

SUPREME COURT OF NOVA SCOTIA

Citation: *Alva Construction Ltd. v. D. W. Matheson & Sons Contracting Ltd.*, 2013 NSSC 352

Date: 2013-11-01

Docket: Hfx No. 408971

Hfx 411018

Registry: Halifax

Between:

Hfx No 408971

Alva Construction Ltd.

Applicant

v.

D. W. Matheson & Sons Contracting Ltd.

Respondent

-and-

Hfx No 411018

D. W. Matheson & Sons Construction Ltd.

Applicant

v.

Alva Construction Ltd.

Respondent

Judge: The Honourable Justice Gregory M. Warner

Heard: September 9 and 10, 2013, in Halifax, Nova Scotia

Counsel: **Geoffrey A. Saunders** and **Serena Bath**,
for *Alva Construction Ltd.*

Robert Dickson Q.C. and **Geoffrey Franklin**,
for the *D. W. Matheson & Sons Contracting Ltd.*

By the Court:

[1] This is a contest between two road contractors respecting the sharing of unanticipated revenues from a contract awarded to D. W. Matheson & Sons Contracting Ltd. (“Matheson”) to supply materials for a Nova Scotia Department of Transportation and Infrastructure Renewal (“NSTIR”) project at Bay St. Lawrence, Victoria County, Nova Scotia.

[2] The resolution of the contest involves determination of the existence and contents of oral agreements between Alva Construction Ltd. (“Alva”) and Matheson. Central to this is the assessment of reliability and credibility of the principals of the parties.

[3] This hearing proceeded as an Application in Court, after consolidation and conversion of Actions by each of the parties against the other. The evidence consisted of affidavits and cross-examination of A. G. MacDonald (“AG”), president and principal of Alva, and Kenzie Matheson (“Kenzie”), president and principal of Matheson.

Background

[4] Alva, of Antigonish, Nova Scotia, owns a fleet of trucks, mobile crushing equipment, and several quarries in Nova Scotia, including one at Leitches Creek, near Sydney.

[5] Matheson, of Little Narrows, Victoria County, Nova Scotia, owns mobile crushing equipment and a fleet of trucks.

[6] In 2012, the Government of Nova Scotia, through NSTIR, decided to conduct some road construction and repair work with its own workforce. It arranged to purchase a mobile asphalt plant in the southern United States. Included was a paving project in northern Victoria County. It intended to purchase materials for this project from contractors who prequalified pursuant to a “Request for Expression of Interest for the Supply of Asphalt Aggregate” issued in January 2012. In early February Matheson successfully applied to prequalify. Alva and other road contractors did not respond to the prequalification request.

[7] On April 19, 2012, NSTIR posted a tender for the supply and stockpile of asphalt aggregate materials, gravels and supply of a mobile asphalt plant site in the Bay St. Lawrence area of northern Victoria County for Pre-Qualified Bidders only with a closing date of May 4.

[8] The total estimated quantity of material to be supplied was 39,700 tonnes made up as follows:

- 12,000 tonnes of 14 mm (1/2 inch) stone
- 8,000 tonnes of unwashed crusher dust

- 3,500 tonnes of washed crusher dust
- 3,000 tonnes of blend sand
- 13,000 tonnes of Type 1S gravel
- 200 tonnes of Type 1 gravel

The first four items are components of asphalt and the latter two materials are placed on the highway shoulder after asphalt is laid.

[9] The tender contained tight deadlines for delivery of the materials. It turned out that after the tender closed, NSTIR's efforts to obtain the mobile asphalt plant in the United States were delayed and the tender deadlines became irrelevant.

[10] Matheson tendered on the project. In the process of tendering, Kenzie contacted Dexter Construction ("Dexter"), a division of Municipal Enterprises, the owner of a quarry 18 kilometres from the project site at Bay St. Lawrence, for the purpose of obtaining most of the materials called for in the tender from that quarry. The quarry is called the Money Point quarry ("Money Point"). Dexter refused Matheson's request to access Money Point for materials for the tender.

