CITATION: Bombardier Transportation Canada Inc. v. Metrolinx, 2017 ONSC 2372
COURT FILE NO.: CV-17-11692-00CL
DATE: 20170419

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
BOMBARDIER TRANSPORTATION CANADA INC.	)	*John E. Callaghan, Michael Watson, Sandra Barton, Laurent Massam* and *Julia Vizzaccaro* for the Applicant
Applicant	)	
	)	
– and –	)	
	)	
METROLINX and JEFFREY RANKIN	)	*Chris G. Paliare, Kris Borg-Olivier* and *Denise Cooney* for the Respondent Metrolinx
Respondents	)	
	)	*Peter Wardle* and *Iris Graham* for the Respondent Jeffrey Rankin
	)	
	)	**HEARD:** March 21 and 31, 2017

HAINEY J.

REASONS FOR DECISION

OVERVIEW

[1] In 2010, Bombardier Transportation Canada Inc. ("BTC") entered into a $770 million contract ("Contract") with Metrolinx ("MTX") to design and supply 182 light rail vehicles ("LRVs") for Toronto's Transit City plan. Delivery of the LRVs is scheduled to start in 2018 and is to continue over a period of many years.

[2] In July 2016, MTX claimed that BTC was in material default under the Contract. The respondent, Jeffrey Rankin, who is the Engineer under the Contract, served BTC with a Notice of Default. BTC disputes that it is in material default and has assured MTX that it will deliver the LRVs in accordance with the revised delivery schedule agreed to by the parties.

[3] MTX maintains that BTC is in material default under the Contract because of its "persistent inability to deliver on its contractual obligations". It cites, as one example, BTC's failure to deliver a "Pilot Vehicle" to MTX by April 2015, as required by the Contract. To date, BTC has not delivered the Pilot Vehicle.

[4] According to MTX, it has repeatedly warned BTC of its concerns about BTC's performance and delays, yet BTC has failed to take any meaningful corrective action. As a result, MTX claims that it had "no realistic choice" but to deliver a notice of its intention to terminate the Contract and begin to prepare contingency plans to move forward with another supplier.

[5] The Contract contains a mandatory multi-step dispute resolution process culminating in an arbitration before a specialized Dispute Review Board ("DRB"). BTC has challenged the validity of the Engineer's Notice of Default by invoking the dispute resolution process. To date, BTC has followed all of the required steps under that process and submits that the validity of the Notice of Default should be determined by the DRB before MTX can terminate the Contract for material default.

[6] MTX maintains that the dispute resolution process in the Contract does not apply to its right to terminate the Contract for material default. MTX has threatened to terminate the Contract for material default and proceed with another supplier before the validity of the Notice of Default can be determined under the dispute resolution process.

[7] In this application, BTC seeks an interlocutory injunction maintaining the *status quo* between BTC and MTX and requiring MTX to follow the dispute resolution process in the Contract to determine the validity of the Notice of Default before MTX can terminate the Contract for material default. BTC is also seeking an order to remove Mr. Rankin as the Engineer under the Contract on the ground that he has not acted impartially and to enjoin him from taking any further steps under the Contract.

FACTS

Parties

[8] MTX is an Ontario government agency created for the purpose of improving the coordination and integration of all modes of transportation in the Greater Toronto and Hamilton areas. MTX is currently building the largest transit infrastructure project in Canadian history as part of a long-term strategic plan for an integrated, multi-modal, regional transportation system in Ontario. MTX is undertaking this project in collaboration with Ontario's municipalities and the provincial and federal governments.

[9] BTC is a multinational vehicle manufacturing firm. BTC has previously manufactured and delivered LRVs for a number of European cities. In North America, BTC is introducing, for the first time, a different type of LRV product. It plans to supply this product to MTX and other North American customers.

[10] As indicated above, Mr. Rankin, who is employed by an outside consulting firm, is the Engineer under the Contract. Mr. Rankin has a dual role as the Engineer. His first role is to represent MTX in the administration of the Contract, with the exclusive authority to provide instructions to BTC on behalf of MTX. He reports to senior management at MTX with respect to the project, including providing regular briefings, progress assessments and communications regarding deficiencies under the Contract. In his second role, Mr. Rankin acts as an impartial

decision-maker between MTX and BTC with respect to the requirements under the Contract. In this role he makes decisions and determinations and he renders opinions as required by the Contract. When he performs this second role, the Contract requires that he "not show partiality to either party."

Key Contractual Provisions

[11] The Contract consists of a number of documents. The key provisions are set out in the Articles of Agreement and the General Conditions ("GCs"). For the purpose of this application, the key contractual provisions can be summarized as follows:

(a) *Role and responsibilities of the Engineer* (GC 8): The Engineer represents MTX and has the authority to act on behalf of MTX to the extent provided in the Contract. MTX is obligated to issue its instructions to BTC in relation to the Contract work through the Engineer. The Engineer is obligated to act as MTX's agent in performing this role. Separately, the Engineer also has the authority to make decisions in relation to approving work, deciding questions relating to the performance of the work, and interpreting the Contract. In making those determinations, the Engineer is not to show partiality to either BTC or MTX.

(b) *Default by BTC* (GC 10): If the Engineer forms the opinion that BTC is in default of its obligations under the Contract, he may notify BTC in writing of the default and instruct BTC to correct the default. BTC has seven business days in which to either cure the default, or to commence corrective work and provide MTX with a schedule acceptable to the Engineer for the correction of the default.

(c) *Termination for Default* (GC 12): This provision sets out the process by which MTX may terminate the Contract by reason of BTC's default, as follows:

(i) *Definition of material default* (GC 12.1): This provision defines the circumstances in which BTC will be in material default of the Contract, including the following:

1) failure or refusal to proceed with the work with due diligence;

2) continual or repeated refusal or failure to supply sufficient skilled workers, or products, plant or equipment of the proper quality or quantity;

3) disregard for or failure to comply with the instructions of the Engineer; and

4) failure to perform any obligation under the Contract.

