Court of Queen's Bench of Alberta

Citation: Maxim Excavating Ltd v Peace Regional Waste Management Company, 2022 ABQB 351

Date: 20220517
Docket: 1203 15420
Registry: Edmonton

Between:

Maxim Excavating Ltd.

Plaintiff

- and -

Peace Regional Waste Management Company and Northern Sunrise County

Defendants

Reasons for Judgment
of the
Honourable Madam Justice M.E. Burns

Introduction

[1] In April 2011, Maxim Excavating Ltd ("Maxim") won a tender relating to the construction of three industrial waste cells for Peace Regional Waste Management Company ("Peace Regional"). The contract time was set for the period from May 15 to August 31, 2011. Maxim completed Cells 2 and 3 by November 10, 2011, and Cell 6 in the spring of 2012 and the three cells were put into use. Omni-McCann Consultants Ltd. ("OMC") acted as the engineer on the project with its employee Royce Sather ("Mr. Sather") being the engineer responsible for the project.

[2] The cause of the delay in completion, who was responsible for the delay and what damages were incurred, if any, is at the heart of this action. Maxim sues for outstanding payments for the work completed plus excess costs arising from the delay. Peace Regional disputes the amounts claimed asserting that Maxim breached the contract and that it is entitled to set off charges arising from the delay and the breach of contract.

The Contract

[3] The natural starting point for a dispute over payment of a construction contract and construction delay is the contract itself ("the Contract"). In this case the Contract includes several documents including:

a. The tender documents,

b. The Agreement,

c. The General Conditions of the Contract ("GCs"),

d. The Supplementary General Conditions of the Contract ("SGCs"),

e. The plans and specifications with Addendums, and

f. The bonds and certificates of insurance.

[4] As Peace Regional notes, the interpretation of contracts has evolved towards a practical, common-sense approach where the main objective is to determine the intention of the parties and the scope of their understanding: ***Sattva Capital Corp v Creston Moly Corp***, 2014 SCC 53 at para 47 (***Sattva***). One must look at the actual language used in the written contract and employ the "cardinal presumption" that the parties fully meant what they said: ***Weyerhaeuser Company Limited v Ontario (Attorney General)***, 2017 ONCA 1007 at para 65.

[5] The written contract must be read "as a whole," where the words are given their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract: ***Sattva*** at para 47. The surrounding circumstances, or "factual matrix," typically refer to facts concerning the genesis of the contract, its purpose, and the commercial context in which the contract was made: ***IFP Technologies Inc v EnCana Midstream and Marketing***, 2017 ABCA 157 at para 83 (***IFP***). However, the surrounding circumstances cannot be allowed to overwhelm or displace the words of the agreement. Finally, the contract's text must be read in a fashion that accords with sound commercial principles and good business sense. In the absence of evidence of a bad bargain, courts should not interpret a contract in a way that yields an unrealistic or commercially absurd result: ***IFP*** at para 88.

[6] I am mindful of the words of our Court of Appeal in ***IFP*** at para 89:

> In the end, contractual interpretation is not an exercise in second guessing what could have been included in a contract while discounting or dismissing relevant terms of a contract and uncontradicted contextual information. It is instead an exercise in determining what the parties objectively intended having regard to the entire written text, relevant contextual background and commercial context.

[7] Upon reviewing the Contract, it is not easy to overlook the many confusing and complicated issues that arise. The evidence is that Mr. Sather, as the engineer on the project, "cobbled" the Contract together. I use that term intentionally as it appears that each component

for the Contract is based on a precedent of one sort or another and cobbled together for the purposes of this particular project. This is problematic and becomes more so when the numbering in the Contract was clearly not proofread and there are several instances where cross references to one subsection or another are clearly wrong. Mr. Sather blames this issue on his administrative staff.

[8] However, generally I find that in this case the commercial purpose of the Contract is not difficult to discern - Peace Regional needed three waste cells built to standards as soon as practicable. I note that the terms of the Contract also contemplated that there would be unforeseen events that might require flexibility and, hopefully, agreement (see for example GC3, GC8, GC20). I agree with Maxim that these provisions contemplated times when the scope of work would change and that it is not commercially sound that there would be an expectation that the work would be done without pay or without adjustment to time for the Contract.

[9] With this consideration of the commercial purpose, I will consider the other issues before me and address any other contract interpretation issues in the context of that analysis.

Assessment of the evidence

[10] At trial, Maxim called two witnesses: Maxim's owner, James Kratchkowski ("Mr. Kratchkowski"); and Aron Reeves, Maxim's Project Manager on this project ("Mr. Reeves"). The Defendants called three witnesses: Mr. Sather, an OMC employee and the engineering lead on the project; Peter Thoma ("Mr. Thoma"), an officer of Peace Regional who took over when the CEO of Peace Regional passed away in the spring of 2012; and Art Sawatzy ("Mr. Sawatzy"), the General Manager of the Peace Regional Waste Management Corporation for eight years and who testified to a waste management contract with Plains Midstream.

[11] In addition to oral evidence, the evidence at trial included a significant quantity of business and other records entered as exhibits, many by agreement.

[12] I found each of the witnesses who testified before me on behalf of Maxim to be credible and mostly reliable, but the passage of time has definitely impacted some memories. With respect to Peace Regional's witnesses, I find Mr. Thoma and Mr. Sawatzy to be credible and mostly reliable with the same concerns I had above relating to the passage of time.

[13] However, I have quite a bit of difficulty with Mr. Sather's evidence. He was qualified as an expert at trial as a witness with expertise involved in the events underlying the litigation but who is not a litigant: see ***Kon Constructions Ltd v Terranova Developments Ltd***, 2015 ABCA 249 at para 35. He was qualified based on his engineering qualifications as set out in his licence.

[14] During his testimony, Mr. Sather often indicated that he did not remember but then proceeded to say what he thought was being looked for. He would indicate he had no specific recollection but then add something like, "One of two things ***would*** have happened". He frequently used what I would call "wiggle-room" language such as "I take those to mean...", "I presume they would be...", and "I assume..." At times it appeared that Mr. Sather was guessing. In fact, at one point in cross examination, Mr. Sather was challenged that he was speculating, and he agreed. Often, the smallest of concessions had to be pulled out of him – like the relative amount of rain between the summer and fall. He would concede nothing. I found that Mr. Sather was deeply entrenched in his view of events and committed to delivering to the Court whatever

information best supported his particular interest. I have difficulty finding Mr. Sather credible or reliable.

[15] Mr. Sather was the engineer responsible for contract administration and the project. He assumed that duty through the Contract and through his professional engineering ethical standards. He had an obligation to administer the Contract in a way that was fair and reasonable to ***both*** sides of the Contract.

[16] There is no doubt that in a construction contract where an owner has expressly given power or discretion over a matter to its engineer there is an implied duty on that engineer to act in good faith when exercising that power or discretion: ***Golden Hill Ventures Ltd v Kemess Mines Inc***, 2002 BCSC 1460 at paras 662- 665 (***Golden Hill***). This duty of good faith is fundamental to every construction contract including this one.

[17] The General Conditions under the Contract contain many examples of the obligations and roles of the engineer. In several of the Contract provisions, the engineer (OMC) is obliged to consider positions and attempt to come to a mutual agreement. This is often in the context of unforeseen events that might entail delay, changed work or other disagreements. For example, GC7 "Engineer's Decisions" gives OMC considerable power and authority. It is qualified by requiring OMC to use the power under the Contract "to enforce its faithful performance by both parties hereto" (GC7, 1.0).

[18] The evidence establishes that Mr. Sather's loyalties lay squarely with those of Peace Regional in the administration of the Contract. He seemed incapable of considering Maxim's side on any issue that arose. As identified by Maxim, a good example is where OMC approved payment, but Peace Regional did not want to pay so as a result Maxim was not paid. Once OMC determined that payment was appropriate OMC should have done whatever it could to have payment made. It was OMC's responsibility "to enforce...faithful performance by both parties".

[19] The failure of OMC, through Mr. Sather, to act for the benefit of the project as a whole made the entire construction process much more difficult as many of the Contract provisions depend on the project engineer acting in good faith when determining what is reasonable in the circumstances.

