

HARPER GREY LLP
3200 – 650 West Georgia Street
Vancouver, British Columbia, V6B
4P7
Canada

Tel: 604 687 0411
Fax: 604 669 9385

CASE SUMMARY: MOTION DISMISSED WHERE FULL FACTUAL RECORD IS REQUIRED FOR PROPER ADJUDICATION

Motion seeking dismissal of a claim against a subcontractor because same losses were claimed in separate claim against builder's risk insurer dismissed.

All-risk insurance; Builder's risk policy; Breach of contract

Freyssinet Canada Ltée v. Dragados Canada Inc., [2017] O.J. No 3509, 2017 ONSC 3914, Ontario Superior Court of Justice, July 5, 2017, E.M. Morgan J.

The plaintiff and defendant by counterclaim, Freyssinet, brought a motion for a determination of a question of law raised in the counterclaim brought by the defendant and plaintiff by counterclaim Parkway Infrastructure Constructors ("PIC") and the other plaintiffs by counterclaim.

The Government of Ontario contracted with Windsor Essex Mobility Group to design, construct, finance, and provide the maintenance for a highway in Windsor, Ontario. Windsor contracted with PIC to perform the design and construction duties involved with the project. Freyssinet was a subcontractor engaged by PIC to fabricate and install just under 1,000 concrete girders for some 11 tunnels and 14 bridges involved in the construction of the project. PIC ultimately claimed that the girders supplied by Freyssinet were defective and directed Freyssinet to suspend work on the project. Freyssinet commenced an action against PIC for breach of contract seeking \$11 million in damages. PIC counterclaimed seeking over \$192 million for property damage and other losses occasioned by the allegedly defective girders.

A builder's risk policy was issued to PIC covering the property of the project and expressly including PIC and all subcontractors as named insureds. PIC brought a separate action against the builder's risk insurer claiming losses of over \$135 million for damages including the cost of repairing and replacing, reconstructing, and making good the property loss with other losses for expenses and delays.

Freyssinet brought a motion asking whether PIC was precluded in law from recovering those sums claimed in the counterclaim against Freyssinet and the co-defendants for the resultant damages and losses allegedly caused by the defective girders fabricated and installed by Freyssinet, which were the same damages and losses PIC had claimed against the builder's risk insurer.

Ultimately, the court held that the issues raised by Freyssinet on the motion and by PIC in the counterclaim would require a full factual record for proper adjudication. They could not be answered on the basis of the pleadings and law alone. As the motion rests on disputed facts, requires the implication of contractual terms, and demands evidence of the circumstances surrounding the subcontract which Freyssinet itself both relies on and rejects, it was dismissed.

This case was digested by [Cameron B. Elder](#) and edited by [Steven W. Abramson](#) of Harper Grey LLP. If you would like to discuss this case further, please feel free to contact them directly at celder@harpergrey.com or sabramson@harpergrey.com or review their biographies at <http://www.harpergrey.com>.