CITATION: Cree Construction v. Kashechewan, 2015 ONSC 735
COURT FILE NO.: 17037/10
DATE: 20150202

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
Cree Construction and Development Company Ltd.	)	Guy Wainwright, for the Plaintiff (Defendant by counterclaim)
Plaintiff	)	
– and –	)	
	)	
Kashechewan First Nation	)	Philip Tunley, for the Defendant (Plaintiff by counterclaim)
Defendant	)	
	)	
	)	
	)	HEARD: March 17 – 26, 2014; October 20 - 23, 2014; November 17, 2014

E.J. KOKE J.

REASONS FOR JUDGMENT

INTRODUCTION

[1] The plaintiff construction company, Cree Construction and Development Company Ltd. ("Cree Construction"), entered into a contract with the defendant Kashechewan First Nation ("First Nation") for the construction of 20 housing units in the community of Kashechewan, Ontario. The contract price was $4,506,482.00, with a contingency allowance of 10% ($450,648.20).

[2] The plaintiff partially completed 15 units and has been paid $2,838,043.27. It claims that a further sum of $2,284,543.49 is due and payable in relation to these 15 units. It attributes the increased construction costs to changes that were made to the building plans, to extras resulting from unstable soil conditions, and to delays in the construction schedule for which it holds the First Nation responsible.

[3] Cree Construction stopped work on the site in May 2009. Thereafter, the First Nation completed construction of the 15 unfinished units and constructed the five units which had not been started by Cree Construction.

[4] The First Nation takes the position that Cree Construction has been paid what it is owed pursuant to the contract. It submits that it is not responsible for any delays and that the extras which have been claimed represent work and materials that were included as part of the contract.

[5] This is an action to determine what amounts are payable to the plaintiff, if any, in relation to the construction and partial completion of the 15 units which Cree Construction started but did not complete.

[6] The defendant First Nation has issued a counterclaim against the plaintiff. It alleges that Cree Construction has been overpaid for the work it completed on the site and that the costs of completing the construction of the 20 houses exceeded the fixed price set out in the contract. It also claims general damages on behalf of the residents of the community for the delays that resulted from the failure of the plaintiff to complete construction in a timely manner.

BACKGROUND

The Construction Project

[7] Cree Construction is a corporation that has its head office in the Province of Quebec. It is engaged in the general contracting business, including the construction of housing. As its name suggests, it is owned by a First Nation entity and it undertakes a considerable amount of work in First Nation communities.

[8] Kashechewan First Nation is an Indian Band within the meaning of the *Indian Act*, R.S. 1985, c. 1-5, and has its band office in the community of Kashechewan, in the District of Cochrane. Kashechewan is located on the shores of James Bay in Northern Ontario. It has a history of problems related to flooding in its community and housing shortages.

[9] Early in 2007, Indian and Northern Affairs Canada ("INAC"), as it was then known, advised the First Nation that it was prepared to consider an application by the First Nation to fund the construction of 20 homes in the community. Thereafter, INAC became involved in the application and planning process for the project, which included providing approvals for the various steps involved in the construction, including the design, the budget, interim payments, and contract terms.

The Creation of and Role of Keeshechiwan Project Development Incorporation Ltd. ("KPD")

[10] INAC encourages First Nation communities to become involved as a partner on projects such as the one proposed for Kashechewan. By becoming involved, First Nations receive organizational and leadership experience in managing construction projects, and employment and skills development are provided to local First Nation members.

[11] In keeping with INAC's policy of First Nation involvement and participation the defendant First Nation in Kashechewan incorporated a company called Keeshechiwan Project Development Incorporation Ltd. ("KPD"). KPD entered into a joint venture

agreement with Cree Construction for the purpose of constructing these 20 homes. The joint venture was known as KC Joint Venture.

[12] The joint venture agreement was signed by the parties on December 13, 2007. Terms of the agreement included the following:

a) The parties would hold an undivided beneficial interest in the joint venture, and KPD would hold a 55% interest and Cree Construction a 45% interest in the other assets and rights of the joint venture, both real and personal.

b) In the event the giver of the work required bonding, financing, industry standard specifications etc., then Cree Construction would undertake the work but would sub-contract the work to KC Joint Venture.

c) KPD would receive a 55% share of the net profits and Cree Construction would receive a 45% share.

d) All "major decisions" would be decided by unanimous decision of KPD and Cree Construction. Other decisions ("management decisions") would be decided by votes based on shareholding interests.

e) Major decisions were defined to include non-budgetary expenses in excess of $5,000, the approval of all budgets and all bids, and contracts related to carrying out the joint venture.

f) Cree Construction was appointed the general manager of the joint venture. The responsibilities of the general manager included general directorship, supervision, and management of the work called for by the joint venture. The general manager would be paid a fee for carrying out the work.

g) Disputes between the parties that could not be resolved internally would be subject to binding arbitration.

The Arbitration

[13] Following the commencement of this lawsuit by Cree Construction, KPD applied to the court by motion to stay this proceeding, or in the alternative, to be added as a defendant, on the basis that the decision by Cree Construction to commence action against the First Nation was a major decision for which Cree Construction had not received unanimous approval. In the alternative, KPD argued that the decision to commence court action was a management decision, which had not received the requisite approval.

[14] KPD took the position that the issues between the three parties should be resolved by arbitration. Cree Construction objected to this process on the basis that the First Nation was not a party to the arbitration agreement.

[15] The motions judge refused to add KPD as a defendant in the lawsuit since to do so would have created a *lis* between Cree Construction and KPD, a dispute which was required to be resolved by arbitration under the joint venture agreement.

[16] Nonetheless, the motions judge stayed the proceedings to permit the resolution of the dispute between Cree Construction and KPD by way of the arbitration provisions in the joint venture agreement.

[17] The issue which was subsequently submitted to the arbitrator was whether Cree Construction, on its own behalf, or on behalf of KC Joint Venture, should be permitted to continue the court action against the First Nation, or whether this was a decision requiring the consent of KPD.

[18] In paragraph 22 of his decision, which was released on February 21st, 2012, the arbitrator described the issue before him as follows:

> 22 ... If the matter cannot be resolved by arbitration because KFN (*the "First Nation"*) is not a party to the joint venture agreement, and cannot be resolved in the courts because KPDI *("KPD")* takes the position that major decisions required unanimity and voting control rests in its hands, then, without its consent, a stalemate results and recovery is beyond the reach of CCDC *("Cree Construction")* [terms in italics added].

[19] The arbitrator decided the issue as follows:

a) The decision to commence the lawsuit by Cree Construction was not a "major decision" as contemplated by the joint venture agreement.

b) Cree Construction launched the lawsuit in its own interest and not on behalf of the Joint Venture, and therefore the decision to do so was not a joint venture management decision to which KPD was entitled to be a party.

c) Cree Construction could continue the action for claims which were being made exclusively on its own behalf.

KPD's Role in this Lawsuit

[20] A review of the arbitrator's decision reveals that at the arbitration hearing the First Nation conceded that KPD is a creation of the First Nation and does not act independently. According to Derek Stephen, the First Nation's executive director at the time, KPD is but a conduit for the views and decisions of the First Nation, and that from the outset, the intent was that KPD would act in the interests of the First Nation. The arbitrator noted that Mr. Stephen described the joint venture arrangement as KPD getting the money (from the government of Canada) and Cree Construction managing the project and executing the construction.

[21] In my view, Mr. Stephen's description of the *de facto* arrangement is consistent with the evidence at trial.

[22] Although the parties to the construction contract were the joint venture and the First Nation, the real dispute here is between the First Nation and Cree Construction, and therefore throughout this decision, unless I indicate otherwise, I will refer to the contracting parties as Cree Construction and the First Nation.

Preconstruction Stage

[23] Representatives of Cree Construction, KPD, and the First Nation commenced discussions with respect to entering into a contract to build these 20 houses early in 2007, and they continued to meet throughout the year. The meetings took place in the cities of Timmins, Laval, QC, (the location of Cree Construction's head office), Ottawa, and Toronto. Representatives of INAC were in attendance at a number of these meetings.

[24] Those present at these meetings on behalf of the First Nation included Derek Stephen and the First Nation Chief, Jonathan Solomon. Cree Construction was represented by its president, William MacLeod, its director on the project, Daniel Achim, and its assistant director on the project, Farid Amrarene.

[25] Initially, the First Nation provided Cree Construction with photographs and sketches depicting the design of houses it wished to build. Cree Construction then took these pictures and sketches and had preliminary architectural drawings of these designs prepared for review by the First Nation and INAC. These designs were prepared by Goscobec Modular Homes, a building and design company located in the Province of Quebec. The drawings were based on the Quebec Building Code and were not stamped by an engineer or architect.

[26] During this time period the First Nation also hired Kelvin Jamieson to act as a project manager to oversee the project on its behalf. Mr. Jamieson was an engineer with Northern Waterworks First Nations Operations Inc. ("Northern Waterworks"), which is located in Cedar Point, Ontario. Mr. Jamieson's contract required him to make periodic visits to the site, provide ongoing consulting services and to serve as a liaison between the First Nation and INAC. The First Nation also engaged Mr. Paul Corston, P.Eng. who is employed with Mushkegowuk Council Technical Services (Mushkegowuk Council"), to act as its primary inspector. He too was expected to make periodic visits to the site. Mushkegowuk Council is an entity which provides development and technical support to First Nation communities.