[11] On May 2, 2012, Kenzie contacted AG to access materials from a quarry owned by Alva at Leitches Creek, 157 kilometres from the Bay St. Lawrence Project Site. Kenzie knew that materials from that quarry would meet the specifications in the tender. AG confirmed to Kenzie that the quarry contained readily available stone and crusher dust required for the tender. He agreed to provide Matheson with a quote to supply the stone and crusher dust. On May 4, Alva provided a written quote to Matheson to provide the required 14 mm stone and unwashed crusher dust with a stipulation: "Alva to be guaranteed 50% of the trucking in total contract quantity".

[12] At first glance, the May 4 quote provided two alternate prices for the stone and unwashed crusher dust: either FOB Leitches Creek Quarry ("Leitches Creek"), or delivered to the project site at Bay St. Lawrence. The quoted price for option #1 was \$6.85 per tonne for material weighed and loaded on Matheson's trucks at Leitches Creek; and, for option #2, \$30.00 per tonne delivered by Alva's trucks to Bay St. Lawrence.

[13] The trucking stipulation was an important term of Alva's quote, and is central to this contest. In reality, the quote required 50% of the total materials in the NSTIR-Matheson contract to be delivered by Alva.

[14] NSTIR published a table of standard highway trucking rates for materials supplied to it by contractors. The table set a rate of “x” dollars per tonne times the distance trucked. The table in effect in 2012 provided that if the distance from the source of the material to the NSTIR project site was 157 kilometers (the distance from Leitches Creek to the Bay St. Lawrence site), the NSTIR trucking rate was \$23.15 per tonne. If the distance from the source to the NSTIR project site was 18 kilometers (the distance between Money Point and the Bay St. Lawrence site), the NSTIR rate was \$3.94 per tonne.

[15] AG acknowledged that Alva’s May 4 quote to Matheson (given verbally by AG in a May 2 phone call with Kenzie) was based on that table rate; that is, \$6.85 for the materials at Leitches Creek and \$23.15 for trucking, based on NSTIR’s approved trucking rate for delivery from Leitches Creek. AG acknowledged that the verbal and written quote was based on the materials being sourced from Leitches Creek. He submitted that this, however, was not a term of the contract.

[16] On May 3, 2012, Matheson submitted a tender to NSTIR. He relied upon the verbal quote given by Alva for stone and unwashed crusher dust from Leitches Creek. Matheson quoted \$40.00 per tonne for stone and crusher dust delivered to the project site at Bay St. Lawrence. Matheson quoted \$15.00 per tonne for the supply and delivery of gravel and sand, which it expected to source from another site close to Bay St. Lawrence.

[17] On May 4, after receiving Alva’s written quote, Matheson amended its tender to NSTIR. It reduced its price for stone and unwashed crusher dust by \$6.00 per tonne (to \$34.00 per tonne delivered), and for washed crusher dust by \$4.00 per tonne (to \$36.00 per tonne delivered).

[18] Tenders closed on May 4, 2012. While Matheson’s tender was not formally approved and awarded until June 15, 2012, it was apparent to both Matheson and Alva from a posting on NSTIR’s website on or about May 4 that Matheson was the only contractor who had submitted a tender for the project.

[19] Both Matheson and Alva made preparations to carry out the tender before formal award of the contract to Matheson on the basis that it submitted the only tender.

[20] On or about May 14, Matheson advised Alva that it had an indication that its tender was likely to be accepted and the contract would be awarded shortly. Matheson advised that Alva would supply the stone and unwashed crusher dust in accordance with its quote to Matheson.

[21] Sometime after May 14, Alva realized that it would be most cost efficient to Alva if it sourced the materials from Dexter’s Money Point quarry. With that in mind, AG first investigated whether Money Point could produce stone and unwashed crusher dust that would meet NSTIR’s specifications by taking and testing a sample of the quarry’s material. Then Alva contacted Dexter to obtain access to Money Pit for the required materials and to negotiate a royalty fee. AG discussed his intentions with Kenzie. They disagree about the timing and

contents of their oral communications with respect to Alva's proposal to Dexter to use Money Pit materials.

