CITATION: *The Ottawa Hospital v. Hôpitel Inc.*, 2025 ONSC 4364
COURT FILE NO.: CV-20-83715
DATE: 2025/07/25

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:		
THE OTTAWA HOSPITAL	Applicant	David Sherriff-Scott and Benedict Wray, Counsel for the Applicant
– and –		
HÔPITEL INC.	Respondent	Craig O'Brien, for the Respondent
		HEARD: April 24 and August 2, 2024

REASONS FOR DECISION

Corthorn, J.

Introduction

[1] In September 2003, the parties entered into an agreement pursuant to which the respondent supplied telephones and televisions to the applicant for inpatient use ("the Original Agreement"). In 2009 and 2010, the parties negotiated the terms of an agreement to amend the Original Agreement ("the Amending Agreement"). Pursuant to the Amending Agreement, terms in the Original Agreement are updated. The updated terms include that the respondent is to supply and install multimedia terminals ("the terminals"), again for inpatient use.

[2] In these reasons, I refer to the Original Agreement, amended by the Amending Agreement, as "the Contract".

[3] The parties are before the court because they disagree as to the end date of the Contract. Section 10 of the Amending Agreement stipulates that Section 13 of the Original Agreement, which sets out the term of that agreement, is replaced with the following section:

> This Agreement's term is of 16 years and six months, commencing on September 1, 2003 or, if applicable, on the date on which the Materials described in greater detail in Appendix "A" will be fully set up and operational, which date Hôpitel will give notice of in writing to TOH. If, after the expiry of the aforementioned term, with no renewal of this agreement as set out in Section 14 below and, notwithstanding the failure to renew, TOH requests that Hôpitel continue to provide its services as set out in this Agreement, until the parties can agree on the terms and conditions of another renewal, it is understood that the consideration stipulated in Section 12 will be upheld until the signing of the new renewal agreement by the parties. Within 15 days of the signing of this new renewal agreement, Hôpitel will pay TOH, if applicable, the consideration owing to TOH.

[4] The applicant's position is that the parties agreed the end date of the Contract is March 1, 2020 (i.e., 16.5 years subsequent to the September 1, 2003 commencement date of the Original Agreement). The applicant asserts that its position is consistent with the plain and ordinary meaning of Section 13 of the Contract, quoted above in para. 2. In late 2019, the applicant gave the respondent written notice, as required, that the Contract would not be renewed and would end on March 1, 2020.

[5] The applicant's alternative position is that, by its conduct, the respondent elected to treat March 1, 2020 as the end date of the Contract; the respondent is not entitled to now rely on a different end date.

[6] The respondent's position is that there are two components to the Contract. The first component is the continued supply of telephones and televisions; the second component is the supply and installation of the terminals.

[7] The respondent agrees with the applicant as to the duration of the term for each component of the Contract—16.5 years. The term of the first component runs from September 2003 to March 1, 2020. The respondent asserts, however, that the start date for the term of the second component is based on the "if applicable" portion of Section 13 of the Contract. The second term began to run on July 2014, when the respondent gave notice of the completion of installation of the terminals ("the July 2014 letter"). The end date of the term for the second component of the work is January 2031 (i.e., 16.5 years after July 2014).

The Issues

[8] The following issues are determined on this application:

1. Applying the principles for interpretation of a contract, what is the date on which the Contract came to end?

2. Does the doctrine of election apply to the respondent's conduct and, if so, is the respondent precluded from taking the position that the Contract runs until January 2031?

Issue No. 1 - Interpretation of the Contract

a) The Law

[9] The parties agree that the authoritative decision on principles for interpretation of a contract is *Sattva Capital v. Creston Moly*, 2014 SCC 53, [2014] 2 S.C.R. 633. The principles explained in *Sattva* reflect an evolution away from technical rules of construction "towards a practical, common-sense approach": at para 47. The common-sense nature of the approach is evident from the following principles, all of which are found in para. 47 of the decision:

- "The overriding concern is to determine 'the intent of the parties and the scope of their understanding' [citations omitted]";

- The contract must be read as a whole; and

- The words used in the contract are to be given "their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract".

[10] In *Sattva*, the Supreme Court provides guidance as to how those broad principles are to be applied. Writing for the Court, Rothstein J. says "the meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement [citations omitted]": at para. 48.

[11] At paras 57-58, Rothstein J. explains the role and nature of "surrounding circumstances". First, he emphasizes that the surrounding circumstances "must never be allowed to overwhelm the words of [the] agreement": at para. 57. Second, the evidence as to the surrounding circumstances has its limits; it "should consist only of objective evidence of background facts at the time of the execution of the contract": at para. 58.

[12] The surrounding circumstances are "often referred to as the factual matrix": at para. 46.

[13] The "factual matrix", as defined in *Sattva*, must be distinguished from "subsequent conduct". As explained by the Court of Appeal for Ontario in *Shewchuk v. Blackmont Capital Inc*., 2016 ONCA 912, 404 D.L.R. (4th) 512, at paras. 41 and 42, subsequent conduct (a) is not part of the factual matrix, and (b) "has greater potential to undermine certainty in contractual interpretation and override the meaning of a contract's written language".