(ii) *Notice of Default* (GC 12.2): This provides that in the event BTC is in material default of the Contract as outlined in GC 12.1, the Engineer may serve written notice specifying the default in accordance with GC 10 and instructing BTC to correct the default;

(iii) *Notice of intention to terminate the Contract* (GC 12.3): This provides that if, within seven days of service of the Notice of Default, BTC fails either to correct the material default, or to commence correction of the default and provide an acceptable schedule for the correction, MTX may serve BTC with a written notice of intention to terminate the Contract;

(iv) *Termination* (GC 12.4): This provides that MTX may serve BTC with a notice of termination if:

1) within seven days of service of the notice of intention to terminate the Contract, the material default continues or BTC fails to commence correction of the default and provide a schedule for the correction that is acceptable to the Engineer; and

2) the Engineer issues a certificate that sufficient cause exists to justify the termination of the Contract for the material default.

(d) *Termination for Convenience* (GC 13): Under this provision, MTX may, by written notice to BTC, terminate the Contract for its own convenience any time, if MTX considers such action necessary or in the best interests of MTX. MTX's right to terminate the Contract for convenience is an absolute and unconditional right and is not subject to the dispute resolution process under the Contract. In the event of a termination for convenience, BTC is entitled to payment of certain specifically listed amounts, described as the Termination Costs.

(e) *Claims under the Contract and Continuance of the Work* (GC 23): BTC may give the Engineer written notice that it intends to make a claim in respect of the proper interpretation, application or administration of the Contract or work to be done under the Contract and to dispute a decision, interpretation, determination or finding of the Engineer. BTC is required to continue any work under the Contract that the Engineer directs it to do notwithstanding its claim.

(f) *Settlement of Disputes* (GC 24): The Contract includes a mandatory protocol for the resolution of disputes between the parties, including a dispute over the Engineer's determination of BTC's claim under GC 23. The dispute resolution process requires the parties to undertake a period of settlement discussions, failing which a party may refer the dispute to the DRB established under the Contract. The DRB must fairly and impartially consider disputes referred to it and provide a written ruling within two weeks of the hearing of the dispute. If the value of the dispute is over $5 million, the DRB's ruling may be appealed to the Ontario Superior Court of Justice.

[12] The Contract also contains an entire agreement clause (GC 4.6), a time is of the essence clause (s. 3 Articles of Agreement), a clause requiring the Contract to be governed and interpreted under Ontario law (GC 5.3) and a clause requiring that any changes to the Contract schedule must be approved in writing by the Engineer.

Events Prior to the Notice of Default

[13] In the spring of 2009, the Ontario government announced that it would be providing approximately $8.4 billion to fund light rapid transit ("LRT") in the City of Toronto. In June 2009, the Toronto Transit Commission ("TTC") awarded BTC a contract ("TTC Contract") to design and supply 204 streetcars for use on the existing TTC streetcar routes.

[14] MTX acquired certain of the TTC's rights under the TTC Contract. MTX exercised those rights, and in June 2010 it entered into the Contract with BTC pursuant to which BTC agreed to supply 182 LRVs for use on four new LRT lines that were to be built in Toronto. The total value of the Contract was approximately $770 million. The LRVs were intended to be used on the following four new lines:

1) 35 LRVs for the Sheppard East Line;

2) 76 LRVs for the Eglinton Crosstown Line;

3) 48 LRVs for the Scarborough RT Line; and

4) 23 LRVs for the Finch Line.

[15] When the Contract was signed with BTC, MTX had not yet contracted for the construction of the necessary infrastructure for these LRT lines. MTX had also not determined what funding model would be used for the construction, maintenance and operation of these lines.

[16] The Province of Ontario directed MTX to use a private consortium to build the Eglinton Crosstown Line. Following an extensive Request for Proposal process, MTX entered into a contract with a consortium of contractors ("Project Co.") to build and eventually operate the Eglinton Crosstown Line. So far this is the only line that has proceeded and on which construction has begun.

[17] The Scarborough RT Line has been cancelled and the Sheppard East Line and Finch Line have both been delayed. As a result, MTX does not require all of the LRVs it has contracted to acquire from BTC.

[18] In March 2013, the parties agreed to amend the schedule for production and delivery under the Contract. MTX did not reduce the number of LRVs it was to acquire, even though it requires fewer LRVs because of the delays and cancellation of its LRT infrastructure.

[19] Starting in 2014, MTX began renegotiating the Contract with BTC to protect it from potential penalties it might incur due to the delay in the LRT infrastructure projects. MTX demanded certain "no cost alterations" to the Contract: primarily involving the removal of all caps on BTC's liquidated damages exposure and indemnification by BTC from any claims by Project Co. if BTC fails to deliver the LRVs on time. These negotiations continued well into 2016 without an agreement.

[20] There is no dispute that BTC has experienced many delays carrying out its responsibilities under the Contract. Although BTC has been very successful manufacturing and supplying LRVs in Europe, this is BTC's first major opportunity to build LRVs in Canada and to develop a specialized labour force in North America. It structured its new undertaking with manufacturing facilities in Mexico, Thunder Bay and Kingston, Ontario. This has resulted in problems that have caused delays in its performance under the Contract.

[21] BTC attempted to address these problems with a new Action Plan that was presented to MTX in May 2016. BTC assured MTX that under the new Action Plan, BTC would meet MTX's delivery requirements for LRVs. Earlier that month, MTX had instructed BTC to stop production of the dual-cab LRVs for the Finch Line that was on hold and focus on production of the single-cab LRVs intended for the Eglinton Crosstown Line, which are to be delivered commencing in November 2018. BTC agreed to do so. BTC has recently confirmed that it is currently on schedule to meet MTX's required November 2018 delivery date for the Eglinton Crosstown Line LRVs.

[22] However, MTX still has serious concerns about BTC's ability to meet its obligations under the Contract in terms of both schedule and quality. It does not regard BTC's Action Plan as a solution to its inadequate performance and critical delays. MTX cites the following problems as examples:

a) BTC's Pilot Vehicles, which were to be delivered in April and May 2015, still have not been delivered. The delivery of the first Pilot Vehicle is still "several months away".

b) BTC's own bi-monthly progress report reveals that following implementation of the Action Plan, the forecasted delivery date for the first production LRV has slipped by seven months.

c) BTC's quality control problems that have plagued the project from the start, including serious welding issues, have persisted since the implementation of the Action Plan.