[20] Given the difficulty inherent in reliability through the passage of time and the serious question of credibility I have with respect to Mr. Sather's evidence, I rely heavily in this decision on the documents provided. Some of the facts set out below are taken from the parties' closing submissions. Where the parties disagreed, the facts herein should be considered my findings based on full consideration of all evidence at trial.

Breaches of contract and sources of delay

[21] Construction delay litigation is, naturally, heavily dependent on the Contract at issue. Courts have considered actions on behalf of a contractor for delay recognizing that a delay can have cost consequences including:

(i) delay or extended duration costs,

(ii) impact or efficiency costs,

(iii) acceleration costs, and

(iv) lost opportunity to earn profit.

[22] Maxim seeks damages for unpaid contract work and for work that arises outside the Contract that was completed by Maxim at the direction of OMC. It asserts that the delays in the project were as a result of circumstances beyond its control – or excusable delay.

[23] Peace Regional is claiming set off damages for non-excusable delay.

[24] The General Conditions of the Contract specifically addresses delay in

GC8. DELAYS

1.00 If the Contractor is ***delayed*** in the performance of the Work ***by an act*** or neglect ***of the Owner, Engineer, or any Other Contractor*** or any employee of any of them, then the ***Contract Time shall be extended*** for such reasonable time ***as the Engineer may decide in consultation*** with the Contractor, and the Contractor shall be reimbursed for any costs incurred by him as a result of such delay.

(…)

3.00 If the Contractor is ***delayed*** in the performance of the Work by labour disputes, strikes, lock-outs (including lock-outs decreed or recommended for its members by a recognized Contractors' Association of which the Contractor is a member), fire, unusual delay by common carriers or unavoidable casualties, or without limit to any of the foregoing by ***any cause of any kind whatsoever beyond the Contractor's control***, then the Contract Time ***shall be extended*** for such reasonable time as may be mutually decided by the Engineer and the Contractor, but in ***no case*** shall the extension of time be ***less than the time lost*** as the result of the event causing the delay, unless such shorter extension of time be agreed to by the Contractor.

(…)

5.00 No extension shall be made for delay unless ***written notice*** of the claim is given to the Engineer ***within fourteen (14) days*** of its commencement providing that in the case of a ***continuing cause*** of delay ***only one claim*** shall be necessary.

(***emphasis added***)

[25] The Supplementary General Conditions also contemplate late completion:

SGC4. LATE COMPLETION

Should the Contractor fail to meet the completion date given, the ***Owner shall be entitled to make deductions*** from payments due the Contractor ***as compensation for costs*** incurred by the Owner beyond the completion date. Such ***costs shall include*** but are not necessarily limited to, administration, bookkeeping and engineering costs. The completion date shall be as noted in the Agreement unless the Owner has agreed, in writing, to an extension of time for completion.

(***emphasis added***)

[26] The evidence established that there was delay. Whether there was late completion depends on whether there are delays that are to be compensated by extensions to the Contract Time completion date.

[27] Maxim asserts several sources of delay including:

a. Berm work,

b. Weather,

c. Unsuitable materials,

d. Changes to the cycle strategy, and

e. Delays in testing gravel.

[28] Peace Regional argues that Maxim must establish the following for each of the alleged causes of delay:

a. The occurrence of an isolated and defined event which gives rise to a delay;

b. That the Contract treats the event as compensable entitling Maxim to both extra Contract Time and money;

c. That Maxim complied with the notice requirements of the Contract;

d. That the delay event is discrete and does not overlap with other delaying events;

e. That Peace Regional is solely responsible for the delaying event; and

f. That Maxim incurred costs or lost time or both as a result of the delaying event.

Notice under the Contract

[29] Before looking at the delays asserted, some consideration of the notice provisions is necessary.

[30] Peace Regional argues that failure to give proper notice when required to do so disentitles Maxim to any relief. As noted above, the Contract deals with delay and the notice required in GC8, Article 5. The condition requires 14 days written notice of the claim to be provided to the engineer. The purpose of notice is to give the owner an opportunity to consider its position and take corrective measures and it is prejudiced by not being able to do so if notice is not provided. Further, written notice allows the parties to deal with problems as they arise rather than arguing about it afterwards. Specifically, Peace Regional argues that the case law clearly states that discussing a potential delaying event during meetings is insufficient and that meeting minutes or notes do not establish notice of a delay. Peace Regional argues that notice is a precondition to any claim for cost reimbursements or an extension of Contract Time. Failure to give such notice is fatal to any request for an extension of Contract Time or a claim for cost reimbursement.

[31] Maxim argues that it complied with all contractual notice requirements because those notice requirements do not arise in a vacuum. Notice is only required when Maxim became

aware that there would be an issue requiring resolution relating to a delaying event. Maxim argues that this applies to every source of delay that has been raised.

[32] While I will deal further with the issue of notice below on the sources of delay raised, generally, I find that Maxim's argument that they can only give notice once they were aware that there was a problem has merit.

[33] In the circumstances of this case, I am concerned that Peace Regional (more specifically its engineer) routinely failed to comply with the Contract provisions and comes to this Court to insist the terms of the Contract be strictly applied to Maxim. It cannot have been the intention of the parties that Peace Regional can simply not comply with their own requirements under the Contract and insist on strict compliance by Maxim. For example, OMC repeatedly failed to deliver the notices of the site occupancy reports to the proper location or in a timely manner. The evidence establishes that site occupancy reports were not provided weekly but were provided whenever it appears Mr. Sather got around to them. Peace Regional cannot now suggest that Maxim must comply with notice requirements which are directly related to the timelines of the receipt of those very reports.

[34] It appears by the actions of OMC that Maxim should also benefit from the relaxed compliance with the provisions of a complex contract that was drafted by OMC. I agree with the court in ***Golden Hill***, at para 741, where it provides that:

> Canadian courts commonly reject “notice” defences raised in construction cases based on a failure of the claiming party to comply with the technical requirements of the formal procedures in the contract recognizing that, on most construction projects the parties adopt less formal procedures more consistent with the realities of the construction project...

[35] I find that this was the case here. The less formal procedures adopted by OMC and Mr. Sather are more consistent with the realities of the construction project, but these informalities must benefit all parties to the Contract.

Sources of delay

(i) The Berms

[36] The first delay asserted relates to berms. Mr. Reeves testified that at the beginning of the project it was apparent that there were berms of unsuitable material obstructing the project and that Maxim was instructed to remove them. Maxim argues that this was work outside the Contract and that working on the berms delayed the Contract. The work was paid as “forced account work” but Maxim argues that Contract Time should also be adjusted. Only one day was given in Contract Time but it took almost a week to do the work.

[37] Peace Regional argues that the removal of the berms was not an extra to the Contract. Mr. Sather testified at trial that the berm removal was work included in Schedule 1(a) of the Contract as one can see the berms on the drawings. Peace Regional asserts that if the work cannot be compensated for outside the Contract, it cannot be a delaying event.

[38] I find that Peace Regional’s position makes no commercial sense. Mr. Sather’s evidence at trial, when considered in context with what he actually did, is one example where Mr. Sather seemed determined to put his view of the best information possible before this Court to support the position taken in litigation. The documentary evidence establishes that Mr. Sather agreed to

pay for the berm removal as "forced account" work rather than on the unit rates set out in the Contract. The documents show that Mr. Sather directed his on-site supervisor to accept the berm removal as forced account work and it was noted in the relevant daily summaries that it was forced account work. If the berm removal was a line item it should have been identified as such. I find that it was paid as forced account work because it was outside the scope of the Contract. Further, Mr. Reeves testified that they were asked to do this work and the fact that it is at odds with their construction schedule and cycle strategy supports that conclusion.

[39] Peace Regional argues that Maxim never raised a complaint due to this forced account work and it did not provide any written notice of delay or make a change request for more Contract Time as is related to clearing away the berms. Mr. Reeves testified that at the beginning of the project this added five additional days to the project that were being paid as forced account work. He further testified that it was not until he had the site occupancy reports seven weeks later, that he saw that they were not given day for day credit for the work, and they were charged site occupancy days. He testified that had he known they would not get day for day credit, they would not have done the forced work.

