Court of King's Bench of Alberta

Citation: PR Construction Ltd v Colony Management Inc, 2025 ABKB 293

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Date: 20250512
Docket: 1403 15558
Registry: Edmonton

Between:

PR Construction Ltd.,

Plaintiff

- and -

Colony Management Inc., The Guarantee Company of North America, Sinopec Canada Energy Ltd., Canadian Oil Sands Ltd, Murphy Oil Company Ltd., Mocal Energy Limited, Nexen Energy ULC, Suncor Energy Inc., Imperial Oil Resources Limited and Canadian Oil Sands Limited.

Defendants

- and -

Colony Management Inc.,

Defendant (Plaintiff by Counterclaim)

- and –

Kevin Lacroix, 0989842 BC Ltd., PR Construction Ltd., and Paul Ronald

Plaintiffs (Defendants by Counterclaim)

Reasons for Decision
of the
Honourable Justice Tamara L. Friesen

SUMMARY

[1] In 2012 PR Construction Ltd. subcontracted with Colony Management Inc to perform steel erection and related work on the Syncrude Canada Ltd. Mine Replacement Project at Mildred Lake, Alberta (the Project). At the time, Colony was itself subcontracted to Kiewit Management Co., which was in turn, subcontracted to Fluor Canada Ltd., the Project Manager.

[2] From 2012 and through most of 2013, Kevin Lacroix was Colony's Senior Project Manager reporting to David Thompson, who is the Owner and Director of Colony. Paul Ronald is the Owner and Director of PR Construction. Lacroix started working for PR Construction in January 2014, after his job with Colony ended.

[3] The contract between PR Construction and Colony (PR Contract) was terminated on March 17, 2014, following a suspension of work by PR Construction. The parties do not agree on who was ultimately responsible for the Contract's termination, or whether the termination was lawful. At the time the PR Contract was terminated, the parties had reached an impasse over payment of invoices issued pursuant to Change Order 15 (CO 15). The terms of CO 15 were intended to compensate PR Construction for a major change to the Project Schedule, which moved much of PR's work into winter.

[4] In its action for breach of contract, PR Construction claims payment of specific invoices related to CO 15 and work they performed on the PR Contract from November 1, 2013, to March 31, 2014, as well as other unpaid invoices, damages and interest. The amount claimed against Colony and its Labour & Material Bond (L&M Bond) holder, Guarantee Company of North America (GCAN), is approximately $6.5 million plus interest.

[5] Colony has counterclaimed against Lacroix and Lacroix's company, 0989842 B.C. Ltd. (Lacroix Defendants), as well as against Ronald and PR Construction (PR Defendants), for breach of the PR Contract and other causes of action related to breach of Lacroix's employment contract. They say CO 15 is not enforceable, and that, among other things, it was the product of a conspiracy between Lacroix and Ronald. Colony claims related damages including the cost of completing PR Construction's work following the PR Contract's termination. They also claim damages in relation to other contested PR Construction invoices. The amount claimed against the Lacroix and Ronald defendants is approximately $2 million plus interest.

[6] For the following reasons, I find that the PR Contract was wrongfully terminated by Colony, and therefore, PR Construction is entitled to damages. However, Colony is also entitled to damages in relation to certain contested PR Construction invoices. On the counterclaim, I find that Lacroix breached his employment contract by failing to follow Thompson's instructions, and in other, more minor, ways. However, as no conspiracy between Ronald and Lacroix occurred, and none of the employment contract breaches caused loss to Colony, no damages have been proven.

ISSUES

[7] The contract between these parties ended in March 2014, when PR Construction suspended work on the Project. The central issue is whether this suspension of work justified Colony's termination of the PR Contract; or, put another way, was PR Construction entitled to suspend work on the Project when they did?

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[8] While the issues involving Lacroix's employment raised in the counterclaim impact PR Construction's claim, for the most part, they will be dealt with separately from the main claim.

[9] I will deal with the various issues and arguments raised as follows:

Part 1: PR Construction's Claim against Colony

1. Is CO 15 a valid and enforceable contract?
2. Are the CO 15 invoices valid?
3. Was Colony entitled to terminate the contract?
4. What are PR Construction's damages and is Colony entitled to set-off?
5. Is GCNA liable to PR Construction?

Part 2: Colony's claims against the PR and Lacroix defendants

1. Did Lacroix breach his employment contract or fiduciary duties?
2. Did PR Construction and Ronald provide knowing assistance to Lacroix or intentionally interfere with Lacroix's contract of employment with Colony?

APPLICABLE LAW

[10] The parties have come before the Court with disagreements about the interpretation of the main PR Contract, and the validity and enforceability of variations to the main contract, mainly CO 15. The issues raised involve consideration of contract formation and contractual interpretation in the commercial construction context.

[11] A contract is formed when the parties clearly intend to be legally bound by the essential terms offered and accepted: ***Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v Aga***, 2021 SCC 22 at paras 35–37; and ***Ron Ghitter Property Consultants Ltd v Beaver Lumber Company Limited***, 2003 ABCA 221 at para 9 [***Ghitter***]. Consideration forms the heart of every enforceable contract: each party must receive something of value from the other: ***Balfour v Tarasenko***, 2016 BCCA 438 at paras 44–45 [***Balfour***].

[12] The duty of good faith requires that contractual parties "not lie or otherwise knowingly mislead each other about matters directly linked to the performance of a contract": ***Bhasin v Hrynew***, 2014 SCC 71 at para 73 [***Bhasin***]. To do so would amount to a party acting dishonestly and in bad faith: ***CM Callow Inc v Zollinger***, 2020 SCC 45 at para 39, citing ***Bhasin*** at para 65. The extent to which a breach of this mandatory doctrine should "substantively constrain a right to terminate" a contract though remains the subject of debate: ***Callow*** at para 43; see also Wayne Courtney, "Good Faith and Termination: The English and Australian Experience" (2019) 1:1 J Commonwealth L 185.

[13] When called upon to assist with interpreting a contract or agreement, the Court must determine what the parties' true, mutual intentions were at the time it was entered into: see ***Consolidated-Bathurst v Mutual Boiler***, [1980] 1 SCR 888 at 901. In ***Sattva Capital Corp v Creston Moly Corp***, 2014 SCC 53 at paras 47, 55 [***Sattva***], the Supreme Court of Canada described a modern, "practical, common-sense approach" for determining the parties' intentions, one which is an inherently fact-specific exercise and "not dominated by technical rules of construction".

[14] The general steps to undertake when interpreting a contract are as follows:

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> First: consider the ordinary and grammatical meaning of the words used in the contract, in the context of the entire agreement;
>
> Second: consider the factual matrix or surrounding circumstances known to the parties at the time of the contract's formation;
>
> Third: assess the words or terms in a manner that is commercially reasonable and in accordance with good business sense; and
>
> Fourth: if the parties' mutual intentions still cannot be discovered, or an ambiguity remains, then the principle of *contra proferentem* applies.

Sattva at paras 46–49, 56–58; ***Earthco Soil Mixtures Inc. v. Pine Valley Enterprises Inc****,* 2024 SCC 20 at paras 61–65 [***Earthco***]; ***Resolute FP Canada Inc v Ontario (Attorney General)***, 2019 SCC 60 at paras 79–80, 142–44; ***IFP Technologies (Canada) Inc v EnCana Midstream and Marketing***, 2017 ABCA 157 at paras 79–89 [***IFP***].

[15] The surrounding circumstances include "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable [person]": ***Sattva*** at para 58, citing ***Investors Compensation Scheme Ltd v West Bromwich Building Society***, [1997] UKHL 28, [1998] 1 All ER 98 at 114; ***IFP*** at para 83. Evidence of surrounding circumstances consists only of objective evidence of facts the parties knew or reasonably ought to have known at the time the contract was formed. Evidence as to subjective intent is inadmissible. In other words, the factual matrix will not include consideration of the parties' evidence that they "intended the contract to mean X" or "understood the contract to mean Y": see ***Alberta Union of Provincial Employees v Alberta Health Services***, 2020 ABCA 4 at para 51.

[16] It should be presumed that, at the time of contract formation, the parties' intention was to enter into a legal, reasonable, and commercially sound agreement; therefore, when presented with two interpretive options, the Court should avoid the interpretation that leads to an unreasonable, commercially absurd, or illegal result: ***Unique Broadband Systems, Inc (Re)***, 2014 ONCA 538 at paras 87–88, 322 OAC 122 [***Unique***]; John D McCamus, *The Law of Contracts*, 3rd ed (Toronto: Irwin Law, 2020) at 822 [McCamus].

[17] Where, as here, the contract at issue is a commercial contract, the Court should consider it objectively, with the goal of discovering a commercially reasonable interpretation focussed on the parties' negotiated terms: ***Earthco*** at para 80. Sophisticated parties are entitled to enter "bad deals" and there is no unfairness in enforcing a contractual obligation that may have arisen from an "expensive but calculated mistake": ***Earthco*** at para 109.

[18] Construction contracts are usually based on standard form contracts that contain industry-specific phrases and terms with meanings that are (or should be) well-known to the contracting parties: see HG Beale, ed, *Chitty on Contracts*, 35th ed, vol 2 (London, UK: Sweet & Maxwell, 2023) at para 40-020 [*Chitty*]; and Bryan West, Immanuel Goldsmith & Thomas Heintzman, *Heintzman, West and Goldsmith on Canadian Building Contracts*, 5th ed (Toronto: Thomson Reuters, 2020) at para 2:3 [*Heintzman*]. The parties are then free to negotiate amendments or additions to that standard form contract: *Heintzman* at para 1:63. Due to the unpredictable nature of the construction industry and attendant risks, all major standard form construction contracts

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contain conditions to address changes or variations to the scope of work: *Chitty* at paras 40-097 to 40-012; and *Heintzman* at para 1:67.

[19] Usually, a variation to an elaborate, fully negotiated written agreement should also be in writing and signed by all parties. However, variations not reduced to writing might still be enforced if, through words or conduct, the parties *act* as though the variation has been agreed to: see, for example, ***Front Construction v 38-44 Chatham Street***, 2018 ONSC 7261 at para 90; see also *Heintzman* at para 1:67.

[20] The usual remedy for breach of contract is damages. Following discovery of a breach, the contract continues with the "obligations of both parties yet unperformed" pursuant to the terms of the contract remaining in place: ***Hunter Engineering Co. v Syncrude Canada Ltd.***, [1989] 1 SCR 426 at 500, 57 DLR (4th) 321 [***Hunter Engineering***].

[21] Professor Stephen M. Waddams has suggested there is only a need to identify two classes of breaches: "breaches that justify termination, and breaches that do not.": *The Law of Contracts*, 7th ed (Toronto: Thomson Reuters, 2017) at para 597 [Waddams]. The "exceptional remedy" of terminating the contract is available where the breach amounts to a failure of performance by one party which deprives the other party of "substantially the whole benefit" of the contract: ***Hunter Engineering*** at 500; ***Guarantee Co. of North America v Gordon Capital Corp.***, [1999] 3 SCR 423 at paras 40–44, 178 DLR (4th) 1 [***Guarantee***]; ***Booster Juice Inc v West Edmonton Mall Property Inc***, 2019 ABCA 58 at para 13 [***Booster Juice***]. The breaching party has, through their actions, repudiated the contract.

[22] An anticipatory breach occurs when one of the parties repudiates the contract through language or conduct by evincing "an intention to abandon and to altogether refuse performance of the contract" in the future: McCamus at 750; ***956126 Alberta Ltd v JMS Alberta Co Ltd,*** 2020 ABQB 718 at paras 109–11.

[23] Whether the breach is actual or anticipatory, it falls to the innocent party to determine whether to accept the repudiation and terminate the agreement, or continue the contract and deal with the breach in some other way: ***Van Camp v Laurentian Bank of Canada***, 2015 ABCA 83 at para 32 [***Van Camp***]; ***Brown v Belleville (City)***, 2013 ONCA 148 at para 45 [***Brown***]; ***Booster Juice*** at para 19. The innocent party must clearly and unequivocally communicate their decision to disaffirm the contract to the party within a reasonable time. Communication of the choice to disaffirm may be done "directly, by either oral or written words, or may be inferred from the conduct of the innocent party in the particular circumstances of the case": ***Brown*** at para 45; ***Van Camp*** at para 32.

[24] The choice to terminate the agreement is not rescission in the true legal sense of the word, being *void ab initio* by a vitiating element; rather, the parties are discharged from future obligations, but remain bound by rights and obligations that have accrued through partial performance: ***Guarantee*** at paras 40–41; see also ***Ascent One Properties Ltd. v Liao***, 2020 BCCA 247 at paras 88–89.

[25] In other words: the contract has ended, but it remains binding in terms of past acts and defaults: ***Beaufort Realties et al. v. Chomedey Aluminum*** 1979 CanLII 66 [**Chomedy Aluminum Co. Ltd. v Belcourt Construction (Ottawa) Ltd.**,] (ON CA), [1979] 24 OR (2d) 1 at 5. Lawful termination of a contract does not deprive the breaching party of accrued contractual rights: ***Norwood*** at 241.

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[26] Late payment of an invoice is a contractual breach that will rarely justify terminating the entire contract; however, a refusal to pay an invoice, or a refusal to follow the agreed upon invoice payment method could amount to repudiation depending on the context: ***R & B Plumbing & Heating Ltd. v Gilmour***, 2018 BCSC 1295, 92 CLR (4th) 263. In ***a.k.a Cartoon v Natterjack Animation***, 2002 BCSC 1763, 31 BLR (3d) 52 the Court found that in some circumstances, when payment is not received "the default may amount to a fundamental breach even where no damages have yet been suffered": ***Natterjack*** at para 52.

FACTS

Evidence at trial

[27] The first part of the trial took place from November 15 to December 10, 2022, with PR Construction and Ronald calling their evidence on the breach of contract claim, followed by Colony calling its evidence on the counterclaim against PR and Lacroix as defendants. The proceedings adjourned, and prior to the continuation of the trial, the PR and Lacroix defendants applied, unsuccessfully, for a non-suit with respect to Colony's counterclaim: ***PR Construction Ltd v Colony Management Inc,*** 2023 ABKB 25 [Non-Suit Decision].

[28] The trial continued from September 11 to 22, 2023, with the PR and Lacroix defendants calling their evidence in response to the counterclaim. Following closing arguments, the parties requested permission to file written arguments. All parties submitted lengthy written arguments and adopted earlier written arguments and submissions in relation to the non-suit.

[29] Despite ultimately relying on the same relevant and material documents, the parties never provided the Court with any consistent or simplified method of referring to the countless exhibits. The documentary evidence consisted of many thousands of pages of invoices, transcripts, reports, emails, letters, and other types of information which the parties tracked and referred to in completely different ways, and which were provided in various formats, contained on numerous fobs, and set out in charts, formulations, indices, etc. throughout the trial. Some exhibits were printed out and provided to the Court, but most were not. This resulted in an evidentiary record that was incredibly and unnecessarily complicated and unwieldy, containing hundreds if not thousands of documents that were never even referred to by either of the parties at trial. This stubborn and thoughtless manner of dealing with the otherwise non-controversial evidentiary paper record caused many needless delays during the trial and afterwards.

[30] The parties agreed on the key pieces of evidence that the Court should consider. Admissibility of these key pieces of evidence was also agreed upon by the parties, or in the case of Lacroix, not contested. Obviously, the parties did not agree on how that evidence was to be interpreted.

[31] Several witnesses testified, including the three primary actors, Ronald, Thompson, and Lacroix. None of these primary witnesses were very helpful in resolving the fundamental disagreements. Each of them had invested significant time, money, and emotion in the proceedings by the time they were called upon to testify, and each considered their reputation and finances to be at risk. All remained entrenched in their original positions. This was evident in their testimony and affected their credibility to a greater or lesser degree, depending on what they were testifying about. Thompson's testimony was particularly unhelpful given he took no contemporaneous notes at the relevant time periods and he indicated he had no independent recollection of many of the events he was eventually found to have participated in.

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[32] Fortunately (albeit disconcertingly), Ronald had surreptitiously recorded many of his conversations with Thompson and Lacroix, while Thompson and Lacroix, and then Colony employee Mike Manning, had recorded a few more. This meant that the Court had access to recordings and transcriptions of many hours of real time conversations between the parties. These tapes were helpful in determining what the parties *actually* said in particular conversations; however, they did not necessarily assist me in determining whether what was said was also *true*. The recording party may have tempered their remarks knowing that they might be reviewed by a decision-maker of some kind in the future, whereas the unsuspecting party would have spoken more freely. This observation does not amount to a finding that either party was more likely to have been truthful or honest in those calls, but the likelihood of truthfulness was certainly something I considered when reviewing the audio transcripts. For instance, I considered that Ronald would have been unlikely to secretly record conversations with someone who was his co-conspirator; rather, he recorded conversations with Lacroix because he considered him to be a potential future adversary.

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[33] While I will deal with this issue in more detail below, the recorded conversations between Ronald and Lacroix, considered fully and in context rather than in a piecemeal fashion, simply *do not* support Colony's broadly drawn assertion of a pre-conceived, agreed upon unlawful conspiracy to damage Colony's interests. Robert J. Hanlon's razor comes to mind: one should never ascribe to malice that which can be adequately explained by neglect, ignorance or incompetence.

[34] This is not to say that Lacroix and Ronald should be proud of what they said in those conversations. They both have much to be embarrassed about in terms of their lack of maturity and professionalism.

[35] The additional witnesses called included Manning, who was employed by Colony Management Inc as a Field Engineer on the Project and who eventually took over much of Lacroix's work after Lacroix's departure; one expert witness, Peter Dent, a professional accountant who was tendered as an expert with respect to forensic accounting and financial investigations; and Henrico Rolke, a professional engineer employed by PR Construction who testified as an ordinary witness called with respect to explaining certain invoicing calculations.

