

CITATION: Heywood Innovative Solutions Inc. v. The State Group Inc., 2025 ONSC 1927
COURT FILE NO.: CV-18-00607867
DATE: 20250327

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
HEYWOOD INNOVATIVE SOLUTIONS) *Angela Assuras, for the Plaintiff*
INC.)
)
Plaintiff)
)
– and –)
)
THE STATE GROUP INC.) *Rui Gao and Matthew Milne-Smith, for the*
) *Defendant*
Defendant)
)
) **HEARD:** January 15-23, 2024, March 14, 15
) 2024, August 27, 2024, and December 16,
) 2024.

2025 ONSC 1927 (CanLII)

PAPAGEORGIOU J.

REASONS FOR DECISION

Overview

[1] TransCanada Corporation (“TransCanada” or “TransCanada Pipelines”) was building a pipeline (the “Project”). It retained the defendant, State Group Inc. (“State Group”), as its general contractor. Part of this Project involved the application of coating to the pipes.

[2] State Group retained the plaintiff, Heywood Innovative Solutions Inc. (“Heywood”), to provide inspection services in respect of the coating of the pipes to ensure that the work was done in accordance with the specifications.

[3] Heywood says it provided these services in full and that State Group has failed to pay certain invoices rendered. It says that State Group owes it \$239,540.24 in respect of outstanding invoices plus payment for extra work in the amount of \$8,436.

[4] State Group says that Heywood fundamentally breached their agreement by failing to provide Daily Inspection Reports in respect of the outstanding invoices. It says that any work done

by Heywood reflected in the unpaid invoices was of no value because the failure to provide Daily Inspection Reports deprived it of substantially the whole benefit that it contracted for.

[5] State Group also counterclaims against Heywood in respect of costs it incurred as a result of this alleged breach in the amount of \$103,013.63 which it ultimately reduced to \$83,398.70 because of issues raised by Heywood. It says that it is entitled to both refuse to pay the outstanding invoices and also claim these damages.

Decision

[6] For the reasons that follow I conclude that Heywood did breach its agreement with State Group by failing to provide the applicable Daily Inspection Reports. However, this was not a fundamental breach. State Group must pay the outstanding invoices, but it is entitled to set off its claim for damages in respect of work that it had to do because of Heywood's breach.

[7] The total amount payable to Heywood, net of State Group's damages, is \$164,577.54.

Issues

- Issue 1: Did the contract require Heywood to provide Daily Inspection Reports?
- Issue 2: Did State Group waive the requirement for Daily Inspection Reports and/or is State Group estopped from relying on this contractual term?
- Issue 3: Was the provision of Daily Inspection Reports a contractual precondition to payment?
- Issue 4: Did Heywood's failure to submit Daily Inspection Reports in a timely manner constitute a fundamental breach or repudiation of the contract entitling State Group to refuse to pay invoices in respect of any work where a Daily Inspection Report was not provided?
- Issue 5: What damages did State Group suffer by virtue of Heywood's failure to provide Daily Inspection Reports?
- Issue 6: Has State Group failed to mitigate?
- Issue 7: What is the payment owed to Heywood pursuant to the contract, net of the damages that State Group incurred?
- Issue 8: Has State Group been unjustly enriched?

Analysis

The trial evidence and credibility

[8] There were many witnesses from both Heywood and State Group.

- Murray Heywood, the President and principal owner of Heywood, testified for a half day. He did not have any material evidence in respect of the terms of the agreement between State Group and Heywood. He did not negotiate the agreement and was not typically on site. His role was advisory. He mainly testified about the industry.
- Tyler Heywood was the main contact at Heywood who dealt with State Group. He works on project management but is also a coater and a coating inspector.
- Glen Loftin, Martin Moxey and Sam Corvo were coating inspectors who worked at Heywood.
- Keith Charest was engaged by Trans Canada to work on the Project as a coating inspector.
- Keith Lotimer was the Quality Assurance Control lead at State Group.
- Samantha MacKinnon was previously the document controller at State Group. She liaised between State Group and contractors and was mostly involved in compiling documents. She is no longer an employee of State Group.
- Florin Pascut was the Construction Manager at State Group.
- Robert Shaw was a project coordinator at State Group responsible for communicating with the trades and communicating with Heywood to schedule their attendance to assess the coating done by the coating shops.
- Tim Koivisto was the Project Director at State Group involved with working with TransCanada and suppliers with respect to putting together estimates. He was the first to reach out to Heywood to seek its assistance with coating inspection.
- Frank Petras was also involved in project management at State Group.

[9] All of the witnesses were doing their best to recall the events in question and I have no concerns that any of them have deliberately misstated anything even though there are disputes in the evidence.

[10] To resolve conflicts in the evidence I apply the principle set out in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.), at p. 357, where the British Columbia Court of Appeal provided the following guidance:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. **The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions.** In short, the real test of the truth of the story of a witness in such a

case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. [Emphasis added]

[11] See also: *R. v. Kiss*, 2018 ONCA 184, at para. 30.

[12] There is also a substantial body of contemporaneous documentation that is of assistance in determining what happened where there are disputes in witness testimony.

[13] I evaluate the reliability and the credibility of the evidence with respect to these matters within the applicable section of these reasons.

Issue 1: Did the contract require Heywood to produce and provide Daily Inspection Reports?

[14] I find that the contract between State Group and Heywood required Heywood to submit Daily Inspection Reports.

[15] At its heart, contractual interpretation is a search for the parties' "objective intention": *Resolute FB Canada Inc., v. Ontario (Attorney General)*, 2019 SCC 60, [2019] 4 S.C.R. 394, at para. 74. A court cannot consider evidence of the parties' subjective intentions: *Corner Brook (City) v. Bailey*, 2021 SCC 29, [2021] 2 S.C.R. 540, at para. 25; *Alberta Union of Provincial Employees v. Alberta Health Services*, 2020 ABCA 4, 441 D.L.R. (4th) 403, at paras. 26-31.

[16] Contracts can be wholly in writing. In some cases, there is no one document that reflects all aspects of an agreement and/or there is no signed written agreement. In such cases, courts have taken into account relevant documents and communications to ascertain the parties' objective intention at the time of the contract: *Canada Forgings Inc. v. Clark Machine Inc.*, 2006 CarswellOnt 5904 (Sup. Ct.), aff'd 2006 CanLII 32988 (ON SCDC).

[17] This is one such case. There is no single document that reflects the parties' entire agreement, which I derive from a combination of the documents, their communications, and their conduct.

The Project

[18] In late 2015, TransCanada engaged State Group as the general contractor on the Project. State Group's work began in March 2016 and was completed in August 2017.

[19] The Project involved the installation of a new compressor turbine station. In simple terms, the station was to pump natural gas from one point to another, as part of TransCanada's infrastructure used for the transportation of natural gas.

[20] There were TransCanada specifications that governed how the construction would be done (the "Specifications").

[21] The Specifications required that special protective coatings be applied to the pipes. Coating is a critical element of the safe and effective operation of a pipeline. It protects pipes from corrosive

factors such as rust, chemical reaction and UV exposure. The Specifications described the coating products to be used, the ambient conditions on which the coating was to be applied, and the tests that had to be administered and satisfied to ensure that coating was done appropriately.

[22] State Group retained the subcontractors Foley Coating Inc. (“Foley”), Aberfoyle Metal Treaters (“Aberfoyle”), and Automatic Coating Limited (“ACL”), to apply the coating to the pipes. Aberfoyle and ACL applied the coating on pipes at their shops. In the late stages of the Project, First Nations was also working at the site but there was not a great deal of evidence about them.

[23] The Specifications also required State Group to conduct its own coating inspections by inspectors certified by the National Association of Corrosion Engineers (“N.A.C.E.”) to verify the coating applicators’ data.

[24] Both parties agree that corrosion and weakening of pipes can take years to develop and can result in sudden catastrophes.

[25] The Project was located near a residential area, and as such, the consequences of improper coating would be grave. In a previous case, TransCanada had an incident where a large section of underground lines ruptured and caused a significant explosion. The cause was a pinhole in the coating.

