

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

ONEC CONSTRUCTION INC.

Plaintiff /Defendant by Counterclaim

-and-

NWT ENERGY CORPORATION (03) LTD.

Defendant/Defendant by Counterclaim

-and-

LIBERTY MUTUAL INSURANCE COMPANY

Defendant by Counterclaim

-and-

NORTHLAND BUILDERS LTD.

Defendant/Plaintiff by Counterclaim

**MEMORANDUM OF JUDGMENT ON APPLICATION
FOR SUMMARY JUDGMENT**

OVERVIEW

[1] This litigation arises from disputes between parties involved in the infrastructure project for the construction of a wind turbine in Inuvik, the Inuvik High Point Wind Project.

[2] NWT Energy Corporation (03) Ltd. (“NTE”) is the owner of the project. ONEC Construction Inc. (“ONEC”) and Northland Builders Ltd. (“Northland”) are construction businesses involved in the completion of the project. Liberty Mutual Insurance Company (“Liberty”) is ONEC’s surety under a labour and material bond.

[3] During the performance of the Inuvik High Point Wind Project, disputes arose between the parties. ONEC filed a Statement of Claim against NTE and Northland. Northland filed a counterclaim against ONEC, Liberty and NTE.

[4] Northland is seeking a summary judgment dismissing ONEC’s claim against Northland and granting Northland’s counterclaim against ONEC, Liberty and NTE, arguing that a trial is not required to dispose of these actions. If the summary judgment application is dismissed, Northland seeks an order striking ONEC’s Statement of Claim.

[5] For the following reasons, I partially grant the application for summary judgment.

BACKGROUND

[6] In November 2020, NTE obtained the necessary permits and licenses for the construction of a wind turbine in Inuvik. This project included the construction of a wind turbine, a battery storage system, an access road, and a distribution line connecting to existing lines near Inuvik’s Mike Zubko Airport.

[7] The nature of the contractual relationships between the parties is in dispute. On December 27, 2021, NTE entered into a Prime Contract (“Prime Contract”) for the construction of the access road with ONEC. ONEC argues Northland is also a party to this contract as a contractor, acting in partnership with ONEC. NTE and Northland take the position that Northland is not a party to the Prime Contract.

[8] On March 15, 2022, ONEC and Northland entered into a contract titled “Integrated Project Delivery Contract” (“IPD Contract”), which relates to the construction of the access road. The parties do not agree on the nature of this contract. ONEC and Liberty submit it is a partnership agreement while Northland argues it is a subcontract. The IPD Contract sets out how ONEC must pay Northland for its participation in the construction of the access road.

[9] On February 3, 2022, ONEC executed a Labour and Material Payment Bond (“the Bond”) with Liberty in favour of NTE. The Bond provides that claimants who have a direct contract with ONEC for labour and material used or reasonably required for use in the performance of the Prime Contract can seek compensation from Liberty if ONEC defaults in payment.

[10] In early 2022, work on the construction of the access road started. ONEC’s role was the management of the project, procuring materials, surveying, supervision and quality control. Northland’s involvement is in dispute. Northland takes the position it was supplying labour and materials for the preparation of the site and performing civil work, while ONEC submits Northland also played an important role in managing the project in partnership with ONEC.

[11] During the performance of the project, Northland invoiced ONEC monthly. ONEC made payments to Northland. ONEC claims some of these payments were advances because Northland did not have the necessary funds to perform the work. ONEC disputes the accuracy of Northland’s invoices and claims that they do not comply with the terms of the IPD Contract. Northland takes the position that ONEC approved the method of invoicing and that further payments are due under the IPD Contract.

[12] On September 23, 2022, in accordance with the IPD Contract, Northland’s lawyer sent a Notice of Default to ONEC for the outstanding amount it claimed was owed for the work performed. ONEC did not make any payments to Northland following the receipt of this notice.

[13] On November 9, 2022, ONEC directed Northland to stop work on the construction site due to a dispute between ONEC and NTE. Northland complied with this direction and never returned to work on site.

[14] On January 14, 2023, Northland terminated the IPD Contract with ONEC for non-payment of the outstanding amounts it claims are due.

[15] On February 10, 2023, NTE sent Northland a “Notice to Subcontractors of ONEC Construction Inc.” indicating that NTE had terminated its contract with ONEC and that any subcontractor who had performed work for the Inuvik High Point Wind Project may be eligible to claim under the Bond and enclosed a copy of the Bond.

[16] On March 3, 2023, Northland submitted a notice of claim to Liberty, the surety under the Bond, for the payment of the outstanding amounts it claimed ONEC owed Northland for labour and materials used or reasonably required for the performance of the Prime Contract. Liberty denied the claim asserting that Northland does not fall into the definition of a “claimant” under the Bond.

[17] On April 27, 2023, ONEC filed a Statement of Claim against NTE and Northland. ONEC alleges that Northland:

- induced NTE and ONEC’s subcontractors to breach the Prime Contract and subcontracts,
- in committing the inducements, breached the terms of the IPD Contract,
- caused damage to equipment belonging to ONEC, and
- continued to use fuel provided by third parties under contract with ONEC after the termination of the IPD Contract.

