**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Canadian National Railway Company v. Halifax (Regional Municipality)*, 2013 NSSC 307

**Date:** 20131001
**Docket:** Hfx. No. No. 358564
**Registry:** Halifax

**Between:**

Canadian National Railway Company, a corporation incorporated under the laws of Canada having its head office at 935 de la Gauchétiere Street West, Montreal, Quebec

Applicant

v.

Halifax Regional Municipality, a statutory body duly incorporated under the laws of the Province of Nova Scotia

Respondent

**Judge:** The Honourable Justice Arthur LeBlanc

**Heard:** May 6 and 7, 2013, in Halifax, Nova Scotia

**Counsel:** Dennis J. James and Melissa P. MacAdam, for the Applicant
Michael Donovan, Q.C., for the Defendant

**By the Court:**

**Introduction**

[1] This is an application brought by Canadian National Railway for a declaration respecting the interpretation of an agreement between it and the respondent, Halifax Regional Municipality.

[2] The parties met and negotiated a contract that set out their respective responsibilities for the repair and maintenance of the railway bridges in HRM. When they attempted to implement the agreement, it quickly became apparent that the parties had very different interpretations of its contents. CN now asks this Court to determine the extent to which each of the parties is obligated under the agreement to provide subsurface layers of fill, to coordinate the relocation of utility lines, and to pay for the construction of temporary traffic control structures.

**Background**

[3] There are twelve reinforced concrete railway bridges carrying roads over CN tracks in the Halifax Regional Municipality. Constructed in 1916, several of these structures are crumbling and in need of repair.

[4] There has never been a formal agreement in place between CN and HRM concerning the repair and maintenance of the railway bridges. In 2008, CN applied

to the Canadian Transportation Agency for an order establishing the parties' respective responsibilities. The matter was referred to CTA's mediation services with the consent of the parties.

[5] On September 10, 2008, the parties met to negotiate a Maintenance and Repair Agreement. Two days later, a representative of HRM prepared and circulated a draft of the proposed terms agreed upon at the meeting. In the months that followed, further drafts were exchanged and the terminology refined until the agreement was executed on March 16, 2009.

[6] At the time of execution, the agreement provided that CN would bear 100% responsibility for the maintenance of the superstructure and substructure of the bridges, which comprised the foundation, supports, arch and concrete box that forms the bridge structure. HRM would bear 100% responsibility for the "road and roadworks" of the bridges, which comprised the "asphalt, sidewalks, curbs, lighting, as well as the subsurface layers to the surface of the arch."

[7] The following year, CN prepared a cost estimate for work to be done on the South Street, Tower Road and Jubilee Road Bridges. Costs were allocated according to CN's interpretation of the agreement.

[8] HRM disagreed with the estimate on the basis that it did not properly reflect the terms of the agreement.

## The Agreement

[9] The relevant provisions of the agreement are laid out as follows:

> 2.1 CN is responsible for 100% of the maintenance of the superstructure and substructure of the bridges. This comprises the foundation, supports, arch and concrete box that forms the bridge structure. The substructure and superstructure component includes maintenance responsibility for basic handrails which meet required safety standards at the time of initial construction or at the time of required replacement of the handrails due to their condition. Any upgrade of the handrails for aesthetic or other purposes, at the request of HRM, is the responsibility of HRM.
>
> 2.2 HRM is responsible for 100% of the maintenance of the road and road works that pass over these bridges. The road and road works comprises the asphalt, sidewalks, curbs, lighting, as well as the subsurface layers to the surface of the arch.
>
> 2.3 If it is determined by CN that a protective membrane is required on the surface of a bridge arch to better control drainage, costs for supply and installation of such a membrane will be split 50/50 between the Parties.
>
> …
>
> 2.6 Unless CN and HRM agree that traffic volumes are such that road closure and detour routing can be arranged, either for the duration of the work or for certain periods of the day or week, responsibility for traffic control costs is based on the assumption that half of the existing travelled lanes will remain open and that there will be no interference with traffic in those lanes during peak hours. Traffic control costs that result will be split proportionally between the Parties to reflect the relative value of the total project cost that each party bears in respect of that portion of the repair work undertaken which requires traffic control.

## The Position of the Parties

[10] According to CN, section 2.1 of the agreement makes CN responsible for the outside, structural part of the bridge. Section 2.2 makes HRM responsible for the inside of the bridge, consisting of the two layers of gravel or "fill" inside the structure and the road.

