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Suppa Construction Ltd. v. Etobicoke (City)

Between
Suppa Construction Ltd., Plaintiff, and
Corporation of the City of Etobicoke, Defendant

[1993] O.J. No. 2557
Action No. 23958/91U

Ontario Court of Justice - General Division
Toronto, Ontario
MacPherson J.

Heard: September 20-24, 27-30 and October 1, 1993.
Judgment: October 29, 1993.
(38 pp.)

Keith M. Landy and Andrea Waltman, for the Plaintiff.
John R. Hart, for the Defendant.

MacPHERSON J.:—

INTRODUCTION

¶ 1 The main issue in this 10-day trial was the claim by the plaintiff Suppa Construction Ltd., that it should be awarded damages for the breach of a construction contract by the defendant Corporation of the City of Etobicoke.

1. An Order to Continue, dated 15 September, 1993, permitted the action to be continued by 752935 Ontario Limited.

¶ 2 The defendant is a large municipal corporation. It is involved, in a substantial and continuous way, in the construction and maintenance of roads, sidewalks and sewers throughout Etobicoke. There is a large bureaucracy dedicated to projects in this domain. Careful annual planning of construction projects and a detailed and sophisticated tender process for these projects are central features of the defendant's construction operations.

¶ 3 The plaintiff has been a construction contractor in the Toronto area for more than thirty years. It has performed several construction contracts for the City of Etobicoke. Until this lawsuit Suppa and Etobicoke had enjoyed a good relationship; indeed on one occasion a representative of Suppa appeared as an expert witness for Etobicoke in another construction case. Although Suppa is an experienced contractor, its experience and expertise are in the area of sewer construction, not roads and sidewalk construction. Indeed, the contract which forms the subject matter of this action was Suppa's first contract combining sewer work and roads and sidewalk work. It is common ground between the parties that the sewer portion of the contract was completed successfully and without dispute. It is the roads and sidewalk portion of the contract that has given rise to all of the matters in dispute in this litigation.

¶ 4 The contract that governed the relations between the parties to this litigation was titled Contract 89-10. It envisioned major storm sewer reconstruction work and related road and sidewalk repair work in a residential district in Etobicoke in the summer and early autumn of 1989. It was contemplated that the construction work would proceed in three phases with the crews moving from south to north through the residential district. In addition, the contract called for the final paving of a single street, Barford Road, that had been worked on and initially paved under a different contract the previous summer.

¶ 5 Contract 89-10 is a long and detailed document. In this respect it is typical of the contracts that tend to govern municipal construction projects. There are several parts to contract 89-10. Some of them, such as Instructions to Bidders, Form of Tender, General Conditions and Supplementary General Conditions, are standard to all Etobicoke construction contracts. Others, especially the part titled Special Provisions, are tailored to the individual project. There are literally hundreds of provisions in the full contract and some overlap, tension and even conflict between some of the provisions is inevitable. Fortunately, the contract deals with this possibility by establishing a clear hierarchy for its different parts. This hierarchy is set out in Article 8 of the General Conditions:

ARTICLE 8 - CONFLICTS AND OMISSIONS

The Contractor shall do all the work and furnish all materials in accordance with the best practice, and in the event of any inconsistency or conflict in the provisions of the plans or specifications or any other document or writing, such provision shall take precedence and govern in the following order:

- (i) ADDENDA
- (ii) Special Provisions
- (iii) Instructions to Bidders
- (iv) Form of Tender
- (v) Plans
- (vi) Standard Specifications
- (vii) Standard Drawings
- (viii) Supplementary General Conditions
- (ix) General Conditions

¶ 6 The construction work contemplated by contract 89-10 proceeded throughout the summer and autumn of 1989. The highlights of the project would include:

- (1) Suppa did all of the sewer work itself. This work was performed in a skilful and timely fashion.
- (2) On the whole, all of the construction work, including the roads and sidewalk portion, was completed in accordance with accepted standards.
- (3) The project was not completed on time. Suppa intended to finish the project by October 20. In fact, Etobicoke certified substantial completion on November 23.
- (4) The problems which gave rise to this litigation all concerned the roads and sidewalk portion of the contract. This work was, on the whole, not performed by Suppa. Rather it was done by sub-contractors hired and supervised by Suppa.

¶ 7 The basic problem flowing out of (4) is a dispute about payment for what are called' in the industry 'Extras'. The parties agree that 'Extras' are a regular and accepted part of most construction contracts. Moreover, Article 26 of the General Conditions of this contract specifically describe and authorize Extras and Suppa's tender on contract 89-10, which was accepted by Etobicoke, clearly contemplated some Extras. Finally, it should be recorded that Etobicoke accepted and paid for, in the amount of \$64,000, nine claims by Suppa for Extras under contract 89-10.

