SUPREME COURT OF NOVA SCOTIA

Citation: *PCL Constructors Canada Inc. v. Town of Truro*, 2025 NSSC 284

Date: 20251014
Docket: Hfx No. 435886
Registry: Halifax

Between:

PCL Constructors Canada Inc.

Plaintiff

v.

Town of Truro and Municipality of the County of Colchester

Defendants

v.

Cameron Contracting Limited carrying on business as Camcon Precast

Third Party

Decision

Judge:	The Honourable Justice John Bodurtha
Heard:	September 25, 26; October 1, 2, 3, 7, 8, 9, 10, 15, 16, 17, 21, 23, 24, 28, 29; November 22; December 20 and 23, 2024 in Halifax, Nova Scotia
Final Written Submissions:	January 22, 2025
Counsel:	William L. Ryan, KC, and John Shanks for the Plaintiff Dennis J. James, KC, Grace A. MacCormick and Gabrielle Everest for the Defendants Cameron Contracting Limited, no appearance

By the Court:

Overview

[1] This action arises from a dispute over a construction contract entered into between the Plaintiff/Defendant by counterclaim, PCL Constructors Canada Inc. ("PCL"), and the Defendants/Plaintiffs by counterclaim, the Town of Truro and the Municipality of the County of Colchester (the "Owners"). The parties signed a standard form CCDC-3 (1998) cost plus contract (the "Contract"), with amendments made through supplemental conditions. The Contract was to construct the Rath Eastlink Community Center ("RECC"), a community multisport complex in the Town of Truro.

[2] The construction of the RECC (the "Project") took place between 2010 and 2014. PCL was selected as general contractor and construction manager for the Project. The Owners jointly funded the Project and now operate the facility.

[3] PCL argues it is entitled to increased Contractor's Fees between the parties because the extensions to the construction schedule and changes to the Project constituted an increase in the scope of the work defined in the Contract. Pursuant to the Contract, costs which exceed the budget accrue an additional fee and mark up.

[4] The Owners claim that they do not owe further costs to PCL under the Contract because there was no increase in the scope of the work which was performed, and that the delays in completing the RECC were the fault of PCL and/or their subcontractors. The Owners counterclaimed for damages resulting from the delayed opening of the RECC and for damages arising from deficiencies found in the construction of the facility, including, but not limited to, the costs needed to replace the arena and pool area stairs because they do not meet the National Building Code of Canada ("NBCC").

[5] PCL has not performed any remedial work to the stairs. The Owners have not performed any repairs to the stairs. To date, the risk of the non-compliant stairs has been managed by advising ushers to inform the patrons to be careful on the stairs.

Legal Proceedings

[6] The original hearing was scheduled for May and June of 2018. Shortly before that trial began a patron of the RECC, who fell when climbing the stairs in the arena, filed a lawsuit against the Owners. An expert's report produced in that litigation opined that the section of the stairs where the accident occurred were non-compliant with the NBCC.

[7] That trial was adjourned to allow the pleadings to be amended to include a counterclaim for the deficient stairs and to involve a third party, Cameron Contracting Limited operating as Camcon Precast. Camcon was the subcontractor responsible for the concrete work who PCL retained during the construction of the RECC. Camcon did not participate in the trial. PCL has not filed for default judgment against Camcon.

Facts

Contract

[8] In 2008, the Owners sought to construct the RECC, a multi-use community center within the Town of Truro. The vision of the RECC was a 150,000 square foot recreational facility, including an NHL-sized ice pad, aquatic centre, weight and exercise facility, walking and jogging track, as well as offices and administrative and meeting space. The Project was a joint venture between the Owners.

[9] A Project Steering Committee (the "PSC") was established by the Owners to oversee the construction. Paul Smith was the Project manager. D'Arcy Arthurs was an architect with Shore Tilbe (who became Perkins Will), the Project's lead architect. Perkins Will worked alongside the local architect, John Dobbs Associates ("JDA").

[10] Following a tendering process, PCL was the successful bidder on the Request for Proposals issued by the Owners in 2009. As of October 14, 2009, PCL became the general contractor and construction manager for the Project.

[11] Prior to being awarded the Contract, PCL submitted a "Proposal for Modified Construction Management Services for the Central Nova Scotia Regional Civic Centre Project" dated September 18, 2009 (the "Proposal"). The Proposal was incorporated into the Contract as a contract document. The parties operated under the Contract with minimal supplementary conditions.

[12] Although the Contract is dated October 14, 2009, it was not signed until February 2012. John Volcko, VP of PCL, testified that it was important to get the Contract finalized. The parties reviewed the Contract; the PSC made a recommendation to the two respective municipal councils. The Contract was executed by the mayors and CAOs of each municipality. None of the terms and conditions from 2009 were changed. Neither party made any requests for amendments to any of the provisions within the Contract.

[13] The relationship between the parties and how they operated did not change from when the construction phase began in 2010 to the date of signing. The signing of the Contract was merely a codification of the already existing sixteen-month relationship between the parties.

[14] Over the course of construction, many changes and requirements for clarification were made to the original scope of the Project, increasing the construction budget and the associated costs.

[15] When PCL submitted its Proposal for the Project the initial budget for the Project was $30 million. In October 2009 the construction budget increased by over 30% to $41.28 million because of incorporating requested changes from the Owners. The cost of the construction budget was more than $48 million when the Project was completed.

Commencement of the Work

[16] The work commenced on September 8, 2010, with a substantial completion date of October 19, 2012. Subsequently, there was a Project budget increase, and an additional three months were added bringing the revised construction schedule from 23 months to 26 months.

[17] PCL was required during construction to submit approximately 497 separate requests for Information to the Owners and their design team. These requests were for additional and necessary information and/or clarification to allow PCL to proceed with construction of the Project.

[18] PCL was also required to submit over 350 contemplated change orders. Many of the change orders revised the work being performed by PCL and its subcontractors on the Project.

[19] The Project was ultimately finished in phases. PCL suggested the Project would be tendered in stages (sequential tendering) in its Proposal. This approach allowed the RECC to open various areas to the public in advance of the Project's overall completion. Substantial completion for the final phase occurred on May 8, 2013. This was approximately seven months later than anticipated from the October 19, 2012, date and five months later than the January 25, 2013, extension date proposed by PCL for substantial completion.

[20] PCL incurred additional costs because of the increased construction budget and the time for construction. As a result, PCL claims they are entitled to additional fees under the Contract, for which they seek payment. They argue that most of these additional fees relate to payment of the construction management services fees, an amount allowed pursuant to the Proposal found in the Contract between the parties and to the fees for the PCL employees working on the Project beyond the period set out in the Contract for which their initial fee was negotiated.

[21] The initial budget for the Project was $30 million, and PCL would be paid a Construction Management ("CM") fee of $1,379,000 as the General Contractor.

[22] At the beginning of the Project, it became clear that the Project's budget was insufficient. The PSC agreed to increase the budget to $41,280,000 and adjusted PCL's CM fee to $2,850,305 (the value differs between Article 5.1.2--$2,850,305 in the Contract and Appendix C--$2,830,305. For the purposes of this decision, I am using the Contract figure from Article 5.1.2).

[23] On November 19, 2013, PCL provided the Owners with a claim for an increase in their Construction Management Fee of $1,787,760. By letter dated February 4, 2014, the Owners responded advising that PCL could not claim payment for delays it caused.

[24] The Owners' position is that the substantial delays were caused by PCL using incorrect paint and primer in the arena and on the pool ceiling (which required sandblasting and reapplication), the use of incorrect tiles in the pool, and the construction and waterproofing of the pool itself. These delays and deficiencies are a result of PCL's failure to properly supervise its subcontractors, including a failure to properly coordinate and maintain the schedule of the subcontractors.

[25] PCL disagreed with the Owners' position and wrote on February 28, 2014, time claiming a CM fee of $1,814,303.

[26] Lastly, the Owners argue that PCL is responsible for the failure of the arena and pool area stairs to meet the 2005 NBCC. They argue this is a major deficiency and PCL is responsible for making the arena and pool area stairs compliant with the NBCC as set out in the CBCL report. PCL has refused to undertake the required work from the report.

Issues

[27] The issues are as follows:

(a) What are the relevant sections of the Contract and how are they to be interpreted?

(b) What is the amount owed by the Owners to PCL arising from the completion of the Project, including Construction Management Fees and interest and what is the appropriate value, if any, for the Owners' claims? and,

(c) Is the Owners' proposed remediation for the pre-cast stair issue reasonable and proportional to the degree of the alleged deficiency?

Taking a View

[28] At the request of, and with the agreement of, both parties, the Court took a view of the RECC pursuant to *Civil Procedure Rule* 51.12, which states:

> **51.12 Taking a view**
>
> **(1)** A presiding judge may inspect a place or thing outside court in the presence of the parties.
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> **(2)** A party may inform the judge in court, and on record, of that which the party wishes the judge to observe.
>
> **(3)** No one may communicate with the judge about the issues or the evidence when the inspection is being made, except a party may point the way to that which the party wishes the judge to observe.

[29] The view involved the following:

- Observe the stairways in both the pool viewing area and the arena;
- Climb sections of the stairs;

- Observe in six locations at the lowest level of the stairs where the steps descend in a straight line directly into the boards/glass and then turn 90 degrees to descend to a ground level exit corridor;
- Observe the viewing platform overlooking the pool;
- View the substructure of the steps from the ice-making room located on the main floor; and
- A general review of the facility, including areas such as the arena, pool, office area, entryway and lobby area.

[30] The taking of a view allowed the Court the benefit of being able to situate the general area of the RECC when considering the testimony of the witnesses. It allowed the Court to view features of the precast stairs, the pool, the fitness area, hockey rink and the facility in general that may not have been adequately conveyed using photographs alone.

