



# Civil Resolution Tribunal

Date Issued: August 13, 2020

File: SC-2020-000990

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Latera Engineering Inc. v. 0910276 B.C. Ltd.*, 2020 BCCRT 898

B E T W E E N :

LATERA ENGINEERING INC.

**APPLICANT**

A N D :

0910276 B.C. LTD.

**RESPONDENT**

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## REASONS FOR DECISION

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Tribunal Member:

Chad McCarthy

## INTRODUCTION

1. This is a dispute about payment for an expert engineering report and additional engineering services. In October 2018, the respondent, 0910276 B.C. Ltd. (276 BC), engaged the applicant, Latera Engineering Inc. (Latera), to provide an expert engineering report for use in litigation. 276 BC also asked Latera to provide other related engineering services. Latera says 276 BC has not paid for all of the services

Latera provided, and still owes \$5,724.84 for the unpaid balance of three invoices. Latera claims \$5,000, the maximum permitted under the small claims jurisdiction of the Civil Resolution Tribunal (CRT), and has abandoned its claim to any amount beyond that total.

2. 276 BC says Latera's work was deficient and was delivered late, and says it has already overpaid for the value of Latera's work. So, 276 BC says it owes Latera nothing more.
3. Latera is represented by its principal, Cameron Robinson, a professional engineer. 276 BC is represented by an employee or principal.

## **JURISDICTION AND PROCEDURE**

4. These are the CRT's formal written reasons. The CRT has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal Act (CRTA)*. The CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the CRT must apply principles of law and fairness, and recognize any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.
5. The CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. This dispute involves an "it said, it said" scenario in some respects, with each side calling into question the credibility of the other. Credibility of witnesses cannot be determined solely by the test of whose personal demeanour appears to be the most truthful in a courtroom or tribunal proceeding. In the decision *Yas v. Pope*, 2018 BCSC 282, the court recognized that oral hearings are not necessarily required where credibility is in issue. I find I can properly assess and weigh the written evidence and submissions before me, keeping in mind that the CRT's mandate includes proportionality and a speedy resolution of disputes. Therefore, I find that an oral hearing is not necessary, and I decided to hear this dispute through written submissions.

6. The CRT may accept as evidence information that it considers relevant, necessary, and appropriate, whether or not the information would be admissible in a court of law. The CRT may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.
7. Where permitted by section 118 of the CRTA, in resolving this dispute the CRT may order a party to do or stop doing something, pay money or make an order that includes any terms or conditions the CRT considers appropriate.
8. In its submissions, 276 BC requests a refund of the amounts it has already paid to Latera. However, 276 BC did not file a counterclaim seeking a refund of its payments to Latera, despite having an opportunity to do so. So, I find a refund issue is not before me in this dispute, and I make no findings about it.

### ***Request to Provide Additional Evidence***

9. The witness statement of 276 BC's representative, LD, said that there was a "great deal more information and evidence" that could be given, although she did not identify any of that evidence. LD said she suffered an injury in early March 2020, and moved her residence in mid-March 2020 to isolate herself from potential Covid-19 infections. LD said this move meant she had no access to any of the records about this dispute, and she requested more time to provide further evidence "as may be required."
10. LD provided no medical evidence about her injury. I note LD filed 276 BC's dispute response with the CRT on March 14, 2020, which I find is mid-March 2020, when LD changed residences. After this, LD submitted reasonably lengthy arguments on behalf of 276 BC, as well as evidence that included dispute-related records. On balance, I find the submissions before me do not show that LD's move or her injury restricted her from accessing her dispute-related records, or what any additional records might have been. Further, parties are told during the CRT's facilitation stage to provide all relevant evidence, but I find that 276 BC LD did not contact a case manager or other CRT staff to request additional time to complete its submissions. I

find LD only requested additional time in the final paragraph of her 17-page witness statement.

11. I note LD submitted 276 BC's evidence in mid-June 2020, nearly 8 weeks before the date of this decision, and the evidence does not show 276 BC attempted to submit more evidence after that point. Given the lack of evidence showing that LD had further evidence to provide, or that such evidence was inaccessible, as well as the CRT's mandate of proportionality, speed, and fairness to all parties and the amount of time that has already passed, I find 276 BC is not now entitled to an extension of time to file additional, unidentified evidence.

## **ISSUE**

12. The issue in this dispute is whether 276 BC owes Latera \$5,000 or another amount for engineering services Latera performed.