¶ 8 This litigation arose because Suppa submitted a further eight claims for Extras. These claims, totalling \$340,069 (amended on consent at trial from the \$335,151.72 in the Statement of Claim), are as

follows (I will use the numbering that was used throughout the trial as a basis for filing documents, and organizing both the evidence from the many witnesses who testified and the legal arguments of counsel):

- Item 1(a) - \$106,393 - Cost of providing residents with access to their driveways during construction.
- Item 1(b) - \$34,242 - Grading of boulevards.
- Item 1(c) - \$18,937 - Construction and maintenance of ramps across excavated sewer trenches to residential driveways.
- Item 2 - \$70,238 - Additional excavation - general.
- Item 3 - \$18,556 - Additional excavation - curb construction.
- Item 4 - \$30,317 - Additional sidewalk construction.
- Item 5 - \$45,202 - Additional costs due to inability to use Barford Road during construction.
- Item 6 - \$16,184 - Replacing, in the summer of 1990, the cracked sidewalks on Watercliffe Crescent.

¶ 9 The umbrellas under which Suppa shelters these eight claims are that they are either explicitly provided for in contract 89-10 or, if the contract is silent, that Suppa performed the work under the direction, and with the authorization, of Etobicoke. Etobicoke's response is that contract 89-10 does not support any of Suppa's eight claims. Moreover, Etobicoke denies that Suppa performed some of the work it claims to have done. Alternatively, says Etobicoke, if the work was done, the decision was Suppa's for business reasons and not because Etobicoke demanded or even authorized it.

¶ 10 Against this background, I will now turn to a consideration of each of the eight claims.

- ITEM 1(a) - \$106,393 - Cost of providing residents with access to their driveways during construction.

¶ 11 The plaintiff Suppa claims that contract 89-10 contemplates that residential driveways would not be accessible during certain phases of the construction project. Suppa relies strongly on Clause 13 of the Special Provisions which provides:

CLAUSE 13 TRAFFIC REQUIREMENTS

During all of the construction operations, each of the roads may be closed to through traffic.

Because of the special problems relating to parking of residents' vehicles during construction operations, the work is to be so scheduled that when construction is proceeding on one street, it must be possible for vehicles to park on adjacent streets.

(Emphasis added)

¶ 12 Suppa says that, in spite of Clause 13, Etobicoke ordered it to maintain access to all residential driveways throughout the construction project and that this necessitated a great deal of extra work, both manual and machine, for its crews. Relying principally on daily worksheets prepared by crew foremen, Suppa has quantified its claim at \$106,393.

¶ 13 Etobicoke's response to Suppa's claim is both factual and legal. The factual component is an assertion that Etobicoke did not order Suppa to maintain access to residential driveways; rather Suppa did this on its own initiative so that it would not have to deal with the complaints of angry residents. This decision, says Etobicoke, "is standard construction practice" (Exhibit 6, p. 75).

¶ 14 I do not accept Etobicoke's description of who made the decision about driveway access. I believe the testimony of Robert Prosser, Suppa's construction superintendent, and Delmar Cavalherio, the site foreman, to the effect that Etobicoke's inspectors ordered them to keep the residential driveways open. Moreover, Etobicoke's principal witness, Frank Czenkey, the city's co-ordinator for this project, admitted on cross-examination that there was "an ongoing instruction" that residential driveways be kept open on a "daily" basis. This instruction is set out explicitly in several of the daily reports filed by Etobicoke's own inspectors (See, for example, the reports for September 1 and 12 in Exhibit 1, Tab 1, pp. 57 and 58).

¶ 15 The legal component of Etobicoke's response to Suppa's claim is reliance on Clause 3 of the Supplementary General Conditions which provides:

CLAUSE 3: STANDARD REQUIREMENTS FOR TRAFFIC CONTROL IN CONSTRUCTION AREAS.

(1) Road closures

- (a) Unless prior approval has been given for the closure of a road by the Commissioner, the Contractor is required to keep such a road open for use by the public, for such lengths and widths as the Commissioner may deem necessary.
- (b) where closure of thereof or any portion thereof has been agreed upon to permit construction work to be undertaken, the closure refers to the exclusion of through traffic only.

¶ 16 Etobicoke contends that implicit in the mandate in sub-clause (a) to keep roads open is the corollary that residential driveways will remain open as well, and that implicit in the permission in (b) to close roads to through traffic is a requirement to keep residential driveways open.

¶ 17 It seems to me that there is some ambiguity in, perhaps even conflict between, Clause 13 of the Special Provisions, relied on by Suppa, and Clause 3 of the Supplementary General Conditions, relied on by Etobicoke. An important doctrinal principle which provides a contextual framework for resolving the ambiguity or conflict is the principle of *contra proferentem*.

¶ 18 The Supreme Court of Canada has defined and relied on this principle in several cases. For example, in *Hillis Oils and Sales Ltd. v. Wynn's Canada Ltd.*, [1986] 1 S.C.R. 57, Justice Le Dain said for a unanimous court, at 68-69:

The rule [of contra proferentem] is...one of general application whenever...there is ambiguity in the meaning of a contract which one of the parties as the author of the document offers to the other, with no opportunity to modify its wording. The rule is stated in its general terms in Anson's Law of Contract (25th ed. 1979), at p. 151, as follows:

'The words of written documents are construed more forcibly against the party using them. The rule is based on the principle that a man is responsible for ambiguities in his own expression, and has no right to induce another to contract with him on the supposition that his words mean one thing, while he hopes the Court will adopt a construction by which they would mean another thing, more to his advantage.'

See also Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance, [1980] 1 S.C.R. 888 at 900-901, and indemnity Insurance Company of North America v. Excel Cleaning Service, [1954] S.C.R. 169 at 179-180.