[11] The first layer below the asphalt is known as granular base fill and stops at the point that the apex of the arch surface is reached. The second or bottom layer, known as general fill, covers the remainder of the arch surface. In CN's view, the words "subsurface layers to the surface of the arch" in section 2.2 require HRM to cover the entire arch surface with fill. This interpretation would make HRM responsible for providing both the granular base fill and the general fill.

[12] HRM's position is that the words "subsurface layers to the surface of the arch" are ambiguous, and that the true meaning of the words is ascertainable only through consideration of extrinsic evidence. According to HRM, evidence of the negotiations between the parties would demonstrate that the language used was intended to obligate HRM to provide the fill only to the point that the surface at the apex of the arch is reached. This would limit HRM's responsibility to the layer of granular base fill. Responsibility for the layer of general fill that covers the remainder of the arch surface would fall to CN.

[13] The difference in the parties' positions is perhaps best understood by reference to a diagram prepared by CN's expert, Nigel Peters, P. Eng, and attached to this decision as "Appendix A". In this diagram, a horizontal line cuts through the length of the bridge structure. This line comes into contact with the arch surface at its apex. According to HRM, its responsibility is limited to providing

the granular base fill that rests above this line. In CN's view, HRM is also responsible for providing all of the general fill located below the line.

[14] In the event that I conclude that the words "subsurface layers to the surface of the arch" are ambiguous and, after considering extrinsic evidence, I am still unconvinced as to their meaning, HRM asks that I apply the doctrine of contra proferentum against CN or that I sever section 2.2 from the agreement on the basis that there was no consensus ad idem.

[15] The correct interpretation of "subsurface layers to the surface of the arch" is not the only contentious issue between the parties. There is also a difference of opinion as to which party is required to arrange for the temporary relocation of utilities that run below the asphalt. The responsible party would bear the upfront cost of temporary relocation and seek reimbursement from the owners of the various lines.

[16] HRM takes the position that because the issue of responsibility for temporary relocation of utilities is not explicitly addressed by the agreement, the issue is not properly before the Court.

[17] CN says that the Court can consider the issue of responsibility for relocation of utilities because the utilities are located within the subsurface layers

referred to in section 2.2 of the agreement, and the intent of the agreement was to delineate the respective maintenance obligations in respect of these structures.

[18] The final issue concerns the cost of construction of temporary structures required to accommodate pedestrian and vehicular traffic in the event that road closure is required.

**Issues**

(1) What is the extent of HRM's responsibility pursuant to section 2.2 for subsurface layers?
(2) What is the proper allocation of responsibility for temporary relocation of utilities during construction and maintenance?
(3) What is the proper allocation of responsibility for temporary traffic control structures?

**Law & Analysis**

**Interpretation of Section 2.2 – HRM's Responsibility for Subsurface Layers**

[19] In Eli Lilly & Co. v. Novopharm Ltd., [1998] SCJ No 59, Justice Iacobucci set out the proper approach to contractual interpretation:

> 54 The trial judge appeared to take Consolidated-Bathurst to stand for the proposition that the ultimate goal of contractual interpretation should be to ascertain the true intent of the parties at the time of entry into the contract, and that, in undertaking this inquiry, it is open to the trier of fact to admit extrinsic evidence as to the subjective intentions of the parties at that time. In my view, this approach is not quite accurate. The contractual

> intent of the parties is to be determined by reference to the words they used in drafting the document, possibly read in light of the surrounding circumstances which were prevalent at the time. Evidence of one party's subjective intention has no independent place in this determination.
>
> 55 Indeed, it is unnecessary to consider any extrinsic evidence at all when the document is clear and unambiguous on its face. … [Emphasis added]

Justice Iacobucci continued:

> 56 When there is no ambiguity in the wording of the document, the notion in Consolidated-Bathurst that the interpretation which produces a "fair result" or a "sensible commercial result" should be adopted is not determinative. Admittedly, it would be absurd to adopt an interpretation which is clearly inconsistent with the commercial interests of the parties, if the goal is to ascertain their true contractual intent. However, to interpret a plainly worded document in accordance with the true contractual intent of the parties is not difficult, if it is presumed that the parties intended the legal consequences of their words. [Emphasis added]

[20] According to *Eli Lilly*, the first step is to determine whether the words "subsurface layers to the surface of the arch" are clear and unambiguous. In reaching this conclusion, the words are not to be considered in isolation. They must be considered in the context of the contract as a whole: *B.C. Checo International Ltd. v. British Columbia Hydro and Power Authority*, 1993 CanLII 145, [1993] 1 SCR 12 (SCC).