[14] In *Consulate Ventures Inc. v. Amico Contracting & Engineering (1992) Inc*., 2007 ONCA 324, 282 DLR (4th) 697, Cronk J.A, writing for the Court, highlights that certainty of terms is required for a contract to be enforceable. At para. 81, Cronk J.A. says that "[a] document that omits essential terms, or that contains vague or incomplete material terms, will not constitute an enforceable contract".

b) The Positions of the Parties

i) The Applicant

[15] The applicant acknowledges that the Contract identifies two possible terms. The first possible term is clear on the face of the document: "16 years and six months, commencing on September 1, 2003". The applicant highlights that the resultant end date of March 1, 2020 is, as the parties intended, precisely seven years subsequent to the end date set out in the Original Agreement. The applicant relies on the certainty of this arithmetically-stipulated end date.

[16] The applicant also relies on what it submits constitutes the factual matrix at the time the parties entered into the Amending Agreement. The applicant's position is that the Amending Agreement reflects the parties' consideration of their respective financial positions; the nature and extent of the work the respondent agreed to carry out; and the financial implications for the respondent through to the March 2020 end date.

[17] The applicant emphasizes that the second possible term of the Contract would only come into effect "if applicable". The applicant's position is that the meaning of "if applicable" is neither clear nor readily ascertainable from the Contract; that portion of Section 13 is unenforceable because it is vague and uncertain.

ii) The Respondent

[18] The respondent relies on what it describes as the dual aspect of the Contract: (a) the continued supply of telephones and televisions; and (b) the introduction of new work, meaning the supply and installation of the terminals.

[19] The dual aspect upon which the respondent relies includes separate terms for each component of the work. The two terms do not overlap; they have different commencement and end dates. The first commencement date is for the extension of the Original Agreement; the second commencement date took effect only upon completion of installation of the terminals.

[20] The respondent's position is that the second commencement date includes a notice requirement. As a result, the term of the Contract relating to installation of the terminals did not commence until the respondent served notice of completion of the installation of the terminals. Once notice was given, the 16.5-year term related to the second component of the work commenced. For the installation of the terminals, the end date is in January 2031 (i.e., 16.5 years after notice was given in the July 2014 letter).

[21] The respondent emphasizes the differences between the two types of work undertaken in the Amending Agreement. The extension of the Original Agreement did not require the respondent to incur significant expenses; the telephones and televisions on which the respondent relied to generate rental fees were already in place.

[22] The supply of the terminals, on the other hand, required the respondent to an incur up-front expense, in the seven-figure range, to acquire the terminals. For the installation of the terminals, a 16.5-year term, commencing in 2014, permits the respondent to recoup its upfront investment and to generate revenue from rental fees.

c) Background

[23] The terms of the Original Agreement include that (a) the respondent provides telephones and televisions to inpatients; (b) the inpatients pay the rental fees for those devices directly to the respondent; and (c) the respondent pays the applicant a commission, based on a percentage of the rental fees received from inpatients. It is undisputed that the term of the Original Agreement is 9.5 years—from September 1, 2003 to March 1, 2013.

[24] In 2009 and 2010, the parties began discussing (a) the possibility of extending the term of the Original Agreement; and (b) updating the technology provided pursuant to that agreement.

[25] The respondent made two written proposals—one in June 2009 and the other in July 2009. The cover letters sent by the respondent with each proposal include the following statement: "As you will see there is a significant variation in the number of rentable beds, and also the remaining contractual term will need to be adjusted in order to accommodate the change with the new televisions".[1]

[26] In December 2009, the applicant signed a letter of intent, confirming the parties' mutual intention to amend the Original Agreement based on matters covered in the respondent's July 2009 proposal.

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[1] Some supporting documents upon which one or both of the parties rely are in French. Neither party requested a bilingual hearing. English translations of critical documents were filed. The parties agree as to the accuracy of the translations.

[27] In addition to addressing the supply and installation of the terminals, the Amending Agreement reflects the parties' agreement to adjust the commission structure. The commission rates change from 48 to 52 percent (in the Original Agreement) to 25 to 30 percent (in the Amending Agreement). Pursuant to the Contract, the commission rates increase incrementally, from 25 percent to a maximum of 30 percent, as total revenue from rental fees increases.

[28] The Amending Agreement and the Contract introduce a new element to the commission structure—the elimination of commission payable by the respondent on the first $775,000 of annual rental fees. In the Original Agreement, commission was payable, at a rate of at least 48 percent, on all rental fees.

[29] When the parties entered into the Amending Agreement, the applicant expected the respondent to begin installing the terminals in July 2010. For a variety of reasons, the respondent did not complete the installation of the terminals until at least July 2014. Not surprisingly, the relationship between the parties deteriorated between May 2010 and the summer of 2014.