[27] Following a meeting in Toronto on August 23, 2007, Mr. Amrarene of Cree Construction wrote a letter to Mr. Derek Stephen on August 31, 2007, enclosing a "revised" proposal for the construction of the 20 houses (the "proposal" or the "August 31st proposal"). Mr. Amrarene stated that the proposal was "to allow you to proceed with an initial request" for funding to INAC. The total price for completion of the units was $4,506,482 plus a 10% contingency allowance.

[28] The proposal contained a schedule of the various costs included in the final price, with amounts designated under headings such as materials, equipment rental, barge transportation, general conditions, material storage, labour, management, site organization, and meals and lodging.

[29] At the time the proposal was submitted, soil studies had not yet been undertaken and the proposal contained the following notation: *"Upon complete soil studies, engineer recommendations and final design for foundations, detailed plans and specifications along with complete material list will be provided"*. There was also a notation that the price excluded *"Cost of extra-ordinary excavation and backfill for foundations (ref. to contingencies 10%)"*.

[30] Contingencies were referred to in the schedule of costs attached to the proposal by way of a notation below the final price of $4,506,482 which stated: *"Contingencies 10% (soil conditions)...$450,648.20."*

[31] With respect to payment, the proposal contained the following statement: *"In order to allow approval of material purchasing and shipment, please note that an amount of $1,726,000 (one million seven hundred twenty six thousand dollars) representing the total of sections 1, 2, 3, and 4 of our breakdown should be authorized and committed for in writing by I.N.A.C. before we can start the process and send 2 barges this September."* This sum represented the cost of the materials which were to be shipped to the site as well as mobilization costs.

[32] In a letter dated September 7, 2007, addressed to Cree Construction Chief Jonathon Solomon formally *"confirm(ed) our joint venture and memorandum of understanding that was signed for the construction/development of Kashechewan First Nation"* and advised that *"permission to go ahead with the mobilization of the materials which is needed to begin this joint venture has been approved"*. He further confirmed their *"mutual understanding the materials are to be transported by barge"*.

[33] Mr. Yves Chenier of Indian Affairs testified that there was no tender process for this project; it was sole-sourced to the joint venture at the request of the joint venture, contrary to the usual policy of INAC. As a result, INAC required that a fixed price contract be entered into, and it did not allocate any funds for possible changes in the work and price.

[34] INAC required that the architectural and engineering drawings comply with the Province of Ontario Building Code and Cree Construction delivered the plans prepared by Goscobec to B.H. Martin Consultants Ltd. ("B.H. Martin"). B.H. Martin is an architectural and engineering firm located in the City of Timmins, Ontario. B.H. Martin revised the plans to meet Province of Ontario Building Code requirements. B.H. Martin's preliminary revised foundation plans, which were marked *issued for construction,* were dated September 28, 2007. Final foundation plans were approved and stamped by B.H. Martin on February 14, 2008. B.H. Martin's preliminary lot location and site plans were dated November 23, 2007. On December 7, 2007, B.H. Martin agreed to prepare and provide stamped construction and architectural plans to Cree Construction. These were completed and stamped on April 10, 2008. The contact person with B.H. Martin was David Horton and it was agreed that he would be available to provide approvals and consulting services and advice when needed.

[35] Although conditional approval for the project had been given, final budget approvals had not been received from INAC in September 2007. INAC had requested further documentation and the First Nation enlisted the assistance of Cree Construction to prepare

and compile such documentation. Mr. Amrarene wrote INAC a letter dated October 15, 2007, stating therein that he had attached details "required to finalize the effective project approval for the Kashechewan housing units". The enclosures in his letter included:

a) Complete material list per model complete with quantities;
b) Typical material list for each model;
c) Complete plans and specifications – (architecture and engineering); and,
d) Budget breakdown for materials, transportation and related incidentals.

[36] Mr. Amrarene concluded his letter to INAC by informing INAC that Cree Construction was in the process of preparing the first invoice in regards to material presently shipped, and would forward a copy to INAC. He would be following up to make sure that payment could be released effectively and according to INAC's policies and guidelines.

[37] Cree Construction continued to assist the First Nation in obtaining the required final approval for funding the project throughout the fall of 2007.

[38] Cree Construction arranged to ship the materials for the construction of the 20 homes to Kashechewan by barge in October and November 2007.

[39] Cree Construction hired Mr. Ayad Badreddine as project manager to supervise the construction of the 20 houses. Mr. Badreddine arrived in Kashechewan on November 4, 2007.

[40] Mr. Badreddine had immigrated to Canada from Algeria in September 2006, and was hired by Cree Construction in October 2007, to manage this project. Although he had experience managing construction projects in Algeria, this was his first project in Canada. He had no previous experience managing projects in cold weather conditions, such as existed in Kashechewan.

[41] Mr. Badreddine testified that when he arrived in Kashechewan, the materials and equipment were still on the side of the dock. The materials were stored in approximately 17 to 20 shipping containers.

[42] There were two other Cree Construction employees in Kashechewan to assist him when he arrived.

[43] The first thing Mr. Badreddine did was to arrange for the storage of the materials. Some of the containers were taken to the local airport, where they were stored. The airport was about 700 to 800 metres from the building site. Other materials were stored at a site about half-way between the town and the airport. A temporary shelter was built to store drywall.

[44] Mr. Badreddine and several other Cree Construction employees lived in Kashechewan over the winter months.

The First Two Invoices

[45] After the building materials were shipped to Kashechewan and a work camp had been established Cree Construction invoiced the First Nation the sum of $1,807,546.12 ("Billing No. 1"). The bill was dated December 31, 2007, and delivered to the First Nation in January 2008. At this time, the First Nation had not yet received effective approval for funding from INAC. Interim funding for this invoice was confirmed by INAC in February 2008, and this bill was paid in May 2008.

[46] A second invoice was rendered by Cree Construction on April 30, 2008, for mobilization, material and equipment and this invoice was in the amount of $548,107.18 ("Billing No. 2"). This was paid in full.

The CCDC Contract

[47] On June 18, 2008, the parties met in Kashechewan to sign the building contract. Representatives of INAC and B.H. Martin were present.

[48] The contract, which was a standard Canadian Construction Document Committee contract ("CCDC contract"), stipulated that the contract price was $4,506,482. In addition, a contingency allowance of 10% of the total contract price was included.

[49] The terms of the contract required the contractor to perform the work in accordance with the *"Contract Documents". "Contract Documents"* were referred to in the contract as including the architectural and civil drawings prepared by B.H. Martin.

[50] A construction schedule that was attached to the contract provided that mobilization for the construction would take place from September 3, 2007, through December 31, 2007, and that excavation for the foundations would commence on June 23, 2008. Subject to adjustment in *Contract Time* as provided for in the contract documents, the work would attain *Substantial Performance* by the 31st day of December, in the year 2008.

Excavation and Construction of Foundations

[51] The excavation for the foundation on the first lot (lot 3) commenced on July 18, 2008. At that time, a soils report had not yet been commissioned. The foundation plans specified that one foot high concrete footings for the houses were to be placed four feet below grade, and that four foot high concrete foundation walls were to be erected on these footings (the top one foot of these foundation walls would therefore be situated above grade). The plans specified that the footings were to be placed on brown silty clay or sandy silt.

[52] After Cree Construction started to excavate it encountered problems with water infiltration and muddy conditions in the excavated area. Cree Construction concluded that this mixture of mud and water would not provide sufficient support for the footings. Mr. Badreddine testified that he decided to deal with this problem by excavating to a depth of seven feet and replacing the bottom three feet of the excavated area with a granular material, which was then compacted with a power compactor and on which the footings

were constructed. In addition, pumps were delivered to the site and used to pump out excess water.

[53] Mr. Badreddine testified that he encountered similar muddy and wet conditions in the remaining lots but through trial and error on the first several lots he determined that it was not necessary to excavate down to the seven foot level on these lots, and that a granular base of about 16 to 24 inches was sufficient.

[54] Although Cree Construction decided to commission a soils report from the Timmins, Ontario, engineering firm of Sutcliffe Rody Quesnel Inc., the report was not completed until September 19, 2008.

Delays in the Construction of the Foundations

[55] Mr. Badreddine testified that the issues he encountered with what he believed were unstable soil conditions resulted in significant delays in the construction of the foundations. According to the construction schedule, construction of the foundations was to commence on June 23, 2008, and was to be completed nine weeks later on August 27, 2008. However, the excavation work did not start until July 18, and on August 20, four weeks after the commencement, only 4 lots were ready for compaction testing. By September 25, 2008, Cree Construction had commenced excavation work on only 9 lots.

The Third Cree Construction Invoice

[56] A third invoice in the sum of $535,990.73 was submitted for payment by Cree Construction on September 30, 2008, for excavation work. The First Nation paid $482,391.66, retaining a 10% construction lien holdback of $53,599.07.