[40] Having reviewed Mr. Heroux's daily reports and Mr. Richard's Construction Summary relating to the first week of work it is apparent that some other work was completed by Maxim during this week - i.e., it was not all forced account work. But I note that Mr. Reeves testified that the scraper and operator would have been used elsewhere during this period but for the forced account work and I accept this evidence. However, I am not prepared to find five days delay. I find three days delay that should be compensated with a Contract Time extension. With respect to site occupancy, I note that the work done during this week that was not forced account work means that Site Occupation Days may be counted in accordance with its definition as discussed below, except the first day which has been already acknowledged not to be a Site Occupation Day in Mr. Sather's calculations.

(ii) The Weather

[41] There is no doubt that there was a significant amount of rain at the worksite during construction. The disagreement arises over which days the rain prevented Maxim from working. Under the Contract, given that no one can control the weather, any delay caused by rain is non-compensable. The consequence of rain delay, *per se*, is with respect to Site Occupation Days and an extension of Contract Time.

[42] But in addition, Maxim clarifies that the damages or compensation it seeks relating to the weather relate to the requirement by Peace Regional to perform work related to the weather but outside the scope of the Contract such as de-mudding, pumping and being on standby.

[43] Again, Peace Regional denies that Maxim provided proper notice of the rain delays. Specifically, they argue that the notices provided do not meet the requirements set under GC8 as they failed to identify any discrete delaying events, they failed to ask for compensation or an extension in Contract Time, they failed to advise that a claim would be brought under the Contract, and any notices given were not within 14 days of the occurrence of the delaying event.

[44] Maxim points out the rain delay is obvious. The weather was described as rain monsoons by the Chief Administrative Officer of Peace Regional at the time. A fax was sent by Mr. Reeves to Mr. Sather on July 7, 2011 - when he finally got the site occupancy reports - and he raises the

issue of site occupancy counting because of the rain and the work required of them. The fax notes that there were also discussions between Mr. Reeves and Mr. Sather.

[45] Peace Regional argues that the faxes on July 6th and July 7th are not sufficient. They argue that Mr. Sather testified he had no recollection of ever receiving these faxes and does not recall discussing the issues described therein. Peace Regional argues that although the impact of the weather was discussed at various points throughout the project no written notice of delay was ever delivered. As noted above, I do not believe Mr. Sather. His memory is convenient. I find the faxes were sent and received as indicated and that they set out the discussions held. I find that this notice satisfies the Contract provisions given the parties' respective conduct (i.e., the delay in sending site occupation reports that would alert Maxim to a problem) and the parties' apparent agreement to flexibility in compliance with strict contractual provisions.

[46] I also note that Mr. Sather considered the rain delay and in fact extended the Contract Time. He originally calculated the rain adjusted completion date to be October 18th, 2011. On October 14th, 2011, OMC informed Maxim that it had revised its calculation of the completion date to October 20th, 2011. This shows that the notice provided to Peace Regional was sufficient for their Engineer to consider the delay and set out a position. The policy objectives of notice have been met.

[47] Peace Regional notes that Maxim did not challenge or contest this new completion date or provide its own calculation with respect to extending the Contract Time for the rain suffered to date. Thus, Peace Regional argues that there was a mutual agreement on the October 18th, 2011 date, as contemplated under GC8.

[48] I find that at no time was there any "mutual" agreement reached regarding an extension of Contract Time as prescribed under GC8 Delays, Article 3.00. What OMC did through Mr. Sather is ask for a schedule and he said, "if it's only the weather that is the issue, I think it's reasonable to assume that weather delays will just push the schedule back from whenever you do get started".

[49] Maxim argues that it did not obtain what it was entitled to under the Contract for an extension of Contract Time because beyond a few limited exceptions, OMC did not allocate any drying time to Maxim to halt the proverbial clocks of Contract Time and site occupancy. Given the monsoon-like rains and the evidence of Mr. Reeves with respect to the muddy conditions following the rain, I find that periods of drying were necessary and compensation by Contract Time extension is reasonable. In fact, the Contract contemplates such days in its definition of Site Occupation Days where it provides that unproductive days (after a rain while de-mudding or pumping) are not Site Occupation Days.

[50] With respect to the extension of Contract Time as a result of weather, I have reviewed all the site reports, and the schedules provided by Mr. Reeves and Mr. Sather in the calculation of days lost to weather, in their respective opinions. I have calculated days lost to weather for the period up to the conclusion of Cells 2 and 3 to total 59 days plus 12 days for "drying" – more properly to reflect the fact that the very wet and muddy conditions delayed construction. GC8 Article 3.00 provides that Contract Time ***must*** be extended by no less than these 71 days.

[51] As discussed in further detail below, I find that the time between November 10, 2011, and May 23, 2012, is not to be counted as Contract Time as the parties agreed to delay the

completion of Cell 6 to the Spring of 2012. A winter break is not Contract Time or Site Occupation Days.

[52] With respect to the period between May 23, 2012, and the completion of Cell 6 on June 21, 2012, I find that there were 12 days of delay from rain and pumping/de-mudding.

[53] With respect to compensation for work done outside the Contract due to dealing with the consequences of the rain, Maxim claims costs incurred including the cost of fuel, equipment, labour, room and board, etc. Maxim argues that the Contract made no provision for pumping water and Maxim was under no obligation to perform that work free of charge and these costs were incurred due to express directions given to Maxim to expedite the work.

[54] Peace Regional indicates that the only promise to reimburse Maxim's costs due to rain was for the mobilization of an additional 815 Packer which it agreed to pay for and was solely related to accelerating the completion of the work. There does not appear to be any dispute about the 815 Packer. The question remains as to whether Maxim can claim expenses relating to non-contract work that arose due to rain and whether notice provisions preclude that compensation.

[55] The fact of the August 5, 2011 meeting shows the importance of the consequences of the rain delay to the parties. Peace Regional needed to get its cells completed as soon as possible. Maxim was limited in their contract work because of the muddy conditions and were being pressured to do whatever they could to de-mud and continue construction. The meeting was precipitated because of Mr. Kratchkowski's communications with Mr. Sather that Maxim required compensation. Mr. Sather's response that further compensation was "unlikely" was met with Mr. Kratchkowski suggesting that Maxim stop the non-contract work, including de-mudding, to allow the sun to dry the site. This would surely have extended the delay due to rain even more. The meeting agenda, drafted by Mr. Sather, recognized that Maxim's concerns needed to be addressed.

[56] Mr. Sather's notes from the August 5, 2011 meeting establish that compensation was discussed and Peace Regional agreed to consider compensating Maxim for the extra cost incurred due to weather related delays. The parties ended the meeting with Maxim tasked with providing information or a proposal to Peace Regional for consideration. No timeframes were noted and Maxim's position is that those extra costs were unascertainable until the job was done.

[57] Mr. Kratchkowski and Mr. Reeves both testified that Maxim was led to believe that those costs would be entertained and addressed at the conclusion of the work such that there was no problem or reason for them to give notice of a claim. Mr. Sather's notes support those impressions. I find that the work was extra to the Contract, and is not compensation for delay *per se*. I do not find that Peace Regional agreed to compensate for the work – but I do find that they cannot expect a contractor to do work at their insistence and not pay for it.

[58] I find that in addition to recalculation of Site Occupation Days and contract extensions as contemplated in the Contract, Maxim is entitled to be compensated for the work they performed that was outside the scope of the Contract. As discussed above, an informal approach to the notice provisions applies and the evidence establishes that notice was in fact provided. The damages and the consequences to Contract Time are discussed below.

(iii) Unsuitable Materials

[59] Maxim argues that another source of delay and extra work on the Contract arose from excessive contaminated material requiring specialized sorting and handling. When excavating

Maxim was looking for clay that would be suitable for the clay liner. If the material was not suitable it would be moved to an “unsuitable” or “junk clay” stockpile in a designated site. In this case much of the unsuitable material was also “contaminated” meaning that the material had to be disposed of in other areas. The unsuitable material encountered on site was mostly old garbage from a previously constructed landfill and lead to a bucket by bucket, time consuming exercise to separate usable clay to ensure that sufficient suitable material would be available to build the clay liners. Maxim argues that the presence of this material ought to have been disclosed to Maxim at the time of bidding.

