SUPREME COURT OF NOVA SCOTIA

Citation: *Eastern Canadian Structures Limited v. MasTec Canada Incorporated*, 2025 NSSC 68

Date: 20250220
Docket: Hfx No. 460890
Registry: Halifax

IN THE MATTER OF: *The Builders' Lien Act*, being Chapter 277, S.N.S.2004, as amended

Between:

Eastern Canadian Structures Limited

Plaintiff

and

MasTec Canada Inc.

Defendant

and

Structural Panels Inc., Central Erectors Inc., Allsteel Builders (2) Limited and Crane-Tec Service Inc.

Third Parties

DECISION ON SUMMARY JUDGMENT MOTION

Judge: The Honourable Justice Scott C. Norton

Heard: January 31, 2025, in Halifax, Nova Scotia

Decision: February 20, 2025

Counsel: Christopher W. Madill and Calvin DeWolfe, for the Applicant, Allsteel Builders (2) Limited
Nathan Sutherland and Dakota Bernard, for the Respondent, Eastern Canadian Structures Limited
Michael Brenton, KC, for the Respondent, Structural Panels Inc.
Susan Fader, for MasTec Canada Inc.
Michael Brooker, KC, for Crane-Tec Services Inc.

By the Court:

Introduction

[1] The claims at issue in this summary judgment motion relate to work performed installing exterior insulated metal panels at a converter station site in Woodbine, Nova Scotia as part of the Maritime Link project. I am the case management judge for this proceeding.

[2] MasTec Canada Inc. ("MasTec") was the general contractor responsible for construction of the converter station. MasTec contracted with Eastern Canadian Structures Limited ("Eascan") to supply and install exterior metal panels for that building. Eascan issued a purchase order to Structural Panels Inc. ("SPI") for the manufacture and supply of the panels. Eascan issued a purchase order to Allsteel Builders (2) Limited ("Allsteel") to install the panels.

[3] MasTec and Eascan have claimed against each other in relation to deficiencies in the panels. Eascan has Third Party claims against Allsteel and SPI seeking contribution towards any damages owed to MasTec. SPI has a crossclaim against Allsteel.

[4] The issue is whether summary judgment should be granted dismissing the claims by Eascan and SPI against Allsteel.

Preliminary Evidentiary Rulings

[5] In its rebuttal brief, Allsteel raised the following evidentiary issues:

1. Whether the Affidavit of Richard Tse (the "Tse Affidavit") filed by SPI is inadmissible, given that it has not been filed in the form of a proper expert report under *Rule* 55.
2. Whether portions of the Affidavit of Nick Bain (the "Bain Affidavit") and the Affidavit of Kyle Rogers (the "Rogers Affidavit") filed by SPI ought to be struck as improper opinion evidence.

[6] Opinion evidence is presumptively inadmissible under the rules of evidence. An opinion is an inference from observed fact. There are two exceptions to the general exclusionary rule for opinion evidence. First, lay witnesses are permitted to offer opinions or conclusions where:

> they are in a better position than the trier of fact to form the conclusion;
>
> the conclusion is one that persons of ordinary experience are able to make;
>
> the witness, although not expert, has the experiential capacity to make the conclusion; and,
>
> the opinions being expressed are merely a compendious mode of stating facts that are too subtle or complicated to be narrated as effectively without regard to conclusions.
>
> (Paciocco, *The Law of Evidence*, Eighth Edition, (Toronto: Irwin Law, 2020), at page 239).

[7] The second exception is that an expert witness is permitted to offer opinions where the trier of fact does not have the special knowledge or experience required to make the relevant and worthwhile inference the expert witness is offering. The Supreme Court of Canada in *White Burgess Langille Inman v. Abbott and Haliburton Co*., 2015 SCC 23, directed that expert evidence can only be admitted if the party calling it satisfies a two-stage test on the balance of probabilities. This two-step test is summarized by Paciocco, *supra*, at pages 250-251:

> At stage 1, the proponent of the evidence must establish that the evidence meets the threshold requirements of admissibility. These are the four "Mohan factors":
>
> - the expert evidence must be logically relevant to a material issue;
> - the expert evidence must be necessary to assist the trier of fact, in the sense that the expert deals with a subject matter about which ordinary people are unlikely to form a correct judgment without assistance;
> - the expert evidence must not run afoul of any other exclusionary rule…; and,
> - expert witnesses must be properly qualified, in the sense that they possess special knowledge and experience going beyond that of the trier of fact in the matters testified to, and in the sense that they are able and willing to carry out their primary duty to the court to provide evidence that is impartial, independent and unbiased.
>
> For opinions based on novel science, contested science, or science used for a novel purpose, there is a fifth Stage 1 factor: the underlying science must be reliable for its purpose.
>
> Stage 2 operates if these four (or five) preconditions are met. At Stage 2, the "discretionary gatekeeping" stage, the trial judge undertakes a balancing analysis to determine if the evidence ought to be admitted, given its potential benefits and associated risks. At this stage, the judge considers such factors as probative value and prejudice, necessity, reliability and the absence of bias.

[8] In addition to the admissibility rules under the law of evidence, *Civil Procedure Rule* 55 prescribes the procedures required to put expert evidence before the court "at the trial of an action or hearing of an application in court". *Rule* 55.02 prescribes: "A party may not offer an expert opinion at the trial of an action or hearing of an application in court unless an expert's report, or rebuttal expert's report, is filed in accordance with this Rule" (emphasis added).

[9] On a motion for summary judgment, responding parties must put their best foot forward with admissible evidence to show that there is an issue of material fact. A "material fact" is one that would affect the result at trial: *Shannex Inc. v. Dora Construction Ltd.*, 2016 NSCA 89, at paras. 34-36.

[10] The *Civil Procedure Rules* do not contain any prescription on the use of expert evidence on a motion. *Rule* 22.15 addresses the rules of evidence on a motion:

> (1) The rules of evidence apply to the hearing of a motion, including the affidavits, unless these Rules or legislation provides otherwise.
>
> (2) Hearsay not excepted from the rule of evidence excluding hearsay may be offered on any of the following motions:
>
> (a) an *ex parte* motion, if the judge permits;
>
> (b) a motion on which representations of fact, instead of affidavits, are permitted, if the hearsay is restricted to facts that cannot reasonably be contested;
>
> (c) a motion to determine a procedural right;
>
> (d) a motion for an order that affects only the interests of a party who is disentitled to notice or files only a demand of notice, if the judge or the prothonotary hearing the motion permits;
>
> (e) a motion on which a Rule or legislation allows hearsay.
>
> (3) A party presenting hearsay must establish the source, and the witness' belief, of the information.
>
> (4) A judge, prothonotary, commissioner, or referee may act on representations of fact that cannot reasonably be contested.

[11] As stated by Justice Cromwell, writing for the court in *White Burgess*, *Rule* 55 "does not change the rules of evidence by which expert opinion is determined to be admissible or inadmissible."

[12] Allsteel argues that any expert report filed on the motion must satisfy *Rule* 55 because any evidence that a trial judge cannot admit cannot be material. With

respect, I disagree with this logic. The judgment of Fichaud J.A. in *Shannex* stated, in para. 34:

> …
>
> The moving party has the onus to show by evidence there is no genuine issue of material fact. But the judge's assessment is based on all the evidence from any source. If the pleadings dispute the material facts, and the evidence on the motion fails to negate the existence of a genuine issue of material fact, then the onus bites and the judge answers the first question Yes. …
>
> [emphasis added]

[13] The duty of a party responding to a motion for summary judgment is to put their best foot forward. At para. 36 of *Shannex*, Justice Fichaud explains what it means for a party responding to a motion for summary judgment to "put his best foot forward":

> [36] **"Best foot forward":** Under the amended Rule, as with the former Rule, the judge's assessment of issues of fact or mixed fact and law depends on evidence, not just pleaded allegations or speculation from the counsel table. Each party is expected to "put his best foot forward" with evidence and legal submissions on all these questions, including the "genuine issue of material fact", issue of law, and "real chance of success": Rules 13.04(4) and (5); *Burton*, para. 87.

