CITATION: Harvie Construction Inc. v. Atlas Dewatering Corporation, 2025 ONSC 4672
DIVISIONAL COURT FILE NO.: 1536/24
(Oshawa)
DATE: 20250829

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Newton RSJ and D.L. Corbett and Nakatsuru JJ.

B E T W E E N :	)	
	)	
Harvie Construction Inc.	)	*Theodore B. Rotenberg and Connor Marino*, for the Appellant
Appellant	)	
	)	
- and -	)	
	)	
Atlas Dewatering Corporation	)	*Barry Greenberg*, for the Respondent
Respondent	)	
	)	
	)	**HEARD (at Oshawa):** January 22, 2025

REASONS FOR DECISION

D.L. Corbett J.

[1] This is an appeal from the trial judgment of Healey J., reported at *Atlas Dewatering Corp.* v. *Harvie Construction Inc.*, 2024 ONSC 1775, and subsequent related interest and costs endorsements (2024 ONSC 2608 and 2024 ONSC 2877).

Jurisdiction and Standard of Review

[2] This action was brought pursuant to the *Construction Lien Act*, RSO 1990, c. C.30 (the "Act"), s. 71(1) of which provides that appeal from a judgment in a proceeding under the Act lies to the Divisional Court.[1]

[3] As agreed by the parties, an appellate standard of review applies to this appeal: correctness for questions of law, and palpable and overriding error for questions of fact. For questions of

[1] The trial judge applied the version of the Act in effect for the period July 1, 2011 to December 11, 2017 (Decision, para. 13), which the parties agree, correctly, is the applicable version of the Act for this matter.

mixed fact and law, the deferential standard of review applies except in respect to extricable questions of law, which are reviewed on a correctness standard. See *Canada (Minister of Citizenship and Immigration* v. *Vavilov*, 2019 SCC 65, para. 17.

Background

[4] The Appellant, Harvie Construction, contracted with the City of Barrie for roadworks known as the "Lakeshore Drive Reconstruction Project". The Appellant subcontracted with the Respondent, Atlas Dewatering, for dewatering services for the project. Within the meaning of the Act, the City was an "owner", the Appellant was the "contractor" under a "contract" with the City, and the Respondent was a "subcontractor" under a "subcontract" with the Appellant (Act, s. 1(1)).

[5] The Respondent claimed $950,509.91[2] from the Appellant for subcontract work and for extra work done pursuant to the subcontract. The Appellant disputed the claim on the basis (among other things) that claimed "extra" work was not authorized in accordance with the subcontract.

[6] The trial judge found largely for the Respondent and held that a balance of $852,416.50 was owed by the Appellant to the Respondent, plus $51,619.51 for prejudgment interest, and costs of $128,129.17.

This Appeal

[7] The Appellant argues that the trial judge erred in admitting hearsay documents for the truth of their contents to establish claims valued at $205,192.23 and that the trial judge committed three "extricable errors of law" in finding that other claims were established to a value of $318,179.14. The Appellant seeks reduction in the trial judgment to $329,045.13, plus consequential adjustments to the amounts awarded for prejudgment interest and costs.

[8] The Respondent argues that the trial judge's decision rests on findings of fact which were available on the record and which were made by the trial judge after a thorough consideration and weighing of the extensive record. There are no "extricable errors of law" in the decision, no impermissible reliance on hearsay evidence, and no palpable and overriding errors of fact.

The Trial Judgment

[9] The trial judge made the following pertinent findings:

(1) The Appellant's bid for the contract included a fixed price of $350,000 for all dewatering services (para. 3).

[2] All figures in this decision include any applicable HST unless stated otherwise.

(2) The Appellant hired the Respondent as its dewatering subcontractor (para. 5).

(3) The parties disagree on the terms of the subcontract (para. 5).

(4) The Respondent invoiced the Appellant $1,133.760.18 for dewatering services. The Appellant paid the Respondent $330,639.11 (para. 6).

(5) The parties raised the following trial issues relevant to this appeal (para. 12):[3]

(i) The terms of the agreement made by the parties, and whether they included:

(a) a fixed price of $300,000 or a fixed price of $300,000 plus additional dewatering and related charges outside the scope of the project documentation; and

(b) a "pay when paid" agreement for additional work.

(ii) Whether Harvie is estopped from asserting that it did not authorize additional work.

(iii) Whether all additional work claimed by Atlas was authorized by Harvie.

(iv) Whether Atlas has proven the value of the disputed work.

(6) The parties did not sign a quotation or otherwise execute a written agreement for the subcontract (para. 43).

(7) The parties agreed that the "base subcontract price" was $300,000 plus HST and that $15,505.87 remained owing on the base subcontract (para. 44).

(8) "What must be determined by this court is the scope of the work that was covered by the base contract price of $300,000, and whether an agreement was reached with respect to additional services not covered by the base contract price" (para. 45).