[60] Peace Regional argues that the sorting and removal of unsuitable materials was always contemplated as part of the Contract to be performed by Maxim. It argues that the work was not an extra to the Contract and therefore it cannot give rise to a delay that would justify a change in the Contract Time nor a change to the Contract price. Further, even if unsuitable materials were an extra or a delaying event, Maxim did not request an extension or give notice of a delay within the time required by the Contract.

[61] The tender form provides a unit price for Earthwork. For Cells 2 and 3, Earthwork includes excavate and stockpile (estimated 20,200 cu m). Material suitable for creating the clay liner was to be stockpiled. Earthwork also includes excavate and dispose in phase 4B (estimated 20,100 cu m) which relates to material found that would be unsuitable for a clay liner. With respect to Cell 6, Earthwork includes excavate from cell and stockpile (estimated 600 cu m).

[62] Maxim asserts that the issue here is that there was much more unsuitable material than anticipated. This meant that there was not enough suitable material for the clay liner, meaning Maxim had to sort through the excavated material to remove, bucket by bucket, the unsuitable from suitable clay in order to stockpile enough clay for the liners. Maxim argues there is no line item or unit price for the activity of separating suitable and unsuitable material.

[63] The evidence confirms that there was much more unsuitable and contaminated material than anticipated. Mr. Heroux’s and Mr. Richard’s notes both document that “significant amounts” of garbage were found resulting in the need to find additional areas in which to stockpile (separately) both unsuitable and contaminated material. The effect of this was that there was quite a bit less material for stockpiling to build the clay liners than expected.

[64] With respect to notice I find that it was sufficient given the relaxed position of the parties relating to the time requirements of the Contract. The policy reasons for notice provisions were met as Peace Regional and OMC were well aware of the issue of unsuitable material and were actively dealing with the issue along with Maxim. Maxim’s position on this is not a surprise to Peace Regional.

[65] Mr. Heroux and Mr. Richard started documenting this issue as early as June 1, 2011. Mr. Heroux’s notes confirm that Mr. Richard raised the issue that not enough suitable material was being stockpiled from the industrial Cells. As early as July 6, 2011, Mr. Reeves sent a fax to Mr. Sather indicating that Maxim did not agree that the time spent sorting and hauling the extra unusable material should be at Maxim's costs according to the Contract. It is apparent from the fax that the issue had been previously raised with the site superintendent, who had discussed the matter with Mr. Sather. Although not drafted as one might expect from legal counsel, the intent is clear. Maxim did not agree and the volumes encountered were causing delays in a project already delayed by weather. Mr. Reeves testified that he made a follow up phone call after the fax was sent.

[66] While Mr. Sather has no recollection of the fax or the discussions with Mr. Reeves, Bob Miles knew about the contaminated material in Cell 3 by at least July 14, 2011, because he discussed the need to plan around it with Mr. Sather. By July 25, 2011, it was apparent that the plan involved Maxim doing the work. The question is whether the work was contract work or extra-contract work.

[67] Peace Regional argues that the work was not an extra to the Contract as the unit rates were full compensation for the work and that sorting materials and double handling was included in the unit rate. Peace Regional specifically points to the General Requirements of the Contract. If the work was within scope of the Contract and paid by the unit prices, it cannot give rise to a delay that would justify a change in either the Contract Time or the price.

[68] Maxim argues that the work of sorting materials load by load was not included in the scope of the Contract. This is evidenced by the sheer volume of the material that had to be handled and sufficient liner material was only attainable through the load-by-load sorting. Maxim argues that the general accuracy of the composition of the soils and the estimated quantities represented under the Contract informed the parties' commercial expectations in two distinct ways:

a. First, the soil composition and quantities were tied to the passage of time, in the sense of enabling an assessment of how long the job would take. To the extent that more work takes more time, no contractor could reasonably expect to encounter much variance in these factors.

b. Second, the Contract expressly provided for the job to conclude no matter what unforeseen contingency arose and that changes to both time and price were contemplated where such contingencies arose. There was no expectation that such work was to be performed free of charge.

[69] Peace Regional is correct that the General Requirements in Part 1.0 provide that the price bid for various items of work is quite inclusive and arguably includes sorting and hauling of material. Part 2.0 specifically addresses "incidental work" and notes that there is no separate payment for incidental work. In particular, "incidental work" includes work shown on the plans and drawings and referenced in the General Conditions, etc. Such work is part of the complete work unless specifically excluded. Part 3.0 provides that payment for excavating and stockpiling includes full compensation for "sorting the material into separate stockpiles" as well as excavating, etc.

[70] I find that the work that was provided in separating load-by-load contaminated and unsuitable material from suitable material for the liners was not incidental work. It is one thing to expect that a load of material will be either placed in the suitable or the unsuitable pile as was contemplated in the Contract, but it is another to be required to sort the material load-by-load. I also note that the bid price is inclusive of many items, with a qualification that the bid price is for work constructed "in accordance with the drawings and specifications". This goes to Maxim's argument that the volume of materials to be handled was outside any commercially reasonable expectations given the volumes provided in the Contract or in accordance with the Contract specifications.

[71] Tender Form, page 2, para 2 provides:

> Any estimate of quantities as provided by the Engineer is approximate and only for the purpose of assisting the contractor in determining the scope of work. No claim will be made because of any increase or decrease in the quantities.

[72] Further, Article 5: Site Conditions in the Instruction to Tenderers provides:

> The tenderer is not entitled to rely on any data or information included in the Tender as to site or subsurface conditions or test results indicating suitability or quality or otherwise of site or subsurface materials for use in carrying out the construction of the work.

I find these provisions do not apply to work that was not contemplated in the Contract. The work that was performed must be paid for and delay from that work must be taken into account.

[73] With respect to delay, I find that the sorting began June 1 and continued to at least the end of July. I find that there were 16 Site Occupation Days for this period. Based on a review of the work site reports, I find that a reasonable period to extend the Contract Time for the work done is six days. The price paid for the work is considered below as part of the damages sought.

(iv) Changed cycle strategy

[74] After being selected as the successful tenderer, Maxim provided a construction schedule which included a cycle strategy to Mr. Sather on May 6, 2011, even before Maxim was served with the Notice to Proceed with construction, at Mr. Sather's request. Mr. Reeves explained that their cycle strategy was how they would allocate resources and work the project such that material was only handled a minimum of times. The original strategy was to excavate Cell 6 and then use material from Cell 3 and possibly Cell 2 on Cell 6 for its clay liner. The strategy was to finish Cell 6 first then proceed to Cells 3 and 2.

[75] Maxim argues that it was directed to change its priorities and its cycle strategy to expedite the work on Cells 2 and 3 as much as possible to accommodate Peace Regional's contract with Plains Midstream. Maxim argues that the costs associated with this direction, none of which were contemplated by the parties at the outset of the Contract, were solely attributable to directions provided by Peace Regional and OMC and give rise to compensation.

[76] Peace Regional argues that the cycle strategy was not part of the Contract and that the cycle strategy was not reflected in the Contract schedules. Peace Regional indicates that Maxim chose to change its cycle strategy in the middle of the construction on its own, not at the direction of Peace Regional. Peace Regional argues that the cycle strategy was not changed in response to the Region's prioritizing industrial Cells 2 and 3 around July 14th, 2011.

[77] Mr. Heroux, in his note of June 14, 2011, states that, "first thing this morning we found out that the contractor's plans had changed. As of today the contractor is leaving the work in MSW Cell 6 until the end of the job. The reason for this is because so much material excavated from the industrial cells has been unsuitable for liner that the contractor is concerned there won't be enough clay in the industrial cells for the liner in Cell 2 and 3."

[78] I am not satisfied on the evidence that Maxim was forced to change its cycle strategy at the behest of Peace Regional – at least not directly. It appears that Maxim had to change its strategy due to the unsuitability of the material being found in Cells 2 and 3, as just discussed. This forced Maxim's hand, no doubt along with the requests of Peace Regional, and Maxim

made the choice to change its cycle strategy. As discussed above, Maxim will receive some Contract Time arising from sorting unsuitable material load-by-load and damages will be discussed below. This appears to be the root of the change and I am not prepared to provide further time or damages for the changed cycle strategy *per se*.

