# SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF HULL

No: 550-17-003421-078

DATE: SEPTEMBER 17, 2015

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**BEFORE THE HONOURABLE MR. JUSTICE MARK G. PEACOCK, J.S.C.**

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**2414-9098 QUÉBEC INC.**
Plaintiff
v.
**PASAGARD DEVELOPMENT CORPORATION**

**-And-**

**3463192 CANADA INC.**
Defendants

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RECTIFIED JUDGMENT

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## INTRODUCTION

Introductory paragraph: The Court itself has ascertained certain typographical errors in its original judgment at the following paragraphs: 91, 97, 125, 137, 199, 301 and 319 as well in the title after paragraph 181. By this rectified judgment, the Court corrects the said typographical errors as per the underlining.

JP1900

[1] In this heated construction litigation, the only signed contractual document between the Plaintiff Contractor ("the Contractor") and the Defendants (collectively "the Owner")[1] is a one page Letter of Intention that indicates a price of $1,420,000.00 plus taxes and specifies that a final contract is to be signed within 10 days.

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[1] The Defendant, PASAGARD, is the owner of the subject property located 1261 Boulevard Saint-Joseph, Gatineau, Québec, while the Defendant MEGA is an automobile dealership selling and servicing both new and used vehicles from that location.

[2] Despite the high level of sophistication of all parties, this construction project for a second building attached to MEGA's auto dealership proceeded without there being any signed final contract. The Contractor claims for a balance owing on the work of the project – an addition to MEGA's existing showroom and garage (the "Addition") – as well as alleged extras. The Owner counterclaims, amongst other things, for the cost alleged to finish the project following the Contractor's leaving the job site on December 20, 2006 before the end of work, as well as ancillary damages.

[3] On the one hand, the Contractor asserts that it was justified in not returning to the job site following the 2006 Christmas break as a result of alleged structural deficiencies, which were not addressed by the Owner. On the other hand, the Owner asserts that it resiliated the contract of enterprise "for just cause" and thereafter had the project completed by a third party contractor at extra expense and with additional delays.

[4] The Contractor registered a legal hypothec dated April 4, 2007 and initiated legal proceedings on September 21, 2007. On December 11, 2007, an irrevocable bank letter of guarantee in the amount of $450,000.00 was substituted for the legal hypothec.

[5] The Court benefited from extensive plans of arguments from both sides: the Contractor's 56-page plan ("P. Plan") and the Owner's 64-page plan ("D. Plan").

***OVERVIEW OF PRINCIPAL WITNESSES INVOLVED IN NEGOTIATING THE CONTRACT***

[6] The three persons principally involved in determining the contractual relationship between the parties were Mr. Joseph Beaudoin on behalf of the Contractor and Messrs. Nader Dormani and Guy Racine on behalf of the Owner. At all material times, all were experienced and sophisticated businessmen.

[7] Mr. Beaudoin started out his professional career as an insurance broker for 11 years. In 1998, he established a company in residential construction and in 1995 branched out also into institutional and commercial construction.

[8] As of 2007, he became involved in the *Corporation d'entrepreneurs généraux du Québec*, which was an industry association for contractors involved in commercial and institutional construction. From 2010 to 2011, he was the president of that association.

[9] He testified that he had hundreds of millions of dollars worth of construction projects to his credit including over 500 construction projects. Prior to the Addition, he worked on 5 to 6 projects concerning automobile dealerships.

[10] He testified that Mr. Guy Racine first contacted him in the autumn of 2005 to discuss his interest in working on the Addition. Mr. Joseph Beaudoin had never previously worked for the Owner.

[11] Mr. Dormani is the sole owner of PASAGARD and a 70% owner of MEGA, with the remainder of the shares being owned by his wife. He holds both a Ph.D. in Process Engineering and a Masters of Business Administration degree. He speaks fluent English and French.

[12] In 2008, he began in the automobile dealership business. His company has over $50,000,000.00 of sales annually. His dealership sells new and used automobiles. Much of his time is spent travelling all over North America to car auctions to purchase used automobiles to sell at his dealership. He is an astute and very successful businessman.

[13] The main person interfacing on behalf of the Owner with Mr. Joseph Beaudoin was Mr. Guy Racine. At the time of trial, Mr. Racine was 51 years old. He was hired – under a contract for services as an independent contractor – to undertake business administration for Mr. Dormani's companies. He is Mr. Dormani's "right-hand person", to the point they share the same office. He has a substantial background in construction and business. In his early career, he worked for *La Société de la Baie James ("SEBJ"),* including managing construction contracts for various projects in northern Quebec. While he has neither architectural nor engineering qualifications, he has a sophisticated experience in the business end of managing construction projects having built numerous warehouses and other buildings in the North as well as 3 to 4 automobile dealerships. As with Messrs. Beaudoin and Dormani, the transcripts from his extensive examination on discovery were filed into the court record[2].

[14] Mr. Racine was the "point man" for Mr. Dormani in charge of getting the Addition constructed. This was the case for all phases prior to and during construction since Mr. Dormani's work commitments took him regularly out of town.

***OVERVIEW OF THE PARTIES' BUSINESS RELATIONSHIP***

## *Events leading up to the Signing of the Letter of Intention, March 31, 2006*

[15] At the outset, it is important to underscore that the Contractor has an obligation of information under *CCQ* art. 2102:

> ***2102. Before the contract is entered into, the contractor or the provider of services is bound to provide the client, as far as circumstances permit, with any useful information concerning the nature of the task which he undertakes to perform and the property and time required for that task.***
> ***1991, c. 64, a. 2102.***

[2] Mr. Joseph Beaudoin was examined on discovery on January 4, 2008 while Mr. Dormani was examined on discovery after defence on September 22 and 23, 2008 and Mr. Racine was examined on discovery on September 23, 2008.

[16] The Contractor exercises this obligation in its letter of February 6, 2006 to Mr. Racine. Mr. Beaudoin volunteers advice to Mr. Racine on how to go about choosing a successful bidder in the process of tendering.

[17] Firstly, Mr. Joseph Beaudoin who writes the letter confirms that the Owner "***fait une demande pour ne pas avoir de suppléments au contrat (extras)***". Mr. Beaudoin states: "… ***nous remarquons des absences au niveau des plans mécaniques et électriques***". One clear meaning of this information is that without the Owner providing mechanical and electrical plans, there will necessarily be extras, something that the Owner wants to avoid.

[18] Furthermore, amongst other recommendations, Mr. Beaudoin recommends consideration of: "***le prix de la soumission et le plus de détails possible sur l'étendue des travaux"***. He ends the letter by indicating that it is important for him to have clients who are satisfied with the quality of the work for which they have paid.

[19] Along with this letter[3], he provides a tender. All parties agree that unsigned architectural plans dated August 11, 2005[4] labelled "***pour soumission***" as well as structural plans "***pour soumission***" prepared by civil engineer Mr. Richard Bélec were provided to three contractors for the purposes of tendering.

[20] The Owner chose the Contractor who tendered the lowest of the three bids.

[21] The Contractor's tender was for $1,448,000.00 plus taxes. Despite the Contractor's own recognition that there were not supposed to be any extras, there was various work excluded from the tender, including mechanical and electrical plans and permits. The tender included an option, if the Owner chose, to have the work done on the basis of **"*une gestion temps + matériel*".** Attached to the tender were outlines of the sub-contracted work to be performed by the roofer, a flooring company, master electricians (with a detailed description of the work: the price of electrical plans was excluded) and plumbers, as well as a ventilation and air-conditioning contractor.

[22] Mr. Racine responded in a two-page document[5] on February 21, 2006 with questions under 12 various headings. A document[6] on the Contractor's letterhead but undated has the same headings but it is unclear whether this document was sent by the Contractor before or after receiving Mr. Racine's document.

[23] Following this tender, there were additional discussions between the parties, which led to a March 6, 2006 letter from the Contractor to Messrs. Dormani and Racine[7].

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3 Exhibit PC-384.
4 Exhibit PC-2.
5 Exhibit PC-386.
6 Exhibit PC-385.
7 Exhibit PC-387.

[24] This letter provides further advice and information from the Contractor and also – in response to further work added by the Owner – the Contractor increases the price for the "***contrat de base***" of $1,448,000.00 plus taxes, with three additions, to reach $1,496,800.00 plus taxes.

[25] Very importantly in that letter, the Contractor points out two distinct issues for the Owner to resolve:

a. that the degree of difficulty of the work is relatively high because it involves attaching two buildings while the only access to MEGA's operational garage would be through the construction site. The Contractor recommends close supervision and control of the construction "***de par la précision de vos plans***[8]**"**, the work to undertake, the relatively short delays as well as the lack of space to undertake the work;

b. the Contractor raises a question which is prescient for what ultimately happens in this case. He says: "***enfin, connaissant vos activités d'affaires, il est à se demander si vous cherchez un prix ou un entrepreneur en qui vous avez confiance?*** ". Then, in a statement which the Contractor's own expert, engineer François Deslauriers, qualified as one of remarkable candour, Mr. Beaudoin states the following:

> "***Vous devez prendre en considération que le prix de départ en construction est le prix de base. Plus le prix est relativement bas, plus vous serez exposés à des charges additionnelles, car l'entrepreneur général ainsi que les entrepreneurs spécialisés doivent rentabiliser leurs opérations. Si les moyens sont très minces, cela occasionne des surcharges (extras) pour toutes les conditions de travail. Pour nous, vous avez demandé de limiter ces surcharges additionnelles. Nous avons donc évalué le bâtiment, les travaux à exécuter avec le plus de précision possible. Si nous partons avec une base financière trop basse, nous allons nous exposer à ces surcharges qui seront plus nombreuses et qui demandent beaucoup de temps de négociations et qui peuvent dégénérer en hypothèques légales***".
>
> …

[8] In the context, the Court interprets that the Contractor is referring to the fact that the plans are not that precise.

> « ***Vous devez comprendre que lorsque vous signez un contrat avec un entrepreneur général, c'est un peu comme un chèque en blanc que vous lui donnez, car par la suite c'est selon son intégrité qui*** **(sic)** ***fixera le prix final du contrat ».***
>
> ***(this Court's emphasis)***

[26] The second last paragraph of the letter is equally important: "***Nous devons donc prendre une décision sur le montant que vous êtes prêts à payer. Car selon ces discussions, nous allons pouvoir vérifier la rentabilité et la possibilité de ce contrat***".

[27] What the Court understands from this statement is that given that there is already an imprecision in the plans – the Contractor has already said that there are neither mechanical nor electrical plans – if a negotiated price is "***trop bas***" this means that the Contractor will seek to charge for more extras, which will not only take more time to negotiate but may mean the filing of legal hypothecs.

[28] The Court is left perplexed by this implied threat. At the same time, the assumption is that if the Contractor agrees to a price – knowing that the Owner does not want to pay for extras – he will have factored in and agreed that the project is profitable for him.

[29] At this point, it is important to underline that into this negotiation between sophisticated businessmen came Mr. Martin Beaudoin who at the time was 27 years of age and was just starting with the Contractor as a junior engineer.

[30] Mr. Martin Beaudoin was a junior engineer in 2003 and only became a professional engineer at the end of 2006. He was responsible for preparing the tender despite his relative inexperience and did so with the help of a senior engineer. Shortly thereafter, Mr. Martin Beaudoin became the Contractor's on-site project manager for the Addition.

[31] Mr. Martin Beaudoin testified that following a meeting between Mr. Joseph Beaudoin and the Owner, Mr. Martin Beaudoin prepared a second tender[9].

[32] Clearly, the parties were getting closer to a meeting of the minds in their discussions since on March 16, 2006, Mr. Racine writes to Mr. Joseph Beaudoin giving him the names of MEGA and PASAGARD to be the contracting parties in a contract to be written up by the Contractor.

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[9] Exhibit PC-4. Mr. Martin Beaudoin had also prepared the original tender on March 6, 2006 (Exhibit PC-387).

[33] The parties agree that Exhibit PC-4 was the contract submitted. It is a standard form CCDC 21994 "***contrat à forfait***" of some 39 pages in total including a tender of the same date for the amount of $1,420,000.00 (plus taxes). Curiously, this document does not append any of the detailed work to be done by the sub-contractors which had been filed with the tender. The CCDC contract notes that the work was to be completed between March 20, 2006 and September 1, 2006 - a period of five months and two weeks. This was a "***contrat à forfait relatif***" since there was an entire section which established a procedure allowing for modifications to the contract and the determination of amounts for that work[10].

[34] The CCDC contract described the "work" as follows:

> ***"Plan de structure ST 1/8 à ST 8/8 reçu le 6 janvier 2006.***
>
> ***Plan d'architecture A1 à A10.***
>
> ***Soumission annexée.***
>
> ***Les plans de mécanique et d'électricité devront être fournis par le maître de l'ouvrage".***

[35] There is conflicting evidence as to the number of CCDC contracts produced by the Contractor and whether the Owner told the Contractor he would not sign such contracts. For the reasons that follow, the Court determines that Exhibit PC-6 of March 16, 2006 was the only CCDC contract given by the Contractor to the Owner.

[36] Mr. Joseph Beaudoin testified at trial that when he gave the CCDC contract to Mr. Racine, the latter said that it would have to be verified by both Messrs. Dormani and Bélec and that Mr. Racine would get back to Mr. Joseph Beaudoin. The Court accepts this as fact.

[37] Furthermore, Mr. Joseph Beaudoin testified that Mr. Dormani wanted the work to begin quickly and to the extent possible, by the beginning of April, 2006. At the same time, Mr. Racine told Mr. Joseph Beaudoin that the Owner was not yet ready to sign the contract and that the Contractor would shortly receive the updated plans from Mr. Bélec.

[38] Mr. Joseph Beaudoin testified that there were ongoing negotiations after March 16, 2006 concerning the price. He acknowledged that Mr. Dormani wanted to be certain on the price.

[39] Mr. Joseph Beaudoin admitted that the revision of February 21, 2006 provided by MEGA was not a "***devis de performance***" but rather a "***devis***". As for the electrical work, he said that his electrical subcontractor provided a work proposal despite the absence of any electrical plans.

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[10] See *Partie 6* beginning at page 66.

## *SIGNING THE LETTER OF INTENTION AND SUBSEQUENT EVENTS*

[40] On March 31, 2006, the Contractor and MEGA signed a Letter of Intention to enter into a contract of enterprise for the construction of the Addition.

[41] Mr. Joseph Beaudoin signed the Letter of Intention for the Contractor and Mr. Nader Dormani did the same for MEGA, with Mr. Guy Racine witnessing the signing of that letter.

[42] All parties agree that no other contractual document was ever signed.

[43] Mr. Dormani testifies that the Letter of Intention constitutes the contract between the parties[11].

[44] For the reasons that follow, the Court disagrees. The Letter of Intention constitutes a civil law "***avant-projet***" in which the common intention of the parties was to enter into a "***contrat final à signer dans les dix jours suivant les présentes***", a contract in which MEGA **"*se réserve le droit de réviser l'ensemble des conditions, modalités et échéancier***"[12].

[45] The parties agreed that the price in a final contract would be for $1, 420,000.00 plus taxes, which "***comprend la totalité du projet 'clé en main' sans aucun excédent et/ou supplément***".

### *Governing Law*

[46] The Letter of Intention is called a promise to contract or an "*avant-projet*" under Quebec civil law (art. 1396).

[47] The Court must determine what the common intention of the parties was since this is the basis of any contract. The Court of Appeal instructs on the importance of determining this intention:

> ***[…] But as my colleague Bich, J.A. wrote in Sobeys Québec inc.,[13] "[…] l'on ne peut ignorer que la volonté déclarée des contractants, ou celle qu'ils déclarent en apparence, ne traduit pas toujours fidèlement leur volonté réelle: le contenu explicite du contrat, pour diverses raisons, peut ne pas être conforme à cette dernière". In interpreting the "Quittance et transaction", as in any other contract,***

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11 Examination after Defence of Mr. Dormani, September 22, 2008, at page 128, line 11.

12 The context for this last statement was that Mr. Racine already had the CCDC contract. From Mr. Racine's own evidence, he had left the impression with the Contractor that Mr. Racine was still reviewing it, an impression in existence on March 31, 2006.

13 *Sobeys Québec inc.* v. *Coopérative des consommateurs de Sainte-Foy*, 2005 QCCA 1172, para 47.

> ***one must seek out the common intention of the parties rather than adhere unthinkingly to the literal words on the contractual page (article 1425 C.C.Q.)[14].***

[48] Particularly relevant to the present case, is the 2013 Supreme Court of Canada decision of *Québec (Agence du revenu)* v. *Services environnementaux AES inc.*[15] This seminal decision establishes principles relating to: the formation of a contract; the evolution of a contract; seeking the parties' true intention as opposed to their declared will; and the right of parties to change the terms of contract governing them.

