

IN THE MATTER OF AN ARBITRATION

BETWEEN:

WALKERTON COMPENSATION PLAN

(The "Administrator")

* and *

(The "Claimant")

MARTIN TEPLITSKY, Q.C.
Arbitrator

APPEARANCES:

**On behalf of the
Administrator** **Milena Protich, Counsel**
Heather Batchelder

On behalf of the
Claimant: Patrick Kelly

Hearing held in Toronto on November 06, 2008

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This claim raises two issues, one factual and one legal.

The factual issue is this. Is there evidence that the Claimant was delayed in fulfilling two contracts because of the water crises?

The legal issue is this. Assuming a causal connection, is the Claimant's economic loss recoverable under Ontario law?

The facts giving rise to this issue may be simply stated.

The Claimant is a contractor. It does [REDACTED] and the like. It was a sub-contractor on two jobs which were to be completed in the fall of 2000; one in Owen Sound and one in Williamsford. Both jobs were delayed and the Claimant was assessed penalties of approximately \$29,000.00. The Claimant asserts that the delay was caused because he could not find employees who would work with his basic crew who lived in Walkerton. He claims that people believed that they could get ill by working with other employees from Walkerton who may have been exposed to E.coli from the contaminated water. No evidence apart from the Claimant's was adduced to support his assertion.

I am not satisfied on a balance of probabilities that there is any causal connection between the Walkerton water crisis and the delay in the completion of these two jobs. My reasons are

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these:

First, I do not accept as credible that potential employees would not work for the reason suggested. It is unlikely that, given all the publicity surrounding the water crisis, anyone harboured this opinion.

Second, with respect to the Owen Sound job, the Claimant wrote a letter dated November 13, 2000 to the general contractor giving reasons for the delay. He blamed the problem on 8 reasons, none of which referenced the point he made before me. He alluded in point 2 to "unable to get extra help" but said that "this was due to the late start and also to the general shortage of qualified help in the industry". No mention is made of the water crisis. In point 8 he specifically addresses the water crisis as affecting the morale of his employees—not the point raised before me.

In dealing with the Williamsford job, the Complainant's notes were produced. In these he referenced a lack of qualified employees without mentioning the water crisis. I note that between April 30, 2000 and August 3, 2000, the Claimant did not advertise for employees. This suggests he did not require any. He advertised again on August 3rd and 4th, 2000 but did not succeed. He also tried through the Human Resources Job Bank.

None of this proves that the water crisis was a cause of the Claimant's inability to obtain sufficient staff.

The Claimant honestly believes that the water crisis at least contributed to his problems

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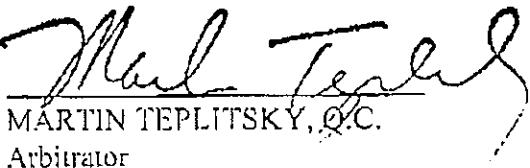
because in 40 years of doing business, he had not experienced these difficulties. However, there is simply no evidence to support his belief.

It is entirely speculative whether the water crisis impacted the labour market in Walkerton, to what extent and for how long. It is entirely speculative what impact, if any, a labour market tightening, if one occurred, had on the Claimant. The Claimant was seeking employees from Owen Sound to Orangeville--a large area. There is no reason to infer that his difficulties throughout this region were related to the water crisis.

The Administrator also submitted that *Design Services Ltd. v. R.* (2008) 1 SCR 737, stands in the way of the Claimant succeeding even if causation were proved. It was conceded that this claim does not fit within a pre-existing category of duty of care for pure economic loss. *Design* stands ultimately for the proposition that a new duty of care is not justified between an owner and subcontractors in the context of a tendering process. This case is not about tendering. Given my conclusion on causation, I see no useful purpose in undertaking an *Ann's Test* analysis.

The claim is, therefore, dismissed.

DATED the 7th day of November, 2008.



MARTIN TEPLITSKY, Q.C.
Arbitrator