[36] While Manning was presented as a neutral, disinterested third-party witness, it became clear throughout the course of his testimony that he was, in fact, very much interested in advancing Colony's position in the trial, although he was no longer employed by them. Manning was a fundamental part of Colony's negotiated settlement with Kiewit following the termination of PR's Contract and therefore had a reputational and personal interest in the outcome of the trial that coloured some of his testimony. Otherwise, his evidence was somewhat helpful in that it was grounded in the documents presented at trial.

[37] Dent's evidence was quite useful when it was contained to what he was properly qualified to testify about, which was: 1) the sufficiency, reliability, accuracy, and completeness of supporting documentation; 2) anomalies in invoicing and supporting documentation; and 3) comparison of financial information based on estimates, in this case winter work to objective documentation of actual circumstances. He presented as fair and impartial and had clearly done a tremendous amount of work parsing through the voluminous invoicing documents relied on at trial by both parties. In contrast, Rolke's evidence "truing up" the CO 15 invoices was not very

useful. This was particularly so given his own admission that he had used the wrong efficiency factor to conduct his CO 15 calculations.

Findings of Fact

[38] The following findings of fact deal with the facts most essential to my determination of the contested issues. It does not include or reference everything referred to by counsel in their oral and written arguments or contained in the many thousands of pages of exhibits and transcripts of evidence submitted to me, which I reviewed in preparing these reasons. Where certain facts or issues were disputed, I have included a ruling and an explanation for same.

Formation of the PR Contract

[39] Like all construction contracts, the PR Contract seeks to achieve financial gain for both parties, while managing the risks and uncertainty inherent in the industry. Construction contracts generally follow the standard contract documents prepared by the Canadian Construction Association (CCA) to manage the relationships between the owner, contractor, subcontractor, and sub-subcontractors. These contractual documents use standard and consistent terminology to ensure that the construction projects are managed in a timely and efficient manner and that work can continue without disruption in the event of a dispute or claim.

[40] On August 1, 2012, Kiewit and Colony entered into a subcontract agreement for Colony to design, supply, fabricate, deliver, and erect structural steel and load, haul offload, and erect modules at the site (the Work) for the Mildred Lake Project. Kiewit in turn was the General Contractor to Fluor pursuant to the Prime Contract, with Fluor as Project Manager for Syncrude as Owner. Per its obligations under the subcontract agreement, Colony was required to, and did, post a L&M Bond issued by GCNA in the amount of $23,134,480.00.

[41] PR Construction is one of several sub-subcontractors to Colony's subcontract with Kiewit (the Colony Contract). The PR Contract follows the general standard form construction contract format, and includes detailed terms, attached as exhibits to the Contract, dealing with various important issues. Exhibit A defines PR's Scope of Work, Exhibit D includes the original agreed upon construction schedule for completion of various aspects of the Scope of Work, Exhibit E defines the accepted billing and invoice methodology, and Exhibit J sets out who has signing authority for Colony. The base price of the PR Contract for PR's anticipated Scope of Work was $6,707,720.51.

[42] A "follow form" term is a term in a subcontract that mirrors, or adopts by reference, a term in the larger contract. The Colony Contract includes follow form terms which refer to terms contained in the Prime Contract. One of those terms, hereafter referred to as a "flow through" term, states that Colony is only entitled to compensation from Kiewit with respect to additional work not covered by the terms of the original contract, if Kiewit is entitled to compensation from Fluor. While negotiating the PR Contract with Thompson and Lacroix, Ronald would not agree to certain "follow form" provisions, and importantly, would not agree to a similar broad "flow through" term.

[43] While the matter was contentious during the contract negotiation period, ultimately, Thompson and Lacroix both understood that if the follow form and flow through terms were not removed, Ronald would not sign on to the Project. In addition to removing or amending those terms, Colony also conceded to adding an "entire agreement" clause in the Supplementary

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Conditions through which the parties agreed that the PR Contract supersedes all other prior agreements and discussions. In other words: the PR Contract is the whole contract.

[44] The PR Contract incorporates other terms designed to manage PR Construction's financial risk. Importantly, Article 4.1 of the PR Contract binds Colony to the schedule provided at the time of signing the Contract, indicating that the schedule may *only* be adjusted with the written approval of PR Construction. However, Colony's subcontract with Kiewit does *not* contain a similar term. Sub-subcontract Condition 6.1 (SSCC) restricts Colony's ability to make changes to the Scope of Work without a Change Order approved by PR Construction. Appendix A, which sets out the "Supplementary Conditions" to the PR Contract, further expands on the methodology for "Changes to the Work" which were to occur through the Change Order process, rather than through Change Directives issued by Colony.

[45] Colony also hired other subcontractors for the Mildred Lake Project. These major subcontractors included: Empire Iron Works Ltd.; Canam Steel Corporation; Trans Tech Contracting Inc.; Northern Crane Services Inc.; and Ace Construction. PR Construction was the only subtrade subcontracted to Colony for the Mildred Lake Project that was able to secure amendments to the standard form construction agreement used by Kiewit. In the result, Colony was obligated to issue a Change Order to PR Construction addressing impacts to cost and schedule whenever a material change was made that affected PR's Scope of Work, without any entitlement to a similar Change Order from Kiewit except to the extent that Kiewit itself was able to obtain a Change Order from Fluor. This created a huge financial risk for Colony. The evidence shows that Thompson was aware of this risk when he agreed to PR Construction's negotiated terms.

[46] Initially, Colony asserted that this "special treatment" of PR Construction was evidence of conspiracy on the part of Lacroix and Ronald; however, those claims were abandoned at trial, and properly so. The oral evidence at trial, as well as the emails sent December 19 and 20, 2012, from Lacroix to Ronald, clearly prove that while Thompson was unhappy with the deleted and amended terms, he needed PR Construction to commit to working on the Project as soon as possible and therefore reluctantly accepted them. In any event, Lacroix clearly had the authority to sign the PR Contract on behalf of Colony per an email sent by Thompson to Ronald on December 15, 2012. Therefore, Lacroix had the authority to agree to the altered terms even without Thompson's express approval.

[47] The PR Contract was formally executed in January 2013, although it was considered retroactive (or backdated) to December 19, 2012.

Specific provisions of the PR Contract

Part 6: Changes in the Work

[48] Part 6 of the PR Contract deals with "Changes in the Work" and includes sections dealing with the subcontractor's rights to make changes, the Change Order process, the method for dealing with delays, and changes to the Sub-subcontract Price. Per SSCC 6.1, Colony agreed that all changes to the Sub-subcontract Work could only be made by agreement through the Change Order process. All references in the standard form contract template referring to Change Directives were explicitly struck from the PR Contract. This meant that PR Construction could not be *directed* by Colony to do additional work without their express written agreement.

[49] SSCC 6.2, which deals specifically with Change Orders, reads as follows:

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> 6.2.1 When a change in the *Sub-subcontract Work* is proposed or required, the *Subcontractor* shall provide the *Sub-subcontractor* with a written description of the proposed change in the *Sub-subcontract Work*. The *Sub-subcontractor* shall promptly present, in a form acceptable to the *Subcontractor*, a method of adjustment or an amount of adjustment for the *Sub-subcontract Price*, if any, and the adjustment in the *Sub-subcontract Time*, if any, for the proposed change in the *Sub-subcontract Work*.
>
> 6.2.2 When the *Subcontractor* and the *Sub-subcontractor* agree to the adjustments in the *Sub-subcontract Price* and *Sub-subcontract Time* or to the method to be used to determine the adjustments, such agreement shall be effective immediately and shall be recorded in a *Change Order*. The value of the *Sub-subcontract Work* performed as the result of a *Change Order* shall be included in the application for progress payment.

[50] "Sub-subcontract Work" as defined in the PR Contract means "the construction and related services required" by the Subcontract Documents. The Subcontract Documents are all the documents that comprise PR's Contract with Colony. PART 1: General provision, SSCC.1 describes the "Documents" while SSCC 1.1.1 states that while the documents are intended to cover the "labour, *Products* and services necessary for the performance of the [work]," it is not intended to cover products or work "not properly inferable from the *Sub-subcontract Documents*."

[51] SSCC 6.5 deals with delays to the performance of the Sub-subcontract Work and provides a mechanism whereby PR would be entitled to its reasonable costs incurred because of any such delay.

[52] SSCC 6.6 deals with the procedure for making a *claim* for an increase to the agreed-upon Sub-subcontract Price arising from "an event or series of events giving rise to a claim." "[E]vent" is not further defined.

[53] The procedure in SSCC 6.6 requires PR to give timely Notice in Writing of its intent to make a claim and to provide a timely submission detailing the amount and basis for the claim. SSCC 6.6.2 and 6.6.3 place certain requirements on PR to mitigate any losses and expenses and to keep and submit all necessary records to support its claim. These obligations begin from the moment the event giving rise to the claim occurs.

[54] SSCC 6.6.6 provides that any claims that cannot be resolved must be settled in accordance with the Dispute Resolution provisions of the Sub-subcontract.

[55] Sub-subcontractors were to keep a running record of their claims against Colony by submitting an "Appendix D – Statement Regarding Outstanding Claims/Liens" with each monthly invoice sent to Colony.

Parts 7 and 8: Default Notice and Dispute Resolution

[56] Part 7 deals with situations in which the parties would be entitled to suspend or terminate the work or the Contract, including suspension for nonpayment by Colony, per 7.2.3, and further sets out a process to follow including provision of Notices in Writing.

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[57] Part 8 of the PR Contract outlines the Dispute Resolution process. It provides that in the event a dispute arises between the parties about the "interpretation, application or administration of the *Sub-subcontract*" or there is "any failure to agree where agreement between the parties is called for" that is not promptly resolved, then in order to prevent delays, PR will continue to perform its work if directed to do so by Colony, without jeopardizing its claim.

Appendix A: Supplementary Conditions

[58] Appendix A to the PR Contract, "Supplementary Conditions", *Clause IV: Changes to the Work*, states that Change Orders must be in writing and signed by authorized representatives of the contracting parties. It further states that PR will not be compensated for any extra or additional work performed without a prior written Change Order.

[59] *Clause II: Payment* sets out the pricing methodology. It indicates that pricing is based on "quantities and unit prices", referring to Exhibit B of the Contract. It further indicates that PR Construction will provide a "Billing Tracking Form" each month, as well as a list of parts.

Exhibits to the Contract

[60] Article 3B of the PR Contract indicates that the "Exhibits" are components to the main contract.

[61] Exhibit A to the Contract sets out more specifically PR Construction's "Scope of Work." The first paragraph of Exhibit A states "Erect Structural Steel only per attached Exhibit "B" – Estimated Quantity and Unit Pricing Form dated: December 20, 2012 and Exhibit "D" – Field Schedule dated: December 20, 2012." It further indicates what is included in 'unit rates" and what is not. The 'Additional Information" section of this Exhibit says at #12 that unit rates will apply to the initial work, but components added after the fact may be billed on the basis of time and materials if agreed to in the applicable Change Order.

[62] Exhibit B is the "Estimated Quantities and Unit Price Form." Exhibit C sets out the agreement between Colony and PR regarding rates for equipment and manpower where it was agreed that PR Construction would be paid based on time and materials.

[63] Exhibit E is a 'live' spreadsheet (see Supplementary Conditions, Clause II) on which actual quantities (parts) as delivered to site were to be recorded as derived from the Parts List maintained by Colony and shared with PR. The erected parts would be invoiced based on actual weight, and paid for pursuant to the unit rates prescribed in Exhibit B.

Winter Work

[64] Almost any kind of outdoor construction will require more time and effort when it is performed during the winter months owing to cold temperatures, precipitation, snowfall, and reduced hours of daylight. At the time of the PR Contract's formation, the evidence shows that the parties considered the issue of additional compensation for Winter Work.

[65] In September 2012, while still negotiating the terms of the PR Contract, Thompson and Ronald corresponded about the "Winter Work premium." Thompson notified Ronald that the Winter Work premium in the unit rates agreed to by PR Construction would no longer apply in light of the then-current Kiewit schedule dated September 9, 2012. Thompson informed Ronald that these costs should be deleted from his bid. Ronald was concerned "that the unit rates for additional work which will probably fall into the winter months will not be inclusive of this provision." Thompson then replied, "[g]ood thought let's leave it parked where it is for the time

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being and see what comes up from Kiewit or Fluor down the road." When the PR Contract was executed, no change was made to the unit prices.

[66] Colony relies on this as proof that the PR Contract contains an agreed upon Winter Work compensation methodology based on an assessment of actual costs incurred by the parties for erection of steel during the period of November 1, 2013, to March 31, 2014, which they refer to as the "Winter Work Period."

[67] However, nothing expressly set out in the PR Contract addresses this point. In fact, the "Field Schedule", attached as Exhibit D, does not assign any tasks at all to PR Construction for that time period. The last task, #59, to "Erect Piperacks and Pipe Supports" for the pumphouse, has an anticipated scheduled end date of November 2013.

[68] It may be that Ronald increased his unit rates on the basis that some amount of work would be done in the winter months, based on the original schedule. That is not evidence that the parties agreed to some kind of Winter Work compensation methodology. Regardless, I find that any major change to the original schedule contained in Exhibit D constituted a major event that impacted on the financial viability of the original unit prices that needed to be accounted for in some way, *either* through a claim or by Change Order.

Commencement of PR's Scope of Work

[69] The original Project schedule required PR to mobilize to the site on February 15, 2013, with work set to commence March 1, 2013, per Colony's instruction. However, Kiewit asked Colony to start work early, and, accordingly, Colony then asked PR to start early. When this request was made, Thompson knew that he would have to pay resulting standby charges pursuant to the delay section of the PR Contract. Unfortunately, Kiewit did not have the site ready in time for PR to begin its Scope of Work early. Due to the early mobilization, on February 8, 2013, PR Construction issued a Notice of Delay to Colony. This was followed by a Notice of Continuing Delay on March 28, 2013.

[70] On April 8, 2013, PR Construction sent an email requesting a Change Order from Colony to reflect a new start date following the issuance of a new Project schedule by Kiewit. Pursuant to Change Order 5, PR Construction invoiced Colony for costs associated with the late start date. Colony then requested compensation from Kiewit for the amount it had paid out to PR Construction.

[71] Ronald was increasingly unhappy with the delays. To keep PR Construction on site, on April 24, 2013, Colony agreed to two more Change Orders and payment of related invoices dealing with the cost of the delay. Change Order 6 addressed field impact of the unprepared foundation and assembly area, and Change Order 7 dealt with "permitting time" to be charged.

[72] Time moved on and the site was still not ready. More and more work was being pushed into the winter months. It was clear that additional Change Orders would be required to deal with the ongoing delay; meanwhile, the Change Orders Colony had already agreed to with PR Construction had not been approved upstream by Kiewit. At one point, Change Order requests amounted to approximately $13 million on this $45 million Project. PR Construction – more specifically, Ronald – was losing patience and was considering giving notice and leaving the site.

[73] Eventually, Thompson directed Lacroix to sign Change Order 10 and pay the associated invoices. Specifically, on May 18, 2013, he directed him to "go ahead with this and give [Ronald] a change order on these things up to now so he can bill on it; okay?" PR Construction

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and Colony also signed Change Orders 8 and 11 which were intended to mitigate PR Construction's standby charges by having them perform construction work on the ATCO Building, and the Chemical Injection Building, work which fell outside their initially agreed upon scope. Other related Change Orders followed. With respect to the current litigation, the most important was CO 15.

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PR's Winter Work order (CO 15)

[74] The Project was clearly behind schedule. On April 3, 2013, Kiewit provided Colony an updated draft April Mitigation Schedule which was then passed on to PR Construction. The site would not be ready for PR Construction to begin its work until July 19, 2013. That same day, Ronald provided Colony with a Notice of Delay. All of the parties involved understood that substantial aspects of structural steel erection work would now be taking place during the winter months, in the harsh climate of northern Alberta. As a result, all the parties – Fluor, Kiewit, Colony, and PR Construction – began discussing compensation methods for dealing with Winter Work. Ronald eventually requested that this occur through the issuance of a Change Order with an updated schedule that included a defined compensation method. This would subsequently become CO 15, also known as the Winter Work Order.

[75] Ronald insisted that PR Construction would not begin work until the Winter Work compensation method was agreed to. The parties had previously relied on Kiewit's Estimating Manual to calculate changed costs with respect to PR Construction's Scope of Work. Lacroix and Ronald thought the methodology set out in the Manual was flawed in this case, as it did not address considerable winter factors including wind chill or reduced daylight. They decided to develop a new methodology, which they then embedded in a spreadsheet that modified "pricing depending on how [tasks moved] in and out of winter" months. This methodology would be relied on by PR Construction and therefore by Colony in seeking compensation for Winter Work.

[76] Thompson had concerns about the method they had proposed, and did not want to agree to anything unless he had secured an agreement from Kiewit and Fluor. He did not want to be on the hook for payments to PR Construction without being able to seek similar compensation from Kiewit. This was clearly expressed to Lacroix and Ronald in person and via email.

[77] On May 12, 2013, Lacroix and Ronald met in person with representatives of Kiewit, including Senior Estimator Don Lee, and Thompson, along with others who attended by conference call. Lacroix testified that the purpose of the meeting was to agree "in principle" on implementing the new approach. The goal was for Lacroix and Ronald to present their proposed Winter Work compensation methodology to Lee so that Lee could accurately present it to Fluor on behalf of Kiewit. This would ensure that payment and compensation would flow from the top down.

[78] Lacroix testified that he effectively showed Kiewit that their past methodology had led to the Winter Work Order being significantly undervalued. To illustrate this, a draft of CO 15 compared the impact of the two methodologies on the anticipated cost of Winter Work. The difference in the estimated value was significant at approximately $6 million. Lacroix described this in various items of correspondence as "pure profit" and a "pot of money." Lee, however, expressed concerns with the new methodology and indicated that it needed substantial clarification and revision before he could present it to Fluor. Several drafts followed.

Documented revisions included clarifying the calculations and strengthening the overall narrative.