[18] On September 21, 2023, Northland filed a Statement of Defence and Counterclaim. The counterclaim alleges ONEC breached the IPD Contract by failing to pay the outstanding invoices and stand-by charges incurred when ONEC directed Northland to stop work. It seeks contractual damages for this breach. Northland also argues that it squarely falls within the definition of claimant under the Bond and that Liberty is liable for the amount owed by ONEC. In the alternative, Northland claims that the Defendants by Counterclaim, including NTE, are liable for unjust enrichment.

[19] On September 19, 2024, Northland filed this application for summary judgment seeking the dismissal of ONEC’s action against Northland, as well as judgment against the Defendants by Counterclaim.

ANALYSIS

Principles on Summary Judgment Applications

[20] Before I turn to the parties’ arguments, I will set out general principles that apply to summary judgments.

[21] Summary judgment applications allow parties to seek the determination of an action without the necessity of holding a trial. It is a measure of efficiency that

recognizes legal proceedings can be long and costly and that not all matters raise issues that require all the tools and expenses of a full-blown trial.

[22] Rules 174 to 176 of the *Rules of the Supreme Court of the Northwest Territories* [*the Rules*] set out the different rules that govern such applications in this jurisdiction. The provisions state the following:

174. (1) A plaintiff may, after a defendant has delivered a statement of defence, apply with supporting affidavits or other evidence for summary judgment against the defendant on all or part of the claim in the statement of claim.

(2) The plaintiff may, on an application made *ex parte*, seek leave to serve a notice of motion for summary judgment on a defendant with the statement of claim and the Court may grant the leave where special urgency is shown, subject to such directions as it considers just.

175. A defendant may, after delivering a statement of defence, apply with supporting affidavit material or other evidence for summary judgment dismissing all or part of the claim in the statement of claim.

176. (1) In response to the affidavit material or other evidence supporting an application for summary judgment, the respondent may not rest on the mere allegations or denials in his or her pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue for trial.

(2) Where the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the Court shall grant summary judgment accordingly.

(3) Where the Court is satisfied that the only genuine issue is the amount to which the applicant is entitled, the Court may order a trial of that issue or grant judgment with a reference or an accounting to determine the amount.

(4) Where the Court is satisfied that the only genuine issue is a question of law, the Court may determine the question and grant judgment accordingly.

[23] In *Hryniak v Mauldin*, 2014 SCC 7 [*Hryniak*], the Supreme Court of Canada took an expansive approach to summary judgments, ruling that “summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims” (para 5). When deciding an application for summary judgment, the question is “whether a full-blown trial is

required to resolve the issue and reach a fair and just result” (*The Commissioner of the Northwest Territories v 923115 NWT Limited*, 2018 NWTSC 24, para 45 [*Commissioner of the Northwest Territories*]; also see *Leishman v Hoechsmann*, 2016 NWTSC 27, para 42). As stated in *Hryniak*, this will be the case “when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result” (para 49).

[24] Although the burden is on the moving party, on an application for summary judgment all parties have the obligation to put their best foot forward (*Commissioner of the Northwest Territories*, para 60). As Schuler J. stated in *Arctic Environmental v Northern Mgmt. & Komaromi*, 2000 NWTSC 53, at para 23:

A judge hearing an application for summary judgment is entitled to assume that the parties have put their best foot forward. It is not sufficient for the responding party to say that more and better evidence will or may be available at trial; the judge is entitled to assume that the parties would present no additional evidence at trial.

[25] This principle is embodied in Rule 176(1), which provides that the respondent “may not rest on the mere allegations or denials in his or her pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue for trial”.

[26] Summary judgment is not limited to cases where the evidence is uncontested. When possible, the application judge should make findings of fact (*Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49, paras 21 and 36, [*Weir-Jones*], *Public Service Alliance of Canada v Ryland*, 2023 NWTSC 1, paras 40-41). However, there are factual issues that are not suitable for determination by way of summary judgment, such as credibility issues and conflicts in the evidence on material issues (*Weir-Jones*, para 38).

ONEC’s Claim against Northland

[27] Northland submits that this matter is suitable for summary judgment arguing that the affidavit and documentary evidence allow the court to fairly resolve the issues in dispute. ONEC claims the parties have presented conflicting evidence on material issues and that there are credibility issues that require a trial.

[28] As set out above, in reviewing the evidence, I must assume that the parties have put their best foot forward and that they have presented the evidence they would rely on at trial. I find that the assessment of ONEC's claim is suitable for summary judgment because even taking ONEC's case at its best, there is simply not sufficient evidence to support ONEC's claim. On the record adduced before me, ONEC's action against Northland is bound to fail at trial.

[29] The parties filed evidence. Northland filed an affidavit of Rob Christopher Adams. Mr. Adams was, at the time of the project, and still is, the President of Northland. Mr. Adams also held the position of President of Northern Operations for ONEC from February 1, 2021 to June 20, 2022. Mr. Adams deposed on his involvement and Northland's involvement in the Inuvik High Point Wind Project. He also produced as exhibits to his affidavit numerous documents related to the project from its inception to the termination of Northland's contractual relationship with ONEC and documents related to Northland's claim under the Bond. The affidavit includes evidence that relate both to ONEC's Statement of Claim and Northland's counterclaim.

[30] On December 13, 2024, Mr. Adams was cross-examined on his affidavit by counsel for ONEC and Liberty and by counsel for NTE. Following this questioning, Northland produced Responses to Undertakings.