The November 11, 2008, Inspection Report

[57] Mr. Corston prepared an inspection report dated November 11, 2008 which confirmed that excavation work and the construction of footings had been completed on 15 lots. On 12 of these lots, foundation walls had been erected. 11 of the lots had been backfilled. Floors had been constructed on two of the lots and exterior walls had been erected on one lot. A report prepared by Mr. Jamieson reported that the percentage of total completion on these 15 lots was in the range of 4% to 20%.

The Change Orders

[58] On December 5, 2008, Cree Construction delivered three change orders for which it requested payment.

[59] The first change order was a request for $65,623.53, representing extra costs incurred by Cree Construction as a result of constructing the foundations in compliance with the plans prepared by B.H. Martin. Cree Construction submitted that its proposal was based on the earlier set of plans prepared by Goscobec. Cree Construction submitted that Goscobec's plans required fewer materials and less labour and this extra represented the difference.

[60] The second change order was in the amount of $1,129,514.43 and purported to represent the additional labour and material costs incurred as a result of the wet and muddy soil conditions. The amount of this change order was later reduced to $663,706.79.

[61] The third change order was in the amount of $6,629.00 and represented the additional costs of constructing slab on grade foundations on the remaining five lots, rather than foundations which required excavation. This change order was subsequently withdrawn since Cree Construction did not proceed with the construction of houses on these five lots.

[62] A fourth change order was submitted on April 20, 2009, in the sum of $126,554.53 representing additional work and materials required to construct the above ground portion of the houses. Cree Construction submits that this invoice comprised work and materials which were not included in the Goscobec drawings.

[63] With respect to change orders one and four, the First Nation refused to pay these on the basis that the formal contract signed June 2008 specifically provided that the houses were to be constructed in accordance with the B.H. Martin plans, and that Cree Construction had draft copies of some of the B.H. Martin plans in its possession since September 2007.

[64] With respect to the second change order for $1,129,514.43, the First Nation retained Bergeron Consultants to undertake a quantitative analysis of the alleged extra costs associated with excavating the building lots. After reviewing Bergeron's report, as well as a soils report prepared by the soils engineer, the First Nation refused to pay this extra cost.

Bill for Extraordinary Cost Due to Funding Delay

[65] In April 2008, Cree Construction advised the First Nation that it would be invoicing it for costs it had incurred resulting from its inability to start the construction in the fall of 2007.

[66] When the First Nation was eventually billed for these costs in 2009, it refused to pay these costs.

Progress of Work: November 2008 – May 2009

[67] Cree Construction completed the construction of the foundations of the 15 houses and continued work to complete these houses during the winter months of 2008/2009. An inspection report, which was based on an inspection that took place on May 25 and 26, 2009, confirmed that most of the work on the exterior of 15 homes had been completed by that time, and that the work on these houses was 62.8% complete. Items remaining to be completed included drywall installation and finishing, flooring, electrical finishing, finishing carpentry, finishing plumbing and water, sewer, and site preparation.

[68] By letter dated May 7, 2009, Cree Construction demanded payment of $774,250.54 calculated on the following basis:

a) Total Contract for 20 houses: $4,506,482.00

b) Total Material for 20 houses: $1,562,970.00

c) Total Contract for 15 houses = (a) x 75%:	$3,379,861.50
d) Total Material for 15 houses = (b) x 75%:	$1,172,227.50
e) Total Construction (excluding material) for 15 houses = (c) - (d):	$2,207,634.00
f) Total invoiced to date for 15 houses (Invoices # 1 – 5):	$3,612,293.91
g) Total paid to date for 15 houses (Invoices # 1 to 3):	$2,838,043.37
h) Total not paid to date = (f) – (g):	$774,250.54
i) Total paid to date excluding material = (g) – (d):	$1,665,815.87

[69] The First Nation refused to pay the above sum. It took issue with Cree Construction's claims for extras and argued that the contract called for the First Nation to make progress payments based on the degree of completion of the contract. Relying on the inspection reports, it submitted that the 15 houses were only 62.8% complete and that the entire project (referring to the construction of 20 houses) was only 47.1% complete. It submitted that 47.1% of the total contract price of $4,506,482.00 was $2,122,553.00 and the First Nation had paid $2,838,044.069 to date.

[70] The parties could not resolve their differences and as of May 27, 2009, Cree Construction ceased work, citing non-payment of invoices as its reason.

[71] On August 17, 2009, the Chief and Council of Kashechewan decided to exercise the owner's rights under Article 7.1 of the Construction Contract to terminate the right of Cree Construction to continue with the housing project, and to take possession of and complete the work. The First Nation notified Cree Construction of that decision by letter the following day, noting that the housing needs of the Kashechewan community were the critical issue in making this decision.

[72] The First Nation eventually completed construction of all 20 houses under the direction of Derek Stephen, who assumed the position of project manager. Mr. Stephen testified that he has taken courses in construction and building management, and has received additional training through the Mushkegowuk council. He worked as an assistant project manager on various construction projects from 1994 to 2003, and thereafter, he took on the role of project manager on various construction projects in First Nation communities.

[73] Mr. Stephen was able to complete the housing development using First Nation resources and was able to do so within the budget as set out in the contract.

[74] Cree Construction subsequently issued a claim against the First Nation for what it alleges were monies owing in relation to the partial completion of the 15 houses. The First Nation counterclaimed for what it alleges was an overpayment to Cree Construction for the work completed, for the cost of replacement materials, contract administration, for the additional costs of completing construction of the 20 houses, and for a portion of the profits. It also

claimed for general damages sustained by the First Nation resulting from the delay in completing the housing units.

ISSUES

[75] The issues before the court in relation to the plaintiff's claim are as follows:

a) As one party to the joint venture, is the plaintiff entitled to sue for damages based on a breach of contract?
b) Is Cree Construction entitled to additional monies due to an alleged delay in receiving final funding approval?
c) Change Order Issues:
    i. Change Orders #1 and #4: Does the August 31 proposal constitute a separate contract for some of the work? Does the doctrine of waiver apply to relieve the plaintiff of strict compliance with the terms of the contract?
    ii. Change Order #2: Did the additional cost of constructing the foundations arise from unexpected soil conditions, or did it result from the use of improper construction methods?
d) The progress payment dispute: Did the First Nation comply with the payment provisions of the contract?
e) What was the cost to complete the construction of the 20 homes, and was this cost reasonable?

1. As one party to the joint venture, is the plaintiff entitled to sue for damages based on a breach of contract

[76] The parties do not dispute the arbitrator's ruling that the plaintiff is entitled to issue claims against the First Nation in relation to claims which Cree Construction can make exclusively on its own behalf. Claims such as a claim for the profits accruing to the joint venture (as opposed to profits accruing to Cree Construction's role as general manager) are not permitted.

[77] In my view, the issues which are the subject of this decision are limited to claims that fall within the first category, i.e. they constitute claims which are made by Cree Construction exclusively on its own behalf.

2. Is Cree Construction entitled to additional monies due to a delay in receiving final funding approval?

[78] By letter dated April 25, 2008, Cree Construction informed the First Nation that it had incurred extraordinary costs as a result of what it alleged was a delay in receiving final approval for the project from INAC. It submitted that if it had received earlier approval, it would have commenced excavation work and constructed the foundations of the houses after the materials arrived on site in November 2007. Thereafter, it could have erected the walls and the roofs and closed in the buildings, and then continued to work on the interior of the houses throughout the winter months.

[79] Cree Construction submitted that the costs of safeguarding the materials in Kashechewan for the period covering October 2007 to April 2008 was $164,460.75 and assessed its costs of having its equipment sitting idle at $318,640. The total amount claimed to the end of April 2008 was $483,100.75. Cree also advised that it would continue to claim such costs from the First Nation until it was able to commence construction, and that these costs would be claimed at the rate of $23,814.92 per month for safeguarding and $45,520 per month for waiting time.

[80] Cree Construction did not forward an invoice to the First Nation for these costs until the fall of 2009, which was after it had ceased work on the project. It claimed the sum of $653,337.47. This amount represented what Cree Construction claimed were delay and safeguarding costs totalling $552,436.42 from October 2007 through May 2008 ($69,014.39 per month), and included the costs of hiring a watchman from June 2008 through August 2009 in the sum of $100,900.80. The costs of hiring a watchman was justified on the basis that the contract did not specifically include this cost.

[81] I find that Cree Construction's claim for these delay costs cannot be sustained. My reasons for coming to this conclusion include the following:

[82] Firstly, there is no evidence that Cree Construction advised the First Nation that it intended to commence construction prior to the winter freeze on the coast of James Bay. Cree Construction relies on its August 31, 2007, proposal letter in which it stated that if approval was given for the purchase of material and equipment it intended to "start the process and send 2 barges this September". This proposal letter however states nothing about the date that the construction would start.

[83] Secondly, the late arrival of the materials in Kashechewan suggests that Cree Construction did not intend to commence construction in 2007, and when they did arrive, it was too late in the year to commence construction. The August 31 proposal indicated that the materials would be shipped in September. However, they were not shipped until October and the last of the materials did not arrive at dockside in Kashechewan until November 2, 2007. Mr. Badreddine testified that after he arrived in the First Nation community on November 4, 2007, it then took his men 20 days to a month to move these supplies to the construction site.