[26] Coating natural gas pipelines is so important that multiple levels of inspection are necessary. Documenting these inspections is important.

[27] The coating applicator has its own quality assurance form that it fills to document its own inspections (the “QC Form”).

[28] There is an Inspection Test Plan (“ITP”). ITPs are outlines and plans prepared at the outset of the Project listing the steps that have to be done which includes the coating. TransCanada, State Group and the coating applicators would sign the ITP’s, signifying that the work was done in accordance with the Specification. There is a signature at each stage, as the work is completed and approved by TransCanada, the coating applicator, and State Group.

[29] State Group did not have N.A.C.E. qualified inspectors among its personnel and so it could not do the inspections on its own.

[30] In December 2015, State Group contacted Heywood to inquire as to whether it could and would be interested in working on the Project and carrying out coating inspections.

[31] By email dated February 17, 2016, State Group connected Tyler Heywood and Mr. Selmanaj (who was responsible for purchasing at State Group) and informed the latter: “[we] are going to be hiring Heywood” and asked him to provide Tyler Heywood with “a copy of the New Vendor information package so we can set him up with State.” Mr. Selmanaj then sent Mr. Heywood the required information on February 22, 2016. Mr. Heywood replied on February 25, 2016, providing State Group with the information requested to set up its account.

[32] Heywood conducted inspections on March 29, 30 and 31, 2016.

[33] On April 1, 2016, State Group emailed Heywood and asked for “daily inspection reports for each of the shop visits you make...complete with pictures” and “daily’s [sic] from the site as well for when you’re here”. State Group provided Heywood with a document called “Daily Job Diary & Progress Report” that had been submitted by a welder as an example.

[34] On April 4, 2016, in response, Heywood submitted three inspection reports using its own format which it used in other projects. It asked whether these were acceptable and State Group agreed that this format could be used. This is a clear agreement by the parties that this would part of their contractual arrangement.

[35] On April 7, 2016, Tyler Heywood emailed Mr. Shaw to advise him that “I have also informed Martin of the **Daily Inspection Report Requirement.**” [Emphasis added]. When cross examined a trial, Tyler also indicated that he informed inspectors of this requirement. The Heywood inspectors also admitted that they were aware of this requirement.

[36] The information on the Daily Inspection Reports included areas of concern, the inspector’s observations, work area conditions (relative humidity and air temperature at specific points in time to document that steps in the coating process were being undertaken in conditions and within tolerances as required by the relevant specifications), a list of summaries of test results for various batches (e.g. dry film thickness) that identified the location and coat number, as well as pictures. It would inform State Group of what was going on, what Heywood looked at and if there were any issues identified, whether they were reoccurring as well as what was being done about such issues. State Group used these Daily Inspection Reports to monitor progress and also to prepare its own daily progress reports to TransCanada.

[37] While the coating applicator’s QC forms contained detailed information, the point of Heywood’s work was to verify the coating applicator’s quality control work, independently. Heywood reviewed the coating applicator’s QC data to ensure that it was consistent with Heywood’s own observations. QC forms did not necessarily reflect the full story and progress during various steps which were documented in detail in Heywood’s Daily Inspection Reports.

[38] Heywood then provided 29 inspections in April 2016 and provided Daily Inspection Reports for these.

[39] Then, on May 2, 2016, State Group sent Heywood a purchase order (the “P.O.”). The P.O. is State Group’s standard P.O. The P.O. did not make specific reference to the Daily Inspection Reports but did reference “supporting documentation.”

[40] It is agreed that Heywood continued to provide Daily Inspection Reports after the P.O. until it stopped in or around June 2016.

[41] I accept State Group’s argument that the contract between the parties consists of the P.O. as well as the prior communications where Heywood agreed to provide Daily Inspection Reports. In a similar case involving an alleged breach of contract related to the machining of certain pieces of

steel, the Court concluded that the contract was comprised partly of the purchase order and partly of discussions between the parties based on an assessment of all the facts, discussions and documents: see *Canada Forgings*.

[42] Given the importance of the work and the potentially hazardous and dangerous situations that could arise in the future, it also makes commercial sense that State Group would need Heywood's detailed Daily Inspection Reports.

[43] This is also consistent with industry standards. Mr. Loftin, who had decades of experience as a coating inspector, testified that the preparation and submission of Daily Inspection Reports was an "accepted" and "standard" practice "from decades in the industry." He said it was his practice to fill these in and supply them to the employer. Mr. Moxey testified that these reports "were not unique to the State Group project", rather, "they're something that Heywood or at least that [Mr. Moxey] did for Heywood...in the same format, same situation for all clients that Heywood had."

[44] The fact that Mr. Pascut testified that he sought to put all important things in State Group's interest in its purchase orders does not undermine the communications that were had where the parties expressly agreed that Heywood would provide Daily Inspection Reports. I add that they had already made that agreement in writing before the P.O. was issued so there would have been no need to also place this requirement in the P.O.

Heywood's Arguments

[45] Heywood raised many contractual arguments, all of which I reject.

[46] First, I reject the argument that the contract was formed on February 17, 2016, before Heywood agreed to provide the Daily Inspection Reports, such that there is no consideration for its subsequent agreement to do so. The communications as of February 17, 2016, may have indicated that State Group intended to hire Heywood, but the parties had not yet negotiated all of the essential terms of their arrangement such as price or quantity of work required. I note that in response to the February 17, 2016, email, Heywood asked for a purchase order in its email dated February 25, 2016. Therefore, Heywood's own communications objectively show that it expected further clarity on the proposed terms. There was no offer, acceptance or certainty of terms as at February 17, 2016.

[47] Second, I reject Heywood's argument, that the P.O. sets out all aspects of the parties' agreement and supersedes any prior agreement to provide Daily Inspection Reports. In this respect Heywood relies primarily upon s. 12.2 of the Purchasing Terms and Conditions attached to the P.O. that provides as follows: "this contract and the terms and conditions incorporated by reference herein contain the entire agreement of the parties." It argues that if the P.O. did not reference Daily Inspection Reports, they could not be required as part of the parties' agreement.

[48] However, Heywood never signed and returned the P.O. as required by s. 1.1. of the Purchasing Terms and Conditions that stated, "one unaltered copy of this Purchase Order must be signed by the supplier in the place indicated for acceptance and then returned to the purchaser

within ten days from its date.” Heywood cannot rely upon an entire agreement clause in a P.O. that it never even signed and returned as expressly required. In my view, Heywood’s failure to sign and return the P.O. precludes the conclusion that the parties’ agreement was wholly reduced to writing in the P.O.

[49] Third, I reject Heywood’s argument that State Group’s pleading precludes it from arguing that the agreement among the parties includes their communications and agreements prior to the P.O. Paragraph 10 of State Group’s Statement of Defence broadly pleads:

10. In light of State's obligation to ensure the completion of coating inspection and to prepare and provide the Turnover Documentation to TransCanada, the Contract was premised on the parties' **mutual understanding and acceptance** that Heywood would provide the requested inspection services as well as the required log data and written inspection reports on a timely basis and in accordance with accepted industry practice, including the applicable NACE guidelines and standards. The timely transmission of log data and written inspection reports to State was crucial to State's ability to complete the Project for TransCanada, and as such, constituted a fundamental term of the Contract. [Emphasis added]

[50] To be clear, the May 2, 2016, P.O. is not mentioned in State Group’s Statement of Defence anywhere, much less is there any pleading that the May 2, 2016, P.O. embodies their entire agreement.

[51] The fact paragraph 9 pleads that “The terms of Heywood’s engagement included various purchase orders prepared by State and accepted by Heywood (collectively, the “Contract””, cannot reasonably be read to mean that the May 2, 2016, P.O. embodied their entire agreement. This paragraph uses the word “include” which by definition means that there could be other terms set out in other places.

[52] In any event, it is trite that the purpose of pleading is to alert the other side to the case it has to meet, as a matter of fairness. A pleading must be read as generously as possible with a view to accommodating any inadequacies in drafting. State Group’s Statement of Defence alerted Heywood to the case it had to meet. There can be no question of Heywood being unfairly surprised by emails that it admits were sent and received or State Group’s position that these communications related to the parties “**mutual understanding and acceptance**” as pleaded that Heywood would provide written inspection reports.