Analysis

Issue 1 - What are the relevant sections of the Contract and how are they to be interpreted?

Principles of contract interpretation

[31] In *Grafton Developments Inc. v. Allterrain Contracting Inc.*, 2022 NSCA 47, the Court considered the principles of contractual interpretation in the areas of construction agreements and determined that irrespective of whether the terms of the agreement are ambiguous, some examination into the "surrounding circumstances" of the agreement is warranted. The Court stated:

> [17] In *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, the Court described the correct approach to contractual interpretation:
>
> > [47] Regarding the first development, the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. ***The overriding concern is to determine "the intent of the parties and the scope of their understanding***" (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at para. 27, per LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 64-65, per Cromwell J.). To 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***. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:
>
> > No contracts are made in a vacuum: there is always a setting in which they have to be placed. … In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.
> >
> > (*Reardon Smith Line*, at p. 574, per Lord Wilberforce)
> >
> > [Emphasis added]

[18] Surrounding circumstances comprise "facts and circumstances that were or "reasonably ought to have been within the knowledge of both parties at or before the date of contracting"" (*S.A. v. Metro Vancouver Housing Corp.*, 2019 SCC 4, at ¶30).

[19] This Court applied the foregoing principles in *Nova Scotia Public Service Long Term Disability Trust Fund v. Baxendale*, 2022 NSCA 6.

[20] Surrounding circumstances are relevant to contractual interpretation, irrespective of whether the contract is ambiguous:

> [13] Prior to the Supreme Court's decision in *Sattva*, it was not clear that the surrounding circumstances or the "factual matrix" of the contract had to be taken into account when interpreting a contract. The Supreme Court had earlier suggested in *Eli Lilly & Co. v Novopharm Ltd.*, 1998 CanLII 791 (SCC), [1998] 2 SCR 129 at para 55–56 that the surrounding circumstances only had to be considered when the contract was ambiguous. Sattva has made it clear that the ***surrounding circumstances are relevant, whether or not there is an ambiguity in the contract.***
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> (*Directcash Management Inc. v. Seven Oaks Inn Partnership*, 2014 SKCA 106; see also: *Alberta Union of Provincial Employees v. Alberta Health Services*, 2020 ABCA 4, at ¶23-24; *British Columbia (Minister of Technology Innovation and Citizens' Services) v. Columbus Real Estate Inc*., 2016 BCCA 283, at ¶42-43)
>
> [Emphasis added]

[21] Surrounding circumstances may include pre-contractual conduct where there is ambiguity or inconsistency in a contract. However, evidence of the parties' subjective intentions is inadmissible (*Alberta Union of Provincial Employees v. Alberta Health Services*, 2020 ABCA 4, at ¶27, 32 and 49; *1079268 Ontario Inc. v. GoodLife Fitness Centres Inc.*, 2017 ONCA 12, at ¶28).

> [22] The law treats post-contractual conduct with greater circumspection. In *Shewchuk v. Blackmont Capital Inc.*, 2016 ONCA 912, Chief Justice Strathy reviewed the dangers associated with reliance on evidence of subsequent conduct, cautioning against admitting such evidence at the outset of any interpretive exercise:
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> > [46] These dangers, together with the circumscription of a contract's factual matrix to facts known at the time of its execution, militate against admitting evidence of subsequent conduct at the outset of the interpretive exercise. ***Evidence of subsequent conduct should be admitted only if the contract remains ambiguous after considering its text and its factual matrix.***
> >
> > [Emphasis added]
>
> [23] Accordingly, post-contractual conduct should only be considered if, following interpretation of the provision that is in dispute, in light of the contract as a whole and the circumstances that existed at the time of contractual formation, there remains an ambiguity that supports different reasonable alternative interpretations (*Shewchuk*, at ¶46; *Magasins Hart Inc. v. 3409 Rue Principale Inc.*, 2020 NBCA 49, at ¶50-52). Even if admitted, the weight of such evidence varies in accordance with the degree to which its inherent dangers are mitigated in the circumstances, which may include deliberate conduct by one party to lend support to its preferred interpretation of the contract (*Shewchuk*, ¶45).

[32] I must consider the surrounding circumstances regarding the formation of the Contract to determine how the parties interpreted its terms and conditions. The objective intention of the parties can be determined by applying the ordinary meaning to the words used by the parties in the Contract to express that intent.

Contract clauses

[33] The wording of the Contract, including the Proposal which was incorporated into the Contract Documents agreed to by the parties at Article A-3 of the Contract contain the pertinent terms and conditions. The relevant sections of the Contract both establish and set the quantification of the fees owed to PCL.

[34] Article A-4 of the Contract describes cost of the work; it was revised by Appendix A, which added supplementary conditions to the Contract. The parties reviewed, accepted, and agreed with the changes. The parties were aware that under the Contract there was no guaranteed maximum price, and the cost of the work could affect the price. Article 4.1 lists the cost of all the things included in the maximum price. The only thing not included in the cost of the work are those contingencies which are a result of a failure of PCL to exercise reasonable care and diligence in

PCL's attention to the work (Joint Book of Exhibits, Vol. 1, Tab 1, p. 7, Article 4.1.26).

[35] Regarding PCL's work, a review of the numerous minutes of the PSC shows there were no complaints. Greg MacArthur, Councillor, Town of Truro, and Paul Smith had no complaints, nor is there any evidence that other members of the PSC had any complaints.

[36] Throughout the PSC minutes PCL suggests ways to reduce costs, advising the PSC that they need to get the tenders out because it is delaying the Project, and they would work with the architectural team to try and get a better price because the Project appears to be going overbudget. The evidence shows that PCL tried to meet the satisfaction of the Owners to make sure the Project was done on budget and on time.

[37] This was an integrated team from concept to occupancy. The integrated project team did not include the PSC. The PSC had very little construction experience, but they had total control over the project. PCL was the Construction Manager and General Contractor Team for the Project. The PSC appointed the Project manager. The delivery of all construction services was coordinated with the Project manager, the Prime Consultant (Shore Tilbe Irwin & Partners), and JDA Architects. These four parties formed the Integrated Project Team which was to efficiently manage the delivery of the Project from concept to occupancy. They all reported to the PSC. The PSC initially gave authorization up to $100,000 and then withdrew it and had all authorization going through them.

Extensions/Delays

[38] In relation to the Project, PCL was responsible for overseeing the tendering process. They would review and select tenders to be approved by the PSC. Once the tender was approved PCL hired the subcontractors directly and acquired the needed supplies. As the general contractor, PCL was responsible for managing and scheduling the various subcontractors on the Project. PCL was supposed to identify any necessary adjustments to the price or schedule as tenders were awarded. Once identified, PCL would submit a change order request to the consultants for approval.

[39] The scale and structure of this Project resulted in approximately 82 change orders. The Owners argue that most of these changes were minor and were required because of the sequential tendering. They had no impact on the scope or sequencing of the project.

[40] It is important to state the difference between tenders being awarded and those tenders being able to be acted on. For instance, as of May 31, 2011, approximately 70-80% of the tenders had been awarded (Joint Book of Exhibits, Vol. 1, Tab 2, p. 337). The PSC minutes dated March 7, 2011 (Joint Book of Exhibits, Vol. 1, Tab 2, p. 312) states that "[a]s it was anticipated that tenders would be 90% issued by the end of January, only 25% of them are issued now as designs are being finalized. It is very important for designs to be 100% complete before being tendered." There is a shifting of when things would be constructed on the Project as a result of the tenders not being able to be acted on when awarded.

[41] There were significant steps which took place on this Project after the tenders were awarded. For instance, the presumptive or selected proponent was dealing with shop drawings and updated drawings which were substantial elements of delay expressed in the Project Coordination Meetings minutes. For example, regarding the structural steel tender, "April 12/11 - Redesign is ongoing and pricing to proceed. CCE will forward the final design drawings to RKO early next week." (Joint Book of Exhibits, Vol. 3, Tab 9, p. 1030). This redesign with the architects is occurring substantially after the tender was awarded in November 2010 and is something which needs to take place before PCL or its subcontractor can perform the work. Clearly, if the design is unsettled, construction on that element is not progressing

[42] At Project Coordination Meeting 16, it is now June 2011 and PCL states that the answers coming back from the architects are coming back slowly and they need to come back in a more timely manner (Joint Book of Exhibits, Vol. 3, Tab 9, p. 1068). In July and August of 2011, the Owners are still working out the design of critical elements such as mechanical, plumbing, structural steel, and the pool. Despite these issues there was no change to the substantial completion date until October 2012.

[43] As the October 19, 2012, substantial completion date for the Project neared, PCL sought an extension, which was granted, extending the date to November 19, 2012. The Owners became concerned that this date would be missed and on or around November 13, 2012, they wrote to PCL to express this concern. Their letter noted that no formal claim for an extension had been received and referenced GC 6.5.4 of the Contract and requested an explanation if an extension was requested.

[44] PCL responded on November 20, 2012. This letter provided a formal request to amend the substantial completion date of November 19, 2012, to January 25, 2013. PCL disputed the application of GC 6.5.4 and asserted that the schedule

extension was caused by changes to the scope of the work covered in GC 6.2.1. PCL argued that the change orders required by the Owners caused the delay. PCL advised the Owners that "the cumulative effects of these changes have had a cost and time impact to the project." PCL would work with Paul Smith, Project manager for the RECC, to "quantify the impact to the CM Services Control of the Scope growth and time extension by the end of November 2012." This quantification was never received, and PCL never advanced a claim under the change orders. This letter was the first time that the Owners were advised of a schedule change because of change orders.