[49] The Supreme Court of Canada instructs on when a contract is formed:

> ***[…] The creation of legal effects that bind the parties is the distinctive function of the contract. The formation of a contract requires agreement on an object, which is defined in art. 1412 C.C.Q. as "the juridical operation envisaged by the parties" at the time of the contract's formation. Furthermore, the contract gives rise to an obligation (art. 1372 C.C.Q.), the object of which is "the prestation that the debtor is bound to render to the creditor" (art. 1373 C.C.Q.). The prestation itself may relate to any property, but the property must be sufficiently determinate or determinable in accordance with objectively verifiable standards or practices of determination or calculation (CCQ art. 1374 …)***

> ***… Once an agreement of wills is reached in accordance with these principles, the contract establishes a set of rules applicable to the parties, which have legal authority for them, for the purpose of carrying out what thereby becomes a common operation or plan[16].***

[50] Not all contracts have their terms clearly established from the beginning. The Supreme Court of Canada discusses the evolving nature of certain contracts:

> ***From this perspective, for a contract to exist and become a legal reality, the parties' undertakings must be sufficiently precise to establish the details of the contemplated operation. In some cases, the details of the operation will be clear immediately. In other cases, a plan will take shape gradually and will come into legal existence as***

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14 *Francoeur* v. *4417186 Canada Inc.*, 2013 QCCA 191, para. 114.
15 [2013] 3 S.C.R. 838.
16 *Ibid*., para. 30.

> ***a contract that is binding on the parties and represents the law applicable to them once its details are sufficiently clear[17].***

[51] Where there is a contract in evolution, the Supreme Court emphasizes the importance of determining common intent as opposed to "declared will":

> ***[…] A contract is distinct from its physical medium. In the Quebec law of obligations, a distinction is maintained between the "negotium" and the "instrumentum", to repeat the words used by the Court of Appeal in the cases at bar, that is, between the common intention and the declared will. The agreement lies in the common intention, despite the importance — as between the parties and in relation to third parties — of the declaration, oral or written, of that intention[18].***

[52] Similarly, the doctrine makes it clear that a contract may be formed in stages[19].

[53] In some cases, parties may enter into an "***avant contrat***" with an option to sign a specific contract[20].

[54] However, in the present case, the "***avant projet***" did not reference a pre-determined final agreement, but rather left it to the parties to come to such a final agreement.

[55] To understand what the common intention of the parties was in relation to the Letter of Intention, the Court must now look at the context both prior to the signing of that letter on March 31, 2006 as well as in the ten-day "window" provided for in the Letter of Intention to sign a "final contract".

## *Clé en main*

[56] A major debate between the parties concerned the qualification of the contract. The Plaintiff alleged it was a *"**contrat à forfait relatif**"* while the Defence alleged that it was a *"**contrat clé en main**"*.

[57] While the "***contrat à forfait relatif***" is discussed at *CCQ* art. 2109, the Quebec Civil Code makes no reference to "***contrat clé en main***".

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17 Ibid., para 31.
18 Ibid., para. 32.
19 Pineau, Jean and Gaudet Serge, *Théorie des obligations, 4ème édition*, (Thémis, Montréal, 2001) at page 130 and following.
20 *Europe Cosmetiques Inc*. v. *Locations Le Carrefour Laval Inc*., 2013 QCCA 1633 at pages 8-9.

[58] The qualification of the contract is a question of law[21]. To answer this question of law in this case, the Court looks to two sources:

a) jurisprudential definitions in existence at the time the term was used in the Letter of Intention on March 31, 2006, and

b) the manner in which the parties executed the contract[22].

[59] The relevant jurisprudential definitions come from two different cases both decided by Mr. Justice Jean-Jacques Crôteau. In the November 15, 1999 decision of *Groupe Guy Pépin inc.* v. *Nova P.B. inc*.[23] his Lordship decided:

> ***« Il sait par expérience qu'il existe certaines conditions pour appliquer cette notion «clé en main». Il aurait fallu que le Groupe Pépin prenne l'entière responsabilité de la conception et de la réalisation des travaux civils et mécaniques. Ce qu'il n'a pas fait.***
>
> ***Comme le mentionne M^e^ Max R. Bernard, dans son article «Comment établir le contrat dans le but de maximiser la protection et minimiser les risques professionnels» paru dans Super conférence sur la construction, L'Institut canadien 1994, Toronto – "clé en main":***
>
> > ***«Il s'agit d'un contrat où l'entrepreneur prend l'entière responsabilité de la réalisation du projet de A à Z pour essentiellement en remettre les clefs au propriétaire lorsque le tout est terminé.»***
>
> ***Plus loin, M^e^ Bernard cite l'auteur américain Albert Dib dans son traité Forms and agreements for architects, engineers and contractors, [1976-1985], New-York, Clark Bordman Ltd., Vol. 1:***
>
> > ***«A turn key contract, as the name implies, is to design, build, fully equip and prepare a plant for operation. The owner is given the symbolic key to the plan. Consequently, «turn key» combines engineering or architecture procurement and construction services as the case may be».***

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21 Europe Cosmétiques, *supra* note 9, para. 30, citing with approval Maurice Tancelin, *Des obligations en droit mixte du Québec*, 7^e^ éd., Montréal, Wilson & Lafleur, 2009, n° 325, p. 23.

22 *Richer* v. *Liberty Mutual ,* 1987 RJQ 1703.

23 J.E. 2000-378.

***Cette approche rejoint la preuve soumise par le Groupe Pépin, non contredite, lorsque son ingénieur conseil, Fouad Victor, mentionne dans son rapport, R-49:***

> ***«...la définition d'un projet de type Clé-en-main. Ce type de projet doit avoir les caractéristiques suivantes:***
>
> ***1. Le besoin du client devra être clairement identifié et indiqué au contrat entre le client et l'entrepreneur;***
>
> ***2. L'entrepreneur s'engage à fournir tous les services professionnels de conception et de préparation des plans et devis nécessaires à la réalisation du projet. Le client a seulement le droit d'examiner ces documents pour s'assurer de leur conformité avec le contrat.***
>
> ***3. L'entrepreneur s'engage à fournir toute la main-d'oeuvre et les matériaux nécessaires à la réalisation du projet, conformément aux plans et devis.***
>
> ***4. L'entrepreneur doit réaliser tous les travaux sous sa propre responsabilité. Cette responsabilité doit inclure celle de tous les professionnels et sous-traitants engagés par lui, pour la réalisation du projet. En plus, l'entrepreneur a normalement toute la flexibilité de prendre les décisions concernant le déroulement des travaux, à condition qu'ils respectent bien l'échéancier ainsi que la qualité de l'ouvrage, tel qu'indiqué au contrat.***
>
> ***5. Les travaux supplémentaires non indiqués aux contrats et demandés par le client, doivent faire l'objet d'une entente séparée entre ce dernier et l'entrepreneur ou encore, faire l'objet d'un avenant signé au contrat initial.***
>
> ***6. Toujours selon les termes du contrat, le client pourra fournir, pour l'installation par l'entrepreneur, quelques équipements***

> ***spécialisés. Dans ce cas, l'entrepreneur n'est pas tenu responsable de la qualité des équipements fournis.***
>
> ***7. Le client doit vérifier l'ensemble du projet pour s'assurer que les travaux sont conformes aux termes du contrat. Tout travail non conforme doit alors être réparé par l'entrepreneur avant sa livraison au client.»***

[60] In a second unrelated judgment issued on October 18, 2000[24], his Lordship added another doctrinal definition:

> ***« Il abonde dans le sens des commentaires de Mes Gagné et Cantin, page 7, cités par les avocats de Société d'Énergie, lorsqu'ils énoncent les caractéristiques suivantes:***
>
> > ***«L'entrepreneur assume d'emblée l'entière responsabilité pour la réalisation du projet et ce, tant au niveau de la préparation des plans et devis que de l'exécution de l'ouvrage. Le donneur d'ouvrage, quant à lui, n'a pas de représentant ou de professionnel sur le chantier.» »***

[61] On a review of the totality of the evidence, there is no consistent treatment by both parties in which their contractual relationship could be qualified as "***clé en main***".

[62] On the contrary, the actions of the Owner, particularly the day-to-day hands-on involvement of the Owner's engineer, Mr. Bélec, in the construction remove this project from any consideration as a project "***clé en main***". For example:

a. the essence of a contract "***clé en main***" is that all aspects are within the control of the Contractor. On the contrary, in the present case, two essential elements to construct the Addition: (a) the electrical plans and (b) the mechanical plans were responsibilities taken on by the Owner. The Owner asked the Contractor specifically to pay a third party to prepare the electrical plans and the Owner itself paid for the mechanical

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[24] *Société d'énergie St-Raphael* v. *Mechano soudure Drummond ltée,* J.E. 2000-2065, para. 200.

plans[25] which were prepared through the offices of the civil engineer, Mr. Richard Bélec;

b. according to Mr. Dormani, the parties could make changes to this contract but the changes did not always mean that there would be a change in the price. He mentioned for example that if the quantity of concrete changed there could be a change in the price provided both parties acted "reasonably"[26]; and

c. the Owner's engineer, Mr. Bélec, required that the subcontractor's shop drawings for the skylights have a Quebec engineer's seal. Such micro-management by the Owner clearly does not allow these parties relationship to be qualified as "***clé en main***", as that expression is commonly known.

[63] Mr. Joseph Beaudoin testified that on March 31, 2006, while he was at the Owner's premises, he was given a copy of the Letter of Intention, in which the words "***clé en main***" were used. In his Examination on Discovery of January 14, 2008[27], Mr. Beaudoin addressed his understanding of this concept:

> ***« Parce que, ici, juste vous faire remarquer, c'est écrit « projet clé en main », un clé en main, pour nous, comme entrepreneur, on doit contrôler les ingénieurs, les architectes, tout le monde dans le projet, ce qui n'était pas le cas. On nous avait dit ça mais, en fait, l'ingénieur et l'architecte dépendaient complètement du propriétaire. Donc c'était plus un clé en main. Et quand on avait signé ça, an avait dit, et c'était bien écrit en bas, on avait dit «Écoutez, là, nous on est bien prêt à signer une lettre d'intention de même mais on veut avoir des plans et puis on veut avoir sur quoi qu'on va travailler». Le propriétaire nous avait garanti que dans les 10 jours suivants, il était pour nous fournir des copies de plans et puis que là on pourrait signer un contrat, chose qu'on n'a jamais eu par la suite. Passé ça, on a demandé à plusieurs reprises d'avoir un contrat. Le propriétaire n'a jamais acquiescé à notre demande ».***

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[25] Similarly, in a case where the owner paid for materials and labour undertaken by subcontractors, such a hands-on approach was found to be "*difficilement compatible avec la prétention d'un contrat 'clé en main'*" (*Locations Lauzon inc*. v. *2428-8516 Québec inc*., 2007 QCCS 4514, para. 33-34.

[26] Discovery of Mr. Dormani dated September 22, 2008 at page 128, line 2 and following.

[27] Exhibit PC-365.

[64] In fact, on discovery, Mr. Beaudoin said: "… ***je vous dirais que c'était un contrat un peu… un « cost » souvent qu'on appelle, une base avec un « cost*** ».

## *Expertise of Mr. François Deslauriers, P. Eng.*

[65] Mr. Deslauriers brought a unique expert perspective to the Court. In addition to holding an MBA, he has practiced as a structural engineer since 1979 and is a senior partner in a major Montreal structural engineering firm with approximately 50 employees and with over 2,000 different construction projects to his credit. He has been recognized as an expert in court between ten and twenty occasions. He has substantial experience both with "***contrat à forfait***" as well as "***contrat clé en main***". His mandate, amongst others, as per the Contractor, was to provide opinion on the type of construction contract used in this matter.

[66] The Supreme Court of Canada confirms that an expert witness may provide evidence on the ultimate question before the Court[28].

[67] Mr. Deslauriers was the only expert in this field to testify. The Court recognizes his high level of experience. On its own analysis, the Court has come to the conclusion that this was not a "***projet clé en main***". This conclusion is also supported in Mr. Deslauriers's report based on his own analysis of the extensive documents submitted to him for his review including the transcript of the Examination on Discovery of Messrs. Racine and Bélec[29].

[68] Mr. Deslauriers concludes: "***Tous les événements et faits survenus tant pendant les soumissions que pendant la construction démontrent qu'il ne s'agit pas d'une formule 'clé en main' tel que vécue dans l'ensemble du marché de la construction mais plutôt une formule de type 'marché forfaitaire'***"[30].

## *In the 10 Days Following March 31, 2006*

[69] The Court determines that Mr. Racine was incorrect in his original Examination on Discovery[31] regarding a second written contract. Mr. Racine testified that Mr. Joseph Beaudoin gave him a contract within 10 days of signing the Letter of Intention. Not only does this contradict Mr. Joseph Beaudoin's evidence but also if there was a second written contract, why did the Owner not produce it at trial? The Court determines it is more probable that the Letter of Intention meant that the Owner reserved the right to make changes to the first CCDC contract, Exhibit PC-6. The Owner had no intention of signing this written contract.

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28 ROYER, J.C. et al, *La prevue civile, 4ème éd.*, (Yvon Blais, Cowansville, 2008) at para. 474.
29 Exhibit PC-314 at pages 1259 and 1266.
30 Ibid. at page 1266.
31 Exhibit PC-381: Examination on Discovery of Mr. Guy Racine, September 23, 2008 at page 35, line 13.

[70] Mr. Racine's explanation that the Letter of Intention required the Contractor to supply a new contract is not probable. In his own testimony, he confirmed that he never told the Contractor that the Owner would not sign the March 16, 2006 CCDC Contract.

[71] On the totality of the evidence, it is clear that this was not the case and that the only written contract provided by the Contractor to Mr. Racine was Exhibit PC-6, given on March 16, 2006.

[72] The Court finds that the Owner did not act in good faith[32] in regard to the proposed final contract since, according to Mr. Racine, the Owner never advised the Contractor that it did not intend to sign the contract, Exhibit PC-6:

> ***Q. [136] Et puis, suite à la réception de ces commentaires-là, est-ce que vous avez signé le contrat?***
> ***R. Non.***
> ***Q. [137] Pour quelle raison?***
> ***R. Il a carrément resté là puis il n'a pas été signé, puis personne n'est revenu à la charge là-dessus.***
> ***Q. [138] Donc à aucun moment, par la suite, Entreprises Beaudoin vous a demandé, soit verbalement ou par écrit, de signer le contrat?***
> ***R. Je me rappelle pas.***
> ***Q. [139] Avez-vous souvenir d'avoir discuté avec M. Dormani de la réception du contrat? Vous l'avez transmis à M. Bélec. Est-ce que vous le transmettez également à M. Dormani ce contrat-là?***
> ***R. Non, parce que, M. Dormani, il le savait c'était quoi le contrat. Pour lui, le contrat c'était faire le plan pour ce prix-là, that's it. C'était simple comme ça. Il n'avait pas besoin de voir le texte, c'était l'ingénieur puis l'architecte qui avaient besoin de voir ça.***
> ***Q. [140] Est-ce que vous mentionnez verbalement à Beaudoin que vous n'avez pas l'intention de signer le contrat?***
> ***R. Non.***
> ***Q. [141] Est-ce que vous leur écrivez pour leur dire : on ne signera pas le contrat?***
> ***R. Non.***
> ***Q. [142] Est-ce que vous avez souvenir d'avoir mentionné à M. Bélec le fait que vous n'aviez pas l'intention de signer le contrat?***

[32] Q.C.C. art. 6, 7,1375

> ***R. J'ai pas mentionné ça à M. Bélec.***
> ***Q. [143] Donc, au meilleur de votre connaissance, M. Bélec ne sait pas si le contrat a ou n'a pas été signé?***
> ***6 R. Il vous le dira, moi je ne le sais pas.***

[73] Mr. Racine had asked Mr. Bélec for his comments on the CCDC contract provided by Mr. Joseph Beaudoin. Mr. Racine testified that Mr. Bélec had recommended to him that the CCDC contract not be signed because it allowed for "extras" to be agreed for and charged.

[74] According to Mr. Joseph Beaudoin, this CCDC contract sat on the edge of Mr. Racine's desk for a very long time. He testified that he asked on at least five or six occasions whether the contract was going to be signed and Mr. Racine avoided a direct response. The Court accepts this explanation as the most probable.

[75] Since Mr. Dormani and Mr. Racine shared the same office, the Court accepts that Mr. Dormani never actually saw the contract but it stretches credulity beyond the breaking point that he did know of the existence of the contract.

[76] In fact, evidence confirms in regard of Mr. Racine and by implication for Mr. Dormani, that the Owner had no intention of signing the contract.