[14] It is not for the court at the summary judgment motion to decide the issue of material fact, only identify that one exists. Expert evidence proffered at the summary judgment motion may show a genuine issue of material fact exists without being conclusive on the issue. This is because, as is the situation in this proceeding, discovery examinations may not have been held or completed, and additional evidence may be required to obtain a report that is compliant with *Rule* 55.

[15] This court has previously held that *Rule* 55 does not apply to interlocutory motions: *Layes v. Bowes*, 2020 NSSC 345, aff'd 2021 NSCA 50 (without discussion on this point). A motion for summary judgment is an interlocutory motion. There is nothing in the summary judgment Rule that distinguishes it for the purpose of considering expert opinion evidence.

[16] I note that the motion before the court in Nova Scotia that led to the Supreme Court of Canada decision in *White Burgess* was a motion for summary judgment. On a preliminary evidentiary ruling, the motion judge struck the affidavit on the basis that the expert was biased. On appeal to the Nova Scotia Court of Appeal, the

majority held that the motion judge erred in law in finding the expert evidence inadmissible. The Supreme Court of Canada decision concluded with the following finding, at para. 62:

> [62] There was no basis disclosed in this record to find that Ms. MacMillan's evidence should be excluded because she was not able and willing to provide the court with fair, objective and non-partisan evidence. I agree with the majority of the Court of Appeal who concluded that the motions judge committed a palpable and overriding error in determining that Ms. MacMillan was in a conflict of interest that prevented her from giving impartial and objective evidence: paras. 136-50.

[17] The matter was returned to the Supreme Court of Nova Scotia for decision on the summary judgment motion: *Abbott and Haliburton Co. Ltd. v. White Burgess Langille Inman*, 2018 NSSC 47. Ms. MacMillan's affidavit was considered on the motion. She was cross-examined on the affidavit. Justice Smith granted summary judgment for the defendants, stating in part:

> [131] The Plaintiffs were obliged to put their best foot forward by leading evidence to demonstrate that there are material issues of fact and law which require a trial. They provided the evidence of Ms. MacMillan as to standard of care, but led no evidence on duty of care, causation or loss – all necessary elements to succeed at trial in a negligence claim.

[18] No level of court in *White Burgess* raised any concern with expert affidavit evidence being used on the summary judgment motion.

[19] Richard Tse is a civil engineer and has experience in the design, manufacture and installation of insulated metal panels. His affidavit, filed January 17, 2025, attaches at Exhibit "B" a draft report. He attests that the findings, opinions and conclusions expressed in the Draft Report are true and that a final copy of the report will be commissioned by counsel for SPI following the discovery examinations in the proceeding.

[20] No objection was taken to Mr. Tse's affidavit or draft report based on its admissibility under the rules of evidence. Mr. Tse was not cross-examined. I am satisfied that Mr. Tse's affidavit and draft report are admissible on the *White Burgess* test. I find that its probative value outweighs any prejudice, it is necessary to assist me on the motion, it is reliable and there is no evidence of bias.

[21] The affidavit of Nick Bain filed by SPI on January 17, 2025, attaches a memorandum of Mr. Bain's observations during his visits to the Woodbine site in

October 2016. Mr. Bain draws certain inferences from those observations that relate to the reasonableness of the installation practices and the technical cause of the damage to the panels (the "Bain Memo"). For example, "it was concluded that the overall quality of material supplied by (SPI) for this project is more than acceptable", and "these installation practices could both individually and cumulatively cause damage to Rockwell panels that may not be apparent until the panel has gone through a full thermal cycle".

[22] Further, para. 9 of Mr. Bain's affidavit is opinion evidence because it draws an inference from technical expertise regarding the impact of panel specifications on installation difficulty.

[23] The Bain Memo contains opinion evidence that does not meet the *White Burgess* test. There is not evidence before the court upon which to qualify Mr. Bain as an expert. He had not provided the court with any undertaking that his opinions are impartial, independent and unbiased. While the factual observations made in the Bain Memo are admissible, the opinions are not and will not be considered by me in determining this motion.