[30] During that four-year period, a dispute arose regarding the commission the respondent was required to pay from the date of the Amending Agreement forward ("the commission dispute"). That dispute remains unresolved; a determination of the commission dispute is not before the court on this application.

[31] In the context of the commission dispute, the applicant's Director of Business Development ("Ms. Furmankiewicz") sent a letter, dated January 10, 2013, to the respondent's President ("Mr. Schneider"). In that letter, Ms. Furmankiewicz follows up on an October 2012 meeting between the parties, including to address the Contract end date:

> At a meeting in Ottawa between TOH and Hôpitel Inc on October 3rd, 2012, I raised a concern about delays associated with the deployment of the Jaotech devices, and both parties' interpretation on the end date of the contract. Mr. Serge Legault suggested your company would look into this and get back to us. I have not received a response to that effect and would like it noted that the TOH position is that the contract end date is March 31, 2020.

[32] Mr. Schneider responds with a letter dated January 15, 2013. He informs Ms. Furmankiewicz that the respondent's "position is that the contract as it is written terminates 16.5 years from the date of the new TV Terminal system deployment in both Ottawa hospitals."

[33] The parties continue their fractious relationship throughout 2013 and into 2014. The respondent continues to provide services related to the supply and installation of the terminals. In July 2014, the respondent's Quebec-based lawyers (i.e., not the respondent's lawyers of record on this application) send the July 2014 letter, by registered mail, to the applicant. The author of the July 2014 letter refers to the "notice" mentioned in Section 13 of the Contract:

> Pursuant to Article 10 of the Amended Agreement which amended Article 13 of the Original Agreement, formal notice is hereby given to you that Hôpitel Inc. has fulfilled is contractual obligations pursuant to said Article in that all of the "Matériel", more fully described in Annex A to the Agreement has been completely installed and is functional.
>
> Accordingly, please be advised that the term of the Agreement pursuant to the foregoing commenced on July 15, 2014.
>
> The present notice is given to you to comply with the terms of the Agreement and you are kindly required to govern yourselves accordingly.

[34] The parties continue for the next five years to disagree about the term and duration of the Contract, and their respective obligations under it. Relying on the termination clause in the Contract, in November 2019 the applicant gives the respondent written notice that (a) the Contract would not be renewed; and (b) the applicant would treat the Contract at an end effective March 1, 2020.

[35] Since late 2019, the respondent has continued to provide services to the applicant. This arrangement is without prejudice to the applicant's position on this application; remains in effect pending the outcome on this application; and is subject to a reservation of the applicant's rights beyond the determination of the issues now before the court.

d) Analysis

[36] Applying a common-sense approach to construction of the Contract, I reach the following conclusions:

- The Contract identifies two possible terms;
- The only possible term that is clear on the face of the Contract is "16 years and six months, commencing on September 1, 2003";
- That term applies to both the continued supply of the telephones and televisions and to the supply and installation of the terminals;

- The second possible term, in effect "if applicable", is vague and uncertain; as a result, that portion of Section 13 of the Contract is unenforceable; and

- The Contract provides for what is to happen if the applicant does not renew the Contract beyond March 2020 and, at the request of the applicant, the respondent continues to provide services pursuant to the Contract.

[37] The parties agree with the conclusion set out in the first bullet point listed in the preceding paragraph. The parties also agree that one of the possible terms defined in Section 13 of the Contract is from September 1, 2003 to March 1, 2020. The parties disagree as to whether the term ending in 2020 applies to both the continued supply of telephones and televisions and the supply and installation of the terminals.

[38] I start with the factual matrix.

i) The Factual Matrix

[39] In *Sattva*, at para. 60, Rothstein J. explains that consideration of the factual matrix—in the context of the parol evidence rule—"is consistent with the objectives of finality and certainty". Justice Rothstein describes the factual matrix as "an interpretive aid for determining the meaning of the written words chosen by the parties, not to change or observe the meaning of those words".

[40] At para. 60 Rothstein J. defines the term "surrounding circumstances" to mean the "facts known or that reasonably ought to have been known to both parties at or before the date of contracting". Defining "surrounding circumstances" as such eliminates concerns about unreliability of the evidence upon which the court relies: at para. 60.

[41] On the matter before this court, the surrounding circumstances include the parties' respective approaches and, at times, collective approach when negotiating the terms of the Amending Agreement.

▪ *The Contract Relates to a Single Project*

[42] The approach taken by both parties to negotiation of the terms of the Amending Agreement, including the term and duration of the Contract, can be seen in the two proposals made by the respondent in the spring and summer of 2009.

[43] In the cover letter to both proposals and in the proposals themselves, the parties refer to the existing televisions and the terminals collectively as "Televisions":

- For example, the subject line of the cover letter to the June 2009 proposal is "Revised television project for phase 2 of the contract";

- In the cover letter to the July 2009 proposal, the subject matter is "Television Project (Revision 2").

- In both cover letters, the respondent's representative ("Mr. Legault") describes the subject proposal as "based on the hospital's new requirements for management of televisions and telephone rentals to patients at the Ottawa Hospital, namely the Civic and General Campuses and Heart Institute, and based on new data, as described".