[53] Fourth, I reject Heywood’s argument that there was no intention to create legal relations and that it only provided the Daily Inspection Reports as a goodwill gesture and not because it was a requirement of the contract. This evidence relates to Heywood’s subjective intentions which is not relevant to the objective determination of their contract. Indeed, the communications objectively and clearly show that the parties’ objective intention was that Heywood would provide Daily Inspection Reports.

[54] Fifth, I also reject Heywood's argument that the only documentation that it was required to submit were those documents TransCanada Pipelines required from State Group in its Specifications for the whole Project. The obvious point here is that the documents that State Group had to provide to TransCanada Pipelines was a contractual requirement that it had to fulfill. That does not mean that State Group could not negotiate the requirement that Heywood submit other additional documentation to State Group for its own purposes, in its contract with Heywood, as it did.

[55] Sixth, I also reject the argument that the parol evidence rule precludes admission of the evidence of the communications where the parties agreed that Heywood would provide Daily Inspection Reports. The parol evidence rule "precludes admissions of evidence outside the words of the written contract that would add to, subtract from, vary, or contradict a contract that has been wholly reduced to writing": *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 59; *Canada Forgings* (Sup. Ct.), at paras. 23 and 28; and *Johnson v. Crocker*, [1954] 2 D.L.R. 70 (Ont. C.A.). I have found that the parties' agreement has not been wholly reduced to writing in the P.O. Therefore, the parol evidence rule does not apply.

[56] Furthermore, as I will explain, the communications where the parties agreed that Heywood would provide Daily Inspection Reports are not even inconsistent with the P.O.

Performance of the contract

[57] In the recent case, *SS&C Technologies Canada Corp. v. The Bank of New York Mellon Corporation*, 2024 ONCA 675, the Court of Appeal provided guidance on the uses of evidence of the parties' performance of an agreement to resolve an ambiguity.

[58] It indicated that the parties' course of performance "can attract significant weight if it is unequivocal, consistent, mutual, close to the time of contracting, is based on the actions of the contracting companies' chief representatives for a given matter and is not self-serving": at para. 50. As the Court notes, "In these circumstances, course of performance evidence can be the next-best-evidence of the parties' intent at the time of contracting after the text, just as parties' subsequent conduct is sometimes the best evidence of whether they objectively intended to form a contract": at para. 50. See also *Shewchuk v. Blackmont Capital Inc.*, 2016 ONCA 912, 404 D.L.R. (4th) 512, at paras. 39-56.

[59] To the extent there is any doubt or ambiguity, the parties' conduct and the way they performed the contract is also consistent with State Group's interpretation that the contract required Heywood to provide Daily Inspection Reports.

[60] Heywood instructed its inspectors to prepare Daily Inspection Reports. The inspectors who testified also agreed that they were aware of this requirement.

[61] Heywood provided Daily Inspection Reports. When they were late State Group followed up, and when they were late, Heywood consistently apologized. Heywood also billed \$75 for each Daily Inspection Report which is inconsistent with a gratuitous client service for marketing purposes as alleged by Heywood.

[62] The above evidence is all unequivocal, consistent, mutual, close to the time of contracting and is based upon the parties' chief representatives. It is not self-serving because it is based upon both parties' interactions.

[63] In the circumstances, I also reject the argument that the principle of *contra preferentum* is relevant or applicable such that the failure to specifically reference the Daily Inspection Reports therein precludes the finding that Heywood was required to submit Daily Inspection Reports. The contract was not one that was reduced wholly to writing. The parties' agreement regarding the Daily Inspection Report arose as part of their communications and the P.O. does not preclude them. The P.O. even says that a failure to provide supporting documentation could impede payment which implies supporting documentation is required.

Issue 2: Do the principles of waiver or promissory estoppel apply?

[64] State Group did not waive the requirement that State Group submit Daily Inspection Reports. Nor does the principle of promissory estoppel apply.

[65] Waiver occurs where "one party communicated a clear intention to waive a right to the other party": *Technicore Underground Inc. v. Toronto (City)*, 2012 ONCA 597, 354 D.L.R. (4th) 516, at para. 63, citing *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490. The party must have "full knowledge" of its right and "an unequivocal and conscious intention" to relinquish that right which was communicated to the other party: *Technicore*, at para. 63, citing *Saskatchewan River*.

[66] Promissory estoppel applies to estop a party from relying on strict performance where it has made a promise or assurance intended to affect a legal relationship and where the other party acts in reliance on that promise to its detriment. The promise must be unambiguous and it is not enough that one party has taken advantage of indulgences granted by the other: *Maracle v. Travellers Indemnity Company of Canada*, [1991] 2 S.C.R. 50, at p. 57; *Engineered Homes Ltd. v. Mason*, [1983] 1 SCR 641, at p. 647; *John Burrows Ltd. v. Subsurface Surveys Ltd.*, [1968] S.C.R. 607, at p. 615.

[67] Waiver and promissory estoppel are closely related; the underlying principle of both is that a party should not be allowed to go back on a choice when it would be unfair to the other party to do so: *Saskatchewan River*, at para. 18.

[68] Tyler Heywood testified that in the summer of 2016 the Daily Inspection Reports had to take a back seat because the Project was behind and State Group was pushing to ensure that things were done as quickly as possible. He says that he was told by Rob Shaw that as long as the ITPs were signed, that would be fine, and that they did not require the Daily Inspection Reports. Tyler's evidence on when this occurred has changed over time. At his discovery he said he could not say if State Group's alleged direction to Heywood to stop preparing reports was in 2016, 2017 or 2018. At trial he said it was in late 2016 or 2017, and in another portion of his evidence, he said that it was roughly in January 2017. This was after the disputed period, and oddly when Heywood began submitting them again, which is not consistent with Heywood's overall position.

[69] Mr. Loftin, a coating inspector testified that sometime in 2017 they were told Daily Inspection Reports were no longer required. This is outside and after the period when Heywood failed to deliver them. Mr. Moxey also testified that there was a time when he was told by Rob Shaw not to prepare Daily Inspection Reports, but he also testified that it was near the end of the Project, which was the summer of 2017. This is also outside the period when Heywood failed to submit the Daily Inspection Reports. As will be seen, both Mr. Loftin and Mr. Moxey worked at the end of the Project during the summer of 2017 to assist with the turnover package. They did not prepare Daily Inspection Reports during these last two months and it may be that this is the period that they are recalling, because there is no evidence of any requirement of Daily Inspection Reports for the work they did to assist with the turnover.

[70] Mr. Corvo also testified that he was told by Tyler Heywood and possibly by someone at State Group not to prepare Daily Inspection Reports, but he could not recall precisely when that was.

[71] Mr. Shaw testified that at no time did he give these instructions. He said that there would be no reason for him to do so. He said no one at Heywood ever raised issues about their workload or being unable to keep up with Daily Inspection Reports, and Heywood never provided a reason as to why it was not submitting them. The other State Group witnesses were also unaware of any instruction to Heywood that it need not prepare Daily Inspection Reports during this period.

[72] I accept Mr. Shaw's and the other State Group witness' evidence because the Heywood witnesses' evidence is inconsistent. Further, State Group's evidence is more consistent with the contemporaneous documents and also more consistent with the probabilities that a practical and informed person would readily recognize as reasonable.

[73] I will explain.

[74] When Heywood stopped providing Daily Inspection Reports between July to December 2016, State Group sent eight follow up emails requesting them:

- July 14, 2016: "Are you able to get caught up on the inspection reports? We haven't received one for all of the recent work being completed."
- July 21, 2016: "As per our conversation yesterday, please send over the Coating Reports ASAP. We are doing extra work to the contract and need these reports daily as back up."
- August 3, 2016: "Following up, still haven't received any reports for Heywood Inspectors."
- August 12, 2016: "We haven't seen any reports for weeks. What's happening with them? Can you give us an update?" and "We're still looking to get caught up on all of the coating reports, and we really do need these coming in on a daily basis. If it comes to it, we may have to ask the coating inspectors to submit their reports each day prior to leaving site. Please let me know what can be done to get caught up and continue to keep on top of it daily."