[84] Both Mr. Badreddine and Mr. Jamieson testified that it would have been too late in the season to commence construction by the end of November. Mr. Amrarene agreed that there was no guarantee that the excavation work could have commenced in November at all, and that commencement that late in the year would have been contingent on weather conditions.

[85] Mr. Badreddine suggested that Cree Construction could have started excavation after his arrival in early November by using a different crew than the one which was arranging for the transportation and storage of the materials. He testified that if it had done so, Cree Construction could have completed the construction of some or all of the foundations. However, the evidence is that even during warm weather building conditions the following summer it took more than a month before the first foundation had been poured. In the circumstances, I do not accept Mr. Baddredine's explanation that he could have excavated

and completed the construction of footings and foundations on the site prior to the winter freeze.

[86] In my view, if Cree Construction had intended to commence construction in 2007, it would have arranged to have its equipment and materials shipped to the site much earlier than November 2007.

[87] Thirdly, in November 2007, a considerable amount of preparatory work was still required to be undertaken before construction could commence. For example:

a) A lot location and site plan was not available until November 23, 2007.
b) Stamped foundation plans were not available until February 14, 2008.
c) Final architectural plans and specifications were not stamped and made available until April 10, 2008.
d) A formal agreement creating the KC Joint Venture between Cree Construction and a corporation wholly owned by Kashechewan was not signed until the middle of December 2007.

[88] Mr. Jamieson was introduced to Cree Construction as the First Nation's project manager for the Housing Project in an e-mail exchange with Mr. Amrarene on behalf of Cree Construction, between November 8, and November 20, 2008. In that exchange, Jamieson identified a long list of documentation requirements, including a "new realistic schedule", that Cree Construction and the First Nation still needed to provide to Native Affairs in connection with their requests for project and funding approvals for the Housing Project.

[89] Fourthly, Cree Construction did not provide timely notice of this extra. A party claiming for delay damages, as with changed conditions or changed work, must give timely written notice of the claim. This way the other contracting party has the opportunity to take remedial action to reduce the costs. This is both a contractual and a common law requirement (See: *Centura Building Systems Ltd v Cressey Whistler Project Corp*, 2002 BCSC 1220). There is no evidence that Cree Construction warned or suggested to the First Nation that it would be claiming such costs if it was unable to commence construction in 2007. Its letter of April 25, 2008, is the first notification by Cree Construction that it had intended to commence construction in 2007, or that it intended to claim costs for an alleged delay. The First Nation was not given the opportunity to reduce the alleged costs, by for example arranging to have someone from the community monitor the sites where the materials were stored.

[90] Fifthly, the parties entered into a fixed price contract. Cree Construction made the decision to ship the materials to the site late in 2007, notwithstanding the fact that construction was not scheduled to commence until the following summer. In the circumstances, I find that it was the responsibility of Cree Construction to absorb any safeguarding and alleged delay costs.

[91] Cree Construction points to the fact that in his email of April 25, 2008, in which he responds to the request for delay costs, Mr. Stephen does not specifically object to paying such delay costs. Mr. Stephen's evidence is that he understood that the letter from Cree

Construction regarding delay costs was sent solely for the purpose of hastening up the final approval process by INAC. He does not agree that there was an intention or agreement by the parties that this sum was properly payable. His understanding is confirmed in his response where he states: "thank you for your letter much appreciated I am sure it will help with INAC, when we negotiate".

[92] Not only do I find that Cree Construction's claim for these costs is without merit, the amount of the claim is exaggerated. Cree Construction claims the sum of $164,460.75 for watching over the materials for seven months. This is $23,494.39 per month for keeping three people employed to watch over construction materials and equipment in a small community of around 2,000 people. I accept the argument by the First Nation that a local resident could have been employed to watch over these materials for considerably less money. In my view, the decision to employ Mr. Badreddine and the other Cree Construction employees to watch over the site during the winter months on a 24 hour per day, 7 day a week basis, has every appearance of being an expensive and unnecessary make work project designed by Cree Construction to generate an income for three of its workers during the winter months.

[93] Also, and with respect to the alleged costs of having its equipment sitting idle, I do not accept that Cree Construction's equipment sat idle during this entire time period. Mr. Jamieson testified that Cree Construction was separately contracted by Kashechewan and Native Affairs during the spring of 2008 to perform emergency works on the flood readiness of the Community, and that it made good use of its local employees and camp facilities in performing that contract. No attempt was made by Cree Construction to contradict this evidence.

[94] For the above reasons, the claim for damages caused by delay in obtaining funding is denied.

3. Change Orders

Change Order #1 - insulation surrounding the foundations, and plywood sheeting, sump pumps, and other details in the crawlspaces (December 5, 2008) – Cree Construction's "two contract" theory

[95] Change Order #1 claims the amount of $52,684.09, purportedly in relation to insulation surrounding the foundations, and plywood sheeting, sump pumps, and other details in the crawlspaces. The First Nation denies that the amount claimed is properly payable, and argues that the work and materials identified in the change order form part of the work and materials referred to in the CCDC contract. A number of issues are raised in support of Cree Construction's claim that this change order is payable.

a) *Did two contracts govern the relationship between the parties?*

[96] The First Nation objected to paying this extra on the basis that the work and materials described in the extra was included in the main CCDC contract.

[97] Cree Construction acknowledges that the work and materials which comprises this change order is include in the detailed B.H. Martin plans referred to in the June 18, 2008, CCDC contract, and it agrees that normally there would not be any claim for such an "extra". It submits however that the parties entered into two contracts, and that this claim falls within the scope of the first contract, the terms of which have been incorporated into the CCDC contract. Cree Construction claims that additional work and materials over and above those referred to in the first contract and which are specified and required by the terms of the CCDC contract comprise an extra.

[98] According to Cree Construction, the first contract consists of its August 31, 2007, proposal letter which it calls its "bid" document, and which it claims was accepted and became contractually binding when Chief Solomon responded with his letter of September 7, 2007. In his responding letter, Chief Solomon stated the following:

> This is to formally confirm our joint venture and memorandum of understanding that was signed for the construction/development of Kashechewan First Nation. Permission to go ahead with the mobilization of the materials needed to begin this joint venture has been approved. As per our mutual understanding the materials are to be transported by barge.

[99] In support of its position Cree Construction asserts that this "bid" contract was specifically included in the construction contract documents, and therefore the terms and documents referred to are contractually binding on the parties, even if they appear to be superseded by other terms and documents in the subsequent CCDC.

[100] I disagree with Cree Construction's characterization that the correspondence between Cree Construction and Chief Solomon constitutes a contract. I also disagree with its submission that the terms of this alleged contract supersede the terms of the CCDC contract.

[101] The construction contract lists a number of documents which it refers to as "Contract Documents" in Article A-3. The list however does not include Cree Construction's August 31, 2007, proposal letter. It does include a document referred to in the construction contract as the "K-C Joint Venture price quotation dated October 15, 2007". This quotation is addressed to INAC and is on KC Joint Venture letterhead. The quotation contained a complete material list per model, plans and specifications (architecture and engineering), and a complete budget breakdown. The inclusion of the October document and exclusion of the August document are significant in interpreting the September 7, 2007, letter from Chief Solomon, in that it confirms that in October 2007, Cree Construction was aware that final approval from INAC had not yet been received and therefore there could be no effective contract with the First Nation.

[102] In my view, by including the October document, and not the August document as contract documents in the CCDC contract, the parties intended that the August 2007 bid document should have no effect on their legal relationship concerning the housing project.

[103] With respect to the inclusion of Chief Solomon's September 7 letter as a "contract document", it is my view that the parties were simply acknowledging that delivery of these materials by Cree Construction, and the subsequent payment for them by the First Nation, constituted prior part-performance of their respective obligations which were now reduced to writing in the Construction Contract.

[104] In support of this interpretation I note as well that the "entire agreement" clause in the CCDC Construction Contract expressly prevents prior "bidding documents" exchanged between the parties from having any effect outside the written provisions of that agreement, and then only if they are listed as Contract Documents.

[105] Cree Construction also argues that although it received the Ontario plans and documents, which were prepared by B.H. Martin prior to signing the CCDC contract, it did not review these documents. I find this surprising, especially since the plans were prepared for and at the request of Cree Construction and a draft copy of the foundation plans which form the basis for change order #1 was available in September 2007.

[106] If in fact Cree Construction did not review these plans prior to signing the contract, this does not mean that Cree Construction is entitled to claim for what it alleges are extra costs incurred in following these plans. The authorities are clear that work is not an extra if it is included in the contract documents. It is the contractor's responsibility to read the contract documents carefully and if the contractor fails to do so at its own risk. As explained in *Heintzman and Goldsmith on Canadian Building Contracts* (5th ed.), at 6§3(c):

> Extras of this nature must be distinguished from work properly called for by the contract. The work is not an extra if it properly falls within the work stated in the original contract. That is so even if the contractor failed to realize at the time of entering into the contract that it would be required to perform such work, because the contractor failed to read the specifications or read them correctly, or the contractor ought to reasonably to have understood that the work was included in the contract.