[77] In fact, Mr. Dormani was not a person who normally signed contracts but who preferred to contract orally as the following excerpt from his Examination on Discovery establishes:

> ***R. Regardez, M. Beaudoin est ici, il peut témoigner, là. On a fait ça un peu comme un Gentlemen's Agreement. Moi, je suis très old fashion dans mes affaires. Les gens qui me connaissent, des fois je fais des centaines de milliers de dollars en affaires on handshake. Je suis très, très old fashion comme ça. Ma parole est importante avec les gens que je fais affaire, la parole, le handshake est très, très important. Avec M. Beaudoin, on s'attendait d'avoir d'autres projets ensemble, puis une des raisons, M. Beaudoin, je pense qu'il voulait avoir ce projet-là, comme SLBL, c'est parce qu'ils savaient qu'il y a d'autres projets qu'on voulait avoir, on voulait construire d'autres choses, il y avait d'autres projets à venir, ça fait que j'avais dit, autant à SLBL qu'à M. Beaudoin : «Écoutez, si vous êtes correct, vos prix sont raisonnables puis***

> ***tout ça, on va travailler ensemble.» Puis les deux, jusqu'à la fin du projet, on a agi comme des gentlemen, j'ai toujours respecté M. Beaudoin, on s'est jamais crié l'un après l'autre, on avait vraiment une entente de Gentlemen's Agreement. On ne savait pas qu'on va se rendre aujourd'hui comme ça. Qu'est-ce que vous voulez, je fais beaucoup de choses comme ça. Souvent j'ai pas de problèmes, mais des fois ça arrive, des problèmes. PAR Me JEAN FAULLEM :***
> ***Q. [299] À votre connaissance, est-ce qu'il y a un autre contrat?***
> ***R. Je ne pense pas qu'on a signé d'autre chose plus détaillé que ça, non.***

## *How the Price of the Contract was Determined*

[78] Mr. Beaudoin admits that at least the parties agreed on the price and that the price was based on the plans referred to in Exhibit PC-6. On this subject, Mr. Racine said the following in his Examination on Discovery:

> ***Q. [162] Sur la base de quels documents le un million quatre cent vingt mille dollars (1 420 000 $) a été établi?***
> ***R. Sur le plan déposé par Richard Bélec en janvier, et sur les précisions apportées par moi et M. Dormani dans les rencontres qu'on a eues avec M. Beaudoin.***
> ***Q. [163] Quelles sont ces précisions qui ont été apportées lors des rencontres?***
> ***R. Ça s'est fait verbalement au cours de rencontres. Ça a été très long, dans le sens qu'on regardait le plan des fois, puis M. Beaudoin nous posait des questions pour savoir vraiment ce qu'on voulait, on lui disait ce qu'on voulait. Ça s'est fait d'un échange quand même très constructif, là. Je ne me rappelle pas que ça n'ait pas bien été, là.***

[79] At trial, Mr. Racine did not specify what these "*précisions*" were.

[80] Accordingly, the Court determines that the common intention of the parties was limited to the Contractor constructing the Addition on the basis of the plans upon which it had tendered and doing the work for $1,420,000.00 that was specified in the March 16, 2006 tender and attachments. Mr. Dormani testified under oath that the contract

was the Letter of Intention. While the Court disagrees that the Letter of Intention was the final contract, for the reasons that have been given, Mr. Dormani's assertion prevents the Court from accepting Mr. Racine's evidence that additional "*précisions*" became part of the contract after the tender was received on March 16, 2006. The burden was on the Owner to prove that such "*précisions*" were accepted and this was not done. Such are the consequences when parties choose not to have their agreement clearly specified in writing.

[81] Moreover, Mr. Racine drafted the Letter of Intention. Mr. Racine was neither an engineer nor an architect nor a contractor nor an attorney. His use of the term "*clé en main*" was ambiguous in the context of the project as defined, particularly in view of the fact that the obligation rested with the Owner to provide the necessary electrical and mechanical plans so that the building could be completed.

[82] Based on the evidence, the Court qualifies this contract as a "contrat à forfait relatif". The Court relies on the doctrine of Me. François Beauchamp whose definition is quoted with approval by Madam Justice Line Samoisette[33]:

> ***« Le contrat à forfait peut être absolu ou relatif. Il sera absolu lorsque le propriétaire ne s'est pas réservé le droit de modifier les plans et devis pendant le cours des travaux ou encore, de demander des travaux additionnels. Dans le cadre du contrat à forfait absolu, le texte de l'article 2109 C.c.Q. pourrait nous porter à croire qu'une preuve testimoniale d'une entente pour permettre des modifications serait possible étant donné que cette nouvelle disposition n'exige plus un écrit comme le faisait l'ancien article 1690 C.c.B.-C. Dans le contrat à forfait relatif, la convention prévoit que le propriétaire peut modifier les travaux sans que l'entrepreneur puisse s'y refuser ou invoquer ce motif pour demander la résiliation du contrat. Le prix des travaux supplémentaires pourra cependant être réclamé par l'entrepreneur à condition de se conformer à une procédure qui sera prévue à même la convention ».***

## *Procedure for Changes and Unforeseen Costs*

[83] The Owner agreed that there could be changes or unforeseen costs[34] that could form part of the parties' contractual relationship.

[84] The agreed procedure was noted at para. 14 of the Site Minutes of May 17, 2006:

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[33] *Construction Réginald Clark inc.* v. *La Corporation des arpents Bolton et al.* 2010 QCCS 2135, at para. 78.

[34] Examination on Discovery of Mr. Nader Dormani, Exhibit PC-382A, at pages 3467-3468.

> ***« 14. Changement et imprévus***
>
> ***L'ingénieur indique que tout changement ou imprévu devra faire l'objet d'une autorisation écrite de l'ingénieur et rappelle à l'entrepreneur que tout travail devant être exécuté en rémunération supplémentaire devra être autorisé par l'ingénieur et/ou le promoteur. Aucun paiement supplémentaire au contrat ne sera accordé autrement. »***

[85] In fact, the evidence[35] confirms that the Contractor followed this procedure regarding the approval for and payment of the super-beams. Furthermore, Mr. Joseph Beaudoin testified as to the process as follows[36]:

> ***« De façon générale, bien les travaux étaient exécutés… étant donné, comme je vous disais, qu'on était en présence d'un projet spécial qu'on peut qualifier, étant donné l'imprécision des plans, pour ne pas dire des plans incomplets qu'on avait à travailler avec, c'est qu'on fonctionnait ... on partait avec la base, admettons de dire ce qui était évident. Mettons dans le 1 420 000 qui était notre intention, on fonctionnait à partir de ces travaux-là et puis tout qui s'ajoutait ou qui était demandé par l'ingénieur ou le propriétaire ou quoi que ce soit en supplément, c'était ... je vous dirais que c'était un contrat un peu un cost souvent qu'on appelle, une base avec un cost. À ce moment-là, ce qu'on avait c'est que, on avait souvent à avoir des travaux à exécuter en supplément, des choses qui devaient être ajoutées. Nous on avisait l'ingénieur et on avisait Guy Racine, le bras droit de monsieur Nader*** **[Ed. note : Mr. Nader Dormani]*****. C'est surtout Guy Racine qui surveillait quotidiennement la gestion de ça. Et on arrivait à la fin du mois, au mois ou aux deux mois, là, tout dépendant de l'avancement des travaux et puis là on fournissait notre facturation avec un détail des choses, des travaux qui avaient été faits en additionnel, en supplément, qui n'étaient pas disons sur les plans originaux ou qui n'avaient pas été comptabilisés au départ ».***

[86] The Contractor argues in his P. Plan at para. 66 that the parties agreed that it was not necessary to get authorisation for the extra and the proposed price but only authorisation for the work to be done.

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[35] Mr. Belec confirmed this procedure that both the extra and the price be approved before work started in a communication to Mr. Martin Beaudouin on June 14, 2006 (Exhibit PC-42).

[36] Examination on Discovery of Mr. Joseph Beaudoin, January 14, 2008, at pages 11 and 12.

[87] This contradicts the procedure established between the parties. The Owner is correct to assert that the only extra and price actually approved using this procedure was for the super-beams.

[88] The Contractor seeks to rely on his demand for payment PC-212 dated November 20, 2006 and the fact that it was paid by the Owner as proof that only approval of the work and not the price was required. The Court disagrees since this alleged practice was not sufficiently consistent to supplant the procedure required in the original site minutes.

[89] In this particular case, four of the twelve (4/12) items claimed as extras were approved by Mr. Bélec.

[90] Mr. Racine testified that he wrote cheques[37] without getting full approval from Mr. Bélec on the other amounts claimed as extras because the amounts for which he did not wait to get approval from Mr. Bélec for the bill were minor and that in the circumstances, in December, 2006 when he wished to advance the project as much as possible, he felt under duress and in good faith wanted to get the money to Mr. Beaudoin as quickly as possible.

[91] The Court accepts Mr. Racine's testimony on this point and thereby confirms that the agreed practice and procedure for payment of extras was having both the proposed work and its price approved in advance. The Court concludes that these extras that Mr. Racine did not get the sign off from Mr. Bélec totalled approximately 23% of the value of the total claim for extras …($90,801.36).

## *EXECUTION OF THE WORK: LIMITATIONS OF THE PLANS*

### *Obligation of Co-operation*

[92] Legal author Me. Vincent Karim succinctly summarizes the corollary obligations arising out of arts. 6, 7 and 1375 *CCQ*: good faith, information, loyalty and cooperation.[38] The Court acknowledges that the following statements from Me Karim represent Quebec law: (a) cooperation is conduct that facilitates the execution of the contract and the achievement of its goals; (b) cooperation requires a balance: achieving common goals, meeting personal objectives for each of the co-contracting parties and not injuring the other party; and (c) cooperation also requires a positive attitude from both parties to execute the contract.

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[37] Exhibit PC-212, en liasse, dated December 5, 2006 and December 14, 2006.

[38] KARIM, V., *Les Obligations* (Montreal Wilson & Lafleur 2015 at para.325). For a thorough jurisprudential study see *Warner Chappell Music FRANCE v. Beaulne*, 2015 QCCS 1562 at para. 87 and following (Wery J.).

[93] Following the signing of the Letter of Intention, both parties had an obligation of means to sign a final contract. The Court determines that the Contractor had already provided the CCDC contract to the Owner and hence it was the Owner's obligation to make whatever revisions were required and to get that settled with the Contractor. The Owner failed in its obligation to cooperate by not advising the Contractor that it was not prepared to sign this CCDC contract.

[94] However, at the time that the ten-day delay expired under the Letter of Intention, both parties then had an obligation to continue to negotiate a final contract. Both the Contractor and Mr. Bélec (on behalf of the Owner) knew or should have known that further plans and specifications were required to complete the work. The Contractor knew this clearly because it had specified in its tender that it was providing no professional services i.e. those for electrical, mechanical or surveying services. The obligation of cooperation by both parties was paramount in this case (a) this when the only document signed by the parties was the one page Letter of Intention; and (b) in such contracts of successive performance where the prestations must be co-ordinated amongst various actors to complete a project on time.

[95] This necessary duty of cooperation collapsed in or about December 20, 2006 when the Contractor left the job site never to return. Based on the expert opinion from structural engineers Auger and Goulet, the absence of any cooperation between the Contractor on the one hand and Messrs. Bélec and Racine on behalf of the Owner on the other meant that the Contract was at an end.

[96] Now turning to the obligation to inform. In the *Bail c*ase, the Supreme Court of Canada discusses the "Relative Expertise" of the parties, right after it discusses the topic of "Allocation of Risk" for contracts of enterprise.

[97] The Supreme Court of Canada instructs that: "The relationship between the risk assumed by the contractor and the owner's obligation to inform the contractor, particularly when the information in question is contained in the call for tenders documents, is very close indeed".[39]

[98] As in a case such as this, the obligation to inform and the obligation to cooperate may overlap: one party must inform of relevant information in its possession which the other party does not posses and which would be necessary to perform the contact and conversely, an obligation exists to inquire and request necessary information and if required, explain why that information is necessary.

[99] The Owner is counseled before the tendering process (and thereafter) by two knowledgeable individuals: Mr. Racine knowledgeable in construction contracts from the business side and Mr. Belec, as a civil engineer, from the construction side. In his

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[39] *Banque de Montréal* v. *Bail Ltée,* [1992] 2 S.C.R. 554 at p. 591

evidence, Mr. Dormani recognized the contributions to the Owner's knowledge made by both men.

[100] Accordingly, there was relative equality between the Contractor and the Owner in terms of construction contract expertise. As *Bail* notes, an owner's obligation to inform increases with its expertise relative to that of the contractor. [40]

[101] As this judgment demonstrates, at various points one or both of the parties did not meet the standard of information and cooperation required by their contractual relationship.

## Overview of Alleged Delays

[102] In chronological order going from the first delay to the last, these delays included: (a) the delay to get the engineer-sealed "plans for execution" from Mr. Bélec to the Contractor which occurred on June 5, 2006. These plans noted the major modification that supporting columns were removed from the basement garage in favour of super-beams;[41] (b) the delay caused by an acrimonious dispute between the Contractor and Mr. Bélec over the shop drawings for these super-beams. Mr. Bélec insisted that these shop drawings must be under seal of a Quebec-qualified professional engineer; (c) once the shop drawing issue was resolved, there was the delay from the time of ordering the super-beams to the time when they were delivered on site; and (d) the delay in the delivery of the super-beams delayed the laying of the reinforced concrete floors both for the basement and for the first floor showroom of the Addition.

[103] All these various delays beg the question: was there an agreed–to completion date?

[104] This was a matter of substantial debate before the Court.

[105] The Court analyzes the ongoing interactions between the parties to determine whether there was agreement on a completion date.

[106] The Plaintiff asserts its position on the basis of the following paragraphs from its P. Plan:

> ***Les éléments factuels additionnels établissant la responsabilité des défenderesses relativement aux demandes de surplus reliées aux délais d'exécution (suppléments 13, 14, 16, 23, 24 et 26 – pièces PC-247 et PC-291) sont les suivants :***

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[40] *Ibid.* at p. 592

[41] The original January 6, 2006 plans showed supporting columns throughout the basement garage. The Owner decided to replace these columns by super-beams as a result of their being told by a sub-contractor that the original columns would hamper the hydraulic lifts used for the automobiles being repaired.

***i) Le début des travaux reporté en juin 2006 résulte de : (a) l'attente de la décision de la Ville de Chelsea quant à l'établissement de la marge de recul minimale entre l'ouvrage à être réalisé et la limite du lot sur lequel il est construit; et (b) le retard dans la production et la livraison des plans de structures pour exécution au chantier :***

- ***Interrogatoires en chef de Joseph Beaudoin et Jean Bilodeau;***
- ***Contre-interrogatoire de Richard Bélec;***
- ***Interrogatoire après défense de Richard Bélec, pièce PC-383, p. 4172 et 4173;***
- ***Rapports journaliers, PC-306, p. 891 à 893 (section commentaire).***

***ii) La décision du client de modifier la structure du sous-sol (retrait des colonnes) pendant la réalisation des travaux a entraîné une semaine d'arrêt (coûts spécifiquement inclus dans la demande de supplément no. 26 – PC-291);***

- ***Interrogatoire de Jean Bilodeau et Martin Beaudoin;***
- ***Courriel d'arrêt des travaux de Richard Bélec : PC-76.***

***iii) La modification des plans et la sélection des poutres par l'ingénieur ont entrainé quatre semaines de retard;***

- ***Tableau synthèse de la preuve communiqué à titre de PC-404A, p. 4312;***
- ***Expertise non-contestée de François Goulet :***

  ***Interrogatoire en chef de François Goulet***

  ***Rapport d'expertise de François Goulet, PC-315;***

***Le début tardif des travaux sur le chantier, le retrait des colonnes au sous-sol demandé par le client et l'incapacité de Richard Bélec à calculer la flèche des super-poutres et à arrêter son choix quant à la grosseur et au type de super-poutres à être commandées a engendré la nécessité de réaliser certains travaux en conditions d'hiver (travaux supplémentaires 13, 14, 16 et 24 – pièces PC-247 et PC-291).***

***Au surplus, le chantier devant initialement nécessiter une mobilisation de quatre mois et une semaine a plutôt requis une mobilisation de six mois et deux semaines soit du 23 mai 2006 (rapport journalier, PC-306, p. 884) au 20 décembre (rapport journalier, PC-306, p. 988), entrainant les conséquences suivantes :***

**i)** ***les dépenses prévues à titre de « conditions générales » et d'« administration et profit » dans la soumission (PC-4/6) pour une période de quatre mois et trois semaines sont totalement encourues par l'entrepreneur;***

**ii)** ***les coûts additionnels reliés à la mobilisation supplémentaire d'une durée d'un mois et une semaine sont encourues et l'entrepreneur est bien fondé de réclamer une compensation à ce titre (supplément 26, PC-291);***

**Applicable Legal Principles**

[107] In addition to having an obligation of result (art. 2100 *CCQ*) the Contractor has both a pre-contractual as well as an obligation during the performance of the contract "to provide the client, as far as circumstances permit, with any useful information concerning the nature of the task which he undertakes to perform and the property and time required for that task" (this Court's emphasis).