[79] It was clear to me in listening to Lacroix's testimony that he believed and continues to believe that his method for calculating Winter Work compensation was something new and improved. I do not find that there was anything fraudulent or intentionally misleading about the methodology he proposed, nor is there any suggestion in any of the evidence, emails, or correspondence, that the other parties believed this to be the case. If anything, Lacroix's proposal represented an act of hubris: he thought his new method was better than the old "tried and true" methods followed by Kiewit and Fluor, he had convinced Ronald this was the case, and neither wanted to back down from that position. However, the method resulted in more money being paid to PR Construction and, therefore, to Colony, if Kiewit and Fluor accepted it. From a business perspective, Kiewit and Fluor simply had no reason to do so.

Meeting with Marina Pratchett

[80] On June 4, 2013, Lacroix and Thompson met with Colony's lawyer, Marina Pratchett, to discuss the proposed Winter Work compensation methodology, which was still in the process of revision, as well as the backlog of Change Orders that were building up due to schedule changes and resulting delays.

[81] Colony did not disclose notes from the meeting taken by Pratchett or Thompson, asserting that they contained privileged legal advice. However, they *did* rely on notes taken by Lacroix as proof of what had been said in the meeting, and in support of their argument that he had breached his duty of confidentiality to his employer by talking about the meeting with Ronald afterwards. This was an unwise tactic given Thompson and Lacroix disagreed in their respective testimony on the solution reached in that meeting.

[82] Thompson said that following the meeting with Pratchett, and per her advice, he told Lacroix *not* to sign CO 15. Lacroix denied receiving any such point-blank instruction. He testified that Thompson had accepted that the PR Contract required change orders to be provided to PR before any associated Winter Work began. In his opinion, that meant that an immediate Winter Work Order was required to prevent PR from abandoning the Project entirely. Thompson testified that he understood Ronald would walk off the job site if he did not get terms such as those contained in CO 15. Specifically, terms that meant Ronald did not have to wait until the end of the job, and the completion of PR Construction's Scope of Work, to claim compensation for any Winter Work.

[83] Lacroix's handwritten notes on the meeting with Pratchett say "Standby, yes" and "Winter work, no" as well as "tie him down to a methodology." Lacroix testified that "Winter work, no" did not mean "never" but, rather, "not right now." I accept as a fact that during that meeting, either Thompson or Pratchett told Lacroix he should not issue the Winter Work Order *until* the new methodology had been approved by Kiewit.

[84] This conclusion is supported by the fact that after the meeting, Lacroix called Ronald to relay what had been discussed. Lacroix says he was directed by Thompson to do so, and the transcript of Lacroix and Thompson's conversation supports that assertion. In that conversation Lacroix explained that Colony had decided to issue the necessary standby orders and would issue a Winter Work Order provided Ronald only billed on it *after* the Winter Work actually happened. Ronald noted that the risk Colony took in signing the PR Contract was that they might

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not be reimbursed from Kiewit to the same degree they compensated PR under future negotiated Change Orders. Ronald expressed his appreciation of the presented approach and said he would make it up to Lacroix somehow.

[85] Lacroix then drafted what would later become the final version of CO 15, and on June 13, 2013, he sent it to Lee for review. On June 14, 2013, Lee advised Lacroix via email that "substantial effort" was still needed to revise the methodology. Notably, Lacroix was told to develop a more "logical, coherent, and step-by-step narrative" to accompany the spreadsheet; however, Lee did not reject the proposed methodology outright nor indicate it was somehow implausible or impossible to implement.

[86] On June 17, 2013, Lacroix, on behalf of Colony, signed CO 15 which implemented the proposed method for calculating compensation for Winter Work. In return, Ronald agreed to keep PR Construction on the Project.

[87] During his cross-examination, Thompson testified that he was unaware that CO 15 had been signed until some time in the latter part of September 2013. He said he was unable to recall when exactly he learned about it but was able to piece together when he found out by reviewing various correspondences and documents. He also testified that he found out directly from his employee, Cynthia Benner. I do not accept Thompson's testimony on this point.

[88] The evidence does not support an inference that Lacroix attempted to hide CO 15 from Thompson, given that it was placed in the master binder of Change Orders in Benner's office and entered into the Timberline recordkeeping system within days of being signed. In his testimony, Thompson was equivocal on whether Lacroix had even received a reprimand for signing off on CO 15 "against his express instructions." He said that when he found out about CO 15 from Benner, he went to see Lacroix and used "strong language," but, ultimately, he did not terminate Lacroix's employment at that point. I find that, at a minimum, Thompson knew CO 15 had been signed against his instructions prior to his correspondence with Kiewit that was sent on August 12, 2013.

Colony's attempt to obtain winter work compensation from Kiewit

[89] By the end of June 2013, Kiewit and Colony appeared to have reached an agreement on final revisions to the CO 15 Winter Work narrative, which can be summarized as follows:

- Repricing to account for Winter Work would be forward-looking, based on monthly 'inefficiency factors' taken from Kiewit's Estimating Manual.
- The inefficiency factors were to be based on historical weather patterns and hours of daylight.
- The hours originally estimated for PR to perform the unit price work would be increased by the 'inefficiency factors' and the corresponding increase in estimated hours would be multiplied by an hourly rate derived from the PR Contract.
- The new schedule would provide the time period during which each unit price work task was to be performed.

[90] Colony's Change Order 74 (CCO 74 Rev 7), which relied on this methodology, was then delivered to Kiewit via an email to Lee on June 24, 2013. Thompson and Lacroix were copied. That email string included the following:

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> Hi Don, here is the revised writeup for the winter work calculations. Please let me know if you require any modifications….
>
> Kevin/David, *This looks fine*…. Please incorporate into Colony's Item 74 quote and resubmit to us the entire Item 74 Rev 7 [CCO 74] quote.

[91] Importantly, Fluor had still not approved the methodology, and Fluor's approval was a prerequisite to Kiewit's approval. In August of 2013, Thompson reached out to Kiewit via letter regarding claims for "Winter Works." In that letter, he indicated he was seeking $3 million from Kiewit, although he also said that he had not yet reached any agreement with the sub-subcontractors, which was not the case.

[92] In an attempt to bring Kiewit on side, Thompson asked Lacroix to prepare a revised submission dealing with the Winter Work compensation methodology that could be presented to Kiewit, using percentages derived from the Winter Work factors in the Kiewit Estimating Manual. On September 30, 2013, Lacroix provided Thompson with a different articulation of the methodology using percentages derived from the requested factors.

[93] On October 4, 2013, on instructions from Thompson, Colony sent notice to PR Construction that it was unilaterally cancelling CO 15, while indicating that a new Change Order would be re-issued once Kiewit had approved the methodology. On receiving this letter, Ronald indicated that, while he did not agree that CO 15 *could* be cancelled, he remained willing to look at alternatives. Notably, the notice did *not* mention that CO 15 had been entered into contrary to Thompson's express instructions and that it was therefore invalid for lack of authority.

[94] On October 7, Colony sent Lacroix's re-worked Winter Work compensation methodology to Kiewit as an application for Change Order 108 (CCO 108) to the Colony Contract. CCO 108 only differed from CCO 74 Rev 7 in that it revised "originally estimated" manhours to "actual" manhours multiplied by Kiewit's winter efficiency factors. Colony later sent a follow-up letter to the same effect on October 31, 2013, with some amendments to the architectural scope.

[95] On October 13, 2013, Colony directed all its sub-subcontractors, including PR, to provide daily time sheets with a comprehensive description of the work performed by the personnel on the Project. On October 14, 2013, Lacroix advised Ronald that Kiewit was clamping down on the need for daily time sheets from Colony's sub-subcontractors. PR was to track and provide daily time sheets for certain PR Change Orders, including CO 15, although Lacroix did *not* assert that these daily time sheets were *required* for CO 15 to be paid by Colony.

[96] On November 4, 2013, Kiewit issued a new schedule to Colony: the November 5, 2013 Schedule. This was the third, possibly fourth, version of the schedule PR Construction had been presented with in the course of the Project. In response, on November 8, 2013, Colony sent Kiewit a letter advising that costs and Change Order requests to address Winter Work conditions would follow.

Possible assignment of PR Contract to Kiewit

[97] By November 18, 2013, Colony was in discussions with Kiewit regarding a proposal that would have Kiewit terminate the Colony Contract and take an assignment of PR's Contract as well as Colony's other sub-subcontracts. A sticking point appeared to be whether Kiewit would agree to take on PR's Contract given the existence of CO 15 and its impending invoicing.

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[98] On November 19, 2013, following a conversation with Thompson, and in response to PR's query about billing for November Winter Work under CO 15 based on the new schedule, Lacroix asked PR to invoice for November Winter Work under the existing CO 15 and schedule indicating that it would be updated moving forward per the November 5, 2013 Schedule. PR issued its first Winter Work invoice under CO 15: Invoice 201362 for $65,387.15 including GST.

[99] On November 21, 2013, Colony employee Robbie Gray prepared a spreadsheet to support an amendment to Colony's CCO 74 Rev 7 request to Kiewit to compensate for changes to Winter Work caused by the new schedule: QAW 74 Rev 8. In QAW 74 Rev 8, the architectural scope was removed, and Colony sought to be compensated based on actual manhours recorded over manhours previously estimated, multiplied by $223.79, and increased by the same inefficiency factors taken from the Kiewit Estimating Manual.

[100] On November 22, 2013, at a meeting in Kiewit's Edmonton office, in the context of Kiewit taking an assignment of PR's Contract, Thompson acknowledged that PR had a Change Order for Winter Work, while Colony did not have a corresponding one from Kiewit as Kiewit did not have one from Fluor. Kiewit suggested that it would be willing to compensate for Winter Work on a time and materials basis, but not per the terms of CO 15.

[101] Thompson reached out to Ronald after this meeting and in a recorded conversation, agreed with Ronald that if Kiewit was to take assignment of PR's Scope of Work, then they would have to agree to the terms of CO 15. In that same conversation, Thompson stated that a change in Winter Work constituted a change in the Contract, which needed to be addressed.

[102] Meanwhile, PR Construction continued to press Colony for an updated CO to reflect the changes in the most recent schedule. On November 25, 2013, Lacroix sent Colony's response, copying Thompson, and indicating that in light of the ongoing discussions between Kiewit and Colony, "we don't believe it would be prudent for us to sign any change orders going forward until the matter is addressed."

[103] By letter dated November 26, 2013, to Ronald, Thompson formally revoked Lacroix's authority to represent Colony with respect to the PR Contract. Two days later, Lacroix's employment was terminated, and he was provided with 30 days' working notice until December 30, 2013.

[104] Also on November 26, 2013, PR Construction issued an updated invoice per the methodology set out in CO 15: Invoice 201362 rev 1 for $363,000.00.

[105] At this point, it had become highly unlikely that Colony was going to receive any reimbursement from Kiewit for payments to PR Construction in relation to CO 15 invoices. Thompson also testified that he had already decided that Colony would not pay PR for Winter Work under CO 15 if he was not going to be reimbursed for it, although he failed to communicate that decision to PR Construction.

[106] On December 4, 2013, Thompson emailed Ronald and indicated that he was looking at a proposal to use actual daily manhours on site to indicate work affected by loss of productivity due to Winter Work based on the formula and hourly values in the Colony to PR Change Order (CO 15). In that email, Thompson indicated that by applying that method "we came very close to your invoiced amount." In my view, this admission supports PR and Lacroix's position that the methodology in CO 15, while costly for Colony, was commercially reasonable.

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[107] Ronald responded, suggesting that he did not agree to changing the methodology as proposed by Thompson. Ronald said the only change he had discussed with Lacroix was "truing up" to Kiewit's November 5, 2013 Schedule: meaning, he would invoice based on that schedule.

[108] By December 12, 2013, Kiewit had determined it would not be reimbursed by Fluor for PR's CO 15 costs. As such, it determined that it could not take assignment of PR's Contract with Colony, and informed Thompson of this decision on December 14, 2013. Thompson tried one last time to seek reimbursement from Kiewit for PR's Winter Work based on time and materials, as Kiewit had earlier suggested. Kiewit replied on December 19, 2013, signalling that they would "leave PR in your scope as per the original plan and not convert in January."

[109] The first payment for Winter Work as per the terms of CO 15 was coming due on January 16, 2014, and still, there was no prospect that Kiewit was going to reimburse Colony for it.

Issuance of updated CO 15 Invoices and Colony's refusal to pay

[110] Thompson and Ronald had a telephone discussion about CO 15 on January 7, 2014. Thompson told Ronald that the information Ronald had submitted in support of the invoices was invalid, and that additional supporting documentation was required. On January 8, 2014, Colony sent an email setting out its position with respect to "validation" that was required to substantiate payments, described as "collaborating evidence of the hours claimed for."

[111] On January 10, 2014, Ronald informed Thompson that he had hired Lacroix to assist him with the Project wrap-up and suggested that while he did not agree that the existing CO 15 was invalid, he would still consider using a different method. He also indicated that while the "back-up" requested was not owed pursuant to CO 15, he had provided it to assist Colony in obtaining compensation from Kiewit.

[112] On January 16, 2014, PR Construction issued Invoice 201362 Rev 2 to Colony, setting out its revised charges for Winter Work, calculated pursuant to the terms described in CO 15, and per the November 5, 2013 Schedule, as well as two new invoices, one for December in the amount of $83,843.77 (plus GST) and one for January in the amount of $1,402,815.46 (plus GST). PR Construction threatened to suspend their work if the invoice was not paid. PR Construction relied on the "Labour and Equipment Factors" worksheet as attached to CO 15 in support of these invoices, and did not provide any additional supporting documentation.

[113] Colony did not pay the CO 15 invoices. Further, Colony did not pay any additional invoices then under review, including for permitting and "Welding to Pile Cap." PR's terms required payment within 60 days. PR continued to work through to March 11, 2014, and continued to submit invoices, but no further funds were paid out by Colony.

Steps along the Path to Termination

[114] Per the "Default" provisions of the PR Contract, PR issued a Notice of Default on January 21, 2014, for Colony's failure to pay Invoice 201362 Rev 2, dated November 17, 2013 in the amount of $181,051.53. Thompson replied that same day, indicating he needed PR to provide proof of the actual manhours worked in November, December, and January. Ronald signalled that he would attempt to provide the documents requested, not because he had to, but because he knew it would assist with Colony's attempts for their own mitigation.

[115] On January 24, 2014, Thompson rejected Invoice 201362 Rev 2 stating "we do not consider this invoice, or any invoices you have provided for Winter Works, valid and the invoice

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(and prior iterations) is hereby rejected. You are well aware that the issue of your entitlements to and for Winter Works is under review and no agreement has been reached . . . Furthermore, there are issues regarding the validity of the change order signed by [Lacroix] in June." The letter further referenced PR's "wrongful" employment of Lacroix to assist with completing PR's Scope of Work for the Project.

[116] PR responded by issuing a Notice of Suspension on January 28, 2014, suggesting that work would be suspended pending rectification of the unpaid invoice. The next day, Thompson proposed to pay PR $120,000.00 "on account" of Invoice 201362 Rev 2, and, failing agreement, they would resolve the issues through the Dispute Resolution process as per GC 8.1.3 of the PR Contract.

[117] Suspension of work was avoided by a letter agreement dated January 30, 2014. Pursuant to the Suspension Agreement:

- PR acknowledged that the parties had a disagreement concerning the validity and enforceability of CO 15;
- PR Construction agreed to rescind its Notice of Default;
- PR Construction agreed not to suspend work on the Project by reason of Colony's nonpayment of Invoice 201362 Rev 2, provided that Colony paid $120,000.00 to PR Construction as payment toward the Winter Work entitlement account;
- PR Construction agreed to co-operate with Colony and Kiewit "in relation to document and information disclosure as required to allow the parties to properly assess [PR's] claim for payment of the balance of the Disputed Invoice [Invoice 201362 Rev 2] and any disputed amounts under further invoices to be delivered in connection with winter work"; and
- PR Construction agreed to submit to a Dispute Resolution process under the PR Contract if the matters were not resolved by agreement without disruption to the completion of the work.

[118] On February 4, 2014, PR initiated the Dispute Resolution process under SSCC 8.2.1 of the PR Contract through issuance of a further Notice of Dispute, citing lack of compliance with Article 6.2, and seeking compensation for the full amount of the disputed invoice.

[119] Additional correspondence between the parties followed, with Thompson requesting documentation of the actual manhours spent, and Ronald asserting that a chart setting out the actual hours worked to date had already been provided. The back and forth with respect to what was expected, what was required, what was available, and what was provided continued, with PR Construction pointing to: 1) Colony's daily reports; 2) signed time sheets collected on site by Colony staff; and 3) providing a manhour data chart for February in the form requested by Colony.

[120] On February 21, 2014, PR sent a letter to Colony providing Notice of Default on other unpaid invoices, including Change Order 9.

[121] On February 24, 2014, as PR's work neared completion, Thompson sent PR two separate communications. In the first, a "PR Status Invoice Sheet," Colony effectively rejected all of PR's CO 15 invoices for Winter Work. In the second, which was Colony's reply to the Dispute Resolution Notice of February 4, 2014, Colony took the position that CO 15 was "void, invalid and cancelled…and was issued without Colony's authorization or consent." Further, Colony

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asserted that it was "irrelevant in any event as it spoke to a schedule that was not implemented: "However we also advise that this POCO was issued without Colony's authorisation or consent. The POCO, would have been double claim for winter works already included in your unit rates."

[122] PR considered this to be an unequivocal repudiation of CO 15, the Dispute Resolution process, the Suspension Agreement, and the PR Contract itself. PR sent a new Notice of Default on February 26, 2014. In it, PR asserted that the "contents of your Reply shows that there is no dispute between PR and Colony as to the 'interpretation, application or administration of the Sub-subcontract or any failure to agree where agreement between the parties is called for' under Part 8"; rather, the dispute arose due to a blunt denial as to enforceability of CO 15. Referring to SSCC 7.2.3 of the PR Contract, PR gave notice that Colony was in breach of its contractual obligations to pay the CO 15 invoices in compliance with Article 6 of the PR Contract; and that there was an anticipatory breach of the Contract with respect to nonpayment of the next two CO 15 invoices, which would come due on March 17 and April 16, respectively.