[44] Both parties treated the work undertaken in the Original Agreement and to be undertaken pursuant to the Contract as singular in nature. The nature of that work is the management of telephones and televisions available to patients at the applicant's three sites.

[45] In both proposals, the respondent summarizes the subject of the submission as "for a project to manage the rental on demand of televisions and telephones to patients for entertainment only" at the applicant's three sites. In the point-form description set out below that summary, the respondent addresses the distribution network for the existing low-voltage televisions, the continued maintenance of those televisions, the supply of new programmable televisions, and installation of an automated management system for the rental of televisions and telephones. Once again, the point is that both parties treated the work to be done by the respondent as singular in nature—as "a project".

[46] In both proposals, the respondent presents a seven-year option and a ten-year option. For all options presented, the duration is specifically identified as either seven or ten years, followed immediately by "(with ELF L-10)"—with the bracketed phrase meaning the terminals. The proposed duration, whether seven or ten years, applies to both the existing televisions and the new programmable televisions.

[47] Only the July 2009 proposal includes the supply and management of an automated management system for the rentals. In the July 2009 proposal, the duration stipulated includes either seven or ten years followed by "(with ELF L-10 and automated system)". The application of the seven-year or ten-year duration to all of the work—including the automated management system—is yet another example of the parties treating the work as a single project.

[48] Last, I consider the inclusion in Section 13 of the Contract of the phrase "if applicable". The inclusion of that phrase is not unique to either the Amending Agreement or the Contract. Identical language is found in Section 13 of the Original Agreement—an agreement that relates only to the supply, installation, and management of telephones and televisions. The Amending Agreement is no different—it also relates to the supply, installation, and management of telephones and televisions. The fact that some of the televisions to be supplied, installed, and managed pursuant to the Amending Agreement are also referred to as "terminals" does not create duality in the work undertaken.

[49] In summary, the parties treat the work undertaken pursuant to the Contract as a single project.

- ***The Commission Structure***

[50] The parties respective approaches to the commission structure options presented during the negotiations are an important part of the factual matrix. At para. 43 of his May 2023 responding affidavit ("the Schneider affidavit"), Mr. Schneider identifies that the "duration of the contractual terms" as one of the "key metrics" the respondent relied on to determine the commission structured proposed. The term of the Contract was also important to the applicant, which was considering nothing more than either a seven or ten-year extension of the term of the Original Agreement.

[51] Paragraph 43 of the Schneider affidavit appears below in its entirety:

> Hôpitel provided different options for commission rates predicated on calculation for the number of television terminals it was required to purchase and install at viable active beds and at non-viable beds which effected the amount of up-front capital investment that Hôpitel would need to make. The total amount of up-front capital, the duration of the contractual terms and subsequent revenue streams were the key metrics used by Hôpitel to determine the different commission rates offered to the TOH and to ensure Hôpitel could get an adequate return on its investment. Importantly, and unlike the 2003 Agreement, the project being proposed in 2010 was not simply a service agreement, it envisioned Hôpitel investing in excess of 1.7 million dollars in computer terminals and peripheral equipment to complete the installation phase.

[52] Mr. Schneider's uncontradicted and unchallenged evidence is that the respondent "envisioned investing in excess of 1.7 million dollars in computer terminals and peripheral equipment to complete the installation phase".

[53] Both the Original Agreement and the Contract provide that the Materials supplied and installed by the respondent would be managed by the respondent and would "[a]t all times" be considered "the personal property of Hôpitel, and any right title and interest in the Materials is and will remain the absolute property of Hôpitel".

[54] In the end, the parties agreed upon a seven-year extension of the term of the Original Agreement, as amended. The term of the Original Agreement is extended from "nine years and six months" to the Contract term of "16 years and six months".

[55] The commission structure set out in the Contract includes a feature that does not appear in any of one the Original Agreement, the June 2009 proposal, or the July 2009 proposal. Only the Contract sets out an exemption from commission payments for revenue that falls below a specified level of total rental fees.

[56] In the Original Agreement and the 2009 proposals, commission is payable on the first $965,000 of rental revenue. The percentage of commission payable increases at $965,000 and above, and again at $1,100,000 and above. By contrast, the commission structure in the Contract exempts the respondent from commission payments on the first $775,000 of annual revenue from rental fees. The lowest percentage commission agreed upon (25 percent) is not payable until the rental revenue exceeds that amount. The higher percentage commission rates are payable on rental revenues between $965,000 and $1,100,000 (28 percent) and on rental revenues that exceed $1,100,000 (30 percent).

[57] Does this commission structure allow the respondent to "get an adequate return on its investment" to the end of the seven years added to the term of the Original Agreement? By my rough calculation, the commission structure provides the respondent with the "adequate return" it was seeking.

