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He is the author of *Goldsmith on Building Contracts*, 4<sup>th</sup> Edition which provides an analysis of the law of contracts as it applies to building contracts in Canada, published by Carswell.  
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## **Contractors Beware: Don't Rely on *Quantum Meruit* to Fill a Gap in a Contract**

The principles of contract interpretation and *quantum meruit* are obviously quite distinct. But in its recent decision *CH2M Hill Energy Canada, Ltd. v. Consumers' Co-operative Refineries Ltd.*, the Saskatchewan Court of Appeal has reminded us that they also give rise to two very different and separate payment obligations. There cannot be an obligation to make a *quantum meruit* payment if the contract, properly interpreted, covers the subject matter but contains no contractual obligation to pay.

*CH2M Hill Energy Canada Ltd.* ("CH2M") answered a request for proposal issued by *Consumers' Cooperative Refineries Ltd.* ("CCRL"). The accepted proposal was for the provision by CH2M of home office services and field management services, and also included the provision of craft labour. The proposal stated that there would be a specified mark-up on the home office service and field management services, including percentages for burden and

overhead. However, while the request for proposal and the accepted proposal provided for payment of the cost of craft labour, neither provided for a mark-up on craft labour.

The Court rejected the argument that the principle of “contractual *quantum meruit*” could be used to imply an obligation to pay a mark-up on craft labour when the contract contained no such obligation. **Contractual *quantum meruit*** only applied, the Court said, if the contract contained an obligation to pay for the mark-up, but left the amount of payment unspecified.

Another concept is **restitutionary *quantum meruit*** which applies if the parties have not made any agreement about the subject matter at all. That was not the case here. The agreement did include the subject matter of craft labour but only provided for payment for the direct cost of that labour.

In the present case, the request for proposal and the proposal contained no obligation to pay for **mark-up** on craft labour. The Court said that *CM2H* was seeking to imply into the contract a “multimillion dollar claim for **overhead**”. The Court noted that overhead is “too variable a term” and its calculation “inherently uncertain and controversial”. In the present case, the amount of the overhead would be about \$10 million. Before an obligation to pay for a mark-up on craft labour could be implied into the contract, cogent evidence of the parties’ intention to that effect would have to exist. To the contrary, the request for proposal and the proposal itself contained no such evidence, in contrast to the mark-up specified for the other services. Absent a contractual obligation to at least pay for the mark-up on craft labour, there was no room for the application of *quantum meruit*.

This decision is a fair warning to contractors: If you want to be paid for each element of the materials or services that you provide, then ensure that the contract clearly identifies those elements and states an obligation to pay for each of them. If you don’t at least provide for the obligation to pay, then don’t expect *quantum meruit* to fill the gap left by an adverse interpretation of the contract.

**Building Contracts – Interpretation – *Quantum Meruit*: *CH2M Hill Energy Canada, Ltd. v. Consumers’ Co-operative Refineries Ltd.* 2010 SKCA 75 (CanLII)**