¶ 19 In this case, the author of the long and detailed contract 89-10 is the defendant Etobicoke. Accordingly, the principle of contra proferentem would assist the plaintiff Suppa if there are ambiguities or conflicts in the contractual provisions.

¶ 20 Against the background of this doctrinal context, it seems to me that there are two problems with Etobicoke's interpretation of Clause 3 of the Supplementary General Conditions of contract 89-10. First, it is a Roads provision, not a driveways provision. On its face, it deals with "traffic control" and "road closures". There is not a word in the clause about driveways and, in my opinion, it stretches both the purpose and the words of Clause 3 to suggest that it governs the issue of driveway access.

¶ 21 Secondly, and more importantly, there is a specific driveway access clause in contract 89-10. It is Clause 13 of the Special Provisions and its explicit statement that "when construction is proceeding on one street, it must be possible for vehicles to park on adjacent streets." Clause 13 is a specific provision tailored to contract 89-10, not a general provision, like Clause 3 of the Supplementary General Conditions, found in all Etobicoke construction contracts. Moreover, Clause 13 is, by virtue of Article 26 of the General Conditions, hierarchically superior to Clause 3 if there is a conflict. Accordingly, even if Clause 3 of the Supplementary General Conditions did implicitly speak to the question of access to residential driveways (which, in my opinion, it does not) it would give way to the more specific and hierarchically superior language in Clause 13 of the Special Provisions.

¶ 22 Turning to the contested question of quantum, I accept the plaintiff's description and monetary evaluation of the work involved in maintaining access on a daily basis to approximately 300 residences. I was particularly impressed with the testimony of the site foreman, Mr. Cavalherio, who described a regular, and at times lengthy, process of machine and manual work, often at the end of the regular work day, dedicated to keeping residential driveways open. The daily worksheets support Mr. Cavalherio's testimony. Accordingly, I find that Suppa has substantiated its claim under this item for \$106,393.

ITEM 1 (b) - \$34,242 - Grading of boulevards

¶ 23 Suppa claims that the work it performed to grade the boulevards (the area, usually grassy, between the curb and the sidewalk) is not covered by contract 89-10. Accordingly, Suppa says it can claim an Extra pursuant to Article 26 of the General Conditions.

¶ 24 I agree with this aspect of Suppa's claim. Contract 89-10 is a long, elaborate and detailed

document. There are twenty-eight separate Pay Items in the contract. The majority of them refer to the definitions and descriptions of work set out in a large Etobicoke book titled Specifications for Roads and Sidewalks. A perusal of this book establishes that grading is specifically dealt with in several places - e.g. grading ditches in specification R-2-09 and grading the roadway in specification R-3-01. The omission from this book of any reference to grading boulevards gives rise to the inference that it is not a Pay Item in contract 89-10.

¶ 25 Etobicoke's response is that grading boulevards is covered by specification R-24-01 which provides:

R-24 TOPSOIL
R-24-01 SCOPE

The work under this item shall include excavation and the supplying, placing and fine grading of topsoil in area designated by the Commissioner.

(emphasis added)

¶ 26 Etobicoke asserts that there are four steps involved in constructing a boulevard. First, the old ditch must be excavated or refilled (depending on its previous shape). Then the excavated or refilled area must be graded to the appropriate level. Then topsoil is added and graded. Then the sod is placed on the topsoil. Etobicoke says that this is all one operation and that the second step, grading the boulevards, is merely "an operational step to get to a Pay Item."

¶ 27 I do not agree with Etobicoke's argument on this point. At a general level, construction contracts, including contract 89-10, are not what I would call final step oriented. Rather they are task oriented. An attempt is made in the contract to identify, and record as a Pay Item, each task to be performed on route to completion of the project. Thus in contract 89-10 there is not just one sewer or road or sidewalk item; rather there are several related to each of these items. To take a simple example, Item 4 identifies and authorizes for payment the removal of sidewalks, whereas Items 13 and 14 do the same thing with respect to the construction of replacement sidewalks.

¶ 28 This general pattern in contract 89-10 is followed, in my opinion, in the boulevard domain. The clearest indication of this is the fact that two of the steps involved in constructing boulevards, namely, placing topsoil and preparing and placing sod, are dealt with separately in specifications 24 and 25 of the Specifications of Roads and Sidewalks book. In other words, the third step in the boulevard construction operation, the topsoil step, is explicitly deemed by the contract not to be "an operational step" to get to the Pay Item of the fourth step, the sodding step. Since Etobicoke admitted through the evidence of its own witness, Mr. Czenkey, that what I have called the second step: in the operation, namely grading the boulevards, is in fact a separate step between excavation (or refilling) and placing the topsoil, it follows that it too should be compensable.

¶ 29 In summary, contract 89-10 could have provided that grading the boulevards was included in one of its Pay Items. It did not do this, even though the task of grading is explicitly identified as a component of other Pay Items. Accordingly, Suppa is entitled to claim the cost of grading the boulevards as an Extra under Article 26 of the General Conditions.

¶ 30 Turning to quantum, Etobicoke concedes that Suppa's estimate of \$34,242 for the performance of this work is a fair one. Suppa is entitled to this amount.