- September 19, 2016: “We have not been receiving the coating reports and they are way behind. These are required to be submitted by the coating inspector the same day. Please note, all payments to Heywood Solutions will be withheld until the reports are submitted and we begin to get them in each day.”
- October 4, 2016: “Not sure if you have sent the reports, but the last I saw this email up to report #80, have you been sending them directly to the site team? Are we up to date with all reports?”
- December 9, 2016: We still have not yet had the inspection reports sent over to us, and we require these as back-up, especially for contract extra work. Can you please send them over to us ASAP. I specifically require ones for September 1 and 2 that TransCanada has requested. Moving forward, can the inspectors give us a report directly on site before leaving for the day?” I note that this email was from Rob Shaw and is entirely inconsistent with what Heywood’s witnesses now attribute to him as having said.

[75] Mr. Heywood did not respond to these follow-ups to dispute the requirement to provide Daily Inspection Reports. Instead, he provided responses which promised the reports would be forthcoming. In his August 12, 2016, reply he stated: “I have some ready that I will get out to you over the weekend...I will keep on my guys to get them done as well. My apologies we have gotten unacceptably behind.”

[76] One would expect that if Mr. Shaw had told the Heywood inspectors that they did not have to submit Daily Inspection Reports, that this would be reflected in a response to State Group’s emails where they follow up.

[77] Then, in January 2017, Heywood again began providing the Daily Inspection Reports. There is no explanation from Heywood as to why they would have begun submitting these again if they had been told that all that was required was that they sign the ITPs and QC forms.

[78] Then, when State Group was attempting to complete the Project and the turnover to TransCanada, it wrote again to Heywood seeking the missing reports. Heywood provided some, but not all, of the missing reports. Again, Heywood never took the position in these communications that it was not required to submit these reports or that it had been told by Mr. Shaw or anyone that Daily Inspection Reports were not required for the disputed period.

[79] The evidence of Heywood’s inspectors on this issue lacks consistency, reliability and is inconsistent with the contemporaneous communications. The inspectors also did not give evidence that would support any alleged clear and unequivocal waiver or promissory estoppel. Their evidence on what was said to them was vague.

[80] Therefore, I accept State Group’s evidence on this point and conclude that no one advised Heywood that it need not submit Daily Inspection Reports during the period of July 2016 to December 2016.

[81] Therefore, the principles of waiver or promissory estoppel do not apply because State Group never told Heywood it need not deliver the reports and it consistently followed up for the missing reports.

Issue 3: Was the provision of Daily Inspection Reports a contractual precondition to payment?

[82] Although the provision of Daily Inspection Reports was a term of the parties' agreement, it was not a precondition to payment. The communications at the time of the contract do not specify that Heywood would only be paid for work if a Daily Inspection Report was provided.

[83] The provision in the P.O. that said "Failure to comply and/or provide supporting documentation may impede payment process" is not sufficiently clear to eliminate payment for work done in the absence of the documentary support. "Impede" could mean slow down as opposed to eliminate. This wording is also quite small on the P.O. Since State Group prepared the P.O., I do apply *contra proferentum* here and interpret "impede" in the manner most favourable to Heywood, which is that failure to provide the reports could delay payment while State Group did its own analysis to verify the work.

[84] In my view, had the parties or State Group objectively intended to make payment contingent on receipt of the Daily Inspection Reports, the P.O. would have used that kind of language expressly, and not the kind of vague and ambiguous language that was used. Or there would have been communications during the time the parties finalized their arrangements that clearly stipulated that Heywood would not be paid if it did not submit Daily Inspection Reports.

Issue 4: Did Heywood's failure to submit Daily Inspection Reports in a timely manner constitute a fundamental breach or repudiation of the contract entitling State Group to refuse to pay invoices in respect of any work where a Daily Inspection Report was not provided?

[85] Heywood's breach was not a fundamental breach. Even if it was, State Group did not accept any alleged repudiation. In fact, it affirmed the contract.

[86] Where an innocent party is deprived of substantially the whole benefit of the contract, the innocent party is allowed to elect to put an end to all unperformed contractual obligations. This is "an exceptional remedy that is available only in circumstances where the entire foundation of the contract has been undermined, that is, where the very thing bargained for has not been provided": *Place Concorde East Limited Partnership v. Shelter Corporation of Canada*, 270 D.L.R. (4th) 181, at para. 51.

[87] To establish a fundamental breach, a party must show that they have been deprived of substantially the whole benefit that they contracted to receive. The court must consider the nature and purpose of the contract and what the parties bargained for. This includes consideration of a number of factors, listed at para. 53 of *Place Concorde*:

- i) The ratio of the party's obligations not performed to the party's obligations as a whole.

- ii) The seriousness of the breach.
- iii) The likelihood of repetition of such a breach.
- iv) The seriousness of the consequences of the breach.
- v) The relationship of the part of the obligation performed to the whole obligation.

[88] Through its witness, Mr. Pascut, State Group provided a comprehensive analysis that shows that between July and December 2016, Heywood conducted 268 inspections. Out of 268 inspections, Heywood provided Daily Inspection Reports contemporaneously for only 8 inspections. In response to multiple follow-ups, Heywood provided 29 additional Daily Inspection Reports shortly before turnover in August 2017 and by the time it delivered the Project to TransCanada Pipelines, it had received reports for a total of only 37 of the 268 inspections for the period between July and December 2016.

[89] Heywood did not cross examine Mr. Pascut on this evidence or present any evidence in response. Therefore, this evidence is uncontroverted and I accept it.

[90] State Group asserts that it needed the detailed Daily Inspection Reports to substantiate both the fact that the inspections took place as well as the observations made during the inspections. It used these reports to monitor progress and identify or address any issues regarding the coating aspect of the Project and to cross-verify the accuracy of information presented by the coating application companies. It intended to provide TransCanada with copies of the Daily Inspection Reports in its turnover package at the end, although it is admitted that this was not required by its contract with Trans Canada. It argues that this was also crucial to maintaining traceability and protecting State Group's interests in the event of any issues concerning coating on the Project in the future.

[91] I reject State Group's argument that Heywood fundamentally breached the contract for the following reasons:

- It retained Heywood to provide coating inspections, and it is admitted that Heywood provided these inspections in respect of all disputed invoices. Heywood was paid \$75 per hour for inspections pursuant to the parties' agreement. The Daily Inspection Reports were billed at approximately one hour or \$75 each. Thus, based upon the parties' own payment terms, the bulk of Heywood's obligation related to the actual inspections, not the Daily Inspection Reports.
- Although State Group provided evidence about the importance of the Daily Inspection Reports in terms of being able to address future problems should they occur, there is no evidence that they had this kind of discussion with anyone at Heywood or that they impressed upon them the issue that they now raise at trial.
- There were already approved QC forms and ITP in respect of the work. TransCanada had its own employee there also signing off on the work done as another form of quality

assurance. Although these documents do not provide the details of the work and observations made, signing off on these forms shows that as of that signature, any identified issues had been addressed. As well, State Group witnesses testified that when there were problems on the site, they were contacted right away.

