FILE/DIRECTION/ORDER

BEFORE JUDGE: J. Steele J. ACTION #: CV-18-00609000

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTER OF TRANSPORTATION
Applicant

-v-

BOT CONSTRUCTION (ONTARIO) LIMITED
Respondent

CASE MANAGEMENT: YES ☐ NO ☐

COUNSEL:	James A. LeBer and Mr. K. MacLean (counsel for the respondent)	PHONE NO.	519-858-8220 x. 225 J.LeBer@advocatesLLP.com
COUNSEL:	Alex Redinger (counsel for the applicant)	PHONE NO.	416-314-2555

Motion Heard via video conference on January 18, 2021

ENDORSEMENT

1. This is a motion by the respondent, BOT Construction (Ontario) Limited ("BOT"), under Rules 1.04, 14 and 38.10 of the *Rules of Civil Procedure* for an order converting this application into an action.

2. The application is brought by Her Majesty the Queen in Right of Ontario as represented by the Minister of Transportation ("MTO"). In its application, MTO seeks to review a referee's decision regarding a rock stockpiling contract between MTO and BOT. BOT had

successfully bid on a contract tendered by MTO for rock excavation and grading work. BOT's position is that the bid they placed was based on a specific volume of rock as estimated by MTO. However, BOT claims that the project involved a volume almost 26% greater than that identified in the contract documents. Accordingly, BOT submitted a request for an additional payment from MTO, which was denied. BOT commenced a claim in accordance with the claims resolution process in the contract. The referee, in a decision dated August 17, 2018, determined that MTO was required to pay BOT $341,012.70, plus HST. MTO then brought the application to court.

3. MTO submits that the matter should not be converted to a trial. MTO submits that there are no material facts in dispute, no complex issues that require expert evidence and no need for pleadings or discovery.

4. BOT argues that there are material facts in dispute on the application, including:

    [1] Whether the referee failed to adhere to the referee process;

    [2] Whether the "bulking factor" for excavated rock material is not a guarantee of field results;

    [3] Whether there was a material difference in the effort required to stockpile the excess rock material at issue in this contract and the general effort that would be required to construct rock embankments;

    [4] Whether the quantity of rock material to be processed from a stockpile is determined by the volume of the in situ excavated rock and not the size of the

resultant rock material stockpile.

5. MTO submits that the facts that BOT says are in dispute (other than the referee process) are based on MTO's position that the bulking factor and rock embankment constructions are relevant to the contract, which MTO denies. MTO's assertion that the bulking factor is not relevant to the contract, is not supported by the documents, as the tender package included the definition of "bulking factor". At the very least, there is an ambiguity in the documents. Further, MTO's application sets out certain alleged errors of the referee (including those related to the bulking factor, and effort required when constructing rock embankments versus placing rock in a stockpile) as grounds for the application. It is not clear how the relief sought by MTO on the application (as set out below in paragraph 12) could be determined without a consideration of these issues, which are in dispute.

6. BOT also argues that there are issues of credibility that will require a consideration of evidence as to industry practice on certain issues. I discuss these issues in paragraphs 14 and 15 below. Finally, BOT argues that, in order to resolve MTO's claims on the application and the complex issues in this matter, expert evidence will be required.

7. MTO's position is that the application is for the straightforward purpose of reviewing a contractual summary dispute resolution and the referee's decision. MTO submits that it would be inappropriate to transform this review into a complex action.

8. The only issue before me is whether it is appropriate to convert this application into an action.

9. In their material, both parties refer to *Przysuski v. City Optical Holdings Inc.*, 2013 ONSC

5709. In that case, Justice Firestone set out the general principles to consider in determining whether to convert an application into an action (at paras. 5 -10):

> [5] "It is a well-established general principle that an application should be used when there is no matter in dispute and when the issues to be determined do not go beyond the interpretation of a document: see *Collins v. Canada (Attorney General)* (2005), 2005 CanLII 28533 (ON SC), 76 O.R. (3d) 228 (S.C.), at para. 28; *Marten Falls First Nation v. Ontario* (1994), 1994 CanLII 7555 (ON SC), 31 C.P.C. (3d) 149 (Ont. C.J. (Gen. Div.)), at paras. 7, 17; *Re City of Burlington v. Clairton Village* (1979), 1979 CanLII 2059 (ON CA), 24 O.R. (2d) 586 (C.A.), at pp. 588-90; and *Re Acumen Investments Ltd. v. Williams* (1985), 1985 CanLII 2068 (ON SC), 53 O.R. (2d) 247 (H.C.), at p. 250. This is not an application concerning the interpretation of a document.
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> [6] Where the legislature has stipulated that a proceeding may be brought by application, there is a *prima facie* right to proceed by application and the matter should not be converted into an action without good reason: see *Sekhon v. Aerocar Limousine Services Co-Operative Ltd.*, 2013 ONSC 542, at paras. 48-49; and *College of Opticians (Ontario) v. John Doe*, 2006 CanLII 42599 (Ont. S.C.), at paras. 18-21.
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> [7] A good reason to convert an application into an action is when the judge who will hear the matter cannot make a proper determination of the issues on the application record: see *Collins*, at para. 29.
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> [8] When issues of credibility are involved the matter should proceed by way of action: see *Gorden Glaves Holdings Ltd. v. Care Corp. of Canada* (2000), 2000 CanLII 3913 (ON CA), 48 O.R. (3d) 737 (C.A.), at para. 30; and *Cunningham v. Front of Yonge (Township)* (2004), 73 O.R. (3d) 721 (C.A.), at para. 20.
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> [9] A factual dispute *simpliciter* in itself is not sufficient to convert an application. The fact(s) in dispute must be material to the issues before the court: see *Niagara Air Bus Inc. v. Camerman* (1989), 1989 CanLII 4161 (ON SC), 69 O.R. (2d) 717 (H.C.), at pp. 725-26; and *BPCO Inc. v. Imperial Oil Ltd*. (1993), 17 C.P.C. (3d) 130 (Ont. C.J. (Gen. Div.)), at para. 13.
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> [10] In determining whether to convert an application into an action, *Collins* sets out the following factors that are relevant at para. 5:
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> 1. Whether material facts are in dispute;
> 2. The presence of complex issues that require expert evidence and/or a weighing of the evidence;
> 3. Whether there is a need for pleadings and discoveries; and