[123] Thompson rejected the new Notice of Default in a letter dated March 4, 2014, and suggested that any actions taken by PR Construction would be considered a material breach of the Contract.

[124] PR replied on March 6, 2014, and indicated that it would be suspending its work. Colony, via Thompson, sent a lengthy reply reiterating their earlier position.

[125] On March 7, 2014, PR made a claim against GCNA under its L&M Bond in the amount of $2,578,130.42. That same day, PR sent Notice to Colony, Kiewit, and GCNA, that it would suspend work on March 11, 2014. A subsequent Notice sent on March 11 indicated that a Suspension of Work would start on March 12, 2014.

[126] As had been cautioned, PR suspended its work on March 12, 2014. PR demobilized from the Mildred Lake Project site and removed their equipment, including safety lines, that Colony asserts were required to complete some pending work.

[127] On March 13, 2014, PR offered to accept $500,000.00 from Colony in order to return to work, provided that the amount was paid without prejudice to further claims. That same day, Colony arranged to have Kiewit perform the remaining PR Scope of Work on a time and materials basis. Kiewit would pay Colony its unit rates and Colony, in turn, would back-charge PR for Kiewit's (Winter) Work on a time and materials basis.

[128] On March 16, 2014, the day before the next invoice was to be issued, Colony sent a letter terminating the PR Contract on the basis that PR had wrongfully suspended work. In response, PR also terminated the Contract, filed a builder's lien, and commenced proceedings to recover payment from Colony and GCNA under its L&M Bond.

[129] Later that day, Ronald sent a letter directly to Kiewit proposing to complete PR's scope of work if an agreement was reached directly with Kiewit. This proposed contract was not accepted.

[130] On March 19, 2014, GCNA requested "substantiation documents" from PR in support of their claim under the L&M Bond. On April 17, 2014, PR informed GCNA that PR's claim under the L&M Bond had been revised to $5,981,211.91. On June 2, 2014, GCNA again demanded substantiating documents from PR Construction in relation to the increase in their claim from approximately $2 million to approximately $6 million. PR did not provide further documentation directly to GCNA.

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[131] On October 24, 2014, PR Construction filed its Statement of Claim.

[132] Kiewit and Colony agreed to settle their contractual dispute in relation to the costs of the Mildred Lake Project in a Conclusion Agreement dated October 29, 2014.

Lacroix's employment

[133] The facts just described tell only part of the story. Underlying this narrative, which describes the business relationship between Colony and PR Construction, is another, more personal narrative, involving the professional and personal relationships between Lacroix, Thompson, and Ronald. The facts relevant to issues raised in the context of Lacroix's employment will be set out in context following my decision on the main claim.

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ANALYSIS

Part 1: PR Construction's claim against Colony

1. Is CO 15, the Winter Work Order, valid and enforceable?

Did Lacroix have the authority to agree to CO 15?

[134] I found in the Non-Suit Decision that Lacroix had the authority to sign Change Orders on Colony's behalf: see Non-Suit Decision at para 80. What remains to be examined is when Thompson formally withdrew all or part of this authority from Lacroix and communicated same to Ronald.

[135] As noted earlier, Colony initially asserted that Lacroix did not have authority to enter into the PR Contract *or* CO 15. As the trial progressed, it became clear that Lacroix did in fact have actual legal authority to sign the PR Contract and to enter Change Orders on behalf of Colony. There are many items of evidence which support this conclusion, the most specific being Exhibit J to the PR Contract, which expressly states it. Further, Thompson did not provide Notice that he had formally withdrawn Lacroix's legal authority to enter into Change Orders on behalf of Colony, or notify suppliers and Ronald of same, until the end of September 2013 – at least three months after CO 15 was signed.

[136] At the close of trial, Colony abandoned its assertion regarding Lacroix's lack of authority to sign the PR Contract but continued to assert that Lacroix lacked authority to sign CO 15. They now submit that Thompson expressly directed Lacroix not to sign CO 15 and that this direction amounted to a withdrawal of Lacroix's legal authority to do so. Further, they argue, as an aspect of their claim in conspiracy, that Ronald knew Lacroix did not have legal authority to enter into CO 15 when it was purportedly executed.

[137] The evidence shows that in May 2013, Thompson, Lacroix, and Ronald were engaged in conversations about a Change Order to deal with additional Winter Work caused by the schedule change. Thompson admitted in numerous correspondences that Winter Work would need to be accounted for in some way. I have found as fact that Thompson told Lacroix not to enter into CO 15 until he had obtained a similar Change Order from Kiewit. In my view, at worst, this proves a failure on Lacroix's part to follow instructions from his superior in exercising legal authority on behalf of his employer. That is an act of professional insubordination and may constitute a breach of Lacroix's employment duties; however, it did not invalidate his legal authority to enter into CO 15 on behalf of Colony, Colony being the legal entity that was his actual employer and Thompson being his principal.

[138] Colony argues that Ronald knew, or ought to have known, about the instructions Thompson gave Lacroix because he knew, or ought to have known, that Thompson would not agree to CO 15 until he had a reciprocal agreement from Kiewit. They say this knowledge is evidence of a conspiracy between him and Lacroix, against Colony. Ronald's knowledge of Thompson's instructions is simply not relevant to the question of Lacroix's legal authority. The fact is that Colony, through both Lacroix and Thompson, agreed to PR Construction's negotiated demand that it would not be vulnerable to the flow through conditions contained in the Colony/Kiewit Contracts. Ronald thoughtfully and deliberately ensured that PR Construction's success in pressing for Change Orders would not be conditional on Colony obtaining similar conditions from Kiewit. Ronald wanted CO 15 because it would be good for his company, not because it would be bad (meaning costly) for Colony, although that was certainly a foreseeable consequence at the time.

[139] I therefore find that Lacroix had actual legal authority to enter into CO 15 as of the date it was signed on June 23, 2013.

[140] I will deal with the impact of Lacroix's insubordination, along with Ronald's potential role in that insubordination, when discussing Lacroix's employment obligations in a later section of these reasons.

Is CO 15 void for uncertainty?

[141] The terms of a contract must be clear, specific, and unambiguous to be enforceable: "Commerce needs predictability": ***Ko v Hillview Homes Ltd.***, 2012 ABCA 245 at paras 3, 91, 100–109 [***Ko***]. Parties to a contract must therefore understand what the terms of the contract are, and how to fulfill them: see ***Ghitter*** at para 9. A party's subjective view or explanation of a term is irrelevant; the term must be capable of being understood objectively by a reasonable bystander: ***Ko*** at para 76.

[142] Colony argues that CO 15 is void for uncertainty because the methodology is "uncertain and necessitates impractical and impossible assumptions." They base this assertion on Manning's testimony that *he* did not understand the methodology. But that was not Manning's testimony. Manning testified that the calculations were a "forward-looking projection of how many hours would need to be added on a given day for a given task to maintain duration." Manning did not like or agree with the methodology, but this does not mean he did not understand it. Colony further relies on evidence that engineers and estimators at Kiewit and Fluor did not accept the methodology. Again, that was not the evidence. The evidence indicates that the estimators, such as Lee, did not agree with the methodology, but similar to Manning, they did understand it.

[143] Here, Colony confuses lack of support or agreement with a lack of understanding. There is quite a difference between having no identifiable subject of a building project, as was the case in ***Ko***, and adopting a compensation methodology that was novel and predictive but still included identifiable assumptions, which is the case here.

[144] Parties are presumed to have entered into a legal, reasonable, and commercially sound agreement: ***Unique*** at paras 87–88; McCamus at 822. Here, the method of calculating Winter Work compensation as set out in CO 15 was described by both parties and put to a number of different witnesses at trial. Importantly, Dent applied it in his expert report. To repeat, the method was as follows:

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- Repricing to account for Winter Work would be forward-looking, based on monthly 'inefficiency factors' taken from Kiewit's Estimating Manual.
- The inefficiency factors were based on historical weather patterns and hours of daylight.
- The hours originally estimated for PR to perform the unit price work would be increased by the 'inefficiency factors' and the corresponding increase in estimated hours would be multiplied by an hourly rate derived from the PR Contract.
- The new schedule would provide the time period during which each unit price work task was to be performed.

[145] There is no issue with uncertainty of terms with respect to implementation of CO 15.

Is CO 15 invalid due to lack of consideration?

[146] Colony asserts that consideration was lacking because PR was obligated to perform the work under the PR Contract with or without it, and, further, a Change Order was not required to deal with the issue of Winter Work compensation. The issue was already being addressed through the delay claims process flowing from the Notice of Delay, which was still pending at the time CO 15 was entered into.

[147] The consideration given in this case was PR Construction's agreement to stay on the job. Even where a company has agreed to perform work under a construction contract, consideration can still flow from the company agreeing to stay on a job in the context of a disagreement: *Heintzman* at para 1:49.

[148] Again: Lacroix had the legal authority to enter into CO 15 on behalf of Colony. Arguments based on whether the Change Order was necessary or wise, or whether it would have been better to pursue standby or Winter Work compensation, are simply irrelevant to the question of enforceability and can be dealt with in the context of Lacroix's employment obligations.

Is CO 15 invalid because it is the product of an unlawful conspiracy between Ronald and Lacroix?

[149] Colony alleges that Lacroix, Ronald, and PR were part of an improper relationship and that they committed "wrongful conduct", which amounted to a conspiracy. One of the primary pieces of evidence Colony relies on to support its assertion of a conspiracy between Lacroix and Ronald is a conversation they had on December 12, 2012. Around the time the PR Contract was being finalized, Ronald recorded a conversation he had with Lacroix in which he told Lacroix "I've got lots to give you" and that "once we get through this shit it will just be you, me, Joel and the suppliers as long as the money is working."

[150] Colony asserts that the reference to "as long as money's working" was intended to, and did in fact, induce Lacroix to act *against* the best interests of Colony by preparing Change Orders for preferential payments only in favour of PR and for the personal future benefit of Lacroix, who did eventually obtain a 25% ownership interest in PR for nominal consideration, as well as a position as Vice President of PR Construction in January 2014.

[151] The conspiracy allegation barely survived the non-suit process: Non-Suit Decision at para 137. It did not improve after hearing and considering all of the evidence at trial.

[152] A claim in conspiracy is made out where there is:

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- An agreement between two or more persons;
- Concerted action taken pursuant to the agreement;
- If the action is lawful, evidence that the conspirators *intended to cause damage to the plaintiff*;
- If the action is unlawful, evidence that the conspirators knew or ought to have known their action would injure the plaintiff; and
- Actual damage suffered by the plaintiff.

D'Agnone v D'Agnone, 2017 ABCA 35 at para 21, 48 Alta LR (6th) 8; ***Mraiche Investment Corporation v McLennan Ross LLP***, 2012 ABCA 95 at paras 40–42, 60 Alta LR (5th) 92 [***Mraiche Investment***].

[153] To be a party to the conspiracy, a defendant must know the facts of the alleged agreement and intend to be a party to it: ***HSBC Bank Canada v Fuss***, 2013 ABCA 235 at para 27. The defendants must then act in concert, by agreement or with a common design: *ibid*. For unlawful act conspiracy, the unlawful act can be a crime, a tort, a breach of contract, a breach of statute, or a breach of fiduciary duties: Erika Chamberlain & Stephen GA Pitel, eds, *Fridman's The Law of Torts in Canada*, 4th ed (Toronto: Thomson Reuters Canada Ltd, 2020) at 904–905. The party asserting conspiracy must prove that there was an actual agreement between the parties, rather than a presumed "ought to know" state of mind: ***Mraiche Investment*** at para 43, citing ***Maguire v Calgary (City)***, 1983 ABCA 121 at paras 11–13.

[154] Colony had initially argued that Ronald and Lacroix had acted *fraudulently* – another claim which barely survived the non-suit process. They wisely abandoned those accusations at the close of trial, presumably given a lack of evidence as to "false representation" resulting in a loss: ***Bruno Appliance and Furniture, Inc. v Hryniak***, 2014 SCC 8 at para 21. Unfortunately, Colony did not abandon their argument that Ronald and Lacroix were engaged in a conspiracy, asserting that Lacroix breached his fiduciary duties to Colony, and therefore his employment contract, by issuing CO 15 and in other ways set out in their materials and that Ronald assisted him in that breach.

[155] Ronald and Lacroix's actions before, during, and after his employment with Colony, even viewed in the worst light as cast by Colony in their closing submissions, simply do not amount to a common design to *intentionally* cause damage which *actually* injured Colony's interests. A legal obligation to pay more money to someone than you wanted to pay under an otherwise legal contract - in this case, CO 15 - is not proof of loss, it is proof of *cost*. Further, the "back charges"; unrecoverable costs due to the asserted "wrongful termination" of the PR Contract; and bonding costs claimed by Colony as damages against Ronald and the Lacroix defendants, cannot possibly constitute "known facts" of an alleged agreement made months or years in advance of an unpredicted, unplanned contract termination sufficient to ground an allegation of conspiracy.

[156] Conspiracy has not been made out. The "unlawful" or wrongful conduct underlying Colony's accusations of conspiracy, being the allegations of a breach of fiduciary duty and knowing assistance in breach of contract, will be dealt with separately in relation to Colony's counterclaim for breach of Lacroix's employment contract.

2. Are the invoices issued by PR Construction pursuant to CO 15 valid?

[157] Colony submits that even if CO 15 is enforceable, the invoices issued pursuant to CO 15 are invalid and unenforceable because they are contrary to the express terms of CO 15 and have

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not been properly substantiated. They submit that the lack of information supporting the CO 15 invoices is in fact one of the primary issues to be determined.

[158] I will therefore attempt to determine what supporting documentation was required pursuant to the PR Contract and CO 15, assess whether PR met its obligations in that regard, and determine the consequences of same.

What documentation was required by the PR Contract to support invoicing?

[159] The PR Contract contains several provisions setting out the parties' obligations with respect to documentation of work performed and invoicing. SSCC 6.2 of the PR Contract deals specifically with the payment of invoices:

> The *Sub-subcontractor* shall make applications for payment together with supporting sworn statements and other documents that are required by the *Sub-subcontract Documents* on or before the 2nd last Sunday of each month (herein called the Submission Date) to the *Subcontractor* for approval and due processing. The amount claimed shall be for the value, proportionate to the amount of the *Sub-subcontract*, of *Sub-subcontract Work* performed and *Products* delivered to the *Place of the Work* up to the last Sunday of the month.

[160] SSCC 5.1.3 of the PR Contract states that: "The schedule of values shall be made out in such form and supported by such evidence as the *Subcontractor* may reasonably direct and when accepted by the *Subcontractor*, shall be used as the basis for payment, unless it is found to be in error." SSCC 5.1.4. expands on the PR's reporting requirements indicating that they had to "include a statement based on the schedule of values with each application for payment."

[161] Appendix A was attached to the Sub-subcontract in which *Clause II* outlined final details on payment as follows:

> *Exhibits E* [Billing Tracking Form and Invoice Form], *F* [Colony Appendix "C" - Statement regarding Outstanding Claims/Liens], and *G* [Colony Appendix "D" – Statutory Declaration by Subcontractor all Bills Paid] must be completed and provided by the *Sub-subcontractor* on the *second to last Sunday of every month* in order to be included in the billing for that month. Any forms received by the *Subcontractor* after the second to last Sunday of every month and approved, will be included as part of the following month's billing.

[162] The Appendix D certifications appended to each of PR Construction's invoices from April 2013 to February 2014 mention a winter work claim. Per SSCC 6.6.2 the PR Contract, "[u]pon commencement of the event or series of events giving rise to the claim", PR must "keep such records as may be necessary to support the claim and afford reasonable access to all books, records, receipts and vouchers to the other party until one year from the date of *Substantial Performance of the Work*."

[163] Colony says that per these provisions of the PR Contract, PR was required to record and submit signed daily time sheets for time and materials work and work subject to a claim, because that was what was required of Colony per its Contract with Kiewit. They say it was "understood" that the reporting requirements contained in the Colony Contract applied equally to the PR Contract. Specifically, section XIV of the Colony Contract, which required daily reports

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on "numbers of staff and craft by classification and equipment on side" and "[i]nformation on installed qualities (as determined by Contractor), progress, problems, delays and milestones." Colony submits that PR Construction was therefore contractually obligated to provide, on a daily basis:

a. Numbers of staff and craft by classification and equipment on site;

b. Information on installed quantities (as determined by Contractor), progress, problems, delays and milestones; and

c. Time sheets.

[164] Colony's interpretation does not accord with the "entire agreement" clause in Article 3B, as well as in the Supplementary Conditions wherein the parties agreed that the PR Contract supersedes all other prior agreements and discussions and takes precedence over the Colony Contract in the case of a conflict. The PR Contract does *not* expressly or through adoption contain specific requirements to report to Colony in the same way Colony is required to report to Kiewit; rather, it contains reporting requirements that are based on "the value, proportionate to the amount of the *Sub-subcontract*, of *Sub-subcontract Work* performed and *Products* delivered to the *Place of the Work*."

[165] Ronald testified that PR maintained a document called a Cost Allocation Sheet (CAS) in an Excel format to track for billing purposes the various tasks PR was instructed to carry out. The CAS was also relied on by PR for payroll purposes as the Master tab usually contained the total sum of hours recorded in subsequent tabs. PR was aware that the purpose of this document was to compile all of the data in a concise form so that Colony could use it to recoup their costs from Kiewit. In other words, Ronald knew that Kiewit required Colony to submit daily time sheets and but did not submit them on a consistent basis. Manning testified that he raised his concerns about this with Lacroix and Ronald "many times" to no avail.

[166] On or about June 26, 2013, Ronald proposed that instead of providing signed daily time sheets, PR would provide its time records in the format of its CAS on a daily basis. The Microsoft Excel workbooks were meant to "include timesheet information [related to labour and equipment] for an entire billing cycle but would still be updated and provided to Colony on a daily basis for written approval." In other words, the CAS would record the number of hours worked by each labourer and equipment hours used each day pursuant to certain Change Orders and field instructions.

