IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Greater Vancouver Water District v. Bilfinger Berger AG,* 2015 BCSC 485

Date: 20150331
Docket: S083856
Registry: Vancouver

Between:

The Greater Vancouver Water District

Plaintiff

And:

Bilfinger Berger AG, Bilfinger Berger (Canada) Inc., Fru-Con Construction Corporation Bilfinger Berger/Fru-Con, a joint venture, Travelers Guarantee Company of Canada, La Compagnie Travelers Garantie Du Canada, Chubb Insurance Company of Canada and in French Chubb Du Canada Compagnie D'Assurance, and Zurich Insurance Company Zurich Compagnie D'Assurances

Defendants

And:

Bilfinger Berger (Canada) Inc., Bilfinger Berger AG, Fru-Con Construction Corporation, and Bilfinger Berger/Fru-Con, a joint venture

Plaintiffs by Counterclaim

And:

Greater Vancouver Water District, Greater Vancouver Regional District, Greater Vancouver Sewerage and Drainage District, Hatch Mott MacDonald Ltd., and The Corporation of the District of North Vancouver

Defendants by Counterclaim

Before: The Honourable Madam Justice S. Griffin

Reasons for Judgment – Summary Trial Application

In Chambers

Counsel for Applicants and Defendants by Counterclaim, Hatch Mott MacDonald ("HMM"):	Frank G. Potts Timothy D. Goepel
Counsel for the Applicants Plaintiffs and Defendants by Counterclaim, Greater Vancouver Water District, Greater Vancouver Regional District, Greater Vancouver Sewerage and Drainage District, and The Corporation of the District of North Vancouver (the "Metro Vancouver parties"):	John R. Singleton QC Stephan M. Vorbrodt
Counsel for the Respondents Defendants and Plaintiffs by Counterclaim, the "Bilfinger Berger parties":	Christopher J. O'Connor QC Michael Skene Krista Johanson
Place and Date of Hearing:	Vancouver, B.C. February 2-6, 10-12, 2015
Place and Date of Ruling:	Vancouver, B.C. March 31, 2015

Introduction

[1] This is complex construction litigation having to do with the construction of two tunnels intended to transport untreated and treated drinking water. The rock conditions in the tunnels are the main source of controversy.

[2] The Metro Vancouver parties ("Metro Vancouver"), who are the owners of the tunnels, and Metro Vancouver's engineer, Hatch Mott MacDonald Ltd. ("HMM"), both bring applications for summary trial of certain issues as against the contractor, the Bilfinger Berger parties ("Bilfinger").

[3] For purposes of this application it is not necessary to distinguish as between the individual entities within the groups referred to as Metro Vancouver or Bilfinger.

[4] The summary trial application will not dispose of all of the issues between the parties.

[5] The respondent Bilfinger submits that the issues are not appropriate for determination on summary trial, as they are inextricably intertwined with other issues which will proceed to trial and it would not be just to decide these issues in isolation. It argues that determining the application would not get rid of the need to call evidence on related issues and so would not significantly shorten the length of trial.

Relief Sought

[6] The HMM notice of application seeks the following relief:

> 1. Pursuant to Rule 9-7(2), and clauses 4.1, 4.2, 4.3, 5.1, 5.2 and 18.2 of the Tender Documents, and clauses 6, 8, 2.4.4, 6.1.13 and 6.1.14 of the Contract, and clauses 1 and 11 of the Geotechnical Baseline Report, and the limitations of the Geotechnical Data Report, an Order that the [Bilfinger parties'] claims in negligence, negligent misrepresentation and for failure to warn in respect of anticipated sub surface conditions during the design, specifications and Tender phases of the Project, be dismissed with costs;
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> …
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> 4. In the further alternative, an Order pursuant to Rule 9-7(17) and/or Rule 12-5(67) and/or Rule 5-3(l)(p) that at such time as [the Bilfinger parties] commence their case as against HMM, that the issues of a) whether HMM owed the [Bilfinger parties] a duty of care in respect of the design,

> specification, and tender phases of the Project and b) the issue of whether the [Bilfinger parties'] claims as against HMM are barred by reason of contractual provisions and/or the terms of the Geotechnical Baseline Report and/or the Geotechnical Data Report ... be determined prior to the continuation of the trial in respect of any remaining issues arising from the claims against HMM; and
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> 5. The [Bilfinger parties] pay to HMM the costs of this application, in any event of the cause.

[7] The Metro Vancouver notice of application seeks the same first item of relief as above and costs of the application, as well as the following relief in item four which is similar to item four as set out by HMM above:

> 4. In the further alternative, an order pursuant to Rule 9-7(17) and/or Rule 12-5(67) and/or Rule 5-3(1)(p) that at such time as Bilfinger Berger commence their case as against Metro Vancouver, that the following issues be determined prior to the continuation of the trial in respect of any remaining issues arising from the claims against Metro Vancouver:
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> a. whether Bilfinger Berger's claims as against Metro Vancouver in negligence, negligent misrepresentation and failure to warn in respect of anticipated sub surface conditions during the design, specifications and tender phases of the Project are barred by reason of contractual provisions and/or the terms of the Geotechnical Baseline Report and/or the Geotechnical Data Report ...

[8] The applicants adjourned items two and three of the relief sought in their notices of application, which sought summary trial determination of issues relating to Bilfinger's claim for consequential damages, and part of item four which sought alternative relief in relation to the claim for consequential damages.

[9] The essence of the Metro Vancouver and HMM position is that exclusion or limitations of liability clauses in the construction contract between Bilfinger and Metro Vancouver negate the possibility of either Metro Vancouver or HMM owing Bilfinger a pre-contractual duty of care in relation to sub-surface conditions, and thus claims by Bilfinger predicated on a pre-contractual duty of care in relation to sub-surface conditions should be dismissed.

[10] In order to understand these applications for summary trial it is necessary to understand some of the background facts.

Background Facts

[11] In early 2002, Metro Vancouver began developing a project to improve the availability and quality of drinking water known as the Seymour-Capilano Filtration Project (the "Project").

[12] Components of the Project include two underground tunnels, one to transport raw water eastward from the Capilano Reservoir to a new filtration plant near the Seymour Reservoir and the other to transport treated water westward from the filtration plant back to the Capilano end to connect with the existing distribution system below the Cleveland Dam. The raw water tunnel (the "RWT") and the treated water tunnel (the "TWT") are collectively referred to as the "Twin Tunnels".

[13] The Twin Tunnels component of the Project entails:

a) an underground shaft, approximately 180 metres in depth, at the Seymour end;

b) two underground shafts, each approximately 270 metres in depth, at the Capilano end;

c) two underground tunnels, each approximately 3.8 metres in diameter and 7.1 kilometres in length, extending through the bedrock between the Seymour shaft and the Capilano shafts;

d) permanent lining for the shafts and portions of the tunnels; and

e) a series of interconnecting pipes from the shafts to watermains.

[14] HMM were the engineers engaged by Metro Vancouver to design the Project.

[15] The Project was put out to tender to pre-qualified general contractors, one of which was Bilfinger.

[16] A Geotechnical Data Report ("GDR") and Geotechnical Baseline Report ("GBR") formed part of the tender package. These reports contained some

geotechnical information relevant to the design of the rock support for the tunnelling and to the methods of tunnelling, including the design of the Tunnel Boring Machines (the "TBMs") to be used in the tunnels.

[17] Bilfinger submitted a bid on the Project and its bid was accepted. The contract price was, after adjustments, in the range of $103 - $104.75 million.

[18] The GDR and GBR as well as some other documents made available to Bilfinger and the other potential tenderers formed part of the contract documents between Bilfinger and Metro Vancouver. The form of contract was part of the tender package as well.

[19] It is not contested that the GBR and GDR formed part of the contract.

[20] HMM was not a party to the construction contract, but was appointed under it as Metro Vancouver's engineer. It was responsible for producing the GBR.

[21] There were terms in the contract documents dealing with disputes. This included a process of referring disputes to a Dispute Review Board ("DRB").

[22] Metro Vancouver and HMM say that the way the GBR was to work in the context of the contract, was to provide a baseline of expected geotechnical conditions as part of the information for tenderers. The expected geotechnical conditions would allow the tenderers to price their bid but were not a guarantee that these would be the conditions encountered in tunnelling.

[23] In simple terms, they say that if, during the course of tunnelling, conditions encountered were adverse in comparison to those set out in the GBR, a contractor could make a claim that there were "Differing Site Conditions" ("DSCs") entitling it to be paid more in order to address those site conditions. If the claim was accepted by the engineer, HMM, then a change order from Metro Vancouver would ensue. If there was a dispute over whether conditions in the tunnels amounted to a DSC, this was to be referred to the DRB.

[24] Bilfinger alleges that in late 2007 and early January 2008 dangerous and unexpected rock conditions were encountered in the tunnels. It alleges that a massive rockburst occurred on January 8, 2008 in the RWT. It then suspended tunnelling.

[25] Bilfinger took the position that the design by HMM was unsafe. It alleges that the GBR, and design based on it, negligently did not take into account the possibility of high *in situ* stress or overstress failures or rockbursts.

[26] Bilfinger was given new tunnelling information by HMM in January 2008. A change order from Metro Vancouver accompanied the new information. Bilfinger took the position that the new information did not provide a safe, viable design and that the change order did not provide a valid instruction to resume excavation.

[27] HMM made further tunnelling design recommendations in February and March 2008. This information is described by the parties as the Tunnelling Support Recommendations. Bilfinger reviewed the design recommendations and took the position that these recommendations still did not provide a safe, viable design.

[28] Various positions were taken by the parties as to the other's respective obligations.

[29] Ultimately Metro Vancouver took the position that Bilfinger had refused to continue the work and gave notice to Bilfinger on May 26, 2008, terminating the contract. The DRB process was not initiated by Metro Vancouver.

[30] Bilfinger says the termination was unlawful and was a repudiation of the contract which it accepted.

[31] Metro Vancouver commenced the within proceeding against Bilfinger. Bilfinger then started its own claim against Metro Vancouver and HMM.

[32] Another contractor was hired to complete the work, which has taken much longer than expected and has cost much more than Bilfinger's bid on the project.

