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Construction Law- Consultants: Beware of overstepping your Authority

Courts do not often examine the authority of a **Consultant** on a construction project and the liability consequences if the Consultant oversteps its authority. That issue was recently dealt with by the Queen's Bench of Alberta in *Online Constructors Ltd. v. Speers Construction Inc.*

A golf club hired a contractor, Speers, to repair a dam on its property. Part of the project involved the construction of a concrete spillway. The golf club hired a Consultant to monitor the project. The contractor hired a subcontractor, Online, to construct the spillway. There were deficiencies in the concrete work in the spillway. The issue was whether those deficiencies were caused by the directions of the Consultant and were therefore the responsibility of the owner, or were caused by the work of the subcontractor Online.

In finding that the Consultant had overstepped its role, the trial judge made a number of interesting findings. She held that "the engineer cannot compel the contractor to carry out his work in a particular manner or sequence unless that specific right is contained in the contract. If the engineer acts improperly, the dissatisfied party is entitled to disregard the decision as not binding upon him".

If, however, the subcontractor follows the engineer's improper instructions, "such interference will amount to a breach of contract for which the owner is liable to the extent that the engineer is acting as an agent of the owner". The trial judge recognized that it was "hardly an option" for the contractor to "throw down its tools and cease to work until the dispute is worked out".

The subcontractor had experienced workmen who wished to proceed in one fashion to pour the cement, while the Consultant's representative was relatively inexperienced and directed that another method be used. The trial judge held that the Consultant had over-stepped its responsibilities. To the extent that the concrete deficiencies were caused by the Consultant's directions to pour in a certain way, the damages were attributable to the Consultant. Since the Consultant was the owner's agent, those damages were the responsibility of the owner.

As important as this finding was, equally important in the result was the trial judge's finding that no damages could be attributed to the Consultant's error. This finding underlines the difficulty in proving damages arising from one of many activities in a construction project. Detailed project analyses and forensic damage evidence will likely be necessary to prove that one activity – such as a Consultant's wrongful direction – caused damage to the claimant.

This decision is also a goldmine of legal analysis on many other issues relevant to construction law: the potential liability of an owner to a subcontractor for **Negligent Misrepresentations** contained in **Tender's**; the **Incorporation by Reference** of the main contract in a subcontract; the circumstances which will give rise to the **Repudiation** of a construction project; and the obligation of a contractor to make **Access to the Site** available to a subcontractor.

Construction Law – Consultants: *Online Constructors Ltd. v. Speers Construction Inc* 2011 ABQB 43 (CanLII).