ITEM 1(c) - \$18,937 - Construction and maintenance of ramps across excavated sewer trenches to residential driveways.

¶ 31 Suppa's claim for this item is really a corollary of its claim under Item 1(a). Suppa says that when the sewer lines were being dug on a street, maintaining access to residential driveways required the construction and maintenance of ramps across the excavated sewer trenches. These ramps joined the unexcavated part of the roadway to the driveways. This is, Suppa asserts, another Extra for which it is entitled to receive payment.

¶ 32 Etobicoke's response is that this work is not an Extra. Rather it is contemplated by Clause 12 of the Instructions to Bidders section of contract 89-10 which provides:

Clause 12: Sewer Backfill in Joint Road/Sewer Tenders

When a tender includes road and sewer construction the price for the sewer within the limits of the road construction shall, unless otherwise indicated, include the cost of the granular backfill up to the proposed road sub-grade.

Granular material above the road subgrade will be included in the road unit prices.

However, in the event that traffic must be restored on the street and over the sewer trench, including laterials, before the road construction and road excavation commences, the sewer trench and laterial from the proposed road subgrade to the level of the existing pavement shall be backfilled with compacted granular material suitable for the maintenance of traffic movement.

The cost for the placing and subsequent removal of this material shall be borne by the road contractor and shall be included in the bid price for the tender items.

(emphasis added)

¶ 33 Etobicoke asserts that the underlined words contemplate keeping streets open for local traffic - e.g. to enable residents to drive to their homes to unload passengers, groceries, etc., to permit commercial deliveries to residences and, importantly, to ensure access by emergency vehicles to private homes.

¶ 34 Suppa's response is that all of these can be accommodated by keeping the streets open. Since the sewer trench is typically on one side of a street quite near the curb, it is unnecessary to ramp across the trench to enable these vehicles to gain access to the residences. In other words, Suppa says that all of these vehicles can perform their duties without having to cross the sewer trench. Therefore, ramping across the trench is an Extra.

¶ 35 On balance, I prefer Etobicoke's factual description and legal analysis. The sewer trenches are long and deep. When Etobicoke's chief construction inspector, John Kelsall, testifies that he would "lose sleep" if sewer trenches were left open, that testimony is, in my opinion, reasonable and credible. Accordingly, a ramp across a sewer trench is not, in my view, just a condition precedent to Item 1(a), driveway access. Rather it is a necessary component of the construction process - for, inter alia, emergency purposes - irrespective of whether access to residential driveways is to be provided.

¶ 36 This conclusion at a factual level is supported by the express words of Clause 12 of the Instructions to Bidders. The relevant phrase includes both the restoration of traffic to the streets and, explicitly, "over the sewer trench" and clearly states that these are to be "included in the bid price."

¶ 37 Accordingly, I would dismiss Suppa's claim under Item 1(c).

ITEM 2 - \$70,238 - Additional excavation - general

¶ 38 Suppa makes a claim for additional excavation. Item 4 of contract 89-10 contemplated additional excavation and, indeed, Etobicoke did pay for some additional excavation. Suppa contends, however, that Etobicoke should give it credit for even more additional excavation. Its claim is a substantial one. Contract 89-10 contemplated 1500 cubic meters of additional excavation. Suppa says that it performed 2900 cubic meters; Etobicoke says Suppa did just over 1300 cubic meters. To illustrate the gulf between these figures, during the trial both parties agreed that it would take 200-250 trucks to carry away the 1600 cubic meters of stone that form the subject matter of this dispute.

¶ 39 Suppa supports its claim of 2900m³ by relying on the invoices showing the amount of stone actually delivered to the site by various sub-contractors (the parties are agreed that, in a normal construction job, the amount of material excavated should be matched by the amount of new stone brought to the site to fill in the excavation). Etobicoke's response is that all additional excavation must be approved in advance by its inspectors (Suppa agrees with this) and that its inspectors will always carefully record the additional excavation they authorize. On contract 89-10 the Etobicoke inspectors have recorded 1300m³ of additional excavation, not 2900m³.

¶ 40 How, then, is this dispute to be resolved? Two possible explanations can be mentioned and quickly dismissed because Etobicoke disclaims reliance on them. The first is that 2900m³ of stone were not in fact delivered to the site or, if it was delivered, it was improperly removed from the site before being used on this project. This explanation would involve an assertion that Suppa and/or its sub-contractors engaged in theft or fraud. Etobicoke does not allege this explanation and on the evidence of a 10-day trial such an allegation would be entirely unwarranted.

¶ 41 A second explanation would be that Suppa did a great deal of additional excavation without receiving authorization from Etobicoke's inspectors. Neither Suppa nor Etobicoke rely on this explanation. They agree that additional excavation is a serious and expensive item which can take place only if it is expressly authorized by the owner, in this case Etobicoke.