[45] On December 27, 2012, the Owners wrote again to PCL after the deadline passed expressing concern that the January 25, 2013, date would be missed and seeking confirmation of PCL's request for a schedule extension and its claim for an increased management fee. The Owners requested among other things that PCL, in their discussions with Paul Smith, provide them with PCL's intentions in regard to CM/GC fees beyond the November 19, 2012, date and PCL's intentions in regard to fee adjustments applied to "actual" construction costs.

[46] Clause 6.1 and 6.2 address changes and change orders. Every change order has potentially an effect on the schedule and the Contract Price. Article 6.2 deals with change orders. Clause 6.2.1 reads:

> When a change in the *Work* is proposed or required, the *Consultant* shall provide a notice describing the proposed change in the *Work* to the *Contractor*. The *Contractor* shall present, in a form acceptable to the *Consultant*, a method of adjustment or an amount of adjustment for the *Contractor's Fee*, if any; a method of adjustment or an amount of adjustment for the *Guaranteed Maximum Price*; **and the adjustment in the *Contract Time***, if any, for the proposed change in the *Work*.
>
> [Emphasis added]

[47] GC 6.2.2 advises that an agreement in relation to GC 6.2.1 shall be recorded in a change order.

[48] A review of the evidence demonstrates that the Project drawings were not available when they should have been and even when the drawings were ready, there were significant change orders that followed. This resulted in a delay with respect to many of the tender packages going out, which ultimately delayed the start of construction. If you consider the delay on the front-end of the Project, it is difficult

not to expect that those delays would affect the substantial completion date for the Project.

[49] There were significant delays on this Project. What is lacking from the evidence is the impact that these delays had on the overall Project schedule. The evidence is that PCL never indicated to the Owners the impact these delays would have on the schedule. The last extension requested by PCL was a letter they wrote on November 20, 2012, extending the current Contract date of November 19, 2012, to January 25, 2013. This PCL letter was in response to the Owners' letter of November 13, 2012, when they were trying to find out what was going on with the Project as a suggestion had been made that PCL may be further delayed in the performance of its work under the Contract. The Owners asked for an explanation if a further extension was requested and referenced clause GC 6.5.4 which reads:

> No extension shall be made for delay unless notice in writing of claim is given to the *Consultant* not later than 10 *Working Days* after the commencement of delay, providing however, that in the case of a continuing cause of delay only one notice of claim shall be necessary.

[50] PCL argues that the signing of the Contract was just a codification of the working relationship between the parties. At that time, PCL never raised a concern in writing or in the PSC minutes to the Owners that the Project schedule was in jeopardy. I agree with PCL that signing of the Contract was not a renegotiation but, in my opinion, it was still an opportunity for either side to raise concerns about the Contract, which neither did. This leads me to conclude that both sides were content with the terms and conditions of the Contract, including the substantial completion date.

[51] It is also significant that none of the PCL witnesses were able to directly advise the Court the impact that any of the delays allegedly caused by the Owner would have on the impact of the schedule. Paul Garnier's response of September 1, 2016, to undertaking 13 (Exhibit 15, Tab 1) as to the effects of any of the Change Orders on the construction schedule was:

> PCL analyzed the cumulative change orders issues on the project to ascertain the overall impact to the project. No recorded time for each change is in the possession of Paul Garnier.

[52] The Change Orders that PCL relies on for their delay argument has a provision for PCL to advise the Consultant if the required change in the work will result in an adjustment in the Contract time. The Change Orders submitted by PCL are silent

with respect to adjustments to the schedule; they only speak to costs. A review of the CRX Detailed Reports ("CRX") provided have a place for the Time Extension. This area is left blank (see for example, Exhibit 9, pp. 67, 126, 133, and 137). PCL provided no explanation as to the impact the Change Orders would have on the schedule. There were no witnesses that testified on behalf of PCL who could definitively provide an explanation as to the impact the numerous change orders would have on the schedule. As a result, the Court has no ability to effectively determine what impact any of these Change Orders had on the Contract schedule. PCL provided no evidence to demonstrate how the change orders increased the scope of the work other than a conclusory statement that it must have based on the number of change orders. That is not enough to meet their onus.

[53] When John Volcko reinforced what was already the working relationship between the parties by signing the Contract on or about February 1, 2012. PCL had been working with the Owners for 16 months from the time the design was approved. PCL would have known and been aware of the issues with the design, difficulties in the tendering process, and issues with the PSC. However, there was no amendment to the original substantial completion date of October 19, 2012, nor any written discussion with the Owners about how any of these change orders would impact the Contract schedule. PCL led no evidence of a desire to alter or change the Project schedule.

[54] PCL could have done the analysis regarding change orders and their impact on the schedule resulting in a Contract schedule adjustment. PCL had the ability to make a Contract extension, and they chose not to do so. PCL had an opportunity to bring a delay claim under GC 6.5 and they did not. As a result, I find that PCL committed themselves to the substantial completion date in the Contract subject to the extension granted.

[55] The Owners argue that PCL was onsite past the extension date and there is a difference between being onsite and being approved to be there. I am not persuaded by this argument. PCL continued to work on the Project, submitted progress payments that were reviewed by the Owners' consultants and paid by the PSC. The Owners did nothing to advise PCL that they would be looking to be reimbursed for all payments post the January 25, 2013, substantial completion date.

[56] I note that during this time past the substantial completion date, the Owners continued to pay the progress billings from PCL, and at times disputed the progress billings which resulted in revised progress billings. They continued to operate with

PCL as they had in the past. PCL did not make a delay claim under GC 6.5 which could have resulted in an extension of the Contract time for a reasonable period of time. PCL strenuously argues that the ordinary meaning of the words in the Contract should be followed when determining their Contractor's Fee; applying that logic, it is difficult to reconcile their argument when PCL has not followed the Contract when it comes to receiving payment for delays on the Project. GC 6.5 along with the blank time extension on the detailed CRXs help inform the Court on how to determine payment for the work PCL performed after the January 2013 substantial completion date.

[57] Next, I will determine what additional fees PCL is entitled to, if any, along with the claims of the Owners. For a reference, I will use Exhibit 9, Tab 6, which breaks down the various items PCL claims. Joe Gian, PCL Manager of Finance and Commercial Risk, testified about the amounts and how all the figures flow from the Contract. He was briefly questioned on his calculation of the 10% mark-up and the subsequent 5% fee. The Owners did not challenge him on the rest of his methods of calculation only on whether certain costs should be included.

Issue 2 - What is the amount owed by the Owners to PCL arising from the completion of the Project, including construction management fees and interest and what is the appropriate value, if any, for the Owners' claims?

[59] PCL's Fee for the Project is set out in Article A-5.1.2 of the Contract at $2,850,305. The details for the calculation of the Contractor's Fee are set out in Appendix C of the Proposal entitled "Construction Management Services Costs Breakdown." This contains Note 2 which references an extension to the pre-construction phase of the Project and an extension to the revised Construction Schedule going from 23 to 26 months.

[60] Appendix C has three columns. The first column is originally submitted from the RFP; the second column is PCL's negotiated additional construction management ("CM") fees; and the third column is the total of the first two which provides the total CM fee.

[61] Article 5 of the Proposal sets out how the Contractor's fee would be amended based on certain contingencies arising in the Project. It also states that:

> 5.2 The Contractor's Fee shall be subject to adjustment as may be required in accordance with the provisions of the Contract Documents listed in Article A-3 of the Agreement - CONTRACT DOCUMENTS.

This term shows that the parties contemplated the possibility of adjustments to the Contractor's Fee. To determine whether PCL is entitled to additional Contractor's Fees under the Contract, the Court must refer to the terms of the Contract and the Proposal along with the words "as may be required". The initial Contractor's Fee was calculated at $1,379,000 based upon a 23-month construction period and later amended in Appendix C to the Contract to $2,850,305 based on an increase in the Project Budget from $30,000,000 to $41,280,000 and a lengthening of both the pre-construction phase and construction period. The Owners argue that the scope of work has not changed; therefore, PCL is not entitled to an adjustment.

[62] Article 5(vi) in the Request for Proposals Approach to Adjusting Contract Terms further states:

> It is always PCL's object to work with our Clients in a proactive way to deliver the best possible project within the budget envelope and fixed time constraints. Despite our best efforts, occasionally circumstances arise that are beyond our control that can cause a construction project to take longer or cost more than anticipated. When this occurs, it is important to have a fair mechanism in place to adjust the contract value. With our vast experience in the delivery of construction, management and fixed price constraints, we would suggest the following mechanisms be put in place to deal with circumstances that we may encounter:
>
> **1. Increase or decrease in scope of services:**
>
> Contract adjustment based on the increase or decrease in the number of hours associated with the change in scope of services at the hourly rates provided in v) above.
>
> **2. Extended project schedule:**
>
> The majority of our CM Fee is based on staff costs; should the preconstruction or construction phases of the project extend beyond the times outlined in our Staff Involvement Chart contained in Section 3.24, the CM Services Fee will be adjusted by the hourly rates provided in v) above for staff costs plus costs for time related rentals such as trailers, cell phones, etc.
>
> **3. Construction costs exceeding the $30 million budget:**
>
> PCL commits to making its best efforts to delivering this project within the budget envelope and recognizes that all members of the Integrated Project Team must share in this commitment.

> To demonstrate PCL's commitment to the project budget we will waive any adjustment to the contract Fee up to a value of 2.0% over the $30 million construction budget. Restated, PCL will not require an adjustment to CM Fees if the final construction cost is less than or equal to $30,600,000 (excludes HST).
>
> In the event that the construction cost for the project exceeds $30,600,000 then PCL's CM Fee will be adjusted by the industry standard Change Order rates of 10% mark-up and 5% Fee on the value of construction cost that exceeds the $30 million project budget.

[63] This section of the Proposal deals with increased costs. It was agreed to by the parties and specifically contemplates the possibility that the construction period for the Project could increase and that the budget could also increase based on circumstances beyond PCL's control. It sets out the means of calculating the increased Contractor's Fee should any of the situations arise. The important point is that the increased CM fee is on the value of the construction costs. This is the basis for the adjustment.