[58] First, the respondent retains 100 percent of revenue from rental fees at or below $775,000 (to a maximum of $5,425,000 in rental revenue over seven years (7 x $775,000)). Second, the respondent is exempted from paying up to $1,356,270 in commission (7 x $750,000 x 0.25). That amount represents 80 percent of the $1,700,000 investment the respondent expected to make to fulfil its obligations. By giving up $1,356,250 in commission income the applicant is, in essence, assisting the respondent to fund the purchase of devices and equipment—property the respondent will ultimately own.

- ***Summary***

[59] Both parties to the Contract are sophisticated entities. Both parties are familiar with the concepts of revenue streams, return on investment, and ownership of property. There is nothing in the commission structure, the ownership of Materials, or elsewhere in the Contract that detracts from the clarity with which the term of the Contract is stated. The factual matrix supports the applicant's position that the Contract end date is March 1, 2020, for both the continued supply of telephone and televisions and the supply and installation of the terminals.

ii) The Second Possible Term is Unenforceable

[60] The parties agree that the Contract includes a second possible term, described in the following language: "or, if applicable, on the date on which the Materials described in greater detail in Appendix 'A' will be fully set up and operational, which date Hôpitel will give notice of in writing to TOH". For the following reasons, I conclude that this portion of Section 13 of the Contract is vague, uncertain, and unenforceable.

[61] The alternative possible term of the Contract falls within the types of contracts discussed in *Bawitko Investments Ltd. v. Kernels Popcorn Ltd.*, 2021 ONCA 880, 26 B.L.R. (6th) 230, at para. 21:

> However, when the original contract is incomplete because essential provisions intended to govern the contractual relationship have not been settled or agree upon; or the contract is too general or uncertain to be valid in itself and is dependent on the making of a formal contract; or the understanding or intention of the parties, even if there is no uncertainty as to the terms of their agreement, is that their legal obligations are to be deferred until a formal contract has been approved and executed, the original or preliminary agreement cannot constitute an enforceable contract.

[62] First, the Contract does not include a definition of "if applicable" and does not stipulate the conditions that must be met for the "if applicable" portion of Section 13 to come into effect. For example, the Contract does not define what is meant by "fully set up and operational" (i.e., the trigger for the respondent to send the applicant written notice).

[63] Second, a reasonable interpretation of the phrase "if applicable" includes a requirement for the parties to reach a further agreement as to a start date and an end date for this alternative term of the Contract.

[64] Third, the interpretation upon which the respondent relies is contrary to the Contract when it is read as a whole. For example, in Sections 12.1 to 12.6 of the Contract, the parties address the commission structure, including unforeseen changes that might affect their agreement on the structure. Pursuant to Section 12.6, any change to the commission structure must be agreed upon and reduced to writing: "Hôpitel and TOH may reassess and change this amendment such that it accurately reflects TOH's actual situation in view of unforeseen changes. If a change to this Amendment is required, however, it must be mutually approved by both parties and it shall not be valid until there is a written agreement signed by both Hôpitel and TOH."

[65] The term "Amendment", which appears in Section 12.6, is not defined. Without deciding the issue, I note that it is possible the parties intended Section 12.6 to apply to the Contract and not only to the commission structure, as amended. Even if Section 12.6 applies only to the commission structure, it is not reasonable to interpret the Contract as (a) requiring an agreement in writing to amend the commission structure, and (b) leaving the start date for a component of the work undertaken by the respondent entirely in the respondent's discretion and control.

[66] Last, one need only look at the latter half of Section 13 of the Contract to ascertain the importance to the parties of certainty, including the reduction to writing any further agreements between the parties. That portion of Section 13 addresses what happen in certain circumstances if the Contract is not renewed.

[67] Section 14 of the Contract is titled, "Renewal" and deals with the automatic renewal of the Contract. That section stipulates that "[u]nless at least three months before the expiry of the initial term or any renewal, one of the parties gives the other written notice of non-renewal, this Agreement will automatically be renewed upon expiry of its initial term or any renewal, for periods of six months each."

[68] The latter half of Section 13 stipulates what happens if the Contract is not renewed *and* the applicant asks the respondent to continue to provide services pursuant to the Contract. That portion of Section 13 provides as follows:

> If, after the expiry of the aforementioned term, with no renewal of this agreement as set out in Section 14 below and, notwithstanding the failure to renew, TOH requests that Hôpitel continue to provide its services as set out in this Agreement, until the parties can agree on the terms and conditions of another renewal, it is understood that the consideration stipulated in Section 12 will be upheld until the signing of the new renewal agreement by the parties. Within 15 days of the signing of this new renewal agreement, Hôpitel will pay TOH, if applicable, the consideration owing to TOH.

[69] The above-quoted version of Section 13 differs slightly from the wording of Section 13 in the Original Agreement. Section 13 of the Original Agreement does not include either of the following phrases: "and, notwithstanding the failure to renew" and " until the parties can agree on the terms and conditions of another renewal". The inclusion of the latter phrase in the amended version of Section 13 is indicative of the importance to the parties of both certainty and the reduction of further agreements to writing.