[31] ONEC filed two affidavits: the affidavit of Denis Wiart, Chief Executive Officer of ONEC, and the affidavit of Stephen Pugh, an Operations Consultant contracted by ONEC. Mr. Wiart deposed on Mr. Adams' involvement with ONEC and in the Inuvik High Point Wind Project, the role and responsibilities of ONEC in the project, including the contractual relationships between the parties in this litigation, his dealings with Mr. Adams before and during the project and issues with Northland's invoicing. He produced, as exhibits to his affidavit, related documents.

[32] Mr. Pugh deposed on his involvement in the Inuvik High Point Wind Project, his dealings with Mr. Adams, Mr. Adams' role and responsibilities in the project including Mr. Adams' role in reviewing and approving subcontract invoices for ONEC, Northland's claim for standby charges and ONEC's invoicing of NTE. Mr. Pugh also produced documents as exhibits to his affidavit.

[33] Neither Mr. Wiart, nor Mr. Pugh, provided any evidence that relates directly to ONEC's four causes of action against Northland: 1) inducing breach of contract;

2) in inducing the breach of contract by third parties; breaching the terms of the IPD Contract; 3) causing damage to equipment belonging to ONEC; and 4) using fuel provided by third parties under contract with ONEC after the termination of the IPD Contract. Northland did not cross-examine Mr. Wiart or Mr. Pugh.

Inducing Breach of Contract

[34] The tort of inducing breach of contract requires the proof of the following elements:

- the existence of a contract between the plaintiff and a third party;
- knowledge or awareness by the defendant of the contract;
- a breach of the contract by a contracting party;
- the defendant induced the breach;
- the defendant, by their conduct, intended to cause the breach;
- the defendant acted without justification; and
- the plaintiff suffered damages.

369413 Alberta Ltd. v Pocklington, 2000 ABCA 307 at para 13; *38274 Yukon Inc. v Borealis Fuels & Logistics Ltd.*, 2024 YKCA 17 at para 14

[35] There is evidence before me that ONEC entered into the Prime Contract with NTE and that ONEC also had contracts with several subcontractors who worked on the Inuvik High Point Wind Project. Mr. Adams acknowledged in cross-examination that he was aware of these contracts. However, there is no evidence of a breach of contract by NTE or by the subcontractors. The evidence before me of the circumstances of termination of the Prime Contract by NTE is scant. Apart from the Prime Contract, the parties have not produced the contracts allegedly breached. There is no evidence on the identity of the subcontractors ONEC claims Northland induced to breach terms of the subcontracts or of the way Northland might have induced these subcontractors to do so. There is no evidence that points to how Northland would have induced NTE to breach the Prime Contract. There is no evidence that Northland intended, by its conduct, to cause NTE or any subcontractor to breach their contract. In addition, in cross-examination, Mr. Adams explained that the reason subcontractors left the project was that they were not being paid by ONEC in breach of their contracts with ONEC. ONEC did not lead any evidence to the contrary.

[36] ONEC argues that it does not have the burden of proof on this application. Relying on *Weir-Jones*, it submits that on an application for summary judgment, there is no symmetry of burdens. As the resisting party on this application, it does not have to prove its own case but only needs to convince the court that the moving party has failed to establish there is no genuine issue requiring a trial (*Weir-Jones*, at paras 32 and 43). I agree, but ONEC cannot simply rely on the mere allegations in its pleadings (Rule 176 of the *Rules*). As stated above, the respondent also has an obligation to put its best foot forward and present the evidence it intends to rely on at trial.

[37] I must assess whether Northland has met its burden to establish ONEC's claim is meritless based on the record before me (*Weir-Jones*, paras 37 and 39). Because of the absence of evidence of essential elements of the tort of inducing breach of contract, I am satisfied that Northland has met its burden to establish that this claim has no merit.

Breach of Contract

[38] ONEC also alleges that Northland breached the IPD Contract. On the application for summary judgment, ONEC argues that Northland breached the IPD Contract when it terminated the contract and refused to remobilize to the work site after the dispute that arose between ONEC and NTE in November 2022 was resolved. ONEC submits Northland's claim for payment of the outstanding invoices was not justified under the IPD Contract. As a result, it claims the decision to terminate the contract on that basis was equally unjustified and was a breach of the IPD Contract.

[39] The problem with these allegations is that they were not pled in the Statement of Claim and ONEC has not sought to amend its pleadings. ONEC's Statement of Claim only refers to a breach of the terms of the IPD Contract in "committing the Northland Inducements". In the Statement of Claim, the "Northland Inducements" refer to the conduct that underlies the allegations of inducing a breach of contract I described above. ONEC cannot now rely on a different cause of action it did not plead (Rules 109 and 112 of *the Rules*; also see *Martel v Nguyen* 2023 ONSC 1382, at para 49). It would be unfair to Northland to allow ONEC to put forward this new ground of action at this stage of the proceedings.

[40] Considering the inducements are the underlying acts to the breach of contract allegation, the same issues of lack of evidence I set out above arise with respect to this cause of action. I am satisfied that Northland has met its burden to establish that ONEC's claim for breach of contract has no merit.

The Damage of Equipment and Use of Fuel Claims

[41] ONEC also seeks compensation alleging Northland damaged equipment owned by ONEC and for the costs of fuel charged to ONEC and stored at Northland's facility.