[167] Lacroix forwarded an email from Ronald to Manning with the proposed CAS attached and said: "This is what PR is proposing to provide daily. [Ronald] will update it daily and is hoping that it can replace the actual timesheets." Manning replied soon after confirming it would "work well." When Lacroix shared Colony's approval with Ronald, he specifically asked: "Can we make sure that we get it daily?" as "Kiewit [was] wrapping our knuckles about submitting our time sheets to them daily." Ronald subsequently replied saying that PR could issue the CAS daily if the method was approved.

[168] Initially, PR Construction submitted the CAS daily, but eventually became much less diligent. Concerns were raised about this with Lacroix, including incidents where, according to Manning, PR claimed time worked by an employee who was found sleeping in his van.

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[169] Lacroix wrote to PR in October 2013 to remind Ronald to submit daily time sheets to ensure compensation for same could be collected from Kiewit. Ronald replied on October 16, 2013, and agreed to provide daily time sheets, including for the listed CO 15 for Winter Work, which he indicated were tracked in the form of PR's CAS. At the time of his initial response, Winter Work had not yet begun. Ronald admitted in cross-examination that he did not end up using the CAS to keep track of Winter Work impacts.

What documentation was required by CO 15 to support invoicing?

[170] Presumably because it was not contained in the PR Contract, the need for daily time sheets to be submitted by PR Construction was explicitly written into certain Change Orders, for example: COs 9 [Permit Requisition – issued on May 8, 2013], 11 [Chemical Injection Building – Mod Yard Work – issued on May 19, 2013], and 14 [Field Instruction Work – issued on June 13, 2013].

[171] Further, on October 18, 2013, Colony sent an "All Trades" advisement to their sub-subcontractors reminding them that daily time sheets had to be submitted and that a failure to do so "would compromise payment."

[172] The parties fundamentally disagree as to whether these daily reporting requirements were required for work completed under CO 15.

[173] CO 15 was signed in June 2013. It does not include any express requirement that PR Construction submit time sheets as required by the Colony Contract with Kiewit or Colony's October 18, 2013 advisement. The method for invoicing CO 15 was to be based on the attached "Labour and Equipment Price Factors for Winter Work" spreadsheet which tracked (anticipated) total "Manhours" and "Duration." Further, as noted in the Dent Report: "CO 15 is the only change order that used a rate of $191.64 per hour. Conversely, all other change orders involving labour used rates found in Exhibit C of the PR Contract."

[174] On this point, Lacroix wrote in an email to Ronald on October 16, 2013, that "[s]ome of [PR's] change orders required daily time sheets from PR to colony, while others are not as well defined." He explained that Kiewit was "clamping down" on Colony's requirement to provide daily time sheets. As such, Colony was hoping that PR would work with them so Colony could collect from Kiewit. With respect to CO 15, specifically, Lacroix wrote "this should be an easy one for Colony to track on a daily basis...Please assist *if required*." [emphasis added]

[175] I find that PR Construction was not required to submit daily time sheets in support of CO 15. Colony had agreed to the whole agreement clauses, the unit rate billing method in the PR Contract, and use of the CAS system to support billing on CO 15, and potentially other COs. Nothing more was required in terms of supporting documentation for CO 15.

Did PR Construction provide appropriate and sufficient supporting documentation to support the CO 15 invoices as required?

[176] There is no doubt that PR Construction was dilatory and inconsistent in its timekeeping, as is evident from the very detailed analysis performed by Dent. PR Construction can only claim for CO 15 invoices insofar as they can be supported based on the documentation submitted through the CAS. Further, I cannot rely on the November 2020 truing up performed by Rolke for the reasons I have set out above which include erroneous factors being relied upon, and also due to the fact that it was based on *estimated* hours and temperatures when *actual* hours and temperatures were then available.

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[177] Dent was able to review PR's calculations based on the actual hours worked as contained in the CAS. While he expressed some valid concerns about the reliability of the CAS method, as I have indicated, the CAS method was what was agreed to by the parties. Attempting to interpret the available data applying the CO 15 methodology, Dent made some adjustments based on reasonable inferences, which I accept. However, I do not accept the rate adjustment he applied, as the rate of $191.64 per hour was specifically agreed to in CO 15, nor do I accept the deduction he made for "winter premium already included in base" as again, I have not found that to be proven and even if proven, it is not relevant to the issue of what was owed pursuant to CO 15.

[178] PR Construction's total claim under CO 15 was $2,751,758.76 (before interest). From this, $729,257.27 needs to be deducted based on Dent's analysis of the CAS, and another $803,424.49 deducted as an adjustment based on actual temperatures. Another $120,000.00 must be credited to Colony for the payment made pursuant to the Suspension Agreement.

[179] Per Dent's assessment of the CAS submitted by PR Construction, accounting for actual manhours and actual temperatures, I find that the amount owing on the CO 15 invoices is $1,099,077.00.

3. Was Colony entitled to terminate the Contract?

[180] Thompson's communications of February 24, 2014, stated that CO 15 was "void, invalid and cancelled" as well as "irrelevant," "issued without authorization or consent", and a "double claim for winter works already included in your winter rates."

[181] This was the first time Thompson had asserted that Winter Work was in fact being "double claimed" as it was already included in the PR Contract unit rate prices. Prior to issuance of this correspondence, Thompson had, on a number of occasions, through his actions, communications and in recorded phone conversations, acknowledged that PR Construction was entitled to additional compensation for Winter Work.

[182] The Suspension Agreement was premised on using the Dispute Resolution mechanisms in the PR Contract to determine the validity of CO 15: as in, the possibility remained that Colony would abide by CO 15's terms. Thompson's letter represented an *unequivocal* rejection of CO 15; in other words, a stated intention *never* to be bound by its terms. This rejection included an ongoing and anticipatory breach in that it evinced Colony's refusal to pay any present and future invoices flowing from CO 15. Prompt payment of CO 15 was of fundamental importance to Ronald and PR Construction, who had steadfastly insisted that payment for Winter Work occur on an ongoing basis and not at the end of the Project. Therefore, rejection of CO 15 was a terminable breach of the PR Contract.

[183] Ronald and PR Construction were entitled to accept Thompson's correspondence of February 24, 2014, as repudiation of CO 15, and therefore, entitled to suspend work under the PR Contract, which they did in their Notice of Default on February 26, 2014. PR Construction then dutifully attempted to follow the applicable resolution and notice provisions of the Contract, giving Colony several more opportunities to rectify the situation. This included last minute resolution offer sent on March 13, 2013. Colony did not rectify the situation, and instead, purported to treat PR Construction's suspension of work as repudiation entitling *them* to terminate the PR Contract.

[184] It is tempting to treat the series of events in February and March 2014 as a mutual repudiation of the PR Contract, but to do so would not accurately reflect the fact that Colony's

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unequivocal rejection of CO 15 began the risky series of parlays and parleys which eventually led to the Contract's termination. As such, I find that Colony wrongfully terminated its contractual relationship with PR Construction.

[185] PR Construction is therefore entitled to recover damages for most, but not all, of its unpaid invoices, plus interest, subject to the more detailed analysis below.

[186] Colony is the author of its own misfortune in this regard and is not entitled to damages for costs to complete, wrongful abandonment, or breach of contract. However, Colony may still be compensated for overcharges or errors relating to PR Change Orders that were already paid, as those arose prior to the PR Contract's termination. Further, any such losses can be claimed as a set-off against PR Construction's total damages claim.

4. What are PR Construction's damages and is Colony entitled to set-off?

[187] PR Construction has also sued Colony for non-payment of other invoices, in the amount of $3,661,360.77 ($6,413,119.53 total claim less amount claimed on CO 15 of $2,751,758.76). As indicated above, the amount owing to PR Construction on the CO 15 invoices is $1,099,077.00.

[188] Most of the remaining amounts are contested, although each of the parties agreed to some minor concessions in relation to certain claims.

[189] Colony agrees that it owes PR Construction $1,724,813.33 for unpaid Progress payment invoices but contests it owes the full amount claimed by PR Construction. Colony claims set-off on the basis that it is owed $1,056,714.08 due to errors and overpayments on the PR Construction invoices.

PR Construction's additional claims

[190] PR Construction claims payment of its various unpaid invoices, as well as compensation for work remaining within its scope, which Colony would have been required to pay for. These are set out in a spreadsheet entered as an Exhibit, and referred to by counsel as the "Scott Schedule," comprised of information regarding sequencing, parts, and units of steel by area.

[191] Based on the Scott Schedule attached to PR Construction's written submission, I have grouped their remaining damages claims into the following categories:

a. Holdback amounts

b. Progress draws

c. CO 9 – Permit Requisition

d. CO 14 – Field Notifications

e. CO 17 – Nightshift

f. CO 20 – Saggy Rod Repair

g. CO 22 – Crane Beam Repair

h. CO DD – Chemical Injection Welding to pile caps

i. CO XX – No exiting

j. Standby related to suspension of work

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k. Field truss assembly

l. Field welding

[192] Colony admits that it owes PR payment with respect to COs 17 and 22 and some invoices under CO 14 as described in its closing submissions. Colony resists payment of the other invoices, and further argues that it wrongfully paid, or overpaid, many other invoices namely:

a. CO 2 – Credit for Truss pre-assembly

b. CO 4 – Stub Column Credit

c. CO 5 – Revised Mobilization Date

d. CO 6 - FIC's – Unprepared foundation

e. CO 8 – ATCO Building Labor

f. CO 9 – Permit Requisition

g. COs 10, 12, 16 – Standby Costs

h. CO 11 – Chemical Injection Mod Installation

i. CO 13 – MLSB Mod Installation

j. CO 14 – Field Instructions

k. CO 17 – Night shift premium

l. CO 21 – Superclamp

m. COs AA, BB, CC – Various repairs

[193] Colony claims that it is entitled to rely on proof of wrongfully or overpaid amounts as set-off against any amounts found or admitted to owing PR Construction.

[194] PR Construction concedes only that it owes Colony a credit of $1029.42 for removal of a stub column from its Scope of Work.

[195] I will deal with some general assertions before assessing each of the claims in turn.

Invoices already accepted and paid

[196] A party that pays an amount beyond what is initially contemplated in any agreement, may be found to have acquiesced to this alteration in the original terms, thus barring any future claims: ***1242311 Alberta Ltd. Tricon Development Inc***, 2020 ABQB 411 at para 156. In other words, a pattern of behaviour between contracting parties that invoices will be paid even if payment protocols are not strictly adhered to may be said to have waived the right to enforce strict adherence to those terms at a later date: see ***Colautti Construction Ltd v Ottawa (City)***, 1984 CanLII 1969 (ON CA).

[197] Simply put: contractual obligations must be discharged in accordance with the reasonable expectations of the parties: ***IFP*** at para 2. Here, PR's reasonable expectation was that the terms of the contract were fulfilled by the payments made under the invoices, particularly when Colony did not raise any concerns at the time of payment. With respect to most invoices now challenged by PR Construction, Colony did not indicate that the payments were not indicative of settled invoices until much later in the litigation process.

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[198] While it is true Colony frequently reminded PR Construction to provide CAS sheets on a daily basis, they continued to pay the invoices as submitted, which made sense given that they conformed with the invoicing method agreed to in the PR Contract. Again: the PR Contract payment provisions did *not* adopt the Colony Contract payment provisions.

[199] Furthermore, Lacroix had authority to accept the invoices for payment even without, what Colony now asserts, was the "required" supporting documentation, and in some instances, Thompson or Manning also approved such invoices without indicating the invoices were being paid "under protest."

[200] Therefore, absent a proven mistake or evidence that an invoice was being paid under protest, I find that Colony cannot claim overpayment of previously paid invoices, or resist paying the holdback amounts owed on those invoices or any invoices. PR Construction was entitled to rely on the fact that the invoices were paid; most were not paid under protest; and it was known at the time they were paid that PR Construction was not following the same invoicing method as Kiewit required from Colony. Nor can Colony necessarily claim repayment of amounts "overpaid" on Change Orders that appear to limit recovery to a certain amount, for example, CO 9. The fact that these amounts were paid is, in most cases, evidence that the parties agreed to the overpayment.

[201] Manning's October 13, 2013 communication on behalf of Colony that daily time sheets or CAS were required moving forward, put PR Construction on notice that there had been a regime change. Invoices issued after this date are therefore entitled to greater scrutiny and PR Construction will be held to strict compliance with the terms of the particular Change Order, absent evidence of approval by Manning or Thompson.

Entitlement limited to amounts recovered through settlement

[202] The parties agree on the law with respect to recoverability of a reasonable settlement from a non-settling defendant as it is set out in a line of cases beginning with ***IPEX v AT Plastics and Lubrizol,*** 2016 ONSC 1859 at paras 21–22, including ***Bank of Nova Scotia v Jarada***, 2022 ONSC 3232 at paras 7–10, and, in Alberta, ***Sherwin-Williams Co of Canada v McCready Products Ltd***, 1985 ABCA 167.

[203] ***IPEX*** states at para 22 that: "A can settle with B and then claim the settlement against C as a fair measure of A's damages provided that the settlement with B was reasonably foreseeable by C and falls within a range of reasonable settlements at the time that it was made."

[204] Based on that line of cases, Colony argues that its settlement with Kiewit is proof of the quantum of its claim against PR, and further, that recovery by PR Construction from Colony with respect to unpaid PR invoices must be limited to what Colony was able to recover from Kiewit.

[205] PR refers to these authorities as support for its position that the settlement between Colony and Kiewit was unreasonable, noting that Colony has not provided sufficient evidence to this Court to enable me to assess reasonableness; further, causation cannot be assumed, it must be proven.

[206] I will deal with these arguments in relation to particular Change Orders below.

Allegations of impropriety

[207] I assume, as Kiewit would have assumed, that Colony would not have sought compensation from them for any paid or unpaid invoice that Colony thought were unlawful or improper. Furthermore, any such argument, if predicated on the assertion of an "unlawful conspiracy" between Lacroix and Ronald, is rejected.

Damages and set-off assessment

[208] I will begin by dealing with the progress payments, followed by general findings related to holdback amounts. Then, I will go through my assessment of certain Change Orders in their numerical order.

Progress Draws

[209] PR Construction claims payment on a number of remaining progress draws, as well as holdback on paid Progress draws, for a total of $2,375,364.94.

[210] Colony agrees that it owes PR Construction payment of $1,724,813.33. Colony contests the amount PR Construction claims is owed for "Deleted Division work," affecting Progress Draws 8, 9, 10, 13, and 15. It further contests the invoicing for "work remaining" at the time the Contract was terminated, relating to Progress Draw 14. Colony agrees that $711,664.44 is a reasonable estimate of expenses that would have been incurred on unit price work to complete PR Construction's Scope of Work, but claims duplication on Invoices 201434 and 201435.

[211] "Deleted Division Work" refers to the deletion of certain items from PR Construction's Scope of Work. Colony says it owes $235,000.00 for Deleted Division Work as that was the amount Colony received from Kiewit as compensation. PR Construction argues that they are entitled to recover costs incurred as invoiced and are not limited to what Colony recovered from Kiewit. Kiewit deleted the Scope of Work and PR Construction would have been entitled to a Change Order to deal with compensation for expenses.

[212] Colony has provided evidence of correspondence between the parties in support of their position that they objected to these invoices when they were originally issued. They argue PR Construction was given an opportunity to provide supporting documentation to prove the amounts claimed when the Divisions were deleted but failed to do so. Colony and PR never reached an agreement on the impact these scope removals had on PR Construction, and the invoices remained unpaid. The agreement with Kiewit for $235,000.00 was reached while PR was still participating in the settlement process.

[213] I accept Colony's argument, and find that PR Construction's compensation in relation to "Deleted Division Work" should be restricted to $235,000.00.

[214] PR Construction has provided evidence by way of its Parts list to support payment of both Invoice 201434 for work performed on the screening plant in March 2014 in the amount of $142,551.09, and Colony admits that Invoice 201435 is reasonable, being 34% of the amount that Colony agrees was a reasonable estimate. I agree there is no duplication and both invoices are payable by Colony to PR Construction.

Change Order 2 - Credit for Truss Pre-assembly

[215] This Change Order dealt with a change in PR's Scope of Work, which enabled some of the trusses previously included in PR's Scope of Work to be pre-assembled by Canam before

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being brought to site. A credit was given to Colony by PR as a result of the change. However, Canam's invoice exceeded the credit given to Colony: meaning, Colony paid more for this change than they would have if it had been left in PR's Scope of Work.

[216] Colony argues that it is entitled to set-off of $106,987.13 as Lacroix and Ronald improperly entered into CO 2 to the detriment of Colony. As I have already indicated, I will not allow Colony to resist or recover payment based on an assertion of conspiracy, which I have found to be unproven. The balance of Colony's argument with respect to this Change Order is nearly incomprehensible.

[217] Colony continues to allege that this Change Order was the product of a conspiracy, even though that allegation was not put to Ronald on the stand. Rather, in his testimony, Ronald explained how the credits were arrived at and set out the rationale for CO 2. I accept his explanation. The terms of CO 2 were predicated on the existing Contract unit pricing and not on Canam's charges under CO 13. If anything, Lacroix may have made a mistake to issue CO 13 before ensuring it did not exceed the credit PR had given Colony via CO 2.

[218] No credit is owed to Colony under CO 2.

Change Order 5 – Revised Mobilization Date

[219] This Change Order dealt with the revised mobilization date. Colony's argument is that it was "improperly entered into with the purpose of providing PR with a windfall and was issued without Kiewit's pre-approval." Colony asserts that Lacroix lied to Thompson about Kiewit approving an early start date for PR Construction.

[220] The evidence, including conversations recorded between Ronald and Manning and Ronald and Thompson, does not support this assertion. Further, a letter sent *by* Thompson to Kiewit on February 20, 2013, confirms that Colony set the March 1 date of PR's steel erection at the Screening Building per Kiewit's request.

[221] In any event, Kiewit's approval was not required for Colony to issue CO 5 to PR Construction. Payment of the invoice less holdback was an admission of the validity of the invoice and the remaining holdback amount of $20,409.38 must therefore be paid to Colony.