[70] It is not reasonable to interpret the Contract as (a) requiring an agreement in writing for periods beyond the expiration of the Contract term, and (b) leaving the start date for a component of the project undertaken by the respondent entirely in the respondent's discretion and control.

- ***Summary***

[71] The Contract is a commercial agreement between two sophisticated parties and involves monetary amounts at or above the seven-figure range. "Commercial contracts are normally designed, at least in part, to maximize certainty": *Oceanic Exploration Company v. Dennison Mines Ltd.* (1999), 127 O.A.C. 224, at para. 37.

[72] The portion of Section 13 upon which the respondent relies in support of a January 2031 end date is not sufficiently clear or certain to be enforceable. To find otherwise would result in a commercial absurdity—with the respondent alone entitled to dictate the terms and end date of a relationship involving millions of dollars.

[73] If, however, I am wrong and the "if applicable" portion of Section 13 is sufficiently clear and certain to be enforceable, I find, in any event, that there is no evidence to support a conclusion that the parties mutually approved any change to the start date for any component of the project (or, even if they did mutually approve such a change, that their agreement in that regard was reduced to writing).

[74] I conclude that the Contract end date is March 1, 2020 and that end date applies to the entirety of the work undertaken by the respondent pursuant to the Contract.

[75] I move on to Issue No. 2—whether, by virtue of its conduct, the respondent has elected to treat the end date of the Contract as March 1, 2020.

Issue No. 2 - The Doctrine of Election

a) The Law

[76] The Court of Appeal for Ontario reviews the doctrine of election, in both its common law and equitable forms, in *Charter Building Co. v. 154097 Ontario Inc.*, 2011 ONCA 487, 107 O.R. (3d) 133. At para. 15, Epstein J.A., writing for the Court, describes the essence of the doctrine as follows: "a person is precluded from exercising a right that is inconsistent with another right if he has consciously and unequivocally exercised the latter."

[77] At paras. 18-22 of *Charter Building*, Epstein J.A. distinguishes between the doctrine of election at common law and the doctrine of election in equity. The distinctions between the two categories are relevant to a determination as to which category of the doctrine applies to a given set of circumstances (i.e., assuming that one of the categories of the doctrine applies).

[78] Starting with the common law doctrine of election, Epstein J.A. explains, at para. 18, that an election is made at common law, "where a party is faced with a choice between two inconsistent courses of action that affect another party's rights or obligations, and knowing that the two courses of action are inconsistent and that he or she has the right to choose between them, makes an unequivocal choice and communicates that choice to the other party." The party who makes such an election is, after making the election, "precluded from resorting to the course of action that he has rejected": at para. 18.

[79] As to when an election is effective, at para. 18, Epstein J.A. highlights that the parties to an ongoing relationship are entitled to know where they stand. For that reason, "an election is effective at the point of communication": at para. 18, citation omitted.

[80] Following the development of the doctrine of election at common law, "the courts of equity developed a separate principle -- the equitable doctrine of election -- in the context of wills and trusts": at para. 20. Justice of Appeal Epstein explains, at para. 20, that the equitable doctrine of election "is based on the fact that the electing party, having obtained a particular benefit from a transaction, must accept all of the consequences that flow from that transaction, including those to his detriment [citations omitted]".

[81] At para. 20, Epstein J.A. summarizes the distinction between the two categories of election:

> The equitable doctrine of election does not involve choice between alternatives. To establish an election in equity, it is unnecessary to show that the electing party made a conscious choice between inconsistent rights at the time when the original decision was made. In fact, an equitable election does not involve making a choice at all -- it involves accepting the consequences of a decision already made. On the other hand, the common law doctrine is all about choice. It applies to prevent a person who has made a decision from resorting to an inconsistent course of action that he has specifically rejected.

[82] The applicant before this court submits that both categories of the doctrine of election apply to the respondent's conduct. I disagree.

[83] The applicant's position on the doctrine of election is premised on the respondent's decision, made three years after the parties signed the Amending Agreement, to (a) assert that the reduced percentage commission structure set out in the Contract was effective as of the date on which the parties signed the Amending Agreement, and (b) claim entitlement to a credit in excess of $332,000 towards the respondent's ongoing obligation to pay commissions based on the reduced commission structure. The applicant submits that the respondent, having made the decision and pursued the course of action, both as described in the preceding sentence, is now precluded from resorting to an inconsistent course of action.

[84] The circumstances in the matter before this court are not analogous to those required for the application of the doctrine of election in equity. The analysis, which follows below, is therefore restricted to the doctrine of election at common law.

b) The Positions of the Parties

i) The Applicant

[85] The applicant submits that the respondent made a strategic decision when it (a) took the position that the commission structure set out in the Contract came into effect in May 2010, and (b) sought to address what the respondent alleges is an overpayment of commission from that month forward. The applicant asks the court to conclude that the respondent made an election, by reason of which it is bound to the arithmetically-stipulated term of the Contract running from September 2003 to March 2020.

ii) The Respondent

[86] The respondent's position is that, between 2010 and 2014, the parties were involved in ongoing discussions about (a) the challenges the respondent was encountering regarding the supply and installation of the terminals, and (b) the financial implications for the parties, the respondent in particular, arising from those challenges. During that period, the respondent was searching for a solution to the financial pressure it was experiencing.

