

1. What, if anything, is the effect of the following items on the contractual arrangement between the parties?
  - a) the decision to use mechanized welding;
  - b) the scope changes;
  - c) the estimate of \$18 million provided by Ledcor;
  - d) the changes to the welding specifications;
  - e) the CLAC agreement;
  - f) the involvement of Midwest;
  - g) the secrecy discussions; and
  - h) the alleged problems with UT/X-ray inspection.
  
2. What was the effect of the cost plus arrangement?
  - a) Did it mean that Ledcor or Husky was responsible for the costs of welding repairs?
  - b) Did it require that Ledcor had to do all the work and complete by March 31?
  
3. If there was a breach of contract by Ledcor, what are the damages payable by Ledcor to Husky?
4. If there was performance by Ledcor, what is owing from Husky to Ledcor?
5. Should the welding reports and the cost report be admitted as evidence at trial?

## FACTS

¶ 3 The following facts were not in contention at this trial:

1. Husky Oil Operations Limited ("Husky") and Ledcor Industries Limited ("Ledcor") entered into a contract for the construction of a 62 kilometre gas pipeline loop between the Stolberg Dehydration Facility and the Ram River Gas Plant near Rocky Mountain House, Alberta ("Stolberg Pipeline"). Husky was the operator of the gas plant and representative of the joint venture owners.
2. The contract resulted from a tender process. Husky awarded the contract to Ledcor on December 16, 1997, based on a fixed cost of just under \$14 million. A contract was executed by Husky on January 30 and by Ledcor on January 26, with an effective date of January 9, 1998. The wording of the contractual terms clearly required Ledcor to weld to certain set specifications.
3. It was clear in the contract that the completion date was to be March 31, 1998, as the construction was in an environmentally sensitive forestry area that was subject to muskeg, and there was a desire to have the project completed before spring break up.
4. There were complications as a result of regulatory approvals that Husky needed for the project. The permit to do the work was issued on January 13, 1998, later than the projected date of late December or early January. It had been anticipated in the

bid documents that temporary bridging of the Ram and North Saskatchewan Rivers would be allowed, but approval was not granted for this. In addition, a number of stream crossings where dam and pump procedures were anticipated now had to be directionally drilled.

5. Ledcor had workers ready to work on January 8. They could not start work until the permit was issued. The inability to use temporary bridging on the Ram and North Saskatchewan Rivers created logistic problems that were recognized by both Husky and Ledcor. By January 12, Ledcor was indicating in writing that these problems would necessitate that the compensation under the contract be revisited.
6. Discussions ensued between representatives of Husky and Ledcor. The evidence of the parties about those discussions is divergent, but it is a common position of both parties that by the end of February, it had been agreed orally that the compensation under the contract was to be changed from the fixed contract amount, to a cost plus basis, based on cost plus 7% for overhead and 5% for profit. No changes to the contract were ever reduced to writing.
7. Ledcor representatives approached Husky asking if a mechanized welding procedure could be used. After investigation and discussions, Husky granted approval for the mechanized weld procedure on January 20, 1998. The use of this procedure required that the protective coating on the piping be cut back in a different manner, and the ends of the pipe bevelled in a different way. Both ultrasonic as well as radiographic inspection was used on the mechanized welds.
8. As the Stolberg pipeline was to carry sour gas, Husky had set stringent welding requirements in the contract. This was due to the concern that the hydrogen sulphide in sour gas can be corrosive on welds, the failure of which could cause lethal gases to escape.
9. By the middle of February, it was clear that a high percentage of welds were unacceptable under the contract specifications. Representatives of Husky and Ledcor were involved in discussions about this, and on three occasions, Husky did relax some of the welding requirements. Husky also introduced a prohibition against any lack of side wall fusion. Achieving acceptable welds using both the mechanized and manual procedure was difficult and led to a great deal of frustration for all parties while attempts were made to ascertain the problem, and to keep the project on schedule. Both parties worked cooperatively to try to achieve an acceptable solution. Husky constantly reviewed the specifications to see if they could be relaxed, while maintaining the integrity of the line. Ledcor shut down the mechanized welding at one point for investigations, and switched welders around in an attempt to find the source of the welding problems. No explanation was ever found, and the welding repair rates of both Ledcor and a subsequent contractor were acknowledged by all to be far higher than would be anticipated, or acceptable.
10. At a meeting on February 2, 1998, Ledcor advised Husky that it could not be on the site after March 31, 1998, due to labour issues. Ledcor employed labour organised under the Christian Labour Association of Canada (CLAC). Ledcor conveyed that it had no choice but to be shut down for two months under the terms of its labour arrangements.
11. By late February, it became evident that the work would not be completed by March 31. Husky entered into a contract with Midwest Management (1987) Ltd. ("Midwest") which started work on the line south of the Ram River on March 11,