(9) "… I find that the agreement struck by Harvie and Atlas and by which they governed their dealings is reflected by the Second Quote (the "Contract"). The Contract price of $300,000 included dewatering work including a daily pump fee for a maximum of 160 days, with longer duration of pumping at an additional cost of $500 per day. It included a system length of only 1,000 metres. It included the costs of the dewatering plan. Any additional rental or services that Harvie required to fulfil its Prime Contract were in addition to the lump sum, such as services related to enviro-

[3] Additional issues related to contested validity of the lien, and claims based on unjust enrichment, are not raised on this appeal.

> tanks, winterization, fuel or electricity, and discharge piping from each dewatering system beyond 40 metres. It was subject to the terms and conditions set out in the Notes, and the exclusions listed Schedule A" (para. 123).

(10) the subcontract did not include a "pay when paid" provision (para. 142).

(11) the Appellant admits that it owes the Respondent $277,119.40 (para. 153).

Analysis

[10] The evidence in this case was voluminous. The trial judge noted this in her decision at para. 150:

> The evidence filed in this case was voluminous. It required countless hours of reading and cross-referencing and additional written submissions. While not all of it is referred in these reasons, it has been considered in the determinations reached.

The trial judge's decision is comprehensive. It is apparent, upon reading it, that the trial judge engaged with the voluminous record, weighed the evidence, made necessary findings of credibility, and made clear factual findings grounding her decision. In short, she did what is expected of a trial judge, and explained how she had reached her conclusions in thorough, systematic reasons. I see no errors in principle in the decision, and no other basis upon which to interfere with the trial judge's conclusions. Therefore, for the reasons that follow, I would dismiss the appeal.

Issue #1: Threshold Admissibility of Business Records

[11] The Appellant argues that, in reaching her conclusions, the trial judge admitted into evidence records tendered by the Respondent that were not admissible as business records. I do not accept this submission.

[12] Subsections 35(2) and (4) of the *Evidence Act*, RSO 1990, c. E.23, provide:

> Any writing or record made of any act, transaction, occurrence or event is admissible as evidence of such act, transaction, occurrence or event if made in the usual course of business and if it was in the usual course of business to make such a writing or record at the time of such act, transaction, occurrence or event or within a reasonable period of time thereafter.
>
> Any writing or record made of any act, transaction, occurrence or event is admissible as evidence of such act, transaction, occurrence or event if made in the usual and ordinary course of any business and if it was in the usual and ordinary course of such business to make such writing or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter.
>
> ….

> The circumstances of the making of such a writing or record, including the lack of personal knowledge by the maker, may be shown to affect its weight, but such circumstances do not affect its admissibility.

[13] The trial judge's reasons are replete with examples of the trial judge assessing the reliability of documents on the basis of the totality of the evidence before her: it is clear that she considered and decided the weight to be afforded records, as provided in s. 35(4) of the *Evidence Act*. On the threshold issue of admissibility, while the trial judge did not make express findings respecting the issues now raised on appeal, it is clear that she accepted that there was a satisfactory foundation to meet the admissibility requirements as set out in s. 35(2) of the *Evidence Act*. See *Setak* v. *Burroughs Business Machines*, 1977 CanLII 1184 (Ont. HCJ); *R.* v. *Felderhof*, 2005 ONCJ 406. With respect, the admissibility threshold was not the material issue here, and it is no surprise that the trial judge did not focus her attention on admissibility requirements that were clearly met, and instead devoted her attention to the weight to be attached to the evidence before her and the consequent factual findings to be made on the myriad of contested factual issues. That said, the trial judge did consider the threshold admissibility issue and found as follows (Decision, paras. 214-218):

> [214] Except where I have previously found them to be missing, all of the charges are supported by time and material reports that have been completed on the day that the labour or material was provided. Most contain a description of why the work was necessitated, and sometimes indicate that someone at Harvie directed the work to be performed. Based on the language in the description and the similar handwriting, they appear to have been prepared by the person who was actually on site to perform the work or observe the work, and signed by a representative of Atlas. There is no reason that arises from the evidence for those record keepers to be motivated to fabricate the work done or time spent. Where applicable, source document were provided along with the time and material sheets to Harvie at the time that the invoices were submitted.
>
> [215] The number and consistency of the time and material reports shows that they were prepared routinely, and that it was in the ordinary and usual course of business to make such a record. These were then used to prepare the formal invoices and are reflected in an ongoing, more detailed chronology of the work that was added to by Atlas over time.
>
> [216] All of this leads to the conclusion that the records are accurate and trustworthy. I find that the time and material sheets and the corresponding invoices were all prepared by Atlas in the usual and ordinary course of business, at or within a reasonable time from when the work was performed.
>
> [217] The large evidentiary record is sufficiently clear and convincing to allow this court to find that Atlas saw the Project through to completion even as it was presented with many challenges: delays caused by directions from Barrie, delay caused by other subcontractors, winter weather, and increased labour and material costs.