[87] The respondent submits that its solution to the financial pressure was to take the position that the commission structure set out in the Contract came into effect in May 2010. By adopting that solution, the respondent had a basis upon which to (a) assert that it had overpaid commissions, and (b) claim a credit against the amount of the overpayment. Given the context in which the respondent asserted that a commission overpayment existed, the respondent should not be bound by that conduct for the purpose of determining the term of the Contract.

[88] As an alternative position, the respondent submits that if the court concludes that the respondent's conduct constitutes a binding election then, in the context of the commission dispute, the applicant is precluded from asserting that it is entitled to commission pursuant to the Original Agreement beyond May 2010.

c) Analysis

[89] From May 2010 to April 2012, the respondent paid commission based on the terms of the Original Agreement. During that period, the relationship between the parties deteriorated and the respondent experienced financial challenges. On occasion, in both 2012 and 2013, the respondent held back commission payments owed to the applicant.

[90] In the spring of 2013, the commission dispute came to a head. In a letter sent to the applicant on May 16, 2013, Mr. Schneider reviews several matters detrimentally impacting the respondent's financial situation ("the May 2013 letter"). In that letter, Mr. Schneider asserts that the respondent is out of pocket by $1,660,000; that amount includes an alleged commission overpayment of $332,000.

[91] Mr. Schneider's review includes the following points. First, the applicant is interfering with the respondent's rental fees revenue, including by allowing patients free access to the applicant's Wi-Fi. Mr. Schneider asserts that by permitting patients that access, the applicant "has impaired the self-financing viability of this project". He further asserts that the free access "if not corrected immediately will destroy [the project's] sustainability." Mr. Schneider demands that the applicant completely shut down the free patient Wi-Fi services available through the applicant's guest account.

[92] Mr. Schneider also reviews lower-than-expected revenue related to rental fees from telephones. He asserts that the unexpectedly low revenue results in "impairment of the self-financing model that was put in place for this project prior to the signing of [the Amending Agreement]". Mr. Schneider asserts that the respondent lost $441,264 in telephone rental fees during the three years after the Amending Agreement was signed.

[93] Under the heading "TOH Commissions" (underlining in original), Mr. Schneider refers to a "TOH Commission Analysis Grid" covering the period January 2010 to April 2013. The grid is a multi-page spreadsheet attached to the May 2013 letter.

[94] In the body of the letter, Mr. Schneider raises the following three "Points of discussion" related to commissions:

> - Hôpitel, at its own discretion and in good faith incurred an additional expense of $332,068.74 by maintaining a 48% commission rate for the TOH since the signed of our mutual Agreement on May 10th 2010, as opposed to the 25% commission rate dictated by the contract.
>
> - TOH's commission disbursements for March and April

- TOH's commissions and commission rates going forward.

[95] In a financial summary in the concluding paragraphs of his letter, Mr. Schneider includes the following entry: "48% to 25% Commission Differential […] $332,068.74". Mr. Schneider explains that figure is based on commission overpaid during the period commencing in June 2010 (i.e., the month after the Amending Agreement was signed) to April 2013.

[96] For the next several months, the respondent continues to assert that it has overpaid commissions. For example, in an email sent to the applicant on July 9, 2013, a Senior Manager with the respondent seeks to confirm the amount of the commission overpayment and requests that the applicant's representative sign a debit memo:

> With respect of the attached debit memo. We would like to confirm than an amount of $340,924.02 is owing by the Ottawa Hospital to Hopitel Inc. as at January 31, 2013. The debit memo attached refers to an overpayment of commission based on the contract signed on May 10, 2010 whereby Hopitel should have been paying commission of 25% on the revenues earned versus the amount paid in error being 48%.
>
> We would also like to confirm with you that the hospital will repay this receivable by deducting against future commissions owing.
>
> We also attached an audit confirmation for the receivable of $340,924.02. Could you kindly sign if you agree on the receivable and return it to me at your earliest convenience. [The spelling of "Hôpitel" appears as in the original.]

[97] The debit memo includes the following statement: "Going forward further deductions can be applied as indicated in para. 12.5 of our contract." I draw an inference and find that "para. 12.5 of our contract" means Section 12.5 of the Contract. That section addresses the potential for downward adjustment of the $775,000 threshold to be met before commissions are payable.

[98] Also, on July 9, 2013, accountants retained by the respondent communicate with the applicant. The accountants ask the applicant to confirm in writing that it agrees with the amount of the commission overpayment identified, as of that date, by or on behalf of the respondent.

[99] By July 2013, not only is the respondent relying on the commission structure in the Contract, it is relying on the $775,000 threshold and the potential for downward adjustment of that threshold (which terms also originate from the Amending Agreement).