[42] ONEC did not file any evidence relating to these allegations. The only evidence before me relating to these claims is that of Mr. Adams in his affidavit and in cross-examination in which he claims the equipment was in perfect condition when it left Northland's possession and that although fuel was stored at Northland's facility in Inuvik, it was not Northland who used it after the termination of the IPD Contract.

[43] ONEC submit that Mr. Adams' credibility has been challenged, more specifically with respect to Northland's invoicing practices and the accuracy of the outstanding invoices. ONEC says that this should cause the court to be cautious before accepting any part of Mr. Adams's account, including those that relate to damage of equipment and the use of fuel.

[44] As I will address in more detail below, I agree with ONEC that the evidence presented by the parties raise genuine concerns about Mr. Adams' credibility with respect to Northland's invoicing. However, I do not accept that as a result, I cannot accept any of Mr. Adams' evidence. ONEC chose not to present evidence in support of its claim. Based on the record before me, there is no evidence that calls into question Mr. Adams' account that Northland did not damage ONEC's equipment, and that Northland did not use ONEC's fuel after the termination of the IPD Contract. In addition, and importantly, ONEC did not present any evidence before me to support these allegations.

[45] I am satisfied that Northland has met its burden to establish that ONEC's claims related to the damage of equipment and the use of fuel have no merit.

The Application to Strike the Statement of Claim

[46] Considering my conclusion on the summary disposition of ONEC's claim, I do not need to address Northland's alternative request for relief seeking an order striking the Statement of Claim against Northland.

Northland's Counterclaim

[47] Northland argues that this matter is suitable for summary disposition because based on the affidavit and documentary evidence, the court can reach a fair decision on the issues raised by the counterclaim. It contends that any conflict in the evidence filed by the parties can be resolved by considering the quality of the evidence submitted. ONEC, Liberty and NTE submit that there are material facts in dispute on the nature of the contractual relationship between the parties and with respect to Northland's invoicing, issues that are central to the counterclaim. They also take the position there are credibility issues the court cannot confidently resolve without hearing *viva voce* evidence.

[48] Having carefully reviewed the record, I find there are issues I can decide based on the evidence presented on this application. The contracts at play have been filed and the affidavits from Mr. Adam and Mr. Wiart provide sufficient context for me to determine who are the parties to the Prime Contract and the nature of the IPD Contract. I can also decide whether Northland falls into the definition of claimant under the Bond. As a result, I can fairly resolve the questions related to liability. However, the conflicting evidence and credibility issues regarding Northland's invoicing are such that I cannot confidently decide on the scale of the damages.

ONEC and Liberty's Liability

[49] Northland invoiced ONEC for the first time on March 1, 2022. For the work completed on the Inuvik High Point Wind Project, Northland submitted a total of 10 invoices to ONEC totaling \$1,850,970.85. The last invoice was issued on November 1, 2022. On April 18, 2022, ONEC paid in full the Access Road Mobilization Fee of \$311,202.74 invoiced on March 18, 2022. Subsequently, ONEC made partial payments of Northland's invoices starting on July 22, 2022, until September 15, 2022. The total amount paid by ONEC to Northland for the work completed on the project is \$821,378.23. In March 2023, Northland submitted three additional invoices for equipment standby charges incurred in November and December 2022 and in January 2023 for a total of \$325,206.

[50] The main point of contention between ONEC and Northland is whether Northland's invoices to ONEC were compliant with the terms of the IPD Contract and any other agreements reached by the parties and, as a result, whether Northland is entitled to further payments from ONEC. ONEC does not dispute that under the IPD Contract it had the obligation to reimburse Northland for the costs Northland incurred in the performance of the contract. The terms that govern the reimbursement of Northland's costs are stated at Article 5 of the IPD Contract and stipulate that "Reimbursable Costs" are actual costs supported by receipts, invoices and other suitable documentation. The real issue is whether Northland has proven that it has incurred reimbursable costs in an amount that exceeds what ONEC has already paid. Whether the contract is a partnership or a subcontract does not change ONEC's legal obligation to pay for admissible reimbursable costs.

[51] The nature of the contractual relationship between NTE, ONEC and Northland is however relevant to Liberty's liability. Liberty claims that Northland was a party to the Prime Contract, acting in partnership with ONEC. It also notes that the IPD Contract sets out that ONEC and Northland share a common purpose and interest in the project and have equal right of control in the project. It highlights that the IPD Contract creates a "risk pool" condition that indicates the parties intend on sharing both the profits and any losses of the project. Liberty argues this creates a contractual relationship between Northland and ONEC that is different from a traditional subcontract. As a result, it submits that Northland does not qualify as a claimant under the Bond. Both Northland and NTE take the position that Northland was not a party to the Prime Contract but rather a subcontractor. Northland also submits that irrespective of the label attached to the IPD Contract, Northland falls within the definition of claimant under the Bond.

[52] The Bond defines a claimant in the following way:

A Claimant for the purpose of this Bond is defined as one having a direct contract with the Principal for labour, material, or both, used or reasonably required for use in the performance of the Contract, labour and material being construed to include that part of water, gas, power, light, heat, oil, gasoline, telephone service or rental equipment directly applicable to the Contract provided that a person, firm, corporation who rents the equipment to the Principal to be used in the performance of the Contract under a contract which provides that all or any part of the rent is to be applied towards the purchase price thereof, shall only be a Claimant to the extent of the prevailing industrial rental value of such equipment for the period during which the equipment was used in the performance of the Contract.

