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Building Contracts, Warranty of Fitness and Faulty Designs: Who is on the Hook?

When entering into building contracts, contractors should be made aware of the potential impacts and consequences of certain provisions, specifically those concerning warranties of fitness and guarantees of good workmanship. A fundamental principle of Canadian contract law is that parties should be permitted to enter contracts on the terms and conditions agreed to, assuming the parties are sophisticated and understand what they are entering into, whether or not those terms and conditions are fair. The courts are reluctant to intervene when contracts are mutually agreed to by the parties because doing so would interfere with the freedom of contract.[1] Although a court will not typically "rewrite" the express terms of a contract between parties, it will imply terms where necessary to give the agreement business efficacy.[2] The court's ability to discern implied terms to a building contract can raise questions for contractors such as "*what are the obligations and warranties that the contractor is truly responsible for?*". This article discusses express and implied terms related to warranties and the implications that arise when parties agree to adhere to specific materials and designs for construction which subsequently results in defective work.

In the context of building contracts, implied terms can provide greater assurance regarding the intentions of the parties. While building contracts typically use express terms about the fitness and quality of the materials supplied and work provided, where such terms are absent, the court will infer an unwritten warranty of fitness. This implied term is that any materials supplied by a contractor will be fit and used for the intended purpose of the project.[3] To provide more certainty to owners, the implied warranty of fitness also captures the assurance that the materials used will be free of any defects.[4] Building contracts will also be interpreted as including an implied term that the contractor will perform their duties diligently, competently and in a workmanlike manner.[5] This term covers work done both before and after a contract has been entered into.[6]

Parties may avoid the consequences of an implied warranty by expressly agreeing to terms that limit or provide different warranties and guarantees under the contract. Parties can also expressly agree to a warranty that mirrors what is already implied by the contract.

Either way, it is a good practice for contractors to ensure that warranty terms are expressly set out in the contract to avoid any disputes in the future about the promised quality or fitness of the materials used and overall construction. However, contractors should also carefully consider how they qualify such terms and conditions with regard to aspects of the contract that are not under the contractor's control. Absent any qualification of the express terms, a contractor will be held responsible for design or material defects, even in circumstances when the materials being made are according to the owners' specifications. As such, contractors should be aware of the consequences of both express and implied warranties.

Express Warranty Issues

In *Steel Co. of Canada v. Willan Management Ltd.*, the Supreme Court of Canada held that even when material is supplied according to the owners' design, the contractor will be liable for any defect if the contractor provides a general guarantee that materials will be supplied without defect and will be fit for the intended purposes.[7]

The BC Court of Appeal considered an instance of the contractor warranting the owner's design in the case of *Greater Vancouver Water District v. North American Pipe & Steel Ltd.*[8] In that case, the contractor, North American Pipe & Steel Ltd., was held liable for construction work deficiencies although this deficiency was caused because of faulty design specifications provided by Greater Vancouver Water District. The applicable building contract stipulated that the contractor would build water pipes and manufacture such materials according to the owners' design specifications. However, the contract also included standard building construction warranties including that the construction materials *"will be fit for the purpose for which they are to be used"* and that the materials would be *"free from all defects arising at any time from faulty design"*. The water pipes proved to be defective because of the type of coating that was specified in the owners' design. The Court of Appeal found that although the design specifications from the owner were ultimately what rendered the water pipes defective, the contractor was nonetheless liable because it had separately warranted in the contract that if it supplied the pipes, they would be free of defects arising from faulty design.

The Court of Appeal further specified that regardless of a conflict between the provisions requiring the contractor to provide the water pipes according to the owners' specifications and assuming liability for faulty design specifications, these were separate contractual obligations. The parties agreed to a distribution of risk and although this risk was not fairly distributed between the parties, the court upheld the fundamental principle that it is not for the court to make a contract fair if the parties agree to their own terms. The Court of Appeal relied on the Supreme Court of Canada decision in *Steel Co. of Canada v. Willand Management Ltd.* to confirm that the contract was unambiguous, and that the contractor clearly guaranteed that the pipes would not have defects arising from faulty design. As such, it did not matter whose design gave rise to the defects and although unfair, the court concluded that contractors may find it in their best interests to address design risk more explicitly and outline responsibility accordingly.