Change Orders 6, 10, 12, and 16 – Standby costs

[222] With respect to these six invoices, Colony argues that recovery by PR Construction must be limited to what Colony was able to recover from Kiewit: $273,913.04. With respect to CO 10, specifically, Colony argues it was issued without Thompson's knowledge. Colony repeats its assertions that it was improper for Lacroix to agree to a Change Order in relation to standby charges when it should have been dealt with pursuant to the claims process. Colony argues that pursuant to the express terms of these standby orders, PR Construction was required to submit daily time sheets and understood the importance of doing so. Further, Colony submits that PR improperly invoiced for travel hours, for inflated equipment hours, and for standby for workers who were at home instead of onsite.

[223] PR submits that its Contract entitled them to these Change Orders and payment of the related invoices, regardless of how much money Colony was able to recover from Kiewit. Thompson was aware of CO 6 and the related invoice; and he was familiar with the terms of COs 8 and 10. He personally approved CO 10 in a conversation with Ronald and Lacroix.

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[224] With respect to CO 6, there is an insufficient evidentiary basis provided to support Colony's assertion that the invoices were improper and that PR Construction "artificially inflated" them. Even if this was true, Colony would or should have been aware of it at the time: more specifically, it would have been clear to Manning who was on site. No protest was raised other than "reminders" to PR to submit daily time sheets. The invoices issued pursuant to the Change Orders were paid, which is an admission of liability for same.

[225] I do not accept Colony's argument. With respect to CO 10, it is particularly ill-conceived given that Thompson personally approved it. Further, these arguments were made despite Colony itself having recovered compensation from Kiewit for charges they now say are false and improper. Colony did not provide any detailed explanation breaking down what materials they relied on in seeking compensation from Kiewit, and instead simply asserted that the "necessary support" was lacking. Therefore, I have no way to assess the reasonableness of this alleged amount.

[226] Colony is liable for the full amounts claimed including holdback under these invoices: $345,217.03.

Change Order 8 - ATCO Building Labour

[227] Invoices related to this Change Order address labour and equipment costs flowing from the addition of the ATCO Building to PR's Scope of Work. When CO 8 was entered into in April 2013, the amount was set at $0, making it a "time and materials" order. On May 19, 2013, the adjusted amount of $89,048.73 was invoiced by PR Construction as a lump sum. The revision included an express statement that if costs exceeded that amount, a new Change Order would be issued. As such, Colony claims a set-off of either $16,728.48, being the difference between what the revised CO 8 allowed and what they actually paid; or $14,472.86, which is the difference between what Colony paid to PR and what Colony recovered from Kiewit.

[228] PR Construction admits that they were paid more than what they agreed to be paid under CO 8. They say the overpayment is comprised of money they would have been entitled to under the standby terms of either or both COs 10 and 12 – it was simply claimed under the wrong CO; however, they have not provided proof of their time and materials as required.

[229] Ultimately, despite deficiencies in proof of time and materials, Kiewit was willing to pay Colony more than what was agreed to in CO 8 for the work done on the ATCO Building. It is reasonable to assume they would not have agreed to go over the contracted amount unless they had proof of same. This equates to some evidence of the reasonableness of the settlement terms in relation to this Change Order.

[230] I therefore find that PR Construction owes Colony a credit of $14,472.86, which is the difference between what PR was paid, and what Colony recovered from Kiewit.

[231] This will change the calculation of holdback owing to PR Construction on this invoice.

Change Order 9 - Permit Requisition

[232] Colony argues it does not owe PR Construction anything claimed pursuant to this Change Order as PR Construction did not comply with its contractual obligation to obtain daily approved time sheets from Colony site staff. In the alternative, it argues that the maximum payment permitted by CO 9 was $63,000, inclusive of GST, as that was the maximum amount contemplated by the express wording of the Change Order

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[233] Further, Colony argues that PR Construction's claim for payment under this invoice should be limited to the amount Colony was able to recover from Kiewit.

[234] PR Construction argues it was not bound to provide time sheets to Colony pursuant to the terms of CO 9: the CAS system was sufficient. Further, while the terms of CO 9 do limit recovery to $63,000.00, by paying the invoices issued under the Change Order, less holdback, Colony admitted the validity of the invoice.

[235] Given that this Change Order contains a maximum limit of recovery, I find that PR Construction should have provided proof of the claimed hours pursuant to the requirements of the PR Contract: the CAS documents provided in relation to CO 9 were not sufficient for this purpose. I therefore accept Colony's argument that they are owed a credit of $44,005.09.

[236] This will change the calculation of holdback owing to PR Construction on this invoice.

Change Order 11 – Chemical Injection Mod Installation

[237] This Change Order was issued on a time and materials basis for costs associated with additional work by PR Construction in relation to the Chemical Injection Building. Colony points out that the Change Order requires submission of daily time sheets and the invoices submitted were paid, despite there being no accompanying daily approved time records.

[238] However, the evidence shows that CAS sheets were submitted in relation to at least some of the invoices. Manning raised a red flag with some of the time entries in the CAS, which seemed to contain typos, and those concerns were forwarded to Ronald who acknowledged they needed to be dealt with, but no follow-up appears to have occurred.

[239] Colony argues that it is only required to compensate PR Construction in the amount it could recover from Kiewit due to PR's failure to provide supporting documents, specifically, daily time sheets. In contrast to arguments made with respect to other challenged invoices, in this case, Colony via Manning's testimony, provided a reasonable explanation for how they went about calculating the compensation owed. Based on the evidence provided to Kiewit, Colony recovered $168,084.76 for work performed by PR Construction on the Chemical Injection Building.

[240] With respect to CO 11, I find that it was reasonably foreseeable to PR Construction that a failure to submit accurate CAS or daily time sheets, as required by the terms of the Change Order, would result in Colony being unable to recover same from Kiewit. Further, Kiewit provided a reasonable explanation for the settlement amount. There is also some evidence of Colony protesting the invoices at the time they were paid, and Ronald acknowledging same.

[241] Therefore, I find that Colony is entitled to set-off in the amount of $128,928.47, which is the difference between what they paid out to PR Construction and what they recovered from Kiewit.

Change Order 13 – MLSB Mod Installation

[242] This Change Order was also issued on a time and materials basis for costs associated with additional work by PR Construction in relation to the MLS Building. Colony points out that the Change Order requires submission of daily time sheets and that the submitted invoices were paid, despite there being no accompanying daily approved time records. Colony argues it is only required to compensate PR Construction in the amount it could recover from Kiewit due to PR's failure to provide supporting documentation. As was the case with CO 11, Colony, via

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Manning's testimony, provided a reasonable explanation for how they went about calculating compensation owed. Based on the evidence provided to Kiewit, Colony recovered $164,805.82 for work performed by PR Construction on the MLS Building.

[243] Again, there is evidence on the record that CAS sheets were submitted even if "time sheets" as required by Colony to Kiewit, were not submitted. There is also evidence that Manning approved that method. In contrast to the evidence with respect to CO 11, there is no evidence here that Manning or anyone else put PR Construction on notice that the CAS was insufficient or erroneous, nor that it would be subject to challenge or further scrutiny. Instead, the associated invoices were simply paid.

[244] Colony is not entitled to claim overpayment or damages in relation to this Change Order. PR Construction is entitled to its holdback amount of $43,433.24, plus interest.

Change Order 14 – Field Instruction Notification

[245] This Change Order was agreed to by Lacroix and Ronald on June 13, 2013. Pursuant to the terms of CO 14, Colony's field personnel were allowed to direct PR to "perform work that is beyond the scope of the subcontract." This was beneficial to Colony and represented a departure from the protections Ronald had negotiated in the main PR Contract as it allowed Colony to instruct additional or changed work on a time and materials basis in accordance with an agreed upon set of rates, without first executing a formal Change Order.

[246] The intention of the Order was to simplify the Change Order process for minor work items. Payment under CO 14 was based on a "Field instruction to Subcontractor" form or a "Field Work instruction" (FWI) that could be signed by Manning or Kyle Stratton whose primary duties were onsite. Per the terms of CO 14, Lacroix was not authorized to issue field instructions.

[247] On or about June 26, 2013, Ronald proposed using the CAS system on a daily basis in lieu of submitting daily time sheets. This suggested approach was accepted by both Lacroix and Manning. PR was not diligent about providing the CAS on a daily basis, and Manning had to remind Ronald many times of his obligation to submit them. The evidence shows that PR and Ronald, specifically, were aware that CO 14 and field instruction work required submission of daily time sheets or, at a minimum, daily CAS.

[248] Colony's primary position with respect to damages suffered as a result of paying these invoices is again, the lack of daily time records. They admit receiving CAS in relation to some of the invoices but assert they received "nothing at all" in relation to others.

[249] Colony admits that it owes PR Construction payment of Invoices 201414 and 201417 as daily time sheets were submitted for those invoices, as well as for a portion of invoice 201423. Colony resists any payment alleged to be owing under Invoice 201406 and claim damages and reimbursement for Invoices 201324; 201329 Rev 1; 201335, Rev 1; 201342; 201363; 201350 Rev 2; 201356; and portions of 201406 and 201423.

[250] With respect to Field Instructions PR-3, PR-12, and PR-13, covering six invoices (Invoices 201324; 201329 Rev 1; 201335 Rev 1; 201342; 201350 Rev 2; and 201356), Colony submits that PR erroneously submitted invoices for equipment charges that were not actually incurred. The evidence provided in support of this claim is indicative of contemporaneous challenges to the invoices asserted by Manning, and acknowledged by Ronald, with Ronald

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eventually offering a credit to Colony. Lacroix did not pursue the offer of a credit and seemed apologetic about it in his reply to Ronald stating, "that was not the intention by questioning it."

[251] With respect to Invoice 201335 Rev 1 and Invoice 201350 Rev 2, PR submits that payment approval was confirmed by Thompson in a recorded conversation on December 7, 2013. These invoices will be dealt with in the next section addressing CO 21.

[252] Regarding Invoices 201363 – Welding to Pile Caps, and Invoice 201356 – Field Instruction PR-12 – PR-39, PR says that the evidence shows these invoices were agreed to or approved by Manning. Further, they submit that payment of these invoices, even after Ronald offered a credit to Colony, amounts to an admission of liability.

[253] In conjunction with my findings in relation to CO 21, I agree with PR. Holdback amounts owing on the six invoices flowing from PR-3, PR-12, and PR-13 must be paid to PR Construction.

[254] With respect to unpaid Invoices 201406 and 201423, Colony argues that PR Construction should only be compensated insofar as they have provided signed daily time sheets to support the charges set out in the invoice. I agree. PR knew that they needed to provide time sheets to support field work invoices at the time they were submitted, and Colony has not admitted liability for these invoices through payment or any other admission.

[255] PR Construction is entitled to be paid $3,729.42 for Invoice 201406; $12,591.02 for Invoice 201414; $78,265.68 for Invoice 201417; and $76,183.08 for Invoice 201423, for a total of $170,769.20.

Change Order 21 – Superclamps

[256] Early on in the Project, PR was using a device called a beam claim, or "superclamp", to lift steel beams. At some point during the Project, Fluor directed that superclamps should no longer be used. The use of alternatives resulted in additional labour and hours for PR Construction.

[257] Colony submits that eventually, Thompson and Ronald entered into CO 21, which Colony says was intended to fully settle the superclamps issue. Pursuant to CO 21, the parties agreed that Colony would pay PR $40,889.01 plus GST. By that time, Colony had already paid PR the sum of $62,258.27 under CO 14. Colony argues that it is therefore entitled to a credit of $14,650.30 with respect to this Change Order.

[258] PR counters this argument with reference to a conversation and agreement regarding the superclamps invoicing under CO 14, and notes that CO 21, if agreed to, was displaced by the agreement reached on December 7, 2013, and also was not signed by Ronald until January 2014. Therefore, there is *no* indication that CO 21 was intended to create a credit to Colony.

[259] I agree. CO 21 is anomalous and should be disregarded. It was signed by Thompson in November but not Ronald at that time, and the agreement they reached in December effectively displaced it. Ronald may have signed it in January, but there is no evidence it was sent to Colony or that Colony considered it to be active. On all of the evidence considered in context, I find Ronald signed this CO by mistake. Nothing is owed to Colony relating to this Change Order.

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Change Order 20 – Saggy Rod Repair

[260] On November 7, 2013, Lacroix issued CO 20 to PR which was for “the correction of warping beams at the Screening Plant due to eccentric loading” in an amount to be determined. Colony paid the invoice, but now claims that the rods were sagging due to bolts not being properly installed or tensioned. In other words: Kiewit’s ironworkers blamed PR Construction’s ironworkers for the problem.

[261] PR Construction provided detailed evidence at trial about the source of the issue from their point of view, indicating they were not to blame.

[262] Considering all the evidence on this issue, I find that the source of the problem remains a mystery. Colony did not prove on a balance of probabilities that it was PR’s fault. They paid the invoice.

[263] Colony is not entitled to repayment of amounts they previously paid out under this Change Order.

Change Orders AA, BB, CC – Various repairs

[264] These Change Orders, which also dealt with repair issues, were invoiced without being signed. Colony says they would not have been paid were it not for the “deceptive conduct” of Lacroix and Ronald. PR points out that it was Manning who approved payment of these invoices, but neglects to acknowledge that they were paid under protest. Manning clearly indicated that they were paid on the basis that the required “backup” would be provided by PR Construction at a later date.

[265] No such backup in the form of signed daily time sheets was ever provided. Without any backup, PR cannot support even a *quantum meruit* claim in relation to these repairs, since Manning testified that no one on site knew what the invoices were related to. The only evidence provided of work done was the title of each Change Order, referencing repairs to a handrail, grating, and grating bolt interference.

[266] PR Construction owes repayment of these invoices in the amount of $18,648.67

Change Order DD – Cable Tray support work

[267] PR also invoiced on this Change Order without it being signed. Colony submits that the work done was within PR’s Scope of Work and no payment is owing. PR points out that Colony took the opposite position when requesting a similar Change Order from Kiewit entitled “Welding to Pile Caps” and supported by daily time sheets. Further, they point to evidence that Manning agreed to pay a previous related invoice on the basis that there would be no more similar charges.

[268] PR’s evidence is that it charged for further welding to pile caps despite its agreement with Manning. In my view, this is a complete answer, and it does not matter why further welding was needed, or whether it was or was not included in the original Scope of Work. Colony is not liable to PR Construction for Invoice 201428.

Change Order XX – No exiting

[269] In both the PR Contract and Colony’s Contract, the parties assumed they would be able to exit elevated work platforms or “EWPs” to do bolted connections. They later learned that a permit would be required to allow exiting and that this had to be approved by one of the Owner’s

representatives. It was difficult to get these permits and there was a time when PR and Colony could not exit the EWPs. Eventually, the issue was resolved. Ronald sought compensation for the inefficiencies created by not being able to exit the EWPs and he and Manning discussed coming up with a methodology for quantifying these inefficiencies. According to Manning, this was never done, yet PR billed on the exiting issue anyway.

[270] Obviously, Colony agreed with PR about the issue of compensation for inefficiencies, and therefore *quantum meruit* applies even without a signed Change Order. In fact, Colony was able to recover some money from Kiewit on this very issue. They initially sought recovery of $295,623.91 plus GST but managed to recover $150,000.00. Colony provided no evidence to support how this figure was determined.

[271] Therefore, the issue is how best to measure reasonable terms for compensation. Ronald gave evidence as to how he arrived at the methodology reflected in the invoices, indicating that Manning had told him to use a 'best estimate.' Manning denied agreeing to this. PR Construction submits that Ronald's evidence on this point should be accepted.

[272] I agree with PR, and accept Ronald's evidence. I find that PR Construction is entitled to full compensation as invoiced for inefficiencies related to the inability to exit the EWPs.

Invoice 201422 -Standby related to suspension of work

[273] The suspension period of March 12 – 17 was valid, as I have indicated above. Therefore, PR Construction is entitled to compensation for standby costs but will be held to strict proof of its related losses. As it has not provided any evidence on this point, I agree with Colony that no compensation is owed under this invoice.

Field truss assembly

[274] PR Construction submits that this invoice is payable as the re-assembly of the screening plant roof trusses was agreed to at $56,000.00 plus GST as set out in Exhibits B and E of the PR Contract.

[275] Colony resists payment on the basis that Lacroix and Ronald somehow nefariously snuck it into the Contract at the last minute. This is absurd. The evidence at trial supports PR's assertion that this method of assembly and payment by lump sum in fact enabled substantial cost savings to Colony.

[276] Colony owes PR Construction $58,800.00 as invoiced for field truss assembly.

Field welding

[277] This invoice was delivered to Colony by PR several years after the Contract was terminated. It purports to charge for cost incurred pursuant to section 21 of Exhibit A to the PR Contract that relates to "field welding performed by other than CWB Certified Welders." PR did not provide any documentary support for this invoice from Prime Quality Construction, who was alleged to have invoiced PR for work over and above that done by PR. Colony does have to pay this invoice.

Conclusion on damages and set-off

[278] Rather than risking a miscalculation, I invite the parties to apply the findings I have set out above and come up with an agreement as to the final amount awarded, taking into account GST, interest and set-off. If the parties cannot come to an agreement, they may apply by way of

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one mutual letter to me, seeking clarification of these reasons. This is not an invitation to make further submissions, although further submissions will need to be made on the issues of costs.

5. Is GCNA liable to PR Construction?

[279] GCNA has been represented by the same lawyers as Colony throughout the litigation process. They depart slightly in their defence against PR Construction's claims in that GCNA claims that the terms of the L&M Bond limit any claim to the cost of "labour, material, or both, used or reasonably required for use in the performance of the PR Contract." GCNA argues that the alleged amounts claimed by PR are claims for loss of profit, extras, and damages that are not recoverable under the L&M Bond.

[280] Further, GCNA submits that as PR failed to provide the additional and specific documents requested by GCNA following PR's claim to GCNA under the L&M Bond, PR has not demonstrated any entitlement to the payment for the amounts claimed, nor any support for the reasonableness of the amounts.