- State Group admitted that during the course of the Project, it could have delivered a non-conformance report (“NCR”) but never did. The fact that one of State Group’s witnesses testified that NCRs are typically used for deficiencies in products and materials does not assist State Group. It could have issued an NCR to emphasize and document its position on the seriousness or the significant impact of the breach. This would have alerted Heywood to the issue on a contemporaneous basis so that it may have cured the problem at the material time.
- As will be seen, State Group was able to complete the turnover package and reconstruct the missing information, but at a cost. It was able to do this because Heywood inspectors kept logbooks on a contemporaneous basis that they used to prepare the Daily Inspection Reports, as certified N.A.C.E. inspectors. Tyler Heywood testified, and I accept, that as long as an inspector had his logbook, he could prepare an inspection report five hours, two weeks, or a year after inspection, as the logbook does not change. In the circumstances, the fact that the raw data exists and could be reviewed and analyzed undermines the argument that in the event of a problem in the future, Daily Inspection Reports would be the only contemporaneous and independent record of the inspections. State Group had the inspectors under its control at the turnover and could have also requested copies of their logbooks to be used in the future if a problem arose. In my view, the raw data would be more important than the Daily Inspection Reports in the event of a serious problem in the future.
- TransCanada paid State Group the full contract price without any reduction in respect of anything that Heywood had done.
- TransCanada was very happy with the turnover package.
- It appears that the conclusion that the failure to provide Daily Inspection Reports deprived it of substantially the whole benefit of the contract may have been an afterthought. In that regard, well after turnover, on November 29, 2017, Mr. Shaw wrote to Mr. Koivisto and asked, “Is there any way we can tell them they’re SOL on the balance?”

[92] Further, the contemporaneous communications at the time do not support the argument that State Group viewed Heywood’s failure to provide Daily Inspection Reports as a breach that deprived it of substantially the entire benefit of the contract. It never said anything like this in all of its follow up correspondence when reports were missing, with the exception of one email, where it told Heywood it would not pay invoices without the Daily Inspection Reports.

[93] It also chose to pay Heywood for Glen Loftin's work during the turnover. One would expect that if Heywood had committed such an egregious error State Group would have insisted that Mr. Loftin work on the turnover package to rectify the issue for free.

[94] Furthermore, even if the breach could have been considered a fundamental breach, the innocent party must, through words or conduct, elect to treat the contract as at an end and communicate that election to the breaching party within a reasonable time: *Place Concorde*, at para. 50. Each party is then discharged from future obligations under the contract.

[95] This never happened.

[96] State Group knew it hadn't received Daily Inspection reports throughout July 2016 to December 2016. It followed up asking for them but never terminated the contract. It simply continued to use Heywood from January 1, 2017, to August 2017, a period of nine additional months. This would not qualify as acceptance of an alleged repudiation under any of the case law submitted. Indeed, this would constitute affirmation of the contract in spite of a breach.

[97] State Group raises a novel argument that the repudiation crystallized at the end of the Project, when State Group had to turn the Project over without the Daily Inspection Reports. It cites no authority for this concept of crystallization of a fundamental breach at a point nine months after the innocent party was already aware of the breach.

[98] It says that in early July 2017 it was still asking Heywood to submit all outstanding reports to complete the turnover. Had Heywood provided them, it would not have needed to do a workaround to get the turnover ready. But that does not mean that the breach was a fundamental breach or that if it was, it was entitled to stay silent on the issue for nine months and then raise it at the end.

[99] The fact that Heywood did not provide the reports contemporaneously from July 2016 to December 2016 or in July 2017, simply means that State Group is entitled to claim damages for the work it had to do to get the Project ready for turnover in the absence of Heywood's Daily Inspection Reports. And as will be seen, I am awarding these damages. It is unclear why in these circumstances Heywood should not be remunerated for the work that it did and that benefitted State Group.

[100] It also says that it was reasonable for it to simply keep asking for the reports rather than hire another coating inspector which would have disrupted the Project. It would have been inconvenient to hire a new coating inspector since Heywood had all the data from July to December 2016. It would have to have a new coater inspect all the work that Heywood had already inspected.

[101] With respect, these were business decisions that State Group made for its own reasons. The fact that it may have made a reasonable business decision does not change the analysis as to whether or not a party has accepted the repudiation. In the face of a fundamental breach, a party must elect whether to affirm the contract or terminate it and sue for damages. It was entitled to affirm the contract for its own reasonable reasons, but having made that decision, it cannot claim that there was a fundamental breach that relieves it of performance.

[102] Additionally, even at the end of the Project, and for a full year afterwards, State Group never communicated any election to treat the contract as at an end.

[103] Between October 16, 2017, and October 5, 2018, Heywood was following up on its invoices without State Group advising that it had been deprived of substantially the whole benefit of the contract as a result of the missing Daily Inspection Reports and that it was electing to treat the contract as at an end. Even when it told Heywood on October 2, 2018, that it would not be paying the invoices, the reason was not that State Group felt it had been denied substantially the whole benefit of the contract. Rather, it stated:

After extensive review and for the same reasons outlined in our previous email below, we still can't see the justification to release payment to Heywood. The State Group incurred significant costs on this Project specifically due to your delays in reporting which was non-recoverable from our client. Further to that, invoicing for work that was completed a year prior without appropriate backup or purchase orders in place makes it impossible for us to validate any of these costs.

[104] Additionally, even if State Group had accepted the breach in December 2016, it would not have been relieved of paying for past benefits it received under the contract while it was ongoing. It would have been relieved of future performance. It would have still had to pay for past work that it had used and benefitted from.

[105] Refusing to remunerate Heywood for its work, when State Group has been able to address the missing reports and been paid by TransCanada with no deduction based upon anything Heywood did, is unnecessarily punitive and not in accordance with the law.

[106] The only case cited by State Group, *Northern Securities Inc. v. GLG Life Tech Corporation*, 2011 BCSC 1462, in support of its position, does not assist State Group. This case involved a company, Northern, who had been retained to assist GLG with a sponsorship and listing application for the Toronto Stock Exchange ("TSX").

[107] The court found that Northern was obliged by the parties' sponsorship agreement to provide a sponsorship report that was in compliance with the policies of the TSX and that was responsive to particular concerns identified by the TSX. The court found that it did not comply with these obligations. There was objective urgency of which it was aware, it had all the information, was requested to do its due diligence but did not do so. It provided a sponsorship report that was a far cry from the in-depth analysis requested.

[108] There are important distinctions here.

[109] Unlike the case before me, Northern was not retained to do physical work that was remunerated by the hour, with daily reports that summarized its work. It was required to prepare one listing application and one sponsorship report. The work it was retained to do was the documents, as opposed to the documents being a summary of work that it had been retained to do.

[110] The actual breach that the Judge identified, was not breaches throughout or at an early point, that GLG knew about, but rather the relevant breach upon which the court based its decision,

occurred at the end when Northern failed to submit the required sponsorship report and GLG realized it. And immediately after this happened and GLG knew about it, it accepted the repudiation and advised it would not make the final payment.

[111] The court in *Northern* found that even though the listing was approved by the TSX, GLG did not receive substantially what it bargained for. It concluded “Northern did not provide the thing that was bargained for: a sponsorship report that addressed the Exchange’s requirements, both general and particular”: para. 141.

[112] *Northern* is about a complete failure of consideration.

[113] The quotation State Group cites from *Northern*, at para. 148, that “it was only at that point that Northern’s failure to perform was truly evident” is taken out of context. The point the court was making was that although Northern had not been complying with the contract all along, GLG only realized it at the end when the TSX contacted it to advise of deficiencies at the end. These are simply not the facts here. State Group knew all along about Heywood’s failure to provide the Daily Inspection Reports.

[114] Finally, the fact that Heywood did not invoice State Group during the months of September to December 2016, but did so afterwards, is immaterial. There was no evidence that there was any deadline for submission of the invoices.

[115] State Group witnesses testified that they paid invoices even if they were received a year after the work has been completed in the past. Once the work was done, Heywood was entitled to be remunerated for it upon submission of an invoice subject of course to any claim for damages.

[116] In summary, State Group cites no authority for the proposition that a party can wait almost two years after it knows about a breach, continue to employ the contractor, accept the remaining benefits of the contract, ask for proof of the work done and the outstanding reports after completion of the work, and then allege fundamental breach when sued without having ever terminated the contract.

Issue 5: What damages did State Group suffer by virtue of Heywood’s failure to provide Daily Inspection Reports?

[117] At the end of the Project, there was a “turnover” process whereby State Group would turn the Project over to TransCanada Pipelines by delivering records and documentation compiled throughout the Project. These records and documents provide a timeline and story of how the Project was completed and would support State Group’s representation to TransCanada Pipelines that the Project was completed in accordance with the Specifications.