[107] In summary, the CCDC contract signed by the parties refers specifically to certain contract documents which include the architectural and civil drawings referred to by B.H. Martin. These documents supersede the unstamped Province of Quebec documents, which are referred to in prior correspondence. The plans included in the CCDC contract form both the basis for determining the scope of the required work and for determining what is payable. In conclusion, the work and materials referred to in change order #1 forms part of the required work under the CCDC contract and is not to be construed as an extra.

b) Did Cree Construction provide timely notice of its intention to perform "extra" work?

[108] The First Nation argues that if Cree Construction encountered unknown and unexpected soil conditions (which it denies) it was incumbent on Cree Construction to provide timely notice in writing prior to undertaking any "extra" work.

[109] The CCDC construction contract signed by the parties contains the following provisions governing changes to the contract price and work:

a) The Owner's right to make changes in the Work by approval of Change Order or Change Directive (*GC 6.1, 6.2 and 6.3*);
b) A requirement that the Contractor "shall not perform a change" in the Work without an approved Change Order or Change Directive (*GC 6.1.2*);
c) Providing for the Contractor's ability to make claims for changes in the contract price, by agreement with the Owner in respect of an approved Change Order (*GC 6.2.1, 6.2.2, p. 59*), or based on actual expenditures in the case of a Change Directive (*GC 6.3.5-6.3.13, p. 60-61*), or otherwise by giving "timely Notice in Writing of intent" to make such a claim (*GC 6.6*);
d) Provisions specifically requiring, whenever the Contractor encounters any concealed or unknown conditions potentially affecting the progress of the Work, that a Notice in Writing be given before such conditions "are disturbed," and "in no event later than 5 business days after first observance of the conditions" (*GC 6.4.1*); and,
e) Provisions governing circumstances in which the Contractor might be delayed in the performance of the work by the Owner or anyone engaged by the Owner, including a requirement for a notice in writing not later than 10 days after the commencement of the delay (*GC 6.5*).

[110] The evidence is that it was not until after it completed the work that comprised this alleged extra that Cree Construction provided notice that it was claiming extra costs for this work.

[111] In my view, Cree Construction failed to give timely written notice of this claim as required by the contract and the claim for this extra fails for this reason as well.

c) Does the doctrine of waiver apply in the circumstances of this case to relieve the plaintiff from strict compliance with the terms of the contract?

[112] The terms of the CCDC contract provided that Kelvin Jamieson would assume the role of consultant under the contract. Mr. Jamieson testified that he had not been requested to act in this capacity by the First Nation and he expressed surprise that the contract designated him as such. He testified that at no time was he asked by either of the parties to perform any of the work required of a consultant under the terms of the CCDC contract.

[113] Cree Construction argues that the failure by the First Nation to designate a consultant operates as a waiver of the strict terms of the contract and that this relieves it of its obligation to comply with the strict terms of the contract, such as providing notice in relation to its claim for extras.

[114] On the basis of the evidence at trial, I am satisfied that Mr. Jamieson was never asked to perform any of the duties of a consultant by either of the parties. I also find that Cree Construction never complained about not having a consultant available during the performance of the contract.

[115] I reject Cree Construction's argument that the doctrine of waiver applies in the circumstances of this case. Waiver or variation of a contract is a "stringent" legal concept. The Ontario Court of Appeal has recently affirmed this narrow conception of waiver and variation in *Technicore Underground Inc. v. Toronto (City)*, 2012 ONCA 597, where at paragraph 63, it cited with approval of the decision of the Supreme Court in *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490:

> [63] The Supreme Court of Canada provides guidance on the doctrine of waiver in *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490. In paragraphs 19, 20 and 24, it lays down the following. Waiver occurs when one party to a contract (or proceeding) takes steps that amount to foregoing reliance on some known right or defect in the performance of the other party. It will be found only where the evidence demonstrates that the party waiving had (1) a full knowledge of the deficiency that might be relied on and (2) an unequivocal and conscious intention to abandon the right to rely on it. The intention to relinquish the right must be communicated. Communication can be formal or informal and it may be inferred from conduct. The overriding consideration in each case is whether one party communicated a clear intention to waive a right to the other party.

[116] In my view, there is no evidence tendered which meets the requirement that the First Nation communicated an "unequivocal and conscious intention to abandon" its right to rely on the notice provision or to otherwise waive strict compliance with the terms of the CCDC contract. Accordingly, there is no factual basis to support the submission of Cree Construction that the First Nation waived compliance with the strict terms of the contract.

[117] Neither is there any pattern of conduct by the parties over the course of the contract demonstrating that they did not intend to be bound by the notice provisions of the contract pertaining to the payment of extras or other invoices. Immediately upon receiving the first change orders, the First Nation objected to paying the first change orders which were submitted to it, and maintained that the CCDC contract should be strictly complied with.

[118] Alternatively, even if any failure to put decisions in respect of payment applications and change orders to a consultant could render parts of the construction contract inoperable, this effect must be given limited scope. That is, any waiver must cover only the mechanisms pertaining strictly to the consultant, and not the contractor's duties to give notice, to make proper applications, and to actually establish that the progress payment or change order is appropriate. The words of Master Sandler in *Kaplun v. Mihhailenko* (2005), 43 C.L.R. (3d) 223, at paras 118-122 are instructive in that regard:

> 118 ... What makes GC 7.1 workable is the interposing of the "Consultant" - (a defined term) — between the conflicting positions of the contractor and the owner. The law is clear that a consultant under a CCDC — type of contract, or under any other type of construction contract who is on the job as a consultant and payment certifier, is acting in a quasi-judicial role and

must be independent, impartial, objective and fair-minded in resolving conflicts between the contractor and the owner ...

119 In the contract in the present case, Ex. 1, Article A - 1 appoints M as the "Consultant" and he is also the named "Owner". See also "Definitions", #7, "Consultant", on page 7 of this contract.

120 In my view, it is impossible for an owner to also be a "consultant" because of the inability of the "owner" to be independent, impartial, objective and fair-minded in carrying out his duties as the consultant under the contract and in resolving conflicts between the contractor and the owner.

121 I therefore find that Part 7, GC 7.1 (and any other part of this contract that provides for activity on the part of a "consultant") is inapplicable and inoperative because of the legal impossibility of these provisions being applied and being workable. This does not abrogate the entire contract but only makes these provisions inapplicable.

122 The question then remains as to what legal principle or provision governs the rights of the owner and the contractor here to perform or stop the work and/or terminate the contract? My answer is the common law, which I have previously set out in para.'s [114] and [115] above. At common law, there is no specific manner required for an owner to terminate a contract. If, at common law, the owner is entitled to terminate because of the repudiation by the contractor, then any method that shows that the owner has accepted the repudiation and has terminated the contract, i.e., has brought the contract to an end, will suffice. Here, I find that the owners' registered letter of August 26, 2003, Ex. 14, was a proper method of termination. Specifically, the owners did not have to give the contractor a specification of what the default or defaults were and a particular number of days' opportunity for the contractor to remedy such defaults, as was argued by counsel for the plaintiff.

[119] I note the parties reached an agreement to use the Mushkegowuk inspectors as the neutral third party, rather than the consultant. In my view, this must be given effect as a limited variation or waiver by both parties of the role otherwise attributed to the consultant in this area by the written contract.

[120] In conclusion, I find that doctrine of waiver does not relieve Cree Construction from complying with the material terms of the contract.

Change Order #4 – plywood for ceramics and under porch; galvanized anchors; attic access door; sump pumps rental of shovel of electrical service entrance and installation of electrical service entrance (April 20, 2009)

[121] Cree Construction delivered a change order referred to as Change Order #4 on April 20, 2009. The change order claimed extra costs totalling $124,201.41. It later delivered an amended change order indicating an increased cost of $126,554.53.

[122] This change order was rejected by the First Nation on the same basis as it rejected change order #1, namely that the work and materials set out in this change order were included in drawings and specifications of the fixed price CCDC contract. It again rejected Cree Construction's submission that it was entitled to bill for amounts over and above the requirements of what Cree Construction has described as its first contract.

[123] My comments with respect to Change Orders #1 and #2 are equally applicable with respect to this claim. I have found that there was one contract which governed the scope of work and the invoicing in relation thereto, and that was the CCDC contract signed by the parties on June 18, 2008. This contract superseded any agreement entered into prior to that date. The evidence at trial indicated that the work that comprised this change order was required by the terms of this CCDC contract.

[124] I also find that no notice was provided in relation to this change order as required by the terms of the contract. The contents of this change order, as was the case with the other change orders received on December 5, 2008 came as a surprise to the defendant.

[125] For the above reasons, this claim for extras is rejected.

Change Order #2 - soil conditions (December 5, 2008)

[126] Change Order #2 was originally in the amount of $1,129,514.43 and it purported to represent the additional labour and material costs incurred in constructing the foundations, resulting from wet and muddy soil conditions. The amount of this change order was later reduced to $663,706.79.

[127] Mr. Badreddine testified that when he discovered that the soils had a high water content his solution was to dig down to a depth of 5 to 7 feet, install pumps to drain the excavated area, and then bring in granular fill to raise the level of the excavated area to a level where it was 4 feet below ground. Once the granular material was in place, the granulars were compacted and footings were placed on this compacted material.