[100] Also, by July 2013, the respondent has retained counsel and an accounting firm to assist the respondent with its ongoing relationship and discussions with the applicant. With the benefit of input from the professionals it engaged, the respondent makes a deliberate choice, more than a year before the July 2014 letter is sent, to rely on the Contract being in full force and effect as of May 2010.

[101] In early 2014, the respondent, through its counsel, continues to assert that there has been a commission overpayment and to rely on sections in the Contract that stem from the Amending Agreement. In February 2014, the same lawyer who authored the July 2014 letter sent a letter to the applicant ("the February 2014 letter"). In the February 2014 letter, the respondent's lawyer,

- addresses the commission overpayment, by that date said to be $358,480;
- relies on Sections 6.1, 12.1 and 12.5 of the Contract—all of which stem from the Amending Agreement; and
- demands that the applicant "immediately reimburse" the respondent for the commission overpayment, "failing which [the respondent] indicated that it would have regrettably no other recourse but to institute legal proceedings for the recovery of same."

[102] The position subsequently taken by the respondent in the July 2014 letter, that the Contract term begins in that month, is an about face to the position maintained by the respondent for more than a year—from at least May 2013 to early July 2014. That long-standing position was communicated to the applicant as an assertion of the respondent's rights pursuant to the Contract and, at times, a statement of the respondent's intention to pursue remedies available to it under the terms of the Contract.

d) Summary

[103] From at least May 2013 forward, in the context of the ongoing relationship between the parties, the applicant was entitled to know where the respondent stood. For more than a year, the respondent clearly communicated its position, asserted its rights, and threatened legal proceedings—all based on the Contract. The respondent is precluded from resorting to the position asserted in the July 2014 letter regarding the start date for the 16.5-year term of the Contract.

[104] The doctrine of election at common law applies to preclude the respondent from relying on anything other than September 1, 2023 to March 1, 2020 as the term of the Contract.

[105] I return, for a moment, to the respondent's alternative position on the doctrine of election. As summarized in para. 87, above, with the court having concluded that the respondent's conduct constitutes a binding election, the respondent requests that the court also make a declaration that, for the purpose of the commission dispute, the applicant is precluded from asserting that it is entitled to commission pursuant to the Original Agreement beyond May 2010.

[106] The commission dispute is not before the court on this application. The dispute before the court at this time is solely as to the term of the Contract. The impact of the decision reflected in these reasons on other matters in dispute between the parties remains to be determined, if necessary, at a later date.

Disposition

[107] The relief requested by the applicant is granted. The court declares that the term of the Contract is September 1, 2003 to March 1, 2020.

[108] The respondent does not dispute that the applicant provided notice in late 2019 of its intention to treat the Contract at an end effective March 1, 2020. The applicant is therefore entitled to the second element of the declaratory relief it requests—a declaration that the applicant complied with the notice requirements under the Contract and the term of the Contract ended on March 1, 2020.

Costs

[109] The applicant is entirely successful in, and is presumptively entitled to its costs of, the proceeding. If the parties are unable to agree upon whether the presumption as to entitlement to costs applies (or is rebutted), the scale upon which costs are payable, and the quantum of costs payable, the parties shall make costs submissions in accordance with the following timetable and requirements:

a) The parties shall, no later than 4:00 p.m. on Friday, August 22, 2025 exchange, electronically file, and upload to Case Center their respective up-to-date costs outlines;

b) The applicant shall, no later than 4:00 p.m. on Friday, September 19, 2025 deliver written costs submissions;

c) The respondent shall, no later than 4:00 p.m. on Friday, October 17, 2025 deliver responding costs submissions;

d) The applicant shall, no later than 4:00 p.m. on Friday, October 31, 2025 deliver reply costs submissions;

e) The written submissions referred to in sub-paragraphs (b) to (d), above, shall comply with the document standards in Rule 4 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194;

f) The written submissions referred to in sub-paragraphs (b) and (c) shall be a maximum of five pages and in sub-paragraph (d) shall be a maximum of three pages;

g) Authorities referred to in the written submissions shall be hyperlinked or, if unavailable through hyperlinking, included as pdf attachments to the written submissions; and

h) Term "deliver", as it appears in sub-paragraphs (b)-(d), above, means served, electronically filed, and uploaded to Case Center. The parties may, if they choose to do so, send copies of the costs outlines and written submissions by email to the SCJ Assistants' generic email address to my attention.

[110] If the applicant's written costs submissions are not delivered, as defined in sub-paragraph (h), immediately above, by 4:00 p.m. on Friday, September 19, 2025, then there shall be no order as to costs.

Date: July 25, 2025

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Madam Justice Sylvia Corthorn

CITATION: *The Ottawa Hospital v. Hôpitel Inc.*, 2025 ONSC 4364
COURT FILE NO.: CV-20-83715
DATE: 2025/07/25

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

THE OTTAWA HOSPITAL

Applicant

– and –

HÔPITEL INC.

Respondent

REASONS FOR DECISION

Madam Justice Sylvia Corthorn

Released: July 25, 2025