

## OWNERSHIP OF MATERIALS IN CONSTRUCTION PROJECTS

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The lingering effects of the 2020 pandemic on supply chain and more recent inflationary pressures on price certainty may motivate contractors and owners to make advance purchase of high volume or high costs items before construction activities commence on-site. The acquisition of construction materials (including equipment to become part of the land or structure) ahead of the start of construction raises an important question as to *“who owns these items”*. The determination of ownership is essential as it impacts related issues such as *“who assumes the risk of loss, obsolescence, shrinkage, deterioration, or liability to third parties”*, and *“who is responsible for securing insurance, warranty, and storage space”* in respect of the acquired materials.

The question of ownership also becomes central in circumstances when a party in the contractual chain becomes insolvent<sup>1</sup>. For example, are the materials purchased in advance owned by the supplier who sold them, the subcontractor who is storing them off-site, the contractor who is storing them on-site, or the owner whose project within which they are being incorporated<sup>2</sup>? This article describes the basic legal principles governing the determination of ownership

in construction contracts with respect to materials, which principles can guide parties when making contractual arrangements that are out of the ordinary involving advance purchase and/or temporary off-site storage.

The analysis undertaken by the courts to determine the ownership of goods in a construction project involves several steps. The first question to be answered is whether a contract is a construction contract, or a contract for the sale of goods<sup>3</sup>. Having clarity on this question is pivotal as different legal rules will govern the ownership of the materials under these two types of contracts. A construction contract, in essence, is a contract for the performance of services, although incidentally may include the provision of goods<sup>4</sup>. Once it is determined that the supply of the goods falls under a construction contract, the court will look at the express terms of the contract to determine whether the parties included a provision addressing the time at which ownership over the materials is to pass. Many construction contracts specifically provide for passing of ownership of materials at time of delivery to the site or, alternatively, for forfeiture of materials that are

left on site if the contractor abandons the work<sup>5</sup>. Notably, some of the frequently used standard construction contracts prepared by the Canadian Construction Documents Committee, such as “CCDC 2 Stipulated Price Contract” and “CCDC 14 Design-Build Contract”, do not expressly speak to the issue of material ownership and the time at which such ownership passes. They do, however, pinpoint the time at which the contractor is entitled to seek payment as being upon the delivery of materials at the project site; this timing may be inconsistent with the common law, and therefore, require amendment by way of supplementary conditions so that the parties’ intentions, the express terms and the common law are aligned.

If no express provision in the construction contract is found as to ownership of the materials, the time when the ownership was intended by the parties to pass will have to be determined by looking at all the terms and circumstances of the particular contract<sup>6</sup>. Clauses of the construction contracts that may be helpful to discern the parties’ intention as to the time of passing of the ownership include the payment, inspection, insurance, and warranty clauses<sup>7</sup>.

Finally, if the intention of the parties cannot be gleaned from the terms of the contract and the surrounding circumstances at the time of the parties’ entering into the contract, the courts will resort to common law rules, as discussed below.

At common law, until the materials are incorporated in or affixed to the works being constructed or to the land, the ownership will remain with the builder, and that is so even when advance purchase has been approved and paid for by the owner or the materials have been brought onto the site (unless the contract between the parties shows a clear intention to the contrary)<sup>8</sup>. This implies that once the materials are incorporated into, or

“affixed” to, the works or land, the title to the materials automatically passes to the owner. The common law also provides the test for determining whether goods can be considered as being affixed<sup>9</sup>. This determination depends on the “degree of annexation” and the “object of annexation”; in other words, how much of a physical connection exists between the goods and the land or structure, and the purpose of such physical connection. When considering the “degree of annexation”, those goods that are attached to land only by their own weight *are not* considered to be part of the land, unless the circumstances show a contrary intention<sup>10</sup>. Conversely, goods attached to the land even slightly *are* considered part of the land, unless the circumstances show a contrary intention<sup>11</sup>. Regarding the “object of annexation”, the law considers whether the goods were affixed to the land or structure for the better use of the goods for their intended purpose (e.g. an air compressor bolted so it does not vibrate and move away) or for the better use of the building (e.g. carpeting tacked to floors in a hotel) while taking into consideration the nature of the building<sup>12</sup>. The greater the degree of annexation and the more likely the object of annexation is for the use of the building or land, the more likely the goods will be considered affixed and the ownership can be considered transferred.

The main takeaway is that the parties would be well advised to expressly provide for the time of passing of the ownership of the materials in the construction contract at the time the parties are negotiating the contract to avoid uncertainty associated with engaging in a complex multistep legal analysis that courts will undertake to answer the question of ownership. Most standard form contracts contemplate that ownership transfers upon delivery of items to the work site, which may not be consistent with the intention of the parties or the common law. When negotiating in respect of

ownership transfer, the parties should consider which party is best suited to assume the risk of loss of the materials and to incur costs associated with their protection, such as insurance and storage.

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Footnotes:

1. *Who Owns Those Goods? Unpicking the Mess in a Construction Context* (UK) by Claire King of Fenwick Elliott LLP published on April 4, 2018 on Mondaq (as seen on October 9, 2023 at the web page <https://www.mondaq.com/uk/construction-planning/688960/who-owns-those-goods-unpicking-the-mess-in-a-construction-context>)
2. *Ibid*
3. *Royal Bank v Saskatchewan Telecommunications*, 1985 CarswellSask 197 (SKCA) at paras 3 and 4
4. *Ibid* [*Royal Bank*] citing at para 13 Goldsmith, Canadian Building Contracts, 3rd ed. (1983)
5. *Scepter Industries Ltd. v MacIntosh*, 2006 CarswellOnt 8925 (Ont. Sup. Ct. of Justice) at para 74
6. *Taypotat v Surgeson*, 1985 CarswellSask 55 (SKCA) at para 23 and *McNeil v Jaron Construction Co.*, 1979 CarswellNS 245 (NSSC Trial Div.) citing at para 31 *Edward L. Bateman Ltd. v. Eric Reed Ltd.* (1960), (4) S.A. 151 (Southern Rhodesia)
7. *Supra* note 6 [*Taypotat*] at paras 22 and 23 and *Supra* note 3 [*Royal Bank*] at paras 15 and 16
8. *Supra* note 5 [*Scepter Industries*] at para 75 and *Supra* note 5 [*McNeil*] at para 26, both cases citing *Hudson Building & Engineering Contracts*, 10th ed
9. *Stack v T. Eaton Co.* (1902), 4 OLR 335 (CA) and *LaSalle Recreations Ltd. v Can. Camdex Invt. Ltd.* (1969), 68 WWR 339 (BCCA)
10. *Ibid* [*Stack v T. Eaton Co.*]
11. *Ibid* [*Stack v T. Eaton Co.*]
12. *Supra* note 9 [*LaSalle Recreations*]



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Sonia is a founding partner of Civic Legal LLP, and practises in the areas of procurement, construction and land development, with a particular focus on tendering law, procurement fairness, construction contracting and use of standard form construction contracts. Sonia routinely provides advice on structuring and administering public tenders and competitive RFPs, managing contractor performance and lien issues and securing land tenure. She practised as a professional engineer for 10 years and worked on civil and geotechnical design and construction projects in British Columbia and abroad. She provides legal advice with practical insight by drawing upon her unique professional understanding of construction and engineering projects. Sonia keeps a watchful eye on technological disruptions to the construction industry, and how these may impact the traditional relationships between parties, such as with the use of BIM technology and smart contracts.

*Our lawyers combine legal experience in local government, commercial real estate development, and construction law to provide legal services to local governments, owners, builders and developers on a range of projects, from concept to completion, and beyond.*

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