[118] TransCanada Pipelines did not require the Daily Inspection Reports from Heywood, but the turnover package is not limited to documents that are specifically required by TransCanada. State Group intended to include the Daily Inspection Reports in its turnover package but could not do so because so many were missing. Including partial records would have been a “red flag”.

[119] State Group witnesses explained that it required the Daily Inspection Reports prior to turnover for other reasons as well. It used these reports to validate the data in the coating applicators' QC forms and cross reference any information that was unclear or missing in a systematic and efficient way.

[120] Because so many were missing, it had to find a way to work around the fact that it did not have the reports.

[121] State Group claims damages in the amount of \$83,398.70 in respect of internal and external expenses it says it incurred as part of the workaround that it had to do because of Heywood's missing Daily Inspection Reports.

[122] These are the categories of damages:

- a) Category 1: \$24,161.63 in respect of payments to Martin Moxey, a Heywood inspector that they retained to personally and directly assist with the turnover process.
- b) Category 2: \$51,863.82 in respect of the time spent by State Group representatives to complete the coating turnover using a workaround process in the absence of Heywood's daily inspection reports.
- c) Category 3: \$7,373.25 for additional rental costs for various facilities as a result of additional time required to prepare the turnover in the absence of Heywood's daily inspection report.

Total: \$83,398.70

Category 1

[123] State Group hired one of Heywood's inspectors, Martin Moxey, at additional cost to assist it with any missing data. At that time, Mr. Moxey was no longer employed with Heywood. It also received the assistance of another inspector, Glen Loftin. It did not pay Mr. Loftin who was still employed by Heywood; in fact, it paid Heywood for Mr. Loftin's time and it does not claim this amount.

[124] Mr. Loftin and Mr. Moxey testified that they were asked to look at their logbooks containing the raw data to confirm the accuracy of QC forms and fill in gaps. The data that they had to search for, retrieve and review would have been readily available and presented in an organized fashion in Heywood Daily Inspection Reports, had those reports been provided.

[125] There are four invoices from Mr. Moxey that total \$24,251.63 as follows:

August 11, 2017: \$5,314.16

August 14, 2017: \$5,341.16

August 14, 2017: \$5,314.16
August 14, 2017: \$4,107.76
August 20, 2017: \$4,201.39

[126] I reject Heywood's argument that Mr. Moxey (and Mr. Loftin) were not addressing issues raised by the absence of the Daily Inspection Reports because they were assisting Foley with the completion of their QC forms.

[127] Mr. Moxey and Mr. Loftin did provide some evidence that supports the argument that one of the coaters, Foley, had gotten behind in their QC forms and that during this summer period, they were assisting Foley with information that was available in their handwritten notes. Mr. Moxey referenced information in his records that included environmental conditions, batch numbers of the materials, surface profiles, and DFTs which is the dry thickness of the coating.

[128] Even if Mr. Moxey and Mr. Loftin were assisting with the completion of such forms, this was still only required because of Heywood's failure to provide the Daily Inspection Reports in a timely manner. The kind of information required to complete these QC forms would have been in the Daily Inspection Reports which were a much more detailed analysis than the QC forms and contained the very type of information that Mr. Moxey said they were helping Foley with. When cross examined, Mr. Shaw testified that even if Mr. Moxey and Mr. Loftin were in fact assisting Foley to complete its QC forms, this would not have been required if State Group had had the detailed information in the Daily Inspection Reports. I accept his evidence.

[129] I also reject Heywood's argument that Mr. Moxey was not actually assisting with the turnover process in respect of three of these invoices but rather conducting new inspections in respect of new coating work done on site or at the coating shops during this period. In that regard, Heywood's argument is that the Project was not actually in the turnover process but was in "active construction" during the summer of 2017.

[130] Heywood bases this argument, in part, on the fact that three of Mr. Moxy's invoices related to work done on site during this period described the work done as "coating inspections". However, all of Mr. Moxey's invoices for the July to August 2017 period say that he was doing inspections, even the ones in respect of work he did at State Group's head office where it is clear he could not have been doing any inspections. It appears that he simply used the same format for his invoices that he always used as a coating inspector.

[131] As well, the fact that Mr. Moxey was on site does not mean that he was doing coating inspections for new work as opposed to doing inspections to verify the work that was done as part of the workaround.

[132] There were also missing Daily Inspection Reports from Tyler Heywood and Sam Corvo. State Group needed a different workaround to have sufficient assurance that the coating met TransCanada's specification. Mr. Pascut explained that State Group had to review its records to identify any further inspections or testing conducted on each relevant spool after it was inspected

by Mr. Heywood or Mr. Corvo. As such, State Group had no choice but to rely on additional inspections including “holiday inspections”, which were inspections for defects to obtain assurance that the coating was done properly in the absence of Daily Inspection Reports.

[133] As well, Mr. Loftin did not testify that they were onsite or at any shop doing new inspections of new coating work but rather to assist with the turnover. Heywood’s counsel did not ask him whether they might have been working on assessing new coating work or whether the Project was in “active construction”.

[134] As well, Mr. Moxey’s initial evidence in chief and during cross examination was also that he was working on the turnover package during this period and he also did not mention any new coating inspections he may have been doing during this time.

[135] Then, during re-examination, he was shown one of his invoices dated August 14, 2017, where he billed for four weeks, and which stated that it was in respect of coating inspection. He stated the following:

A. Well the project was still underway in construction. So these four invoices cover, you know, a period of time where I could have been at the site or at one of the shops doing inspections, but all working towards the goals of the—of the project.

Q. All right

A. In active construction

Q. Okay, so this is active construction that you’re billing out and then you submitted further invoices for the work that you did at State Group helping Foley deal with the—the backlog of quality control forms, is that correct?

A. That’s right.

[136] It was only when this was suggested to him by putting his invoice to him that he then indicated that he “could have been...doing inspections.” This is far from being clear evidence that that is what he was actually doing. It is simply what he “could” have been doing. He also never explained what he meant by “active construction.”

[137] It is also inconsistent with an email that Mr. Moxey sent in January 2018 when he was alerted to State Group’s position on not paying the invoices. He said, “We spent lots of time completing an amazing turnover package for state to present to TCPL...I did a very thorough job on those binders and TCPL...”. This email did not mention any other work Mr. Moxey was doing at that time.

[138] Based on this answer and based on his failure to give this evidence in chief I conclude that Mr. Moxey did not actually recall doing inspections of new coating work, but rather, inferred this from his invoices which referenced his doing inspections. But as I noted, all of these invoices describe the work as actual inspections of new work, when he clearly testified that he was doing

work on the turnover package, and in circumstances where it is admitted that he was working at head office for two of the invoices, where he could not have been doing inspections.

[139] It also makes little sense that State Group would have hired Mr. Moxey to do new inspections of new work unrelated to the absence of his Daily Inspection Reports because he was no longer working at Heywood. State Group was still using Heywood at that time and Heywood still employed Mr. Loftin. Had the issue been the need to do new inspections of new and ongoing coating work, at a Project that was in whole scale active work, as opposed to State Group requiring Mr. Moxey's notes and logbook to assist with the turnover, it makes logical sense that State Group would have simply continued with Heywood inspectors for this.

[140] The way these invoices are written as a whole, in the absence of Mr. Moxey's specific and clear recall that he was actually doing new inspections, does not displace the clear and cogent evidence of State Group's witnesses that Mr. Moxey was there assisting with the turnover because they did not have Heywood's Daily Inspection Reports.

[141] I add that Mr. Moxey's recall overall during the trial was not very good. When he was shown his time sheets that Heywood submitted on his behalf, he could not identify them.

[142] Finally, if Mr. Loftin and Mr. Moxey were onsite doing new inspections wholly unrelated to the work they were doing on the turnover package, there should be Daily Inspection Reports for this work since that was a general requirement that was fulfilled from January 2017 until July 2017. There are no Daily Inspection Reports for this period.

[143] Thus, I award the amount claimed by State Group here in its counterclaim.