(v) Delays in testing

[79] Maxim argues that OMC's decision to do its own testing of material caused considerable additional delays in a project that was already behind schedule due to weather. Maxim asserts that OMC had no right under the Contract to reject the test results of JR Paine & Associates ("JR Paine") and insist on its own testing. Specifically, Maxim argues that OMC's conduct as engineer breached its duty of good faith by refusing to recognize that using its own resources to test the gravel was causing significant delays to Maxim and the project. In the end these delays were beyond Maxim's control. Maxim points to GC8, Article 1 that provides that if the contractor is delayed in the performance of the work by an act of the engineer, then the Contract Time shall be extended for such reasonable time as the engineer may decide in consultation with the contractor and the contractor shall be reimbursed for any costs incurred by him as a result of such delay. No agreement was reached, and the delays are compensable by an extension of Contract Time and reimbursement for costs.

[80] Peace Regional argues that the testing conducted was appropriate and that the gravel supplied by Maxim's gravel supplier was the problem and the cause of the delay on the project. OMC was not obliged to accept deviations from the Contract specifications. Further, Peace Regional argues that there is no evidence to prove that even if another firm would have tested the gravel that the turn around time or the test results would have been any different. If the turn around time was a delaying event, then Maxim should have given notice under the Contract but Maxim did not do so. The Contract did not expressly provide the turn around time for testing and Maxim never provided notice of this alleged cause of delay.

[81] Section 01400, of the Contract, Quality Control, provides that "testing shall be carried out by an independent inspection firm appointed by the Engineer". OMC interpreted that to mean it could appoint itself and do the testing. It chose to do so at its facilities in Edmonton.

[82] Mr. Reeves testified that the same rain that made it impossible to work was affecting their subcontractor's inventory. Rain on large piles of rock necessarily changes the composition of the pile by washing away the "fines" to the bottom. Given the already lengthy delays from weather, Maxim was seeking short turnaround time on the testing of the granular material and seeking the use of the local testing firm of JR Paine. In fact, Mr. Sather testified the method of testing was standardized such that JR Paine and OMC should have arrived at the same result.

[83] The question then is whether there was a delay by using OMC in Edmonton and whether notice of the delay and claim was given by Maxim.

[84] I do not have a lot of evidence with respect to the effect of the delays, although I am satisfied that there were delays. I have a May 13th email attaching a report from JR Paine indicating their turnaround can be within one day. The sample was dropped off May 12 and the results were available May 13. Likewise, a sample provided June 13 seems to have been processed within 24 hours. Mr. Reeves' evidence is that JR Paine indicated it could turnaround the testing in 24 hours.

[85] The evidence is that the samples were sent to OMC's Edmonton office on a Greyhound Bus. Mr. Sather testified that the turnaround time was "3-4 days". A sample dropped off on August 17th, 2011 was not completed until August 22nd (five days) through OMC's testing process. A sample taken September 7 was not processed until September 13 (six days). However, I do note another sample taken by OMC on August 25th was processed by the next day. Nonetheless, it is patently obvious that there was delay due to OMC using its Edmonton facility.

[86] With respect to notice on this issue, in an August 24 email to Mr. Sather, Mr. Reeves raised concerns with respect to OMC doing testing and the consequential delays to the project. On August 30 he again raised the concern indicating that JR Paine was local and could run the tests right away. On that occasion he asked if OMC was going to do the testing how fast could the turn around be. Mr. Sather's response was that the turn around time would be three to four days subject to a courier's delivery time. I find that Peace Regional had notice and that there were delays attributable to the use of OMC processing the sample testing from its lab in Edmonton.

[87] The delay caused by the decision to test from Edmonton is difficult to quantify. The one concrete example was where concerns of quality were raised on a Saturday (October 22) and testing results were not available until the Wednesday (four days). While alternate sources of gravel were sourced to avoid losing three days of production, there was delay that needs to be compensated. In addition to this example, I find that there were other times where delay occurred. I note there are at least two other samples of testing out of Edmonton. I find that a reasonable extension to Contract Time for the delay in testing is six days.

Maxim Delays

[88] Peace Regional argues that in addition to the delays that are asserted by Maxim, I must consider whether any of the delays are as a result of Maxim's conduct and breaches.

[89] Peace Regional argues that Maxim's gravel supplier was a source of delay as discussed above. In addition, Peace Regional argues that Maxim had deficient resources dedicated to the job including incompetent crew members, malfunctioning machinery, and scheduling problems. They point to concerns reported on OMC's daily progress reports. Peace Regional argues that all of the above problems and issues were Maxim's sole responsibility and they caused or at the very least contributed to the delay on the project. Peace Regional argues that the timing of many of these occurrences overlap with the events that make up Maxim's delay claims against Peace Regional.

[90] Maxim submits that Peace Regional's argument that there were concurrent delays attributable to Maxim should be precluded either for the purpose of assessment of damages or apportionment. Maxim argues that on a substantive analysis of these arguments they are not made out. The evidence is weak. The authors of the records on which those arguments were made were not called to give evidence and any evidence is an example of hearsay or double hearsay. Second, employee turnover is a regular occurrence in every industry, and it was not shown to result in a loss of productivity overall. Third, the reference to equipment and scrapers breaking down is misplaced in any event as the equipment was brought in specially to deal with the topsoil berms and was ultimately kept on the site to expedite the work at Peace Regional's request. Finally, in a general sense, equipment breaks down from time to time and it is also an anticipated and expected commercial reality factored into every job.

[91] My trial notes indicate that there were attempts by counsel for Peace Regional to raise issues of delay by Maxim. For example, Mr. Reeves was cross examined on Mr. Richard's notes that a 627 scraper broke down. When asked if this resulted in a delay, Mr. Reeves testified there was no impact on the production schedule. When asked about the note that there were delays from a packer not being able to work in high gear, he admitted yes but noted this was because the packer cannot work in high gear when it is working in mud. He notes the cause of the delay was therefore the rain. Overall, this cross examination did not produce any evidence that Maxim and its resources were the cause of delay.

[92] Mr. Heroux's notes also mention times when, in his opinion, there were delay issues related to Maxim's equipment and manpower. These notes were not put to Mr. Reeves in the same detail as Mr. Richard's notes. I find that these notes are all hearsay as the report writer was not called nor could the comments be cross examined on any of the alleged issues. I recognize that these notes might arguably be a business record exception to hearsay as they were done in the usual course of a construction project, but I find that many of the comments are subjective and would still have been usefully cross examined on.

[93] I find that Peace Regional has not proven that Maxim's resourcing on the project (equipment and manpower) was a cause of the delays on the project.

Cell 6 completion

[94] Peace Regional also argues that Maxim is the reason why Cell 6 construction was abandoned until 2012. I disagree. The delay was largely caused by the weather and the fact that construction was pushed into the shorter days of the fall. As construction progressed it became less likely that Maxim was going to be able to complete both Cells 2 and 3 and Cell 6 before the winter season and freezing temperatures. Peace Regional acknowledges that it directed Maxim to focus on completing Cells 2 and 3.

[95] The evidence establishes that on October 26, 2011, Maxim sought confirmation it could delay Cell 6 construction and that it would not suffer any cost penalties as a result. Maxim noted it was prepared to finish Cell 6 (or attempt to) if that was the direction by Peace Regional. On November 7th, 2011, Peace Regional confirmed its agreement that continuing construction of Cell 6 was no longer viable. However, Peace Regional expressly stated there would be no change to the schedule related to Contract Time. I find that the period between the end of the construction season in 2011 and the start of the season in 2012 was a winter break that is properly considered a weather delay for Contract Time calculation purposes. Otherwise, both site occupancy days and Contract Time were unchanged.

Conclusions on delay

[96] In conclusion, I find that there was delay which should have been compensated with a reasonable extension of Contract Time including with respect to the berms, the weather, the unsuitable material, and the choice by OMC to test material out of Edmonton. I will address the extension of the Contract Time below and deal with any damages that may arise.

Extension of Time and Damages

[97] Given the assessment of the delay above I must now calculate the Contract Time, the Site Occupation Days and the amount of any damages proven.