¶ 42 Etobicoke does contend that the discrepancy between the 1300m³ that it has paid for and the 2900m³ claimed by Suppa is explained by one (or both) of two factors - either the sub-contractors unintentionally excavated too deep or there was a great deal of spillage on the site. Neither of these explanations is, in my view, persuasive. The evidence put forward by both parties is that the grade level for excavations is one of the most important measurements on the site. The construction companies involved in excavation on a site do not want to dig even a very few millimeters below the level specified in the contract because they will not be paid for this extra work. Also, the owner's inspectors are vigilant about checking grade levels because they are one of the most important components of the contract and of the actual construction. The evidence in this trial, from Etobicoke's own inspectors, is that they checked the grade levels "regularly and frequently", that they established them "very, very close" to the specified levels, and that the sub-contractors performing the road excavations were "competent" and "experienced". In these circumstances, I strongly doubt that the explanation for the additional excavation is that the sub-contractors inadvertently dug far below the specified grade levels. Similarly, the competence and experience of the sub-contractors belie an explanation grounded in a truly massive accidental spillage of stone on the site. Accidental spillage does not explain 200-250 truckloads of missing stone!

¶ 43 The only remaining explanation for the discrepancy between Suppa's stone delivery records and

Etobicoke's inspectors' reports is the one advanced by Suppa, namely, that the inspectors who authorized the additional excavation forgot to record it. There is a great deal of reliable evidence to support this explanation.

¶ 44 First, the summer of 1989 was an exceptionally busy construction period throughout Ontario. There was a great deal of confusion on many construction sites as a limited number of companies dashed from site to site to complete their work before winter set in.

¶ 45 Second, several of the Etobicoke inspectors responsible for contract 89-10 were new to their positions. Indeed, contract 89-10 was the first inspection job for two of the three principal inspectors on the job.

¶ 46 Third, the new inspectors received only a very cursory introduction to their new jobs. For example, John MacFarlane, one of the main inspectors throughout contract 89-10, met the chief construction inspector on his first day on the job, was given a brief description of his duties, proceeded directly to the construction site, was taught how to measure excavations that morning (this being something he had never done before) and then went to work as a full-fledged inspector.

¶ 47 Fourth, and most importantly, the evidence at the trial demonstrated in an overwhelming fashion that there were serious errors in several aspects of the inspectors' reports. In at least four major areas, there was a discrepancy between the work Suppa said it had done and the records of the Etobicoke inspectors. Suppa said it removed 1870m³ of culverts, the inspectors recorded 1330m³. Suppa said it removed 8 catch basins; the inspectors recorded 3. Suppa claimed 35 connecting drain pipes; the inspectors recorded 14. Suppa claimed 1593m³ of sub-drains; the inspectors recorded 1450m³. In some of these instances not only is the discrepancy in the numbers substantial; in addition the items themselves are quite large (e.g. culverts) which compounds the discrepancy. The crucial point, however, is that all of these discrepancies were resolved in favour of Suppa. Etobicoke certified payment in all four instances. In doing so, in my opinion, they implicitly agreed with Suppa's records rather than with their own inspectors' records.

¶ 48 Fifth, in at least one instance the relevant inspector admitted that he had indeed forgotten or omitted to record additional excavation in his daily inspection report.

¶ 49 For all of these reasons, I find that it is probable that the Etobicoke inspectors did not record all of the additional excavation performed by Suppa and its sub-contractors. Since Etobicoke accepts Suppa's assertion about the amount of stone delivered to the site and does not allege that it disappeared improperly from the site, and since neither incompetent excavation nor massive spillage are credible explanations for 200-250 truckloads of missing stone, I believe that the stone Suppa claims it used on the site was in fact used. Some of the use was not properly recorded by Etobicoke's inspectors. I think that the best way to resolve this issue is, in the words of Mr. Prosser, Suppa's superintendent, to "let the stone decide." The records indicate that 2900m³ of stone was delivered to the site to refill areas that had been excavated.

¶ 50 I would make one final comment about this item. Although a discrepancy of 1600m³ of stone (200-250 truckloads) seems like a lot in the context of an estimate of 1300m³ of additional excavation for this contract, it needs to be recalled that the stone delivered to the construction site is used to fill in areas of both general and additional excavation. The same type of stone is used to refill both types of excavation. In that vein, the amount of general excavation Suppa estimated it did was 14,350m³ and Etobicoke certified that amount. Accordingly, it is possible, and in my view fair, to view the inspectors' error not as missing 1600m³ out of 2900m³, but rather as an error of 1600m³ out of 17,250m³, - i.e. an

error in recording excavation amounts of less than 10 per cent. Such an error, in a busy construction season and by new and largely untrained inspectors, is not particularly surprising.

¶ 51 Turning to quantum, I believe that the documentation prepared by Peter Ozaruk, Suppa's engineer on this project, whom I found to be an honest, intelligent and fair witness, amply supports the claim for the full amount of \$70,238.

ITEM 3 - \$18,556 - Additional excavation - curb construction

¶ 52 Suppa asserts that its tender bid on contract 89-10 was made after it had perused, inter alia, the relevant Etobicoke plans and drawings, including what are called the cross-section drawings which show the arrangement of all components (roadway, curb, boulevard, sidewalk, driveway) of a roads and sidewalk configuration in Etobicoke. Suppa says that its bid was based on an assumption that it would be constructing in accordance with typical Etobicoke cross-sections as shown on the plans and drawings.