1998. Ledcor was willing to allow Midwest to use its camp at Rocky Mountain House and its machinery on site. Ledcor signed over the welding procedure and took steps to do what it could to accommodate Midwest's transition into the project. Ledcor left the project at the end of March. Midwest completed all of the remaining work, including repairs to some welds originally done by Ledcor.
12. During March, Ledcor requested a letter from Husky asking it to leave the project on March 31, 1998. This letter was provided on March 23, 1998. The evidence is clear that the sole reason for Ledcor requesting this letter was to make it to appear that Ledcor was not leaving the site due to its labour arrangements, even though the opposite was true.
  13. During the project, Ledcor invoiced Husky by way of invoices entitled "progress estimates". These accounts were paid by Husky up to and including the account of April 1, 1998. A total of \$11,479,754.23 was paid by Husky to Ledcor. Husky started an audit on the project in April, 1998, and did not pay any of the Ledcor invoices after that date.
  14. Ledcor invoiced Husky a total of \$18,074,546.36 (inclusive of GST) and is suing Husky for the outstanding balance of \$6,594,792.13. There is no dispute about rates, hours, or the mathematics of the invoices; the issue raised by Husky is contractual entitlement.
  15. Husky paid Midwest approximately \$12.57 million to work on the pipeline from March 11, 1998 until completion sometime in May, 1998. Husky also paid approximately \$1.2 million to other contractors, to complete largely the clean up work. Husky claims approximately \$10.2 million in damages for extra costs and delays caused by Ledcor's inability to weld to the specifications.
  16. The high rate of welding repairs delayed the completion of the pipeline. Problems that Husky had unrelated to Ledcor's services, mainly the river crossing problems and obtaining the valves, meant the pipeline could not be put into service until late May or June, long after the welding was completed.

#### WHAT IS THE EFFECT OF THE FOLLOWING ITEMS ON THE CONTRACTUAL ARRANGEMENT BETWEEN THE PARTIES?

¶ 4 The main issue in this trial is the extent to which the parties changed the written contract between them. The law is clear that in the determination of whether a contract is rescinded, or only varied and continuing to exist in an altered form, will depend on the intention of the parties to be gathered from an examination of the terms of the subsequent agreement and from all of the surrounding circumstances.

¶ 5 Various issues were raised during the trial, and were alleged by the parties to be relevant to the determination of the actual contractual situation between the parties. Most of these issues relate to surrounding circumstances and the backdrop against which the discussions to change the contract were discussed, but some relate to events after the contract was changed. Each one of these issues is analysed below before the examination of the main issue.

##### A) Mechanized Welding

¶ 6 At the pre-bid meeting Ledcor had raised the possibility of using flux welding (an automated feed of the filler material) but this was rejected outright by Husky. After the tender was provisionally awarded to

determined from the evidence before the court. Overall, cumulatively, they did not have a great effect on the acceptability of the welding.

¶ 68 This issue is relevant not only as a background fact, but is considered later in this judgment because any increase in the contract specifications is a change to the original contractual terms.

#### E) The CLAC Agreement

¶ 69 Much evidence was called at trial around the fact that Ledcor's workers are members of CLAC. From the evidence, including that of an expert in labour relations, it is clear that this union is regarded as a "management" or "scab" union by the regular trade unions and there is animosity between the two types of unions that extends down to the worker's ranks. Each CLAC employer negotiates a contract for two years, and by legislation the last two months of the contract must be an "open" period, where other unions can attempt to "raid" the CLAC employer's workers and attempt to sign them up to be organized by another union. I accept the evidence that this can often lead to disruption on the worksite. It is absolutely clear from the evidence that Ledcor made a management decision not to work on projects during the open period. By doing this, Ledcor had no "employees" during the open period, and thus no raiding could occur.

¶ 70 The evidence is that Ledcor notified Husky at the project meeting on February 2 that it would not have workers available for two months after March 31 due to its union arrangement. It is clear from the evidence that Husky was surprised to hear this, both Mr. Sonnenberg and Mr. Gutowski testified to that. I find from the evidence that the Husky representatives were not familiar at that time with the details of CLAC union issues. The evidence is very contradictory as to exactly what details Ledcor gave at the meeting and I accept that the Husky representatives at the meeting did not understand the details of the union matters behind the March 31 date. However, I do not find that Ledcor lied or deliberately misled Husky about the contractual terms between itself and CLAC.