[64] Paul Smith and Greg MacArthur testified there was not a lot of construction expertise on the PSC. As the size of the Project continued to grow, the evidence shows that the PSC did not have an appreciation of the impact their decisions had on the budget and on the schedule.

[65] The calculation of the increased Contractor's Fee is broken into two components: first, the increase in the Construction Budget and second, the costs of performing construction management services for the extended period of construction. Article A-6 of the Contract defines the "Contract Price" as follows:

> 6.1 The Contract Price, which excludes Value Added Taxes, is equal to the sum of the Cost of the Work as in accordance with Article A-4 of the Agreement – COST OF THE WORK and the Contractor's Fee as stipulated in paragraph 5.1 of Article A-5 of the Agreement – CONTRACTOR'S FEE.

[66] To determine the increase in the Contractor's Fee relating to the budgetary increase for the Project, I reviewed the Cost of the Work as set out in the Contract. Article A-4 of the Contract defines the "Cost of the Work", which incorporates 26 separate categories to be included under this definition. PCL's wages and expenses are incorporated as an element of the Cost of the Work under Appendix A Supplementary Conditions 1.

[67] Articles A-4.1.1 to 4.1.4 were amended in Appendix A – Supplementary Conditions to the Contract which states:

> SC 1 – Article A-4.1.1, Article A-4.1.2, Article A-4.1.3 and Article A-4.1.4 -Delete and replace with the following:
>
> EXCEPT for the wages, salaries and benefits (including any contributions, taxes or assessments) that relate to the scope of work contained at 5.0 (ii) of Appendix B (which costs are included in the Contractor's Fee of $2,850,305 set out at Article A-5.1.2), all wages, salaries, and benefits for the Contractor's personnel in whatever capacity for the duration of the performance of the Work employed at the project site or home office for the time spent on the Project including any contributions, taxes or assessments as per Appendix B;

[68] The amendments at Appendix A further show that the parties specifically turned their mind to what PCL costs would be included in the Cost of the Work in support of its Contractor's Fee. This amendment to the Contract further shows that the provisions of Appendix B (the Proposal) and section 5.0 of the Proposal were also specifically considered and incorporated by the parties into the calculation of the Contractor's Fee.

[69] When Article A-4 is reviewed as a whole, it is clear that the definition of the items falling under the category "Cost of the Work" is broad, covering all expenses incurred by PCL while performing its work under the Contract.

[70] Over the course of construction, there were significant changes requested by the Owners that had an impact both on the budget and the schedule for completion of the Project. There were multiple change orders for work requested by the Owners which resulted in the overall construction budget increasing from $41,280,000.00 to $48,180,800.84. I find such a substantial increase in the budget as the reason to address the "as may be required" factor in Article 5.2 of the Proposal to adjust the Contractor's Fee.

[71] Pursuant to the terms of the Proposal at Article 5, when the construction costs for the Project exceeded $30,000,000.00 (the original budget amount), the Construction Management Fees are to be adjusted at a rate of 10% of the budget overrun. As noted above, the base amount of the Contract Price was adjusted to $41,280,000 at the time of signing the Contract. This was the only amendment to the provision in the Proposal. The percentages were not adjusted. PCL submits that pursuant to Article 5.0(vi) of the Proposal it is entitled to additional Contractor's Fees of 10% mark-up and an additional 5% fee on the increased value of the construction beyond the base budget of the Project:

> **3. Construction costs exceeding the $30 million budget:**

…

In the event that the construction cost for the project exceeds $30,600,000 then PCL's CM Fee will be adjusted by the industry standard Change Order rates of 10% mark-up and 5% Fee on the value of construction cost that exceeds the $30 million project budget.

[72] PCL's calculations in support of its adjusted Contractor's Fee are summarized in the chart below from its brief:

CALCULATION OF CONTRACTOR'S FEE		
Category	**Description**	**Amount**
Original Cost of the Work	Budgeted Contract Price less Contractors Fee ($41,280,000 - $2,850,305)	. $38,429,695.00
Final Cost of the Work as billed in P8#44	Final Contract Price less Contractor's Fee ($48,180,800 - $2,925,777)	$45,255,022.00
Increase in Cost of the Work as billed	$45,255,022 - $38,429,695	$6,825,327.00
Plus additional staffing costs until completion of project		$751,665.00
Plus Dexter Construction claim submission		$186,603.00
Plus McCarthy's Roofing claim submission		$194,856.00
Total increase in Cost of the work	($6,825,327.00 + $751,665.00 + $186,603.00 + $194,856.00)	$7,958,451.00
Calculation of addition Contractor's Fee	10% Mark-Up on increase in Cost of the Work	$795,845.10
	5% Fee on increase in Cost of the Work (inclusive of additional mark-up)	$437,714.81
TOTAL ADDITIONAL CONTRACTOR'S FEE ABOVE INITIAL CONTRACT PRICE ($41,280,000 PER CONTRACT)		**$1,233,559.91**
LESS CREDIT FOR ADDITIONAL CONTRACTOR'S FEE PAID BY OWNERS		($75,472.00)
TOTAL ADDITIONAL CONTRACTOR'S FEE OWING TO PCL		**$1,158,087.91**

[73] At the time of the Proposal, which was incorporated into the Contract, the base Contract Price was $30 million. PCL committed that if a cost overrun of less

than $600,000 occurred, it would not adjust its fees. If the Cost of the Work increased by more than $600,000 (2% of the base budget) the additional mark-up and fees set out in Article 5 of the Proposal would be calculated on the full amount of the increase (value of the construction).

[74] Although the base budget amount for the Project was increased from $30,000,000 to $41,280,000 between the Proposal date and the signing of the Contract, this term and its meaning were not altered. I find that once the 2% threshold for a cost increase is met, the additional fees will be calculated on the full amount that exceeds the original budget if it relates to circumstances beyond PCL's control.

[75] The parties disagree on whether the 5% fee is calculated on a figure that includes the 10% mark-up on the cost increase. PCL argues, and Joe Gian testified, that this is standard contracting practice in the industry as the mark-up figure recognizes the additional work performed by PCL in managing the change orders and the increased scope of the contract. The 5% fee is applied to the additional scope of work performed by PCL in responding to and executing on the Owners' change orders. As such, the 5% fee includes the full scope of work undertaken by PCL above the original scope and budget amounts. I agree with that interpretation from my interpretation of the Contract. I also find that the reasons for the increased budget related to circumstances beyond PCL's control, such as the increased cost for structural steel and plumbing.

Increase in construction steel and plumbing

[76] The Owners argue that the construction steel and plumbing should be backed out from the 10% mark-up and 5% fee because there is nothing in the Contract that says a price increase would be subject to this provision. They say that PCL cannot apply the 10% mark-up and 5% fee because there was no approved change order in relation to this price increase, and that a price increase does not change the scope of the work. They say that the adjustment clause applies to Change Order rates which is not present here. I am not persuaded by this argument as Article 4 Costs of the Work clearly addresses the price increase and the Contractor's Fee adjustment. These price increases fall under the cost of the work which forms part of the excess budget costs. The important point is that the Contractor's Fee will be adjusted on the value of construction costs that exceeds the Project budget.

[77] The Owner's argument is based on a misreading of the wording "… adjusted by the industry standard Change Order rates of 10% mark-up…" This is the term

being used but it is not that the amount is contingent upon being reflected in a Change Order for the 10% to apply. The evidence is that this 10% mark-up rate is the industry standard Change Order rate and then there is a 5% fee that is going to be added on as well. Both of these percentages are added on the value of construction costs that exceed $30 million ($41.28 million). I find that this provision is based on construction costs and not solely items contained within Change Orders. The mark-up applies to the value of construction costs over the Project.

[78] There was an increase in this Project in the cost of the work. The excess was agreed to by both parties through progress bills and payment certificates.

PCL Staff costs

[79] The information that the Court has with respect to what work was being done, in the context of what personnel PCL provided to the Project, is found at Exhibit 9, Tab 8. These are print-out sheets that Paul Garnier relied on to show the various individuals of PCL who were working on the Project and the hours and the dates that they were working. Paul Garnier obtained this information from PCL's computer system and used it to establish PCL's claim for staff costs as follows:

Construction Management Adjustments between November 14, 2012 and June 14, 2013			
PCL Employee	**Hourly Rate ($/hr)**	**Number of Hours**	**Fees**
Paul Garnier (Project Manager)	$109.00	778.5 hours (173 hrs/mo x 4.5 mos)	$84,856.00
John Shead/Devin Noseworthy (Superintendent)	$109.00	1211 hours (173 hrs/mo x 7 mos)	$131,999.00
Brent Whalen (Project Coordinator)	$90.00	778.5 hours (173 hrs/mo x 4.5 mos)	$70,065.00
Ron Treen (Project Manager)	$109.00	432.5 hours (173 hrs/mo x 2.5 mos)	$47,143.00
Charles Bennett (Project Coordinator)	$90.00	1038 hours (173 hrs/mo x 6 mos)	$93,420.00
Expenses (trailers, phones, office equipment, etc.)		($7,500 x 2 mos) + ($4,000/mo x 5 mos)	$35,000.00
Subtotal			**$462,483.00**

Construction Management Adjustments between June 15, 2013 and April 30, 2014			
PCL Employee	**Hourly Rate ($/hr)**	**Number of Hours**	**Fees**
Paul Garnier (Project Manager) at 33% time	$109.00	346 hours	$37,714.00
Paul Garnier (Project Manager) at 10% time	$109.00	77.85 hours (173 hrs/mo x 4.5 mos x .1)	$8,485.00
Devin Noseworthy (Superintendent)	$109.00	1557 hours (173 hrs/mo x 9 mos)	$169,713.00
Charles Bennett (Project Coordinator) at 50% time	$90.00	346 hours (173 hrs/mo x 4 mos)	$31,140.00
Justin Guiry (Project Accountant)	$85.00	88 hours	$7,480.00
Finance/Administration Manager	$125.00	22 hours	$2,750.00
Construction Manager	$150.00	176 hours	$26,400.00
District Manager	$250.00	22 hours	$5,500.00
Subtotal			**$289,182.00**
TOTAL			**$751,665.00**

[80] The Schedule of additional PCL costs for wages and salaries for its workers post November 14, 2012, represents the conclusion of the 26 months' Construction Period plus the extension by the parties up to the substantial completion date. Progress billing for the construction of the Project commenced in September 2010.