[24] The affidavit filed by SPI on January 17, 2025, from Kyle Rogers also attaches the Bain Memo and at para. 12 of the affidavit endorses the findings and recommendations contained in it. This is also improper opinion evidence for the same reasons.

Facts

[25] On March 30, 2016, Eascan contracted with SPI to manufacture interior and exterior insulated metal wall panels for use on and in the Maritime Link Converter Station in Woodbine, Nova Scotia. The specifications for the wall panels were provided to SPI by Eascan. On May 30, 2016, Allsteel accepted a purchase order from Eascan to install exterior insulated panels at the converter station.

[26] Discussions between Allsteel, Eascan, and SPI about the installation of the SPI panels at the Woodbine site began in early August 2016. Between August 2 and September 21, 2016, Allsteel communicated with Eascan and SPI about the method of installation they intended to use, which involved a vacuum suction lifting apparatus referred to as a "CladBoy". Allsteel was provided with materials from SPI which recommended suction devices be used in the installation.

[27] The first full length wall panels were installed on the Woodbine converter building in late September 2016. They were installed using the CladBoy. On September 30, 2016, personnel on site noticed the appearance of deformities on the outside surface of certain panels, which resembled rippling or bubbling in the exterior material. There is disagreement about whether the deformities are aesthetic only or impact on the structural and functional integrity of the panels.

[28] These same deformities were observed at the converter station being constructed at Bottom Brook, Newfoundland, where the SPI panels were being installed by Central Erectors Inc. Allsteel did not install any panels for approximately one week after the deformities were first noticed on September 30, 2016.

[29] On October 7, 2016, new installation instructions were provided by Eascan to Allsteel. These instructions involved lifting future panels into place using metal channel stiffeners on either side of the panel to brace them during the lifting process. Allsteel began hoisting panels according to these new instructions, but similar deformities occurred. After the new installation method proved unsuccessful, Allsteel was left to standby and await further instructions.

[30] After approximately two weeks of further standby, Allsteel was provided with additional instructions for installation on October 19, 2016. Allsteel followed these instructions, but the SPI panels continued to exhibit the same deformity. Allsteel personnel observed that the deformity to the SPI panels appeared to occur when the panels were exposed to sunlight, which was not noticeable immediately upon installation. Panels which had been installed but not yet exposed to sunlight generally would not display any issues.

[31] On November 16, 2016, SPI issued a memorandum which offered an explanation as to why the deformity occurred upon sunlight exposure. The explanation, which read as follows, attributed the deformity to manufacturing, not installation practices, and suggested that it is purely aesthetic in nature:

> As a result of the combination of the dark steel and external fastening method, the panel is unable to properly thermally bow and retract resulting in a bunching of steel due to over stressing of the steel. The subsequent crease is a result of the steel having no area to expand and cannot be absorbed by the mineral fiber cores bow. Although aesthetically unpleasing, the structural integrity remains intact as the ripple accounts for a very small portion of the overall panel…

[32] Kyle Rogers, President of SPI and author of the memorandum, attests in his affidavit that he did not intend this memorandum to suggest that the distortions present in the panels could not have been caused by Allsteel's installation practices, rather, his intention was to propose remedial measures to address the distortion concerns which would lessen the impact of damage caused to the panels on installation.

[33] On November 21, 2016, correspondence from MasTec again referenced that the same deformities were occurring at the Bottom Brook site in Newfoundland and noted that MasTec was considering abandoning the SPI panels in favour of the Kingspan panels that Allsteel initially believed would be used for the job.

[34] On November 24, 2016, MasTec terminated its contract with Eascan because of concerns with the "long term reliability" of the panels, the "delamination / bucking defects" in panels at both the Woodbine and Bottom Brook jobsites, and associated construction schedule delay.

[35] On November 28, 2016, MasTec placed a purchase order with Kingspan for insulated panels to be used at the Woodbine and Bottom Brook jobsites instead of the SPI panels. On January 26, 2017, MasTec officially approved a purchase order for Allsteel to directly handle the installation of the Kingspan panels at the Woodbine site.