[23] According to MTX, because of BTC's record of persistent failure and its inability to demonstrate genuine improvement, even following the implementation of BTC's Action Plan, Mr. Rankin issued a Notice of Default to BTC pursuant to GC 10 of the Contract on July 12, 2016. In the Notice of Default, Mr. Rankin identified the following material defaults:

a) failure to deliver the Pilot Vehicles by April and May 2015;

b) failure to schedule properly; BTC has not yet received approval of a schedule that recognizes the milestone dates that were included in the amendments to the Contract;

c) failure to comply with load levelling specifications for the LRVs; and

d) failure to supply skilled workers, products, plant and equipment.

[24] On the same day, MTX's President and CEO, Bruce McCuaig, sent the following e-mail message to BTC's President, Benoit Brossoit:

> I just left you a voice mail message with respect to a letter your project lead on the LRV order will be receiving. The letter is intended to initiate the provisions in the contract with respect to default. We want to use the contract provisions to frame an agreement on how Bombardier addresses our outstanding issues on the delivery of the vehicles.

[25] On July 21, 2016, BTC wrote to the Engineer contesting the allegations of material defaults in his Notice of Default. BTC also pointed to its Action Plan to demonstrate to Mr. Rankin that BTC had started corrective action to cure the alleged defaults in accordance with GC 12.3 and GC 12.4 of the Contract.

Events after the Notice of Default

[26] On September 2, 2016, Mr. Rankin wrote to BTC, stating as follows:

> Upon review of your letter ... Metrolinx has determined that the defaults identified ... have not been corrected. Nor has Bombardier responded with sufficient documentation, as requested ... to demonstrate that the defaults are being addressed.
>
> ... Metrolinx hereby reaffirms that Bombardier is in default of its contractual obligations.

[27] On September 6, 2016, MTX wrote to Mr. Rankin, stating as follows:

> Further to your letter of September 2, 2016, we note that your letter states that "Metrolinx" has made certain determination(s) in respect of Bombardier's default(s) under the Contract. To be clear, Metrolinx in no way participated in or influenced the performance of your duties as Engineer under GC 10, or otherwise in relation to the default(s). Rather, the determination(s) communicated by your letter of September 2nd were arrived at by you in your capacity as Engineer, and not by Metrolinx. We would be grateful if you would confirm the foregoing.

[28] On September 12, 2016, Mr. Rankin wrote to MTX, stating as follows:

> This review was conducted by myself and the LRV Engineering team under my direction as Engineer. The conclusions arrived at were not influenced by Metrolinx.

[29] On October 28, 2016, MTX wrote to BTC, stating as follows:

> We hereby inform you of our intention to terminate the Contract pursuant to GC 12.3, given the continuation of Bombardier's default as described in the Notice of Default dated July 12, 2016.

[30] On the same date, Mr. McCuaig again wrote to Mr. Brossoit, stating as follows:

> Attached to this letter, I am delivering a Notice of Intention to Terminate the Contract. While we recognize that the Notice could lead to the conclusion that continuing with the Contract is not viable, we are interested in finding a way forward with the Company. In the meantime, we will continue to perform our obligations ...
>
> I propose that we proceed with the process discussed above to allow an assessment of progress while we schedule a forum to discuss how we move forward together.

[31] On November 7, 2016, BTC wrote to MTX, stating, in part, as follows:

> ***First:***
> It is improper for Metrolinx to have served the Notice of Intention at this time. The Notice of Intention refers to and is based on the July 12, 2016 Notice of Default (the "Notice of Default") issued by the Engineer. As you know, Bombardier has opposed the Notice of Default and told the Engineer that it intends to file a statement of claim. The Engineer has granted an extension for filing the statement of claim until December 9, 2016. The validity of the Notice of Default is now subject to the dispute resolution process provided for in the Contract, and will ultimately be determined by the Dispute Review Board. Metrolinx therefore has no present right to invoke the termination provisions of GC 12 of the Contract.
>
> ***Second:***
> As Bombardier has made clear to the Engineer, it disputes that there has been any material default pursuant to GC 12. Any purported termination of the Contract by Metrolinx where either (i) there has been no material default, or (ii) the dispute resolution process has not been concluded, would constitute an unlawful repudiation of the Contract by Metrolinx. ...
>
> ***Third:***
> In rejecting Bombardier's response, and in other respects generally during the last several months, it has become apparent that Metrolinx has been improperly exerting influence over the Engineer, making it impossible for him to comply with his obligations of impartiality under GC 8.5.
>
> ***Fourth:***
> As we stated in our July 21, 2016 response, the matters raised in the Notice of Default have been subject to ongoing discussion. ...

[32] On January 13, 2017, BTC filed its Statement of Claim under GC 23 disputing the validity of the Notice of Default. The Engineer's determination of the validity of BTC's dispute regarding the Notice of Default pursuant to GC 23.6 was due on March 13, 2017. However, Mr. Rankin granted himself a 60-day extension to determine the issue, as he is entitled to do under the Contract. Accordingly, his determination is now due by May 12, 2017.

[33] Despite the Notice of Default, MTX has acknowledged that "in theory" BTC will be able to deliver LRVs on time. MTX has also reported to its Board of Directors that the Eglinton Crosstown Line is "on-budget" and "on-time".

[34] On the first day of the hearing of this application, BTC's president, Benoit Brossoit, provided the court with an affidavit in which he undertook, on behalf of BTC, "to abide by any order concerning damages that the court may make if it ultimately appears that the granting of the order has caused damage to the responding parties".

ISSUES

[35] The issues that I must determine are the following:

1) Does the dispute resolution process under the Contract apply to the Notice of Default and MTX's right to terminate the Contract for material default?

2) If it does, should the court grant an interlocutory injunction that preserves the *status quo* and prevents MTX from terminating the Contract for material default while the validity of the Notice of Default is determined under the dispute resolution process?