[81] In determining the later work on the Project, I have relied on the tables created by Paul Garnier, Project Manager. In addition, I reviewed the project coordination minutes where Paul Garnier stated that around September 2013 deficiencies were about 85% done.

[82] The evidence is John Shead, PCL's superintendent, stayed on an extra month after substantial completion date of May 8, 2013, to take care of the first wave of deficiencies and that Paul Smith specifically requested he stay on board for that period because they wanted the continuity of having the key Superintendent present for the deficiencies. John Shead stayed for a month or so and then left, based on the

evidence of Paul Smith. There is no evidence that John Shead left under protest of the Owners, Paul Smith, or the PSC.

[83] In addition to the hours of work performed by PCL, there is other evidence with respect to the later work conducted by PCL. Exhibit 31 lists expenditures for reimbursable expenses that have been charged to PCL for the Project. Exhibit 31 does not tell the Court what was happening onsite, but what it does tell the Court is PCL was incurring an expense as a cost of work under the Contract and passing those costs for approval to the Owners. In essence, PCL was onsite and performing work that the Owners had knowledge of and agreed to. All these charges were passed along to the Owners. All these charges were reviewed by the consultants and Paul Smith. They were approved for payment, and they were paid by the Owners. PCL objects to the Owner's claim for reimbursement for some of these amounts because these are charges that the Owners have already reviewed and paid.

[84] The difficulty I have with the Owners' position is that all of what was properly claimed the first time by PCL was reviewed and paid by the Owners. The amounts are all aspects of the cost of the work that were reviewed and paid for. I find that these are proper costs. The question for the Court is whether PCL is entitled to their costs after the extension in January.

[85] Article A-4.1.26 of the Contract states in part:

> .26 other costs incurred in the performance of the Work as listed below:
>
> - the cost of Subcontractor Default Insurance (Subguard) at a rate of $9.50 per thousand of subcontract or supplier costs;
>
> - costs incurred by the Contractor, with the Owner's permission, in expediting the rejected and warranty work of Subcontractors and costs incurred by the Contractor in correcting defects or deficiencies in the work undertaken by his own forces or its Subcontractors or suppliers and repairing damages resulting therefrom either during the course of construction or the warranty period except those arising from a willful act of the Contractor.

[86] The parties have specifically agreed that the costs incurred by PCL to rectify work of its subcontractors is claimable by PCL as Cost of the Work under the Contract unless they arise from a willful act of PCL. I disagree with the Owners' argument that the work undertaken by PCL to correct issues relating to the tiles or the paint peeling should be excluded from the calculation of PCL's Contractor's Fee. The parties have agreed in the Contract that time has been incorporated into the Cost of the Work at Article 4.1.26. The write-in clause 4.1.26 establishes a very high bar

to suggest that PCL would not be entitled to receive compensation for correcting deficiency work undertaken by its own forces or for its subcontractor except for those deficiencies arising from a willful act of the contractor, PCL. I find there is nothing in the evidence to suggest that PCL was wilfully acting contrary to the requirements of the Contract. I find there is no evidence of negligence on behalf of PCL. There is no failure of PCL to exercise reasonable care and diligence. There have been delays on this Project but there is no suggestion that the delays arose from an issue with negligence.

McCarthy's Roofing and Dexter Construction

[87] PCL claims it is owed the costs of additional work performed by its subtrades, McCarthy's Roofing and Dexter Construction, in relation to work which they performed at the project and for which PCL and the subtrades have not been paid.

(a) Dexter's claim, $186,603; and

(b) McCarthy's claim, $194,856.

[88] These claims were advanced by McCarthy's and Dexter. They were recognized and approved by PCL, but they were not paid by PCL. They were billed by the subtrades but were not advanced by the Owners. They remain outstanding. Joe Gian did not have direct evidence with respect to what these bills related to. Paul Garnier had little evidence as to what the bills were for other than the fact that they were advanced. The bills have not been paid but were adjudged as appropriate claims by PCL under Article A-4.1.11. PCL added these amounts to the overall Cost of the Work.

[89] I am denying these invoices because they did not go through the approval process. The PSC has not had an opportunity to review and approve these claims. In addition, the evidence is lacking as to what work on the Project was being done by these contractors. PCL has not met their onus to satisfy these amounts.

Rate of interest and period of entitlement

[90] Article A-7 sets out the terms for calculation of interest and the period for which it is to be paid by the Owners:

7.3 Interest

> .1 Should either party fail to make payments as they become due under the terms of the *Contract* or in an award by arbitration or court, interest at three percent (3 %) per annum above the prime rate on such unpaid amounts shall also become due and payable until payment. Such interest shall be compounded on a monthly basis. The prime rate shall be the lowest rate of interest quoted by the Royal Bank of Canada for prime business loans.
>
> .2 Interest shall apply at the rate and in the manner prescribed by paragraph 7.3.1 of this Article on the amount of any claim and for which the *Contractor* is thereafter entitled to payment, either pursuant to Part 8 of the General Conditions - DISPUTE RESOLUTION, or otherwise, from the date the amount would have been due and payable under the *Contract*, had it not been in dispute, until the date it is paid.

[91] Joe Gian gave evidence on the outstanding amount of interest claimed by PCL. There was no evidence led that the Owners had a problem with the interest clause. There was no argument from the Owners that they were not obligated to pay interest based on this clause. Traditionally, if the parties agree on interest in the contract, one party is responsible for paying it, while the other party is entitled to receive it.

[92] In *Awaiting Developments v. Durham Region Non-Profit*, 2016 ONSC 2680, the Ontario Superior Court of Justice reviewed an interest claim very similar to that in the Contract. In that case there was an over 20-year delay in the Contractor receiving payments due under the Contract.

> [39] That interest rate is governed by article A-4(c) of the Construction Contract, which provides:
>
> > If the [Defendant] fails to make payments to the [Plaintiff] as they become due under the terms of this Contract or in an award by arbitration or court, interest of Prime Plus Two percent (Prime Plus 2%) per annum on such unpaid amounts shall also become due and payable until payment. Such interest shall be calculated and added to any unpaid amounts monthly.
>
> [40] Although it is common knowledge, it is worth noting that the phrase "prime" is generally understood to mean "the rate published by Canadian Charter banks as the most favourable rate charged to creditworthy customers": *Hanil Bank Canada v Gill Construction Ltd.*, [1992] OJ No 134. Although this rate may vary slightly from financial institution to financial institution, the meaning of "prime" indisputably refers to generally published rates: *Coldmatic Refrigeration of Canada v 1234777 Ont. Inc.*, 2004 CarswellOnt 474.
>
> [41] The Plaintiff has produced a chart from the Bank of Canada Common Data and Statistics Office entitled "Chartered Bank Administered Interest Rates – Prime Business". This chart contains the prime rates over the past number of years,

> including those relevant to the present dispute. The Defendant accepted this chart as reflecting the prime rate when it made late payments during the life of the contract, and does not appear to take issue with the chart now (although, of course, it disputes its liability for the contract interest rate).
>
> [42] The payment of $116,000 was made by the Defendant to the Plaintiff this week – on April 19, 2016. The question is: when did the prime plus 2% rate begin to run?
>
> [43] Counsel for the Plaintiff stated at the outset of the hearing that it could be one of three dates: a) the date of total performance, being January 7, 1994; b) the date of the first demand for payment, being April 2, 1996; or c) the date of the Statement of Claim, being March 4, 1998. Obviously, the counsel for the Plaintiff prefers the earliest of these dates.
>
> [44] The Defendant submits that little or no pre-judgment interest should be payable. Counsel for the Defendant contends that the Plaintiff caused much of the delay in the action in that it failed to adequately advance the matter. Since the pre-judgment interest has accumulated as a result of the long delay in payment, the Defendant's position is that the Plaintiff is the responsible party.
>
> [45] The position taken by the Defendant assumes that pre-judgment interest is a kind of punishment for delay, and that if a party does not deserve to be punished it should not have to pay interest. However, that is not how the courts conceive of pre-judgment interest: see *Graham v Rourke (1990)* 1990 CanLII 7005 (ON CA), 75 OR (2d) 622, paras 20-21. Interest is compensatory, not punitive, and represents the time value of money: *Bank of America Canada v Clarica Trust Co.*, 2002 SCC 43 (CanLII), [2002] 2 SCR 601, paras 36-38. If a payment is made two decades after it came due, the payee is owed the lost value of its money over the years. Interest is a reflection of the sheer passage of time, and does not speak to who caused the passage of time.
>
> [Emphasis added]

[93] In *Seagate v. Halifax Regional Municipality*, 2023 NSSC 176, the contractual rate of interest set out in a construction contract was the appropriate rate of prejudgment interest chargeable against the Owner.