[33] The two actions proceeded in tandem. I was assigned as case management judge on October 2, 2008 and I have heard many applications in these proceedings over the course of the litigation. The two proceedings have been consolidated into the within proceeding. The matter was set to commence trial before me in February of this year but was more recently delayed to May 2015.

[34] The trial is expected to be very lengthy.

[35] Metro Vancouver's claim against Bilfinger is for breach of contract "and/or negligence".

[36] Bilfinger claims against Metro Vancouver for breach of contract.

[37] Bilfinger also claims against Metro Vancouver and HMM in negligence.

Nature of Claims

[38] Metro Vancouver claims Bilfinger is liable for the difference between its contract price and that of the new contractor, plus damages for delay.

[39] Analyzing the Metro Vancouver theory of damages will necessitate comparing the price paid in respect of the completion contract to what Bilfinger's ultimate contract price would have been, taking into account any changes during the course of the work based on DSCs as compared to that set out in the GBR.

[40] Metro Vancouver submits that it now concedes there were some DSCs that would have affected the Bilfinger final contract price, although not to the extent Bilfinger says there were.

[41] Bilfinger vigorously defends the Metro Vancouver claim. The essence of its defence is that the termination of the contract was in breach of contract, and that Metro Vancouver was further in breach of contract by failing to provide a safe and viable design for the rock conditions. This allegation of failure to provide a safe design, as part of Bilfinger's defence of the Metro Vancouver claim, runs the length of the parties' relationship: at the tender phase, during construction of the tunnels,

and later when HMM provided additional design recommendations after Bilfinger claimed there were rockbursts in January 2008.

[42] Bilfinger's defence to the Metro Vancouver claim mirrors the allegations it advances in its counterclaim against Metro Vancouver and HMM.

[43] Bilfinger also alleges in its counterclaim against Metro Vancouver that Metro Vancouver breached the contract in various ways, including in failing to provide a safe and viable design, and in wrongfully terminating the contract.

[44] Bilfinger also advances claims against Metro Vancouver and HMM in negligence, including at the following paragraphs of the counterclaim:

a) para. 60, negligent pre-design investigations, negligent design, failure to provide a safe design to tunnel in the encountered conditions;

b) para. 61, misrepresentations as to: the suitability of the design for the site conditions; that Metro Vancouver had and would identify hazards; the lack of risk of overstressing; sufficient engineering had been done;

c) para. 69, breach of duties to warn before the contract and during the contract, including failing to divulge information in their hands of the risks of high *in situ* stress;

d) para. 74, in preparing the design and providing the consulting engineering services, HMM owed duties of care to Bilfinger "to perform such services at the standard required of professional engineers of the day for projects of a like nature", which duties included: preparing a safe and viable design; disclosing all material information in the tender documents; investing the *in situ* stress and the strength of the rock in the tunnels and the zone of altered rock in the tunnels experiencing overstress, before and after the work stoppage; and

e) para. 77, Metro Vancouver owed a duty of care to Bilfinger to ensure that the Project engineers were competent and similar duties as set out in para. (d) above.

[45] In its counterclaim Bilfinger says but for the negligence of HMM and Metro Vancouver, it would not have submitted a bid for the Project or the bid it did submit, and would not have entered into the contract or have agreed to use the current TBMs.

[46] There are several terms in the contract documents which the applicants and respondents referred to in argument. I have set out some of the more material terms in Appendix A to these reasons.

The Principles Applicable to the Summary Trial Procedure

[47] The applicants rely on R. 9-7 of the *Supreme Court Civil Rules,* B.C. Reg. 168/2009 [*Rules*], known as the summary trial rule.

[48] HMM argues that the approach to summary trial in BC may need to change following the Supreme Court of Canada's judgment in *Hryniak v. Mauldin*, 2014 SCC 7 [*Hryniak*]. I will therefore first review the approach of BC courts to the procedure and then consider the approach in *Hryniak*.

A. The Summary Trial Rule in BC

[49] The summary trial rule provides that a party may apply to the court for judgment on an issue or generally, and may tender any of affidavit evidence, answers to interrogatories, discovery evidence, admissions and expert evidence in support: R. 9-7(2), (5). The court may allow for a party who has sworn an affidavit or an expert who has provided a report to be cross-examined either before the court or another person: R. 9-7(12).

[50] The summary trial rule provides the court with discretion to decline to determine the merits of the issues sought to be determined on the summary trial application, as identified at R. 9-7 (11) and (15):

> (11) On an application heard before or at the same time as the hearing of a summary trial application, the court may
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> (a) adjourn the summary trial application, or
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> (b) dismiss the summary trial application on the ground that
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> (i) the issues raised by the summary trial application are not suitable for disposition under this rule, or
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> (ii) the summary trial application will not assist the efficient resolution of the proceeding.
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> …
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> (15) On the hearing of a summary trial application, the court may
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> (a) grant judgment in favour of any party, either on an issue or generally, unless
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> (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
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> (ii) the court is of the opinion that it would be unjust to decide the issues on the application,
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> (b) impose terms respecting enforcement of the judgment, including a stay of execution, and
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> (c) award costs.
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> [Emphasis added.]

[51] Summary trial applications have been commonplace in civil and family litigation in BC for over 30 years.

[52] The original and predecessor summary trial rule was R. 18A. It was brought into force in 1983 as an access to justice initiative, to provide for the early resolution of many cases without the costs and delays associated with a full trial.

[53] The history of the rule was explained in *Inspiration Mgmt. Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 at 211 (C.A.) [*Inspiration Management*]. *Inspiration Management* was a judgment of a panel of five judges of the Court of Appeal pronouncing on the proper approach to summary trial applications. The principles stated in the case have remained unchanged.

[54] The Court of Appeal in *Inspiration Management* emphasized that the summary trial rule is different than the summary judgment rule, which at that point had a much longer history.

[55] A summary judgment application, currently provided for in R. 9-6, can be brought for judgment on the basis that there is no genuine issue for trial. In contrast, a summary trial application can be brought and determined by an applicant seeking the court's judgment on triable issues.

[56] There may have been some discomfort with the novel summary trial procedure initially because it allowed for judgment to be given on affidavit evidence without the safeguard of seeing the witnesses testify and be challenged in cross-examination at trial.

[57] The fact that the summary trial rule permits a court to decide triable issues on an application was the focus of the Court of Appeal's judgment in *Inspiration Management.* In *Inspiration Management* the chambers judge found conflicts on the affidavits that she could not resolve and so dismissed the application. The Court of Appeal held that the chambers judge applied the incorrect test by concluding that she should not give judgment "unless it was 'clear that a trial in the usual way could not possibly make any difference to the outcome'": at 210.

[58] The Court of Appeal in *Inspiration Management* found that the chambers judge was correct in concluding she could not resolve the conflicts in the evidence. However, the Court of Appeal felt that the conflicts were sufficiently narrow that they could have been resolved by ordering cross-examination on the affidavits before a judge, rather than dismissing the application: at 217.

[59] The following principles emerge from *Inspiration Management*:

1. The intention with the summary trial rule is to shortcut some of the normal processes involved in a trial in order to expedite the administration of justice. The rule substitutes other safeguards:

a. first, a lengthy notice period for the application;

b. second, a chambers judge cannot give judgment unless she can find the facts necessary to decide the issues of fact or law; and

c. third, a chambers judge who can decide the issues may decline to give judgment if she thinks it would be unjust to do so: at 214.

2. In determining whether the judge can find the necessary facts, a judge should not decide an issue of fact or law solely on the basis of conflicting affidavits. However, there may be other admissible evidence which will make it possible to find the necessary facts, such as evidence which corroborates one side's affidavit and contradicts the other side, or, there may be other procedures which allow the judge to find the necessary facts, such as cross-examination of the persons who gave the affidavits: at 216.

3. In deciding whether it would be unjust to decide the issues, the chambers judge can consider amongst other things:

a. the amount involved;

b. the complexity of the matter, although use of the rule is not limited to simple or straightforward cases;

c. its urgency;

d. any prejudice likely to arise by reason of delay;

e. the cost of a conventional trial in relation to the amount involved; and

f. the course of the proceedings: at 214.

[60] The case of *Inspiration Management* sent a strong signal that the summary trial procedure could be used in complex cases and even where there were conflicting affidavits. The procedure became widely used in BC for all sorts of disputes.

[61] Where credibility is a material issue, and cannot be resolved by the body of written evidence, the courts have repeatedly found it difficult to find the necessary facts based on the contradictory affidavit evidence of witnesses alone, and have also found it unjust to decide the issues without allowing for the right of cross-examination: see *Mayer v. Mayer*, 2012 BCCA 77 at paras. 78-83.

[62] A number of "hybrid" trials have occurred in BC where the direct evidence of all or some witnesses of a party is put before the court by way of affidavit but then all or some of those witnesses are subject to cross-examination either outside of court or before the chambers judge. This is within the scope of the summary trial rule (R. 9-7(12)(b)) and was envisioned in *Inspiration Management*, and is also permissible under the rule governing orders that can be made at trial management conferences and trials: R. 12-2(9)(h) and 12-5(59). The advantages of a hybrid trial for cases where the dispute is "focused more on competing perspectives on a complex factual background–as opposed to narrower contests over credibility" are discussed by Tim Dickson, "A Few Thoughts On Hybrid Trials" (2014) 72 The Advocate 361 at 363.

B. *Hryniak* and the Revised Summary Judgment Rule in Ontario

[63] A project on civil justice reform conducted in Ontario by Hon. Coulter Osborne concluded with a report in November 2007, which amongst other things recommended the adoption of a summary trial rule similar to BC's R. 18A: see *Civil Justice Reform Project: Summary of Findings & Recommendations,* (Ontario: 2007) [*Osborne Report*]. The *Osborne Report* stated at 38:

> British Columbia's rule 18A has been very well received and is said to be successful. As noted by one commentator in British Columbia, "[N]ot since the introduction of the summary trial under rule 18A has such a versatile and useful tool been placed in the hands of litigators wishing to have a civil dispute of modest dimensions adjudicated in a speedy, comparatively inexpensive, yet just manner....When Rule 18A was first introduced, no one could have imagined the way, and the extent to which, it would change (for the good) the practice of civil litigation in the province." [Vancouver Bar Association, The Advocate (Volume 61, Part 2 (March 2003)) at 169-170.] Indeed, the British Columbia rule is being employed in 60% of cases; however, a similar rule in Alberta is not yet widely used. [Alberta Law Reform

> Institute, "*Alberta Rules of Court Project - Summary Disposition of Actions*," Consultation Memorandum 12.12, August 2004, Edmonton, Alberta, at 63.]

