q. 916, (C.A.), Justices McCarthy, Chouinard and Steinberg.**

- ***The supplier to a supplier of materials is not entitled to register a privilege.***

In a decision rendered under the former Civil Code, the Court of Appeal held, as regards a supplier of materials, that article 2013e C.C.L.C. did not give a right of privilege to it unless it had a direct contractual relationship with the owner or the contractor. This article did not grant a right of privilege based simply upon the destination of construction materials to a project.

The new Civil Code of Quebec being drafted differently, one cannot be sure that this decision would be followed under the new law.

Russel Drummond v. **Aciers Lévisiens Ltée, J.E. 94-37 (C.A.), Justices Bisson, LeBel and Otis.**

- ***A privilege cannot be registered before the contract which gives rise to it has been executed.***

A privilege in virtue of article 2013e C.C.L.C. comes into being from the date of the supplier of materials' contract. However, it is necessary that such contract be executed. Therefore, an application for credit, even if accepted, is not a contract of sale of materials and does not give birth to a privilege. The object of the contract is the credit, not the sale. Therefore, only a contract of sale of materials constitutes a supply contract within the meaning of article 2013e C.C.L.C.

Les Matériaux Robert & Robert Ltée v. Caisse Populaire de Rock Forest, [1994] R.J.Q. 33 (C.A.), Justices Tyndale, Mailhot and Baudouin.

- ***Transitional Law: what are the criteria to be used to determine the applicability of the new Civil Code?***

To facilitate the transition from the old Code to the new, article 133 of *An Act respecting the implementation of the reform of the Civil Code* declares that the old Civil Code will apply to all cases in which the right to the realization of the security, i.e. the privilege, has been acquired by the sending and publication of the notices required under the former legislation or, if not, by means of a judicial demand before the coming into force of the new legislation. If the right to the realization of the privilege has not been acquired prior to January 1, 1994, the new Civil Code will then apply after that date to the right to the realization of what are now called legal hypothecs.

The Courts, however, are not unanimous in their interpretations of article 133. In Fibres Dynamiques Soulard Inc., Judge Jean-Marc Tremblay of the Court of Quebec applied the new law in an action on privilege instituted after January 1, 1994, although the privilege had been registered prior to that date. However, the Superior Court in two judgments, both of which have been taken to appeal, held that the old Civil Code applied when the privilege had been registered prior to January 1, 1994, although the action was instituted after that date.

It is now up to the Court of Appeal to resolve the question.

Fibres Dynamiques Soulard Inc. v. Construction Pronovost & Laberge Inc., J.E. 94-874 (C.Q.), Judge Tremblay.

Société d'Hypothèques C.I.B.C. v. Les Fenêtres St-Jean Inc., [1994] R.J.Q. 1029 (S.C.), Judge Tellier.

Hydro P-1 Inc. v. Coffrages Universel Ltée, [1994] R.J.Q. 2222 (S.C.), Judge Durocher.

- ***Under the new Civil Code, does the legal hypothec in favour of persons having taken part in the construction or renovation of an immoveable, article 2724 C.C.Q. ("the construction hypothec") always rank ahead of any other published hypothec?***

Article 2952 C.C.Q. seems to leave little doubt on the question. The article reads:

> "Legal hypothecs in favour of persons having taken part in the construction or renovation of an immoveable are ranked before any other published hypothec, for the increase in value added to the immoveable; such hypothecs rank concurrently among themselves, in proportion to the value of each claim.".

The decision in the Louango case followed article 2952, although the other hypothec involved was anterior in date.

However, the provisions of article 2783 C.C.Q. have raised some doubt. This article reads:

> "A creditor who has taken property in payment becomes the owner of it from the time of registration of prior notice. He takes it as it then stood, but free of all hypothecs published after his.
>
> Real rights created after registration of the notice may not be set up against the creditor if he did not consent to them.".

In Caisse Populaire Québec Est v. Groupe Audet, the Court of Quebec, in its resolution of the problem, found inspiration in the works of certain authors who had suggested that the solution was to be found in article 2750 C.C.Q., which reads:

> "Earlier ranking creditors take priority over later creditors when exercising their hypothecary rights.
>
> An earlier ranking creditor may, however, be liable for payment of expenses of a later creditor if, after being notified of the exercise of a hypothecary right by the latter, he delays unreasonably before invoking the priority of his rights.".

The reasoning behind this suggested solution is that the creditor who holds the legal construction hypothec can require the creditor holding a conventional hypothec registered prior to his legal hypothec to proceed to a sale by justice and enforce his prior rank at the time of collocation.

In this case, however, the creditor holding the legal hypothec, although notified of the taking in payment by the creditor holding the conventional hypothec, did not intervene to prevent a judgment in the taking in payment proceedings. The Court therefore found valid such proceedings and ordered the radiation of the legal hypothec.

Louango v. Compagnie Trust National, J.E. 94-1688 (S.C.), Judge Downs.

Caisse Populaire Québec-Est v. Groupe Audet Inc., (C.Q. 200-02-003475-946) August 26, 1994, Judge Gagnon.

- ***Substitution of a letter of guarantee issued by a bank for a legal hypothec is possible, but only if such letter is sufficient.***

By virtue of article 2731 C.C.Q., a Court may, upon request of the owner of a property charged with a legal hypothec, order the substitution for this hypothec of another security sufficient to guarantee payment of the secured debt.