Summary Judgment

[36] Summary judgment on evidence in an action is governed by *Rule* 13.04. Under *Rule* 13.04(1), summary judgment must be granted when a judge is satisfied that: (1) there is no genuine issue of material fact for trial of the claim or defence, and (2) the claim or defence requires determination only of a question of law and a judge exercises the discretion provided in *Rule* 13.04 to answer the question.

[37] The law of summary judgment in this province has been the subject of extensive analysis by this court and the Court of Appeal. The test on a motion for summary judgment on the evidence was articulated by Justice Fichaud in *Shannex, supra*. This framework was recently confirmed and applied in *Arguson Projects Inc. v. Gil-Son Construction Limited*, 2023 NSCA 72, at paras. 33-42.

Analysis

Shannex Question 1: Does the challenged pleading disclose a genuine issue of material fact, either pure or mixed with a question of law?

[38] As stated above, a material fact is one that would affect the result. The moving party has the onus to show by evidence that there is no genuine issue of material fact. If the pleadings dispute the material facts, and the evidence on the motion fails to negate the existence of a genuine issue of material fact, then the onus bites and the judge answers the first question "Yes".

[39] It is the evidence on the motion that must be considered to determine if there is a dispute of material fact. Bald assertions in an affidavit without more in terms of an evidentiary foundation will not give rise to a dispute of material fact.

[40] Here, SPI and Eascan allege that Allsteel failed to follow the manufacturer's instructions and industry standards in relation to the installation of the metal wall panels causing or contributing to the deformities. Allsteel says that the factual landscape invites the commonsense inference that Allsteel had nothing to do with the deformities in the panels and there is no expert evidence to suggest otherwise.

[41] With respect, I disagree. Determining what caused the deformities in the metal wall panels is a clear genuine issue of material fact. A judge on a summary judgment motion can only draw an inference of fact based on undisputed facts before the court and if the inference is strongly supported by the facts: *Fares Construction Limited v. Lead Structural Formwork Limited*, 2024 NSSC 52.

[42] The cause of the deformities in the panels must be determined before the court can decide, by inference or otherwise, whether such cause would have occurred but for any act or omission by Allsteel.

[43] The admissible affidavit evidence establishes, beyond mere bald assertions, that there are disputes of fact about whether Allsteel performed its work properly and followed the manufacturer's (SPI's) instructions when installing the metal panels. The admissible factual observations contained in the Bain Memo are that a review of the installation process disclosed that several manufacturer's recommended practices were being overlooked. For example, the crew did not spin the panel to minimize the suction bond between panels as stated in the manufacturer recommendations. Even when this procedure and the reason for it was explained to the crew, it was not implemented by the crew.

[44] Richard Tse opines that the handling and installation practices of Allsteel, as observed by Mr. Bain and described in his memo, likely stressed the panels.

[45] There is clearly conflicting evidence as to whether Allsteel followed the recommended manufacturer's instructions for proper installation of the panels. There is conflicting evidence as to whether the deformities are aesthetic or structural and there is a clear dispute of fact as to what caused the deformities. These are genuine material disputed facts relevant to determining if Allsteel breached its contract or was negligent.

[46] As stated in *Arguson*, at the *Shannex* question 1 stage, I am to look at facts that stand on their own but relate to causation. Here, there are clear disputes of fact which, when placed in the context of the pleadings, lead to a dispute over causation. I am not permitted on this motion to undertake any qualitative or quantitative analysis of the evidence or weigh the sufficiency of the facts, whether they are disputed or otherwise. The question is whether there is a genuine issue of material fact. If there is, I must conclude that summary judgment is not available: *Burton Canada Company v. Coady*, 2013 NSCA 95, at para. 33.

[47] The onus is on Allsteel to show by evidence that there is no genuine issue of material fact. They have failed to do so. The motion for summary judgment fails at stage 1.

Conclusion

[48] The motion is dismissed with costs payable to the Respondents. If the parties cannot agree on costs, I direct that they provide me with their written submissions within three weeks of this decision.

Norton, J.