Implied Warranty Issues

In *Double Dutch Construction Inc. v. Colwell*[9], the Court of Queen's Bench of New Brunswick (known now as the Court of King's Bench of New Brunswick) specified that when a building contract does not contain an express clause about the contractor's obligation to perform their duties in a workmanlike manner, the court will imply this

warranty. In this case, the owner provided the contractor with proposed design and construction plans prepared by an architect. Following numerous deficiencies in the design, the owner sued the contractor for damages. Here, the contract did not contain any express warranties, yet the contractor was held responsible for breaching the implied warranty of fitness that the materials supplied by the contractor would be fit and used for the intended purpose and the implied warranty that the contractor would perform their duties in a workmanlike manner. The Court of Queen's Bench of New Brunswick clarified that the contractor had a duty to warn the owner of any unsuitable design specifications, even if those specifications were not drafted, prepared or proposed by the contractor. This case emphasizes how implied terms related to contractor warranties may result in a contractor being held liable for faulty designs even when the contractor does not provide any express warranty or guarantee in the contract.

Takeaway

The main takeaway is that before bidding on a building and construction contract, a contractor should carefully consider the proposed warranty terms and whether the contractor is willing to warrant the design and fitness of the materials involved, regardless of which party prepares the design or specifies the materials. It is highly recommended that contractors manufacturing materials to an owners' specifications do not contractually agree to standard terms assuring the design and fitness of the materials unless they are willing to assume full risk and liability if the design proves faulty. Instead, contractors should qualify the warranties and guarantees in the contract by limiting their liability only to the designs and specifications that the contractor prepares themselves rather than a generalized warranty guaranteeing any design specifications. If design or specifications are completed by the owner or a third party such as an architect, a contractor should also carefully review those specifications and warn the owner if there are any reasonably foreseeable issues with the specifications provided. If the contractor fails to do so, the contractor may be responsible for any damages as explained above.

As of now, there is no guidance on what a contractor should do if they enter a contract but later conclude the design is faulty prior to construction. The contractor should consider engaging the owner to see if a different design is agreeable, and failing that, if the contract provides other remedies. While there is no current direction on this point, it will be interesting to see how the courts will consider such a situation in the future seeing as the court tends to protect owners rather than contractors.

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Kyle Laplante

Footnotes:

1. *Bhasin v. Hrynew*, 2014 SCC 71 at para 76.

2. *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 SCR 711 at paras 42-44.

3. *Raynard v. O'Blenis*, 1978 CarswellNB 196 at para 15.

4. *McCain Foods Ltd. v. Grand Falls Industries Ltd.*, 1991 CarswellNB 255 at paras 58-61.

5. *Stange v. Manhas*, 1982 CarswellBC 411 at para 4.

6. *Riar v. Bowgray Investments Ltd.*, 1977 CarswellOnt 399 at para 4.

7. *Steel Co. of Canada v. Willan Management Ltd.*, [1966] 1 SCR 746.

8. *Greater Vancouver Water District v. North American Pipe & Steel Ltd.*, 2012 BCCA 337.

9. *Double Dutch Construction Inc. v. Colwell*, 2012 NBQB 317.

Civic Legal LLP

KYLE LAPLANTE
604.358.1663
KYLE@CIVICLEGAL.CA

Kyle is an associate lawyer of the firm and maintains a general municipal law practice with a focus on real estate development. Prior to joining Civic Legal LLP, Kyle worked at a regional law firm specializing in real estate development where he represented a number of developers. In his practice, Kyle assists clients throughout all stages of the development process from rezoning and development permit issuance to air space parcel subdivision and occupancy permit issuance. He regularly drafts section 219 covenants, statutory rights of ways and other legal agreements for development projects.

Kyle obtained his Bachelor of Political Science and Communication Studies with a Minor in Legal Studies and a specialization in Media and Cultural Theory with Distinction from Wilfrid Laurier University. He later completed his Juris Doctor at the University of Ottawa and was called to the British Columbia Bar in 2023. During his time in law school, Kyle volunteered with the Indigenous Law Students Government and OUTLaw to advance the rights of Indigenous and 2SLGBTQ+ Peoples. While in law school, Kyle worked with the Federal Government at Fisheries and Oceans Canada where he worked on international oceans policy with a particular focus on the Arctic Ocean. Upon graduation, Kyle articled with a national corporate law firm in downtown Vancouver.

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710 - 900 West Hastings Street, Vancouver, BC V6C 1E5
604.639.3639 | **www.civiclegal.ca** | @CivicLegal