3) Has the Engineer breached his duty under the Contract to act impartially? If so, should the court set aside his determinations with respect to BTC's alleged material default and remove him as the Engineer under the Contract?

4) Is BTC entitled to an interlocutory injunction *nunc pro tunc*?

POSITIONS OF THE PARTIES

BTC's Position

[36] BTC submits that the dispute resolution process in GC 23 and GC 24 of the Contract applies to all disputes that arise under the Contract, including its challenge to the validity of the Engineer's Notice of Default. It argues that to allow MTX to ignore the mandatory dispute resolution process in connection with this most fundamental and important dispute as to whether MTX can terminate the Contract for material default leads to a commercially absurd result.

[37] BTC submits that the court has jurisdiction to grant the interlocutory relief it seeks because no adequate alternative remedy exists. It also submits that it has met the *RJR – MacDonald* test for the granting of an interlocutory injunction. Further, BTC has provided an adequate undertaking as to damages.

[38] Finally, BTC submits that the Engineer has not acted impartially because of his close connection to MTX. For this reason, BTC argues that his determinations under GC 12 should be set aside.

MTX's Position

[39] MTX submits that BTC is in material default of the Contract. GC 12.4.2 of the Contract expressly permits MTX to terminate it for BTC's material default "notwithstanding any other provision in the Contract". Therefore, BTC's right to terminate the Contract for material default is not subject to the dispute resolution process in GC 23 and GC 24.

[40] According to MTX, although GC 23 and GC 24 apply to the Engineer's determination that BTC is in material default of the Contract, reading the Contract as a whole, in light of sound commercial principles, it is clear that MTX's ability to terminate the Contract for material default is not subject to these provisions. Further, MTX's right to terminate the Contract for material default is not stayed while BTC disputes the Engineer's conclusions of material default.

[41] Finally, MTX disputes that BTC has provided the necessary undertaking as to damages required for the injunctive relief sought.

The Engineer's Position

[42] Mr. Rankin submits that MTX did not interfere in his assessment of whether BTC is in material default under the Contract. He maintains that he acted impartially in arriving at his determination that BTC is in material default under the Contract. Mr. Rankin further submits that there is no basis to have him removed as Engineer or to set aside his determination that BTC is in material default under the Contract.

[43] Mr. Rankin does, however, concede that he cannot issue the certificate referred to in GC 12.4 while he is considering BTC's Statement of Claim pursuant to GC 23. As indicated above, he has granted himself a 60-day extension until May 12, 2017, to complete this determination.

ANALYSIS

Issue # 1: *Does the dispute resolution process apply to the Notice of Default and MTX's right to terminate the Contract for material default?*

[44] The parties agree on the principles that apply to the interpretation of the Contract. The Supreme Court of Canada in *Sattva Capital Corp. v. Creston Moly Corp.*[1], made it clear that modern contractual interpretation requires a practical, common-sense approach not dominated by technical rules of construction. A contract must be read and construed as a whole, not by determining the meaning of the words, but rather the meaning of the document. The court should adopt an interpretation of a negotiated commercial agreement that is in accordance with sound commercial principles and good business sense.

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[1] *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633.

[45] In *National Trust Co. v. Mead*,[2] the Supreme Court of Canada stated that, "Since the Court should strive to give meaning to the parties' agreement, it should reject an interpretation that would render one of its terms ineffective."

[46] MTX concedes that GC 23 and GC 24 apply to the Engineer's determination that BTC is in material default of the Contract and that BTC is entitled to invoke the dispute resolution process with respect to the Notice of Default. However, Mr. Paliare, on behalf of MTX, submits that MTX's right to terminate the Contract for material default is not subject to these provisions, and its right to terminate is not stayed pending the dispute resolution process.

[47] I do not accept this submission. It does not make commercial sense to exclude MTX's right to terminate the Contract for material default, which is one of the most serious disputes that could arise, from the mandatory dispute resolution process agreed to by the parties. Such an approach would render the dispute resolution process in the Contract ineffective. Considering the terms of the Contract as a whole, in the light of sound commercial principles, I am satisfied that GC 23 and GC 24 apply to all disputes that arise under the Contract, including MTX's right to terminate the Contract for material default.

[48] Paragraph 46 of MTX's factum indicates that there are two express limitations on MTX's ability to terminate the Contract for material default. The first is that BTC has not cured the defaults identified in the Notice of Default and has not provided an acceptable schedule to do so. The second is that the Engineer must issue a certificate that sufficient cause exists to justify MTX's termination of the Contract for material default. Mr. Wardle concedes that the Engineer's decision to issue a certificate that sufficient cause exists to justify termination of the Contract for material default is subject to the dispute resolution process. In my view, it does not make commercial sense to allow MTX to rely upon the Engineer's certificate to terminate the Contract for material default under circumstances where the validity of the certificate will be determined later by the DRB.

[49] MTX makes the following submission at para. 49 of its factum:

> If it is ultimately determined that Bombardier was not in default, Bombardier could seek compensation for breach of contract against Metrolinx. Bombardier is by no means left without a remedy.

[50] I do not consider this approach to be consistent with sound commercial practice or good business sense. BTC has invested a substantial amount in its efforts to perform its obligations under the Contract. It does not make commercial sense that the Contract can be terminated for material default on the strength of a certificate that BTC has challenged under the mandatory dispute resolution process. In my view, it would be commercially unreasonable for MTX to rely

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[2] *National Trust Co. v. Mead*, [1990] 2 S.C.R. 410, at p. 425.

upon the Engineer's certificate to terminate the Contract for material default before the DRB has determined its validity.

[51] MTX relies upon the wording in GC 12.4.2 that provides that MTX may terminate the Contract for material default, "Notwithstanding anything to the contrary in this Contract", in support of its position that the right to terminate the Contract for material default is not subject to the dispute resolution process. This provision in the Contract does not apply because BTC has not provided an acceptable schedule to correct the defaults identified by the Engineer. GC 12.4.2 only applies if BTC has failed to correct the material defaults "in accordance with the schedule". There is no acceptable schedule in this case. Therefore, GC 12.4.2 does not apply.