## **EVIDENCE AND ANALYSIS**

13. In a civil proceeding like this one, Latera, as the applicant, must prove its claims on a balance of probabilities. I have read all the submitted evidence, but I refer only to the evidence I find relevant to provide context for my decision.
14. 276 BC says it was bringing a legal claim against a third party for poor deck and railing construction work at a home. That claim is not before me. 276 BC says it engaged Latera, on its lawyer's advice, to provide an expert opinion on the deck and railing for "court purposes."
15. The undisputed evidence is that Latera Engineering developed a written consulting services proposal dated September 28, 2018, which 276 BC signed on October 23, 2018. The proposal said that Latera would investigate the construction of the existing deck, and prepare a detailed report to address the following two questions:
  - a. Was the deck built in accordance with prudent construction practices?

b. Does the existing deck comply with the BC Building Code?

16. The proposal said the “level of detail of the report would be suitable for submission to court.” Latera proposed to charge 276 BC by the hour, with different labour rates depending on the role of the person doing the work. The proposal estimated that 276 BC should budget \$2,400 for the deck investigation, \$2,400 for the report preparation, and \$310 for travel disbursements. The proposal also included rates for additional travel mileage, plotting, and other disbursements. Under the proposal, 276 BC would pay all Latera invoices within 30 days without holdback, after which interest would apply. Immediately above 276 BC’s signature, the proposal said that 276 BC’s representative accepted the proposal and authorized Latera to proceed with the services described in the proposal. I find this signed proposal is a contract between the parties for the investigation and preparation of an expert report that addresses the two questions it contains. There was no schedule or deadline in the report, and it did not say that any further tasks were required.
17. 276 BC does not deny signing the proposal, but says it is “inadequate and problematic” because it did not say an expert opinion for a particular court dispute would be produced, and it did not say it would identify what should have been done and needed to be done to remediate the poor deck work. 276 BC says that the report was to include detailed specifications, including engineering drawings, for the repair and replacement of the deck and railing, so that contractors could bid on and perform that work. For the below reasons I find the parties did not agree these other items were part of the written contract’s budget estimates, but that 276 BC later requested them as additional work.
18. I find the written contract did not say that Latera would produce specifications and drawings. Having said that, I note that Latera’s March 15, 2019 report did contain at least one engineering drawing, plus a detailed scope of work outlining what was needed to repair the deck and railing, relevant sections of the *BC Building Code*, and 48 pages of photographic evidence, among other content. The report also said that the deck had not been built in accordance with prudent construction practices in

several aspects, and that the guardrail and deck waterproofing did not comply with the *BC Building Code*. I find that the March 15, 2019 report is consistent with the parties' written agreement.

19. I find 276 BC argues, essentially, that the parties' agreement included unwritten terms, beyond those in the written contract, that Latera did not fulfill. In particular, 276 BC says Latera committed to completing its work by early December 2018, and that it would include detailed specifications and drawings for a new deck and railing.
20. While a contract does not have to be written down, it is more difficult to prove that parties agreed to verbal contract terms. Further, the "parol evidence rule" says that if the meaning of a written contract is clear in the surrounding circumstances, a party cannot use outside evidence to support a different interpretation of the contract. Such outside evidence can only be used to clarify an ambiguity in the written contract (see *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at paragraphs 57 to 60, *Athwal v. Black Top Cabs Ltd.*, 2012 BCCA 107 at paragraphs 42 to 43).
21. I have reviewed the evidence, including the correspondence on file, and I find it does not show that Latera agreed to complete any work by early December 2018. A November 13, 2018 email from 276 BC to its lawyer said that Latera had agreed to complete its work, including "specifications", by early December 2018. However, Latera denies this, and there is no deadline or schedule in the parties' written contract or any other document in evidence.
22. Based on the parties' correspondence, I find that beginning around December 2018, 276 BC wanted Latera to produce additional work, beyond that specified in the written contract. I find that 276 BC requested more report detail and additional work product from Latera over time, based on extensive design discussions with Latera and other construction professionals, and 276 BC's lawyer. By February 2019, 276 BC's expected work included a detailed engineering design of a new deck and railing, detailed work specifications for the deck and railing, and engineering drawings. 276 BC told Latera it wanted the detailed specifications so that

contractors could bid on and perform the deck and railing repairs. In February 2019, 276 BC told Latera that the work specifications were always part of the parties' original agreement.