[64] I have been unable to find any source for the above statement that the BC summary trial rule was, as of 2007, being employed in 60% of cases. I am advised that this Court has not maintained any statistics on the use of the summary trial procedure as compared to ordinary trials. It is possible that the statement was merely anecdotal as opposed to being based on empirical data. In any event, there is no apparent cultural aversion to the use of the rule, but rather, it appears to have been widely adopted and applied in civil litigation in BC. Most currently practicing lawyers and many judges in BC have always accepted it as part of the litigation repertoire and have not known a time when it was not available.

[65] I cannot comment on the impression stated in the *Osborne Report* that the rule is not widely employed in Alberta. The summary trial procedure was introduced in Alberta in 1998, which also retained a summary judgment rule as noted in *Can v. Calgary (Police Service),* 2014 ABCA 322 at paras. 76, 103, Wakeling J.A., concurring; see also *Hajjar v. Repetowski*, 2001 ABQB 432.

[66] It was clear that the recommendation in the *Osborne Report* for a similar summary trial rule in Ontario had in mind the concept of "proportionality" and considered that a summary trial rule would allow for the final disposition of "non-complex cases", "where a full *viva voce* trial is not warranted given the amounts or issues at stake": at 40.

[67] The law reformers in Ontario decided not to adopt a summary trial rule similar to BC's R. 18A, but instead, to modify the summary judgment rule in 2010. This modified rule was the subject of the Supreme Court of Canada's judgment in *Hryniak*.

[68] In *Hryniak,* one of several defendants was found liable for civil fraud on application by the plaintiffs pursuant to Ontario's amended summary judgment rule. The application was brought against several parties, but was dismissed against all but Mr. Hryniak on the basis that a trial was required for the others but was not

required for the case against him. The summary judgment was upheld on appeal although the Ontario Court of Appeal disagreed with the motion judge's approach to summary judgment. A further appeal to the Supreme Court of Canada ensued, with that Court also upholding the summary judgment.

[69] The Supreme Court of Canada in *Hryniak* praised the development of more streamlined procedures for the resolution of civil disputes, as increasing access to justice, with the important proviso that the process of adjudication must remain fair and just: at paras. 23, 27. The judgment by Karakatsanis J. sanctioned the concept of proportionality, explaining that just as "one would not expect a jury trial over a contested parking ticket, the procedures to adjudicate civil disputes must fit the nature of the claim": at para. 29.

[70] Proportionality is also a theme running throughout the decision in *Inspiration Management* and subsequent decisions interpreting BC's summary trial rule, see for example *Ghavim v. Jamali*, 2014 BCCA 21 at para. 32 [*Ghavim*].

[71] Proportionality was also expressly stated to be one of the goals of the BC *Rules* when the current version of the *Rules* was adopted in July 2010. Rule 1-3 provides:

> 1-3(1) The object of these Supreme Court Civil Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits.
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> (2) Securing the just, speedy and inexpensive determination of a proceeding on its merits includes, so far as is practicable, conducting the proceeding in ways that are proportionate to
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> (a) the amount involved in the proceeding,
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> (b) the importance of the issues in dispute, and
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> (c) the complexity of the proceeding.

[72] As is made clear by the above objects of the *Rules*, and as was noted in respect of the parallel family rule by Willcock J.A. in *Ghavim*, in considering proportionality one must not lose sight of the ultimate goal which is to determine cases on the merits justly.

[73] There is an aspect of the new Ontario summary judgment rule which is similar to BC's summary trial rule, in that it requires a chambers judge to consider when it might be unjust to decide an issue summarily, as explained in *Hryniak* at paras. 42-45.

[74] The Supreme Court of Canada in *Hryniak* held at paras. 49-51:

> [49] There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.
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> [50] These principles are interconnected and all speak to whether summary judgment will provide a fair and just adjudication. When a summary judgment motion allows the judge to find the necessary facts and resolve the dispute, proceeding to trial would generally not be proportionate, timely or cost effective. Similarly, a process that does not give a judge confidence in her conclusions can never be the proportionate way to resolve a dispute. It bears reiterating that the standard for fairness is not whether the procedure is as exhaustive as a trial, but whether it gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute.
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> [51] Often, concerns about credibility or clarification of the evidence can be addressed by calling oral evidence on the motion itself. However, there may be cases where, given the nature of the issues and the evidence required, the judge cannot make the necessary findings of fact, or apply the legal principles to reach a just and fair determination.
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> [Emphasis added.]

[75] The Supreme Court of Canada in *Hryniak* disagreed with the Ontario Court of Appeal that in considering the "interests of justice" the motions judge must ask herself "can the full appreciation of the evidence and issues that is required to make dispositive findings be achieved by way of summary judgment, or can this full appreciation only be achieved by way of a trial?": at paras. 53, 56. Rather, on such an application "the evidence need not be equivalent to that at trial, but must be such that the judge is confident" that she can resolve the dispute in a way that is fair and just: at para. 57.

[76] The Supreme Court of Canada in *Hryniak* observed that the question of whether it is in the interests of justice to resolve a dispute on a summary procedure, as opposed to at a trial, is necessarily comparative, requiring consideration of the relative efficiencies of the motion as compared to trial, "the nature, size, complexity and cost of the dispute and other contextual factors", and the potential evidence available and ability to fairly evaluate it under both procedures: at paras. 58, 82.

[77] It can be seen by the above review that the judgment in *Inspiration Management*, governing the approach to summary trials in BC, is entirely consistent with the observations in *Hryniak* as to the general approach, including the concept of proportionality, that should be applied to these types of summary procedures.

[78] Although not important for present purposes, it must be kept in mind that the BC summary trial rules and summary judgment rules remain distinct, and so have some important differences from the new Ontario summary judgment rule: *The Owners, Strata Plan BCS 1348 v. Travelers Guarantee Company of Canada*, 2014 BCSC 1468 at para. 65; *N.J. v. Aitken Estate*, 2014 BCSC 419 at paras. 32-38.

C. Summary Trial of Part of a Case

[79] The case of *Inspiration Management* appears to have been dealing with an application for judgment on the entire dispute between the parties, not for partial judgment on only some of the issues. The Court did comment, however, that a chambers judge has discretion whether to decide only some issues, with other issues remaining for trial, and should consider if that may assist in settlement and should not feel constrained in doing so: at 214.

[80] Similarly the Supreme Court of Canada in *Hryniak* was not for the most part focused on the question of the appropriateness of a summary weighing of evidence to determine only part of a dispute between two parties, with other issues remaining between those parties for trial.

[81] However, the Supreme Court of Canada in *Hryniak* did briefly consider the approach to a summary determination of issues against one party with issues

remaining against other parties for trial. The Court cautioned that while this summary determination could be done under Ontario's new rule, a motions judge would need first to consider how this would impact the remaining issues for trial and would have to be mindful of the risk of duplication or inconsistent findings. As held by Karakatsanis J. at para. 60:

> The "interest of justice" inquiry goes further, and also considers the consequences of the motion in the context of the litigation as a whole. For example, if some of the claims against some of the parties will proceed to trial in any event, it may not be in the interest of justice to use the new fact-finding powers to grant summary judgment against a single defendant. Such partial summary judgment may run the risk of duplicative proceedings or inconsistent findings of fact and therefore the use of the powers may not be in the interest of justice. On the other hand, the resolution of an important claim against a key party could significantly advance access to justice, and be the most proportionate, timely and cost effective approach. [Emphasis added.]

[82] The appropriateness of litigating only partial issues by way of a motion for summary trial, and the impact of doing so on the litigation as a whole, has been considered many times over the course of BC's more than three decades of history with the procedure.

[83] In *Jam's International Ventures Ltd. v. Westbank Holdings Ltd.*, 2001 BCCA 121 [*Jam's International*] the Court of Appeal overturned a summary trial decision which had granted judgment on only part of the proceeding. The question decided on summary trial dealt with whether oral representations could survive a contractual release. The Court held that the chambers judge had erred in granting judgment because the issues decided required a fuller evidentiary basis, and the question of whether reliance on the representations was reasonable required evidence of the full factual matrix.

[84] The Court of Appeal in *Jam's International* held at para. 4 that the following principle applied to those cases where summary trial was sought of only part of a proceeding:

> The first principle applies to those cases where the summary trial relates to only one issue in the appeal and is not a trial of the whole proceeding. The principle was stated in *District of North Vancouver v. Fawcett* (1998)

> 162 D.L.R. (4th) 402 where, in a unanimous judgment, the Court said this, at p.413:
>
> > With respect, it seems to me that if the answer to an issue sought to be tried under rule 18A will only resolve the whole proceeding if one answer is given, but not if a different answer is given, then the applicant should be required to demonstrate, and the judge should be expected to decide, that the administration of justice, as it affects not just the parties to the motion, but also the orderly use of court time, will be enhanced by dealing with the issue as a separate issue. It cannot be enough simply that the parties have agreed to a summary trial of one or more issues, but not all of the issues, raised in the proceeding, without any consideration for the effective use of court time, or the efficient resolution of the proceeding.

[85] In the case of *Bacchus Agents (1981) Ltd. v. Philippe Dandurand Wines Ltd.,* 2002 BCCA 138 [*Bacchus*] the summary determination of parts of a dispute, leaving the remaining parts for trial, was described as “litigating in slices”. The Court of Appeal noted at paras. 6 and 7:

> [6] [Rule 18A] is a useful rule intended to shorten litigation, thereby lessening its cost to the parties and to the public treasury and reducing delays in the process, it being an axiom, at least since Bacon's time, that justice delayed is justice denied.
>
> [7] When, however, as in this case, the rule is invoked to try "an issue" rather than the whole case – what I have often characterized as "litigating in slices" – it may become a hindrance to the "just, speedy and inexpensive determination" of the dispute "on its merits".

[86] In *Bacchus* the parties sought summary determination of an issue in the litigation, namely, the plaintiff’s ability to claim as agent for damages suffered by the plaintiff’s undisclosed principal. The plaintiff was advancing a claim in contract, breach of a duty of good faith, and for negligent misrepresentation. One of the defences advanced was that the plaintiff as agent could not claim for damages suffered by another party. This was the issue determined by way of summary trial.