[52] I accept the following submissions at paras. 74 and 75 of BTC's factum:

> 74. The breadth of the mandatory dispute resolution process makes perfect sense in the factual circumstances in which the parties negotiated the Contract. The contract is worth $880 million. It was signed in 2010, and the last LRV is currently scheduled for delivery in 2022. Warranties will extend further. The Contract will therefore span almost 15 years.
>
> 75. MTX's interpretation is that it may terminate the Contract without proceeding through the dispute resolution process in GC 23 and GC 24. Such an interpretation would only make GC 23 and GC 24 utterly ineffective to deal with the most fundamental and important dispute that could arise under the Contract: the right to terminate the Contract. It would also mean that an $880 million negotiated commercial agreement could be terminated by MTX based solely on a determination made by its own representative. BTC would have no means of challenging that determination. This is a commercially absurd result in the face of the broadly-worded dispute resolution process that provides for ultimate determination by an impartial expert arbitral panel.

[53] I have concluded, for these reasons, that GC 23 and GC 24 apply to the Notice of Default and to MTX's right to terminate the Contract for material default.

Issue # 2: *Should an interlocutory order be granted preventing MTX from terminating the Contract for material default pending the dispute resolution process?*

[54] I agree with BTC's submission that I have jurisdiction to grant the interlocutory relief sought if no adequate alternative remedy exists. MTX does not challenge my jurisdiction to do so.

[55] However, BTC must satisfy the following three-part test set out by the Supreme Court of Canada in *RJR – MacDonald Inc. v. Canada (A.G.)*[3]:

1) There must be a serious question to be tried.

2) The applicant must suffer irreparable harm if the interlocutory injunction is not granted.

3) The balance of convenience must favour the granting of the interlocutory injunction.

[56] BTC must also provide an undertaking as to damages. I am satisfied that Mr. Brossoit's undertaking as to damages on behalf of BTC, which was provided on the first day of the hearing of the application, satisfies this requirement. Mr. Paliare questioned whether BTC's undertaking is sufficient given the questionable financial strength of the company. He argued that he had been deprived of the opportunity to cross-examine Mr. Brossoit on this issue which is relevant to the strength of the undertaking. I agree that the undertaking should have been given earlier to allow for cross-examination. However, BTC has provided MTX with two irrevocable letters of credit for a total amount of $153 million to guarantee BTC's performance under the Contract. I am satisfied that this is adequate protection for MTX with respect to any damage it may suffer from the granting of the interlocutory injunction sought by BTC.

[57] In *International Steel Services Inc. v. Dynatec Madagascar S.A.*[4], Newbould J. was faced with a similar situation as I am in this case. International Steel operated an acid plant for Dynatec under a lease that terminated on May 1, 2016. International Steel alleged that the parties had agreed to a two-year extension of the lease. Dynatec disagreed and indicated that it intended to take possession of the plant on May 1, 2016. International Steel invoked the arbitration provision in the contract. However, Dynatec gave notice of termination and maintained its position that it was going to take possession of the plant on May 1, 2016, despite the arbitration proceeding. International Steel applied for an interim injunction to restrain Dynatec from taking possession of the plant until its right to do so had been determined in the arbitration proceeding.

[58] Newbould J. granted the interim injunction, applying the *RJR – MacDonald* three-part test. He concluded that,

1) Whether the lease was to come to an end or whether it had been extended by the parties was a serious question to be tried.

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[3] *RJR – MacDonald Inc. v. Canada (A.G.)*, [1994] 1 S.C.R. 311.
[4] *International Steel Services Inc. v. Dynatec Madagascar S.A.*, 2016 ONSC 2810, 58 B.L.R. (5th) 150 ("*International Steel*").

2) International Steel would suffer irreparable harm if the injunction was not granted for the following reason:

> In this case there is a serious issue that ISSI may suffer irreparable harm if the injunction is not granted. ISSI will be out of the Acid Plant and will likely face difficulty if after the arbitration and an award declaring the Agreement to be still in force it attempts to start up again and hire employees to work for it.

3) The balance of convenience favoured permitting International Steel to continue operating the plant while Dynatec's right to terminate was being arbitrated.

[59] I intend to follow the same approach in this case. I have applied the *RJR – MacDonald* test to BTC's request for an interlocutory injunction. My conclusions are set out below.

Serious Issue to be Tried

[60] MTX concedes that BTC meets the threshold for establishing that there is a serious issue to be tried. I agree that the question of whether BTC is in material default of the Contract is a serious issue.

Irreparable Harm

[61] BTC submits that proof of irreparable harm is not required where the moving party shows a clear breach of a negative covenant. According to BTC, "MTX's and BTC's agreement to use the dispute resolution process for disputes amounts to an agreement not to proceed to take steps without complying with that process."

[62] BTC relies upon GC 24.5.2.1 of the Contract, which requires BTC, during the dispute resolution process, to "continue with the Work as directed by the Engineer, in a diligent manner and without delay …"

[63] I do not accept this submission because I do not consider MTX's agreement to the dispute resolution process in the Contract to constitute a negative covenant. A negative covenant is an express agreement not to undertake an action. MTX did not expressly agree not to take any action. It agreed to resolve disputes under the Contract through the dispute resolution process. This is an affirmative covenant, not a negative covenant. In my view, BTC must satisfy the irreparable harm requirement of the *RJR – MacDonald* test.

[64] Evidence of irreparable harm must be clear and not speculative. However, the moving party need only establish a meaningful risk of irreparable harm. This is a relatively low standard.

