MARGIE STRUB
CONSTRUCTION LAW

2300 Yonge Street
Suite 2001, Mailbox 2331
Toronto, Ontario, M4P 1E4

T: 647 . 792 . 0010
F: 855 . 940 . 4101
www.margiestrub.com

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Proving Time Takes Time: A Guide for Contractors on Cost-Plus and T&M Contracts

Imagine completing months of work, submitting your invoices, not getting paid, and then losing your entire claim in court. You lose, not because the work was not done, but because you could not prove how long it took to complete the work. It happens more often than you might think - it happened in the now well-known case of *Sjostrom Sheet Metal Ltd. v. Geo A. Kelson Co*,[1] and we continue to see it happen in practice.

This article offers a practical guide for contractors working on cost-plus or time-and-material ("**T&M**") arrangements, by setting out what Ontario courts require, highlighting what can go wrong, and providing some best practices to avoid evidentiary pitfalls.

What Courts Require

Ontario courts have established a demanding evidentiary standard for contractors seeking to recover on a cost-plus or T&M arrangement. The leading principles were set out by the court in *Infinity Construction Inc. v. Skyline Executive Acquisitions Inc* and are summarized as follows: [2]

a) Parties have an obligation in open-ended contracts to exercise a degree of diligence in carrying out the work so that they do not incur costs significantly higher than the estimate without approval;

b) Courts will often imply terms preventing payment for wasteful or uneconomic use of labour and materials;

c) Where an estimate is given, the final price should fall somewhere near the estimate, and the amount of variance that is acceptable will depend on the specific circumstance;

d) The role played by the estimate depends on the context, including how it was given, the knowledge of the parties, whether it was relied upon, whether the contractor assumed the risk of overrun, and whether the paying party encouraged the work to continue despite knowing the estimate would be exceeded;

e) The sophistication of the parties is relevant in determining how closely they will be held to the estimate;

f) A contractor has an obligation to promptly notify the paying party of cost overruns on a cost-plus contract;

g) The evidentiary burden of proving costs on a cost-plus basis is a heavy one;

h) Accounts do not need to be kept to a high standard, but must be kept sufficient to prove the contractor's charges;

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[1] *Sjostrom Sheet Metal Ltd v Geo A Kelson Co,* 2023 ONSC 4959, aff'd 2025 ONSC 2610. [*Sjostrom*].
[2] *Infinity Construction Inc v Skyline Executive Acquisitions Inc*, 2020 ONSC 77.

i) Once a contractor proves it kept proper accounts with supporting documentation, the onus shifts to the other party to show that the accounts are incorrect or unreliable;

j) Once doubt is cast on the accounts, the onus shifts back to the contractor. If the court is left in doubt, the contractor fails; and

k) While materials may be proven with somewhat less conclusive evidence, labour hours must be strictly proved because they are difficult to verify after the fact.

A Cautionary Tale

The consequences for failing to heed these principles can be severe. In the *Sjostrom* case, Kelson, the mechanical subcontractor, retained Sjostrom on an hourly basis at $69.50 per hour to complete sheet metal installation work. The estimated cost to complete the work was $73,183.50. Sjostrom completed the work and issued three invoices totalling $254,846.07 claiming the cost for 3,245 man hours. Kelson paid the first invoice. The remaining two invoices, totalling $161,585.76, were disputed.

In dismissing Sjostrom's claim, the court identified the following evidentiary failures, each of which is relevant to contractors working on T&M or cost-plus arrangements:

- The regular and overtime hours were combined. Sjostrom's invoices indicated that its labourers worked an aggregate of 3,245 man hours and overtime hours were billed at 1.5 times the regular hourly rate. Sjostrom combined the overtime hours with the regular hours, instead of billing them as separate line items. Therefore, the actual hours spent by Sjostrom's labourers was less than the aggregate hours being billed for.
- The time summaries were second-hand. Sjostrom's primary evidence was a set of weekly time summaries. These time summaries were not time sheets prepared and signed by Sjostrom's labourers or foreman, but prepared by its principal, Bill Preston, who had no personal knowledge of the hours. He compiled the summaries at the end of each week based on information relayed to him by the site foreman, typically by text message or in person. The underlying timesheets from the labourers themselves, described as being often nothing more than notes on scrap paper, pieces of drywall, cardboard, or napkins, were not kept or produced in the litigation. The court found that the time summaries had limited evidentiary value without corroborating evidence.
- The labourers were never called as witnesses. Sjostrom's initial witness list included many of the labourers who had worked on the project. None of them were ultimately called at trial to confirm the hours they worked.
- Time records were not shared contemporaneously. Although the time summaries were prepared weekly, they were not provided to Kelson on a weekly basis. Kelson only received them when invoices were issued. The court found there was no evidence that Kelson could reasonably have known how many hours Sjostrom was spending on site until those invoices arrived.
- No notice was given of the overrun. Sjostrom never notified Kelson that hours were tracking beyond the estimate. In fact, the court specifically noted that Sjostrom provided no notice to Kelson that actual labour hours were greatly exceeding the agreed figures until the invoices arrived, by which point it was too late.
- Bank statements did not save the claim. In an attempt to corroborate its time records, Sjostrom tendered bank statements showing that it had paid its labourers. The court rejected this argument. There was no evidence of the hourly rates paid to labourers, no source deduction