[53] Courts must adopt a common-sense approach to the interpretation of contracts. The focus of this exercise is to determine “the intent of the parties and the scope of their understanding”. As stated in *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 at para 47 [*Sattva*]: “[t]o do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract”. Recognizing that words can have a different meaning depending on the circumstances, the context in which the contract was formed is important (*Sattva*, para 48). The intent of the parties must be assessed objectively, approaching this issue by “considering the factual matrix, ‘other than the subjective intention of the parties, through the lens of an objective reasonable bystander’ to determine the nature of the agreement” (*Schrof v Schrof*, 2025 MBCA 49, para 15).

[54] In considering the interpretation of provisions of a contract, “one provision must not be read in isolation but should be considered in harmony with the rest of the contract and in light of its purposes and commercial context” (*Tercon Contractors Ltd. v British Columbia (Transportation and Highways)*, 2010 SCC 4, para 64). The parties’ conduct after they entered the agreement can be used to resolve ambiguities only if the contract remains unclear after considering its text and the factual matrix (*Shewchuk v Blackmont Capital Inc.*, 2016 ONCA 912).

[55] Applying these principles to the facts of this case, I am satisfied that Northland is not a party to the Prime Contract. On the cover page of the contract, in the box “Name of Contractor” the following appears: “ONEC Construction Inc In Partnership with Northland Builders Ltd”. Both Mr. Adams and Mr. Wiart explained in their respective affidavits that Northland’s participation in the project was essential to securing the bid for the Prime Contract because Northland is a Gwich’in business and the prominent role of Gwich’in businesses was key to obtaining this contract. This explains why Northland’s name had to appear on the Prime Contract, whether it was a party to the contract or not. The simple mention of Northland on the cover page of the contract is not determinative of this question.

[56] I acknowledge that the day before Mr. Adams and Mr. Wiart signed the Prime Contract, Mr. Adams emailed a third party indicating that the contract was signed “under ONEC Construction and Northland Builders”. However, I find this evidence of little probative value because the evidence before me does not provide any context to this brief exchange of emails between Mr. Adams and the third party. In addition, and more importantly, the text of the contract does not support ONEC and Liberty’s position. The signature page identifies two parties to this contract: ONEC and NTE.

Mr. Adams and Mr. Wiart signed the contract and they both did so on behalf of ONEC. At the time the contract was signed in January 2022, Mr. Adams was the President of Northland, but he was also the President of Northern Operations for ONEC, and it is in that latter capacity that he signed the contract, as evidenced by his title under his signature. Mr. Wiart, as CEO of ONEC, also signed the contract in the same box under “ONEC Construction Inc”. NTE and ONEC are also the only parties identified under “Notice Address”. I additionally note that the Prime Contract does not give any responsibilities to Northland and that Northland is listed as a subcontractor in the Prime Contract.

[57] Considering the text of the Prime Contract and the circumstances known to the parties at the time they entered the contract, an objective and reasonable person would conclude that Northland is not a party to the Prime Contract.

[58] Liberty argues that the conditions of the IPD Contract on the sharing of responsibilities as well as the sharing of profits and losses create a partnership, such that Northland does not fall within the definition of claimant under the Bond. I agree with Liberty that the IPD Contract creates a form of collaboration between ONEC and Northland that is not typical of a construction subcontract. However, Article GC 2.1.2. specifically states that “[a]lthough the Contract establishes a relationship of mutual trust and good faith [...], it does not create an agency relationship, fiduciary relationship, partnership, or joint venture” (emphasis added). In addition, the Bond defines a claimant as “one having a direct contract with the Principal for labour, material, or both, used or reasonably required for use in the performance of the contract”. This language is broad and does not limit claimants to traditional subcontractors. In this case, the IPD Contract identifies the “Owner” as ONEC and the “Contractor” as Northland, creating a form of subordination. Article 5 Reimbursable Costs and Article A-6 Payment set out an obligation on ONEC to pay Northland all actual costs supported by receipts, invoices and other suitable documentation it incurred in performing the contract, plus overhead of 8%. These terms set out a direct contract between ONEC and Northland for labour, material, or both, reasonably required for use in the performance of the contract.

[59] I conclude that ONEC and Liberty are liable for the costs Northland incurred for the work performed on the Inuvik High Point Wind Project. However, they must pay only the outstanding amounts due under the IPD Contract. Based on the evidence presented before me, I am satisfied that some amount is owed to Northland. However, as explained below, I am not convinced that I can, at this stage, fairly determine the exact amount Northland is entitled to receive.

NTE's Liability

[60] Northland advances that NTE is liable for the outstanding amount not already paid by ONEC as a breach of contract or under the doctrine of unjust enrichment if the court finds that Northland stood in a contractual or quasi contractual relationship with NTE, which Northland denies. This was presented by Northland as a position in the strict alternative, in the event my decision on ONEC and Liberty's liability left them without any other recourse to recover the amounts Northland claims are owed.