> [218] The evidence supports the finding that Atlas delivered the supporting documentation as referenced above with respect to its claim with each of its invoices. Roberto Santarelli was Atlas' estimator/project manager with responsibility for internal review and supervision of the Project. As has been noted several times, it [is] only after this proceeding was begun that Harvie raised the objection that the work was not authorized. Santarelli's evidence is that there are no corporate records or other documentation in which Harvie raised any issue or dispute about Atlas' entitlement to payment of the extras outlined in the invoices. While Santarelli did not create the business records at issue, he familiarized himself with the documents relating to the Project and the invoicing done up to the time that he joined Atlas in February 2015 when the Project was ongoing, and was responsible for it thereafter.

[14] With respect, the impugned documents were spreadsheets attached to invoices that were sent monthly by the Respondent to the Appellant. The whole point of the "business records" exception to the hearsay principle is that the "maker of the record" need not testify to them – rather, the tendering party must satisfy the test set out in the *Evidence Act*, as explained in *Felderhof* and *Setak*. The information set out in the spreadsheets documented work done by the Respondent, and was the subject-matter of extensive evidence – often on an item-by-item basis, as reflected by the trial judge's analysis of the Scott Schedules placed before her by the parties. Unlike in many cases involving business records (such as, for instance, bank statements), the trial judge could, and did, assess the accuracy of these business records independently from the totality of the evidence before her, as she was entitled to do. Based on this assessment, the trial judge found both that the impugned records met the admissibility test as business records, and also that the records were "accurate and trustworthy". I would not give effect to this ground of appeal.

Issue #2: Drawing an Inference from Appellant's Submission of Extra Claims to Owner

[15] The Appellant argues that the trial judge drew an impermissible inference when she found that the Appellant accepted the Respondent's claims for extras when it submitted those claims to the owner for payment.

[16] I do not read the trial judge's decision as applying a principle of general application when she drew the impugned inference. Rather, she concluded that, in the circumstances of this case, where she had found that there was no "paid when paid" term in the subcontract, and where the scope of work and pricing of the subcontract did not mirror the price and scoping of the contract, in submitting the claim for extra work by the contractor, the contractor was accepting that the work was requested by it, performed by the subcontractor, and that the value of the work was as claimed by the subcontractor:

> I find that this category of claims made to Barrie requires no further analysis, as the fact that Harvie made the claim shows that it does not dispute that it authorized the work, nor its value or that it was completed. (Decision, para. 155)

These conclusions flow from the many other findings made by the trial judge. Thus, the inference was one the trial judge drew on the basis of the specific circumstances of this case, and it was open to her to come to this conclusion.

[17] The record supported the trial judge's finding on this point. The Appellant's principal testified on discovery that the Appellant did not submit all of the Respondent's claims to the owner, but rather only submitted the claims that the Appellant considered to be justified (Examination of Nick D'Urzo, April 9, 2018, p. 95, lines 1-15). The Appellant's own records did not establish its account of "authorized" extra work and extra work that had not been done but not "authorized". The Respondent provided monthly accounts and summaries of work done and the record does not disclose objections from the Appellant that it was being billed for unauthorized work in respect to the items that were billed by it to the owner. And finally, this was not a case where there was a "paid when paid" term in the subcontract, which might provide a foundation for a contractor to make a claim "on behalf of a subcontractor".

[18] Had I concluded otherwise on this point I would not have granted the Appellant's requested remedy in respect to this issue (reducing the trial judgment by $318,179.14 on a final basis). Rather, I would have sent this issue back to the trial judge for her determination of whether the Respondent is entitled to be paid for this claimed extra work in the absence of an inference arising solely from submission of claims for payment for this work by the Appellant to the owner. I would have affirmed the balance of the trial judgment, with consequential adjustments to interest, enforceable forthwith.

General Observation

[19] As noted in her reasons, this was an unfortunate situation where two parties with a business history, and with mutual trust and respect, proceeded on the basis that the contractor had committed itself to terms in the contract which the subcontractor was unwilling to undertake in the subcontract. In the result, to the extent that the contractor committed with the owner for a fixed price that was not covered by the by the commitments made by the subcontractor to the contractor, the contractor was at risk. The extent to which this has happened is a matter between the contractor and the owner, and the subcontractor is entitled to be paid by the contractor, however the issues may be decided between the contractor and the owner. These were the primary issues in dispute, and the other (numerous) issues concerning the precise calculation of the amount to which the subcontractor was entitled were all questions of fact, decided by the trial judge on the basis of the usual kinds of evidence available for such claims in a construction dispute.

Disposition

[20] I would dismiss the appeal, with costs in the agreed amount of $19,000.00, inclusive, payable by the Appellant to the Respondent within thirty days.

"D.L. Corbett J."

I agree: "D. Newton J."

I agree: "Nakatsuru J."

Released: August 29, 2025

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NEWTON RSJ and D.L. CORBETT and NAKATSURU JJ.

BETWEEN:

Harvie Construction Inc.

Appellant

– **and** –

Atlas Dewatering Corporation

Respondent

REASONS FOR DECISION

D.L. Corbett J.

Released: August 29, 2025