[94] Similar considerations were expressed by the Court in *Galrich Restoration Inc. v. 1597181 Ontario Inc.*, 2014 ONSC 1933, at para 26:

> [26] The contract rate of interest is 2% above the TD prime rate for the 60 days that begins 30 days after the invoice is issued, and 4% above the TD prime rate after the 90th day that moneys owing remain unpaid. The TD prime rate was 3% throughout the relevant time period. This translates to 5% for days 31 to 90 and 7% after day 90 until payment is received. That is significantly higher than the

> prejudgment interest rate of 1.3% under the *Courts of Justice Act* applicable to causes of action that arose in 2012 when Galrich issued its unpaid invoices.
>
> [27] The parties specifically put their minds to the rate of interest to be applied to moneys owing and not paid. They contractually agreed to a rate above the rate for prejudgment interest prescribed by the *Courts of Justice Act*.
>
> [28] 159 relies on the decision of the Supreme Court of Canada in *Bank of America Canada v Mutual Trust Co.* at paragraph 62 for the proposition that the court retains ultimate discretion to fix the rate of interest regardless of a contractually agreed upon rate of interest for unpaid amounts. I accept that proposition. In the present case I find that the agreement as to the appropriate interest rate was made by two sophisticated contracting parties. In such circumstances the agreed upon contractual rate is reasonable.

[95] The Owners argue that the long passage of time from the date that payment was due to the time of trial of this matter should limit PCL's entitlement to its agreed-upon interest. PCL argues that those issues are not relevant considerations to the awarding of a contracted for payment of interest.

[96] I find that a contractual rate of interest agreed to by sophisticated parties should be upheld. An award of interest is not punitive but reflects the lost value of the money wrongfully withheld from PCL following completion of the Project. There has been no delay that can be "charged against" PCL that would limit its entitlement to interest as set out in the Contract. There is no reason to relieve the Owners of the obligation they freely bargained for with PCL in the Contract.

[97] PCL is entitled to its interest under the Contract.

Outstanding A/R

[98] There is $126,607 on an outstanding invoice set out in Progress Billing #44 (Exhibit 24) for which PCL was never paid. Article A-7 addresses the payment price. Article 7.1.1 authorizes progress payments to PCL when certified by the consultant. PCL referred to a cheque that was certified for payment to PCL but was never provided to PCL to be cashed. Paul Smith had the initial authority to look at a request for payment and had to approve it before it was passed on to the PSC, which he did. The finance departments of both municipalities had to approve it, which they did. It was signed by one of the signatories and then put in a safe. PCL was never given those funds authorized to come out of the cheque. The cheque was brought to PCL's attention for the first time when Paul Smith was discovered. The

cheque is for $120,096.63 and was signed off by Paul Smith and the municipalities to be paid to PCL.

[99] From the evidence, there appears to be an arbitrary decision by someone not to endorse the cheque and provide it to PCL. As a result of that decision, the cheque was kept, and its existence was never mentioned to PCL. Greg MacArthur testified that he was shocked to hear this because as a member of the PSC he understood PCL had been paid for everything they billed for. The municipalities had the benefit of this money even though PCL did the work for the cheque and was entitled to it based on the Owners' consultant certifying it for payment.

[100] The Owners pushed back against the Progress Claim (Exhibit 24) but did certify payment in the form of the cheque. I find that PCL is entitled to the amount of the cheque ($120,096.63) under the terms of the Contract.

Outstanding CO #1 and #2

[101] In concluding my review of Exhibit 9, Tab 6, which breaks down the various items PCL claims. PCL has presented no evidence regarding the amounts of $14,437.50 and $2,530.61, respectively. These amounts are denied based on PCL not meeting its onus to prove they are entitled to these amounts.

Additional staff costs

[102] After reviewing the contract and the conduct of the parties in determining additional staff costs after the extension date of January 31, 2013, I find that PCL did not follow the provisions of the Contract with respect to delay. By not advising the Owners that the requested Change Orders could impact the schedule as required under the Change Order provisions and on the detailed CRX forms the Owners operated under the assumption that the substantial completion date would be met. It was incumbent upon PCL to file a delay claim under the Contract if it wanted to be paid. I can only conclude that the delay is PCL's after the implied extension date because there is no evidence led by PCL as to the impact on the schedule based on the Change Orders scope of work. PCL is not entitled to be paid for the months of February 1, 2013 to May 8, 2013 inclusive because PCL had not been approved for an extension on the Project. The Owners are to be reimbursed for these dates.

[103] I find that PCL is entitled to be paid from the date after substantial completion May 9, 2013, to their last day on the Project because PCL is entitled to claim for deficiency work for these months based on the evidence and Article 4.1.26 of the

Contract. During this period, PCL billed the Owners, those bills were reviewed by Paul Smith, approved for payment and they were paid. PCL is entitled to be paid for those amounts, and the Owners' claim for reimbursement after they have already reviewed and approved payment is incorrect.

Issue 3 - Is the Owners' proposed remediation for the pre-cast stair issue reasonable and proportional to the degree of the alleged deficiency?

Positions of the parties

[104] PCL argues that the Owners are only entitled to nominal damages rather than the cost of remediation because the breach of the NBCC is a technical one that does not impair the utility of the project itself.

[105] The Owners argue that the primary calculation for breach of a construction contract is the cost of reparation and there is no reason to depart from that method in this case. They delineate between cases where the breach is merely "technical" or "aesthetic" in the sense that there is no clearly compensable damage, and cases where the defect poses a risk to personal safety or structural integrity such that the construction needs to be redone. The Owners argue that failure to comply with the NBCC is more than a technical or aesthetic breach, that the stairs are not satisfactory for their intended purpose and, because the NBCC is a code of minimum standards for public health and safety, they need to be redone. The Owners submit that they have every intention of using a damage award to repair the stairs.

[106] The normal method for calculating construction breach of contract damages is the cost of remediation. However, there are exceptions to this method. Other damage assessment methods can be used where remediation damages are not "reasonable" or where the cost of remediation is "disproportionate to its advantages."

[107] The normal method for calculating breach of contract damages is the cost of remediation. In *Miller v. Advanced Farming Systems Ltd.,* [1969] S.C.R. 845 ("*Miller*"), the Supreme Court of Canada adopted Lord Denning's language from *Hoenig v. Isaacs*, [1952] 2 All E.R. 176: "the measure is the amount which the work is worth less by reason of the defects and omissions, and is usually calculated by the cost of making them good" (pg. 848).

[108] Since *Miller,* appellate jurisprudence has explicitly stated that remediation damages are the appropriate starting point. In *Diotte v. Consolidated Development Co.,* 2014 NBCA 55*,* ("*Diotte*"), the New Brunswick Court of Appeal held:

> 2 … The normal measure for breach of a building contract is the cost of remedying the deficiency, thereby placing the innocent party in the position he or she would have been in had there been contract compliance (the expectation principle). Thus, the "cost of performance" or "cost of reinstatement" is the usual measure of recovery.

[109] The Court of Appeal for Ontario made similar comments stating there appears to be no disagreement in the jurisprudence that damages are usually assessed on a remediation basis (*Jarbeau v. McLean,* 2017 ONCA 115, at para. 53, citing their own decision in *James Street Hardware & Furniture Co. v. Spizziri* (1987), 62 O.R. (2d) 385).

[110] There are exceptions to granting remediation damages. In *Strata Corp. NW 1714 v. Winkler*, [1987] B.C.J. No. 2340, the British Columbia Court of Appeal set out three options for calculating damages, citing *Hudson's Building and Engineering Contracts, 8th Edition* ("*Hudson*"):

> 41 … in the case of defective work (or work not in accordance with the contract) there are in fact, three possible bases of assessing damages, namely (a) the cost of reinstatement (b) the difference in cost to the builder of the actual work done and the work specified or (c) the diminution in value of the work due to the breach of contract.

[111] *Diotte* also sets out a list of alternatives to remediation:

> 2 … the law makes room for other methods of assessment. Damages may be awarded for any "diminution in value" of the property caused by the breach. Alternatively, nominal damages may be awarded for what is commonly referred to as a "loss of amenity", a "personal preference" or a "consumer surplus". Finally, there is the option of seeking to recover the contractor's gain in those cases where the breach resulted in a cost-saving.

[112] In determining how to assess damages, I need to determine whether remediation damages are "reasonable." In *McGarry v. Richards, Ackroyd & Gall Ltd.,* [1954] 2 D.L.R. 367, Davey J. of the British Columbia Supreme Court said remediation damages do not apply where the owner would be acting "unreasonably or oppressively" in asking for such damages (pg. 387). In *Strata Corp,* the British Columbia Court of Appeal cited *Hudson,* holding: "there is no doubt that wherever

it is reasonable for the employer to insist upon reinstatement, the courts will treat the cost of reinstatement as the measure of damage." (para. 41).

[113] In considering reasonableness, the New Brunswick Court of Appeal in *Diotte* concluded that the right approach is to ask, "whether it is reasonable to award damages equal to the cost of reinstatement" (paras. 40 and 42).

[114] In *Nu-West Homes Ltd. v. Thunderbird Petroleums Ltd.*, [1975] 59 D.L.R. (3d) 292 ("*Nu-West*"), the Alberta Supreme Court Appeal Division held that remediation damages are not appropriate where the "cost of rectification is great in comparison to the nature of the defect…" (page 307).

[115] There is a line of cases which use the language of weighing the costs and benefits of remediation instead of the language of reasonableness. In *LA Home Solutions 2013 Inc. v. Barclay,* 2016 ABPC 119*,* LeGrandeur, A.C.J. affirmed the *Nu-West* test, rephrasing it as "whether the cost of making good the defects and omissions is unreasonably high in relation to the value to be gained by its expenditure" (para. 57).

[116] LeGrandeur, A.C.J. in *LA Home Solutions* quoted from Ronald M. Snyder and Marvin D. Pitch, in *Damages for Breach of Contract*, loose-leaf (consulted April 1, 2016, 2d ed, (Toronto Carswell, 1989), "…if substantial restoration can be accomplished for a lesser cost than completely rebuilding and that restoration comes close to the original contract requirements, the Court can adopt the less costly solution." (para. 55).