[108] In its original March 16, 2006 tender – which was not accepted – the Contractor submitted that the work would be completed between March 20, 2006 and September 1, 2006, a period of approximately five months and two weeks.

[109] The Court determines that no agreement between the parties, either written or oral specified any date for completion of the work. As the jurisprudence teaches, in the absence of an agreement between the parties, the work must be completed within a time that is reasonable given the circumstances.[42]

[110] The Owner knew or should have known that the schedule proposed by the Contractor was for the work outlined in the plans given for tender – the Contractor made it clear in its tender that the only electrical and mechanical work being tendered upon were those attached to the tender.[43]

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[42] *CCQ* art. 6, 7, 1375 et BAUDOUIN et JOBIN, *Les obligations,* 7è éd. (Yvon Blais : Cowansville, 2013) at pp. 261-262.

[43] It must be noted that the electrical and mechanical work to be done by the sub-contractors was annexed only to the March 16, 2006 tender (Exhibit PC-4) but not to the CCDC Contract supplied later – in which the two page tender, minus the "détails'" were not appended.

[111] Accordingly, the Court infers that a period of approximately five months and two weeks was “reasonable” to complete the original project, as tendered upon by the Contractor.

[112] The Contractor was able to prepare the site but could not begin the work until it received the final sealed plans for execution from Mr. Bélec.

[113] By email dated July 11, 2006, Mr. Bélec advised Mr. Martin Beaudoin that the construction site was put on hold pending receipt of the construction permit.[44] Mr. Racine testified that there was no such delay but the Court prefers the written evidence of the email from Mr. Bélec, a copy of which was sent to Mr. Racine and for which there is no written response from Mr. Racine.

[114] The evidence shows that the statutory construction holidays in 2006 were from July 14 through to July 30, 2006.

**Analysis**

[115] From the evidence, the Court draws the following conclusions: (a) neither in the Letter of Intention nor in the subsequent months of April, May, June and July 2006 did the parties put their minds to fixing a specific date for completion of the Addition; (b) due to the change of plans and the addition of the super-beams, as well as other reasons, the Owner did not get the plans for execution to the Contractor until June 5, 2006; (c) thereafter, the Contractor and the Owner’s representative, Mr. Bélec, were left in a “contractual no man’s land” to deal with a variety of technical issues that would normally have been covered had a full set of execution plans been prepared (architectural, structural, mechanical and electrical); (d) additionally, there was a one week delay in July 2006 due to a permit issue and that, added to the two week statutory construction holiday, meant that there were three weeks lost in July 2006 through no one’s fault; and (e) working under pressure to get the job completed but without a full set of plans for execution, both the Contractor and the engineer, Mr. Bélec, became irritable with each other , resulting in an impossible working environment.

[116] The Court concludes that the ensuing delays were the joint responsibility of the Contractor and the Owner, both of whom rushed into the project without fully comprehending and defining all of the necessary specifications and obligations.

[117] In review, a chronological overview of the causes of the delays, resulting in the Contractor leaving the work site on December 20, 2006 for the Christmas break includes: (a) delays in getting new plans showing the super-beams; (b) delays getting the shop drawings for the substitute super-beams when those originally specified were not available; (c) delays inherent in ordering and getting those beams; (d) delays in getting Mr. Bélec to approve the plans for the steel structure; and (e) until the beams

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[44] Exhibit PC-76.

could be obtained, the delay in pouring the concrete in the basement and the first floor of the Addition.

[118] The Court concludes that there is no legal liability for the delays caused in the project up to December 20, 2006. A review of the evidence confirms the following conclusions:

a. from June through to December 20, 2006, the schedule of the work was changing because the work required was changing;

b. there were inherent delays in receiving goods and services from third party suppliers; and

c. the lack of definition to the project became apparent and additional delays occurred due to ongoing changes being made by the Owner and Mr. Bélec[45].

[119] The result of these delays was that much heavy construction began after October 15, 2006, which was a date after which a premium was normally due to a contractor in light of "winter conditions". An element of such conditions was the extra costs incurred in adding accelerant to the concrete to help it cure more quickly despite colder temperatures.

[120] On July 7, 2006, Mr. Bélec emailed Mr. Joseph Beaudoin and asked him to put in a tender for this new construction contrary to what would normally occur in a turn-key project and asked as well for Mr. Beaudoin to calculate the credits for work not being done.[46]

[121] Mr. Bélec's July 11, 2006 email confirmed that all work be stopped on the project (this particular stoppage lasted for one week) as a result of issues arising from the construction permit.[47]

[122] In a letter dated July 13, 2006 from Mr. Joseph Beaudoin to Messrs. Dormani and Racine, Mr. Joseph Beaudoin noted that production and delivery from the mechanical sub-contractor would take approximately two months. Mr. Beaudoin confirmed that delays of several months in the execution of the work can be foreseen and "***il y a des coûts supplémentaires rattachés à tout retard dans l'exécution du projet (Roulotte de chantier, clôture temporaire, assurance, responsabilité, contremaitre ... etc.***)" Mr. Beaudoin further indicated that the amount of such costs for each week could not be determined at that time but that the costs would represent

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45 The Contractor characterizes the Owner's continual changes operating as an « open bar ». See letter from Mr. Joseph Beaudoin to the Owner dated February 26, 2007, Exhibit PC-262 which illustrates the deterioration in the working relationship between the Contractor and Mr. Bélec due to the pressures created in filling gaps in the construction project.

46 Exhibit PC-75.

47 Exhibit PC-76.

several thousand dollars per week. He said that he could not understand the present delay and alerted the Owner that any delay in the work could cause the Owner and the Contractor to suffer "important financial prejudices"[48] (this Court's translation).

[123] On July 18, 2006, Mr. Racine wrote to Mr. Joseph Beaudoin to confirm that since Mr. Beaudoin had had the plans involving the super- beams since July 10, 2006 Mr. Racine wanted a quote on the price.

[124] On August 3, 2006, Mr. Joseph Beaudoin submitted a tender on a change involving the removal of all the columns in the basement and the changing of the floor structure. The amount was $60,000.00 plus taxes and Mr. Racine agreed to it on the same day. There is no mention at this time of any new deadline to complete the work.

[125] The evidence is that the Contractor had a practice of having its foreman, in this case Mr. Jean Bilodeau, provide a daily site note on the work done. Such a note on August 4, 2006 (internal only to the Contractor and not shared with anyone else) had the following observation – un-contradicted in the evidence – by Mr. Bilodeau***: "Il (Mr. Bélec) me dit qu'il est écœuré du projet. Je ne sais pas pourquoi!"***[49]

[126] There is a site meeting on August 8, 2006 for which Mr. Bélec prepared minutes[50]. In this meeting, Mr. Bélec indicated that his office would prepare the mechanical plans even though he himself was not a mechanical engineer. In evidence, he indicated that he did have a junior mechanical engineer working for him.

[127] The ventilation sub-contractor advised those present at the meeting that there was a six to eight week delay in receiving the ventilation units that would be installed on the roof for both the showroom and the basement floors. The same contractor indicated that if a curtain of warm air were to be used for the garage, the design of the doors would have to be such so as to not block the vertical flow of that warm air.[51]

[128] The evidence discloses that in the period from August 10 to 16, 2006 the Contractor had difficulty in getting the necessary plans from Mr. Bélec. On August 10, Mr. Martin Beaudoin asked Mr. Bélec for the ventilation plan for the basement;[52] on August 11, Mr. Bélec responded by saying that his office was working on this plan;[53] and finally on August 16, Mr. Martin Beaudoin noted that the electrical engineer had not yet received the mechanical plans which this electrical engineer needed and that these mechanical plans were the responsibility of Mr. Bélec.

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48 Exhibit PC-75.
49 Exhibit PC-82.
50 Exhibit PC-84.
51 The French term is "*rideau d'air*". The Court understands it is a "wall of hot air" that is blown when the door is raised in winter to keep the heat in the garage.
52 Exhibit PC-90.
53 Exhibit PC-92.

[129] Mr. Joseph Beaudoin had indicated in his evidence that the Owner had requested that the Owner would pay the costs for him to obtain the electrical plans from an electrical engineer. At this site meeting, the electrical sub-contractor indicated that such plans were in fact ready and would be received shortly.

[130] On August 18, 2006[54], Mr. Martin Beaudoin asked his subcontractor, Dent, to send the shop drawings for the super-beams to Mr. Bélec as soon as possible for Mr. Bélec's approval. On the same day, Dent suggested a substitution for a different dimension of beam due to delivery problems with the original super-beams suggested in Mr. Bélec's revised plans. Apparently, the original super-beams were an uncommon item for construction and were not easily obtainable.

[131] On August 23, 2006, Mr. Bélec confirmed in an email to Mr. Martin Beaudoin that Messrs. Dormani, Racine and Joseph Beaudoin had agreed with Mr. Bélec that the shop drawings regarding the concrete work for axis D would be completed by August 26, 2006 (at the latest) and that the new mechanical drawings being prepared by Mr. Bélec would be available then to be sent to the electrical engineer. In fact, Mr. Bélec was not able to complete these mechanical drawings until on or about November 7, 2006.

[132] On August 23 and 24, 2006, a testy relationship began to develop between Mr. Bélec and the Contractor regarding the progress of the work. By email of August 23, 2006, Mr. Bélec ruled that the shop drawings for the structure were not acceptable but that in general, he felt that "***les travaux avancent bien et de façon fluente***". This email shows the intimate degree in which Mr. Bélec involved himself in the actual work of the Contractor: he instructed the Contractor that the Contractor was removing the forms from the concrete prematurely[55].

[133] The next day, August 24, 2006, Mr. Martin Beaudoin responded. On the contrary, he was adamant that the project was <u>not</u> advancing well: « ***Nous ne pensons pas que les travaux avancent bien car à chaque fois nous devons apporter des corrections à l'exécution de nos travaux. Les délais de décisions et de réponses sont beaucoup trop lents*** *».* Mr. Martin Beaudoin added that given that Mr. Bélec did not approve the structure, he ought to provide a solution; otherwise the Owner would incur additional cost in the tens of thousands of dollars. Mr. Martin Beaudoin asserted that Mr. Bélec should have completed the drawings for this aspect of the structure before the construction holidays. He accused Mr. Bélec in this email, with a carbon copy to Mr. Racine, that Mr. Bélec caused the delays and that the Contractor must inform the Owner of these new delays since a November 2006 delivery had been scheduled but now with these delays, an additional two months would be required[56].

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54 Exhibit PC-102.
55 Exhibit PC-110.
56 *Ibid.*

[134] The schedule being referred to by Mr. Martin Beaudoin was a schedule he prepared and provided to the parties on August 15, 2006, which showed a completion date of November 12, 2006. At this point, it is relevant to quote the argument raised by the Owner in its D. Plan[57]:

> ***Qui plus est, le 15 août 2006, l'entrepreneur a soumis au client un échéancier révisé pour tenir compte des changements apportés à la structure, soit le remplacement des colonnes par des super-poutres, dans lequel il s'engageait à terminer les travaux pour le 12 novembre 2006. L'entrepreneur se devait de respecter les échéances prévues et de compléter les travaux à l'intérieur de délai convenu, celui-ci étant tenu à une obligation de résultat à cet égard.***
>
> ***Or, le non-respect de cet échéancier n'incombe pas aux agissements du propriétaire ou de ses représentants, mais bien du fait de l'entrepreneur qui a soumis un échéancier irréaliste dont le respect était à toute fin pratique impossible. En effet, l'échéancier prévoyait notamment que les travaux pour l'érection de la structure d'acier devaient débuter le 11 septembre 2006 et se terminer le 25 septembre 2006.***
>
> ***Or, l'entrepreneur était bien au fait qu'il fallait prévoir un délai de 4 à 8 semaines pour la livraison de la nouvelle structure et que celle-ci ne pouvait être commandée avant la réception des dessins d'ateliers de ses sous-traitants. Ces dessins d'ateliers n'étaient par ailleurs toujours pas complétés en date du 15 août 2006. Il était donc impossible que la structure d'acier soit érigée pour le 25 septembre 2006 et, par le fait même, que les travaux se terminent en date du 12 novembre 2006. En effet, un délai dans l'installation de la structure d'acier avait pour effet de retarder la quasi-totalité des étapes restantes, lesquelles ne pouvaient, selon cette cédule, être entamées avant l'érection de la structure.***
>
> ***Dès le 15 août 2006, l'entrepreneur avait donc en main toute l'information pour savoir qu'il ne pouvait espérer compléter les travaux avant, au mieux, en janvier 2007.***

[57] The D Plan at page 35.

[135] The Court determines that the Contractor cannot be held to the November 12, 2006 deadline for the following reasons:

a. Having decided on the super-beam design himself, Mr. Bélec knew or should have known that it would take four to eight weeks to receive delivery of the super-beams and that accordingly the November 12, 2006 delivery date was not realistic; and

b. Nine days after he first issued this schedule, Mr. Martin Beaudoin did advise of an additional two months delay beyond November 2006.

[136] It is important to note that Mr. Racine is copied on virtually all of the correspondence between Messrs. Bélec and Martin Beaudoin. Also, there was a meeting wherein these additional delays were discussed and explained[58].

[137] Between August 24 and August 29, Dent supplied a new design to suit a deflection requirement for one of the super-beams. By August 29, all the beams had been approved by Mr. Bélec and on that same date, Mr. Martin Beaudoin indicated to Mr. Bélec that he needed to be advised of the beams' loads, once the shop drawings had been improved. He notes that these calculations were needed quickly since it takes three to six weeks to get the super-beams. He says: "…***les minutes sont comptées***"[59].

[138] The next day, August 30, 2006, Mr. Joseph Beaudoin writes a most remarkable letter to the Owner the subject of which is Mr. Bélec himself.

[139] The second paragraph of that letter is prophetic:

> « ***Il*** [Mr. Bélec**]** ***nous mentionne que nous n'aurions pas dû signer d'entente avec vous*** **[the Owner]** ***avant d'avoir les plans complets et à cette condition, nous n'aurions pas encore signé de contrat, car aucun des plans n'est complet*** ».

[140] In the letter, Mr. Joseph Beaudoin castigates Mr. Bélec for "***la non-productivité***", Mr. Bélec's continual questioning of the Contractor's work, his failure to cooperate in the good operation of the job site and the fact that from the beginning he prepared "***des plans qui s'avèrent erronés et incomplets, celui-ci modifie l'avancement à tous les jours et/ou la façon d'exécuter nos travaux. Il nous fournit continuellement des détails additionnels sans les avoir mentionnés au plan***[60]".

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58 The meeting was between the Contractor and the Owner.
59 Exhibits PC-113, PC-116 and PC-119.
60 Exhibit PC-122.

[141] Mr. Joseph Beaudoin enumerated additional costs he alleged were caused by modifications and/or additions to the contract because of incomplete plans in the amount of $35,000.00 and that he estimates "***les pertes actuelles dues à l'incompétence de monsieur Bélec à +/- 100 000.00 $***".

[142] Furthermore, Mr. Joseph Beaudoin made the following allegations:

**a.** « ***Toutefois, le plus important à venir c'est que les travaux sont au point de prendre des retards de plusieurs semaines parce que celui-ci [Ed. note : Mr. Bélec] n'approuve aucun plan et/ou dessin d'atelier au point de suggérer qu'il ne possède pas les compétences requises pour ce genre de projet …;***

b. ***« le but de cette lettre est clair : nous allons vivre avec toutes les erreurs de monsieur Bélec à date. Toutefois, à compter d'aujourd'hui, nous n'acceptons plus de payer pour ses erreurs, ses manquements et/ou sa non-production*** *».*

c. that the result of Mr. Bélec not accepting the steel structure will cause a delay of a further two to four weeks, with enormous monetary consequences, potentially up to $100,000.00, including paying for the "***conditions d'hiver***";

d. that the other engineers on the project say they are not able to obtain responses from Mr. Bélec when they need them and that when such responses arrive they are incomplete or wrong;

e. that Mr. Bélec has not yet approved the mechanical shop drawings;

f. even though Mr. Bélec has not written any performance specifications, he continually questions the Contractor's work, and in addition,

- that since June 2006, the Contractor has been required to modify its schedule five times to date;
- that the subcontractors and suppliers question the project; and
- that this project is neither profitable for the Owner or the Contractor.

[143] He posed two rhetorical questions at the end of the letter:

a. how much is the Owner prepared to pay for the incompetence of Mr. Bélec?

b. how much delay is the Owner prepared to accept to complete the Addition?