[61] NTE claims that the counterclaim is not appropriate for summary disposition. It argues Northland is not a party to the Prime Contract and Northland's pleadings against NTE do not make out a claim for breach of contract. In addition, NTE takes the position that there are material facts in dispute and credibility issues that require a trial. In the alternative, NTE submits that the application for summary judgment against NTE based on the doctrine of unjust enrichment should fail on the merits. It claims the test for unjust enrichment is not met because the contract between NTE and ONEC and the contract between ONEC and Northland are juristic reasons that would justify any enrichment in this case.

[62] As explained above, I am satisfied that I can resolve the issues of liability on the record before me. Having found that Northland is not a party to the Prime Contract and that ONEC and Liberty are liable to Northland for any proven outstanding amounts, I make the corresponding finding that NTE is not liable to Northland.

Damages

[63] Northland submits that the evidence before me is sufficient to rule on the extent of the contractual damages. ONEC and Liberty claim that factual and, more specifically, credibility issues make the question of damages unsuitable for summary judgment.

[64] The material facts at the heart of the issue of damages relate to the validity of Northland's invoices. Northland acknowledges that there is conflicting evidence. However, relying on *LaBuick Investments Inc. v Carpet Gallery of Moose Jaw Ltd*, 2017 SKQB 341 and *Jardine v Saskatoon Police Service*, 2017 SKQB 271 for the proposition that some apparent conflicts of evidence may be resolved at the stage of a summary judgment application depending on the nature and quality of the evidence presented by the parties, it claims that it has presented better quality evidence than

the other parties. Northland argues this allows me to make the necessary findings of facts and apply the law to those facts such that a just result can be reached without the necessity of a trial. Northland takes the position that Mr. Adams' account is thoroughly supported by documentary evidence. It further submits that ONEC's affidavits are self-serving, conclusionary and argumentative.

[65] I will deal first with the argument relative to ONEC's affidavits. I disagree with Northland that Mr. Wiart and Mr. Pugh's affidavits are self-serving, conclusionary and argumentative. I agree that some paragraphs of the ONEC affidavits are argumentative, for example, paragraphs 12 and 32 of the Wiart affidavit and paragraph 19 of the Pugh Affidavit. However, the affidavits are not riddled with inadmissible evidence, as alleged by Northland, such that I should disregard them altogether. Both affidavits contain, for the greater part, statements of fact, many of which are supported by documents, that are relevant to this litigation. The evidence presented by ONEC is not a general denial or bare assertions without supporting evidence as alleged by Northland. I have not considered the inadmissible portions of the affidavits set out above, but I have considered the Wiart and Pugh affidavits in reaching my decision.

[66] Turning to Northland's argument that Mr. Adams' affidavit should be preferred because it is largely supported by documentary evidence, I agree that some of Mr. Adams' evidence is supported by documents, but I find that central areas of dispute remain.

[67] On March 18, 2022, Northland submitted an invoice to ONEC for a mobilization fee, which was paid in full. Starting in April 2022 and until November 2022, Northland submitted invoices to ONEC monthly for the costs it incurred during that month. The costs claimed include flat monthly rates, for example, for project support services, shop and utility expenses, well site fees, monthly accommodation for Mr. Adams, as well as various other expenses, for example, the costs of workers' accommodation and meals. Northland has filed receipts to prove some of these expenses, but many are not supported by any documents. ONEC and Liberty argue that as a result, the invoices do not comply with the terms of the IPD Contract with respect to reimbursable costs. They take issue with several items of expenses claimed by Northland.

[68] For example, Northland invoiced ONEC for project support services at a rate of \$5,000 per month and for shop and utility expenses at a rate of \$8,000 per month. Mr. Adams claims Mr. Wiart agreed to the monthly rates. In cross-examination, Mr.

Adams said the agreement was confirmed either by email, verbally or both. However, when asked to provide supporting documentation, he was not able to provide any documentary evidence of such agreements. Instead, in a response to an undertaking, Northland pointed to text messages and emails exchanged between Mr. Adams and Mr. Wiart it claims establishes that ONEC reviewed and accepted Northland's invoices, including the project support service and shop and utilities monthly fees. In his affidavit, Mr. Wiart denies that the Northland invoices were ever approved by anyone acting on behalf of ONEC. Mr. Wiart deposes that in fact, ONEC made payments to Northland as advances to ensure the project progressed, but the invoices were not accepted as presented.

[69] Although I agree with Northland that some communications between Mr. Adams and Mr. Wiart suggest the invoices were accepted, other communications highlighted by ONEC show that Mr. Wiart challenged the accuracy of the invoices, questioned the adequacy of the supporting documents and wrote to Mr. Adams noting that a cost review might have to be completed at the end of the project to ensure the costs claimed by Northland accord with the terms of the IPD Contract. In cross-examination, Mr. Adams acknowledged that from the very beginning of the project, ONEC had conveyed to him that he was not providing enough support for the Northland invoices.

[70] The evidence of the parties must also be assessed in light of the terms of the IPD Contract. Article 5 defines reimbursable costs as actual costs supported by receipts, invoices and other suitable documentation, plus overhead of 8%. Article GC 1.6 imposes an obligation on the parties to keep full and detailed accounts and records necessary for the documentation of the reimbursable costs and to afford the other party to the contract reasonable access to records relating to reimbursable costs. The conflicting evidence on this issue is such that I cannot rule with confidence on the material facts without hearing *viva voce* evidence.