[87] On appeal in *Bacchus*, the Court of Appeal concluded that it was not appropriate to determine the issue by summary trial. There were two factors leading to this conclusion:

a) The Court considered that the issue that had been determined on summary trial raised important, rare and unsettled questions of law. These questions of law might not have been necessary to answer, had the case gone to trial and the plaintiff failed in proving the necessary facts to succeed in a claim. The Court of Appeal held that these issues ought not to be addressed at the appellate level unless the case at hand, in all its aspects, required it: at paras. 25, 29.

b) The determination of the issue by summary trial meant that an appeal ensued, and the original trial date for the entire cause was thereby missed. The sense of the Court's judgment was that the Court did not consider that this assisted the goal of an efficient resolution of the proceeding: at paras. 27-28.

[88] The Court in *Bacchus* did not establish an absolute rule against the use of the summary trial procedure where the above factors are present. Rather, these factors combined to make the Court conclude that summary trial of an issue ought not to have occurred in that case, based on the issues in that litigation. The issue determined by summary trial was whether the defendant engineers owed a duty of care to the plaintiff.

[89] There are other cases where important and novel issues have been determined on a summary procedure, despite the fact that other issues remain for trial. One example is the case of *Edgeworth Construction Ltd. v. N.D. Lea & Associates Ltd.*, [1993] 3 S.C.R. 206, [*Edgeworth*]. The issue determined by summary trial was whether the defendant engineers owed a duty of care to the plaintiff.

[90] In *Edgeworth,* the summary trial application was brought by defendants, but it was unclear from the reasons of the original motions judge whether the plaintiff took the position that it was inappropriate for determination by summary trial. However, the chambers judge did comment that there was "no dispute as to the facts on the

matter of duty to be resolved on affidavit or otherwise": *Edgeworth Construction Ltd. v. N.D. Lea & Associates Ltd.,* 37 C.L.R. 152 at 159 (B.C.S.C.).

[91] It is not obvious that the litigation in *Edgeworth* was made more efficient by reason of the fact that there was a summary trial of one issue first. The action number indicates the proceeding was commenced in 1987. The time period of the relevant facts appears to have started in 1977. The original decision by the chambers judge, dismissing the plaintiff's claim against the engineers on the basis that there was no duty of care, was in 1989 which was relatively soon after the summary trial rule was introduced in BC. The appeal affirming that decision was in 1991, and the Supreme Court of Canada decision, reversing the earlier decisions and finding that the engineering firm did owe a duty of care to the plaintiff, was in 1993.

[92] It appears that the contractor plaintiff in *Edgeworth* started a parallel claim against a sub-consultant to the engineering firm, namely the geotechnical firm involved in the project. There are various reported decisions involving applications in this parallel claim. One motion in that case went to the Court of Appeal in 2000: *Edgeworth Construction Ltd. v. Thurber Consultants Ltd.*, 2000 BCCA 453. This judgment noted that the original *Edgeworth* litigation was still active and had not yet gone to trial: at para. 3.

[93] In other words, in 2000, 11 years after the original summary trial application in *Edgeworth*, the litigation was still ongoing and trial had not yet occurred. What occurred in the *Edgeworth* litigation after that is not apparent from a search of reported cases. But this is part of the background experience in BC that must be understood when considering the Court of Appeal's caution in *Bacchus* in 2002 about "litigating in slices".

[94] Counsel for HMM submits that the description "litigating in slices" is unnecessarily pejorative to the extent it indicates a judicial presumption in BC against doing so, a presumption that should now be considered overruled by *Hryniak*.

[95] I disagree with the submission that the phrase "litigating in slices" is pejorative or that it has been used in BC to create a presumption against summary trial of a single issue when multiple issues remain. I find that the comments in *Hryniak* mirror those in *Inspiration Management* and *Bacchus* and the other leading authorities in BC to the effect that determining one issue by way of a summary trial procedure can at times be in the interests of justice, but determining whether it is so needs to consider whether it is truly efficient and the impact it will have on the remaining issues in dispute.

[96] The extensive experience with this procedure in BC identifies that litigation in slices is most feasible if the slice can be made cleanly but is less advisable when the issues sought to be determined first are intertwined with the issues remaining.

[97] When an issue in litigation is inextricably interwoven with the remaining issues, the courts in BC have often found it inappropriate to determine the issue first by way of summary trial. As but a few examples of this:

a) *Prevost v. Vetter*, 2002 BCCA 202 [*Prevost*], in which the Court of Appeal held that determining whether a duty of care existed and was breached, in a social host liability case, was inappropriate by way of summary trial. This was because the facts necessary to decide those issues also were facts necessary to determine the outstanding issue of causation, giving rise to the potential for inconsistencies and for reconsideration of the facts when the subsequent issues were tried, all to the prejudice of the defendants: at para. 8, 24-26. It was also a factor that the issues were controversial and novel, as in *Bacchus*.

b) *Parsons v. Finch*, 2003 BCCA 409, in which the Court of Appeal held that the chambers judge erred in determining by summary trial the issue of whether a municipality which had issued a building permit for the building of a house owed a duty of care to the homeowners in relation to soil conditions. The Court of Appeal held that summary trial determination of the issue was not appropriate, both because it did not assist in the efficient

resolution of the proceeding and because the homeowners had been deprived of the opportunity at trial of calling evidence on the standard of care, which evidence could overlap with the duty of care issue even though the issues are distinct.

c) *Kaspersky Lab, Inc. v. Bradshaw*, 2010 BCSC 68, in which the plaintiff sought summary trial determination of amounts owing to it under contract. It said that a counterclaim by the defendant was barred by the contract. The Court found that it would be unjust to decide the issue by way of summary trial because it was based on breach of contract yet the counterclaim also alleged breach of contract and the issues were inextricably intertwined: at paras. 22-24.

d) *Tembec Industries Inc. v. Lucidyne Technologies, Inc.,* 2003 BCSC 802 [*Tembec*], which involved an application for partial summary judgment by a defendant being sued in relation to alleged faulty equipment it had sold. The defendant argued that an exclusion clause in the contract with the plaintiff defeated the claims. The Court concluded that the matter was not suitable for determination by summary trial because the contractual limitation of liability clauses could not be considered in isolation, and a court would need to look at facts relevant to the entire context of the agreement: at para. 31.

e) *SmartCentres Inc. v. EBA Engineering Consultants Ltd.*, 2014 BCSC 2271 [*SmartCentres*], also involving a determination of the applicability of a limitation of liability clause in a contract.

f) *Coast Foundation Society (1974) v. Currie*, 2003 BCSC 1781 [*Coast Foundation*], also involving a contractual limitation of liability clause.

[98] As is seen by the above authorities, if the evidence in relation to the issue for which summary trial is sought, and findings in relation to that evidence, could have a material impact on the trial of the remaining issues, and evidence regarding the

remaining issues could have a material impact on the issue for which summary trial is sought, the issues are interwoven and not easily separated. In such a case an application judge will rarely have confidence that summary trial of a partial issue will be fair and just.

[99] The case of *SmartCentres* involved a claim by land developers against engineering and environmental consultants for allegedly preparing negligent reports. The defendants sought to have the court determine on summary trial the applicability of a limitation clause in the contract. The issue was framed as a matter of contractual interpretation.

[100] In *SmartCentres,* Butler J. concluded it would not be appropriate to determine the issue by summary trial because: the issue was likely intertwined with other issues, the full extent of which would only be determined at trial and it would be problematic to treat contentious contractual issues in isolation; if the defendants were not fully successful on their application, the case would still proceed to trial and there would be little or no savings of court or parties' resources; further, the result would invite an appeal which would derail the trial and be inefficient: at paras. 26, 27, 29, 31, 33-37.

[101] The case of *Coast Foundation* also involved construction litigation. The defendant architects were sued in respect of an alleged faulty design of an apartment building which had become one of Vancouver's many leaky buildings. The defendants sought a ruling by way of summary trial that some of the claims against them were barred by a limitation clause in the contract for their services.

[102] In dismissing the summary trial application in *Coast Foundation*, Groberman J., as he then was, noted that the issue was an important precedent for other architects relying on similar contracts in relation to leaky building claims: at para. 4. In respect of determining a single issue on a summary trial application, he held at paras. 13-18:

> [13] The question of when the court ought to give judgment on an issue, as opposed to on the claim generally, is more complex. The court is justifiably

> reluctant to decide cases in a piecemeal fashion. In addition to all of the concerns that arise when the entire claim is before the court, there is a multitude of others. The result is that the court must exercise considerable caution before coming to the conclusion that it should grant judgment on an issue in a summary trial.
>
> [14] Where a Rule 18A application requires determination of a difficult issue of law that might not need to be resolved in order to decide the claim at trial, for example, the court may conclude that the appropriate development of the common law demands restraint: *Bacchus Agents (1981) Ltd. v. Philippe Dandurand Wines Ltd.*, 2002 BCCA 138, 164 B.C.A.C. 300.
>
> [15] The court must also be wary of making determinations on particular issues on a Rule 18A application when those issues are inexorably intertwined with other issues that are to be left for determination at trial: *Prevost v. Vetter*, 2002 BCCA 202, 210 D.L.R. (4th) 649; inter-relatedness of issues is not always obvious, and caution is necessary whenever a party seeks judgment on an issue as opposed to judgment generally under Rule 18A: *B.M.P. Global et al v. Bank of Nova Scotia*, 2003 BCCA 534, [2003] B.C.J. No. 2383.
>
> [16] It must be borne in mind that the primary purpose of Rule 18A is the efficient resolution of disputes. Where the court does not consider that the determination of an issue under Rule 18A will assist in the efficient resolution of the dispute, it ought not to make the determination.
>
> [17] There are at least two aspects to be considered in gauging the efficiency of the summary trial process. First, this court must be concerned about the allocation of its own resources: *North Vancouver (District) v. Lunde* (1998), 60 B.C.L.R. (3d) 201 at 212 (C.A.) (paragraph 33). Summary trial applications that will not, even if successful, reduce the length of trial, should, in general, be discouraged. The court must recognize the reality that judicial time is a scarce resource.
>
> [18] Second, the court must consider the efficiency of a partial determination from the standpoint of the litigation itself. Piecemeal decision-making is rarely an efficient manner in which to resolve a dispute. It raises the possibility of multiple appeals on individual issues, and this will generally impede rather than hasten the orderly determination of the action.