calculations, and no attempt to mathematically connect the payment amounts to the hours claimed. The bank statements alone were insufficient.

Best Practices for Protecting Your Claim

The evidentiary foundation for recovering under a cost-plus or T&M arrangement must be built on the job site and long before any dispute arises. The following practices should be treated as a minimum standard for any contractor working on such arrangements.

- Use signed, contemporaneous timesheets. Each labourer should input their own hours daily or at the end of each week. Ideally, these summaries should be verified by a foreman, or even better, confirmed by the payer's site representatives. Summaries compiled after the fact, or based on informal communications, carry significantly less weight before a court.
- Keep your source documents. Texts, emails, and notes used to compile time records should be preserved for the duration of the project and beyond. If those communications form the basis of your time summaries, a court will want to see them.
- Bill regular and overtime hours separately. Do not combine regular and overtime hours into a single figure. Bill them as separate line items on your invoices. Combined billing obscures the actual hours worked and invites doubt about the reliability of records from the outset.
- Submit time records to the payer regularly, not just with invoices. Weekly or biweekly submission of time records gives the payer an opportunity to raise concerns in real time and demonstrates that your records are not being constructed after the fact. Better still, where practical, have the payer review and sign the timesheets as the work progresses. Doing so creates a contemporaneous record of the work performed and makes it significantly more difficult for the payer to later argue that it lacked knowledge of, or did not approve, the time being claimed.
- Give prompt written notice when hours are running over the estimate. If actual hours are tracking materially above what was estimated, notify the payer immediately, in writing, and document their response. Silence on both sides will be scrutinized. Notice is not merely good practice; it can be an affirmative obligation.
- Be prepared to call your workers. Your labourers are your best evidence of the hours they worked. If a dispute proceeds to trial, they should be called to give evidence.
- Correlate your financial records to your time records. If you intend to use payroll or banking records as corroborating evidence, make sure you can show the connection between what you paid your workers and the hours you are claiming. Records that cannot be connected to the specific hours claimed will not carry much weight.

Conclusion

Cost-plus and T&M contracts shift much of the pricing risk away from the contractor (or subcontractor), but they do not eliminate it. As the Ontario cases demonstrate, the principal risks are not commercial - they are evidentiary.

Two practical lessons emerge.

First, estimates matter. While an estimate is not necessarily a fixed price, it is not without legal significance. A contractor who becomes aware that an estimate is likely to be materially exceeded should

promptly communicate that fact to the payer. Surprising an owner or contractor with a substantially larger invoice after the work is complete invites disputes that could often have been avoided through timely communication.

Second, records matter even more. The burden of proving the hours worked, the labour supplied, and the costs incurred rests squarely on the party seeking payment. Ontario courts have consistently held that this is a demanding evidentiary burden. Contemporaneous timesheets, daily reports, invoices, supporting documentation, and regular communication with the payer are not merely good project management practices; they are often the difference between recovering the full value of the work performed and recovering nothing at all.

Ultimately, a well-managed cost-plus or T&M contract is built on transparency. Contractors who communicate openly, maintain detailed contemporaneous records, and provide the payer with regular visibility into the work and costs as they are incurred place themselves in the strongest possible position if a dispute later arises.

Daniel Iaboni
Associate
T. 289-815-5504
diaboni@margiestrub.com

Gary Brummer
Partner
T. 289-815-6678
gbrummer@margiestrub.com

Simren Sihota
Associate
T. 647-794-1564
ssihota@margiestrub.com