[281] PR Construction argues that the claims against GCNA and Colony are identical and they are represented by the same lawyers. In other words: disclosure to one is disclosure to both. Nothing more is owed to GCNA than was owed and provided to Colony. PR is therefore entitled to recover from both pursuant to the terms of the L&M Bond. They refer to ***Johns-Manville Canada Inc. v. John Carlo Ltd.,*** [1981] 32 OR (2d) 697, 113 DLR (3d) 686 (ON CA) and ***Citadel General Assurance Co. v. Johns-Manville Canada Inc.***, [1983] 1 S.C.R. 513, 147 D.L.R. (3d) 593 [***Citadel***].

[282] I have considered McIntyre J's observations in the *Citadel* decision – written over 30 years ago - as to the history of construction bonds and "evolving" practice in the industry. He endorsed a liberal interpretation of bonds, as they are intended to ensure "prompt payment for materials and labour supplied": ***Citadel*** at 512. This approach is in keeping with the modern principles of contractual interpretation and the stated aim of such bonds being to "ensure that construction work will be completed without interruption": see ***Valard Construction Ltd. V. Bird Construction Co.***, 2018 SCC 8 at paras 42, 52, [2018] 1 SCR 244, Karakatsanis J, dissenting, though not on this point.

[283] I do not accept Colony's interpretation of the L&M Bond, nor its characterization of PR Construction's claim against the bond. Accepting their submissions would lead to a commercially unreasonable result and cannot be what the parties intended. Instead, PR's intention was to ensure they were paid for the work they did for Colony.

[284] I find that GCNA is jointly liable to PR Construction.

Part 2: Colony's claims against the PR and Lacroix defendants

Summary of arguments

[285] Colony argues that the PR and Lacroix defendants should be liable for their damages in the claim and counterclaim as a result of various breaches of Lacroix's employment and fiduciary duties, and Ronald's participation in those breaches. Due to Lacroix's position in the company, Colony was particularly vulnerable to Lacroix's exercise of discretion in fulfilling the terms of his employment. It was his duty to act in Colony's best interests.

[286] Among other allegations, Colony asserts that the following impugned actions constitute a breach of fiduciary duty:

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a. Lacroix made disparaging comments about Thompson to Ronald and Manning and admitted that he often ignored Thompson's instructions;

b. Lacroix sometimes emailed Ronald from his personal email account;

c. Lacroix asked for a raise when he did because he wanted to "exploit the vulnerability of Colony by the application of maximum financial pressure";

d. Lacroix gave special treatment to PR's invoices, including assisting with their preparation and failing to scrutinize or make corrections to them when these were brought to his attention;

e. Lacroix failed to enforce PR's obligations to provide daily time sheets which damaged Colony's interests;

f. Lacroix's preparation of Change Orders led to preferential payments in PR's favour, including specifically, the standby orders and CO 15;

g. The methodology used in CO 15 was intentionally misleading and clearly in favour of PR Construction;

h. Lacroix went against Thompson's direct instruction by entering into CO 15 and hid the fact that he had signed it;

i. Lacroix knew that a Change Order for Winter Work was not required and that the matter could be dealt with through a claim, yet still agreed to CO 15;

j. Lacroix disclosed confidential legal advice to Ronald without Thompson's permission; and

k. Lacroix started working for PR Construction while still employed by Colony and did not disclose this to Thompson, which was a conflict of interest.

[287] Colony argues that "accordingly, by engaging in all of the above activities, Lacroix breached his undertaking as a fiduciary to act in Colony's best interests." They refer to "all of the above activities" in support of their assertions of "fraudulent and dishonest conduct" and conspiracy. They go on to argue that PR and Ronald knowingly assisted Lacroix in these breaches, and further, intentionally interfered with Lacroix's employment agreement.

[288] Lacroix submits first and foremost, that Colony is prevented from pursuing many of its arguments against Lacroix on the simple basis that when given the opportunity to do so, Colony's counsel failed to confront him with the allegations or inferences it laid out in its closing submissions. In my view, the failure to confront Lacroix does not prevent Colony from making the assertions; however, it does impact the weight I give to those assertions.

[289] Further, Lacroix argues that it is not enough for Colony to complain generally about Lacroix's actions, or even to prove that he favoured PR Construction. Rather, Colony must prove that Lacroix took concrete steps in favour of PR Construction that he had no reasonable basis for taking when considered in the context of the PR Contract and PR's Scope of Work *and* which caused specific damage to Colony. I agree.

Applicable law

[290] An employee will have breached their employment contract where there has been a substantial failure to perform a fundamental contractual term or duty: see Geoffrey England,

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Roderick Wood & Innis Christie, *Employment Law in Canada*, 4th ed, vol 2 (Toronto: LexisNexis Canada Inc, 2005) (loose-leaf updated 2022) at § 11.25 [England, *Employment Law*].

[291] The duty of fidelity or loyalty is an implied common law duty imposed on *all* employees to faithfully and reasonably advance their employer's best interests: ***RBC Dominion Securities Inc v Merrill Lynch Canada Inc.***, 2007 BCCA 22 at para 129, 275 DLR (4th) 385, aff'd 2008 SCC 54, [2008] 3 SCR 79 [***RBC Dominion***]; Geoffrey England, *Individual Employment Law*, 2nd ed (Toronto: Irwin Law, 2008) at 58 [England].

[292] Among other things, this duty requires employees to obey lawful and reasonable orders of their employer, so long as those orders are within the scope of their employment: ***Secretary of State for Employment v ASLEF (No 2)***, [1972] 2 All ER 949, [1972] 2 WLR 1370 (CA); ***Lucas v Premier Motors, Ltd***, 1928 CanLII 314 (AB CA). An employee may breach their duty of loyalty by acting contrary to their employer's direct orders, even if they think they are acting in the employer's best interests: ***Buxton v Lowes***, 1915 CanLII 995 (AB KB).

[293] Other employee duties that may be express or implied in an employment agreement include: to not compete with the employer during their tenure; to keep employer information confidential; and to be honest with the employer: see ***RBC Dominion*** at paras 18–20, 37, 53–57; England, *Employment Law* at §§ 11.94, 11.136, 11.142; ***McKinley v BC Tel***, 2001 SCC 38 at para 48; ***McMahon v TCG International Inc,*** 2007 BCSC 1003 at para 51. Unsurprisingly, an employee will breach the duty of loyalty where they are working for a competitor during their term of employment: England at 73.

[294] An employee may owe their employer a higher duty depending on the specific nature of their relationship and whether the employee occupies a fiduciary position: England, *Employment Law* at § 11.168.

[295] The basic framework for deciding if a fiduciary relationship exists was set out in ***Frame v Smith***, [1987] 2 SCR 99, 42 DLR (4th) 81, and modified by ***Alberta v Elder Advocates of Alberta Society***, 2011 SCC 24 at paras 27, 30–36, citing ***Galambos v Perez***, 2009 SCC 48 at paras 66, 71, 77–78 and ***Hodgkinson v Simms***, [1994] 3 SCR 377 at 409–10:

1. A fiduciary has scope for the exercise of some discretion or power;
2. The fiduciary can unilaterally exercise that discretion or power so as to affect the beneficiary's legal or practical interests;
3. The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power; and
4. The fiduciary has given an undertaking to act in the best interests of the beneficiary.

[296] As set out in the Non-Suit Decision: Lacroix was clearly in a fiduciary relationship with Colony, given that he was a Senior Project Manager and was responsible for negotiating and executing contracts and change orders with Colony's subcontractors and for approving their invoices. He was a key employee able to affect Colony's legal and financial interests. Lacroix was therefore bound by the duties inherent in a fiduciary relationship, including duties of loyalty, good faith, and avoidance of conflicts of interest: ***Canadian Aero Service Ltd v O'Malley***, [1974] SCR 592 at 606, 40 DLR (3d) 371 [***Canadian Aero Service***].

[297] All employees owe their employer an implied contractual duty not to reveal confidential information: see ***Canadian Aero Service***; England, *Employment Law* at § 11.142. However, the

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content of that duty differs depending on whether the employee is a fiduciary or not. If the employee is a fiduciary, then there is an automatic breach of the duty if the employee reveals confidential information without the employer's permission, no resulting damage or loss need be proven: ***Canadian Aero Service*** at 609. If the employee is not a fiduciary, then the employer must also show a loss to prove a breach of the duty not to reveal confidential information: *ibid*; see also ***Lac Minerals Ltd v International Corona Resources Ltd***, [1989] 2 SCR 574, 61 DLR (4th) 14. In either case, the duty to not misuse confidential information survives the term of employment: ***Globex Foreign Exchange Corporation v Kelcher*, **2011 ABCA 240 at para 25; ***Carlsen v Physique Health Club Ltd (Physique Fitness Store)***, 1996 ABCA 358 at para 4, citing ***Faccenda Chicken Ltd. v Fowler***, [1986] 1 All ER 617 at 625, [1986] 3 WLR 288 & ***Monarch Messenger Services Ltd. v Houlding***, 1984 CanLII 1315 (AB KB), 56 AR 147.

[298] In ***Jetco Heavy Duty Lighting v Fonteyne***, 2018 ABQB 345 at para 146, the Court set out factors to consider when deciding if information is confidential enough to attract protection:

(a) The extent to which the information is known outside the business;

(b) The extent to which it is known by employees and others involved in the business;

(c) Measures taken to guard the secrecy of the information;

(d) The value of the information to the holder of the secret and to its competitors;

(e) The effort or money expended in developing the information;

(f) The ease or difficulty with which the information can be properly acquired or duplicated by others; and

(g) Whether the holder and taker of the secret treat the information as secret.

See also ***Pharand Ski Corp. v. Alberta***, 1991 CanLII 5869 (AB KB) at para 144 [***Pharand***] and ***GasTOPS Ltd. v Forsyth***, 2009 CanLII 6613 (ON SC) at paras 124–25, aff'd 2012 ONCA 134.

[299] Even fiduciary or key employees are not expected to be perfect and any employer who seeks to impose liability for mistakes or errors committed by imperfect employees in the course of their duties face a high burden. Courts are not inclined to allow employers to sue their own employees, whether fiduciary employees or regular employees, for mere mistakes, incompetence, or simple negligence: ***Douglas v Kinger (Litigation Guardian of),*** 2008 ONCA 452 at para 39 [***Douglas***]. Rather, where an employee breaches a duty of care owed to their employer, the preferred remedy is employment discipline, with dismissal being the most extreme action: ***Breen v Foremost Industries Ltd,*** 2023 ABKB 552 at para 486, citing ***Douglas*** at para 60.

[300] For policy reasons, damage to the employer caused by an employee is considered to be a risk of doing business that is "borne by the employer alone unless it is due to the intentional or grossly negligent conduct of the employee": ***Grant v Electra Sign Ltd.***, 2016 MBQB 131 at para 53, citing ***Douglas***. Where a breach of contract is alleged by the employer, they must establish a substantial failure by the employee in relation to a specific contractual term that is fundamental to the employment contract: ***Kirby v Amalgamated Income Limited Partnership***, 2009 BCSC 1044 at paras 377–78 [***Kirby***].

[301] In the event that a breach of contract has been proven, recovery of damages by an employer is only possible "if the loss is directly connected to the breach, that is, it is actual and

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demonstrable. Damages for which the employer is partially responsible are not recoverable": ***Kirby*** at para 380.

Findings of Fact

[302] Lacroix was hired by Colony to be a Senior Project Manager on March 19, 2012. Lacroix was a professional engineer, but this was the first time he had held a position as Project Manager. Thompson knew, or should have known, this.

[303] Lacroix's responsibilities with respect to the Mildred Lake Project included scheduling and progress monitoring, subtrade/supplier co-ordination, subtrade/supplier contract negotiations, award and administration, invoice approval, and cost control. He had formal signing authority for contracts, change orders, sub-subcontractor invoice approval, and field work instructions from December 2012 to November 26, 2013.

[304] Lacroix was paid a salary of $10,000 per month. The terms of Lacroix's employment agreement, included, among others, the following terms or "Articles":

> 5. Employee to Devote Full Time to Company. The Employee will devote full time, attention and energies to the business of the Company, and, during this employment, will not engage in any other business activity, regardless of whether such activity is pursued for profit, gain, or other pecuniary advantage. Employee is not prohibited from making personal investments in any other businesses provided those investments do not require active involvement in the operation of said companies and provided the other businesses in which such personal investment is made do not in any way compete with the business of the Company.
>
> 6. Confidentiality of Proprietary Information. Employee agrees, during and after the term of this employment, not to reveal confidential information, or trade secrets to any person, firm, corporation or entity.

[305] Per Article 16 of Lacroix's employment agreement, and subject to Article 10 which dealt with termination for cause, Lacroix was entitled to 10% of the balance that remained in the contingency account at the completion of the Mildred Lake Project. Article 10 stated that if Lacroix was let go without cause prior to the completion of the Project, he would be entitled to 5% of the amount in Colony's contingency account based on a specified formula.

[306] The contingency account was a separate pool of excess funds held in case Colony went over budget and needed to access extra money to complete the Project. This incentivized Lacroix to make business and management decisions that kept the Project within the allotted budget: the less the contingency fund was used during the Project, the more money he stood to gain at its conclusion.

[307] One of Lacroix's responsibilities was to negotiate with PR Construction with respect to the Contract. While he frequently checked in with Thompson about various items, Thompson and Ronald had worked together in the past and he preferred to have Lacroix, as Project Manager, be the main point of contact. It made sense for Lacroix to attempt to establish trust with Ronald early in the process. Unfortunately, Lacroix appears to have tried to establish trust with Ronald by setting Thompson up as their verbal punching bag – in fact, on one occasion, Ronald even joked about punching Thompson in the face.

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[308] The genesis of Colony's concerns over Lacroix's relationship with Ronald is found in a conversation that Ronald recorded in December 2012, while nearing the completion of negotiating the final terms for the PR Contract. During this conversation, Ronald told Lacroix "I've got lots to give you" and that "once we get through this shit it will just be you, me, Joel and the suppliers as long as the money is working."

[309] Colony also highlights a portion of an email sent April 3, 2013, as further evidence of Lacroix's ill intentions towards Colony. After receiving a proposed, revised schedule from Kiewit, Lacroix forwarded the proposed schedule to Ronald via email and advised Ronald that they should meet to determine "if there is any opportunity for additional money." This is one example of times when Lacroix corresponded with Ronald using his personal email without copying Thompson. Colony claims that this is indicative of an agreement for Lacroix to help PR Construction make more money at Colony's expense, and further that the use of his personal email address was an attempt to conceal that fact from Thompson.

[310] Following Kiewit's schedule revision, conversations began, involving all the parties, regarding how best to deal with compensation for the extra Winter Work. Accordingly, Lacroix began working on a method of compensation which *both* PR Construction and Colony could use.

[311] As discussed above, the new proposed methodology developed by Lacroix after extensive discussions with Ronald was, in Lacroix's words, "pure profit" and could result in "many many millions" of additional compensation for doing work that was already covered in PR's s Scope. As such, it would not result in any increased costs for performance. Were Kiewit to agree to the methodology, those "millions" would also accrue to Colony through Kiewit.

[312] On May 8, 2013, Lacroix and Ronald had a conversation in which Ronald indicated his opinion that Colony had breached the PR Contract due to the delay and it was no longer intact. Therefore, he wanted to put similar agreements into place moving forward. Lacroix expressed his agreement. The assertion of the PR Contract being "breached" and no longer in force was never pursued by Ronald.

[313] On May 13, 2013, Lacroix and Ronald attended a meeting with Kiewit in Edmonton to discuss a change in the methodology for determining the value of the additional Winter Work. There was nothing secretive about this meeting. Lacroix was convinced he had discovered an incredible way to account for Winter Work and the proposal presented was on behalf of both PR Construction and Colony. Kiewit was leery of it and as a result, so was Thompson.

[314] Lacroix was obviously feeling very confident about his abilities at this time, and on May 14, 2013, he demanded that Colony triple his salary otherwise he would terminate his employment with Colony. Lacroix explained at trial that he made that demand because he did not believe he would receive any bonus based on the contingency fund, which was being depleted, and Kiewit was not issuing Change Orders to Colony in a timely fashion. Ronald had also opined that he did not think Thompson would honour Lacroix's bonus agreement under his employment agreement.

[315] Thompson agreed to increase Lacroix's salary from $10,000 a month to $20,000 a month. Effective May 16, 2013, Lacroix's employment agreement was amended to reflect this salary increase.

[316] Colony asserts that Ronald offered to hire Lacroix if he did not get the increase he wanted and that this was improper. Ronald denied expressly offering Lacroix a job and explained in his

oral testimony that if he did say something like that, it would have been as a joke. However, Manning testified that on May 14, 2013, Lacroix told him he had a job waiting for him at PR if he was unable to secure a raise. I accept that Ronald may have said this to Lacroix, or something like it, on this and other occasions.

[317] On May 18, 2013, in another recorded conversation, in the context of dealing with payment for standby while PR was waiting to begin their work, Lacroix suggested that PR did not need a Change Order, and they could just bill on the PR Contract as a claim. Ronald responded that he could not carry that cost, and did not want to put in a claim. Ronald stated that Thompson would not pay the claim at the end of the Project because "I know how he works", and Lacroix replied "Right".

[318] Lacroix recorded his understanding of this conversation in contemporaneous notes on the back of a spreadsheet: "If not a change order, then at his own expense. If not a change, it is a claim. Then dispute would make it not paid until the end, if at all [therefore] he needs a change order." This note accurately reflects Ronald's position.

[319] Lacroix continued to navigate the situation with Ronald and Thompson, insisting that his new compensation methodology was sound. Eventually, Thompson booked a meeting with Colony's lawyer, Marina Pratchett, as described earlier in these reasons. Following this meeting, Thompson started to review Lacroix's dealings with PR Construction and began to take more control of the Change Order process in May 2013. As of May 11, 2013, Thompson began to personally review all of PR Construction's Change Orders; however, he did *not* withdraw Lacroix's signing authority.