[144] This letter was not copied to Mr. Bélec.

[145] Next, the Court will describe the litany of changes and issues arising up to the issuance of the new work schedule on October 4, 2006[61]:

a. September 1, 2005: Mr. Bélec wants Mr. Martin Beaudoin to provide him with the shop drawing for the skylights[62];

b. September 5, 2006: following the request from Mr. Dormani, Mr. Joseph Beaudoin puts in a tender for a tire storage construction in the amount of $94,500.00 plus taxes. This tender is later reduced but is never accepted by the Owner. This tender puts the Owner on notice that winter conditions apply as of October 15, 2006[63];

c. September 5, 2006: Mr. Bélec provides a direction to Mr. Martin Beaudoin to change the sprinkler system[64];

d. September 13, 2006: Mr. Bilodeau's site notes indicate that three to four days have been lost because there has been a change to the anchoring bolts[65];

e. September 13, 2006: Mr. Martin Beaudoin indicated that the Hambro steel structure will be delivered on October 23, 2006 following the "*délai d'approbation et les changements apportés*". Mr. Martin Beaudoin adds that as a result of this delay of six weeks, "***des frais de conditions générales***" and "***les conditions d'hiver***" will be charged[66]; and

f. in his reply of the same date, Mr. Bélec blames any delay on the failure by Mr. Martin Beaudoin to provide him with the shop

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61 Exhibit PC-164.
62 Exhibit PC-127.
63 Exhibit PC-130.
64 Exhibit PC-132.
65 Exhibit PC-306, p. 949.
66 Exhibit PC-143.

> drawings for the steel structure, even up to that day. Mr. Bélec asks Mr. Martin Beaudoin to accelerate the pace of the work[67];

[146] On September 14, 2006, Mr. Bélec refused to accept the corrected plans for the steel structure, amongst other reasons, because a member of the Quebec Order of Professional Engineers had not sealed them.

[147] On October 4, 2006, there was an important site meeting attended by Messrs. Dormani, Racine and Bélec on behalf of the Owner and both Messrs. Martin and Joseph Beaudoin on behalf of the Contractor. In the meeting, there was an exchange of recriminations between Mr. Bélec and the Contractor regarding who was responsible for the delays. The Contractor confirmed that the steel structure would be delivered on October 23, 2006. Mr. Bélec asked that the Contractor provide a completed set of shop drawings « ***de lui permettre de finaliser la révision du contenu et approuver l'installation*** »[68].

[148] In his testimony at trial, Mr. Bélec confirmed that he had a difficult relationship with the architect, Mr. Vivieros. The minutes of the meeting note that there was a coordination problem with the architect to get the construction permit from the municipality. In response to a question from the Court, testimony was given that it was standard practice at that time for construction projects to be permitted by the municipality even before any construction permits were granted. As a final note, the minutes indicated: "***l'ingénieur demande une nouvelle cédule des travaux puisque celle déposée antérieurement par l'entrepreneur n'est plus réaliste***". That meeting ended at noon[69] and approximately two hours later, Mr. Martin Beaudoin provided a new schedule which said: "***Salut! Voici la cédule des travaux si tous se déroulent comme prévu. J'ai parlé avec Gascon*** *(*Ed. note: this is the steel structure erecting company*)* ***et il ne peut pas avant le 30 octobre commencer à faire l'érection et il en a pour deux semaines. Je vérifie si on peut couler la dalle du sous-sol avant***". Under this new schedule, the completion date for the work is January 29, 2007[70].

[149] On October 10, 2006, the architect advised Mr. Bélec and the Owner that the final construction permit was still "in the works" and was yet to be obtained from the City.

[150] On October 16, 2006, Mr. Martin Beaudoin exchanged recriminations with Mr. Bélec regarding the shop drawings on the steel structure[71], which recriminations continued further in an email exchange of October 16, 2006[72].

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67 *Ibid.*
68 This type of oversight by the Engineer also confirms that this is not a "*projet clé en main*".
69 Exhibit PC-162.
70 Exhibit PC-339.
71 Exhibit PC-168.
72 Exhibit PC-170.

[151] On November 1, 2006[73], Mr. Joseph Beaudoin submitted to the Owner a list of extras noting that either Mr. Bélec or the Owner asked for this work and that the work had already been done. Mr. Joseph Beaudoin pointedly stated the following in his letter:

> « ***J'apporterais à votre attention que les plans de mécanique ne sont toujours pas complets et ce depuis six mois. Il va sans dire que votre fin des travaux selon la cédule fournie n'est plus adéquate et de même nous ne pouvons pas fournir aucune cédule dû au manque de sérieux et professionnalisme de monsieur Bélec. De même et sans doute le plus dommageable, le permis de construction n'est toujours pas émis. La responsabilité incombe à monsieur Bélec. Il est urgent que vous réglez la situation d'ici une semaine***[74] ***».***

[152] The Court is perplexed by this deadline imposed by Mr. Joseph Beaudoin given the evidence that apparently the municipality in circumstances such as these was lenient on permitting construction to proceed without a permit. That document noted nine claims for specific extras and two claims for "*imprévus*" *(*unforeseen events*).* The amount requested is $20,880.36 and the document noted that "to come" were charges regarding the changes to the mechanical plans and the winter conditions.

[153] On November 3, 2006, Mr. Bélec sent Mr. Martin Beaudoin an email concerning the electrical plans and noted the fact that they had not yet been prepared. He received a sarcastic response from Mr. Martin Beaudoin who had not yet received the mechanical plans he had been asking for and had been told by Mr. Bélec he would have received soon after August 16, 2006[75].

[154] On November 10, 2006, Mr. Racine asked Mr. Bélec to review the request for the extras[76]. The result of this was that Mr. Bélec, on November 13, 2006 asked for supporting documents from Mr. Martin Beaudoin[77].

[155] In the month of November, there were a series of back and forth emails concerning questions from the steel erector subcontractor.[78]

[156] At the end of the month of November, 2006, Mr. Bélec in an email of November 23, 2006 told Mr. Racine - with a copy to Mr. Martin Beaudoin - that Mr. Bilodeau was requesting a change order for "***conditions d'hiver***" but that Mr. Bélec would not be providing such a change order. He indicated that accelerant was required for the concrete to cure since the temperature was going down below zero centigrade and that

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73 Exhibit PC-176.
74 *Ibid*.
75 Exhibit PC-184.
76 Exhibit PC-201.
77 Exhibit PC-203.
78 Exhibit PC-208 and following.

heat should be put under the newly poured concrete floor to keep it warm in order to improve curing.

[157] After being asked to provide details of this request for the "conditions d'hiver"[79] on November 23, 2006 and after having been provided with these details, an email sent by Mr. Bélec to Mr. Beaudoin on the same day refused this request for "conditions d'hiver" as an extra[80].

[158] On November 24, 2006, there was an exchange between the mechanical contractor and Mr. Bélec noting that the electrical outlet was insufficient to allow for the "hot air curtain" for the garage doors.

[159] On November 29, 2006[81] Mr. Bélec complained to Mr. Martin Beaudoin that the shop drawings he had received for the skylights were incomplete. At the same time, Mr. Bélec reminded Mr. Martin Beaudoin of the Owner's priority that the basement concrete floor be poured.

[160] In a letter of November 30, 2006 headed "Mis en Demeure" and addressed to Mr. Bélec[82], Mr. Joseph Beaudoin again went on the attack against Mr. Bélec, this time directly addressing Mr. Bélec and providing a copy to the Owner. The letter put Mr. Bélec "***en demeure des insinuations fausses et erronées, de malhonnêteté professionnelle et des atteintes à notre intégrité*.** **Nous devons transmettre ce dossier aux autorités compétentes."** Mr. Joseph Beaudoin alleged that the plans did not conform either to the norms of the municipality or to «***éthique de votre Ordre*** …».

[161] Mr. Joseph Beaudoin further alleged that the Contractor was required to delay performance on three occasions because of the un-kept promises of Mr. Bélec to provide necessary plans and that when the plans were provided, they were incomplete and erroneous regarding the information contained therein and the measurements. Furthermore, he asserted that Mr. Bélec came daily to the work site to adjust and modify Mr. Bélec's plans.

[162] Mr. Joseph Beaudoin also affirmed that the Contractor was required to close the work site for six weeks because the plans were incomplete or not prepared. In addition, Mr. Beaudoin alleges: (a) that the floor drainage that Mr. Bélec was asking the Contractor to undertake was not in the original plans; and (b) nor was a modification to the oil containers and recent modifications to the installations of the hydraulic hoists.

[163] Mr. Joseph Beaudoin confirmed his discussions with Mr. Racine and Mr. Dormani to the effect that both concrete floors - basement and first - would be poured before Christmas 2006.

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79 Exhibit PC-221.
80 Exhibit PC-222.
81 Exhibit PC-228.
82 Exhibit PC-232.

[164] Mr. Joseph Beaudoin concluded that Mr. Bélec had exceeded his jurisdiction by giving orders to the Contractor's foreman as well as holding discussions with the Contractor's sub-contractors and suppliers. He warned Mr. Bélec that Mr. Bélec was not the project manager and that Mr. Bélec should stick to his role as consultant to the Owner.

[165] During this time, what was the Owner doing?

[166] Mr. Racine testified that Mr. Dormani was very active in the winter months in purchasing inventory at used car auctions throughout North America. In late November - early December 2006, there were cars that needed to be stored and Mr. Racine did not have any place to put them. He asked Mr. Bélec whether 15 to 20 of these cars could be parked on the newly poured concrete first floor in the Addition. Mr. Bélec agreed after carrying out some rough calculations[83].

[167] On the same day[84], Mr. Martin Beaudoin wrote to Messrs. Racine and Bélec to indicate that the Contractor would not be responsible for any consequences from the use of the first floor and asked for a letter from Mr. Bélec releasing it from all liability, to which Mr. Bélec replied there would be no negative consequences. He did note that the floor needed to be protected from the likely minus 40 centigrade temperature and that "***Il est certain que plusieurs fissures de retrait apparaitront dans la dalle à cause des conditions de chantier. Cette situation sera de la responsabilité de Beaudoin construction pour sa négligence et de ne pas avoir complété ses travaux dans les temps prévus***." Mr. Bélec added that he could not understand why, for the past ten days, the Contractor had not put up the walls for the first floor.

[168] On December 19, 2006[85], Mr. Joseph Beaudoin retorted that the first floor had only been poured fourteen days ago and that in these winter conditions, it was not yet ready. He alleged that this puts the workers on the site at risk as well as compromises the security of MEGA's employees and clients. Mr. Joseph Beaudoin called this a "***mise-en-demeure formelle***".

[169] Around December 20, 2006, the Contractor left the job site and removed its trailer. Mr. Racine testified that in the latter weeks of December 2006, very few of the Contractor's employees were on the job site.

[170] Mr. Beaudoin's evidence at trial was that when he left, it was his intention to return to the job site after the Christmas break. He did not do so.

[171] Following the Christmas break, relations remained acrimonious between the Contractor and Mr. Bélec. On January 16, 2007[86], Mr. Bélec warned the Contractor that

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83 Exhibit PC-236.
84 Exhibit PC-237.
85 Exhibit PC-243.
86 Exhibit PC-245.

he would complain to the Quebec Order of Engineers if Mr. Martin Beaudoin did not, within five days, provide him with the relevant information concerning the erection of the steel structure, in the absence of which Mr. Bélec asserted that Mr. Martin Beaudoin was preventing him from doing his job.

[172] The final aspect of this dysfunctional construction project relates to the skylights. Put simply, the Contractor alleged that Mr. Bélec had failed to properly determine whether the roof structure could hold the weight of the two skylights (approximately 4,500 and 8,000 pounds respectively) and how the skylights would be supported. The Contractor continued to assert that the plans provided by Mr. Bélec were inadequate and Mr. Bélec pitched the ball back to the Contractor saying this was the Contractor's job to provide the necessary specifications, which he had to approve prior to any installation of the skylights. Thereafter, a dialogue of mutual recriminations began on February 14, 2007[87].

[173] As noted earlier, the Owner warned the Contractor that it would resiliate the contract if the Contractor failed to recommence the work by a specific deadline. This did not occur and the Owner engaged the construction firm of Mr. Sylvain Bertrand – by oral engagement – to complete the Addition. The facility was operational in September, 2007.

[174] The Court must determine the legal consequences of an expert engineering report dated March 22, 2007[88] in which the structural engineer, Yves Auger, following a review of Mr. Bélec's plans, gave the following opinion:

[175] ***« À notre avis, ces plans ne sont pas complet dans leur état actuel dû au grand manque d'information et aux aspects de design non-conformes. Dû aux faits énumérés dans le présent rapport, nous jugeons qu'il y a risque d'incidence importante sur la performance structurale de l'immeuble. Aussi, plusieurs calculs devront être revérifiés et confirmés par l'ingénieur du projet ».***

[176] By letter dated March 28, 2007[89], the then attorneys for the Contractor provided the attorneys of the Owner with a copy of the Auger Report and said: (a) «***les plans apparaissant comme nettement insuffisants pour le parachèvement de l'ouvrage*** » and (b) that Mr. Auger indicated that, as a result of information missing from Mr. Bélec's plans, this "***peuvent avoir une incidence importante sur la performance même de l'immeuble***"

[177] Mr. Bélec himself demonstrated a keen interest in work site safety.[90] On August 18, 2006, he expressed his concern for the security of workers, should the concrete

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87 Exhibit PC-255.
88 Exhibit PC-273, filed on behalf of the Contractor.
89 Exhibit PC-275.
90 Exhibit PC-104.

forms be removed before the concrete was properly cured. He said: "***La sécurité des travailleurs est extrêmement importante***".

[178] Based on the reasoning that follows, the Court determines that this report justified the Contractor in not proceeding with further construction based on the plans the Owner had provided.

[179] *CCQ* art. 2100 requires that a contractor is "bound to act in accordance with usage and good practice …"

[180] In *obiter* in its 1988 judgment in *Proulx inc*. v. *Proulx et al*., the Court of Appeal indicated that a contractor confronted with doing work that did not conform to the rules of art "… ***devrait plutôt refuser de les accomplir ou, à tout le moins, mettre en garde ses clients*** *…".* Following the adoption of *CCQ* art. 2100, the jurisprudence and doctrine has confirmed that the obligations imposed on a contractor are of public order[91].

[181] Subsequent jurisprudence confirms that a contractor has an obligation to refuse to do work "***dans un contexte dangéreux***" and if the work is "***contraire aux règles de l'art***"[92].

## *Legal consequences of the Auger report*

[182] The Owner qualifies the report of Mr. Auger as a pretext for the Contractor to stop work. There is insufficient evidence to prove this bad faith intention on the balance of probabilities. However, Mr. Joseph Beaudoin testified that this contract was no longer profitable for the Contractor. It would appear that at the same time the Owner was actively seeking to bring in a replacement contractor, Mr. Sylvain Bertrand[93].

[183] Be that as it may, the Auger report prepared for the Contractor has a pivotal legal effect.

[184] Mr. Yves Auger testified at trial. Having graduated in engineering from the University of Ottawa in 1979, and being registered as a professional engineer both in Québec and Ontario, he had practiced structural engineering for 36 years at the time of his testimony.

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91 *Promutuel Lévisienne-Orléans* v. *Service de techniciens en électricité du Québec*, 2010 QCCS 1608 at para. 129 and 130.

92 *Filion* v. *Allard & Allard Construction Inc*., 2011 QCCS 3647 at para. 132 and 133.

93 Mr. Bélec sent plans for the Addition to Mr. Bertrand on March 14, 2007, with a copy to Mr. Racine (Exhibit PC-270) and it would appear that at least by March 20, 2007, Mr. Bertrand had provided financial figures to the Owner in regard to taking over the project (Exhibit PC-272 at page 2).

[185] He never visited the job site but rather reviewed Mr. Bélec's Revision N$^{o}$. 5 of the plans dated June 1, 2006 and also the architectural plans prepared by Mr. Vivieros, dated July 11, 2005.

[186] Mr. Auger's report provides, in chapter and verse, various pieces of information that he opines are missing from Mr. Bélec's plans. An example is at page 6 of his report. Mr. Auger refers to the lateral stability of the roof between axes 1 and 7. He notes that the roof must resist lateral forces caused by earthquakes and winds. The engineering concept in French for a building to resist these forces is "*contreventement*" (cross-bracing). Mr. Auger raises the following questions:

- ***Est-ce que cette poutre est adéquate pour prendre les efforts?***
- ***Les connections des éléments en croix ont été conçues pour quelle force?***
- ***Les boulons d'ancrage à ces colonnes ne sont pas spécifiés.***

[187] He opines: "***Nous croyons que la stabilité latérale du bâtiment doit être revue au complet par l'ingénieur et il devra en fournir tous les calculs, détails et informations manquants***".