23. On the evidence before me, I find that the parties did not agree that this detailed design and specification work was part of the original written proposal and agreement, which I find was limited to an investigation and report on whether the deck was built in accordance with prudent construction practices and complied with the *BC Building Code*. I find that the written contract was clear in the circumstances in which it was made, and did not include the production of a detailed work specification. So, considering the parol evidence rule, I do not find 276 BC's alternative interpretations of the contract to be persuasive.
24. In any event, I find Latera worked with 276 BC to develop a new deck and railing design and specifications as requested, around December 2018 to March 2019. I find Latera continued to charge 276 BC for all of Latera's work on the same time and materials basis set out in the parties' written contract. 276 BC does not deny that it requested this work, or that Latera performed the work that it invoiced 276 BC for.
25. In late January 2019, 276 BC told Latera it was "slightly worried" about its timeline for the project, namely the "report" and "specifications", because it had expected the work to be done in early December. Latera responded by saying that it was happy to continue adding detail to reports and documents as 276 BC had been requesting, but that this work was not included in its initial written estimate. In the following weeks, 276 BC did not deny that the additional work, beyond the report for court purposes, was not included in the initial estimate.
26. Then, in February 26, 2019 correspondence, 276 BC told Latera that a work specification was always required as part of the original estimate, as allegedly discussed on an initial telephone call with a Latera staff member. I find neither the Latera staff member's record of this initial call nor the other evidence indicates that

a detailed repair work specification was included as part of the original Latera time estimate and contract.

27. In the February 26, 2019 correspondence, 276 BC confirmed that Latera's hourly rates were those set out in the written contract, and that she needed the specification and drawing work done. 276 BC requested a quotation for the total price to complete a) the "court ready" report, b) a detailed specification of the work to be done on the deck and railings, including drawings, and c) a firm deadline to complete everything. I find this is additional evidence that the parties agreed Latera worked on a time and materials basis rather than a fixed price, and that there were no deadlines for the work.
28. Latera indicated it would concentrate on completing the report first. Latera provided an updated, final version of the report to 276 BC on March 15, 2019, which contained Cameron Robinson's professional engineer seal. Shortly after, Latera and 276 BC's working relationship broke down. Latera declined to continue its work for 276 BC, although Latera said it could complete the drawings it had already started, and would be available to testify in a court proceeding. Shortly after, on March 29, 2019, 276 BC instructed Latera to stop working altogether.
29. Overall, I find the evidence shows Latera performed additional work at 276 BC's request, and charged 276 BC the previously agreed rates for that work. I find it was an implied term of the parties' contract that Latera's work must be of reasonable quality (see *Lund v. Appleford Building Company Ltd. et al*, 2017 BCPC 91 at paragraph 124). I also find the questions raised by 276 BC, about whether the quality of Latera's professional engineering work was adequate and whether Latera took a reasonable amount of time performing it, are beyond ordinary understanding and require expert evidence to prove (see *Bergen v. Guliker*, 2015 BCCA 283 at paragraph 119). There is no expert evidence before me showing that Latera's work was substandard, or that it took an unreasonably long time. The evidence before me shows that 276 BC requested significant additional work from Latera, and



sought numerous changes and additions to both the report and the new deck design specifications, which Latera performed until ceasing work in March 2019.

30. 276 BC's primary complaint is that Latera's report is allegedly unusable in court as an expert report. However, there is no evidence that a court has rejected the report as expert evidence. Further, there is no expert evidence before me showing that the content of the report would not be accepted as expert evidence in the applicable court proceeding. I find expert evidence is required to address that question. In a March 29, 2019 email to Latera, 276 BC said that 2 experienced contractors had pointed out serious issues and deficiencies with Latera's March 15, 2019 report. However, 276 BC did not submit a statement from those contractors, and did not indicate who the contractors were or what deficiencies they alleged, so I give this evidence no weight.
31. 276 BC says that because Latera gave 276 BC opportunities to review and comment on the draft report, this could render the report "unacceptable" to a court because it would be seen as 276 BC's opinion and not an expert opinion. I find that 276 BC requested numerous changes and additions to the report over a period of many weeks. I also note that 276 BC did not stop requesting additions and changes even after sharing drafts of the report with its lawyer. Based on the correspondence in evidence, I find that Latera revised the report in response to some of 276 BC's requests for more detail or clarifications, but that it also declined to make other requested changes. On balance, I find the evidence fails to show that Latera adopted 276 BC's opinions simply by responding to some of 276 BC's report revision requests. I also find the evidence does not show that Latera's report is inconsistent with its author's reasonable professional opinion.
32. 276 BC also suggests that because Latera proposed being the project manager for the construction of the new deck, this created a financial conflict that cast doubt on the reliability of its expert report. I do not find this argument persuasive, as there is no evidence showing that Latera tailored its report in order to be awarded further 276 BC work.