[21] In *BC Rail Partnership v. Standard Car Truck Co.*, 2009 NSSC 240, Warner, J. adopted the following useful definition of "ambiguity":

> **24 Canadian Encyclopedic Digest Contracts IX.2(a)** succinctly notes:
>
> s. 562 "**Ambiguity**" is a term of art, which refers neither to uncertain breadth of language, nor to an inaccuracy, a novel result, or a difficulty in interpretation, nor to clear contractual wording that does not say what one of

> the parties intended it to say. An ambiguous contractual provision is one that is reasonably capable of more than one meaning .... "**ambiguity**" implies that the parties knew fundamentally what they were contracting for or about, but did not express it clearly ....
>
> s. 563 Correspondingly, a cardinal principle of contractual interpretation is that, if the language of a contract is capable of only one meaning, read objectively in the context of the contract as a whole and its surrounding circumstances, the court is required to give effect to that meaning. A court will not resort to subsidiary rules of construction or interpretation unless the words used by the parties are reasonably capable of more than one meaning.

[22] As G.H.L. Fridman notes in *The Law of Contract in Canada*, 6th ed (Toronto: Carswell, 2011) at 442-3:

> …[W]here the contract as written is ambiguous, extrinsic evidence can be admitted to resolve such ambiguity. But the court should not strain to create an ambiguity that does not exist. It must be an ambiguity that exists in the language as it stands, not one that is itself created by the evidence that is sought to be adduced. [Emphasis added]

[23] CN says that the words "subsurface layers to the surface of the arch" mean the layers that rest along the entire surface of the curved structure. HRM says that the words have a narrower meaning and its maintenance obligation for fill is met when the highest point, or apex, of the surface of the arch is reached. In my view, when read in the context of the entire section, the words "subsurface layers to the surface of the arch" are clear and unambiguous. Contrary to the position advanced by HRM, there is nothing in the language that narrows or limits the surface of the arch to its apex.

[24] Nor are the words ambiguous when read in the context of the entire contract. The "surface" of an "arch" appears again in section 2.3 of the agreement. In that section, the parties agree that if a protective membrane is required "on the surface of a bridge arch", the cost of the membrane and its installation will be split evenly between the parties. The parties do not dispute that this section requires the membrane to be applied to the entire surface of the arch.

[25] In its submissions, HRM asserts that there is a significant difference between responsibility for what is on the surface of the arch and a responsibility that extends only to the surface of the arch. I disagree. The interpretation of section 2.2 advanced by HRM presumes that when descending from the asphalt to determine HRM's responsibility for subsurface layers, the only relevant point of reference is the centre of the structure. This presumption is unsupported by the actual language used in the agreement. The words chosen by the parties are not reasonably capable of the meaning ascribed to them by HRM.

[26] Since I have decided that the meaning of the words section 2.2 is unambiguous, I need not consider extrinsic evidence, the doctrine of contra proferentum, or the issue of failure to achieve *consensus ad idem*.

**Allocation of Responsibility for Temporary Relocation of Utilities**

[27] The repairs to the road and roadworks contemplated by the parties will require temporary relocation of utility lines that run beneath the asphalt. The cost of relocation will ultimately be borne by the owner of the utility but it will be necessary for one of the parties to coordinate with the various agencies and to pay the upfront cost of relocation.

[28] The temporary relocation of utilities is not specifically addressed in the agreement. CN's position is that HRM's responsibility for coordinating the relocation of the lines is implicit in its obligation under section 2.2 to maintain and repair the road and roadworks that contain the utility lines. HRM disagrees.

[29] The law has long recognized that parties to a contract will not always succeed in committing every aspect of their agreement to writing. Accordingly, in limited circumstances, the Court may imply a term or terms into a contract in order to give efficacy to the agreement of the parties. In this case, CN asks that I imply a term requiring HRM to assume responsibility for coordinating relocation of the utility lines.