[103] Examples of cases where summary trial of an issue was determined to be just despite the fact that there would be remaining issues to be dealt with at trial include (but are not limited to):

a) Cases in which the relevant facts were uncontroversial and the courts held that it was appropriate to determine a contractual or statutory limitation period defence by way of summary trial, such as *Howe Sound School District No. 48 v. Killick Metz Bowen Rose Architects and Planners Inc.,*

2008 BCCA 195; *College of New Caledonia v. Kraft Construction Company Ltd*., 2007 BCSC 1408; *Langley (Township) v. Witschel*, 2015 BCSC 123 [*Langley*].

b) Cases in which the claim being determined by summary trial was a straightforward claim such as a claim in debt, notwithstanding the fact there were other claims or counterclaims remaining extant, such as *Natco International Inc. v. Photo Violation Technologies Corp.*, 2009 BCSC 1504 [*Natco*]; *Amiama v. CII Enterprises Inc.,* 2008 BCSC 60; *British Columbia (Attorney General) v. Malik*, 2009 BCSC 603; see also *First Boston Financial LLC v. Grant,* 2014 BCSC 2, an action to enforce a foreign default judgment in which certain "technical" defences were considered discrete issues and determined by summary trial.

c) Cases involving personal injury claims where the issue of liability was determined by summary trial, leaving the issue for damages to be determined later if necessary: *Piering v. Trevor,* 2012 BCSC 1653; *Charlie v. Canada Safeway Limited,* 2010 BCSC 618, aff'd 2011 BCCA 202; and *Jeffery v. Commodore Cabaret Ltd.* (1995), 13 B.C.L.R. (3d) 149 (S.C.).

[104] A common theme of the cases in which some but not all issues in dispute are determined by summary trial is that the issues being determined are "discrete" and not "inextricably interwoven" with the remaining issues, and that it will promote efficiency in the litigation to determine the summary trial issues in advance of the others.

[105] In *Langley,* the Court held at para. 19:

> The issues are not intertwined and the issue for determination is a discrete one. As well, from the representations of counsel I am satisfied that this is the one issue between the parties that prevents a resolution and that deciding it will likely bring the case to an end irrespective of the summary trial result.

[106] In *Natco,* I held as chambers judge that despite the defendant's position that summary trial was inappropriate, I was not persuaded that the plaintiff's debt claim

issues sought to be determined on summary trial were inextricably interwoven with the remaining issues. I found that the summary trial issues were discrete and straightforward and there was ample evidence to allow me to determine them without affecting the remaining claims: at para. 12.

[107] In *Natco,* the defendant had done nothing in two years to prosecute its counterclaim, most of the counterclaim had nothing to do with the debt claim and there was no evidence that the part that did relate to the debt claim was even arguable: at paras. 8, 42, 44. These kinds of facts go to the justness of deciding a discrete claim by summary trial and not letting it be tied up in a cross-claim which is languishing.

[108] The fact that one party opposing summary trial might be strategically seeking to delay proceedings and the one seeking summary trial is wishing to move the case forward can be seen as a factor weighing in favour of summary trial of a discrete issue in other cases as well, for example, *Initiate School of the Canadian Rocky Mountains Ltd. v. Wolfenden Ventures Ltd.,* 2013 BCSC 257 at paras. 13-14, 30-31.

[109] The concerns that arise when considering whether to determine only some of the issues in a proceeding by way of summary trial, with other issues to be determined later, are in some ways similar to the concerns of a court in considering whether to grant any of the following applications: to strike pleadings; to determine questions of law or to determine an issue of fact or mixed fact and law; for judgment on part of a claim based on admissions; for severance and to try some issues before other issues in the proceeding: see Peter Behie, “Determination of an Issue Before Trial” (2005) 63 The Advocate 81; and *Ross River Dena Council v. Canada (Attorney General)*, 2013 YKCA 6.

[110] In summary, the authorities in BC, including *Hryniak*, make clear that the factors the court must consider on applications to determine by summary trial only part of the issues in the lawsuit are:

a) whether the court can find the facts necessary to decide the issues of fact or law;

b) whether it would be unjust to decide the issues by way of summary trial, considering amongst other things:

   i. the implications of determining only some of the issues in the litigation, which requires consideration of such things as:

      (1) the potential for duplication or inconsistent findings, which relates to whether the issues are intertwined with issues remaining for trial;

      (2) the potential for multiple appeals; and

      (3) the novelty of the issues to be determined;

   ii. the amount involved;

   iii. the complexity of the matter;

   iv. its urgency;

   v. any prejudice likely to arise by reason of delay; and

   vi. the cost of a conventional trial in relation to the amount involved.

Analysis

[111] I turn now to analyze whether the summary trial procedure is appropriate in this proceeding.

[112] In my view the most important factor here is the inter-relationship between the issues sought to be determined and those remaining in the lawsuit. In this case this affects both whether the Court is able to find the necessary facts on the summary trial application, and whether it would be just to decide these issues by way of summary trial.

A. Ability to Find Facts

[113] One of the most prominent legal issues in the lawsuit, if not the most prominent, will be interpretation of the contract between Metro Vancouver and Bilfinger. This has an impact on all the key issues in the case: the determination of whether there were duties of care; were there breaches of contract; were proper contract procedures followed leading up to termination of the contract by Metro Vancouver and was termination justified; and assessment of damages.

[114] What HMM and Metro Vancouver are urging the Court to do is determine the interpretation of one aspect of the contract, certain disclaimer clauses, in advance of determining the interpretation of the other related parts of contract at issue in the case.

[115] It is a basic principle of contract interpretation that words of a contract must not be read in isolation but should be considered consistently with the whole of the contract, its purpose and commercial context: *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4 at para. 64 [*Tercon*].

[116] I am not confident that I will be able to make the necessary findings of fact on the applicability and meaning of the limitation of liability clauses without fully understanding the other contractual issues which have not yet been fully canvassed before me.

[117] As an example, HMM in particular argues that the contract disclaimer and limitation of liability clauses mean that Bilfinger could never succeed on an argument that the GBR guaranteed the rock conditions that would be encountered in the tunnels. HMM argues that the whole point of a GBR is to avoid litigation over representations about rock conditions, because if they turn out to be worse, the contractor is entitled to make a claim that there is a DSC and to request a change order.

[118] Bilfinger argues that HMM's interpretation of the contract would render the GBR meaningless, other than as a starting point for making claims for DSCs.

[119] There may be a position somewhere in between these two extremes.

[120] Bilfinger argues that there is a middle position: that HMM had a duty to meet a certain standard of care in preparing the GBR so that it could provide a professional opinion as to the expected rock conditions.

[121] Amongst other things, Bilfinger points to language in the contract documents which: refers to the engineer exercising "best judgement" regarding expected rock conditions (GBR Introduction); refers to the expected geological conditions being "developed with the standard of care commonly applied as the state of practice in the profession" (GBR Limitations); refers to Bilfinger's reliance on the indications in the GBR and Drawings Contract (contract clause 2.4.6); and has an exception that excludes the information in the GBR from the entire agreement and no representations or warranties disclaimer clause (contract clause 6.1.13 or 6.1.14).

[122] HMM and Metro Vancouver argue that the above-mentioned references must be interpreted a certain way; Bilfinger argues they ought to be interpreted another way. I am unable to determine the validity of their respective positions on the evidence before me.

[123] It was clear during the applicants' submissions that they relied on more than just narrow disclaimer clauses in support of their applications, and they wished the Court to adopt their view of how the disclaimer clauses worked in the context of the entire agreement, including in the context of other clauses relating to DSCs, change orders, and the resolution of disputes. Likewise, Bilfinger relies on other clauses in the contract to support its interpretation. The proper interpretation of these other contract clauses remains very much at issue in the lawsuit.

[124] Furthermore, there are two "policy" arguments that were raised in the parties' submissions as potentially, but not necessarily, coming into play in determining the issues raised by the applicants on the present applications:

a) If there is a *prima facie* duty of care owed by the applicants to Bilfinger, are there policy grounds to negate that duty of care, the second stage

of the test for recognizing duties of care in tort established in *Anns v. Merton London Borough Council,* [1978] A.C. 728; *Cooper v. Hobart*, 2001 SCC 79 at para. 30.

b) If the exclusion clauses apply to the circumstances, are there policy grounds which justify the court refusing to enforce them: *Tercon* as per Binnie J. in dissent at paras. 82, 122-123; adopted by the majority at para. 62.

[125] Likewise, I am not confident I will be able to make the necessary findings of fact to properly consider the policy arguments raised on this application without knowing the fuller context of the entire contract and relationship between the parties, including the knowledge of the parties at the tender stage and during the contract when conditions were actually encountered in the tunnel.

[126] This conclusion that I am unable to find the necessary facts to decide the factual and legal issues means the summary trial application must be dismissed.

[127] As noted in the case of *Placer Development Ltd. v. Skyline Explorations Ltd.* (1985), 67 B.C.L.R. 366 (C.A.), one can envision a situation where it is possible for the chambers judge to find the necessary facts on a summary trial application, but nevertheless the judge decides that it would not be just to do so; one cannot envision a reverse situation, where the chambers judge decided that it was not possible to find the necessary facts but nevertheless it was just to decide the issues. Nevertheless, I will go on to analyze the justness of deciding the issues by way of summary trial because the relevant factors loom large in the present case.

B. Whether it Would be Just to Determine the Issues

i. Implications of Determining Only Some of the Issues

(1) Potential for Duplication or Inconsistent Findings

[128] An important area of factual dispute at the heart of this litigation is whether the rock conditions actually encountered in the tunnels were materially different than that expected, or than that which should have been expected, at the pre-contract

design and tender stage, and as set out in the GBR. This requires an examination of facts that span the entire timeline of the parties' relationship: pre-contract, during contract, and post-contract when the completion contractor was completing the tunnels.

[129] This area of factual dispute will not disappear if the summary trial applications are granted.