[188] The Contractor filed a second structural engineering report, this one dated September 13, 2010[94], prepared by structural engineer Mr. François Goulet. Mr. Goulet testified at trial. He graduated from *École Polytechnique de Montréal* in 1975 and has been a structural engineer in private practice since that time. He has extensive experience in structural engineering for construction projects of all dimensions including new constructions as well as renovations. His evidence was not diminished on cross-examination. At this point, Mr. Goulet's conclusion that is relevant for Mr. Auger's report is:

> ***« 9.8. Les commentaires de l'ingénieur Yves Auger étaient quant à nous bien fondés: l'entrepreneur Beaudoin ne pouvait pas continuer à construire un édifice dont les plans de structure faisaient défaut par le manqué de trop nombreuses informations. Pour construire en dépit de ces informations manquantes, l'entrepreneur aurait dû improviser sur de nombreux aspects de la structure avec les conséquences qui auraient pu en découler ».***

[189] Mr. Bélec acted professionally in responding to the allegations made by Mr. Beaudoin. Between March 20 and March 27, 2007, Mr. Bélec wrote three separate letters to the Owner.

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94 Exhibit PC-315.

[190] In his first letter of March 20, 2007[95], Mr. Bélec indicated he had reviewed his calculations on the steel structure and found they were correct and did not need to be modified. However, he also pointed out several potential issues to the Owner:

> ***« Sachant que Beaudoin Construction a requis les services de Yves Auger, ingénieur, je demeure peu convaincu que ce dernier viendra supporter les allégations de Joseph Beaudoin. Par contre, après l'analyse des événements, je considère qu'il sera tout à fait probable que Yves Auger amènera le débat sur les certaines incohérences et certains ajouts demandés durant le cours des travaux, notamment :***
>
> 1. ***Il pourrait exister des différences entre les dimensions montrées aux plans de structure et d'architecture, les plans d'architecture ayant été finalisés après ceux de la structure;***
>
> 2. ***Certains détails ont été ajoutés par l'architecte à notre insu. Par contre, rien ne pourrait affecter la structure actuellement érigée;***
>
> 3. ***Certains détails supplémentaires ont été demandés pour la construction de la dalle du sous-sol notamment en ce qui concerne l'implantation d'au moins deux appareils de levage (lift);***
>
> 4. ***Des détails ont été ajoutés pour l'entrepôt au sous-sol et le déplacement de la salle de toilettes de la salle de montre actuelle, etc. »***

[191] In his second letter of March 27, 2007[96], Mr. Bélec responded to each one of the paragraphs in Mr. Auger's letter and concluded that all of the load calculations were in conformity with the applicable National Building Code, that the calculations on the solidity of the structure were correct and that he was ready to proceed with the work. He concludes: "***J'atteste avoir effectué toutes les vérifications d'une façon très objective***".

[192] The Owner had filed an expert's report from Mr. Bélec himself but withdrew this report from evidence on February 2, 2015[97], during the trial.

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95 Exhibit PC-272.

96 Exhibits PC-277 and PC-279.

97 The Contractor took exception to this withdrawal since there had been an order excluding witnesses and Mr. Bélec had been permitted to attend throughout the trial on the grounds that he would be called as an expert. The withdrawal of his expert's report was undertaken just prior to his being called as a witness. Such a practice should be neither condoned nor encouraged by the Court. Where there

[193] Mr. Belley, in a report of April 27, 2007 (which the Court cannot find referenced in the common table of exhibits filed chronologically) but where the Executive Summary[98] of that report notes that Mr. Belley - after reviewing certain plans and inspecting the structure - came to the conclusion that the state of the structure was not compromised and that the foundations and structure were built in conformity with the "***règles de l'art***". In this regard, he is contradicted by Mr. Goulet. As a result of Mr. Goulet's much greater experience in the field and much more detailed report and after seeing both men testify, the Court prefers the testimony of Mr. Goulet that, in fact, the structure could not be built in accordance with the "***règles de l'art***" because of the deficiencies and omissions in the plans.

[194] Given the superior qualifications of Messrs. Auger and Goulet, and given the independence and objectivity of their reports, the Court determines on the balance of probabilities that under *CCQ* art. 2100, the Contractor was within its rights not to return to complete the work after December 20, 2006. The existing contractual arrangement between the Owner and the Contractor was not capable of further performance. Accordingly, the subsequent resiliation by the Owner was simply confirmation of an existing legal status – that on the basis of the existing arrangement concluded between the parties, that contractual arrangement was not capable of performance on the basis of the plans as provided.

## WAS THE COMPLETED WORK UNDERPAID OR OVERPAID?

[195] In Plaintiff's Exhibits PC-404 and PC-404A, the Plaintiff outlines its final claims for the contractual balance owing as well as its claims for extras. The total is $310,544.00 with $119,696.00 being for the balance under the contract and $190,848.00 being for the extras.

[196] The Contractor's bill for September 11, 2006, for $215,821.30[99] was promptly paid in full by cheque dated September 27, 2006.

[197] The next bill n$^{o.}$ 3 dated November 20, 2006[100] for work done from September 11, 2006 to November 20, 2006 for a total amount of $336,381.95 was paid in full in two timely payments on December 5, 2006 and December 14, 2006.

[198] The next demand for payment was for the period from November 20, 2006 to January 20, 2007, although the Contractor left the job site on December 20, 2006[101]. This demand was not paid.

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is a conflict in the evidence, the Court has taken into consideration that Mr. Bélec had the considerable advantage of sitting through the evidence of the other witnesses prior to giving his testimony in defence and counterclaim on behalf of the Owner.

98 This Executive Summary is PC-403.

99 Exhibit PC-139.

100 Exhibit PC-212.

101 Exhibit PC-247.

[199] Paragraph purposely omitted.

[200] On March 5, 2007, Mr. Joseph Beaudoin put the Owner in default to pay the January 20 bill[102].

[201] Finally, on September 20, 2007 – some nine months after leaving the job site – the Contractor issued demand n$^{o.}$ 5[103] for payment, in which it demanded (taxes included) $262,274.89 composed of the alleged balance due under the contract of $53,370.00 and extras in the amount of $176,797.00. The Contractor provided a detailed breakdown of its charges for the extras. This amount also remained unpaid.

[202] At the same time, the Owner has filed expert reports by engineer Mr. Jean Belley in which the latter opines that the Owner overpaid in the amount of $121,133.00.

[203] Both parties have a burden of proof: the Contractor to prove that the required work was completed and not paid for and the Owner to prove that they overpaid for work that was done.

[204] The difficulty presented to the Court in answering this question – which will require the Court to determine the percentage of work completed on various aspects of the project – is firstly the determination of the scope of the work agreed to. The Court accepts the evidence of the Contractor's expert Mr. Goulet that the plans provided insufficient detail for the work to be completed.

[205] The Owner relies on expert engineer, Mr. Jean Belley, to seek to prove various percentages of the work that were not completed in support of its claim for overpayment.

[206] While Mr. Belley was qualified as an expert in engineering, his lesser experience does not give his opinion the same weight as experts Auger and Goulet. He graduated in engineering in 1993 from the University of Quebec and up till 2005, the bulk of his experience was as a "***chargé de projet***". In 2005, he started his own consulting firm in which his curriculum vitae states that, amongst other things, he offered services in "***gestion et evaluation des comptes progressifs"*** and ***"réclamations juridiques***". Accordingly, at the time of his expert's report, he had started to do this type of work for approximately two years.

[207] For Mr. Belley to determine what percentage of work had been completed, it was necessary for him to know exactly the scope of the work contracted. However, the second factor reducing the weight of Mr. Belley's report is that the facts upon which he relied to determine the scope were incomplete and not all present in the evidence. Firstly, he asked the Owner for the plans and "*devis*". As this citation demonstrates, Mr.

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[102] Exhibit PC-265.
[103] Exhibit PC-291.

Belley relied on the Owner to provide the necessary supporting documents upon which he could come to an opinion:

> ***"L'intérêt de cette réalisation est d'évaluer plus précisément l'avancement quantitative des travaux prévus et autres modifications issues de la construction pour déterminer la valeur des travaux effectués au moment de la visite. Il sera donc nécessaire de nous fournir les plans et devis de construction afin de déterminer le plus précisément le degré d'avancement des travaux et d'évaluer les modifications faites lors de la mise en œuvre". (this Court's emphasis)***

[208] Mr. Belley indicated the following as sources of information for his opinion:

> ***« Certains autres details concernant les modifications et ajouts à ce projet nous ont été transmis pour analyser la définition des travaux de ce contrat et nous permettent d'identifier pleinement quelles sont les opérations ou phases de ce projet qui sont plus ou moins complétées à ce jour.***
>
> ***Après avoir analysé les détails de mise en œuvre des travaux et les indications verbales que monsieur Bélec nous a relatées, nous avons fait une inspection visuelle sur le site pour constater l'avancement de certaines portions des travaux prévus aux plans. » (this Court's emphasis)***

[209] "***Les autres détails***" et les "***indications verbales***" were not put into evidence. As Mr. Bélec himself testified, he was not part of the contract discussions. Furthermore, Mr. Belley's report referred to certain documents[104] but neither those documents nor the plans he referred to are filed into the record with his report.[105] An equally important omission is that he was not provided with the March 16, 2006 tender documents, which indicated the work that the Contractor was prepared to do for the sum of $1,420,000.00.

[210] Mr. Belley testified that he attended the job site in April 2007, took photographs and prepared reports indicating percentages of specific categories of work completed[106].

[211] For these reasons, the evidence of Mr. Belley is of lesser probative value. However, the Court's comments should in no way be taken as criticism of Mr. Belley's professionalism, but rather a reflection on the usefulness of his opinion in the very particular circumstances of this case.

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104 See Exhibit PC-285, page 645.
105 2005-STR-419.
106 Exhibit PC-369.

## *DÉMOLITION*

[212] In the original tender[107] of March 16, 2006, the demolition noted was: ***murs, tranchées de béton, réservoir d'huile et pit de garage***. The site notes indicate the following work was done: "***couper dalle garage plus trou 6 pouces***".

[213] The Court turns now to analyze the percentage of completed work alleged by each party under the specific categories.

[214] According to Mr. Belley, only 15% of the demolition work was done because:

> ***"la demolition de l'ouverture murale dans le garage prevue au detail 5 de la planche 6, la demolition des fenêtres et du mur montrée à la planche 5 ainsi que la demolition de solins métaliques des toitures n'est pas effectuée".***

[215] Mr. Belley's evidence is discounted here since only demolition of the wall is indicated in the tender. In fact, two of the four items in that tender were completed: likely more than 15%.

[216] According to the site note, the work claimed by the Contractor was completed on December 12, 2006; therefore this work was undertaken within the period covered in the January 22, 2007 bill[108].

[217] On the balance of probabilities, the Court determines this claim for 25% and awards the amount of $4,750.00 to the Contractor.

[218] For the same reasons, the Owner's claim for adjustment of $11,400.00 is disallowed.

## *EXCAVATION/REMBLAYAGE*

[219] The only indication of the work in the tender is "***excavation et remblai (bâtiments et réseaux égouts***)". The Contractor claims a balance of 5% of the work in the amount of $4,350.00 but Mr. Belley opines that only 60% instead of 95% of the work was done and therefore an adjustment of $30,450.00 should be credited to the Owner.

[220] In the references provided to the Court[109], the Contractor claims this excavation was undertaken beginning on November 29, 2006, some work being done on December 15, 2006 with bills for the delivery of earth dated November 30, 2006 and December 31, 2006 as well as invoices for bulldozer work on December 18, 2006, filed into evidence. This work was to level the basement floor in the garage with a bulldozer.

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[107] Exhibit PC-2.
[108] Exhibit PC-247.
[109] Exhibits PC-404 and PC-404A.

[221] Plan n$^{o.}$ ST-7/8 clearly shows a stairwell and Mr. Belley says there was no excavation done for this stairwell. From the relevant plans of Mr. Bélec, the Court approximates that the surface area of the stairwell is 10% of the total excavation. The Court determines that 85% of this work is complete as opposed to the 95% claimed by the Contractor and for which 95% is already paid. Therefore, while the Court accepts that the work was done in Exhibit PC-404, the percentage allowed is 85%, which means that a 5% credit or $4,350.00 is due to the Owner.

## *BÉTON ET ARMATURE*

[222] Here the Contractor is claiming for 5%, being $14,000.00, for work that was done on November 22-23, 2006, and December 18-19, 2006. The subcontractor's bill is dated November 27, 2006 and that bill states that 85% of the work is approximately completed[110].

[223] The subcontractor's indication of 85% for completed work is the same percentage noted by Mr. Belley. Accordingly, while the Court accepts that the Contractor is entitled to this $14,000.00, the Owner should only be obliged to pay for the 85% that was completed as opposed to 95% of this work. Therefore, the Owner is awarded the difference of 5% ($14,000.00) as a credit.

## *ACIER DE CHARPENTE*

[224] In the May 16, 2006 submission, all that is indicated is "*acier de charpente (Système Hambro)*". The Contractor is claiming for 15% being the amount of $31,500.00. However, the Contractor shows that 95% of this item has been completed and paid for in the amount of $199,500.00 on its September 20, 2007 payment demand. This is an admission against interest by the Contractor and therefore the Contractor's claim is dismissed on these grounds.

[225] Mr. Belley gives a detailed description[111] of what has yet to be installed, or is missing for the steel structure. The Court accepts his evidence for this clearly defined work and therefore the Contractor should have been paid 90% as Mr. Belley opines as opposed to 95% for this item. Therefore, the Owner will be given a credit of $10,500.00 (being 5%).

## *PORTE DE GARAGE*

[226] The Contractor is claiming 100 percent for the garage door. The bill for this is $13,399.55 dated February 12, 2007, noting payment by cheque by the Contractor to the sub-contractor on May 15, 2007.

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[110] Exhibit 294, page 777.
[111] Exhibit PC-369 at p. 646.

[227] However in the no.[5] payment demand dated September 20, 2007[112], the Contractor notes that the door costs $7,500.00 and that it has been paid in full. Since the sub-contractor's bill pre-dates this payment demand by months, the Contractor must be taken to have settled this claim out at the amount of $7,500.00 which it has received.

[228] Accordingly, this claim by the Contractor is dismissed.

[229] At the same time, Mr. Belley notes that the "*rideau d'air*" was not yet installed. The Contractor had said this feature was included in its relevant tender documents. He claims this to be valued at 10% or $750.00. The Court prefers the evidence of Mr. Bertrand who ultimately installed the "Rideau d'air" and will adjudicate on the amount later in the judgment.

## *PLOMBERIE*

[230] Mr. Belley agrees with the 35% work completed for plumbing as noted in the n$^{o.}$ 4 payment demand dated January 22, 2007.

[231] In n$^{o.}$ 5 payment demand dated September 20, 2007, the Contractor is claiming another 15% or $2,400.00 for the plumbing. This claim is not allowed since the Contractor's most accurate estimate should have been at the end of work, i.e. January 22, 2007.

## *TOITURE*

[232] The tender of March 16, 2006 simply refers to "***toiture telle que plan***".

[233] Mr. Belley states in his reports that no work was done on the roof. However, the Contractor claims 10% or $6,900.00 which was the exact amount claimed in the September 20, 2007 account n$^{o.}$5 demand for payment.

[234] Exhibit PC-306, at page 971 of the site notes indicates that four employees of the Contractor worked on the "***parapet, toiture plus divers***". This claim is very confusing since in the September 20, 2007 account[113], the Contractor notes : "***Les parapets en bois été complété à 90% au pour tour des toits (Seulement abri auto avant non fait).*** Donc coût des toitures $69,000.00 x 10% travaux exécutés = $6,900.00."

[235] From this, the Court understands that the virtually completed parapets compose approximately 10% of the total work to be done on the roof.

[236] This assertion was not contested directly by Mr. Belley and therefore will be awarded to the Contractor for $6,900.00.

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[112] Exhibit PC-291.
[113] Exhibit PC-291 at p. 666.

## *CONDITIONS GÉNÉRALE, ADMINISTRATION ET PROFITS*

[237] Up to January 22, 2007[114], the Contractor claimed that for general conditions the 100% amount was $63,000.00 and for administration and profits was $70,000.00. The Contractor asserted that 20% remained owing for general conditions in the amount of $12,600.00 and 20% remained owing for administration and profits in the amount of $14,000.00.

[238] The Court is perplexed by this claim. Under n$^{o.}$4 demand for payment, which is dated January 20, 2007, the Contractor claims 20% for both these items in the amount of $12,600.00 and then $14,000.00. The argument is allegedly based on the revised schedule of October 5, 2006 in which the Contractor indicated that the job would terminate on January 26, 2007. This schedule was longer than the original period agreed to by the parties.