[22] Kenzie says he was advised by AG about his approach to Dexter before Dexter agreed to it, between May 25 and June 6. He says they discussed and agreed that they would share the profits from what Kenzie estimated would be the savings in trucking costs as a result of sourcing the materials from the Money Point quarry.

[23] Kenzie believed the trucking savings would be about \$500,000.00. Alva would truck the stone and crusher dust from Money Point at \$3.94 per tonne (the highway rate) and they would share in the savings above that. As part of these discussions, Alva asked and Matheson agreed to buy its Type 1S and Type 1 gravel (that Matheson had intended to source elsewhere) from Alva at Money Point. Gravel is a by-product of the production of the stone and unwashed crusher dust.

[24] Kenzie says that AG was in a hurry to start. In the first week of June, Alva offered to move its scales to the project site rather than wait for NSTIR's scales to arrive. Alva offered to provide a bull dozer to speed up the clearing of the project site (one of Matheson's tender responsibilities). Kenzie says that he met with AG only once. It was at the project site.

[25] Kenzie says that AG agreed to share the savings arising from the fact that the trucking distance, and therefore the cost of materials delivered to the project site would be substantially reduced. Alva's May 4 quote (in which Alva stipulated that it would do one-half of the trucking of all materials in the NSTIR tender) would now involve trucking materials 18 kilometers instead of 157 kilometers.

[26] AG says otherwise. He says that after he made a deal with Dexter, at about the end of May or early June, he advised Kenzie. Kenzie was happy because it would make the job go quicker and easier. He says Kenzie did not ask him to change his price for delivery of materials (option #2 in Alva's quote). At the same time, AG says that he did consider sharing the benefit of the unanticipated reduction in trucking costs with Matheson.

[27] He says that by June 6, Matheson had been awarded the tender and Alva had moved its crushing equipment to Money Point and begun operations.

[28] AG says that, on June 7, Kenzie called and asked that they consider profit sharing. AG says he was not interested. He had extra costs. He advised that any such arrangement was not going to happen and that "Kenzie did not disagree".

[29] AG agrees that he offered to sell Matheson the gravel, a by-product of the production of stone and crusher dust. He says that, in addition, as a change in Alva's May 4 quote, he proposed and Kenzie agreed that: (a) Alva would truck the stone and crusher dust (20,000 tonnes of the estimated 39,700 tonnes of material called for in the NSTIR tender) and Matheson would truck the rest of the material, and (b) if either required help from the other in trucking their

material, the party trucking would be paid the NSTIR approved trucking rate. Said differently, if Alva needed help from Matheson trucking stone and crusher dust, Alva would pay Matheson \$3.94 per tonne to truck it from Money Point to the NSTIR project site, and if Matheson needed help from Alva trucking the other material, Matheson would pay Alva \$3.94 per tonne.

[30] Alva and Matheson also disagree about the contents of their oral communications after work began on the project.

[31] Trucking of materials from the Money Point quarry began on June 11, 2012.

[32] On June 30, Alva invoiced Matheson for materials supplied in June:

- 12,796 tonnes of stone and unwashed crusher dust at \$30.00 per tonne delivered
- 4,652 tonnes of gravel at \$9.00 per tonne produced
- Trucking for 304 tonnes of gravel at \$3.94

Matheson paid the invoice on August 3.

[33] Alva completed production and delivery of materials by July 16. On July 31, it sent an invoice for 13,843 tonnes of stone and crusher dust at \$30.00 per tonne. On the same day Municipal Enterprises (of which Dexter was a division), invoiced Alva the royalty fee for 38,000 tonnes of material at \$5.00 per tonne. On August 30, Alva sent Matheson a second invoice for 8,500 tonnes of Type 1S gravel at \$9.00 per tonne.