I agree with MTX's description of the standard as a "meaningful doubt as to the adequacy of damages if the injunction is not granted".[5]

[65] BTC submits that it will suffer irreparable harm if MTX is permitted to terminate the Contract for material default before the question of whether BTC is in material default can be determined by the DRB. BTC relies upon the evidence of Lamia Orfali, BTC's Project Commercial Manager for the Contract. The following is a summary of her description of the consequences of MTX's termination of the Contract for material default:

- The Contract is one of BTC's largest Canadian transit projects. The work under the Contract has created approximately 450 jobs, 70% of which are in Canada. BTC's Thunder Bay plant is to become BTC's primary production site for LRVs. BTC is Thunder Bay's largest private sector employer employing over 1,100 employees. Approximately 367 employees in Thunder Bay are involved in the production of LRVs under the Contract. If the Contract is terminated, 32 employees on BTC's engineering team devoted to the work under the Contract will likely have to be terminated. Further, it is expected that almost 230 Canadian jobs created as a result of the Contract will be lost.

- LRVs are relatively new to the North American market. As a result of the Contract, BTC has been able to develop LRV expertise, which it will be able to leverage in delivering other existing (but less advanced) LRV projects and future LRV projects in North America. If BTC has to terminate these employees, it will lose significant expertise that it has developed in LRV production at its Thunder Bay and Kingston locations. Once expert employee resources have been lost by BTC, they will be difficult to regain for future LRV projects. The loss of skilled labour will also have an economic impact on the Thunder Bay and Kingston areas due to the loss of local business activity.

- Termination of the Contract will also have a negative impact on BTC's supply chain. If the Contract is terminated, BTC will have to cancel its contracts with suppliers and shut down its supply chain for this Contract. Suppliers who are currently available and able to provide supplies for the Contract may not be available at a later date. BTC may have to either re-negotiate new terms with its current suppliers or negotiate new agreements with different suppliers if the DRB determines that it is not in default under the Contract and BTC has to deliver LRVs in accordance with the timelines under the Contract.

- BTC's cancellation of its contracts with its suppliers will also damage its reputation within the industry. This will adversely affect BTC's ability to negotiate favourable terms with suppliers in the future. Premature cancellation of a contract of this magnitude – especially if it is cancelled on the basis of an allegation of material default –

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[5] *Potash Corp. of Saskatchewan Inc. v. Mosaic Potash Esterhazy Limited Partnership*, 2011 SKCA 120, 341 D.L.R. (4th) 407, at para. 61.

will seriously impact BTC's reputation and goodwill with its suppliers. This will affect its ability to negotiate discounted prices from suppliers for large projects in the future.

- The termination of the Contract for material default will also impact BTC's reputation as an employer of choice for specialized employees in project management and engineering. This, in turn, will make BTC less competitive in attracting and maintaining talented employees.

- BTC has never previously received a notice of material default in respect of any of its contracts in North America. This is significant because the termination of the Contract for material default will affect BTC's ability to bid on future LRV projects in North America. This is because Requests for Proposals ("RFPs") usually require proponents to disclose whether they have ever been terminated for material default. A previous termination for material default will affect BTC's ability to qualify as a bidder and will negatively affect how it is scored on future RFPs. If MTX terminates the Contract for material default, BTC's ability to win new RFPs for LRV projects will be affected, resulting in a loss of future LRV business for BTC.

- Further, if BTC is terminated for material default under the Contract, MTX can, at its sole discretion, restrict BTC from submitting tenders or proposals on subsequent MTX projects. This is significant because MTX controls most of the transit projects in Ontario, which is BTC's largest Canadian market.

- BTC has also invested a significant amount of expertise into the design and manufacture of the LRVs it intends to supply to MTX under the Contract. These designs and tools have been developed using BTC's expertise, experience, proprietary technology and processes. This proprietary technology is unique in the transit industry. It is vital to BTC's ability to distinguish itself from its competitors in the North American marketplace. The Contract prescribes how and when MTX is entitled to access and use BTC's designs, drawings and other intellectual property. Those restrictions vary depending on whether the Contract is completed or terminated for material default. MTX has already solicited information from BTC's direct competitors about replacing BTC as the supplier of its LRVs. BTC has serious concerns that if MTX is permitted to terminate the Contract for material default before the dispute resolution process has been completed and provides BTC's competitors with BTC's designs, drawings, technical data and intellectual property for the purpose of completing the work under the Contract, BTC will suffer a loss of competitive advantage. Intellectual property and other proprietary information cannot be recovered once they have been disclosed to BTC's competitors. This information would be of great value to BTC's competitors, not just with respect to the Eglinton Crosstown and Finch Line projects, but with respect to other projects on which they might be bidding against BTC in the future.

[66] BTC submits that it is well established that the loss of business reputation, the loss of a skilled workforce and the loss of intellectual property, constitute irreparable harm. BTC argues that the evidence of Ms. Orfali establishes that BTC will suffer these types of losses if the

Contract is terminated for material default before the dispute resolution process has been completed.

[67] MTX submits that none of these losses constitute irreparable harm because BTC can be fully compensated for these losses through an award of damages. It points to GC 13 which allows MTX to terminate the Contract for convenience and provides that BTC is entitled to Termination Costs "as defined under the Contract, and nothing more". According to MTX, this demonstrates that BTC has agreed that it can be adequately compensated by an award of damages if the Contract is terminated.

[68] This submission ignores the difference in the ramifications to BTC from a termination of the Contract for convenience and a termination of the Contract for material default. I accept Ms. Orfali's evidence that if the Contract is terminated for material default BTC would have to disclose this in its responses to future RFPs for LRV projects. Such disclosure could very well result in BTC losing future LRV business. This potential loss is impossible to quantify. As a result, I am of the view that there is a "meaningful doubt" that damages would be an adequate remedy for this potential loss to BTC.

[69] Mr. Paliare relies upon the evidence of Mr. Brossoit, who testified that BTC has a "tremendous global reputation", despite having received "terrible press" regarding BTC's performance of its contract with the TTC and other "cherry-picked" projects where there have been "challenges" for BTC. In my view, the reputational damage referred to by Ms. Orfali that could affect BTC's ability to win future RFPs due to the termination of the Contract for material default is different from BTC's global reputation referred to by Mr. Brossoit. The stigma resulting from a termination of the Contract for material default would likely result in lost LRV business for BTC in the future. I am satisfied that this constitutes irreparable harm because there is a meaningful doubt that damages could adequately compensate BTC for this type of loss. The question of whether BTC is in material default of the Contract is the very issue that BTC wants determined under the dispute resolution process. I am satisfied, for this reason alone, that BTC has established irreparable harm within the meaning of the *RJR – MacDonald* test.