Category 2

[144] State Group dedicated its own internal resources through its employees Peter Lotimer (Q.A./Q.C. Manager), Rob Shaw (Project Co-Ordinator), Flo Pascut (Construction Manager) and Samantha MacKinnon (Document Controller and Administrative Assistant). Messrs. Lotimer, Pascut, and Shaw indicated that they could not be reassigned to another project until the coating turnover was completed. They were salaried employees. Ms. MacKinnon testified that she had been re-assigned to another project but that she had to assist with the turnover as part of a workaround because they did not have Heywood's Daily Inspection Reports. Ms. MacKinnon was paid by the hour, and she tracked her time.

[145] These witnesses explained their personal involvement and their work searching for, collecting and reviewing documents. Mr. Shaw described it as a "forensic analysis" that required a review of emails, schedules, field logs and other documents to track what had happened.

[146] The State Group witnesses testified that the entire workaround process they had to follow because of the absence of the Daily Inspection Reports lasted two months, from July to August 2017. Notably, all other aspects of the Project had already been completed and turned over to TransCanada.

[147] They testified and I accept their evidence that they continued to have to be on site during this period because of this delay in submitting the turnover package, caused by the incomplete records they had from Heywood.

[148] Heywood again argues that the Project was still in active construction such that these State Group personnel would have had to be there irrespective of the turnover issues; therefore, their expenses are not causally linked to Heywood's failure to provide the Daily Inspection Reports. It bases this argument on a number of documents:

- Again, with respect to Foley, it references certain documents that it says show that Foley was doing new coating work during this time. The documents that Heywood references were not put to any witness at all who testified at trial. These documents are unlike any of the other documents and forms that were the focus of this proceeding and there is no evidence on these documents and how they should be interpreted. As well, not even Heywood's own witnesses, Mr. Loftin and Mr. Moxey, who testified about Foley, indicated that Foley was there doing new coating work.¹
- Two Heywood invoices that Heywood argues shows it billed for inspections in July and August 2017. This was the period when Mr. Loftin was on site helping with the turnover. It is not clear what these invoices relate to. They do use the word "site inspection" but no witness from Heywood gave evidence that these invoices related to new inspections as opposed to work on the turnover that Mr. Loftin testified he was doing at that time.
- A change order in respect of work by First Nations that says "coating" and "coating inspections". First Nations was not called as a witness. Robert Shaw was asked about this in cross examination briefly and although he could not recall he agreed it appeared to be a

¹I note that even though Heywood lead evidence from its own witnesses about Foley and also cross-examined State Group's witnesses about what Foley was allegedly doing during the turnaround, no one from Foley was on the witness list. On the last day of trial, at 3:30 pm, after all 6 of Heywood's witnesses had testified and after 5 of State Group's 6 witnesses had testified, Heywood advised of its intention to call someone from Foley as a witness in defense of State Group's counterclaim or as a reply or rebuttal witness to provide evidence on what Foley was doing during the turnover. I did not permit this as this would constitute Heywood splitting its case. Heywood had already lead evidence through Mr. Moxey and Mr. Loftin as to what Foley was doing during the turnaround in its case in chief and the intended evidence was no different. This was not evidence that Heywood could not have reasonably anticipated would be relevant and was not related to new evidence that State Group had raised.

Furthermore, permitting this would have resulted in a further adjournment to permit State Group to respond and/or to further cross examine Heywood's witnesses. The trial had already had to be scheduled for one continuance for two days. There were two months between the uncompleted trial and the continuance when Heywood could have raised this issue, at least prior to 4 of State Group's last witnesses being examined during this continuance. The prejudice outweighed the probative value.

quote by First Nations for a change order for repairs requested by TransCanada Pipeline. The quote is undated.

- Some documents in the turnover package (ITP's and QC's) that show that someone named Kevin Silversmith signed for someone called "FNCS" in respect of work done by what appears to be First Nation in July and August 2017 and which appears to be some kind of repair work. No witness at trial was asked any questions about this and whether it related to the change order above for First Nations. I note that at least one of these documents referenced "holiday testing" which Mr. Pascut talked about as something they may have had to do as part of the workaround. See above.

[149] The main difficulty with Heywood's arguments surrounding these documents is that, not a single Heywood witness at trial was asked about these documents, in support of the propositions for which the documents are now being put forward. Neither was State Group with the exception of Mr. Shaw who was asked briefly about the Change Order and did not recall it. Heywood only raised the argument that these documents show the Project was in active construction during July and August 2017, in its closing argument. The result is that no witness has testified confirming that these documents mean what Heywood alleges.

[150] Importantly, Heywood did not cross examine Mr. Pascut, State Group's principal witness who explained its counterclaim damages, to put these documents and this proposition to him.

[151] It is well established that the rule in *Browne v. Dunn* is a rule of fairness. A party who seeks to challenge the credibility of another witness must give the witness a chance to address the contradictory evidence in their cross examination while he or she is in the witness box: *R v. Dexter*, 2013 ONCA 744, 313 O.A.C. 266, at para. 17.

[152] As noted by the Court of Appeal in *R. v. Schoer*, 2019 ONCA 105, 371 C.C.C. (3d) 292, at para. 52, "the rule in *Browne v. Dunn* is rooted in the principle of fairness." While witnesses do not need to be confronted with every piece of contradictory evidence, "fairness requires that the witness be confronted on contradictory matters of substance so that the witness can be given an opportunity to explain": at para. 52. See also *R v. Powell*, 2021 ONCA 271, at para. 76.

[153] It is unfair to assert the propositions for which these documents are now being relied upon without having given State Group's witnesses a chance to address them. These documents relate to significant matters of substance related to the State Group counterclaim. This goes to the credibility of the State Group witnesses given their testimony that during July and August 2017, that they remained assigned to the Project and incurred costs because they were assisting with the turnover workaround necessitated by Heywood's breach. It is an implicit challenge to their credibility.

[154] State Group witnesses were not given a fair opportunity to address:

- Whether Foley did any new coating work in the summer of 2017.

- Whether FNC did new coating work in the summer of 2017 and whether these may have been minor repairs or part of the holiday testing that Mr. Pascut talked about.
- If the work was in July and August 2017, the nature of the work, how such work became necessary, why it had to be done at that time, and if there may have been a causal link to Heywood's failure to deliver Daily Inspection Reports.
- If they did coating work in July and August 2017, why it did not require the incurring of expenses that form the basis of State Group's counterclaim.
- Heywood's claim that as a result of these documents, the Project was in active construction in July and August 2017.
- The proportion of State Group's counterclaim that may relate to the work on the turnover package as opposed to these new inspections, if they were new inspections and not something that was necessitated because of Heywood's failure.

[155] I reject the argument that there is nothing unfair about this because these were documents that State Group had tendered and they were admitted for the truth of their contents on consent. There are thousands and thousands of documents in this record and that State Group would have been dealing with in this Project. To pluck out a few documents post-trial and put them forward for propositions that entirely contradict these witnesses' evidence in respect of their counterclaim, without giving them an opportunity to address the issue that they are being put forward for, is unfair. The parties had marked a giant document brief containing thousands of documents as one Exhibit, as a matter of convenience and then referenced tabs as they asked witnesses questions. This is a practice that is often undertaken, but when documents are not put to a witness, it is often not clear what they mean, even if they are admitted for the truth of their contents.

[156] Furthermore, the proposition that the Project was in active construction at that time when the turnover package was actually delivered to TransCanada on August 17, 2017, is not believable. Even the timing supports the conclusion that the summer of 2017 was spent tying up loose ends so the Project could be delivered to TransCanada.

[157] While the documents that Heywood relies upon remain admissible, and for the truth of their contents, I do not give them any significant weight for the propositions they are now put forward for, which is to allege that the Project was in active construction and that all of State Group's claimed expenses would have still occurred despite the workaround necessitated by Heywood's breach.

[158] I have the evidence of Mr. Moxey and Mr. Loftin that they were there trying to complete the turnover package. I have the State Group witnesses who say they incurred these expenses as part of the workaround. I accept this evidence and in circumstances where there is a significant *Browne v. Dunn* issue, it significantly outweighs the propositions for which these documents are now put forward.