[128] The amended change order in the amount of $663,706.79 included construction costs of $406,221.85, which included additional labour costs in excess of $100,000, equipment costs of $145,774.45, imported backfill in the amount of $53,021.70, and pumping costs of $68,451. Added to this amount was the sum of $170,914.49 for general conditions and $86,570.45 for administration and profit.

[129] Mr. Jamieson testified that he was shocked when he saw the claim by Cree Construction in respect of the soil conditions. He testified that, based on his discussions with Cree

Construction to that date, he was expecting a claim for at most 2-3 feet of extra excavation, at just 2 of the 15 lots, and extra fill and compaction for the costs of a gravel pad to make up that extra depth; instead, Cree Construction claimed these additional costs for all fifteen lots.

[130] In my view, this claim for extras must fail for the following reasons:

(a) Cree Construction Did Not Employ Suitable Construction Methods

[131] Cree Construction's August 31st proposal contemplated that studies would be available prior to the start of construction, and that "complete soil studies" and related engineer recommendations would be necessary in order to finalize a materials list. Mr. Jamieson testified that by the contract signed on June 18, 2008, a funding allowance of $300,000, over and above the Contract price and contingency amounts, was available to cover necessary expert costs and could have been used for soil studies. Notwithstanding the apparent need for such studies, Cree Construction decided to commence the excavation work for the foundations without first commissioning a study of the soil conditions.

[132] After experiencing difficulties with the excavation work, Cree Construction sought the advice of Daniel Cook, a soils engineer with the engineering firm of Sutcliffe Rody Quesnel Inc. Mr. Cook had knowledge of and experience with soil conditions in the communities on James Bay. He was given the lot layout and foundation plans, as well as related specifications, and asked to assess the soil conditions and soil bearing capacity at the site. Test pits were dug at seven locations on the project, and the strength of the native soil was measured at each site. Mr. Cook produced a written report that was completed on September 19, 2008; by that time, Cree Construction had been carrying on excavation work for a period of two months.

[133] Mr. Cook was called to give evidence by Cree Construction. He explained that the foundation design prepared by the architect called for soil strength of at least 75 KPA, which is a measure of bearing weight or pressure over a given surface area. He confirmed that in his opinion, a design bearing value of 75 KPA was appropriate and used on other projects (not just in Kashechewan). The purpose of the testing was to ensure that the local soils provided the required measure of support.

[134] Mr. Cook concluded in his report that "competent soils" having the required bearing capacity to support the use of the proposed foundation footing design were found at the building sites by the testing. He confirmed in cross examination that his conclusion meant that the soils, even with the high water content, were competent and had adequate bearing capacity for the foundation as designed by B.H. Martin. He also confirmed that if the construction had proceeded smoothly, without excessive disturbance and with adequate water control, the foundation as designed could be placed directly on the native soils at the 4 foot depth suggested in the B.H. Martin plans, without any need for a compacted gravel pad.

[135] Mr. Cook agreed that when high water concentrations and infiltrations are encountered it is up to the contractor on site to come up with the necessary techniques to deal with

potential moisture problems, in consultation with the onsite inspector or engineer. He also agreed that when moisture problems are encountered, the deeper you dig the more likely it is that water problems will occur and that machine compaction of these wet soils has the effect of bringing water to the surface. He also agreed that an experienced excavator operator who is capable of digging down 4 feet with only a minimal disturbance of the underlying soils is a definite asset.

[136] Mr. Cook's conclusions are supported by the experience of the First Nation when it completed the footings and foundations on the remaining five lots in 2009. Mr. Stephen, who managed the completion of the five units, testified that his team constructed the foundations without having to excavate beyond the four feet required by the foundation designs in the construction contract, and without any need for a compacted gravel pad within the excavations. He confirmed that his team did not encounter any unusual soil conditions. The lot locations for the five units constructed by Mr. Stephen's team were just as close to the Albany River as the 15 done by Cree Construction.

[137] In summary, Cree Construction decided to proceed with excavation of the 15 lots without first obtaining a soils study. After a significant amount of trial and error, Cree Construction eventually completed the construction of the footings and foundation on the first 15 sites but the methods it employed resulted in significant extra costs. I accept the First Nation's argument that these methods resulted from the decision by Cree Construction to use construction methods that caused unnecessary disturbance to the soil, such as excavating to a deeper depth and using compacting equipment. As confirmed by Mr. Cook, the soils were suitable. The foundations could have been constructed according to the plans, without the necessity of additional excavation and remedial or extra work, assuming the work was performed properly.

[138] This claim for additional costs resulting from soil conditions is dismissed.

(b) The Subject Matter of Extra No.2 Does Not Properly Comprise an Extra

[139] Although the aforementioned section disposes of the claim, I will deal briefly with the First Nation's argument that the subject matter of this claim does not properly constitute an extra.

[140] The Supreme Court of Alberta established the following rules for determining when a claim by a contractor for extra costs is truly an "extra" in the case of *Chittick v. Taylor* (1954), 12 W.W.R. (N.S.) 653, at paras 6-9:

> 6 Rule 1. An item specifically provided for in the contract is not an "extra."
>
> 7 Rule 2. When the plaintiff supplied material of a better quality than the minimum quality necessary for the fulfilment of the contract, without any instructions, express or implied, from the defendant to do so, he is not entitled to charge the extra cost as an "extra."

> 8 Rule 3. When the plaintiff did work or supplied materials not called for by the contract (plans or specifications) without instructions, express or implied, from the defendant, or the consent of the defendant, he is not entitled to charge this additional work or materials as an "extra." ...
>
> 9 Rule 4. When the plaintiff did work or supplied materials not called for by the contract on the instructions, express or implied, of the defendant, he is entitled to charge for additional work or materials as an "extra."

[141] In my view, the *Chittick v. Taylor* decision remains good law today. I agree with the argument by the First Nation that this claim by Cree Construction does not meet the test set out in this decision for the following reasons:

a) The foundations of the houses and other details claimed for were specifically provided for in the contract. The foundations as designed would have been perfectly serviceable. [Rule 1]

b) To the extent the plaintiff did work or supplied materials beyond what the contract called for, it was entirely the plaintiff's decision and the defendant never requested this to be done, let alone agreed to pay for it. [Rule 3]

c) There is no evidence that it sought or was given approval or instructions, express or implied, by the First Nation for any such work before it was done. [Rule 3]

(c) Cree Construction Did Not Provide Timely Notice of this Claim as Required by the Contract.

[142] The First Nation argues that if Cree Construction encountered unknown and unexpected soil conditions (which it denies), it was incumbent on Cree Construction to provide timely notice in writing prior to undertaking any "extra" work.

[143] The parties disagree on what conversations took place prior to the written request for payment of these extras on December 5, 2008.

[144] Mr. Badreddine acknowledged that he did not speak with Mr. Jamieson or anyone else at Kashechewan about a claim for extras relating to the soil conditions encountered, either when excavation began in July 2008, or anytime thereafter.

[145] Mr. Amrarene testified that he first spoke with Mr. Jamieson regarding a claim for extras regarding the soil conditions encountered when Cree Construction first discovered the issue in July 2008. Mr. Jamieson denies that this conversation took place. Neither of the parties have anything in writing that confirms this call. Mr. Amrarene does acknowledge however that, consistent with the construction contract requirements, Mr. Jamieson told him to submit a claim in writing. He also acknowledged that Mr. Jamieson said nothing about whether the First Nation or the Project Team would be agreeable to paying anything for such a claim.

[146] Mr. Jamieson does recall that he forwarded an email to Cree Construction after he was informed by Mr. Corston that Cree Construction had encountered issues with the excavation work and was bringing in additional fill which it was compacting. In his email, he raised the issue of a potential claim for extra costs, stating: "If this method of compaction is going to cost big time then I need details". There is no evidence that any details were provided until the December 5, 2008, request for payment of an extra was sent to Mr. Jamieson. This was four months after the start of construction. By that time, work on the foundations for the 15 houses was complete, and work was proceeding on those which had been framed in before the winter. As noted above, Mr. Jamieson testified that he was shocked when he received the claim.

[147] The Construction Contract contains an exhaustive scheme for dealing with changes in the work and consequent changes to the contract price (see discussion in relation to Change Order #1). The contract is designed to protect both parties. That scheme required Cree Construction to give timely notice of any conditions that would disrupt or delay the work. It is my view that having failed to do so, Cree Construction cannot claim an increase in its compensation.

(d) Quantum Meruit Does Not Apply to this Claim for Extras

[148] Cree Construction claims that it has a valid quantum meruit claim for the alleged costs related to the soil conditions. I disagree. In my view, Cree Construction cannot evade the operation of the contractual scheme by framing its case in "quantum meruit", since the digging of the foundations did not fall entirely outside the ambit of the contract. As stated in *Heintzman and Goldsmith on Canadian Building Contracts* (5th ed), at 10§6(c):

> [A] claim for unjust enrichment for work arising from changed circumstances may be made in two situations: if the work falls entirely outside the ambit of the contract and the owner insists on the work being done when it has no right to so do so; or the circumstances demonstrate an implied agreement that it would pay for the work. Otherwise, the contractor is left with its contractual rights, either to an adjustment of the price or other compensation if that is provided for in the contract, or to a claim for damages.