[239] As of October 5, 2006, the parties realized that, unforeseen by them, the project was going to run into the winter. While unforeseen, the additional time required was the result of a series of errors and corrections – except for the truly new item of the super-beams – that resulted from the parties agreeing to an ill-defined project from the beginning. In these circumstances, the Owner required that the Contract be performed over the period that both parties contemplated. Mr. Bélec, as one of the Owner's representatives knew or should have known of this standard charge in construction contracts of "***conditions générales et administration et profit***".

[240] Mr. Belley opines that the general conditions and administration and profits should be reduced to 36% based on his cumulative earlier calculations of uncompleted work. Since the Court has not accepted all of his calculations, this figure of 36% cannot also be accepted.

[241] The Contractor based its original tender for "***conditions générales et administration et profit***" on the basis of five months and two weeks of work. Instead, the Contractor left the work site on December 20, 2006, effectively seven months after starting. This is about 26% more than the time originally foreseen. Accordingly, the Court arbitrates that the Contractor is entitled to the 20% increase requested in payment n$^{o.}$4 and therefore is awarded the amount of $26,600.00.

[242] In its claim of September 20, 2007, some nine months after leaving the job site, the Contractor seeks an additional $39,900.00 for "***conditions générales et administration et profit***". The Court rejects the argument contained in that September 20, 2007 payment demand as an argument for double indemnification. Accordingly, it will not be allowed because the first claim was made on January 20, 2007 when the Contractor knew or should have known of these calculations.

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[114] Exhibit PC-247.

## *ÉLECTRICITÉ*

[243] The Contractor is claiming for 3% of the electrical work done being the amount of $4,170.00. The Contractor asserts that this was for a heating cable installed in the garage drainage.

[244] While Mr. Belley noted that no electrical work was done, the Court prefers the evidence of Mr. Bilodeau who was on site and who prepared contemporaneous site notes.

[245] This claim will be permitted and credited to the Contractor in the amount of $4,170.00.

## CLAIMS FOR EXTRAS AND UNFORESSEN COSTS BY CONTRACTOR

### *Conditions d'hiver du béton pour la dalle 1* [115] *et la dalle 2* [116]

[246] A substantial focus of this litigation concerned who was responsible for various delays and accordingly, who should be responsible for various categories of damages.

[247] On the basis of delays allegedly caused by the Owner, the Contractor claims four categories of extras: "#13 *coulée beton d'hiver: dalle* 1, #14 *coulée beton d'hiver: dalle 2*, #16 *gaz naturel et chauffage* and #24 *conditions d'hiver*", for a total of $21,116.00. As extra #26 the Plaintiff further claims for "*coûts d'impacts*" in the amount of $64,375.00 thereby seeking a total of these two amounts of $85,481.00.

[248] These four extra charges were incurred because the Project was not ready to start in June 2006. If the Contractor could have begun in early June, 2006, then in 5 months and 2 weeks i.e. by mid-November 2006, the Project should have been completed and in which case, these extra costs would not have been incurred

[249] The Court finds that the quantum has been proven. The actions of both parties contributed to the Project running into the winter. Accordingly, incurring these extras was inevitable and the question becomes who is legally obliged to pay.

[250] The Contractor did try to get advance approval for the extra for the pouring of the concrete but the Owner refused.

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[115] Exhibit PC- 247, *Demande de paiement* # 4, Item 13, p.543-545.
[116] Ibid. Item 14, Exhibit PC-247, p.543 & 546.

[251] The major contributor to the delay was the Owner's change to having the super-beams but the Contractor did not collaborate with the sourcing or keeping the Owner apprised of all the time these new changes would require. The Court determines that the Owner is 2/3 responsible and the Contractor 1/3 responsible.

[252] Therefore, the Owner must pay to the Contractor: 66% x $21,116.00 being: $13,936.56.

**Pit pour 2 lifts de garage**[117]

[253] At trial, Mr. Martin Beaudoin admitted that he had no authorisation regarding this request as an extra. On the other hand, Mr. Bélec sent an email to Mr. Racine on November 14, 2006[118], on which he copied Mr. Martin Beaudoin, requesting comments "***concernant les changements demandés dans le garage, i.e., déplacements des hoists, la prévision d'un trottoir dalle sous les hoists, les plafonds surélevés au-dessus des hoists***".

[254] According to the procedure established in May, this request from Mr. Bélec should have generated a tender with a price from the Contractor for prior approval by the Owner.

[255] The site notes of Mr. Bilodeau[119] confirm that this work was done.

[256] Nonetheless, there was approximately one month from the original request from Mr. Bélec to the time the work was done for the Contractor to submit a tender and receive approval. The Contractor was not required to do this work without getting the authorisation for the price. Having failed to do so, the Contractor cannot now claim this amount.

## *Drain et puits pour évacuer l'eau*

[257] The Contractor is claiming $6,230.00[120] under the heading "***drains et puits pour évacuer l'eau – creuser les caniveaux – installation de drain français – remblayage***".

[258] The Court determines that the obligation was on the Contractor to obtain more information from the Owner if it did not understand the extent of the drainage required pursuant to the plans.

[259] There was no evidence of whether the installation of a French drain appeared on the plan in question nor can the Court find any notation. Two possibilities exist:

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117 Exhibit PC-247, *Demande de paiement* #4, Item 15, p. 548-549.
118 Exhibit PC-207.
119 Exhibit PC-306, at pages 982 - 984 (December 12-14, 2006).
120 Supplément 17, Exhibit PC-247, at page 543.

a. either that the French drain was a standard part of the drainage system and hence was part of the work required by the plan – and hence was included in the price;

b. or that it was an extra, in which case an authorisation in advance had to be given and it was not.

[260] On the other hand, Mr. Racine admitted that ground water seeping into the basement during construction was an "*imprévu*".

[261] The Owner had in its possession a soil study dated May 13, 2005 in which at page 3 there was a notation that the water table was between the surface and 1.5 meters in depth "***selon les observations en chantier et l'apparence des échantillons***"[121].

[262] The contractual obligation to inform under *Bail*[122] was on the Owner, who failed to provide this document to the Contractor.

[263] Mr. Martin Beaudoin sought authorisation from Mr. Bélec[123] and Mr. Bélec incorrectly refused this authorisation.

[264] The Court is satisfied that a drainage system was part of the plans. However, at the same time, the drainage system installed was more extensive than normally required given the proximity of the water table to the surface of the land.

[265] Both sides share the responsibility for these costs. The Court arbitrates that in the circumstances, both parties bear one half of the responsibility and so the Contractor will only be allowed one half of the claim, being $3,115.00 (or 50% of $6,230.00).

## ***Excavation et remblai (pour un possible entrepôt à pneus)****124*

[266] On May 17, 2006, Mr. Bélec wrote to Mr. Martin Beaudoin in relation to work connected with a new ramp that was going to be built at the west end of the building to permit access to the existing garage while construction was progressing on the Addition. In that letter, Mr. Bélec sought confirmation that, amongst other things, no extra would be charged "***pour entrepôt de pneus à la façade ouest du bâtiment***"[125].

[267] The day after on May 18, 2006, Mr. Joseph Beaudoin replied raising the following issues: (a) if the Contractor started excavation first in the front (as Mr. Bélec

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121 Exhibit PC-1.
122 *Bail, supra note 39*.
123 Exhibit PC-239.
124 Exhibit PC- 291, *Demande de paiement* #5, Item 18, pp.661 et 663.
125 Exhibit PC-12.

wanted), then the Owner would not have access to the back of the garage since the ramp would not have been built; and (b) with this staging of the work, the excavators would have to come back additional times thus increasing costs because the excavators were going to be on-site for a longer period and also making movement around the building more difficult.

[268] At the same time, Mr. Joseph Beaudoin maintained that the extra was legitimately claimed.

[269] Before any agreement was reached, the Contractor undertook the excavation necessary for the tire storage facility on June 7, 2006.

[270] The explanation given by foreman Bilodeau was that, according to the Contractor's argument, the excavation had to be undertaken at the beginning of the construction because of the configuration of the work site. The Court understands his reasoning was the same as the explanation given earlier by Mr. Joseph Beaudoin: to make the excavation cheaper and safer.

[271] Nonetheless, the Contractor did not have the requisite approval necessary either to do or charge for this extra work. In fact, it is six days later on June 13, 2006[126] that the Contractor provided its tender for $95,000.00 for the construction of the tire storage facility. This tender was not accepted and a second tender was presented on June 28, 2006[127] in which the price was reduced to $74,500.00, which was not accepted either.

[272] In these circumstances, the Contractor has no entitlement to claim for this excavation as an extra.

[273] However, as the Contractor points out in its argument, Mr. Sylvain Bertrand, who had agreed to complete the work in the months following the departure of the Contractor from the job site, testified that this excavation was useful and necessary when Mr. Bertrand completed the tire storage facility for the Owner.

[274] Accordingly, the Owner accrued a benefit from this excavation.

[275] In these circumstances, the articles of the *Quebec Civil Code* concerning unjust enrichment are relevant:

> ***1493. A person who is enriched at the expense of another shall, to the extent of his enrichment, indemnify the other for the latter's correlative impoverishment, if there is no justification for the enrichment or the impoverishment.***

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126 Exhibit PC-300.
127 Exhibit PC-392.

***1991, c. 64, a. 1493; I.N. 2014-05-01.***

***1494. Enrichment or impoverishment is justified where it results from the performance of an obligation, from the failure of the person impoverished to exercise a right of which he may avail himself or could have availed himself against the person enriched, or from an act performed by the person impoverished for his personal and exclusive interest or at his own risk and peril, or with a consistent liberal intention.***

***1991, c. 64, a. 1494; I.N. 2014-05-01.***

[276] Other than the amount charged by the Contractor in its n$^{o.}$5 demand for payment[128], which is dated September 20, 2007, the Court has no other proof.

[277] According to the Contractor's detailed calculation, the work was undertaken on June 7, 8 and 12, 2006. In the circumstances, the Court arbitrates that 65% of the amount claimed will be granted as unjust enrichment and so the Owner must pay 65% of $12,290.00 which equals $7,988.50.

## *Assèchement des eaux*[129]

[278] The site notes indicate that Mr. Bilodeau discovered a disused 12-inch pipe from the City while excavating for the footings[130]. On June 12, 2006, the site notes indicate that the Contractor was pumping out the water from the site. According to the site notes, the work in relation to this issue continued up to September 14, 2006[131].

[279] The same reasoning applies to this section as for the drainage discussed under elsewhere. Accordingly, the Contractor will be entitled to 50% of the claimed amount of $7,955.00, being $3,977.50.

## *Construction des caniveaux du garage*[132]

[280] The January 6, 2006, plans of Mr. Bélec[133] clearly show that drainage is to be constructed in the Addition. In the March 16, 2006 tender, the plumbing subcontractor[134] - in a document dated January 30, 2006 – notes, amongst other things as a description of work: "***raccordement des nouveaux et de l'ancien drain (caniveaux) dans le***

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128 Exhibit PC-291 at p. 663.
129 Exhibit PC-291, *Demande de paiement* #5, Item 19, p. 664.
130 Exhibit PC-306 at p. 899.
131 Exhibit PC-306, Site note, at page 950.
132 Exhibit PC-291, *Demande de paiement* #5, Item 20, p. 665.
133 Exhibit PC-3, p. 25.
134 Exhibit PC-4, at page 39.

***garage au nouveaux intercepteurs d'huile***." Mr. Martin Beaudoin testified that this work was done without any prior approval from the Owner.

[281] However, despite this, Mr. Bélec, on November 8, 2006, provided a drainage plan showing, amongst other things, the floor drainage in the garage[135] and then on November 13, 2006, Mr. Bélec asked for a tender on these plans regarding drainage in the garage[136].

[282] Mr. Bélec is correct when he says in his email of November 23, 2006 to Mr. Martin Beaudoin (copied to Mr. Racine) that the Owner is not asking that the work be done first and a price fixed later – as could be done if the Owner issued a "*directive de modification*[137]"

[283] The Contractor is claiming for $9,170.00 for this work but failed to obtain the prior necessary authorization from the Owner.

[284] In the Exhibit PC-404A, the list of claims by the Contractor, there are a series of site notes referred to - the first of which is Exhibit PC-306 dated November 28, 2006. Accordingly, the work did not start until November 28, 2006 whereas the request from Mr. Bélec for a tender was dated November 23, 2006, some 5 days previously. This was sufficient time for the Contractor to prepare and submit a tender and receive approval prior to the beginning of work.

[285] As a result of the Contractor's failure to obtain approval, this claim for $9,170.00 cannot be granted.

## ***Portes de garage à ouverture verticale en raison de la présence de rideaux d'air***[138]

[286] The garage doors for the basement were indicated in the original architectural plans.[139] Mr. Martin Beaudoin's testimony was that the modifications to the wall of air necessitated a change in the garage doors.

[287] The Court understood from the evidence that in the March 16, 2006 tender, the ventilation sub-contractor provided for: "***deux rideaux d'air pour porte de garage***".[140]

[288] The original plans appear to show a solid door that would raise vertically all in one panel. This would impede the "*rideau d'air*" which essentially creates, as the expression suggests, a wall of hot air when the door is opened in the winter to prevent

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135 Exhibit PC-197.
136 Exhibit PC-204.
137 See Exhibit 218 at page 496, para. 6.3.1 and Exhibit PC-219.
138 Exhibit PC-291, *Demande de paiement* #5, Item 21, p. 664.
139 Exhibit PC-2 at p.22.
140 Exhibit PC-3 at p.40.

heat from leaving the garage. For this system to work, the garage door must be louvered so that when it opens and closes, it does so as panels, thus allowing the "*rideau d'air*" to function continuously as opposed to it being blocked if the door rises as one full panel. The louvered door is more expensive and this is the extra being asked for costing $3,780.00.

[289] The Contractor in its table of claims for extras makes reference to an initial tender Exhibit PC-376 dated September 7, 2005 for $8,511.85 and then refers to a bill from another door company dated February 12, 2007 in the amount of $13,399.55 including a 25% surcharge for re-storage (the reason for which is unexplained).

[290] In an email of November 2, 2006 from Mr. Bélec to Mr. Martin Beaudoin, Mr. Bélec asks, in relation to the garage doors, that he be provided with the shop drawing so that he can verify the "*rideau de chaufage*", which Mr. Bélec says he must approve.

[291] The Court does not take this as a request for a tender for an extra but rather simply as verification on behalf of the owner of the work being done.

[292] The Contractor was in possession, at the time of the March 16, 2006 tender, of both the original architectural plan showing the door as well as the tender by the sub-contractor. It was up to the Contractor to note any discrepancies and deal with those in the March 16, 2006 tender.

[293] Having failed to do so, the Contractor cannot now come back and claim that different doors were required and that these now constitute an extra.

[294] Accordingly, the claim for $3,780.00 cannot be granted.

## ***Rampe accès arrière***[141]

[295] This ramp was specifically requested by the Owner to permit it to park approximately 20 vehicles on the newly laid concrete floor of the showroom in the Addition.

[296] The Court is satisfied that Mr. Bélec, as agent for the Owner, confirmed a procedure with Mr. Martin Beaudoin which permitted the Owner to require the Contractor to undertake a modification to the work before an agreement on price provided that a "***directive de modification***" was produced by Mr. Bélec.[142]

[297] Since Mr. Racine was also an agent for the Owner, the Contractor was entitled to consider an email from Mr. Racine to Mr. Martin Beaudoin[143]. That email said: "***Bonjour Martin, Richard m'a autorisé à parquer 15 à 20 autos sur la dalle du R.C.***

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141 Exhibit PC-291, *Demande de paiement* #5, Item 22, p. 667.
142 Exhibit PC-218 and 219 (pages 496 & 500 respectively).
143 Exhibit PC-237, p.525.

***J'ai aussi demandé à Jean Bilodeau de me faire une pente en 0-3/4 afin d'y avoir accès… Nous avons besoin de ces espaces maintenant*".** This email constituted a « ***directive de modification*** » for which prior price approval was not required.

[298] In response to Mr. Racine (with a copy to Mr. Bélec), Mr. Martin Beaudoin, some 26 minutes later, confirmed that this ramp would be built and that : "***Aucun problème pour faire la pente en 0 – ¾, les surplus vous seront envoyés plus tard suite à cette directive. Les Entreprises Beaudoin se dégage de toute responsabilité découlant de tous évènements qui pourraient survenir suite à l'utilisation de la dalle. Nous demandons d'avoir une lettre signée de l'ingénieur qui nous dégage de tout problème qui pourrait survenir avec la dalle suite à l'utilisation***."

[299] The response email from Mr. Bélec to Mr. Martin Beaudoin did not contradict this affirmation that the extra should be constructed forthwith.