[320] Despite the fact that he was reviewing all PR Construction's Change Orders as of May 11, 2013, Thompson testified that he found out CO 15 had been signed many weeks after the fact. While Colony asserts that Lacroix tried to conceal CO 15 from Thompson, the evidence does not support this inference. CO 15 was placed in the master binder of Change Orders at Colony's offices and entered into the Timberline recordkeeping system within days of being signed.

[321] On June 17, 2013, Lacroix issued and signed CO 15, which included his new (and he thought, improved) method of calculating Winter Work compensation. That same day, Ronald sent a private text to Lacroix saying, "Thanks [Lacroix] for your ongoing efforts. Much appreciated."

[322] Lacroix was not removed from his position nor subjected to any job action following issuance of CO 15. In his testimony, Thompson was equivocal about whether Lacroix even received a reprimand for signing off on CO 15 "against his express instructions." It was not until the end of September 2013 that Thompson formally withdrew Lacroix's authority to sign Change Orders on behalf of Colony and communicated the same to suppliers, including Ronald. Lacroix's responsibilities were then gradually shifted over to Manning.

[323] Around this time, Lacroix admitted to Manning that it had been very difficult for him to *ignore* what Thompson wanted him to do, but he had done it. The following excerpt from a conversation recorded by Manning encapsulates both Lacroix's attitude towards his superior, Thompson, and his firm belief that he was making decisions that were in Colony's best interests:

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> And it’s very difficult. It’s difficult to work for a guy and ignore what he wants you to do. I mean, I’ve had a hard time ignoring him over the months, like, ignoring what [Thompson] wants me to do. Like, it's been, like, hard, but I did it.
>
> But not that it leaves me in a better place because I'll probably get fired, and he won't; right? Like, it's just -- I don't think it's any better, but that's why he doesn't come to me to get me to do things because I think he knows I would say I don't really agree with that.

[324] On November 28, 2013, Lacroix and Colony agreed to mutual termination of Lacroix’s employment, effective December 31, 2013. Notably, Lacroix was *not* let go “for cause”. Colony directed Lacroix to work from home and paid Lacroix’s salary until the end of December. Thompson confirmed that Lacroix was paid until the end of December 2013; however, the Record of Employment indicates that last day of work for which Lacroix was paid was November 30, 2013.

[325] During the month of December 2013, Ronald and PR provided Lacroix with a company laptop and email address (prconstruction@gmail.com), which Lacroix used to assist PR with invoicing Colony and updating PR’s Change Order spreadsheets to account for schedule changes. Lacroix did not inform Thompson that he was doing this.

[326] On January 6, 2014, Lacroix and Joel Prior enter into a partnership agreement for 25% of the voting shares each in PR Construction.

[327] On January 10, 2014, Ronald and PR Construction advised Colony that they had hired Lacroix as their Vice President of Business Development. Lacroix would be Colony’s new contact person for the Project. Notably, it was only after Thompson found out that Lacroix had started working for PR Construction that he asserted CO 15 had been signed without authority.

Analysis

1. Did Lacroix breach his employment contract or fiduciary duties?

<u>Employee loyalty and fiduciary duty to act in Colony’s best interests</u>

[328] It is not surprising that Thompson was angry and upset when he discovered that Lacroix had left his employment with Colony to work for PR Construction in the middle of a heated dispute over the Winter Work issue, which Lacroix was deeply involved in. Unfortunately for Lacroix, the resulting distrust caused Thompson to look back on what was admittedly a rocky and sometimes ill-managed series of events through the lens of fraud and conspiracy. At the same time, it gave Thompson a plausible scapegoat with respect to the bind he was in vis-à-vis his obligations to PR Construction downstream and to Kiewit upstream.

[329] As Lacroix points out in his submissions, when pressed by Lacroix about what he was going to do about the Winter Work bind, Thompson said that he would “start muddying the waters.” Lacroix submits that Colony’s entire countersuit against the PR and Lacroix defendants for fraud and conspiracy is an attempt by Colony and Thompson to do just that.

[330] Many of Colony’s complaints are general in nature and I do not propose to address all of them in these reasons; however, some are worth specifically mentioning such as Lacroix’s consistent disparagement of Thompson to Ronald and others.

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[331] Manning testified that Lacroix frequently complained about Thompson to him, describing him as unscrupulous, dishonest, and unreasonable. Manning further testified that Lacroix told him he had ignored Thompson's instructions and shared things about Thompson with Ronald that he knew he should not have. This is consistent with how Lacroix spoke about Thompson to Ronald in some of the recorded conversations.

[332] It was incredibly unprofessional for Lacroix to speak this way and had Thompson discovered it, it would have likely been grounds for Lacroix's dismissal as it illustrates a grave lack of judgement, disloyalty, and distrust. I agree that it was a breach of Lacroix's employment contract, more specifically, a breach of his duty of fidelity to speak about Thompson in this way, particularly with Ronald. It was not, however, a breach of his fiduciary duties.

[333] Of greater concern is the allegation that Lacroix deliberately acted against Colony's best interests in relation to CO 15. Colony argues that Lacroix knew that a change order for Winter Work was not required and the matter could be dealt with through a claim but still agreed to CO 15, the methodology used in CO 15 was intentionally misleading and clearly preferential to PR Construction, and Lacroix went against Thompson's instructions in entering into CO 15, and hid the fact that he had signed CO 15.

[334] Lacroix and Ronald incorporated a methodology in CO 15 that had not been agreed to by Kiewit and represented a departure from the Kiewit Estimating Manual. The methodology did not incorporate the inefficiency factors contained in the Manual; rather, it used an entirely new method of calculating Winter Work impacts that used wind chill and daylight hours and inefficiency factors that were different than those annotated by Kiewit. Lacroix's methodology was never accepted by Kiewit, although I accept that, at the time he entered into CO 15, Lacroix had received correspondence and communications that led him to sincerely believe he could convince Kiewit to eventually accept it.

[335] The Lacroix Defendants argue Lacroix was justified in entering into CO 15 because it was necessary due to the long delays in the start of the Project, Lacroix's engineering ethics required him to do so, Lacroix had the authority to sign the Order, and Thompson accepted Lacroix's explanation and gave evidence that it appeared to him that Lacroix was always acting in the best interests of Colony.

[336] There are likely much better methods for determining Winter Work compensation – Kiewit and Fluor certainly thought so. But, as I have already determined, the method set out in CO 15 was the method Lacroix had agreed to on behalf of Colony. It was not a dishonest or misleading method, and, had it been accepted by Kiewit, Colony would have no reason to say it was overly preferential to PR Construction. Importantly, I accept that Lacroix sincerely thought he was doing what was best for Colony and for PR Construction, in agreeing to Ronald's demands for a change order, and specifically CO 15, in order to keep PR Construction on the job.

[337] Unfortunately, in so doing, Lacroix went against Thompson's direct instructions and this act of insubordination was a breach of his employment duties.

[338] Lacroix also took a significant risk that Kiewit would not adopt his methodology, leaving Colony to pay PR's CO 15 invoices without any corresponding compensation from Kiewit. This is precisely what occurred. In addition to this bad business decision, Lacroix made other bad decisions in his handling of PR Construction's Contract, some of which negatively impacted Colony's financial interests, such as failing to follow-up on invoicing irregularities.

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[339] On all the evidence, I find that Lacroix's insubordination and the risk he took in agreeing to CO 15 did not constitute a breach of his fiduciary duties as that term is understood and used in the jurisprudence. Simply making an intemperate or ill-conceived business decision does not, without more, equate to acting against an employer's best interests. Nor was Lacroix's conduct of such a nature to attract liability based on negligence and, in any event, that was not argued by Colony.

[340] Initially, it appears Colony was also of this view. Thompson did not fire or discipline Lacroix when Thompson found out he had signed CO 15 against his directions. In November, Colony terminated Lacroix's employment "without cause." It was only after Lacroix was hired on by PR Construction that Thompson began to view Lacroix's bad business decisions in a conspiratorial light, when the explanation was much simpler, although not at all flattering to Lacroix.

[341] Colony further argues that by engaging in work on behalf of PR while he was employed by Colony, Lacroix breached his obligations of fidelity and good faith to Colony. Moreover, by assisting PR in the preparation of invoices for compensation for the additional work performed by PR while Lacroix was employed by Colony, he put himself and Colony in a position of conflict of interest and breached his employment contract.

[342] I agree. By November 2013 Lacroix had crossed the line and was unlikely to have been prioritizing Colony's best interests; rather, he would have been prioritizing the best interests of his new employer, PR Construction. Had his employment with Colony not already been terminated at the time, this conflict of interest would certainly have been just cause for his dismissal. This is so even if it were a conflict in appearance only. Lacroix's actions did not, however, rise to the level of a breach of fiduciary duty.

[343] While Colony has proven that Lacroix breached his employment contract through disloyalty and insubordination, the evidence does not disclose that any damages – certainly not the extensive damages sought by Colony – were caused by these breaches, or by Lacroix's "conflict of interest" in working for PR Construction and Colony at the same time.

[344] While no damages arise from Lacroix's breach of his employment contract, I find that the evidence is sufficient to support after-acquired cause for termination per Article 10 of that contract.

Duty of confidentiality

[345] Ronald knew that Thompson and Lacroix were going to meet with Pratchett to get legal advice on "our contract and the Kiewit contract and [Thompson's] responsibilities" because Lacroix had told him. Thompson testified that he was very upset just by the fact that Lacroix had mentioned he told Ronald the meeting was taking place; however, he did not explain why he was upset. Why would Thompson want to keep the fact that he had obtained legal advice a secret from Ronald?

[346] For his part, Ronald admitted that he spoke to Lacroix by telephone after Colony's meeting with Pratchett on June 4, 2013, in which Lacroix disclosed some of the legal advice received. Colony asserts that the information about the meeting that Lacroix relayed to Ronald had a "quality of confidence" as set out by the Court in ***Pharand*** and that he breached his duty to his employer by sharing it with Ronald: see ***Pharand*** at para 136, citing ***Ansell Rubber Co. v Allied Rubber Industries Pty. Ltd***., [1967] VR 37.

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[347] Given the opportunity to explain to the court what information had a "quality of confidence" Colony, in their written argument, highlighted certain parts of the telephone call between Ronald and Lacroix as follows:

- Lacroix stated that they only had to get through a year with Thompson;
- Ronald stated that they could all retire some day;
- Ronald told Lacroix that he appreciated his efforts and that he would make it up to him somehow;
- Lacroix said that he would give Ronald an opportunity to do that; and
- Ronald stated that they had a year long job in front of them, and there was plenty of opportunity.

[348] The Lacroix Defendants point out that there is no evidence that what Lacroix communicated to Ronald was communicated to Lacroix in confidence or that it was misused by Lacroix. In any event, there is no evidence that what Lacroix communicated was an accurate reflection of what Colony's lawyer said. Finally, the Lacroix Defendants argue that it was part of Lacroix's role to communicate the results of the meeting to Ronald.

[349] Communications between lawyer and client are *de facto* subject to solicitor-client privilege. Here, the client was Colony, and Lacroix was Colony's key employee vis-a-vis PR Construction. This is sufficient evidence of a solicitor-client relationship. Colony has asserted that the contents of the meeting are therefore privileged, and if not privileged, confidential. Further, Thompson testified that he did not want Lacroix to tell Ronald about the meeting, or what was said at it (although he also said he did not remember what happened exactly and was piecing it together from the document at trial.)

[350] As noted earlier, Colony's position on this point is self-defeating. They say the information shared was "legal advice" and confidential, but have simply made a blanket assertion on this point. They provided no actual evidence or articulation of what confidential information was conveyed or why it was protected and confidential in the first place. There are, of course, Court processes which could have been followed to protect the information while also substantiating the legal argument.

[351] Lacroix testified that he thought it was his job to communicate the results of the meeting to Ronald - that he was expected to do so as part of Colony's negotiation with Ronald about delay and Winter Work orders. It makes sense, given what was happening at the time, that Thompson would have asked Lacroix to talk to Ronald after the meeting. Again: in the context of the conversation considered as a whole, it is difficult to define precisely *what* confidential information Colony thinks was improperly shared. The argument becomes even more confusing when considering Colony's other arguments about what Ronald knew or ought to have known about the legality of CO 15 at the time he signed it.

[352] If I am wrong, and Lacroix violated his duty of confidentiality to his employer by disclosing information about the meeting with Colony's lawyer to Ronald without Thompson's permission, the violation was minor and occurred in the context of a good faith discussion with Ronald. As such, it could potentially constitute cause for employment discipline, or even termination, but nothing more. In any event, none of the damages sought by Colony flow from, or were caused by this violation.

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2. If in breach, did PR and Ronald provide knowing assistance to Lacroix, or otherwise interfere with his employment contract?

Applicable law

[353] Where a fiduciary relationship has been established between two parties, equity will bind the "conscience of the fiduciary and that of a third party who knowingly assists or participates in the breach of the fiduciary's duty", most commonly the employer who subsequently hires the terminated fiduciary: ***Anderson, Smyth & Kelly Customs Brokers Ltd. v. World Wide Customs Brokers Ltd.,*** 1996 ABCA 169 at paras 38–40. Collaborating in a breach of the duty of fidelity may be actionable where a third party facilitates and encourages the rogue employee: ***Trim Trends Canada Ltd. v. Dieomatic Metal Products Ltd***, 1976 CanLII 1268 (ON SC), 53 CPR 245 at 254–55.

[354] The criteria for establishing a claim for knowing assistance in the breach of a fiduciary duty were summarized by the Ontario Court of Appeal in ***Harris v. Leikin Group Inc***., 2011 ONCA 790, at para 8, and again in ***Enbridge Gas Distribution Inc. v. Marinaccio***, 2012 ONCA 650 at para 23, as follows:

a. there must be a fiduciary duty;

b. the fiduciary must have breached that duty fraudulently and dishonestly;

c. the stranger to the fiduciary relationship must have had actual knowledge of both the fiduciary relationship and the fiduciary's fraudulent and dishonest conduct; and

d. the stranger must have participated in or assisted the fiduciary's fraudulent and dishonest conduct.

[355] The test for intentional interference with contractual relations was set out by the Alberta Court of Appeal in ***Brae Centre Ltd. v 1044807 Alberta Ltd.***, 2008 ABCA 397 at para 19:

> To find that a defendant intentionally induced a breach of contract, six elements must be established (see Klar, *Tort Law*, 3d ed. (Toronto: Thomson Canada Limited, 2003) at pp. 610-620):
>
> i. the existence of a contract
>
> ii. the defendant intended to cause a breach of the contract
>
> iii. knowledge by the defendant of the contract
>
> iv. the defendant's conduct induced the breach
>
> v. damage
>
> vi. lack of justification for the defendant's conduct.

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Analysis

[356] The asserted facts Colony relies on in relation to proof of "knowing assistance" are the same as those set out above in relation to proof that Lacroix breached his employment or fiduciary duties to Colony.

[357] The breach related to the signing of CO 15 was an act of insubordination and therefore a breach of the employment contract, but it was not "fraudulent and dishonest" nor a breach of Lacroix's fiduciary duties. I accept that Ronald knew Thompson did not want Lacroix to sign CO 15. More importantly, Ronald knew that Lacroix had the authority to sign CO 15 on behalf of Colony. In signing it, neither Ronald nor Lacroix acted fraudulently or dishonestly.

[358] The breach arising from Lacroix's decision to begin working for PR Construction while still employed by Colony is different. This breach did involve an element of dishonesty in that Lacroix did not disclose to Colony that he had placed himself in a conflict of interest, albeit for a very short period of time. However, there is simply no evidence implicating Ronald in Lacroix's actions. Lacroix made his own choices and Ronald had no obligation to disclose to Thompson that he had hired Lacroix. In any event, Colony's asserted damages were not caused by this breach, and the attendant appearance of a conflict of interest did not manifest in any actions detrimental to Colony. It is clear that Lacroix would have been terminated even without the job offer from PR Construction.

[359] The same reasoning applies to Lacroix's disclosure to Ronald of information obtained during the meeting with Pratchett. Lacroix is responsible for his own actions. In any event, even if this disclosure constituted a breach of confidentiality and his employment or fiduciary duties, no damages arise.

[360] As I indicated earlier, I do not find that any defined conspiratorial agreement existed. Ronald was aware of Lacroix's interest and desire to obtain an ownership position in a company from his previous interactions with Lacroix, and he may have played up his willingness to have Lacroix come work for him in the future in order to secure better treatment for himself and PR Construction. This may be sharp business practice, but it is a far cry from a conspiracy. In any event, an offer of future employment will rarely rise to the level of interference with an existing employment contract. It certainly does not rise to that level here.

[361] Colony's action against the Ronald Defendants is dismissed in its entirety. As such, I have no need to consider Colony's submissions on the issue of "lifting the corporate veil": ***Swanby v Tru-Square Homes Ltd***, 2023 ABCA 224 at para 36.

CONCLUSION

[362] PR Construction is entitled to its damages and contract interest on the claim against Colony for breach of contract, as set out above.

[363] PR Construction is entitled to claim against GCNA per the L&M Bond, the amount of the judgment it recovers against Colony in contract, including contract interest, plus tariff costs.

[364] PR Construction may also claim recovery against the Lien Bond security posted by GCNA.

[365] Colony's counterclaim against the Lacroix Defendants is granted in part but no damages arise.

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[366] Colony's counterclaim against the Ronald Defendants is dismissed.

[367] Colony is entitled to set-off on PR Construction's claim, as set out above.

[368] If the parties are unable to settle the matter of costs associated with these proceedings, they may contact me within 30 days of issuance of this decision, via my legal assistant to discuss a method for making further submissions on that issue.

Heard on November 15-19, 22-26, November 29 to December 2, December 6-10, 2021 and September 11 -15, 18-22, 2023.

Dated at the City of Edmonton, Alberta this 12th day of May 2025

Tamara L. Friesen
J.C.K.B.A.

Appearances:

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R. Fleming,
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