Factors to Consider

[117] Assessing whether remediation damages are reasonable or proportionate involves looking at several factors.

[118] In *Enfield Hardware Limited v. DeGier,* 2002 NSSC 164 ("*DeGier*"), this Court adopted *Hudson's* four-part test for whether remediation damages are reasonable. The test is as follows:

(a) whether the work actually carried out is reasonably satisfactory for its purpose;

(b) whether the building owner has carried out or in fact intends to carry out the work of reinstatement;

(c) whether the defect or omission has substantially affected either the market value or the amenity value to the building owner of the works;

(d) whether the cost of reinstatement is wholly disproportionate to the advantages of reinstatement.

[119] An important factor in deciding whether remediation damages are appropriate is whether the work is satisfactory for its purpose despite the defects. In cases where the owner is still able to use the work product as expected, courts often decline to award remediation damages.

[120] In *0867740 B.C. Ltd. v. Quails View Farm Inc.,* 2014 BCCA 252, deficiencies were alleged in relation to the building of an RV park. The British Columbia Court of Appeal refused to intervene in the trial judge's awarding of damages for diminution of value instead of remediation. A central reason for the trial judge's decision was the fact that the park continued to be used on a frequent basis, meaning the deficiencies were not fundamental to using the park for its intended purpose (paras. 102-103). The British Columbia Court of Appeal held that this was a finding of fact open to the trial judge and saw no reason to interfere with the award.

[121] In *Diotte*, the building in question was smaller in square footage than contracted for and one of the walls did not meet the building code. The trial judge awarded a sum to strengthen the wall and a nominal amount for the loss of square footage. In coming to this conclusion, she noted that the tenant of the building had accepted it as provided and paid the rent, and the wall had withstood windstorms to date (i.e., the building was functioning adequately for its purpose). The New Brunswick Court of Appeal affirmed the decision.

[122] In *G & J Parking Lot Maintenance Ltd. v. Oland Construction Co.,* [1979] 1 A.C.W.S. 20, Laycraft, J. found that a slight increase in the vertical height of asphalt had no impact on its intended use. He awarded a nominal sum of $500 for deviation from the stipulated height in the contract.

[123] In contrast, remediation damages are often awarded where remediation is the only option that will allow the owner to enjoy the property for its intended purpose. In *DeGier,* the owners of a renovated house claimed deficiencies for failure to install a vapour barrier under a concrete floor. Richard, J. held that it was reasonable to award remediation damages, emphasizing the fact that no other method could accomplish what the vapour barrier was designed to do (para. 22). Richard, J. noted

that the owners had not used the renovated areas to the extent they had intended and may not do so until the floor was redone (para. 45).

[124] Remediation damages were awarded for the same reason in *LA Home Solutions.* In this case, hardwood flooring had been installed with serious deficiencies that led to excessive popping and squeaking that would only worsen with time. In awarding remediation damages, LeGrandeur, A.C.J., held that replacing the floor was the only way to remedy the breach and put the defendants in the position they ought to have been (para. 89).

[125] Similarly, in *LaForce v. Kaye,* 2008 ABQB 249, the court held that the cost of rebuilding was not unreasonably high because there was significant damage to the walls in question and a failure to repair would only invite further problems in the future.

[126] The common theme throughout these cases is that reinstatement was the only way to enable the use of the building for its intended purpose. As explained by Sheard, J. in *Scaffidi-Argentina v. Tega Homes Developments Inc.,* 2016 ONSC 5448: "In the absence of evidence that the plaintiffs *have no choice but to rebuild*, to award damages based on the cost of rebuilding would not be reasonable or fair to the defendants." (para. 77) If there are other options instead of rebuilding or if the property continues to be used for its intended purpose, remediation damages may not be appropriate.

[127] Importantly for the case before me, the New Brunswick Court of Appeal held in *Diotte* that issues of personal safety or structural integrity call for reinstatement damages:

> 35 … Most certainly, damages equal to the cost of reinstatement are justified in those instances where the deviation or defect poses a risk to personal safety or the structural integrity of the building and the like (*e.g.*, a foundation or wall that is structurally unsound).

[128] The same response was reflected in LaLonde, J.'s comments in *Safe Step Building Treatments Inc. v. 1382680 Ontario Inc.,* [2004] O.J. No. 4119 ("*Safe Step*"):

> 69 … if the defects in the work are mostly aesthetic rather than related to issues of safety and functionality, courts will normally adopt the diminution in value as the proper measure of damages… Conversely, if the work must be carried out for

> reasons of safety, or in order to make the property usable, the cost of performance will be deemed a reasonable measure of damages.

[129] Therefore, when safety is raised as an issue, the question is: can the building be used safely for its purpose despite the defects and deficiencies? If yes, reinstatement damages may not be appropriate. If not, the cost of performance is likely reasonable.

[130] A second key factor in deciding how to assess damages is whether there is evidence that the building owner intends to rebuild. Where there is no such evidence, an award of remediation damages is unlikely.

[131] In *Diotte,* the owner had not performed any of the repairs recommended by the experts and would not allow Diotte back on the premises to conduct any repairs. Deware, J. commented that her suspiciousness of whether work would ever be done factored into her compensation analysis. While finding it unnecessary to opine on its effect in the case before them, the New Brunswick Court of Appeal commented generally that an intention to carry out the work normally comes into play where the cost of reinstatement is obviously disproportionate to the benefit achieved (para. 45).

[132] In *514953 B.C. Ltd. v. Leung,* 2007 BCCA 114, the trial judge found that the great bulk of deficiencies had not been repaired despite the house in question having been occupied for five years. On appeal, Hall, J.A. held that a diminution of value award necessarily follows from a finding that the homeowner had no present intention of remedying the deficiencies:

> 11 … Running through the decided cases are two sometimes disparate principles from the law of contract. One principle is that the party who suffers from a breach of contract is entitled to be put back into the position he or she would be in if the contract had been performed according to its tenor. But that consideration is always to be balanced against another principle in this area of the law, namely, **that a person who suffers damage by reason of a breach of contract is bound to act reasonably to mitigate damages arising from the breach**. …
>
> [Emphasis added]

[133] In other words, the aggrieved party should be expected to take reasonable steps to address the deficiency. While *Nu-West* makes clear that aggrieved parties do not have to act perfectly (page 308), there is generally an expectation that the party at least demonstrate an intention to carry out the repairs they allege are necessary. In *Safe Step,* where the aggrieved party had already carried out some or all of the work, courts are more likely to award the cost of performance (para. 66).

Otherwise, aggrieved parties must satisfy the court of their intention to rebuild. As described in *Scaffidi-Argentina,* the evidence must make judges "virtually certain" that the owners will rebuild (para. 59). In *Safe Step,* it was enough that the owner had obtained estimates for the cost of removing the floor and moving equipment for the renovations and had already undertaken repairs to another part of the building (para. 67). Damages were awarded to replace the deficient floor with a new one of the same material.

[134] In cases where economic loss is measurable, it is important to assess the effect of the deficiencies on market or amenity value. The question is whether the deficiency has a significant effect on the value of the building. In *DeGier,* it was found that the absence of a vapour barrier in the concrete floor would have a detrimental effect on the resale value of the home.

[135] It is problematic when no evidence about market value is brought forward at trial. This was the case in *Diotte,* where there was an absence of expert evidence regarding the impact of contract deviation on the property's value. As a result of this omission, the New Brunswick Court of Appeal held that assuming a damage award equal to the cost of reinstatement is necessary was not reasonable in the circumstances (para. 45).

[136] Whether the cost of reinstatement is disproportionate to its advantages is folded into *Hudson's* reasonableness assessment. The issue here is whether reinstatement damages will leave the aggrieved party better off than if the contract had been performed without deficiency. As explained in *Safe Step,* courts are generally concerned with awarding the aggrieved party a "windfall" instead of awarding the cost equal to "the true measure of loss" (para. 60).

[137] In explaining why remediation damages were not appropriate in *Strata Corp,* the British Columbia Court of Appeal stated:

> 30 … Were the plaintiffs to recover on the basis asserted by them in this case, they would be in a far better position than if the contract had been properly performed. They would then have a sum of money approximately equal to the original cost of that area of the building occupied by them and would still have a building serviceable for their purposes. That would not be a reasonable result. It therefore cannot be one intended by the general rule, the purpose of which is to grant full compensation, not a windfall.

[138] Comparatively, in awarding remediation damages in *DeGier,* Richard J. held:

> 45 … This is not a case where the Defendants will gain an unreasonable benefit in that they will enjoy the full benefits of the completed residence. They have already demonstrated by their conduct that this is not the case. Indeed, they have not used the renovated area to the extent which they had intended — and may not do so until the renovations are completed according to contract.

[139] The question of disproportionality is clearly tied to the earlier questions of usability of the structure and intention to rebuild. If the building is already usable for its purpose, awarding remediation damages would put the building owner in a superior position. This is especially true if the builder does not intend to rebuild and will be pocketing the damage award as a windfall instead of going through with the repairs.

[140] If the four factors I have spoken to lead to a conclusion that remediation damages are not reasonable, damages must be calculated another way. The most common alternative to remediation damages is an award for diminution of value. Where an award for diminution in value is not appropriate, then I should still award some nominal amount for the loss resulting from the breach of contract. As explained by LeGrandeur, A.C.J. in *LA Home Solutions,* "Once it has been proven that a loss has been suffered then even if the quantum of damages is difficult to estimate, the Court must simply do its best on the material available" (para. 62). It is clearly not right to fail to compensate a party who suffers a breach of contract because no precise approach for calculating nominal damages is available (*Strata Corp.,* para. 48-52; *Quail Views Farms,* paras. 102-103; *Scaffidi-Argentina,* para. 37). When awarding nominal damages, I should simply make my best estimate of what amount reasonably compensates for the breach.