¶ 71 At the time the bid was made neither Ledcor nor Husky had any reason to think the contract would extend beyond March 31. No one testified that the job would not have been finished by then if it had gone as expected. Ledcor's performance demonstrated that despite delays at the start of the project, it was capable of adapting and making up time. Had the welding not been problematic, and had Husky obtained the valves on schedule, and had the directional drills and stream crossings gone as Husky originally planned, there is every reason to think the project would have been concluded in time and before the open period in the CLAC contract. Husky did not require as part of the bid process that the union situation of the bidder be disclosed. I find that by disclosing its position at the February meeting, Ledcor disclosed this in a timely manner, as there had been concerns about delays in January and it was by this time a possibility that the March 31 completion date could not be met.

¶ 72 Husky was requested by Ledcor to write a letter asking Ledcor to be off the job site. All the evidence, with the exception of Mr. Sonnenberg's, was clear that this letter was requested solely so Ledcor could use it to substantiate the myth that it had not voluntarily decided to close down during the open period, but rather been told that its work was over. Husky went along with the request and after several drafts the final letter, exhibit 1-256 was produced.

¶ 73 I put no weight on the letter of March 23 as in any way discharging Ledcor if it had a legal obligation to complete the work on this project by March 31. I have discounted Mr. Sonnenberg's evidence about the letter, as I find he was trying to put it in a light that was not intended. His evidence is contradictory to every other witness who talked about the letter, including Mr. Breen, the officer of Ledcor.

¶ 74 As a surrounding circumstance, the CLAC agreement is relevant only because at the time that the parties started discussions to change the contract, Husky was fully aware that Leducor would not work beyond March 31. It is also clear that from the end of January to the end of February, the relevant time for contract renegotiation, all parties still hoped the project could be completed by March 31. I do not find that what Leducor told Husky about its labour issue leads to any actionable remedy that is separate from any breach of the main contract that occurred.

#### F) The Involvement of Midwest

¶ 75 The discussion of the CLAC contract leads into a discussion of the involvement of Midwest on this project. Once Husky heard that Leducor would not have workers available after March 31st and as the work proceeded in February and it became clear that there were delays in welding, and that the stream crossings and valve issues were going to delay completion beyond March 31, Husky wanted another contractor available. Husky decided that it could not stall the work two months or into the next freeze up. Husky wanted work to proceed through spring break up to completion. The evidence is clear that Mr. Enwright was contemplating some contractors, but wanted Leducor to leave some machinery and share its camp in order to facilitate the transition and to reduce mobilization costs. Leducor suggested Midwest because it was also a CLAC employer, and thus Leducor was willing to allow Midwest to use its machinery. Midwest, after meeting with Husky, provided a tender which was accepted, with some changes in the way the bonus was structured.

¶ 76 The evidence is clear that Husky never said that Leducor would or would not be responsible for the costs of Midwest coming on the job. No one addressed this at the time of the contract renegotiations in late January and February, as it was not then obvious the project could not be completed by the end of March. When Husky decided to work through the spring break up if the work was not completed, it wanted another group of workers on site to complete the project, and Leducor was working cooperatively to get off the job due its concern about working in the open period. Leducor made every effort to facilitate the transition of Midwest into the job. Leducor was involved in the decision that the best place for Midwest to start work was south of the Ram River. Leducor rented its machinery to Midwest at favourable rates, it released the approved welding procedures to Midwest (these would be Leducor's proprietary information and property) and it allowed sixty Midwest employees to share the camp starting March 11, and then use the camp after Leducor left until Midwest was finished. Leducor transferred all the material it had purchased and not used to Midwest for its use. It is clear that after Leducor laid off its welders, some were hired by Midwest.

¶ 77 What can be made of this? Leducor was not ordered off the job. There were no hard feelings. Both parties were working cooperatively for Husky to continue the work, but with a different contractor due to Leducor's decision for union reasons not to work beyond March 31. Project issues (which were to both Leducor's and Husky's account) meant the project could not be done by March 31. There were no discussions of the legal effect of this changeover. The transition was done in the cooperative fashion with which many things were done on this project. The owner and contractor were working to get the project done, to cooperatively address the problems, and move forward.

¶ 78 The involvement of Midwest and its performance raises an interesting perspective in relation to this project. It came on the project in early March, and was aware it would be doing repairs on rejected welds and some original welding in relation to the water crossings and the valve tie ins. It estimated the project at \$5 to \$6 million but its total bills were in the range of \$12 million. It signed a contract that had the same terms as the Leducor contract, except for the terms of payment in schedule seven and the description of the