[159] Thus, I accept State Group's evidence in this regard, which was comprehensive, well supported with documentary invoices that set out the weekly amount billed by Messrs. Lotimer, Shaw, and Pascut, as well as the hours spent by Ms. MacKinnon. These witnesses did not veer from this testimony when cross examined.

[160] I award these amounts.

Category 3

[161] State Group also claims additional costs it had to incur to extend the rental of the facilities it used as a result of the additional time required for turnover in the amount of \$7,373.25. These were required because the Project took longer because of Heywood's breach.

[162] State Group provided sufficient evidence to support this both through documents and also through the testimony of its witnesses.

[163] I reject Heywood's argument that this claim is not properly pleaded.

[164] In paragraphs 32 and 33 of its Statement of Defence, State Group pleads:

32 As set out above, Heywood's failure to provide the written inspection reports on a timely basis, or at all, was a breach of a fundamental term of the Contract.

33. As a result, State had to dedicate additional internal and external resources to complete the inspection reports and to review and reconcile State's internal records with Heywood's invoices in order to complete the Project and prepare the Turnover Documentation for TransCanada. In doing so, State incurred costs in the total amount of \$103,013.63.

[165] The pleading, read generously, is broad enough to include this claim for additional facilities costs. Heywood had the opportunity to examine on all costs claimed by State Group. It did not indicate that this information had been requested at discovery and never provided.

[166] I also reject Heywood's bald assertion that this claim is statute barred. State Group clearly claimed damages for costs incurred for the workaround, and the rental of facilities required because of the delay falls within a category of damages pleaded.

[167] As a general matter, it is also irrelevant to State Group's counterclaim that Heywood sought to submit some of these Daily Inspection Reports (in particular 166 of them) in 2018. By that time, State Group had already completed the Project and expended the sums to address Heywood's breach.

Issue 6: Has State Group failed to mitigate?

[168] I reject Heywood's argument that State Group has failed to mitigate its damages. First, all of its activities set out above were its mitigation.

[169] Second, I reject the actual argument as to why it failed to mitigate. Heywood says that what State Group should have done is ask Mr. Moxey to provide the missing Daily Inspection Reports.

[170] This may have been something that State Group could have done, but there is no evidence that Mr. Moxey would have prepared them gratuitously, or that the cost of doing so would have been less than having Mr. Loftin and Mr. Moxey on site going through their logbooks and information to reconcile matters.

Issue 7: What is the payment owed to Heywood pursuant to the contract, net of the damages that State Group incurred?

[171] There are six Heywood invoices that State Group has not paid related to the disputed period. They total \$237,505.64. There is an additional amount that State Groups agrees is payable in respect of a different invoice in the amount of \$2,034.50. The total claimed by Heywood is \$239,540.24. It also claims an amount as an extra for the preparation of the Daily Inspection Reports it ultimately submitted in 2018 in the amount of \$8,436.

[172] With respect to the disputed invoices, State Group complains that it never received time sheets required by the P.O. on a contemporaneous basis. Even though Heywood did provide the time sheets in support of the invoices after this litigation commenced, State Group takes the position that Heywood did not provide the timesheets in native format with unaltered data to allow State Group to confirm that the timesheets were created contemporaneously. State Group suggested that there is no way to verify the time spent without the time sheets in native format.

[173] I reject State Group's argument for the following reasons.

[174] I have found that the P.O. did not constitute the parties' entire agreement. Rather, it was composed of the P.O. and their communications and conduct.

[175] Notwithstanding what was in the P.O, the parties conducted the entire work for over a year and a half without Heywood ever having provided concurrent time sheets. At no time did State Group ever follow up with Heywood for these time sheets while Heywood was performing the contract. State Group's closing submission reads "there is no dispute that the requirement for timesheets was not strictly enforced or insisted upon by State Group during the Project."

[176] At trial, State Group conceded that Heywood's inspectors conducted the 268 inspections set out in the disputed invoices. There are hundreds of pictures taken during that time period documenting the work.

[177] There is no dispute that TransCanada Pipelines paid State Group in full for work that included Heywood's inspections. The turnover package given to TransCanada Pipelines includes ITPs and QC forms which have been signed off by Heywood.

[178] Although State Group argues there is no way to verify the time spent, the way that Heywood did the work was that State Group would send it a Request to Inspect, directing it to inspect the work, so it knew the exact days that Heywood worked.

[179] In an email dated October 6, 2017, Mr. Shaw, of State Group admitted that Heywood “was pretty much full-time through that period.” Travel time is also something it could have figured out.

[180] Thus, State Group could have reviewed the Requests to Inspect it sent, to verify the hours Heywood billed, by calculating full time hours during those days as well as an estimate of travel time. It provided no evidence of this nature that would undermine the invoiced amount.

[181] Additionally, it was possible for State Group to precisely verify the hours the coating inspectors worked at the site because individuals needed to use swipe cards to get into the premises. It provided no evidence of this nature either that would undermine the invoiced amount in respect of the site.

[182] Furthermore, Heywood’s inspectors testified that they provided the inspections and for the most part, identified their timesheets. Mr. Heywood and Mr. Loftin identified their timesheets, and their evidence was clear in this regard. Mr. Moxey could not identify his time sheets, but it has been many years since the events in question. I do not take this to show that he did not work these hours because Mr. Heywood identified these as the ones that Mr. Moxey sent him concurrently. And it is also confirmed that Heywood paid these inspectors for their work. Mr. Heywood also had a logbook that recorded the dates he did inspections and the time he spent.

[183] I accept Heywood inspectors’ evidence in respect of the timesheets which is supported by sufficient contemporaneous documents and the course of events that involved Heywood actually having paid the inspectors for their work. As such, I accept these inspectors’ evidence.

[184] Further, there was no contractual requirement that timesheets be in native format. The implicit suggestion is that Heywood has prepared the timesheets after the fact and/or submitted requests for payment for time that the inspectors did not actually work. If State Group wanted to prove such a serious allegation, it should have moved for an Order requiring production of the timesheets in native format. At discovery, it could have also asked Heywood for proof of what it actually paid the inspectors and then cross referenced that payments to the timesheets. It could have also asked the inspectors what they were paid at trial but did not do so. It could have taken the information it did have about Heywood’s inspectors working fulltime during that period and done calculations to show that the invoices are inflated taking into account the work that it could verify.

[185] It did not do any of these things. I am satisfied that the time that Heywood says it worked is adequately verified on a balance of probabilities.

[186] There is also an invoice for extra work claimed by Heywood in the amount of \$8,436. This is for the preparation of the Daily Inspection Reports it prepared in 2018. Although I accept State Group’s argument that the Daily Inspection Reports may not have been as useful at that time, as the Project had already been turned over, I award this amount because during the fall of 2017 and

in early 2018, Heywood was seeking payment of its invoices, and on January 9, 2018, and on March 15, 2018, State Group wrote to them advising that they wanted the Daily Inspection Reports to be able to approve the remaining invoices. Having requested that Heywood do this work, it must also pay for it.

[187] Therefore, Heywood is entitled to damages in the amount of $\$237,505.64 + \$2,034.50 + \$8,436 - \$83,398.70 = \$164,577.54$.

Issue 7: Has State Group been unjustly enriched?

[188] Given that the parties had a contract that governed their relationship and pursuant to which I have awarded Heywood damages, the principles of unjust enrichment do not apply.

[189] This was not even seriously pursued, as there are two paragraphs only in the closing submissions citing no caselaw.

Conclusion

[190] Therefore, I find that Heywood is entitled to damages in the amount of $\$164,577.54$. The parties may make cost submissions as follows: Heywood within 10 days and State Group within 10 days thereafter.

Papageorgiou J.

Released: March 27, 2025

CITATION: Heywood Innovative Solutions Inc. v. The State Group Inc., 2025 ONSC 1927
COURT FILE NO.: CV-18-00607867
DATE: 20250327

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

HEYWOOD INNOVATIVE SOLUTIONS INC.

Plaintiff

– and –

THE STATE GROUP INC.

Defendant

REASONS FOR DECISION

Papageorgiou J.

Released: March 27, 2025