[141] Despite the variation in the reasonableness analyses throughout the caselaw, *Hudson's* test summarizes the main elements that recur most frequently as follows:

- The first important factor is whether the work is satisfactory for its purpose. If the owner is still able to use the work product as expected, courts may decline to award remediation damages. If, on the other hand, remediation is the only option to allow the owner to enjoy the building for its intended purpose, remediation damages are appropriate. Courts have held that safety issues call for remediation damages.
- The second important factor is whether the owner intends to use the remediation damages to rebuild. Builders can expect aggrieved owners to act reasonably, though not perfectly, to mitigate the harms of an alleged

deficiency. Where owners have taken few or no steps to address the deficiency or have brought no evidence to prove their intention to rebuild (e.g., getting quotes, beginning renovations, etc.), courts may decline to award remediation damages.

- Third, courts also look at whether the alleged deficiencies have had a significant effect on the value of the building such that reinstatement is necessary for resale.
- Finally, courts look at whether the cost of reinstatement is disproportionate to its advantages in the sense that reinstatement damages will grant the owner a windfall. A windfall exists where an owner is granted the cost of reinstatement while already having a building that is usable for its intended purpose.

Analysis of the RECC

[142] Based on the factors emphasized in the case law above, I agree with PCL that remediation damages are not appropriate in this case. In my view, the Owners have not suffered a loss that justifies remediation. While the Owners are right to say this is more than an "aesthetic breach" (i.e., it is not their "personal preference" that the stairs comply with the NBCC), I find remediation damages would still be unreasonable in this case. The stairs are usable. There is little evidence of intention to rebuild, and the cost of redoing the RECC stairs is disproportionate to the benefit that would be achieved.

Whether the building is usable for its intended purpose

[143] The case law reviewed above delineates between cases where the building is usable for its intended purpose without remediation and cases where remediation is the only option to enable use as intended. I find this case is the former.

[144] The RECC stairs are being used for their intended purpose. The stairs at the RECC are intended to allow patrons to access the arena. The Owners were granted an occupancy permit without raising concerns about the safety of the stairs. Since then, despite eventually discovering the NBCC non-compliance, the stairs have been used for exactly their purpose. They have also been used regularly as part of an exercise track (individuals go up and down the stairs), arguably pushing their use beyond the intended purpose.

[145] I find that the stairs are not unsafe because of the NBCC violation. The Owners argue the stairs are not fit for their purpose because the NBCC sets minimum standards for health and safety. *Diotte* and *Safe Step* are clear that issues of personal safety call for remediation damages. Based on the evidence before me, the stairs can be used safely for their purpose despite the NBCC violation. The stairs violate the NBCC only by a matter of millimeters. Since the RECC opened to the public, only one person has been injured on the stairs. The claim relating to this injury was withdrawn for unknown reasons and it was only at the time of the claim that the NBCC violation was discovered. There is no causal link between that injury and the NBCC violation. There is no certainty that the person fell because of the NBCC violation. In my opinion, the safety risk is speculative, and the evidence supports a conclusion that the stairs are usable as is. Further, at trial, there was a suggestion that over a million people have used the stairs. The Owners did not adduce any evidence of complaints by any of these users. There is no proof of the alleged safety risk having materialized.

[146] Importantly, I think there is a difference between failure to comply with the NBCC and evidence of lack of safety. The Owners conflate the two. From my perspective, non-compliance does not automatically mean "unfit for their intended purpose." Given that the stairs have been used for their intended purpose for many years, and given that the safety risk is speculative, the NBCC violation appears to be more of a "technical" breach in the sense of not giving rise to actual harm or loss. As such, I do not see remediation damages as necessary in this case.

Whether there is evidence of intention to rebuild

[147] I find that the evidence of intention to rebuild is lacking in this case. I am not satisfied that the Owners have proved they intend to rebuild the stairs. The Owners have stated that they intend to rebuild. Beyond that statement, there is no evidence of steps they have taken to mitigate the harms of the deficiency. This is not a case like *Safe Step* where quotes have been gathered and renovations have begun. This is a case like *Leung* where the deficiency has existed for many years and nothing has been done to address it.

[148] The jurisprudence is clear that the Owners must act reasonably. While building owners are not expected to be perfect and while municipalities have understandable budgetary constraints, there are steps the Owners could have taken that would have mitigated potential risk without significant budgetary expenditure. They have not done so.

[149] I find the Owners have failed to do the bare minimum to address the deficiencies. While the Owners argue that their budget constraints and work to address the pandemic and housing crisis make it reasonable for them not to have started repairs, I believe signs and railings could easily have been added if there was genuine concern about safety. Further, no money would have had to be expended to alter the use of the stairs to mitigate risk. Instead, the stairs continue to be used regularly. While the Owners say they have used ushers to warn of risks, there is no real evidence of these mitigation efforts. This lack of evidence makes it difficult to conclude that the Owners have proven a clear intention to rebuild.

[150] Further, it is an important consideration that the Owners cannot be forced to fix the stairs. As PCL argues, the Owners are the "authority having jurisdiction." There is no third-party enforcer – the Owners themselves are the only party who can order compliance with the NBCC. To date, they have not done so. The Owners could have ordered themselves to fix the stairs and had an employee testify to the order as evidence that they intend to repair the stairs. This is another step that could have been taken to prove their intention to rebuild.

Impact on market or amenity value

[151] Market value plays no role in this case because the building is a community centre that will not be resold. While *DeGier* stated that NBCC related deficiencies can impact future purchases of the property (para. 45), the Owners in this case have not brought evidence of intention to sell. In fact, the Owners say themselves in their pre-hearing brief that the irrelevance of market value is a reason to award reinstatement damages. Since nominal damages are an option, irrelevance of diminution of value does not mean that I must award reinstatement damages; it merely suggests that market value plays no role in my analysis.

Whether the cost of reinstatement is disproportionate to the advantages

[152] I find the cost of reinstatement is disproportionate to its advantages. The Owners are asking for a large damage award to redo the stairs. Yet, the RECC the Owners contracted for works as intended. The high cost of renovation is not necessary when the deficiency has had no impact on the use of the RECC.

[153] The disadvantages of remediation for the broader community also militate in favour of declining to grant remediation damages. This is a unique case. Here, an important consideration is the impact on the surrounding community of a large

renovation to their community hub. Knowing the stairs work as intended, this impact on the public is disproportionate to the benefit of NBCC compliance when there is no evidence that the stairs currently pose a safety issue.

[154] Reinstatement damages are even more disproportionate considering there are other options to remedy the breach. This is not a case like *DeGier* where reinstatement is the only option. In *DeGier,* none of the other alternatives to a vapour barrier were adequate. Here, there are other options that could mitigate harm without the inconvenience and cost of full renovations, including installing railings and signs or renovating particular stairs.

[155] This case is similar to *Diotte*. In *Diotte,* the owner wanted a replacement wall and reconstruction to the contractually agreed upon square footage. The owner was only awarded a sum to strengthen the wall and nominal damages for the square footage problem because the deficiencies had not caused issues with the use of the building and there was no clear intention to rebuild. I find that the cost of full replacement of the stairs is disproportionate to the advantages of replacing them given they have proved to be perfectly usable. A nominal amount to bolster the safety of the stairs would be more appropriate.

Nominal damages

[156] After analyzing the above factors, I find reinstatement is not appropriate. Another method of assessing damages should be used. Diminution in value is the most common alternative method. Where diminution of value cannot be calculated, courts should still compensate for the breach by estimating nominal damages. I find a nominal damage award should compensate for the infrastructure necessary to make the stairs safer without completely redoing them.

Award of Nominal Damages

[157] The Owners have adduced no evidence to show that the stairs are unsafe or unfit for their intended purpose. The evidence demonstrates that the stairs are used daily as intended, with the Owners having taken no action in the past decade to restrict use, modify the stairs, or warn users. The stairs are being used for their intended purpose, and the cost of remediation put forward by the Owners is disproportionate to the nature of the breach.

[158] Remediation damages do not have to be awarded where doing so would be unreasonable or disproportionate to the advantages. The primary considerations are

whether the building is already usable for its purpose, whether the owner intends to rebuild, and whether the advantages of reinstatement outweigh the costs.

[159] I find remediation damages are not appropriate in this case. The stairs have been used exactly as intended for years and there is no evidence they have caused injury in this time. Further, while the Owners say they will rebuild, they have not taken steps over the years to mitigate the harms or brought real evidence to prove their intention. Finally, the financial cost and impact of rebuilding on the community is high in comparison to the benefit of reconstructing stairs that already achieve their purpose, especially since there are ways of bolstering the safety of the stairs without full reconstruction. Remediation damages are not required here, and I award a nominal sum. That sum shall be the value of installing handrails in every aisle in the RECC for the arena and pool, along with sufficient signage alerting patrons to the issue of the stairs (i.e., watch your step).

[160] If the parties cannot agree on the costs for the nominal sum, I will accept three quotes in total from the parties, one being from an agreed upon party and the others from their own choosing. I will then provide the parties with a nominal sum.

Conclusion

[161] I find that PCL is entitled to its Contractor's Fee with the applicable mark-ups, the staff costs except for February 1, 2013, to May 8, 2013, the amount of the cheque ($120,096.63), and interest.

[162] The Owners are entitled to nominal damages which I will determine upon receipt of the quotes.

[163] PCL is entitled to costs as the successful party. If the parties are unable to reach an agreement on costs, I shall receive written submissions within 30 days of the date of this decision.

[164] I would ask counsel for the Plaintiff to prepare the Order.

Bodurtha, J.