[70] I agree with MTX's submissions that Ms. Orfali's evidence about the Ontario jobs that will be lost if the Contract is terminated does not constitute irreparable harm to BTC but to third parties. However, I accept Ms. Orfali's evidence about the problems that a termination of the Contract for material default will cause to BTC's current supply chain and the potential loss of its employee expertise. This will have a negative impact on BTC's ability to get up and running again to perform its obligations under the Contract if the DRB concludes that BTC is not in material default under the Contract. I am of the view that there is a meaningful doubt that damages could adequately compensate BTC for this type of loss. Newbould J. came to a similar conclusion in *International Steel*.

[71] I agree with MTX's submission that BTC's loss of intellectual property could be compensated for in damages. BTC has already agreed to this in GC 13, the termination for convenience provision.

[72] However, I am satisfied that BTC has established that there is a meaningful risk that it will suffer irreparable harm if the Contract is terminated for material default because its ability to successfully bid on future LRV projects will be adversely affected. I have also concluded that the damage to BTC's supply chain and the potential loss of certain of its expert workforce resulting from a termination of the Contract for material default will negatively affect BTC's ability to start up again to perform its obligations under the Contract if the DRB concludes that BTC is not in material default. There is no realistic way to quantify these losses so that there is a meaningful doubt as to the adequacy of damages if the injunction is not granted.

Balance of Convenience

[73] The final step of the *RJR – MacDonald* test requires the court to determine which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits.

[74] BTC is seeking to maintain the *status quo* between BTC and MTX until the dispute resolution process can be completed. It submits that preserving the *status quo* is a factor that weighs in favour of granting an interlocutory injunction. BTC argues that if MTX is permitted to terminate the Contract for material default without allowing the dispute resolution process to be completed, it will suffer greater harm than MTX if the *status quo* is not preserved until its completion. In particular, BTC's ability to acquire new LRV business will be adversely affected if the Contract is terminated for material default. Further, it will be difficult to re-establish BTC's relationships with its suppliers and re-engage its specialized workforce if the DRB concludes that BTC is not in material default under the Contract and BTC is then required to deliver the LRVs in accordance with the timelines provided under the Contract.

[75] MTX disagrees and submits that I should consider the following in assessing the balance of convenience:

a) MTX is likely to suffer significant financial damage if it is enjoined from terminating the Contract, for which it will be unable to seek indemnification from BTC. This is because MTX's exposure to Project Co. is significantly higher than the liquidated damages that BTC would be responsible for if the LRVs are not delivered on time.

b) MTX may lose its ability to mitigate against BTC's poor performance by entering into an agreement with an alternate supplier that would allow for delivery of the LRVs within the timelines MTX has agreed upon with Project Co.

c) Courts should be reluctant to order parties to remain in failed contractual relationships.

[76] I have concluded that the balance of convenience favours maintaining the *status quo* between MTX and BTC for the following reasons:

- MTX has provided no specific evidence about its contingency plan or an alternative supplier. It has provided no evidence that an alternative supplier could provide LRVs in accordance with MTX's contractual obligations to Project Co. Mark Ciavarro, who is

part of MTX's senior management team dealing with the Contract, testified as follows about this at para. 120 of his affidavit sworn February 22, 2017:

> Metrolinx has been in discussions with an alternative supplier for the urgent supply of LRVs for the Eglinton Crosstown line. Any alternative supplier would also have to comply with the Canadian Content Policy which would require, as noted above, certain percentages of Canadian content for expenditures, thus limiting the potential number of alternative vehicle suppliers that Metrolinx could consider.

- This evidence falls short of establishing that it is realistic to conclude that there is another supplier who can deliver LRVs by the required date in November 2018 for the Eglinton Crosstown Line if MTX terminates the Contract with BTC for material default now. This weighs in favour of granting the injunction.

- I am not persuaded that MTX really intends to terminate the Contract for default. It appears to me that MTX is using the threat of termination for negotiating purposes. This is, in part, because of the history of negotiations between BTC and MTX about "no cost alterations" to the Contract, leading up to the Notice of Default and Mr. McCuaig's letter to Mr. Brossoit that accompanied the Notice of Default in which he stated as follows:

> The letter is intended to initiate the provisions in the contract with respect to default. We want to use the contract provisions to frame an agreement on how Bombardier addresses our outstanding issues on the delivery of the vehicles.

- Further, as stated above, when MTX delivered its notice of intention to terminate the Contract, Mr. McCuaig again wrote to Mr. Brossoit stating as follows:

> Attached to this letter, I am delivering a Notice of Intention to Terminate the Contract. While we recognize that the Notice could lead to the conclusion that continuing with the Contract is not viable, we are interested in finding a way forward with the Company.

- MTX has not confirmed in any of the material before the court, including its counsels' written and oral submissions that it <u>is</u> going to terminate the Contract for material default, only that it <u>may</u> terminate it for material default. This also weighs in favour of granting the injunction.

- MTX has an absolute and unconditional right to terminate the Contract for convenience pursuant to GC 13. It has not done so notwithstanding that its right to terminate the Contract for convenience is not subject to the dispute resolution process. When I questioned Mr. Paliare about this he explained that MTX had not done so because a termination for convenience results in greater exposure to MTX due to the Termination

Costs under GC 13. That may be the case, however, in considering the balance of convenience as between MTX and BTC, this unconditional right to terminate the Contract for convenience weighs in favour of granting the injunction. If I do not grant the injunction, BTC will suffer the irreparable harm I have referred to above. If I do grant the injunction, MTX can still terminate the Contract for convenience.

- BTC has provided an undertaking as to damages that is supported by two irrevocable letters of credit totaling $150 million. This is adequate protection for MTX for any loss it might incur if the injunction is granted. This weighs in favour of granting the injunction.