[149] In this case, the foundation did not fall outside the ambit of the contract and the plaintiff has not proven that there was any agreement in effect that it would pay for this work.

4. The progress payment dispute: Did the First Nation comply with the payment provisions of the contract?

History of Invoices and Payments

[150] Cree Construction based its decision to cease working on the alleged failure by the First Nation to make payments as required by the CCDC contract.

[151] Under the heading of "Applications for Progress Payment", the CCDC contract provides that "the amount claimed shall be for the value, proportionate to the amount of the

Contract, or *Work* performed, and *Products* delivered to the *Place of the Work* as of the last day of the payment period."

[152] The Mushkegowuk council was assigned to carry out the inspections to determine the percentage completion of the work. Initially, Mr. Corston and later Mr. Derek Laronde carried out inspections. Both men were fully qualified and certified as inspectors in the Province of Ontario.

The Inspections and Degree of Completion

[153] Derek Laronde testified that in February 2009, he and his company, Aboriginal Building Services Corp., were appointed by Mushkegowuk Council to replace Mr. Corston as the building and progress inspector for the Housing Project. Mr. Laronde has been certified as building inspector in the Province of Ontario since 1991. Many of his inspections involve First Nation communities. His inspections were delivered to and reviewed by Mr. Jamieson.

[154] Mr. Laronde testified that in carrying out his inspections in Kashechewan, he applied a national weighting system that had been developed for Aboriginal housing projects from a Canada Mortgage and Housing Corporation template. He testified that he conducted an inspection on February 4, 2009, and found the 15 units were 24% complete; he compared that to the last report summary provided by Mr. Corston (which indicated 23% completeness for the 15 units), and was satisfied his results were consistent .

[155] Mr. Laronde's May 26, 2009, report found that the 15 housing units commenced by Cree Construction were 62.8% complete. The remaining five units had not been started. No further construction work was performed by Cree Construction on the Housing Project thereafter.

[156] On August 10 and 11, 2009, Ms. Valerie Girard attended at the site on behalf of Cree Construction. Ms. Girard had recently completed the academic portion of her training to become an architect, and she was employed at the time by Artcad, an architectural firm in Rouyn, Quebec, where she was completing her practical training to become a certified architect in the Province of Quebec.

[157] Ms. Girard's task in Kashechewan was to prepare an estimate of the percentage of the work completed to date and to inspect the materials left on site to determine whether they were sufficient to complete the housing development.

[158] Ms. Girard carried out a thorough inspection of both the partially completed houses and the storage sites. She took photographs and notes and after returning to Rouyn, she met with her supervising architect and with his assistance prepared a report in which she concluded that there were sufficient materials on site to complete all 20 houses.

[159] Ms. Girard also reported that in her opinion the 15 houses were approximately 75% complete.

[160] Ms. Girard presented as a well prepared and credible witness. However, with respect to her finding that the 15 houses were 75% complete, I prefer the evidence of Mr. Laronde to

that of Ms. Girard. Mr. Laronde has received specific training in relation to building inspections in the Province of Ontario. His training includes calculating the degree of completion as referenced in the payment section of CCDC contract. He also has many years of experience in preparing such inspection reports. Although Ms. Girard had recently graduated as an architect, she had limited experience or training in carrying out inspections for the purpose of determining the percentage completion of a building project.

[161] I therefore accept that the percentage of completion of the 15 houses was 62.8%.

The Amount Owing to Cree Construction as of May 26, 2009

[162] Based on Mr. Amrarene's letter of May 7, 2008, (see par. 68 above) it would appear that as of May 26, 2009, there was no dispute as to the following facts:

a) Total contract for 20 houses:	$4,506,482.00
b) Total material for 20 houses:	$1,562,970.00
c) Total contract for 15 houses = (a) x 75%:	$3,379,861.50
d) Total material for 15 houses = (b) x 75%:	$1,172,227.50
e) Total "work" for 15 houses = (c) - (d):	$2,207,634.00
f) Total paid to date for 15 houses (Invoices # 1 to 3):	$2,838,043.37
g) Total paid to date excluding material = (f) – (d):	$1,665,815.87

[163] Accordingly, assuming the above facts, and accepting that Mr. Laronde's opinion as to the degree of completion is accurate, I find that the construction contract progress billing provisions required the First Nation to have paid Cree Construction for all its materials and work completed through May 26, 2009, the sum of $2,654,427.60, calculated as follows:

(a) 100% of the "Materials" amount, plus

(b) 62.8% of the "Work" amount for 15 houses,

(c) less 10% holdback.

That calculation is $1,562,970.00 + (62.8% of $2,207,634.00) = $2,949,364.10 less 10% Construction Lien holdback ($294,936.50) = $2,654,427.60.

[164] It is not disputed that in May 2009, the First Nation had paid Cree Construction a total of $2,838,043.27. Accordingly, I find that the First Nation was not in breach of the provisions of the agreement between the parties and furthermore, that Cree Construction was not in a position whereby it could unilaterally cease work on the project.

5. Cost to Complete the Construction of the 20 Houses

[165] Prior to commencing work to complete the housing development, Mr. Stephen prepared estimates setting out the cost of completing the 15 partially completed units and the cost of constructing the five units on which construction had not yet commenced. He estimated that the cost of completing the 15 units was $349,022.40 and the estimated cost of constructing the five remaining units was $780,693.60.

[166] Mr. Stephen's cost estimates are exclusive of any additional or replacement materials, equipment or tools, which were required for completion purposes, and it was exclusive of contract administration costs and safeguarding costs.

[167] Cree Construction maintains that Cree Construction could have completed the project for less than the contract cost and claims a credit for the difference.

[168] According to Cree Construction, the cost of completing the 15 units should not have exceeded $157,163.77. It estimated the cost of constructing the five units to be $735,953.

[169] In my view, neither party presented credible evidence in support of their cost estimates. Mr. Stephen's evidence on this issue was confusing and poorly documented, as was his evidence with respect to the actual final costs of completion. I found the evidence of Cree Construction to be speculative, and clearly inconsistent with the costs that it alleges it incurred in completing the first 62.8% of the project. For example, Cree Construction was paid $1,665,815.87 to complete the labour portion of the 15 houses, and it invoiced for much more, and yet it argued that the final 37.2% of the work could be completed for $157,163.77. Even if I accept the 75% completion percentage purported by Cree Construction, a completion cost of $157,163.77 cannot be reconciled with Cree Construction's past invoices.

[170] The project completion report submitted to INAC by Mr. Jamieson confirms that INAC's "Approved Amount" for the Construction portion of the project (not including contingencies and non-construction costs) was $4,506,482 and confirms that the "Final cost" for this portion of the project was $4,506,482. The First Nation therefore completed all 20 units, for an amount which was within the available project budget.

[171] The fact that the First Nation was able to complete the contract within budget satisfies me that it acted reasonably in completing the contract for these 20 homes. In the circumstances, I am not prepared to entertain a dispute or to speculate as to whether it could have completed the project for less money; particularly in circumstances were the evidence put forward by the plaintiff to suggest that the First Nation could have completed the project for less money is not persuasive. Cree Construction is entitled to be paid on the basis of the work and materials it supplied to the site and no more, and I am satisfied that it has been paid the required amount as per the terms of the contract.

PLAINTIFF'S CLAIM: SUMMARY AND CONCLUSIONS

[172] My decision in relation to the above issues can be summarized as follows:

(a) In accordance with the arbitrator's ruling, the plaintiff was entitled to proceed with this action for claims, which it could make exclusively on its own behalf.

(b) The claim for alleged delay costs is denied. There was no agreement that construction would commence in 2007, and in any event Cree Construction arrived too late in the year to commence construction in 2007. Also, the required preparatory work, including the preparation and approval of drawings had not been completed before the end of the year.

(c) The claims for extras are denied. My reasons include:

i. The CCDC contract is the only contract which governs the rights and duties of the parties; the work identified by Cree Construction in the change orders is work which was required pursuant to the terms of the CCDC contract. Quantum meruit does not apply;

ii. The doctrine of waiver does not apply to relieve Cree Construction from complying with the terms of the contract;

iii. Timely notice of the claims for extras was not provided; and,

iv. The extra costs incurred for constructing the footings and foundations resulted from the failure by Cree Construction to obtain a soils study report prior to commencing construction and from improper excavation and construction techniques employed by Cree Construction in excavating the site.

(d) Payments by the First Nation were to be based on the percentage of completion. In determining the percentage of completion, the evidence of the inspectors employed by the Mushkegowuk Council (Paul Corston and Derek Laronde) is to be preferred over that of Valerie Girard. On the date Cree Construction ceased work on the site, the degree of completion of the 15 houses was 62.8%.

(e) Based on the percentage of completion, the amount owing on May 26, 2009, was $2,654,427.60 (after deducting a 10% holdback). The amount paid as of that date was $2,838,043.27. The First Nation was not in breach of its obligations to make periodic payments as of May 26, 2009.