¶ 53 Etobicoke's cross-section drawings show a neat line separating the curb and the boulevard. Accordingly, says Suppa, it assumed that it would not have to do any excavation behind the curb. However, Suppa states that Etobicoke's inspectors ordered it to excavate to a line 300 millimeters behind the back of the curb. Suppa says that it obeyed this instruction and claims this additional excavation as an Extra.

¶ 54 Etobicoke has three responses to this claim. First, it says that it didn't order suppa to excavate 300mm. behind the curb; rather its inspectors "simply suggested this amount of excavation. I am not sympathetic to this response. On a construction site the inspector has an important and powerful role. He is the owner's representative and is responsible for authorizing much of the work that takes place on site. Construction crews are accustomed to obeying his instructions. Accordingly, the attempt by Etobicoke to draw a distinction between an order and a suggestion is, in my opinion, a bit too subtle in a construction context. Moreover, inspector John MacFarlane's site diary (Exhibit 27) shows, on his first day on the job, a fairly detailed drawing of the curb construction. The drawing clearly indicates that there is to be excavation 300 mm. behind the curb. Mr. MacFarlane testified that he made this drawing to help, him understand a conversation he had with Bill Brown, the chief inspector on this project. The logical inference is that both Brown and MacFarlane were making it clear to the construction crews that they were to excavate 300 mm. behind the curb.

¶ 55 Etobicoke's second response is that an excavation of 300 mm. behind the curb is standard in the industry; it is not, therefore, 'additional' excavation. There was conflicting viva voce evidence on this point. However, what I find determinative is the fact that the provincial standard, reflected in its plans and drawings, is 300 mm. Etobicoke's plans and drawings do not follow the provincial standard. It is estopped, therefore, from saying that a 300 mm. excavation beyond the curb is standard for its projects.

¶ 56 Etobicoke's third response is that a 300 mm. excavation behind the curb is included under the rubric of General Excavation. Etobicoke relies on specification R-13 in the Specifications of Roads and Sidewalks book which provides:

R-13 CONCRETE CURBS AND CONCRETE CURBS AND GUTTERS

R-13-02 EXCAVATION AND SUB-BASE PREPARATION

The cost of excavation for curb and gutter constructed shall be included in the price bid for General Excavation.

The granular road base shall extend beneath the curb or curb and gutter, and shall be included in the price of the curb, or curb and gutter.

(emphasis added)

¶ 57 The key word in R-13-02, in my view, is 'beneath'. It is clear that the roadway will have to be excavated immediately below the curb to enable the curb to be properly installed. However, on the evidence of John Kelsall, Etobicoke's chief construction inspector, the integrity of the curb does not require any excavation behind the curb, that is between the curb and boulevard. Moreover, Mr. Kelsall admitted that a contractor will normally want to get his excavation "as tight as possible" to the back of the curb so that he is not performing unnecessary additional work. In short, neither the exigencies of curb construction nor the express words of R-13-02 support Etobicoke's claim that an excavation of 300 mm. behind the curb is included within the rubric of General Excavation.

¶ 58 Turning to quantum, Suppa's original claim was for \$13,635. Etobicoke agreed with this assessment, although it disputed its liability to pay anything. At the trial, Suppa's counsel noticed an obvious error in its calculations and requested that its claim under this item be amended to \$18,556. Etobicoke consented to this amendment and I made an order permitting the amendment. Etobicoke contends, however, that the original amount of \$13,635 is a better assessment of the work done on this item. Because the calculation error is an obvious one apparent on the face of the relevant documents, because, as I stated earlier, I find Mr. Ozaruk's record-keeping and calculations to be thorough and fair, and because Etobicoke led no evidence to support its assertion that the original amount is more accurate than the amended amount, I am of the opinion that Suppa is entitled to receive \$18,556 on this item.

ITEM 4 - \$30,317 - Additional sidewalk construction

¶ 59 Contract 89-10 contemplated sidewalk construction as one of its major components. Items 13-16 called for 1200m² of sidewalk removal and construction. Suppa and its sub-contractors performed this work and were paid for it at the unit rate specified in the contract.

¶ 60 However, Etobicoke requested, through its inspectors on site, that Suppa perform a substantial amount of additional sidewalk work. The parties agree that such requests are a normal feature of most construction projects. Indeed, construction contractors usually appreciate these requests because, once they have brought their workers and machines to the site, it is relatively simple to do the extra sidewalk work for which they will be paid at the unit price.

¶ 61 On contract 89-10 Etobicoke requested that Suppa perform 4100m² of sidewalk construction, Suppa and its sub-contractors did this work, and they have been paid for all 4100m² at the unit price. Suppa claims an additional \$30,317, however, on two bases - first, \$25,360 it had to pay as premiums to sub-contractors who did the actual work during an exceptionally busy construction season; second, \$4957 as a premium for work done during the winter season which, the parties agree, occurs after November 1.

¶ 62 Suppa supports its claim with two arguments - first, that the increase from 1200m³ to 4100m³ was a huge increase, especially during one of the busiest construction seasons on record, and that this posed major problems for Suppa because of the non-availability of many construction sub-contractors; second, that Etobicoke's inspectors were confused and tardy with respect to making their requests for additional sidewalk work and that this pushed the construction beyond November 1.