33. The March 15, 2019 report contained a disclaimer stating that it was “delivered on a “without prejudice” basis for the purposes of settlement discussions”. 276 BC says this “without prejudice” phrase prevents the report from being used in court. 276 BC also says the report was “sealed,” which it says means that the report could not be altered.
34. First, I find Cameron Robinson, the author of the March 15, 2019 Latera report, applied his BC Professional Engineer seal to the cover of the report, to verify his credentials and the authenticity of the report. I find this is the “sealing” referred to by 276 BC. There is no evidence before me that applying this seal would prevent Latera from issuing other “sealed” copies of the report, including ones with the “without prejudice” disclaimer removed.
35. Second, the parties’ written agreement does not indicate whether the report could include a “without prejudice” disclaimer. In a January 9, 2019 email, Latera asked 276 BC if the report was initially intended for settlement discussions or for use in court. 276 BC said it would consult its lawyer but failed to provide instructions, and Latera included the “without prejudice” disclaimer in the report. Latera says that in its experience, settlement discussions are often the first stage of litigation, in which case it applies the “without prejudice” disclaimer to versions of the report used for those purposes. Latera says it can easily remove the disclaimer. I note that the report contained a certification that the author was aware of his duty to the court not to advocate for a party, that the report was prepared according to that duty, and that Mr. Robinson was willing to testify in court. Latera confirms Mr. Robinson is still willing to testify in court. Also, I find 276 BC has not provided evidence showing that the report’s “without prejudice” disclaimer prevents it from being used in a particular court. On balance, I find the evidence fails to demonstrate that the content of the report would not be accepted as expert evidence in court.
36. Further, given that 276 BC provided no instructions about the “without prejudice” disclaimer, despite Latera’s inquiry, I find it was reasonable for Latera to first provide a version of the report including the disclaimer. In a March 29, 2019 email,

276 BC instructed Latera to cease all work, without first asking Latera for a copy of the report with the “without prejudice” disclaimer removed. So, on balance, I find Latera is not responsible for failing to provide a version of the report without the disclaimer.

37. Overall, I find the evidence fails to show that Latera’s work was delivered late or was deficient. 276 BC does not take issue with the accuracy of Latera’s invoices, or that \$5,724.84 was the outstanding balance of those invoices. So, I find 276 BC must pay the \$5,000 Latera claims for the outstanding balance.

### **CRT FEES, EXPENSES, AND INTEREST**

38. Latera is entitled to interest under the *Court Order Interest Act*. I find that interest on the \$5,000 owing is calculated from May 31, 2019, which is 30 days after Latera provided its final invoice to 276 BC on May 1, 2019, until the date of this decision. This equals \$108.76.
39. Under section 49 of the CRTA and CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. Latera was successful in this dispute, so I order 276 BC to reimburse Latera \$175 in CRT fees. Neither party claimed CRT dispute-related expenses.

### **ORDERS**

40. Within 30 days of the date of this order, I order 276 BC to pay Latera a total of \$5,283.76, broken down as follows:
- a. \$5,000 in debt for engineering services and related expenses,
  - b. \$108.76 in pre-judgment interest under the *Court Order Interest Act*, and
  - c. \$175 in CRT fees.

41. Latera is entitled to post-judgment interest, as applicable.
42. Under section 48 of the CRTA, the CRT will not provide the parties with the Order giving final effect to this decision until the time for making a notice of objection under section 56.1(2) has expired and no notice of objection has been made. The time for filing a notice of objection is 28 days after the party receives notice of the CRT's final decision. The Minister of Public Safety and Solicitor General has issued a Ministerial Order under the *Emergency Program Act*, which says that tribunals may waive, extend or suspend a mandatory time period. The CRT can only waive, suspend or extend mandatory time periods during the declaration of a state of emergency. After the state of emergency ends, the CRT will not have this ability. A party should contact the CRT as soon as possible if they want to ask the CRT to consider waiving, suspending or extending the mandatory time to file a Notice of Objection to a small claims dispute.
43. Under section 58.1 of the CRTA, a validated copy of the CRT's order can be enforced through the Provincial Court of British Columbia. A CRT order can only be enforced if it is an approved consent resolution order, or, if no objection has been made and the time for filing a notice of objection has passed. Once filed, a CRT order has the same force and effect as an order of the Provincial Court of British Columbia.

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Chad McCarthy, Tribunal Member