

## Real Estate

## Definitive deference: How courts treat consultants' decisions

By **Catriona Otto-Johnston and Andrew Dominy**



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(May 22, 2018, 8:55 AM EDT) -- The consultant's role on a construction project is important and includes interpreting the underlying construction contract, certifying work as sufficiently complete for interim or final payment, rejecting work which fails to conform to the contract and determining deductions for any defective work. The consultant must be impartial in fulfilling its duties, including its decisions as to entitlement as between the owner and the contractor. This can be particularly difficult where either the owner or the contractor disagrees with the findings.

Where a dispute arises between the parties to a construction contract due to the determinations of the consultant, it is important to understand the deference the court will accord to the consultant's decision. In such circumstances, *ASC (AB) Facility Inc. v. Man-Shield (Alta.) Construction* 2018 ABQB 130 (Man-Shield Construction) is instructive.

In *Man-Shield Construction*, ASC (AB) Facility Inc. (ASC) entered into a contract with Man-Shield (Alta) Construction (Man-Shield) to construct a retirement residence. The contract was in the standard CCDC2 form, which specifically creates and empowers the role of consultant for the underlying project. The consultant chosen for the project was IBI.

IBI determined that some of Man-Shield's work did not satisfy the contractual requirements and concluded that ASC was entitled to deduct the value of that work from amounts otherwise owing to Man-Shield. Ultimately, ASC terminated Man-Shield's right to continue work on the project. Man-Shield consequently registered a lien that included invoices issued both before and after termination. The contract provided for mediation and arbitration in most circumstances but left open the ability to independently enforce liens. As a result, the parties proceeded with a summary trial to determine which work Man-Shield had performed and the extent of the deficiencies.

The core of Man-Shield's argument was that while deference is owed to a consultant's decisions during the life of the contract, no deference is owed after the contract is terminated. Man-Shield did not cite any specific authority for this proposition, rather relying on the argument that the parties' intention to be bound by IBI's decisions ended when the contract was terminated.

The court disagreed with Man-Shield that no deference should be given to a consultant's decisions after a contract is terminated. Particularly, the court found that the consultant still has the opportunity to observe the work and the expertise to evaluate it even after termination, suggesting deference should be given to the consultant's decisions regardless of termination.

Another significant rationale for deference was the relative expertise as between the court and the consultant. The consultant would have had access to the worksite and the requisite expertise needed to make an evaluation. The consultant would have been regularly involved with the parties and was mutually chosen by them to perform the role of consultant. With its lack of expertise and closeness to the project, the court was not as well placed to make such decisions.

The court further discussed Man-Shield's position that all contractual terms cease to apply upon termination of the contract, noting that numerous contractual provisions are designed to survive contractual termination. In these circumstances in particular, the contract stipulated mediation and arbitration, except where one of the parties sought to enforce a lien. It was this latter contractual

term which the parties relied for this action. Man-Shield itself, through its submission of another invoice after the commencement of litigation, had also continued to rely on the contractual obligation for payment after termination.

In the result, the court found that a consultant's determinations of fact or contractual interpretation should be accorded deference in the absence of compelling evidence to the contrary or demonstrable and significant error. Had it been before the court that the consultant had erred on a legal determination however, the appropriate standard of review would have been correctness. The court also discussed the changes the consultant had made to some numbers to reflect updates or correct superficial errors.

These errors were minor and not substantial enough to strip deference to the consultant's decision, especially as it would be unreasonable to hold a consultant to a standard of perfection. Given the deference to the consultant's decisions, the court found that the onus of establishing demonstrable and significant error rested on the party looking to dispute the determinations. This also meant in the circumstances that ASC could rely on the consultant's conclusions as *prima facie* evidence of the deficiencies in dispute.

Whether a party to construction litigation intends to rely on a consultant's findings or dispute a consultant's findings, the decision in *Man-Shield Construction* is instructive in summarizing the test that must be met in order to prove that a consultant's findings ought or ought not to be accepted by the court.

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