[130] The evidence of whether HMM's work in relation to the GBR was substandard will come into play in the trial regardless if some issues are determined first, because:

a) The validity of HMM's recommendations for design changes, once the project was underway, is challenged by Bilfinger and will be central to the dispute as to whether Bilfinger was justified in not continuing the work after January 2008 and the dispute as to whether Metro Vancouver was justified in terminating Bilfinger. Bilfinger argues that HMM's recommendations for design changes were based on the foundation of the GBR. This means the underlying foundation of the design, the GBR and the investigations leading up to the GBR, will still need to be examined at trial.

b) In challenging HMM's design recommendations during the ongoing project, Bilfinger wishes to show that HMM was originally negligent in preparing the GBR and that this negligent design carried on even when encountered rock conditions showed that the design was inadequate.

c) The same issues will need to be understood in assessing the claims to damages. Assessing damages will require an understanding of what Bilfinger would have been entitled to be paid had it continued with the contract and not been terminated. Determining this will keep in issue HMM's design recommendations and geotechnical analysis, any differences between the GBR and actual encountered site conditions,

> and geotechnical investigations before and during the ongoing Metro Vancouver contract with Bilfinger, and subsequently, during the ongoing contract with the completion contractor.

[131] During the course of the hearing, the applicants' submissions seemed to expand from the position in their notices of application, namely from a position that pre-contract negligence claims regarding sub-surface conditions would be disposed of, to the position that the natural implications of doing so would be to also dispose of all post-contract negligence claims by Bilfinger as well. But this expanded relief was not part of their notices of application and for this reason alone cannot be granted. Equally important, though, is that this expanded relief reveals the very problem with the summary trial procedure in this case: it is not easy to hear one aspect of the claim in isolation without it affecting the other claims.

[132] HMM suggests it should not be required to be a party to the litigation just because it will be an important witness to the contractual claims between Bilfinger and Metro Vancouver. HMM has a point here, but HMM was the engineer involved in the project and negligence issues advanced against it are intertwined with the contractual issues.

[133] I am concerned that any findings I might make now will have unintended prejudicial effect on the findings that will have to be made at trial of the other contractual issues. What will the Court do at trial if the evidence leads it to conclude it misunderstood key facts as the basis for the summary trial determination? Will the Court be put in a position of having to reconsider the earlier findings, or make inconsistent findings, or will one or another party be prejudiced by the earlier incorrect findings? Because of the complexity of this case and the strong connection between the issues, I am of the view that there is a very good chance of such a dilemma arising should I decide the summary trial issues now.

[134] My conclusion that the issues on this summary trial application are intertwined with the other issues in the case giving rise to the several concerns above, support the conclusion that it would not be just to determine these issues by summary trial.

(2) Possibility of Multiple Appeals

[135] It is highly likely that determination of the present issues on summary trial will give rise to an appeal by the losing party, further delaying the imminent but already delayed trial of the remaining material issues in the parties' dispute.

(3) Novelty of the Issues

[136] I note that HMM also argues that this case will be the first time that a construction contract for tunnelling will interpret the contract clauses regarding the GBR and DSCs and the interplay with the exclusion clauses.

[137] It is possible that if Bilfinger fails to prove certain material facts of its negligence allegations against HMM at trial, namely that HMM breached the applicable standard of care of engineers in preparing the GBR or in other aspects of the design, there might be no need to determine the rare and novel legal question regarding the applicability of the exclusion or limitation of liability clauses in the contract and how these interact with the GBR.

ii. Amount Involved

[138] There are very large claims being advanced in this case, both against Bilfinger, and by Bilfinger against other parties.

[139] Bilfinger is facing a claim in the range of $130 million, advanced by Metro Vancouver against it. Metro Vancouver expects to have all of the normal trial procedures available to it to prove its claim. It strikes me that given the size of the claims against Bilfinger which are going to trial in any event, it does not seem fair to limit Bilfinger's opportunity to present its claims at trial.

[140] Bilfinger's first theory of damages in its counterclaim against Metro Vancouver and HMM, as set out in its particulars of damages, is that it is entitled to damages to put it in the "position it would have been if the misrepresentations had not been made and the wrongful conduct had not occurred". It says that but for the misrepresentations it would not have entered the contract at all and so is entitled to

all of its losses for its unpaid job costs and its bonding costs. This claim is alleged to be in the amount of approximately $86 million.

[141] It is this theory of the claim that the applicants wish to get rid of on this application. They say that any such theory is necessarily based on pre-contract representations and can have nothing to do with anything that happened after the contract was entered into. It therefore does not matter that Bilfinger has pleaded that there were continuing duties of negligence that were breached after the contract was entered into.

[142] This argument fails to address the fact that Bilfinger pleads in defence to Metro Vancouver's claim that the design was unsafe, and that this brings into play much of the same evidence post and pre-contract. I acknowledge that Bilfinger's defence does not make HMM a party; it is the counterclaim which does so. Nevertheless, as I have indicated already I am not persuaded that determination of the pre-contract issues can be done as cleanly as submitted by the applicants, obviating the need to cover much of the same ground in relation to other extant issues.

[143] Bilfinger's second theory of damages is based on Metro Vancouver's wrongful termination of the contract. This theory of damages claims for termination costs, unpaid holdback funds, invoiced and unpaid work, and bonding costs, and is in the amount of approximately $39 million. This is not a claim in negligence or a claim against HMM. It is always possible that HMM will seek and be granted leave to absent itself from this part of the trial, and the part of the trial where Metro Vancouver seeks to prove its damages claim against Bilfinger, which could address part of HMM's concern about attending the full trial.

iii. Complexity of the Matter

[144] On this summary trial application, the Court received at least 39 binders of material, containing pleadings, affidavit evidence, authorities and submissions. The Court also received several loose written aide memoires and supplemental submissions.

[145] Over the many years since this procedure was introduced this court has come to realize that there are extensive out of court judicial resources involved in determining summary trial applications, especially as the tool is not limited to simple cases and is used frequently in complex cases involving multiple factual and legal issues. The filing of a large written evidentiary record on a summary trial application may result in a shorter hearing than a conventional trial but requires a disproportionately greater amount of judicial study after the hearing ends.

[146] One cannot conclude that the mere quantity of materials filed on a summary trial application proves that issues are unsuitable for determination. It all depends on the issues of course.

[147] Nevertheless, the quantity of materials and authorities reveal that the issues are complex and will require considerable judicial resources to determine them. When determining the issues will not end the proceeding, but will likely give rise to an appeal, the efficiency of doing so is questionable.

iv. Urgency

[148] There is no particular urgency in this case that might weigh in favour of determining the issues sought to be determined by way of summary trial.

v. Prejudice Likely to Arise by Reason of Delay

[149] The problem with delaying the trial while an inevitable appeal from a summary trial result runs its course is that a considerable amount of time has already passed since the disputed events occurred. The parties have worked hard through discovery to get this case ready for trial. Locating and maintaining the meaningful participation of witnesses will be increasingly difficult as time passes. The lawyers too are not going to get any younger and it will be of no assistance to the clients if due to the passage of time members of their legal team move on and they are required to hire new counsel. There is also of necessity bound to be some duplication in legal preparation time each time there is a hearing, as well as duplication of judicial resources.

vi. Cost of Conventional Trial

[150] The applicants submit that determining issues on this summary trial application will significantly shorten the trial which is scheduled to begin in May of this year and is currently estimated to need at least 95 weeks of hearing time, or roughly two years not taking into account any necessary breaks in the schedule.

[151] There are a few observations to make in this regard.

[152] Above all else, there is no doubt that the unusually long expected length of trial mandates serious consideration of whether determination of some issues first will be more efficient.

[153] However, trial time will only be saved if HMM and Metro Vancouver succeed in their position that they owed no pre-contractual duties of care to Bilfinger in relation to sub-surface conditions. Trial time will not be saved if they lose this issue.

[154] Neither Metro Vancouver nor HMM attempted to identify what paragraphs of the pleadings would be disposed of if they were successful in their applications for summary trial.

[155] In addition, I was not persuaded that a significant amount of trial time would be saved if the issues were determined in HMM and Metro Vancouver's favour.

[156] As I have already noted, Bilfinger will still be seeking to prove the facts underlying its counterclaims regardless of the outcome of the summary trial application, as it relies on these allegations to defend the claim against it and in support of its allegation that Metro Vancouver's termination of the contract was in breach of the contract.

[157] Further, there is no reason to believe that determination of these issues now, in advance of the other issues at trial, will result in a settlement of the case, as the other issues between the parties are so significant and it is likely that determination of the present issues at the trial level will not be accepted as the last word.

[158] The determination of the question of whether the engineers owed a duty of care to the contractor by way of summary trial in *Edgeworth* clearly did not lead to a settlement of the litigation even though the first determination of the issue disposed of the entire claim. As noted above, the case was still alive and in active litigation 11 years after the summary trial application, during which time there had been one visit to the Court of Appeal and one visit to the Supreme Court of Canada.

[159] I find relevant the observations in *Coast Foundation* at para. 24:

> I accept that the court should, in appropriate cases, consider the prospect of settlement as a factor in determining whether to deal with a substantive issue on a [summary trial] application: *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.). In many cases, however, it would simply be unjust to allow one party, over the objection of another, to have a single issue determined in advance of all others, in the hope that it will enhance its bargaining position.

[160] The tools for active case management have already been utilized in this case and will continue to be in order to make the trial as efficient as possible, albeit this will be easier with the cooperation of all the parties.

[161] In an earlier ruling I granted HMM's application to strike out that part of Bilfinger's claim that alleged that HMM owed to Bilfinger duties of fairness and good faith, as indexed at 2013 BCSC 2324. This removed one issue from trial.

[162] The parties continue to work to try to obtain agreement on facts that are uncontroversial, so as to avoid taking time at trial to prove them. Also, the parties are taking steps to determine evidence that can be introduced by affidavit rather than by calling the witness in person. Case management to find ways to make trial more efficient will continue until the trial starts and during the trial as well.

C. Conclusion

[163] After much deliberation and not without some reluctance I have determined that the matters sought to be determined by the applicants are not appropriate for summary trial. I am not confident that I can find the necessary facts and I am

persuaded that it would not be just to decide the issues sought to be determined on this application.

[164] The applicants seek determination of pre-contract duty of care issues when other duty of care issues post-contract are also alleged by Bilfinger; the applicants also seek determination of the meaning of certain contract clauses when the meaning of other related contract clauses will remain in issue and will require an understanding of the whole of the contractual factual matrix.