4. The importance and impact of the application and of the relief sought.

10. Based on the record before me, and having heard the oral submissions of counsel, I have determined that this is a case where a trial is needed for a "fair and just process". This is not a case where the judge will be in a position "to find the facts necessary to resolve the dispute and apply the relevant legal principles to the facts as found" without "the forensic machinery of a trial" (*Niro v. Societa Caruso*, 2015 ONSC 7446 at para. 53).

11. The matter before me is unlike that in *Niro*, where the application only involved an assessment of the manner in which the disciplinary process was conducted. While this matter concerns how the referee conducted the process, that is but one issue.

12. MTO's application seeks (i) a declaration that the decision of the referee was wrongly decided, (ii) an order requiring BOT to return to MTO to payment of $341,012.70 plus HST; and (iii) a declaration that MTO owes no additional payment to BOT in respect of the contract. The relief MTO seeks goes beyond the mere interpretation of a document. For example, MTO takes the position that the referee exceeded its contractual authority by allowing certain submissions and receiving presentations at the referee meeting, and that the referee made certain errors.

13. I accept BOT's submission that there are issues of credibility and material issues in dispute, some of which likely require expert evidence.

14. One issue that may require industry or expert evidence is the question of whether the manner in which the volume of rock changes in an embankment is different than in a

stockpile. The parties further disagree as to whether there is a difference in the effort required when constructing rock embankments versus stockpiling. The affidavit evidence of Mr. Steve Logan (for MTO) is that "[t]he Referee further failed to appreciate that there is a material difference in the effort required when constructing rock embankments versus placing rock in a stockpile, particularly in terms of compaction". On the other hand, the affidavit evidence of Mr. Ian Marshall (for BOT) is that he "strongly disagree[s] with the assertion that there was material difference in the effort required when constructing rock embankments generally and the effort required to place rock material in the stockpile on this project." I agree with BOT's submission that these contradictory statements cannot be resolved by reviewing the contractual documents.

15. There is ambiguity in the contract regarding the application of the bulking factor definition, which does not specify whether it applies to embankments or stockpiles or both. There is conflicting affidavit evidence on this. Mr. Logan states in his affidavit and MTO submits that the bulking factor is not relevant to this contract; however, this is not clear based on the documents. Mr. Marshall's affidavit evidence is that the bulking factor prescribed in the contract is a warranty made by MTO that BOT relied upon in estimating total anticipated rock volumes. He states that "[t]o suggest otherwise is completely contrary to industry practice and the way in which Bot, and other paving contractors, bid projects requiring excavation and handling of in situ rock material. In this proceeding, Bot will rely on evidence of its own practice together with the evidence of other contractors in support of this industry practice."

16. As there is "conflicting evidence that requires credibility determinations on central issues,

the application must be converted to an action". (*Maurice v. Alles*, 2016 ONCA 287)

17. There was no recording (and therefore no transcript) of the referee meeting, and therefore there is an incomplete record. I agree with BOT's submission that the court will not be able to make a proper determination of the issues based solely on the application record.

18. Converting this application to an action at the present time is the most expeditious route in the circumstances. In Mr. Logan's reply affidavit, he states that "[d]epending on the outcome of this Honourable Court's decision on the Application, another legal proceeding in the form of an Action may occur, as contemplated in GC 3.14.14.02, at which point BOT will have a full opportunity to marshal its case through discovery and expert opinions. Now is not the time." This suggests that MTO contemplates an action being brought after this application is concluded. This is not efficient. An additional step will only increase the cost and time of all parties to reach a resolution. Converting the application to an action now will permit the court to have a full and complete record before it, with industry evidence and expertise and will permit the court to finally determine the matter on its merits.

19. I further note that the contract between the parties does not require the interim step of an application, nor does it prohibit the parties proceeding to an action. The contract provides that the parties may explore alternative dispute resolution prior to litigation. Ultimately, it provides that either party may resort to litigation.

20. For the reasons set out above, I order the following:

(i) This application is converted into an action. The Applicant shall be the Plaintiff and the Respondent shall be the Defendant.

(ii) The Plaintiff shall deliver a Statement of Claim within 15 days from today's date.

(iii) The Defendant shall deliver their pleadings within 10 days after receiving the Plaintiff's Statement of Claim.

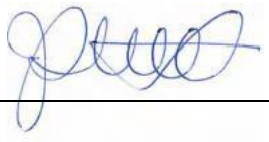
(iv) All prior court orders made in this application will apply without exception to this action.

(v) Once pleadings are exchanged, the parties may reach out to my judicial assistant, Polly Diamante (polly.diamante@ontario.ca), to set a timetable for examinations for discovery.

(vi) All steps in this action are to be expedited.

21. Costs of this motion to the moving party, BOT, in the cause. I am not seized.

January 19, 2021
DATE



JUDGE'S SIGNATURE