[71] Northland's invoicing for the cost of labour is also in dispute. For example, Northland charged ONEC for work performed by Mr. Adams for 14 to 16 hours a day, every day from March 2022 to some time in October 2022. In cross-examination, Mr. Adams was asked if he took any time off from March 2022 until November 2022. After a brief hesitation, when he said he was not sure if he took time off in November or October, he claimed that he did not take a day off during that period. The October invoice confirms that he did take time off in October, which is reflected on the invoice, but otherwise Northland charged for Mr. Adams' work on the project 7 days a week, 14 to 16 hours a day, from March to October 2022.

[72] ONEC and Liberty take issue with Mr. Adams' evidence. They say Mr. Adams' claim that he worked 14 to 16 hours a day every single day for over seven months is implausible. ONEC and Liberty also point out that the alleged timesheets supporting Mr. Adams' hours provided by Northland in response to an undertaking are not timesheets but rather invoices without any details of the actual dates and times Mr. Adams worked on the project. In addition, Mr. Wiart deposed that in July 2022, he travelled to Inuvik and that during his stay in the region, he took a vacation day with Mr. Adams and his father to explore the Mackenzie River. Yet, Northland charged ONEC for Mr. Adams working 14 hours on the Inuvik High Point Wind Project that day. Northland argues that Mr. Wiart's evidence is anecdotal and cannot cast doubt on Mr. Adams' credibility. I disagree. If the court accepts Mr. Wiart's evidence that Mr. Adams was not working on the project that day, it means that the timesheets Northland presented are not accurate and it could put into question Mr. Adams' credibility and the reliability of the documentary evidence Northland filed on this application to support the invoices.

[73] The monthly flat rates charged for project support services and for shop and utility expenses and the costs of labour are examples that show there is conflicting evidence related to Northland's invoicing under the IPD Contract that requires credibility findings I cannot reach without the benefit of *viva voce* evidence. I agree with ONEC and Liberty that there is a genuine issue that requires a trial on damages.

[74] Northland advanced an argument in the alternative. It relied on the doctrine of contractual *quantum meruit* in the event I find that the parties did not reach an agreement on the specific costs items under the IPD Contract. This doctrine applies when the parties to a valid contract for the provision of good or services intended to be remunerated for but failed to provide for the terms of such remuneration. In such circumstances, they are presumed to have agreed that a reasonable price be paid. Considering there is a contract between the parties that provides for the terms of the remuneration, this doctrine is not engaged. (*McElheran v Great Northwest Insulation Ltd.*, 1994 CanLII 18492 (NWT CA); *CH2M Hill Energy v Consumers' Co-operative Refineries Ltd.*, 2010 SKCA 75, para 24)

Costs

Northland, ONEC and Liberty

[75] Northland is seeking solicitor and client costs against ONEC, or in the alternative, enhanced costs, claiming that ONEC's claim against Northland was

baseless and brought in bad faith to pre-emptively offset the amounts owed to Northland by ONEC. Northland also argue that ONEC and Liberty acted in bad faith in denying Northland's claim under the IPD Contract and the Bond. ONEC and Liberty submit that there is no valid reason to order elevated costs in this case and that if any costs are ordered, it should be on a party and party scale.

[76] Considering that Northland is successful on some, but not all, aspects of the summary judgment application, I must first decide which party, if any, is entitled to costs.

[77] In *Carter v Northwest Territories Power Corp.*, 2014 NWTSC 72, Shaner J. (as she was then) examined how to determine who was the successful party in a litigation. She recognized that it can be a challenging exercise. At paragraph 21, she wrote:

[T]hat a party is not successful on all of the issues it brings before the court does not necessarily equate to divided success. A party that succeeds on only some issues may nevertheless be considered "successful". The Court must determine which, if any, party prevailed by examining the entire event.

Quoting with approval *Fotheringham v Fotheringham*, 2001 BCSC 1321, she adopted an approach focused on substantial success when looking at all the disputed matters globally. The question is who was substantially successful looking at the entire event.

[78] Guided by this framework, I find that, vis-à-vis ONEC and Liberty, Northland was substantially successful on this application. Northland's position prevails with respect to ONEC's claim and with respect to the counterclaim, on the liability of both ONEC and Liberty. The only issue that I find requires a trial is the scale of damages. Accordingly, Northland is entitled to costs.

[79] The next question is what the appropriate scale of costs in this case is: solicitor and client costs or enhanced costs, as argued by Northland, or as suggested by ONEC and Liberty, party and party costs.

[80] Solicitor and client costs awards are exceptional. They are ordered as a punitive measure only in cases of reprehensible, scandalous or outrageous conduct on the part of one of the parties (*Northwest Territories (Commissioner) v 923115 NWT Limited*, 2019 NWTSC 13, para 35; *Marlowe et al v Barlas et al*, 2025 NWTSC 12, para 50 [*Marlowe*]). Enhanced costs, a lower scale of costs based on a multiple

of the tariff costs, can also be ordered against a party who engages in blameworthy conduct during the litigation, including a party who unduly delays, hinders or confuses the litigation or who forces litigation where there is no serious issue of fact or law that requires lengthy and expensive proceedings (*Marlowe*, para 49).