[165] If findings were made in relation to the present applications they would be made in a factual and legal vacuum unconnected to other outstanding issues.

[166] This would not be just from two perspectives: first, there is a strong possibility that any present findings could have unintended consequences on the other outstanding issues; and second, there is a strong possibility that the hearing of the other outstanding issues could have an important influence on the determination of the present issues.

[167] I am also not persuaded that determining the present issues would be efficient in terms of the parties' or judicial resources.

[168] I have therefore concluded that the summary trial applications must be dismissed.

[169] Given this conclusion, I have attempted not to comment on the merits of the parties' arguments for or against a particular factual or legal conclusion. I have not commented on every argument raised. Because these issues remain in dispute between the parties it is important that I not suggest any preliminary thoughts on the strengths or weaknesses in their respective positions.

[170] In setting out facts in these reasons for judgment, I did not intend to make any final finding of fact. The facts remain to be proven at trial.

Alternative Relief

[171] The applicants seek in the alternative an order that the issues they seek to be determined by summary trial be determined at the start of Bilfinger's case at trial. For all of the reasons already mentioned, this relief must be dismissed as well. I have concluded it would not be fair, just or efficient to decide these issues separately and in advance of other issues at trial.

Costs

[172] Bilfinger took issue with a sentence in the HMM notice of application as potentially suggesting that the Bilfinger negligence claims against HMM are brought for an improper purpose, and as such, improperly impugning the motives of Bilfinger and its counsel. Bilfinger asserts that this justifies a special costs award against HMM.

[173] Counsel for HMM apologized and explained orally that they did not intend to imply this and that they do not advance this as a submission.

[174] I recall this is not the only time counsel have offended opposite counsel, which also occurred when Bilfinger brought an application alleging abuse of process by the other parties by reason of their delayed production of a litigation cooperation agreement. On that occasion Bilfinger's counsel apologized and made it clear that they did not impugn the professional ethics of opposite counsel. I did not order special costs there (see 2014 BCSC 1560 at paras. 210-213) and I do not order it here.

[175] The scale of this litigation and the amounts at stake for their respective clients must be taxing on counsel. Nevertheless I am impressed by the civility and professionalism of all counsel in this case. Counsel are experienced and from what I have seen well know that they will not advance their clients' interests by being uncooperative on every small point or by disparaging their legal opponents. I have every reason to believe the professionalism I have observed will continue despite the pressures counsel are under.

[176] Costs will be in the cause.

"The Honourable Madam Justice Susan A. Griffin"

Appendix A

Excerpts from the documents forming the contract between Metro Vancouver and Bilfinger (underlining indicates language significant to arguments advanced by HMM and Metro Vancouver; double underlining indicates language significant to Bilfinger)

Tender documents forming part of the contract:

PART 4 INSPECTION OF SITE

4.1 It is the responsibility of the Tenderer to examine the Work Site before submitting a Tender. It is the Tenderer's responsibility to be familiar with and allow for all site conditions including the location of the Work, local conditions, subsurface and topographical soil conditions, weather, access to the Work Site, and all other site conditions which might affect the Work or the Tender. In certain locations on the Work Site there are or may be existing structures and services above or below the surface and the Tender Price will be deemed to include the cost of working with these structures and services in place. Every Tenderer by submitting a Tender will be deemed to have complied with these requirements. The Corporation will not grant and the Tenderer will not be entitled to any additional payments or extensions of time due to site conditions which were or would have been reasonably foreseeable upon a proper inspection of the Work Site by the Tenderer.

4.2 The submission of a Tender by the Tenderer shall be deemed to be an acknowledgment that the Tenderer has relied and is relying on its own examination of the Work Site, and all other matters related to the completion of the Work.

4.3 If a Tenderer wishes to make exploratory excavations or investigations on the Work Site, it shall make special arrangements with the Corporation, who may set conditions under which such exploratory excavations or investigations shall be made and, in the Corporation's sole discretion, may refuse to permit such excavations or investigations.

...

PART 5 GEOTECHNICAL REPORTS

5.1 Refer to Section 00500 – General Conditions regarding Geotechnical Baseline Report and Geotechnical Data Report. In addition, other geotechnical reports relating to the Work Site are available. It is the Tenderer's responsibility to make arrangements with the Corporation to inspect such reports if the Tenderer considers it necessary.

5.2 Any information pertaining to geotechnical conditions and any bore-hole logs that may be furnished by the Corporation are a matter of general information

only. If bore-hole logs are furnished, bore-hole descriptions or logs shall not be interpreted as descriptive of conditions at locations other than those described by the bore-hole themselves.

…

PART 18 DISCLAIMERS/LIMITATIONS OF LIABILITY

...

18.2 The Corporation, its directors, officers, servants, employees, agents and consultants expressly disclaim any and all liability for representations, warranties, express or implied or contained in, or for omissions from this tender or any written or oral information transmitted or made available at any time to a tenderer by or on behalf of the Corporation. Nothing in this tender is intended to relieve a tenderer from forming their own opinions and conclusions in respect of this tender.

...

Geotechnical Baseline Report

INTRODUCTION

...

This Geotechnical Baseline Report (GBR) summarizes the geotechnical basis for design of the Twin Tunnels Project and presents a baseline of conditions expected to be encountered during tunnel and shaft construction. This report includes: descriptions of the tunnel and other underground works to be constructed; interpretations of the geological and geotechnical information obtained for the Project; a summary of expected geotechnical and groundwater conditions to be encountered; and a summary of how these expected conditions have been reflected in the Project design.

This GBR is a Contract Document of Contract C710, and is intended to assist tenderers in evaluating the requirements for excavating and supporting the ground, and in preparing their tenders. Risks associated with subsurface conditions consistent with, or less adverse than, the baseline conditions represented in the Contract Documents are allocated to the Contractor. Those risks associated with subsurface conditions more adverse than the baseline conditions are accepted by the GVWD. The provision of baseline conditions in the Contract is not a warranty that baseline conditions will be encountered. The baseline conditions represent a contractual standard that the Owner and the Contractor will agree to use when interpreting sub-section 2.4.5 of Section 00500 - General Conditions. The Contract Documents contain provisions for a Disputes Review Board to assist the parties in the resolution of contractual disputes.

...

This report presents the design team's best judgement of soil, rock and groundwater conditions expected to be encountered in the surface and subsurface excavations.

While the actual conditions encountered in the field are expected to be within the ranges discussed, the distribution of geologic conditions encountered will likely vary from those presented in this report. The behavior of the geologic materials present in the surface and subsurface excavations will be influenced by the Contractor's selected equipment, means, methods, and level of workmanship.

...

7 DESIGN AND CONSTRUCTION - BORED TUNNELS

7.1 Design Considerations

...

7.1.3 Tunnel Stability

As indicated in Table 5.10, The quality of the granitic bedrock is expected to be predominantly "Good" to "Very Good" with NGI Q-system values greater than Q'=10 over a large proportion of the tunnel alignment. It is expected that the TBM excavated tunnels will be largely self-supporting, and will require only nominal levels of local or pattern rock bolts over large portions of the tunnel alignment.

...

7.1.4 Tunnel Support Classes, Installation and Expected Distribution

Five TBM Initial Tunnel Support Classes (TSC) have been developed as shown on Drawing W3042-C-170. The support classes address the range of ground conditions expected to be encountered during tunnel excavation. The relationship between tunnel support classes and the range of rock mass quality to be implemented during excavation is presented in Table 7.1 This relationship may be modified during excavation as directed and/or approved by the Engineer.

...

The information presented in Table 7.1 has been developed based on evaluations of the information obtained during the site investigations and engineering judgment. The locations of installed initial support will be determined in the field. The Contractor will be paid for tunnel supports required to be installed, and for any supplementary support that may be required by the Engineer. With regard to tunnel support, or elements of work based upon such values, a claim for additional compensation will only be considered with regard to the distribution of tunnel support given in Table 7.1 for the entire tunnel alignment. No claim will be considered to have merit or reasonable basis if predicated solely on a portion of the tunnel alignment.

...

11 LIMITATIONS

The interpretations and assessments contained in this report are based upon the available information from limited surface mapping, borings, in situ tests and laboratory tests. The geologic environment of the overburden at the Seymour Shaft site and of the bedrock along the tunnel alignment is complex, and as such, no amount of pre-construction information will convey as detailed an understanding as will exist following excavation. The range of expected site and construction conditions presented in this report is established as a baseline to be used by all tenderers in preparing their bids, and by the GVWD to evaluate differing site condition claims. The expected conditions were developed with the standard of care commonly applied as the state of the practice in the profession. No warranty is included, either expressed or implied, that the actual conditions encountered will conform exactly with the baseline conditions described herein.

Geotechnical Data Report

1.0 INTRODUCTION

...

This report should be read in conjunction with "***Information and Limitations of This Report***" which is appended following the text of this report. The reader's attention is specifically drawn to this information, as it is essential that it is followed for the proper use and interpretation of this report.

...

IMPORTANT INFORMATION AND LIMITATIONS OF THIS REPORT

...

Unless otherwise stated, the suggestions, recommendations and opinions given in this report are intended only for the guidance of the Client in the design of the specific project. The extent and detail of investigations, including the number of test holes, necessary to determine all of the relevant conditions which may affect construction costs, techniques and equipment choice, scheduling and sequence of operations would normally be greater than has been carried out for design purposes. Contractors bidding on, or undertaking the work, should rely on their own investigations, as well as their own interpretations of the factual data presented in the report, as to how subsurface conditions may affect their work.

Soil, Rock and Groundwater Conditions: Classification and identification of soils, rocks, and geologic units have been based on commonly accepted methods employed in the practice of geotechnical engineering and related disciplines. Classification and identification of the type and condition of these materials or units involves judgement, and boundaries between different soil, rock or geologic types or

units may be transitional rather than abrupt. Accordingly, HMM/Golder does not warrant or guarantee the exactness of the descriptions.

Special risks occur whenever engineering or related disciplines are applied to identify subsurface conditions and even a comprehensive investigation, sampling and testing program may fail to detect certain conditions. The environmental, geologic, geotechnical, geochemical and hydrogeologic conditions that HMM/Golder interprets to exist between sampling points may differ from those that actually exist.