¶ 63 Etobicoke's response is a simple one - the problems and delays were Suppa's fault, caused by its inexperience in sidewalk construction, its poor scheduling of the sidewalk work, and its inadequate supervision of the sub-contractors it engaged to perform the sidewalk component of the contract.

¶ 64 I agree with Etobicoke's response. Suppa was an experienced sewer construction contractor. However, contract 89-10 was its first experience with a combination of sewer work and roads and sidewalk work. When Suppa bid on the job, its intent was to perform the sewer work itself (it did this - effectively, on schedule and within the tender prices) but to engage a subcontractor to perform the roads and sidewalk work. It experienced all kinds of difficulty in realizing this objective. First, its original tender mentioned two sub-contractors which it hoped would perform the sidewalk work. It was able to hire neither company. Second, Suppa's original work schedule, a fairly detailed line chart or diagram of the different components of the job and a schedule for the work on them, made no mention at all of sidewalks. Third, Suppa was forced to hire four different companies to do the sidewalk work - Campana, Burlington, Ventura and Campana again. Fourth, the evidence supports the conclusion that there was an absence of supervision of the sub-contractors by Suppa. The daily reports of Suppa's own representatives and of Etobicoke's inspectors, and especially the minutes of the bi-weekly Site Meetings, indicate that the sidewalk construction proceeded slowly and with little supervision from Suppa. Fifth, there is no credible evidence that Etobicoke was slow in identifying the additional sidewalk it wanted constructed. In early July, Mr. Byberg, an Etobicoke inspector, marked out all of the sidewalk in Phase 1 of the project. In early October he marked out the sidewalk for Phases 2 and 3. Suppa complains about this 'delay'. The complaint is misconceived. The minutes of the Site Meeting on September 20 record, under the heading 'Work scheduled for the next two weeks', this notation: "sidewalk replacements to commence." If Suppa and its sub-contractors have not even commenced Phase 1 sidewalk work by September 20, after Etobicoke had identified the relevant work more than two months before, it cannot complain that Etobicoke did not identify the sidewalk work for Phases 2 and 3 until early October.

¶ 65 There is no doubt that Suppa paid its sub-contractors premiums of \$25,000 to entice them to perform the additional sidewalk construction that its first sub-contractor could not complete because of other commitments. Also, Suppa had to pay a \$5000 premium for post-November 1 'winter work'. I find, however, that these payments resulted from Suppa's own conduct and omissions, especially during July and August. The minutes of the very first Site Meeting, held on July 26, record "Progress to date has been very slow." The minutes of every other Site Meeting in July and August say the same thing - e.g. August 24: "The Contractor was informed that they are way behind their schedule." In my opinion, if Suppa had scheduled and supervised its sidewalk work properly, it could have done the additional sidewalk work - before November 1 and at the unit price.

¶ 66 Suppa chose to do most of the sidewalk work late in the project. It is clear from the minutes of the Site Meetings that Etobicoke's inspectors were urging Suppa to do the sidewalk work in closer proximity to the sewer and road work. However, Etobicoke could not go further; it could not order Suppa how to carry out its construction work. Decisions on organization, method and timing of the work were within Suppa's jurisdiction. In the words of Justice McLachlin, speaking for a unanimous court in the recent case *Auto Concrete Curb Ltd. v. South Nation River Conservation Authority* (S.C.C., Unreported, 9 September, 1993), at p. 5:

It has long been established that, barring specific arrangements to the contrary, the method by which a contractor chooses to execute the work falls within its sphere of responsibility, and that neither the owner nor the design professionals employed by the owner have a duty to advise the contractor as to what method to choose, or how to go about accomplishing the work by whatever method the contractor in fact chooses.

¶ 67 Suppa chose to organize its work so that sidewalk construction proceeded very slowly. It cannot be heard to complain when, in order to ensure that it completed its contractual obligations, it was forced to hire expensive sub- contractors late in the season and pay them premiums for their work on the sidewalks. Accordingly, Suppa is not entitled to recover under Item 4.

ITEM 5 - \$45,202 - Additional costs due to inability to use Barford Road during construction

¶ 68 One of the components of contract 89-10 was the final paving of Barford Road, a residential street adjacent to the other residential streets where the major sewer, road and sidewalk work was to be done. Major construction work had taken place on Barford Road, during the summer of 1988. Contract 89-10 called for placing the final layer of asphalt.

¶ 69 Once Suppa had paved Barford Road, it started to use it in conjunction with the rest of its operations on contract 89-10. Put simply, it was convenient to use Barford as an exit point for its vehicles coming off Checkendon and Ludgate. If Barford could not be used then the vehicles would have to make difficult turns in confined spaces on Checkendon and Ludgate.

¶ 70 When Etobicoke became aware that Suppa was using Barford, it ordered Suppa to cease. Suppa complied. The parties agree that this caused Suppa some difficulties - it had to reschedule some work and use different equipment. The parties agree that \$45,202 is a reasonable estimate of the cost to Suppa of not being able to use Barford Road. Accordingly, Suppa claims this as an Extra under Article 26 of the General Conditions because, it says, contract 89-10 is silent about the non-availability of Barford Rd.