- I agree with BTC's submission that if I do not grant the injunction the DRB's determination regarding BTC's alleged material defaults will be moot. BTC will have already been denied its dispute resolution rights under the Contract as well as its right to complete the Contract. In *1338121 Ontario v. FDV Inc.*[6], this court granted interim relief, prohibiting a party from taking steps in relation to a unanimous shareholders agreement that would have rendered a pending arbitration moot. D. M. Brown J. (as he then was) described the attempt to avoid the arbitration proceeding as having "an element of unfairness" and stated as follows[7]:

> One could view such tactics as an effort to foreclose an inquiry into, and adjudication of, whether the conduct of the respondents breached the [unanimous shareholders agreement] in a material way.

I am of a similar view with respect to MTX's attempt to terminate the Contract for material default without allowing the question of whether BTC is in material default or has cured that default to be determined under the dispute resolution process both parties agreed to. This weighs in favour of granting the injunction.

[77] For all of these reasons, I am satisfied that BTC has met the *RJR – MacDonald* test, and an interlocutory injunction should issue prohibiting MTX from terminating the Contract for material default before the DRB has decided the question of whether BTC is in material default under the Contract.

[78] However, my decision to grant an interlocutory injunction to preserve the *status quo* is conditional upon the following:

a) BTC must take all reasonable steps to expedite the dispute resolution process. If it does not, MTX may attend before me on short notice to seek an appropriate remedy.

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[6] *1338121 Ontario v. FDV Inc.*, 2011 ONSC 3816, 92 B.L.R. (4th) 1.
[7] *1338121 Ontario*, at para. 49.

b) If the DRB concludes that BTC is in material default of the Contract, the interlocutory injunction shall no longer be in force following the release of the DRB's Ruling. If BTC appeals the DRB's Ruling, a further order from the court will be required to extend the interlocutory injunction.

Issue # 3: *The Impartiality of the Engineer*

[79] I am of the view that the question of whether the Engineer failed to act impartially in determining that BTC is in material default under the Contract relates to the validity of the Notice of Default and the subsequent steps taken by MTX under GC 12. These are questions that should be considered and determined by the DRB pursuant to GC 24. The question of the Engineer's impartiality should, therefore, also be determined by the DRB.

[80] It is not necessary for me to determine this issue in order to decide whether there should be an interlocutory injunction. In any event, I am not prepared to decide this important question about the Engineer's impartiality on the evidentiary record before me. I have concluded that it is an issue that should be determined under the dispute resolution process in the Contract.

Issue # 4: *Should the Order be Nunc Pro Tunc?*

[81] BTC submits that the interlocutory injunction should be made *nunc pro tunc* back to July 12, 2016, so as to stay the running of certain cure periods contained in the Contract. According to BTC, granting such an order will preserve the *status quo* between BTC and MTX.

[82] This approach is consistent with what the Court of Appeal for Ontario said would be appropriate in *407 ETR Concession Co. v. Ontario (Minister of Transportation)*[8]. In that case, a dispute arose between the parties as to whether 407 ETR was entitled to raise tolls on the 407 highway without the Province's consent. The Province served a notice of default which would lead to a termination of the lease for the highway if 407 ETR did not cure the alleged default within 60 days. 407 ETR invoked the dispute resolution process under the lease, challenging the notice of default. The Province asserted that the 60-day cure period provision was not affected by the arbitration proceedings and continued to run. The Court of Appeal for Ontario described the appropriate remedy as follows[9]:

> Once the application judge had decided both that the right of 407 ETR under the cure period provision could be lost and that there was no timely remedy available to 407 ETR under the agreement, the application judge should have fashioned a remedy that delayed the running of the cure period until the underlying dispute over the right of 407 ETR to unilaterally increase the tolls was before an arbitrator. That arbitrator would then have the power to determine the meaning of

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[8] *407 ETR Concession Co. v. Ontario (Minister of Transportation)* (2005), 199 O.A.C. 221 (Ont. C.A.).
[9] *407 ETR Concession*, at para. 32.

the cure period provision and provide whatever interim order he or she thought necessary pending resolution of the underlying dispute.

[83] I am satisfied that the cure periods in the Contract should be stayed pending the completion of the dispute resolution process. The interlocutory injunction will apply to all relevant cure periods from July 12, 2016.

CONCLUSION

[84] For all of the reasons outlined above, I have concluded as follows:

a) The dispute resolution provisions in the Contract (GC 23 and GC 24) apply to the Notice of Default and MTX's right to terminate the Contract for material default.

b) BTC has met the *RJR – MacDonald* test and an interlocutory injunction will issue prohibiting MTX from terminating the Contract for material default until the DRB has issued its Ruling on the dispute between BTC and MTX.

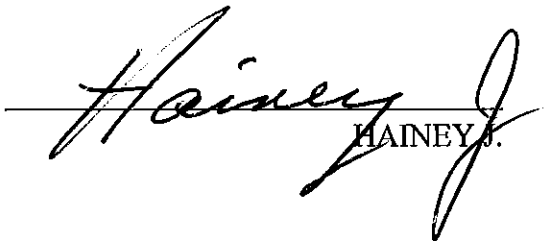
c) The question of the Engineer's impartiality should be determined by the DRB as part of its consideration of BTC's alleged material default and MTX's right to terminate the Contract for material default.

d) The interlocutory injunction shall take effect as of July 12, 2016, so that it stays the running of any relevant cure periods in the Contract.

COSTS

[85] I urge the parties to settle the issue of costs. If they cannot, they may submit written costs submissions of not more than three pages with costs outlines within 30 days.

[86] I sincerely thank counsel for the very efficient and professional manner in which they conducted this proceeding.



HAINEY J.

Released: April 19, 2017

CITATION: Bombardier Transportation Canada Inc. v. Metrolinx, 2017 ONSC 2372
COURT FILE NO.: CV-17-11692-00CL
DATE: 20170419

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

BOMBARDIER TRANSPORTATION CANADA INC.

Applicant

– and –

METROLINX and JEFFREY RANKIN

Respondents

REASONS FOR DECISION

HAINEY J.

Released: April 19, 2017