Contract Time

[98] Maxim argues that "Site Occupancy" and "Contract Time" cannot be distinct concepts under the Contract as page three of the Tender Form made "Contract Time" subject to SGC5, which is "Duration of Work and Site Occupancy". However, Maxim also notes that the closing provision of SGC5 provides that SGC5 "in no way negates or mitigates the conditions of GC8 Delays...or SGC4 Late Completion". Maxim argues that accordingly, the "reasonable time" and "mutual decision" required under GC8, Article 3.00, informs all of SGC5, and affects all of Contract Time, Site Occupancy, and the price. On a common sense, whole contract basis, Maxim argues that Site Occupancy and Contract Time are therefore linked.

[99] While there is some logic in that analysis, I do not find that it changes the clear provisions in the Contract. In the Contract before me there are several provisions relating to the question of time and delay. Specifically, there is "Contract Time" and "Site Occupation Days". While it is sometimes hard to distinguish between them because they are both connected to the concept of time and are affected by delay, they are different concepts, calculated differently with different consequences under the Contract. They cannot be conflated.

[100] Nonetheless, Contract Time is troubling in this Contract because in the Tender Forms the Contract Time dates were set from May 15th, 2011, to August 31st, 2011. These dates were non-negotiable and the tenderers could not modify them. When the process did allow for the tenderers to bid Site Occupation Days this became problematic because of the Contract Time. Case in point, when Maxim bid with Site Occupation Days of 113 days the nature of time meant that even if they made the Site Occupation Days they would be offside the stated Contract Time because May 15th to August 31st is only 109 days.

[101] This is what happens when a contract is cobbled together. Mr. Sather testified that he chose May 15 as a realistic time that the construction site would be ready for construction and he chose August 31 to allow some time post-construction so the owner could finish up work before winter. He decided 108 days was reasonable.

[102] Does this mean that when Peace Regional accepted a bid with 113 Site Occupation Days that it also accepted an extension of the non-negotiable Contract Time? I find that it must have as this is the only commercially viable interpretation of the Contract. Time is time. If Peace Regional was prepared to accept 113 Site Occupation Days, it must also have accepted the Contract Time would be extended four more days. There is no evidence that Maxim was asked to reduce its Site Occupation Days to 109.

[103] In addition to the extension due to the Site Occupation Days bid as found above, GC8, Article 3.00 states:

> If the Contractor is delayed in the performance of the Work by… any cause of any kind whatsoever beyond the Contractors' control, then the Contract Time shall be extended for such reasonable time as may be mutually decided by the Engineer and Contractor, but in ***no case shall*** the extension of time ***be less than the time lost*** as the result of the event causing the delay, unless such shorter extension of time be agreed to by the Contractor.
>
> [***emphasis added***]

[104] As found above the berms, the weather, the unsuitable materials, and the delays in testing were beyond the control of the Contractor and the Contract Time must be extended. In addition,

as noted above I find that the Contract Time was extended on October 20, 2011, when the parties agreed that Cell 6 would not be completed until 2012. This was mutually decided. Maxim asked that it be extended but noted it was prepared to finish if that was Peace Regional's instructions. Peace Regional agreed to defer the completion to the spring of 2012. Subsequently the parties agreed (through Mr. Sather when he accepted the proposed work schedule) that the Cell 6 work would continue starting May 23, 2012, and Cell 6 was completed June 22, 2012.

[105] I note that the Certificate of Substantial Completion for Cells 2 and 3 was issued November 10, 2011. The Certificate of Substantial Completion for Cell 6 was issued June 22, 2012. The original Contract Time for completion was August 31, 2011. I find that Contract Time is reasonably extended by four days for the site occupation discrepancy discussed above. It is also extended three days for the berms. Rain delay results in a reasonable extension of 59 days for rain and 12 days for drying. Contract Time is reasonably extended six days for unsuitable material sorting and extended six days for testing delay. This is a total extension of 90 days. In addition, the period between November 10, 2011, and May 23, 2012, does not count as it relates to the winter break as agreed to by the parties. I calculate August 31, 2011, to November 10, 2011, as 71 days. Then there is the winter break. The remaining 19 days for Contract Time runs from May 23 to June 11, 2012. Contract Time ended June 11, 2012. As noted above, the work was substantially completed June 22, 2012, being 11 days late.

Site Occupation Days

[106] Calculation of site occupation is found at SGC5. Site Occupation Days are whole calendar days. Calculation of the days starts with the first calendar day of the first disturbance of the work site. Every calendar day after that counts unless it does not. Assessment of calendar days end when the project reaches substantial performance. The following days do not count as calendar days and are relevant to this action:

a. When the contractor schedules days off for his workers (to a maximum of eight a month);

b. When the project is delayed due to weather; and

c. When the project is shutdown for the winter.

[107] A weather delay is where the contractor works less than half of a normal day because of the weather or the conditions resulting from the weather. Drying or fixing damages caused by the weather also do not count as a calendar day. A normal day is the average of the duration worked in the preceding five uninterrupted working days. Summer days and hours will be longer than fall days and hours.

[108] On Progress Payment Certificate #10, OMC determined that Maxim had taken 118 days of site occupancy to complete the project and therefore deducted $7,500.00 from the final amount owing to Maxim. Maxim had selected 113 site occupancy days in its bid.

[109] Peace Regional noted that during the project OMC issued site occupancy memos. At trial I heard that, according to Mr. Reeves, Maxim received the site occupancy memos from OMC for the first time July 7, 2011. These memos spanned the preceding seven weeks. Mr. Sather claims Maxim had received copies of these earlier, but there is no written record of these documents being sent to Maxim at its head office, by email or otherwise. There is similarly no record of Maxim receiving these documents at the work site, which Mr. Reeves denied ever happened. For the reasons I stated earlier, I accept Mr. Reeves' evidence over Mr. Sather's.

[110] The same day the site occupation memo was received, Mr. Reeves sent a fax objecting to OMC's purported calculation of site occupancy. I find that this constitutes full compliance on the Maxim's part with any contractual requirement to provide notice.

[111] I find that Maxim never agreed with OMC's assessment of site occupancy throughout the project. According to Maxim's calculations, it took them 109 days of site occupancy to complete the project. Using the daily site reports and the construction summaries provided by Mr. Sather and Mr. Reeves I have calculated Site Occupation Days to be 107 days; however, for the purpose of determining this issue I will agree with Maxim's calculation of 109 days meaning that rather than being penalized $7,500 on the final payment, Maxim should have been credited $6,000.

Damages

[112] The burden of proof is on Maxim to establish damages. In in ***Webb v Birkett***, 2011 ABCA 13 the Alberta Court of Appeal noted, at para 62:

> As stated by Lord Goddard, CJ in *Bonham-Carter v Hyde Park Hotel* (1948) 64 TLR 177 at 178:
>
> > Plaintiffs must understand if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and, so to speak, throw them at the head of the court, saying: "This is what I have lost, I ask you to give me these damages". They have to prove it.

i. Production losses & original tender profit losses

[113] Maxim seeks production losses of $354,752.12 and original tender profit losses of $217,557.64. The production loss claim is based on Maxim's expected tender costs versus the actual costs to arrive at the production losses. The profit loss claim includes profits expected on Maxim's original. The figure is directly from Maxim's project management costing program and Maxim's expectation at the tender stage as to what profit it would earn.

[114] While I accept that Maxim had production losses and did not make the anticipated profit on this project, I am not satisfied that these damages flow from the contract damages claims I have accepted. I note that profit was part of the tender process – i.e. it was expected if the unit price was paid, there would be a profit. The profit was never intended to be a cost plus profit calculation. The weather delays had a lot of impact on all parties but were not the exclusive responsibility of anyone. It is expected that there would be negative consequences for both parties arising from the extraordinary rains and delays. I am not prepared to award damages for production losses or lost profit on the basis proposed as it is undoubtedly largely from the adverse weather.

ii. Equipment costs during rain and drying days

[115] Maxim claims that due to the location and nature of the project, Maxim was unable to undertake any other work during the significant rain delays and drying days. Maxim asserts that at the instruction of Peace Regional and OMC, Maxim kept crews and equipment ready and able to perform work on the project throughout the periods of inclement weather.

[116] I again find that damages for the rain delay, *per se*, are not the responsibility of Peace Regional. With respect to equipment being "trapped" on site, it is undoubtedly true that equipment sat idle. The rain caused that. The fact that the location was remote and made it

impossible to use the equipment for other purposes was no doubt part of the compensation bargained at the beginning of the project. All parties knew there would be rain, it was the quantity that was surprising.