[81] In this case, I did find that Northland met its burden to establish that ONEC's claim was without merit. However, I am not prepared to draw the further inference that ONEC filed its claim knowing it was meritless, therefore abusing the court process. Also, I do not accept Northland's argument that ONEC and Liberty acted in bad faith in refusing to make payment to Northland. I am finding against ONEC and Liberty on the issue of liability on the counterclaim, but the positions they advanced were reasonable. In addition, their arguments were well founded regarding the issue of damages. There are no other allegations of blameworthy conduct by ONEC and Liberty that would justify enhanced costs. ONEC and Liberty will pay Northland party and party costs.

Northland and NTE

[82] Relying on Rule 180 (1) of the *Rules*, NTE is seeking solicitor and client costs against Northland.

[83] Rule 180 states:

180. (1) Subject to subrule (2), where the applicant obtains no relief on an application for summary judgment, the Court may fix the respondent's costs on the application on a solicitor and client basis and order the applicant to pay the costs without delay.

(2) The Court may decline to fix and order costs under subrule (1) where it is satisfied that the making of an application, although unsuccessful, was nevertheless reasonable.

(3) Where it appears to the Court that a party to an application for summary judgment has acted in bad faith or primarily for the purpose of delay, the Court shall fix the costs of the application on a solicitor and client basis and order the party to pay them without delay.

[84] Charbonneau J.'s decision in *Paul's Aircraft Services v Kenn Borek Air Ltd.*, 2012 NWTSC 85 sets out the principles that guide the court when deciding on cost awards under Rule 180. It stresses that the decision to award solicitor and client costs against an unsuccessful applicant is a discretionary one and highlights that the

purpose of Rule 180 is to deter unreasonable and dilatory applications for summary judgment (paras 15 and 18). In that case, although the court dismissed the summary judgment application, Charbonneau J. found that it did not fall into that category of unreasonable or dilatory applications that should attract costs on a solicitor and client basis.

[85] I come to the same conclusion in this case. The relief sought by Northland against NTE was in the strict alternative. Considering ONEC and Liberty argued that Northland was a party to the Prime Contract, it was reasonable for Northland to advance an alternative position against NTE.

[86] NTE is a successful party on this application and consequently, it is presumptively entitled to party and party costs. I see no valid reason to depart from the general rule in this case.

CONCLUSION

[87] I find that Northland has established that ONEC's claim against Northland does not require a trial and is without merit. I also find that Northland has met its burden to establish that the issue of liability on the counterclaim does not require a trial. Northland has proven that ONEC and Liberty are liable to pay contractual damages. However, because there is conflicting evidence on material facts and the necessity to reach findings of credibility, I conclude that there is a genuine issue that requires a trial on the scale of damages. Considering my conclusion on the liability of ONEC and Liberty, the counterclaim against NTE is meritless.

[88] Having found that I can rule on liability but not on the scope of damages, the need to manage this litigation, to adopt an efficient and cost-effective approach and, to the extent possible, shorten the litigation and focus it on the real issues at play, I partially grant the summary judgment and order a trial on damages only (Rule 176(3) and *VP Auto Sales & Service Ltd. v Ahmed2 Inc.*, 2024 ONCA 507, para 25 leave to appeal to SCC dismissed).

[89] I make the following order:

- I grant Northland Builders Ltd.'s application for summary judgment with respect to ONEC Construction Inc's claim against Northland Builders Ltd.;

- I dismiss ONEC Construction Inc.’s claim against Northland Builders Ltd.;
- I partially grant Northland Builders Ltd.’s application for summary judgment with respect to Northland Builders Ltd.’s counterclaim against ONEC Construction Inc. and Liberty Mutual Insurance Company;
- I find ONEC Construction Inc. and Liberty Mutual Insurance Company liable to contractual damages to Northland Builders Ltd.;
- I order a trial on the quantification of damages with respect to Northland Builders Ltd.’s counterclaim against ONEC Construction Inc. and Liberty Mutual Insurance Company;
- I dismiss Northland Builders Ltd.’s application for summary judgment against NWT Energy Corporation (03) Ltd.;
- I dismiss Northland Builders Ltd.’s counterclaim against NWT Energy Corporation (03) Ltd.;
- ONEC Construction Inc. and Liberty Mutual Insurance Company shall pay Northland Builders Ltd. party and party costs in any event of the cause;
- Northland Builders Ltd. shall pay NWT Energy Corporation (03) Ltd party and party costs.

Annie Piché
J.S.C.

Dated at Yellowknife, NT, this
6th day of August 2025

Counsel for the Plaintiff/Defendant by Counterclaim
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Counterclaim Liberty Mutual Insurance Company:

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Northland Builders Ltd.:

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Haley Stearns

**IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES**

BETWEEN:

ONEC CONSTRUCTION INC.

Plaintiff /Defendant by Counterclaim

-and-

NWT ENERGY CORPORATION (03) LTD.

Defendant/Defendant by Counterclaim

-and-

LIBERTY MUTUAL INSURANCE COMPANY

Defendant by Counterclaim

-and-

NORTHLAND BUILDERS LTD.

Defendant/Plaintiff by Counterclaim

**MEMORANDUM OF JUDGMENT
ON APPLICATION
FOR SUMMARY JUDGMENT
OF
THE HONOURABLE JUSTICE ANNIE PICHÉ**