[30] The Supreme Court of Canada outlined the three ways that a term may be implied into a contract in *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.* [1999] SCJ No 29:

> **27** The second argument of the appellant is that there is an implied term in Contract A such that the lowest compliant bid must be accepted. The general principles for finding an implied contractual term were outlined by this Court in *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711. Le Dain J., for the majority, held that terms may be implied in a contract: (1) based on custom or usage; (2) as the legal incidents of a particular class or kind of contract; or (3) based on the presumed intention of the parties where the implied term must be necessary "to give business efficacy to a contract or as otherwise meeting the 'officious bystander' test as a term which the parties would say, if questioned, that they had obviously assumed" (p. 775). See also *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, at para. 137, *per* McLachlin J., and *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at p. 1008, *per* McLachlin J. [Emphasis added]
>
> > **29** As mentioned, LeDain J. stated in Canadian Pacific Hotels Ltd., supra, that a contractual term may be implied on the basis of presumed intentions of the parties where necessary to give business efficacy to the contract or where it meets the "officious bystander" test. It is unclear whether these are to be understood as two separate tests but I need not determine that here. What is important in both formulations is a focus on the intentions of the actual parties. A court, when dealing with terms implied in fact, must be careful not to slide into determining the intentions of reasonable parties. This is why the implication of the term must have a certain degree of obviousness to it, and why, if there is evidence of a contrary intention, on the part of either party, an implied term may not be found on this basis. As G. H. L. Fridman states in The Law of Contract in Canada (3rd ed. 1994), at p. 476:
> >
> > > In determining the intention of the parties, attention must be paid to the express terms of the contract in order to see whether the suggested implication is necessary and fits in with what has clearly been agreed upon, and the precise nature of what, if anything, should be implied. [Emphasis added]

[31] In *Whitehall Holdings Ltd. v. Hawboldt Metal Fabricators Inc.* (1987), 78 NSR (2d) 346 (NSSCAD), Pace, J.A. adopted the following statement by Lord Pearson in *Trollope & Colls v. North West Metropolitan Regional Hospital Board*, [1973] 2 All ER 260 at p. 268:

> The court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other terms would have been more suitable. An unexpressed term can be implied if and only if the court finds that the parties must have

> intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, although tacit, formed part of the contract which the parties made for themselves.

[32] Courts should be slow to exercise the power to imply terms in a contract: *K.W. Robb & Associates Ltd. v. Wilson*, [1998] NSJ No 249 (NSCA) at para. 73. The court will only imply a term where it is "reasonable, necessary, capable of exact formulation, and clearly justified having regard to the intentions of the parties when they contracted": G.H.L. Fridman, *supra* at 466-7.

[33] Unless the issue of relocation of the utilities is addressed, the parties will remain at a standstill. Without relocation of these lines, HRM is unable to fulfill its responsibilities under the contract and the bridges will remain in a state of disrepair. After careful consideration of the express terms of the contract, and in light of my conclusion that HRM is responsible under the agreement for both subsurface layers of fill, I am satisfied that implication of a term requiring HRM to coordinate relocation of the utility lines is consistent with the division of responsibility agreed upon between the parties, and is necessary to give efficacy to the agreement.

**Allocation of Responsibility for Temporary Traffic Control Structures**

[34] The final issue to be decided pertains to responsibility for the cost of temporary traffic control structures in the event that road closure is required. There was some confusion as to CN's position on this issue. In its written submissions, CN referred to a suggestion made by a representative of HRM that the cost of temporary traffic control structures be split along the same percentage as set out in section 2.6 of the agreement. CN denies that it has any responsibility under the agreement for temporary traffic control structures and asks for a declaration to this effect.

[35] There was no evidence presented as to who made the alleged suggestion on behalf of HRM referred to by CN, and HRM denies that any such suggestion represents its position. For its part, HRM agrees that the cost of temporary traffic control structures is not addressed in the agreement and asks that the Court refuse to deal with the issue.

[36] The law has long recognized that the power to imply terms into a contract must not be used by the Court to rewrite a contract for the parties. As Lord Atkin observed in Bell v. Lever Brothers, Ltd., [1931] All ER Rep 1, [1932] AC 161 at 32:

> Nothing is more dangerous than to allow oneself liberty to construct for the parties contracts which they have not in terms made by importing implications which would appear to make the contract more business-like or more just.