COUNTERCLAIM BY FIRST NATION

Limitation Period Issue

[173] Cree Construction left the site on September 5, 2009. Thereafter, it commenced this action against the First Nation on April 9, 2010. The First Nation's counterclaim was issued on April 12, 2012. Cree Construction raises a limitation period argument. It points out that the counterclaim by the First Nation was issued more than two years after the cause of action arose.

[174] In my view, the limitation period with respect to Kashechewan's counterclaim was tolled while the arbitration was outstanding before Mr. Scott. This was by operation of s. 11(1) of the *Limitations Act, 2002*, and/or s. 52 of the *Arbitration Act, 1991*. Those provisions read:

> **Attempted resolution**
>
> 11. (1) If a person with a claim and a person against whom the claim is made have agreed to have an independent third party resolve the claim or assist them in resolving it, the limitation periods established by sections 4 and 15 do not run from the date the agreement is made until,
>
> (a) the date the claim is resolved;
>
> (b) the date the attempted resolution process is terminated; or
>
> (c) the date a party terminates or withdraws from the agreement.
>
> **Limitation periods**
>
> 52. (1) The law with respect to limitation periods applies to an arbitration as if the arbitration were an action and a claim made in the arbitration were a cause of action.

[175] Following the issuance of the statement of claim by Cree Construction on April 9, 2010, the parties participated in arbitration with David W. Scott. The First Nation was named as a party in that arbitration, and as a defendant in the main action. The arbitration was properly commenced and proceeded to a final award.

[176] The First Nation's counterclaim arose on September 5, 2009, when Cree Construction left the site. The statement of defence and counterclaim was delivered 31.5 months after the cause of action arose. But the arbitration was pending at least from Justice MacDonald's order of January 5, 2011, until Mr. Scott's Final Award of February 21, 2012. That is almost 14 months during which the arbitration was outstanding. Deducting 14 months from 31.5 shows that the limitations clock was only running for 17.5 months at the most before the First Nation commenced its counterclaim – well under the two-year limitation period.

[177] In my view, the First Nation's counterclaim was commenced within the prescribed period.

5.5% Profit on Payments to Cree Construction

[178] The contract labour and material/equipment charges all contained a built-in 10% mark-up representing profit. Pursuant to the joint venture agreement, 55% of all profit was to accrue to the joint venture partner owed by the First Nation. By way of counterclaim the First Nation claims a claw-back of 5.5% (55% x 10%) on all amounts paid to Cree Construction for work and materials (55% x $2,838,044.06 = $156,092.42).

[179] In my view, this is a matter that directly involves the joint venture and this matter should therefore be dealt with pursuant to the arbitration provisions of the joint venture agreement.

Reimbursement of Overpayment

[180] Cree Construction was paid the sum of $2,838,043.27 in relation to work it performed in partially completing 15 houses. Based on the degree of completion, which I have accepted was 62.8%, it was entitled to claim $2,654,427.60 at the time it ceased work on the project. The First Nation submits that it is entitled to the sum of $183,615.67, being the difference between the amount paid ($2,838,043.27) and the amount to which Cree Construction was entitled in May 2009 ($2,654,427.60).

[181] The amount payable in May 2009 was calculated on the basis that Cree Construction was entitled to be paid $2,949,364.10 less a 10% construction lien holdback ($294,936.50), resulting in the net payable of $2,654,427.60. A certificate of substantial completion was issued on January 16, 2012. After the issuance of the certificate, Cree Construction would normally have been entitled to be paid the entire sum owing for the work it completed ($2,949,364.10), which includes the 10 % holdback of $294,936.41.

[182] On the basis of Cree Construction's entitlement to the holdback monies, I am rejecting the First Nation's claim that it is entitled to what it claims was an overpayment to Cree Construction.

Allocation of Construction Lien Holdback Monies

[183] The First Nation was able to complete the project within budget. In doing so, it retained the sum of $111,320.90 which effectively comprised the balance of the holdback funds ($2,949,364.10 - $2,838,043.20 (the amount paid to Cree Construction) = $111,320.90) and applied these funds against the costs of completion.

[184] It is my view that the First Nation was entitled to apply its costs of completing the project against these holdback funds, to the extent that these funds were required to bring the project to completion within budget.

[185] As discussed in the next two sections, I have applied these holdback monies against the costs claimed by the First Nation of purchasing the tools and equipment that were needed to complete the project and to its administration costs.

Cost of Replacement Materials, Tools, and Equipment

[186] Mr. Stephen presented evidence to support a claim for additional materials, tools and equipment which were required to complete the housing project. Initially the claim was for $324,474.35 but this was later reduced at trial to approximately $134,400. Ms. Girard testified that she also conducted a comprehensive inventory of the materials which were left on site, and she reported that there were sufficient materials to complete the construction of the houses.

[187] As I have already stated, I found that Mr. Stephen's testimony with respect to the costs of completion was confusing, contradictory, and poorly documented. On the other hand, I was impressed with Ms. Girard. She took comprehensive notes of her visit to the site and it was her evidence that all materials were accounted for. With respect to the materials that Mr. Stephen alleges were missing from the site, I accept her evidence over that of Mr. Stephen and I am not allowing a claim for the purchase of additional materials on the basis that the First Nation has not proven this claim.

[188] I do accept that costs were incurred by the First Nation for the rental or purchase of tools and equipment which were required to complete the project. The claim for these items was also poorly documented by Mr. Stephen, and I am left with considerable uncertainty as to how much was spent by the First Nation to purchase these items. Added to this uncertainty is the fact that these tools and equipment would also have some residual value to the First Nation upon completion of the project. Based on my review of the documents which were filed to support the claim for the purchase of these items, I find that a fair estimate of these costs is $30,000. I am applying this sum against the residual holdback monies.

Additional Contract Administration Costs

[189] A review of the First Nation's close out report to INAC indicates that INAC allowed the First Nation the sum of $300,000 for non-construction costs, over a 6 month construction period from June 18, 2008, to December 14, 2008 ($50,000 per month).

[190] The First Nation submits that after August 2009 construction could not have been completed without incurring further administration costs comprising a three month construction period in May to August 2010 ($150,000), and a further winter period guarding the site from December 14, 2009, to May 2010 ($30,000). The First Nation argues it should be entitled to the sum of $180,000 to cover these administration costs.

[191] I agree that some additional time and administration costs as well as safeguarding costs were incurred as part of the completion costs. There is no evidence before me confirming the amount of costs actually incurred by the First Nation and without proof of the actual costs incurred I am not prepared to assess these at $180,000. On a common sense and practical basis, I am allocating the sum of $75,000 ($25,000 per month) to the administrative costs, and the balance of the holdback funds ($6,320.90) to the safeguarding costs.

Unpaid Truck Rental Invoice for Work Associated with Change Order #2

[192] One of the costs included in Cree Construction's Change Order #2 (payment of which was denied) pertained to the rental of a truck by Cree Construction from the First Nation. This rental invoice was for $79,887.50. The First Nation claims that this sum remains payable. In my view, there was insufficient evidence led to support this claim and in the circumstances, I am denying it.

General Damages

[193] The First Nation claims general damages totalling $100,000. Mr. Stephen testified that Cree Construction's delays in completion of the Housing Project aggravated the already serious overcrowding on Kashechewan's reserve. The sum of $100,000 is based on a claim of $5000 for each of the 20 houses.

[194] The First Nation argues that these damages result from a breach of the construction contract.

[195] No evidence was led in relation to this claim, other than general comments from Mr. Stephen.

[196] Cree Construction argues that the First Nation does not have standing to claim in a representative capacity on behalf of these 20 families.

[197] Even if I was convinced that the First Nation has standing, I am not prepared to grant such relief, in the absence of direct evidence from the individuals on whose behalf these damages are claimed. In the absence of such evidence, I am not in a position to assess this claim, and the claim is therefore denied.

COUNTERCLAIM BY FIRST NATION:

SUMMARY AND CONCLUSIONS

[198] My decision, in relation to the counterclaim can be summarized as follows:

(a) The limitation period was tolled as a result of the arbitration and the First Nation's counterclaim was commenced within the prescribed period;

(b) Any entitlement to profits should be subject to arbitration, pursuant to the terms of the joint venture agreement;

(c) Cree Construction's entitlement to the holdback monies negates the claim by the First Nation that it overpaid Cree Construction.

(d) The First Nation did not pay out to Cree Construction the sum of $111,320.90, which effectively comprised the balance of the holdback funds ($2,949,364.10 - $2,838,043.27

= $111,320.90). This sum is notionally applied against the following costs of completion as alleged by the First Nation;

i.	Replacement tools and equipment	$30,000.00
ii.	Administrative costs	$75,000.00
iii.	Safeguarding costs	$6,320.90
	Total	$111,320.90

[199] The claims by the First Nation for truck rental, missing materials, and general damages are dismissed.

Costs

[200] The parties may file written submissions with respect to costs within 20 days of the release of this decision. Thereafter they have 10 days to reply to each other's submissions, should they wish to do so.

E.J. Koke S.C.J.

Released: February 2, 2015

CITATION: Cree Construction v. Kashechewan, 2015 ONSC 735

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Cree Construction and Development Company Ltd.

Plaintiff

– and –

Kashechewan First Nation

Defendant

REASONS FOR JUDGMENT

E.J. Koke

Released: February 2, 2015