Contract terms:

Section 00400
FORM OF AGREEMENT
(Page 1 of 3)
...

THIS AGREEMENT WITNESSES that the Contractor and the Corporation agree as follows:

...

6. The Contract supersedes all prior negotiations, representations or agreements, whether written or oral and is the entire agreement between Corporation and the Contractor with respect to the subject matter of this Agreement.

…

8. In entering into and executing this Agreement, the Contractor has relied on its own examination of the Work Site, access to the Work Site, and on all other data, matters and things requisite to the fulfillment of the Work, and on its own knowledge of existing services or utilities along or crossing or in the vicinity of the route or facility to be installed or constructed under this Contract, and not on any representation or warranty of the Corporation.

...

Section 00500
GENERAL CONDITIONS
Page 12 of 54
…

PART 2 CORPORATION-CONTRACTOR RELATIONS

2.1 AUTHORITY OF CORPORATION
...

2.1.3 Appointment and Authority of the Engineer

(1) The Corporation may appoint an Engineer for the Work at any time before or after the award of the Contract. If the Engineer is so appointed, the Engineer will have authority to act on behalf of the Corporation only to the extent provided in the Contract Documents, unless otherwise modified by written agreement as provided in paragraph 2.1.3(2).

(2) The duties, responsibilities and limitations of authority of the Engineer as set forth in the Contract Documents may be modified or extended only at the sole discretion of the Corporation.

2.3. RESPONSIBILITIES OF CONTRACTOR

...

2.3.9. Employee Safety

The Contractor alone shall at all times be responsible for the safety of its employees, its subcontractors' employees and other persons and equipment lawfully on the Work Site. The Contractor shall maintain the Work Site as a safe place to work and perform the Work in a manner which meets all applicable requirements and standards for the Work Site, as set out in any applicable safety manual, the Workers' Compensation Act and regulations thereto and under statutory and common law.

...

2.3.11 Construction Procedures

Subject to the rights of the Corporation, the Engineer and the Project Manager pursuant to the Contract Documents, the Contractor shall be solely responsible for and shall supervise and direct the Work. The Contractor shall determine the means, methods, techniques, sequences and procedures of construction, except where the Contract Documents, in order to define the quality of an item of Work, specify a means, method, technique, sequence or procedure for construction of that item of Work.

...

2.4. CORPORATION - CONTRACTOR CO-ORDINATION

...

2.4.4 Site Conditions

(1) The Contractor shall be deemed to have conducted an examination of the Work Site and to have informed himself as to the risks and contingencies and all other data, information, reports, matters and things, local or otherwise, respecting the Work Site.

(2) The GBR and the Drawings shall serve as the only basis for determining changes in geotechnical subsurface conditions.

(3) If the Contractor encounters subsurface conditions at the Work Site differing materially from those indicated in the GBR or on the Drawings, the Contractor shall promptly, and in any event within seven (7) days of the discovery of such conditions notify the Corporation in writing.
...

(4) The Contractor's failure:

(a) to examine the Work Site; or

(b) to properly interpret the conditions at or respecting the Work Site or any information respecting the Work Site or any other aspects of the Work,

shall not relieve the Contractor of the responsibility of satisfactorily performing the Work under the Contract.

2.4.5 The Corporation, the Engineer and the Project Manager shall promptly investigate the conditions of which they [have] been notified under Section 00500, Clause 2.4.4(3). If the Engineer concludes that the conditions set out in Section 00500, Clause 2.4.4(3) do exist and cause an increase or decrease in the Contractor's costs of, or time required for, performance of any part of the Work under this Contract, whether or not changed as a result of such conditions, the Corporation may issue a change order pursuant to Section 00500, Clause 7.2.

2.4.6 No claim by the Contractor asserted on the basis that it encountered subsurface conditions differing materially from those indicated in the GBR, or elsewhere on the Drawings, will be allowed under this clause, unless the Contractor can demonstrate that it relied on the indications in the GBR or the Drawings.

2.4.7 No claim of the Contractor under this clause shall be allowed unless the Contractor has given the required notice pursuant to Section

00500, Clause 2.4.4(3), and has made its request for a change order within 15 days of giving that notice.

2.4.8 The Contractor may not request a change order if the notice under Section 00500, Clause 2.4.4(3) was given after the final payment is made under the Contract.

2.4.9 Where the actual subsurface conditions are materially and substantially different from the conditions referred to in Section 00500, Clause 2.4.4(3) the Contractor shall not be relieved of the responsibility of satisfactorily performing the Work under the Contract.

2.5 DISPUTE RESOLUTION

2.5.1 Disputes

A dispute occurs between the Corporation and the Contractor where there is a difference between the parties in connection with the Contract, including but not limited to any dispute between the parties arising out of the Work, the interpretation of any provision of the Contract Documents, a performance obligation of a party, a claim for additional compensation, or an alleged breach of Contract.

2.5.2 The Corporation and the Contractor agree that, both during and after the performance of the Work, each of them will:

(a) identify and address all disputes in a prompt and timely manner so as to facilitate the resolution of disputes as they arise,

(b) use all reasonable efforts to resolve any disputes arising between them by negotiations before submitting a dispute to the Disputes Review Board; and

(c) provide frank, candid and timely disclosure of all relevant facts, information and documents to facilitate the resolution of any dispute.

2.5.3 When a dispute occurs either party may give written notice of the dispute to the other party and the parties will use all reasonable efforts as identified in Clause 2.5.2 to resolve the dispute.

2.5.4 If the Corporation and the Contractor fail to resolve the dispute within ten (10) days after the notice pursuant to Clause 2.5.3, the dispute will be referred to senior management of the parties for resolution.

2.5.5 If senior management fails to resolve the dispute within ten (10) days after the dispute has been referred to them, the dispute will be referred to the Disputes Review Board as provided herein.

2.5.6 Notwithstanding any other provision in the Contract Documents, if the Corporation makes a decision or order exercising its discretion pursuant to Clauses 6.2, 6.3, or 7.5, the matter shall be dealt with as provided under Clause 2.5.10 and it shall not be referred to the Disputes Review Board.

2.5.7 Instructions Pending Resolution

If any dispute is not resolved promptly in the sole discretion of the Corporation, the Engineer shall give any instructions as may be necessary for proper performance of the Work and to prevent delay of the Work pending resolution of the dispute. The Contractor shall comply immediately with the Engineer's instructions. If it is subsequently determined that the instructions were contrary to the Contract Documents, the Corporation shall pay the costs incurred by the Contractor in carrying out those instructions beyond what the Contract Documents required.

2.5.8 Notice of Claim

No payment shall be made by the Corporation to the Contractor in addition to the Contract Price on account of any extra expense, loss or damage incurred by or sustained by the Contractor for any reason unless the Contractor has given written notice of a claim to the Corporation within 30 days of the date the Contractor first became aware of the circumstances which gave rise to the claim. The written notice must set out the date on which these circumstances arose and the estimated amount of the claim.

The Contractor shall be conclusively deemed to have waived any right to make a claim for any amount in addition to the Contract Price, if the Contractor does not give the required written notice within the required time and provide the required information.

...

PART 3 SPECIFICATIONS AND DRAWINGS

...

3.2 CONFLICTING PROVISIONS, ERRORS AND OMISSIONS IN CONTRACT DOCUMENTS

3.2.1 Conflicting Provisions

In case of any inconsistency or conflict between the provisions of the Contract Documents, the provisions of such documents and Addenda thereto will take precedence and govern in the following order:

(1) Agreement
(2) Supplementary General Conditions
(3) General Conditions
(4) Specifications
(5) Drawings
(6) Executed Tender Form
(7) All Other Documents

3.2.2 Errors and Omissions

If the Contractor, in the course of the Work, discovers that there are any errors, omissions or misrepresentations in the Contract Documents, it shall immediately notify the Project Manager in writing and shall not proceed with any part of the Work that is affected by that notice until directed to do so. The Project Manager shall promptly forward the notification to the Corporation. The Corporation will review the matter and if it concludes that there is an error, omission or misrepresentation, it shall determine the corrective actions to be taken and will advise the Contractor accordingly. If the corrective actions increase or decrease the amount of work called for in the Contract, the Corporation may issue, or the Contractor within 15 days after receiving the notice may request, a change order. If, after discovering any matters described in this clause, the Contractor proceeds with the Work without the required notice or without waiting for written direction, the Contractor is fully responsible for the consequences.

...

PART 6 PROGRESS AND COMPLETION

6.1 CONTRACT TIME

...

6.1.6. If the Corporation, the Engineer or the Project Manager makes any suggestion to the Contractor relating to the Work which is not set out or provided for in the Contract Documents and which the Contractor adopts and uses, in whole or in part, such adoption or use shall be at the risk of the Contractor. The Corporation, the Engineer and the Project Manager shall bear no risk or responsibility for the adoption and use of such suggestion and without limitation will not be

responsible for any defects, non-compliance with the Contract Documents or delay in the Work which may result from the adoption and use of such suggestion.

...

6.1.12 Delay By Contractor

Without limiting in any way any remedy the Corporation may have for damages or otherwise for a breach or breaches of the Contract, the Contractor shall pay the Corporation the amount of actual damages representing actual necessary costs and expenses suffered by the Corporation as a result of the failure of the Contractor to complete the Work in accordance with the Contract Documents. Such actual necessary costs and expenses may include sums paid to other contractors, the Project Manager and the Engineer because of the late completion by the Contractor.

6.1.13 No Representations or Warranties*

[**same as clause 6.1.14 in Conforming Document*]

Except for information in the GBR, this Contract is made and entered into by the Contractor and the Corporation on the distinct understanding that the Contractor has, before execution, investigated and satisfied itself of everything and of every condition affecting the Work to be executed and the labour and material to be provided, and that the execution of this Contract by the Contractor is founded and based upon its own examination, knowledge, information and judgement, and not upon any statement, representation, or information, made or given by, or upon any information derived from any quantities, dimensions, tests, Specifications, plans, maps of profiles made, given or furnished by the Corporation, its officers, employees or agents, or the Project Manager or the Engineer or any of their officers, employees or agents, and except for the GBR, any such statement, representation, or information, given or furnished, was given, or furnished merely for the general information of tenderers and is not in anywise warranted or guaranteed by or on behalf of the Corporation, the Project Manager or the Engineer.