However, in this case the bank letter of guarantee proposed as a substitute for the legal hypothec was not sufficient since it was irrevocable for only twelve months, there was no undertaking or requirement to have the letter extended and the letter was to be held in trust by the owner's attorneys only to be released to the creditor upon a final judgment confirming the latter's rights. The Court held that, the legal hypothec being a conservatory measure which remained in force until radiated without the necessity of any renewal, the bank letter of guarantee did not provide the same security to the creditor as did a legal hypothec.

Fibres Dynamiques Soulard Inc. v. Construction Pronovost et Laberge Inc., J.E. 94-874 (C.Q.), Judge Tremblay.

- ***An application may be made to reduce the amount of a legal hypothec when, on the face of the notice of legal hypothec, it is clear that a part***

of the amount claimed did not give any plus value to the immoveable.

A sub-trade of a sub-trade registered a builder's privilege on the owner's property. On the face of the statement of account forming part of the notice of privilege, it was evident that several parts of the claim could not have given any plus value to the building, as, for example, a claim for loss of productivity.

The Court found that the new article 804 C.P.C., which replaced article 805 C.P.C., provides that an application can be made to request the reduction of a registration in the land register. The Court posed several general principles which had assisted it in rendering judgment:

- it is only upon the hearing on the merits that a decision will be made as to whether or not the claim secured by the legal hypothec is well founded;
- a distinction must be made between the debt itself and the legal hypothec which secures it;
- that only the validity of the registration of the hypothec can be attacked by application under article 804 C.C.P., not the validity of the claim;
- the validity of the legal hypothec is dependent upon the plus value given to the property by the work done;

The Court concluded that when it is evident, on the face of the notice of legal hypothec, that a part of the claim that the creditor wished to secure, has given no plus value to the immovable, there is no legal right allowing the hypothec to be registered for such part. The Court therefore ordered a reduction of the legal hypothec.

Les Constructions Sicor Inc. v. **2944-9519 Québec Inc.,**

(C.S. 500-05-001712-940), April 12, 1994, Judge Mercure.

5. Miscellaneous

- ***A Builders Risk Comprehensive Form policy of insurance provides coverage to both the general contractor and its sub-trades.***

This matter was discussed by the British Columbia Court of Appeal which held that a general contractor and its sub-trades who do work for the account of an owner, are unamed insureds under a "Builder's Risk Comprehensive Form". The Court found it inconceivable that sub-trades were not protected by such a policy.

Consequently, the recovery action taken by the insurer against the sub-trades was dismissed on the ground that an insurer could not proceed in recovery against its own insureds.

Sylvan Industries Ltd. v. **Fairview Sheet Metal Works Ltd., [1994] 14 C.L.R. (2d) 22 (C.A.-B.C.).**

- ***The limit of $100,000.00 imposed by the Architects Act, is not unconstitutional.***

A self-employed architectural technician prepared plans for residential premises even though the cost of the work would exceed $100,000.00. This amount is imposed by the *Architects Act* as a limit in excess of which only architects may do the architectural work.

The technician pleaded that, taking into account inflation, the $100,000.00 limit tended, year after year, to enlarge the exclusive field of the architects' practice and diminish that of others which could not have been the intention of the legislature. The Court rejected this argument, pointing out that it did not

have the authority to increase the limit of $100,000.00, which could only be done by the legislature.

The Court also held that, although hypothetically there existed discrimination, it was based on a distinction relating to scholastic degrees and professional competence, which is not unlawful.

Finally, the Court held that the Canadian Charter of Rights and Freedoms did not guarantee the right to practice a profession or a trade, nor any economic rights.

The technician was therefore found guilty of an offence under the *Architects Act*.

Ordre des architectes du Québec v. **Roy, J.E. 94-1592, (C.Q.)**

THE CONSTRUCTION AND SURETY LAW TEAM

Jerome C. Smyth, Q.C. (55)*	(514) 877-2903
J. Vincent O'Donnell, Q.C. (56)	(514) 877-2928
Jean Bélanger (65)	(514) 877-2949
Allan Lutfy (68) Ottawa	(613) 594-4936
J.-François de Grandpré (71)	(514) 877-2927
Ian Rose (73)	(514) 877-2947
Claude Baillargeon (74)	(514) 877-2929
Jean Hébert (74)	(514) 877-2926
Claude Larose (75) Québec	(418) 688-5000
Gary D.D. Morrison (78)	(514) 877-2923
Hélène Gauvin (78) Québec	(418) 688-5000
Daniel Alain Dagenais (79)	(514) 877-2924
Richard Wagner (80)	(514) 877-2922
Odette Jobin-Laberge (81)	(514) 877-2919
Pamela McGovern (83)	(514) 877-2930
Antoine St-Germain (86)	(514) 877-2981
Geneviève Marcotte (87)	(514) 877-2918
Dominique Vézina (88)	(514) 877-2920
Marie-Claude Cantin (90)	(514) 877-3006
Nicolas Gagnon (90)	(514) 877-3046
Martin Dupras (91)	(514) 877-3037
Antoine Dore (92)	(514) 877-3007

* Year of admission to the Bar

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