[117] That said, on days spent drying and de-mudding, the equipment was being used for purposes not anticipated in the Contract. As provided in GC2, the third sub-section 2.05, "It is not intended that the Contractor shall provide any work not covered or properly inferable from any of the contract documents". Where the Contractor provided such work, it is entitled to be paid for it. I have no difficulty in finding that Mr. Sather and the on-site superintendent ordered the de-mudding and clean-up as part of the general push to get the project completed in spite of the torrential rains. Peace Regional is responsible for this cost.

[118] However, the evidence I have on this point is difficult to extract. The evidence I have is the cost of having the equipment sit idle each rain day – and I am not providing damages for that. The "drying days" some equipment was used but I cannot tell if that was to accomplish some work or was purely for de-mudding. I also have numbers for a generator, fuel, and a pump and hose. I did hear evidence that they were used for de-watering and do award damages for those items totalling $4,986.10.

iii. Additional project management & administration costs from rain delays

[119] Mr. Reeves testified that there were additional project management and administration costs due to the management of the rain delays. I am prepared to accept these come from the management and administration of de-watering, de-mudding and being on standby such that they are not the usual cost of a rain day during an unremarkable project season. Maxim claims $25,000 for Project Management and $12,000 for administration costs being 200 hours for each. Exhibit 7, Tab A-5 outlines the calculations. I accept that these are reasonable in the circumstances.

iv. Rain de-mudding and standby costs

[120] Maxim claims that these items represent additional costs that could not have been anticipated and were incurred by Maxim due to rain delays. Maxim had to rent additional water pumps throughout the duration of the project in addition to using its own. The rain delays also created additional challenges with the site conditions and required Maxim to work into late October/early November, which could not have been reasonably anticipated. As a result, Maxim incurred additional costs to bring in or rent additional equipment. These costs represent overages that were not included in the bid price. The claimed costs include a Water Pump for $2,884.00, an 815 Packer for $23,000.00, Light Plants and Fuel for $3,878.30, a Cat Dozer and Operator for $8,332.50 and a Rock Truck for $12,194.15.

[121] As with the production losses and profit losses discussed above, I find that the rain delay was a shared risk. The fact that these costs were not anticipated does not make them claimable. No one anticipated monsoon rains. Likewise, the need to extend the work into the fall is not something that can be claimed. That result was due to the rain. The losses incurred because of the delay *per se* are not recoverable. I am however prepared to give costs for the extraordinary expenses related to the delay including the water pump and the 815 Packer which was discussed between the parties and was sought at the request of Peace Regional for a total of $25,884.00.

v. Liner supplier additional weather delay charges

[122] Maxim claims $29,062.50 for the amounts it paid to WTL to be on standby while waiting for the rain to end and the area to dry. Peace Regional argues that this is a coordination issue for which Maxim is solely responsible under General Requirements, Division 1, Section 01040. While this may be in the usual course (and I am not certain it is) in these particular circumstances the need to keep WTL on standby was necessitated by Peace Regional's insistence (through Mr. Sather) that the cells be finished as soon as possible. The evidence established that, had WTL not been guaranteed this standby amount, they would have gone to different job sites and there was no guarantee when they would become available again. I find that these expenses were incurred at Peace Regional's insistence and direction and they are payable in the amount of $29,062.50.

vi. Liner supplier restocking for material overages

[123] In addition to the standby charges for WTL, Maxim claims $1,618.96 as the supplier was unwilling to pay its employees to wait at a site being unproductive when there was other work they could do and material overages was part of the agreement to have them standby as long as there were invoices supporting this figure. I find these are payable for the same reason as the standby charge.

vii. Tire repairs from scrap buried in Cells 2 and 3

[124] Maxim claims costs of $7,274.92 for tire repairs on its rock trucks. Maxim was not expecting to run into steel material or waste buried just below the surface and as a result, the sides of the tires on its rock trucks were sliced and had to be repaired. Maxim claims these costs were incurred due to the inaccuracy of OMC's Geotech/bore hole reports.

[125] I am not prepared to award these damages. There was little evidence on this issue and it is not obvious to me that such material would not be found buried at a waste site. I also accept Peace Regional's argument that these costs are included in the unit rates charged – having to replace tires is part of doing business.

viii. Additional leachate material upcharge due to testing delays

[126] Maxim claims $4,308.40 arising from the delays in waiting for leachate test results due to OMC's refusal to use the nearby services of JR Paine. Maxim managed to bring in a small amount of material from another supplier to keep the project moving while waiting for test results from OMC. This figure simply represents the difference in cost for this product, which was an additional $2.00/tonne.

[127] While I found delay as a result of the testing delay, it was Maxim's choice to try to source elsewhere for the leachate material. I am not prepared to award these damages.

ix. Additional living out allowance for fall 2011

[128] Maxim claims $14,850 representing the additional living out allowance ("LOA") costs incurred by Maxim due to delays in the project, which resulted in having to work shortened days in the fall of 2011. By November of 2011, the site was receiving just over eight hours of daylight as opposed to the 17 hours it was receiving in June of 2011. Based on Maxim's calculations, it took an additional 33 days to complete the same work due to the shortened days. The figure of $14,850.00 was derived by multiplying 33 days by the tender price for the LOA for a crew of four, which was $450/day.

[129] I am not prepared to award these damages. The bulk of the delay was due to rain. The burden of that falls on both parties and Maxim cannot be compensated for this loss.

x. Additional living out allowance for spring 2012

[130] Maxim claims $28,191.58 representing the additional LOA from start to finish for crews on site to complete Cell 6 in the spring of 2012 using the LOA tender price and multiplying it by the number of days. For the reason above relating to the fall of 2011, I am similarly not prepared to award these damages.

xi. Mobilization/De-Mobilization of 815 Equipment for spring 2012

[131] Maxim claims $5000 in additional costs incurred by Maxim for the mobilization and demobilization costs for 815 packer and additional equipment that was brought to site for completion of Cell 6 in spring of 2012. Again, this is a consequence of the rain delay and is not recoverable.

xii. Site administration costs overruns to finish Cell 6

[132] Maxim claims $51,000 for site administration overrun costs to finish Cell 6. As with the above costs this relates to the rain delay and is not recoverable.

Back Charges

[133] Peace Regional's view is that Article 2.2 of the Contract provides that Maxim is liable to pay liquidated damages to Peace Regional for every day that the work remained incomplete beyond the Contract Time. This is further described by SGC4:

> Should the Contractor fail to meet the completion date given, the Owner shall be entitled to make deductions from payments due the Contractor as compensation for costs incurred by the Owner beyond the completion date. Such costs shall include but are not necessarily limited to, administration, bookkeeping and engineering costs. The completion date shall be as noted in the Agreement unless the Owner has agreed, in writing, to an extension of time for completion.

[134] Peace Regional argues that Maxim failed to complete the Contract within the Contract Time as determined in accordance with GC8. Peace Regional has claimed a number of different heads of deductions against Maxim for its delayed completion including for engineering services, double handling of waste, and frost protection.

[135] OMC deducted the following amounts from monies owed to Maxim based on SGC4, on the assumption that the Contract Time expired on October 20, 2011:

Engineering Services Oct 21 to Nov 10, 2011 - $50,175.10

Engineering Services May 14 to June 22, 2012 - $91,348.36

Double Handling of Waste (as per PRWMC costs) - $133,690.00

Frost Protection for 2011 constructed clay liner - $24,148.60

Total Deductions for Cost Incurred - $299,362.06

Engineering services

[136] The deductions for engineering services refer to the OMC professional consulting fees charged by Peace Regional after October 20, 2011. My concern with respect to these charges is that many of the engineering charges after the Contract Time would have been charges that would have been incurred in any event. The Contract does provide that Peace Regional is "entitled to make deductions from payments due the Contractor as compensation for costs incurred by the Owner beyond the completion date". Does this mean all costs or damages, i.e., costs in excess of what would have been incurred if the Contract was performed on a timely basis? For example, the engineering required to get the government approval was engineering that was going to be dealt with whether the Contract was finished on time or not. I see no adjustment being made for this in the back charges. Interpreting this provision in its ordinary, commercially cognizant meaning, it must mean that the costs reference that cost otherwise not payable if the Contract was performed on time.