[37] More recently, Cory, J.A. (as he then was) noted in *G. Ford Homes Ltd. v. Draft Masonry (York) Co. Ltd.* (1983), 43 OR (2d) 401:

> **9** When may a term be applied on a contract? A Court faced with that question must first take cognizance of some important and time-honoured cautions. For example, the Courts will be cautious in their approach to implying terms to contracts. Certainly a Court will not rewrite a contract for the parties. As well, no term will be implied that is inconsistent with the contract. Implied terms are as a rule based upon the presumed intention of the parties and should be founded upon reason. The circumstances and background of the contract, together with its precise terms, should all be carefully regarded before a term is implied. As a result, it is clear that every case must be determined on its own particular facts.
>
> [Emphasis added]

[38] I am satisfied that the parties did not turn their minds to allocation of responsibility for the cost of traffic control structures when drafting the agreement. The application of the cost sharing formula set out in section 2.6 is strictly limited to situations in which one lane of traffic remains open. The implication of a term assigning responsibility for the cost of temporary traffic control structures in the absence of evidence that the parties intended for such a term to form part of the agreement would be an inappropriate exercise of judicial power. The law is clear that the Court must not rewrite a contract for the parties. In the event that closure of both lanes of traffic is deemed necessary to effect repairs to a bridge structure,

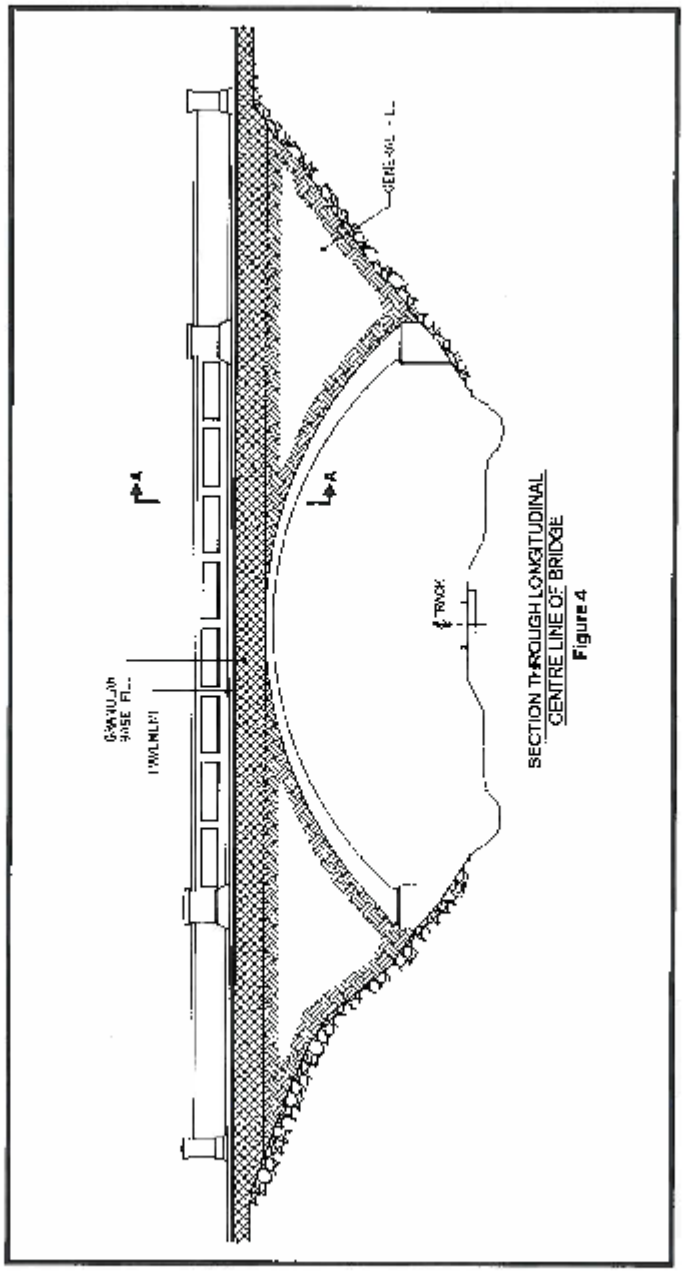
the parties will have no choice but to return to the negotiating table to resolve any traffic control issues that arise as a result.

**Conclusion**

[39] The respondent is responsible under the agreement for providing both subsurface layers of fill and for coordinating the temporary relocation of all utility lines contained within the fill. The applicant is entitled to its costs. If the parties cannot agree, I will accept written submissions.

LeBlanc J.

# APPENDIX "A"


SECTION THROUGH LONGITUDINAL
CENTRE LINE OF BRIDGE
Figure 4