¶ 71 Etobicoke responds in two ways. It says that Suppa should have known that Barford Road would be off-limits after final paving because heavy construction vehicles might damage the new pavement. I do not accept this argument. The evidence of many of the witnesses, and I think common sense, support the conclusion that properly constructed pavement can easily withstand the pressure of huge volumes of traffic, including heavy vehicles, within a day or two after it is poured. The transportation system in Ontario would be in deep trouble if this were not the case!

¶ 72 Etobicoke's second argument is based on Clause 3 of the Supplementary General Conditions which provides:

CLAUSE 3 - STANDARD REQUIREMENTS FOR TRAFFIC CONTROL IN CONSTRUCTION AREAS.

11(b) Truck Routes

All contractors' and suppliers' trucking operations are to be confined to roads designated as truck routes unless otherwise agreed to by the Commissioner.

¶ 73 Etobicoke says that since Barford Road had not been designated as a truck route, Suppa could not use it.

¶ 74 I do not agree with this submission. The nearest designated truck route is Kipling Avenue. If Suppa were limited to using only Kipling, it would be unable to perform contract 89-10. All of the streets worked on under contract 89-10, and all of the adjacent streets (Brookmere, Katrine, part of Elmhurst) necessary to get to the contract streets are residential streets. It would be nonsensical for Etobicoke to say that these streets could not be used because they are not truck routes. Logically,

Barford is in the same category.

¶ 75 In Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery insurance Co., supra, Justice Estey said, at p. 901:

[T]he normal rules of construction lead a court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract. Consequently, literal meaning should not be applied when to do so would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the insurance was contracted. Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties.

¶ 76 Consolidated-Bathurst dealt with an insurance contract. However, the passage quoted is, in my opinion, as relevant for construction contracts as for insurance contracts. The parties to contract 89-10 must have intended that the contractor would use only designated truck routes to get to the project location, but once there could use the residential streets on, and adjacent to, the project in order to perform the construction work.

¶ 77 For these reasons, I agree with Suppa that it is entitled to receive \$45,202 as compensation for the inconvenience and extra expense caused by Etobicoke's unexpected order forbidding access to Barford Road. Since contract 89-10 is silent on this point, and since a fair assumption by a contractor examining the site drawings would be that Barford could be used for the construction project, Suppa has a worthy claim on this item.

ITEM 6 - \$16,814 - Replacing, in the summer of 1990, the cracked sidewalks on Watercliffe Crescent

¶ 78 Suppa's claim here is similar to its claim under item 4. Its sub-contractor, Campana, formed and poured sidewalk on Watercliffe Crescent during the last few days of November, 1989. Some of the sidewalk cracked during the winter and Etobicoke ordered Suppa to repair it the following summer. Suppa complied but claims this work as an Extra. It says that the late November construction was Etobicoke's fault on two counts - first, Etobicoke demanded too much additional sidewalk construction throughout the project and delayed its identification of this work, thus causing Suppa difficulties in obtaining sub-contractors late in the construction season; second, Etobicoke decided on the site in late November that the sidewalk should be poured without a proper granular base.

¶ 79 I have dealt with the first of these arguments under item 4. It is Suppa, not Etobicoke, which must be blamed for the fact that sidewalk work was still proceeding in November.

¶ 80 I do not find the second argument persuasive either. The evidence indicated that there was a gap of several days between the forming of the sidewalks and the pouring of cement on watercliffe Crescent in late November. Moreover, it appears that the sub-contractor may not have taken the proper precautions on the site to protect the base during the days between forming and pouring. In those circumstances, with the onset of cold, wet weather at the very end of November, and facing the prospect of open sidewalks through the winter months, with the attendant safety concerns, it was reasonable, in my view, for the Etobicoke inspectors to reject Suppa's on-site advice about the need for a granular base and order Suppa to pour the sidewalks. Some of the sidewalks cracked, some did not. The costs of the decision to gamble on pouring the cement should be borne by Suppa because, but for Suppa's

performance on the sidewalk portion of the contract throughout the July-November period, there would have been no decision to make, no gamble to take, on a miserable afternoon in late November on Waterville Crescent.

CONCLUSION

¶ 81 I find for the plaintiff Suppa Construction Ltd. on five of the eight items it has claimed under contract 89-10. The plaintiff is entitled to recover from the defendant Corporation of the City of Etobicoke, \$274,631. The plaintiff is also entitled to recover pre-judgment and post-judgment interest in accordance with the Courts of Justice Act.

¶ 82 The plaintiff has not been successful in making out its claim under three other items totalling \$65,438. At trial the plaintiff made an alternative argument for recovery on a quantum meruit basis for items if it lost on its breach of contract arguments. The argument was that, irrespective of the contractual position of the parties, Suppa had in fact done the work and Etobicoke had gained and accepted the benefit of the work. Accordingly, Suppa should recover its costs of this work.

¶ 83 I do not think that the principles of quantum meruit apply to any of the three items on which the plaintiff has lost on its breach of contract arguments. On Item 1(c) I have found that the work performed was included in the contract. On Items 4 and 6 I concluded that the premiums paid by the plaintiff and the costs of repairing sidewalks were both necessitated by the plaintiff's own conduct. The defendant has already paid the plaintiff the appropriate amounts for these items on a unit price basis under contract 89-10. The plaintiff is not entitled to additional amounts.

¶ 84 The parties may speak to costs, if necessary.

MacPHERSON J.