[137] As I have found that the Contract Time expired June11, 2012, only engineering services from June 12, 2012, to June 22, 2012, are recoverable. Further it is only services that were incurred because the Contract Time was exceeded.

[138] Maxim argues that OMC's extra engineering costs for Cell 6 were within the original budget for that Cell and so no damages have been established. I have gone through OMC's invoices to Peace Regional in detail and based on a Contract Time expiry of June 11, 2012, I find that there were engineering services costs incurred because of the delay in completion. I find that damages for costs incurred past the Contract Time are $17,625 exclusive of GST, not the $91,348.36 claimed.

Double handling of waste

[139] The charges for the double handling of waste referred to the industrial waste that had to be stockpiled in November because the industrial cells were not complete rather than being placed in cells upon arrival as is typical. The waste had to be stockpiled on a temporary basis on a biodegradable pad and then was hauled into the industrial cells once they reached substantial completion. This work was tracked via multiple invoices and transaction reports.

[140] OMC's budgetary information disclosed that OMC was overbudget to October 20, 2011, by almost $60,000, which Mr. Sather confirmed at trial was attributable to the same rain that had affected Maxim.

[141] Peace Regionals double handling of material that was accepted knowing rain had delayed their ability to receive it, was self-inflicted harm.

[142] These are damages arising from rain delay. It is not the responsibility of Maxim. Both parties bear the burden of the monsoon rains. This is Peace Regional's burden.

Frost protection

[143] Maxim was back charged a total of $32,745.60 for its "refusal" to place straw on the partially completed liner for Cell 6. Peace Regional argues that Maxim had a specific obligation to protect the liner from the winter elements and failed to meet this responsibility even though it was repeatedly informed of this requirement. Maxim informed OMC on November 18th, 2011, that laying down straw to protect the clay liner in Cell 6 was, in its professional opinion, unnecessary and that it would simply rework or replace the clay liner in the spring. However, on

the advice of OMC, Peace Regional did not accept inaction to be a viable protective measure. OMC and Peace Regional arranged for the straw to be placed.

[144] This issue is another of the areas where I find Mr. Sather's evidence unreliable and incredible. I accept the evidence of Mr. Reeves with respect to this incident. OMC acted unreasonably and in bad faith by demanding that Maxim protect the clay liner for Cell 6 but at the same time refusing to provide any further information or direction on how to do so to OMC's satisfaction. Either Mr. Sather should have given his opinion or advice to ensure any winter protection met his standards or he should have let Maxim do what they wanted – leave it and re-work it. As noted by Maxim the need for straw protection was not a consequence that was foreseen by anyone. Under the Contract, Maxim had control of the work and the site. They were prepared to live with the consequences.

[145] Time revealed that Maxim's position was valid as it was cheaper for Maxim to rework any damages of the Cell in the spring (as they were directed to do by OMC) than the cost of applying the straw. The decision to apply the straw in the circumstances was Peace Regional's choice and their responsibility. There should be no back charges for this work.

Conclusion on costs incurred beyond Contract Time

[146] In the result I find that there were valid back charges for exceeding the Contract Time under the Contract for a total of $17,625, which was appropriately deducted from the amounts payable on the Contract.

Changes to Progress Payment Certificate Amounts

[147] In addition to its claim for damages, Maxim claims that it was not paid the amount that was contracted for under the Contract. At trial Peace Regional admitted that it still owes $139,769.34 to Maxim on the Contract according to its own calculations. In addition, Maxim claims that the excavated and stockpiled amounts were being changed by OMC after the amounts were certified. The result is that they were not paid all amounts due for the total work performed.

[148] Progress Certificates were issued by OMC monthly. OMC would certify amounts for which unit prices were provided under the Tender. These are amounts due and payable to Maxim for work they completed in the prior month. The dispute arises where OMC certified amounts and then lowered those amounts in subsequent Progress Payment Certificates ("PPC's").

[149] Peace Regional argues that although quantities have been approved by OMC along the way through the issuance of various PPCs, the payment for work done including the volume of excavations and the site of the stockpile will be based on the ***final*** size and dimensions of the stockpile. Peace Regional asserts that the final PPC issued by OMC reflected the "final position" of the various items in the payment certificates as provided for in the Contract and that payment was approved by OMC based on the wording of the Contract referencing "final position in the stockpile", in their interpretation.

[150] Maxim does not dispute that the size of some of the stockpiles have decreased, but they argue that the reason these stockpiles had to be reduced was due to the need to use clean stockpiled material since so much unexpected garbage material was found on site. That use did not negate the fact that the materials were stockpiled to begin with, a Tender Form line item that attracted payment.

[151] The Contract Specifications in Part II at Section 01025, Part 3 provides that the "volume of material excavated and stockpiled will be measured in cubic metres in its final position in the stockpile (fill volume)". This is in contrast to the measurement of the volume of material excavated and disposed of in Phase 4B where it "will be measured in cubic meters in its original position (cut volume)".

[152] It is apparent from a plain reading of these provisions that the language is intended to distinguish between two different ways of measuring how much earth is moved. One can either measure the size of the pile of earth created (fill volume) or measure the size of the hole left behind (cut volume). The provisions do not support an argument that no matter how much earth was moved the contractor is only paid for the final measurements.

[153] OMC are professional engineers and Maxim was entitled to rely upon the accuracy of their certificates. The monthly certificates were intended to reflect the amount of progress and the work completed each month. It is expected that when something is certified by a professional it means that whatever is certified is correct. There is no basis in the Contract for OMC to have withdrawn or reduced amounts that had been previously certified.

[154] In two cases, OMC certified payment for excavated and stockpiled quantities which it later reduced, leading to a lower overall job cost.

[155] OMC certified the volume of material excavated and stockpiled by Maxim from Cell 6 and Maxim was paid for the quantity that had been certified in PPC#4. The certified quantity was reduced subsequently. The quantity certified in PPC#4 was 15,600 cu/m and in PPC#10, this quantity was reduced to 4,486.42 cu/m, a difference of 11,113.58 cu/m, which is equal to a payment deduction of $30,784.62 (11,113.58 x $2.77).

[156] The certified quantities for excavating and stockpiling materials from Cells 2 and 3 were also reduced from the amount that was certified and that Maxim was paid for in PPC#4. In PPC#4, the amount excavated and stockpiled was certified as 31,319 cu/m. In PPC#10, that amount was reduced to 20,934 cu/m, a reduction of 10,385 cu/m, which is equal to a payment reduction of $43,097.75 (10,385 x $4.15).

[157] The total amount that was improperly deducted is $73,882.37.

Conclusion

[158] At trial Peace Regional admitted that did not pay the sum of $139,769.34 from amounts properly due and owing to Maxim. In addition, there was a holdback related to Cell 6 in the amount of $24,587.88. There was no defence or justification for its failure to release this holdback other than Mr. Sather suggesting that paperwork such as statutory declarations may not have been completed. OMC can advise of the paperwork required and upon provision of the holdback must be released to Maxim. Therefore, this amount is also properly owed to Maxim.

[159] The amounts to be paid to Maxim by Peace Regional are as follows:

Outstanding payment	$139,769.34
Cell 6 Holdback	$24,587.88
Payments due from altered certificates	$73,882.37
Site occupancy days adjustment	$13,500.00

Equipment costs drying	$4,986.10
De-mudding costs	$25,884.00
Liner Supplier	$29,062.50
Less damages for exceeding Contract Time	($17,625.00)
TOTAL	$294,047.19

Plus interest from July 10, 2012 being the date of PPC#10.

[160] If the parties are unable agree on costs, they shall provide written submissions to me, within 45 days after the release of this decision. Submissions are to be limited to 3 pages. In addition, a draft Bill of Costs plus copies of relevant offers are to be attached as appendices.

Heard on the March 1 to 11, 2021 and March 24 – 26, 2021.
Final written arguments provided to the Court by June 11, 2021.
Dated at the City of Edmonton, Alberta this 13th day of May, 2022.

M.E. Burns
J.C.Q.B.A.

Appearances:

Matthew Pruski & Balraj Deol
Rackel Belzil LLP
for the Plaintiff

Paul Stocco & Nathaniel Brenneis
Brownlee LLP
for the Defendant