[300] For these reasons, the claimed amount of $2,286.00 is awarded to the Contractor.

## *Bétonnage à 30 mPa*[144]

[301] This extra is for $5,130.00. The Contractor claims that the original plan showed that the « *dalles et empattement* » were to have concrete at a compression resistance of 30 mPa but as no mention was made for the walls, the basis of the Contractor's quote was 25 mPa for the walls.

[302] On May 16, 2006 in the first site meeting,[145] Mr. Bélec notes that the concrete for the walls of the foundation should have a compression resistance of 30 mPa at 28 days and that this detail must be added to the plans which will be updated.

[303] This is a change to what was part of the original agreement.

[304] By email dated June 12, 2006, Mr. Bélec advises Mr. Martin Beaudoin that all the calculations have been undertaken based on concrete of 30 mPa compression resistance and that the plans have always shown this. He adds that to diminish the capacity of the concrete would be hazardous and that he cannot recommend a "***montant imprévu pour cet item***".

[305] As one of the two on-site representatives of the Owner, Mr. Bélec has an obligation to act collaboratively with the Contractor. His reference that the 30 mPa was always in the plans is misleading since his own plans of June 1, 2006 added this indication for the first time in regards to the concrete for the walls.

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144 Exhibit PC-291, *Demande de paiement* #5, Item 23, p. 667.
145 Exhibit PC-11.

[306] Since Mr. Racine was provided with a contemporaneous copy of this correspondence and since he did not say anything to the contrary, the order by Mr. Bélec effectively constitutes a "directive" which the Contractor must follow before approval on the price.

[307] However, when Mr. Martin Beaudoin writes to Mr. Bélec now on June 14, 2006,[146] Mr. Bélec responds on the same day[147] that "***tout travail supplémentaire ou demande de paiement pour travaux imprévus devrait avoir été approuvé par les soussignes et faire objet d'une directive écrite … à défaut de vous confirmer à la présente directive, je me verrais dans l'obligation de demander un arrêt de travail, ceci à vos frais*** ».

[308] On June 6, 2006, Mr. Martin Beaudoin[148] points out to Mr. Bélec that the plans of January 6, 2006 only show 30 MPa for "***les semelles et les dalles***", but that the revision of June 1 now adds 30 MPa for the concrete in the walls. He notes that this must be charged as an extra. The Court agrees since the work was ordered by "*directive*" and did not form part of the original submission.

[309] Accordingly, the Contractor is entitled to be paid this amount of $5,130.00.

## *Électricité*

[310] The Contractor is claiming for 3% of the electrical work done being the amount of $4,170.00. The Contractor asserts that this was for a heating cable installed in the garage drainage.

[311] While Mr. Belley noted that no electrical work was done, the Court prefers the evidence of Mr. Bilodeau who was on site and who prepared contemporaneous site notes.

[312] However, since the proper approval process was not followed, this claim will not be permitted.

## *Agrandissement arrière*

[313] For the first time, the Contractor claims $60,534.00 for this extra in its no. 5 demand for payment on September 20, 2007. In the chart which it has filed to explain its claims for extras,[149] the Contractor provides a series of justifications. The Court is perplexed that it was billed in September 2007. For the reasons that follow, the Court dismisses this claim.

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146 Exhibit PC-43.
147 Exhibit PC-42.
148 Exhibit PC-28.
149 Exhibit PC-404 and 404A.

[314] Firstly, despite some initial confusion, this agrandissement arrière is clearly an extra for which the Contractor should have, but did not, obtain approval in advance.

[315] Why is this an extra? In the site meeting of May 16, 2006,[150] Mr. Bélec indicates that new plans will have to be presented which take into account other changes made by the Owner "and / or the Contractor" (Court's translation). Mr. Bélec refers to this new storage space under the transition ramp to the west of the Addition between axes B and C as a clear change by the Owner. The site minutes note that the architect would be making this change on his plans and this would necessitate a change in the structural plans.

[316] The obligation of cooperation between the Contractor and the Owner meant that for this *agrandissement arrière to* be built, updated plans must be provided and a price negotiated and approved by tender to the Owner.

[317] Nonetheless, on June 5, 2006 in the next site meeting,[151] Mr. Bélec indicates that the Owner takes the position that this storage facility was in the original tender and Mr. Bélec suggests that the Owner and the Contractor "***régler le litige concernant les suppléments***". Mr. Bélec's original plans for the tender[152] do not show but the revised plans prepared by Mr. Bélec on June 1, 2006 do show this *agrandissement arrière* added[153] and therefore it is a potential extra subject to the approval procedure. It was in the May 16, 2006 site minutes that Mr. Bélec confirmed for the first time the requirement that extras be submitted by tender and approved by the Owner.

[318] In Exhibit PC-404, the Owner did not indicate any reference to prove when this work was undertaken. Nonetheless, there is no reason - given the minutes of the May 16, 2006 meeting - that work of this magnitude ($60,534.00) would not have followed the normal approval process. For an example of the Contractor following the appropriate process for tender approval, see Exhibits PC-390 and 392, two tenders in relation to the tire warehouse facility.

[319] Paragraph purposely omitted.

[320] Furthermore the Court is mindful of the initial statement by Mr. Joseph Beaudoin that if the Owner required the Contractor to accept too low a base price, that there would be conflict afterwards over extras that the Contractor would seek to charge.

Finally, the Contractor has not met its burden of proof as regards this extra since not only does the Court not know when this work was undertaken but it was presumably done before December 20, 2006 and therefore should have been billed with n$^{o.}$4 demand for payment, dated January 20, 2007.

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150 Exhibit PC-11.
151 Exhibit PC-25.
152 Exhibit PC-2 at p. 26.
153 Exhibit PC-302 at p.865.

## DAMAGES CLAIMED BY OWNER

[321] In the D. Plan, the Owner asserts its entitlement to complete indemnification under *CCQ* art. 1590 because of the Contractor's failure to deliver the work on time and its refusal to start the work again after the 2006 Christmas holidays.

[322] The Owner argues that its unheeded demand letter of April 2, 2007 entitled it to resiliate the Contract on April 7, 2007. For the reasons already given, the Court determines that there has been no proven breach of contract by the Contractor either in relation to delay or the alleged obligation to start work again after the 2006 Christmas vacation.

[323] At all relevant times, the Owner was a knowledgeable user of construction services being counselled by an experienced civil engineer, Mr. Bélec and also by Mr. Racine who had considerable experience with construction contracts in his work with SEBJ.

[324] The Owner knew or should have known that this project could not be completed on the basis of the incomplete plans provided to the Contractor. The Owner knew or should have known that this was not a turn-key project especially in light of the overseeing functions mandated by it to Messrs. Racine and Bélec. The Owner knew or should have known that the delays were also caused by the Owner's failure to provide adequate plans including structural, electrical and mechanical plans on a timely basis and that further delays were caused by changes the Owner wished to make.

[325] The Court will now deal with each of the Owner's individual claims for damages.

### *Garantie Nationale*

[326] The basis of this claim was that *Garantie Nationale*, this insurer of used car servicing, diverted repair work from MEGA to other garages from November, 2006 to September, 2007 since MEGA did not have the new garage in the Addition to undertake this work.

[327] MEGA claimed for a gross loss of $202,274.00. This claim cannot be accepted for the following reasons: (a) it was not caused by the fault of the Contractor; (b) it was not a foreseeable loss since this specialized profit centre – servicing used cars for owners who had purchased an insurance policy at the time of purchase of the used car from MEGA or other dealers – was not something that the Contractor could have known nor was there any evidence that the Owner made the Contractor aware; and (c) in all events, even if causality had been proven, the amount claimable was the net profit in the order of 3.6% and not the gross claimed.[154]

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[154] *Canada* v. *Constructions Bé-Con inc.,* 2013 QCCA 665 at para. 77.

## *Asphaltage et Interlock*

[328] The Owner claims for the cost of repairing asphalt in its parking lot and peripherally paved areas as a result of numerous trips of construction vehicles working on the excavation at the back of the building. There is also a claim for the same reason for damaged interlocking pavement brick.

[329] While both the asphalt and the interlocking brick may have been damaged by heavy construction trucks, this was not as a result of any breach of contract by the Contractor: this is a normal cost to the Owner when construction has to be done, unless otherwise specified by contract. Accordingly, both these claims are dismissed.

## *Electricians' Costs*

[330] The Owner claims these costs for electricians' charges to install temporary lighting in the garage after the Owner left on December 20, 2006.

[331] The Owner did not prove that this cost was in any way related to a breach or fault by the Contractor and accordingly, this claim is dismissed.

## *Ingénieur*

[332] The Owner continued to pay for the services of Mr. Richard Bélec, after the Contractor left, so as to complete the project with Mr. Sylvain Bertrand. Mr. Bélec testified that the amount he charged for his services to the Owner after January 1, 2007, was $15,682.30.

[333] The Owner was the author of its own misfortune in not ensuring that it provided sufficiently detailed plans to complete the project. The fact that the Owner was required to continue to engage the services of Mr. Bélec is its own responsibility. Accordingly, this claim is rejected.

## *Arpenteur*

[334] The Owner asserts that it paid accounts for the surveyor in the amount of $20,000.00. The Owner makes its claim against the Contractor to pay 50% of this amount on the grounds that it was the Contractor that required the attendance of the surveyor on many occasions.

[335] There is no evidence that the work of the surveyor was not useful to the construction project.

[336] The Contractor's March 16, 2006 tender specifically excluded surveyors' charges from the tender.

[337] Accordingly, these charges for the surveyor are the exclusive responsibility of the Owner and this claim is rejected.

## *Chauffage*

[338] The Owner's claim for $4,550.30 is based on the evidence of Mr. Racine that the Owner's heating costs were substantially increased during the performance of the work.

[339] Again, no causation has been established and this claim must be dismissed.

## *Atteinte à la Réputation*

[340] Mr. Racine gave hearsay evidence that the delay in completing the project caused several clients to query whether the Owner had the capacity to pay for the work. Mr. Dormani raised a similar point when his banker questioned him concerning the legal hypothec registered by the Contractor.

[341] The level of the evidence provided by the Owner to support this claim does not prove, on the balance of probabilities, that there was damage done to the reputation of the Owner. A business such as MEGA with more than $50,000,000.00 worth of sales annually, or PASAGARD did not prove their reputations were diminished in any way.

## *Dommages esthétiques, troubles et inconvénients*

[342] Mr. Dormani testified to various aesthetic issues including the fact that the joinder of the two buildings at the level of the showroom was not even. While the Court understands the trying circumstances of this project, both for the Owner and Contractor as well as for the engineer, any aesthetic damage or inconvenience cannot be attributed to the fault or breach of the Contractor. Accordingly, this claim is also dismissed.

### *Couts d'impacts*

[343] The Contractor claimed as an extra "*couts d'impact*" in the amount of $64,375.00 particularized as follows: (a) $12,875.00 for Mr. Bélec's ordered suspension of work on the job site from July 9 through to July 14, 2006 and (b) the work suspension from September 26 to October 28, 2006: as a result of the modification of the plans to allow for the super-beams. This twenty-day suspension was evaluated at $51,500.00.

[344] The applicable law is stated by legal author Me. Guy Sarault[155] who instructs that while damages for *couts d'impacts* are claimable,[156] each case must be looked at on its

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[155] Guy SARAULT, *"Les Reclamations de l'Entrepreneur en Construction en Droit Québécois*" (Yvon Blais; Cowansville, 2011.)

particular circumstances, especially the wording of the contract and the change orders given in the course of executing the work.[157]

[345] On this basis, the Court determines that the first part of the claim is justified. There was no warning concerning this July suspension and it was entirely due to issues revolving around the permit, the permit being the responsibility of the Owner. Accordingly, the amount of $12,875.00 will be awarded to the Contractor.

[346] However, as to the second part of the claim, this experienced Contractor knew or should have known that there would be a delay caused by the super-beams. The Contractor knew or should have known from the point that the new plans were produced – at whatever time that was – that there would be such a delay.

[347] Accordingly, the Contractor was in a position to account for a reasonable estimate for this cost of impact in its tender.

[348] The original tender for the super-beams included "***conditions générales***". The Contractor was aware that the Owner did not want any surprises regarding costs and in this context, it was implicit (and also an aspect of the obligation of cooperation), that this tendered amount cover everything, including the impact cost for the foreseeable delays.

[349] As a result, the Contractor is not entitled to this second aspect of the claim in relation to the super-beams of $51,500.00.[158]

## *Owner's Claim for Damages to Repair Contractor's Improperly Executed Work*

[350] In its Re-re-Amended Defense and Counterclaim, the Owner at paragraph 78 claimed damages for MEGA and PASAGARD together in the amount of $191,574.00 (which included the sum of $121,133.00 that the Owner alleged was overpaid). Accordingly, the difference between these two figures is the amount of $70,441.00 which allegedly was for work to repair and correct work done by the Contractor.

[351] On the last day of evidence, the Owner called Mr. Sylvain Bertrand as a witness. Mr. Bertrand holds an MBA and runs his own construction company and in 2006 – 2007 had already completed 20 projects similar in size to the Addition. He had lost out to the Contractor in the original bid process.

[352] Around April 2007, the Owner hired him to continue and complete the Addition. Mr. Bertrand started work in April, 2007 and completed the work in November of the same year.

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156 Ibid at para.74.

157 Ibid at para 75.

158 See Sarault, *supra* note 153, referencing *Doyle Construction Co. v. Carling O'Keefe*, (1987), 23 C.L.R. 143 (B.C.S.C. confirmed in appeal).

[353] No written contract was put in evidence for Mr. Bertrand's work nor could Mr. Bertrand remember whether there was such a written contract. Subsequent to his work, he had done three very substantial projects for Mr. Dormani: (a) one major historic building renovation; and (b) two automobile dealerships. He testified that the Contractor had under-bid the Addition.

[354] He confirmed that he was fully paid for all of his work and that just for the completion of the work originally undertaken by the Contractor, he was paid $950,500.00.

[355] The Contractor argued that the Owner cannot claim damages for any repair work since the Owner was not put in default to undertake these repairs (*CCQ* art. 1590 and 1602).

[356] The jurisprudence instructs that the creditor of the obligation must both put the debtor of the obligation in default regarding specified problems as well as be given a reasonable delay to repair.[159]

[357] However, the actions by the Contractor in not living up to its obligation to co-operate and leaving the job site with no real intention to return create a "*fin de non-recevoir*" which prevents it from relying on this right to a *mise-en-demeure*.[160]

[358] At the same time, the Owner has only met its burden of proof in regard to the following items of this claim: (a) $9,762.22 plus taxes for repairs to the structure;[161] and (b) $2,144.52 plus taxes to correct the *rideau d'air* for the garage door. A third amount of $12,016.85 is claimed for repairs to the showroom floor.[162] Based on the evidence of Mr. Goulet, problems to this floor were also caused by the Owner prematurely storing cars before the concrete had fully cured. Accordingly, the Court only allows 50% of this claim, being $6,008.42 plus taxes. The total of these three amounts is $17,915.16 plus taxes,[163] which equals $20,222.23.

## COSTS

[359] All parties bear the responsibility for moving forward on this construction project without any detailed written agreement. Parties as sophisticated as these knew or should have known that this unfortunate choice was sowing the seeds of the litigation that resulted; litigation which has been ongoing since September 25, 2007 when the original action began.

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159 *Construction Inco inc. v. Fournier*, 2012 QCCS 3775 at paragraphs 93 -95.
160 KARIM, *supra* note 38 at para. 31.
161 Exhibit PC-348 at pages 2133 and 2134.
162 Exhibit PC-348 at p.215.
163 The two sales taxes are calculated as of the date of Mr. Bertrand's company bill, March 3, 2008. (Exhibit PC-345): G.S.T. 50% and Q.S.T. 7.5%.

[360] Due to this jointly undertaken choice and given the mixed success of both sides in these proceedings, it is reasonable and in the interest of justice that the parties bear their own costs for this litigation.

[361] The Court acknowledges the professionalism of all counsel in the presentation of this case.

## CONCLUSIONS

### FOR THESE REASONS, THE COURT:

[362] **GRANTS** in part the Plaintiff's action and **GRANTS** in part the Defendants' counterclaim;

[363] **ORDERS** that the Plaintiff pay to the Defendant MEGA and the Defendant PASAGARD jointly the total of $49,072.23;

[364] **ORDERS** that the Defendants jointly pay to the Plaintiff the amount of $78,253.56 and hereby **ORDERS** that the respective claims be compensated one against the other;

[365] **ALL WITH EACH PARTY PAYING THEIR OWN COSTS.**

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**MARK G. PEACOCK J.S.C.**

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Dates of hearing: January 19, 20, 22, 23, 26, 27, 28, 29, 30, and
February 2, 3, 4, 5, 6 9, 2015.