[34] AG says that Kenzie called him in early August, advised AG that the job did not go well and asked AG to consider “throwing some money his way”. AG says he told Kenzie he would review it and get back to him and that he may be able to do something. AG says he did some calculations and concluded that Matheson had not done poorly.

[35] By September, Matheson had not paid Alva’s two outstanding invoices. The bookkeeper checked with Matheson’s office and was advised that Matheson had been paid by NSTIR.

[36] On September 11, AG called Kenzie about the outstanding invoices. Kenzie asked whether Alva had considered his request for a discount. AG says he told Kenzie that he had a figure in mind; however, before he was able to give this figure, Kenzie asked that \$150,000.00 be deducted from the final invoices. AG says that he was shocked by the figure and refused to agree, and did not relay the adjustment he had in mind. AG indicates he was concerned that if they quarrelled, Matheson would not pay anything on the account so he told Kenzie to pay the difference and they would discuss the \$150,000.00 later. AG states however that he made it clear that he was not agreeing to the requested adjustment of \$150,000.00.

[37] AG arranged for his brother, who was in Sydney at the time, to immediately (the same day) pick up Matheson's cheque for the amount agreed on during the telephone call and arranged for it to be deposited.

[38] On September 25, AG called Kenzie and demanded the remaining \$150,000.00 plus HST. Matheson refused. AG says that he had no idea before September 11 that Matheson would not pay Alva's invoices in full.

[39] On the same day, Alva sent NSTIR a "Notice of Claim", the result of which was that NSTIR froze Matheson's security deposit of \$119,300.00 until the dispute between them was sorted out or determined by a Court. It is still frozen.

[40] Kenzie's version of these discussions differs from AG's.

[41] Kenzie says that after work began, about June 12, AG advised that he would truck all of the stone and crusher dust to "keep it clean" and Matheson would truck the other material. Matheson says that while this was not part of Alva's stipulation in its May 4 quote, he agreed to try it and sort it out later. He says AG's business diary entry, tendered at trial, confirms this.

[42] On July 13, Kenzie called AG about the June 30 invoice, asking why it was based on trucking from Leitches Creek, as opposed to Money Point. Matheson says that AG told him he calculated it that way to get some cash-flow and that he would adjust the invoice when the final costs of sourcing from Money Point quarry were known. Matheson paid the full invoice on the basis of AG's promise to adjust the price at the end.

[43] Kenzie agrees that the work ended about July 16.

[44] Kenzie says he called AG on September 11 to discuss the final invoices and the price adjustment. Even though Kenzie believed that the savings were in the range of \$500,000.00, he told AG that he would accept \$150,000.00 (plus tax) as the price adjustment, as opposed to the 50/50 share of the trucking savings (which he believed was greater) because Alva had done more of the work.

[45] Kenzie says that AG agreed to take \$150,000.00 (plus tax) off the final invoices. Kenzie agreed to pay the agreed amount immediately. The same day AG's brother drove from Sydney to pick up Matheson's cheque.

[46] Kenzie testified that ever since AG advised that Alva was able to access Money Point quarry, on or about May 25, he believed Alva would abide their oral agreement to share the trucking savings equally. At no time did Alva say otherwise. The only question was what the net savings would turn out to be. He paid Alva's June 30 invoice on that basis. They settled on a final adjustment of the contract price, arising from the move from Leitches Creek to Money Point, in the amount of \$150,000.00 plus HST on September 11.

[47] Matheson refers the Court to handwritten notes made by AG on June 21 and September 12, 2012, which it says confirms Kenzie's version of his oral discussions with AG.

[48] AG's June 21 handwritten note shows some calculations followed by the words "thought for now, I quoted Kenzie \$30.00 per tonne for stone and sand. I will share profit over 12,000 stone and 8,000 sand. However my quote will govern if he does not play by my fair rules." [Court Note: 'sand' was AG's short-hand for unwashed crusher dust]. This appears to indicate that AG was prepared to share some of the additional profit from the move to the Money Point quarry.

[49] AG's September 12 handwritten note expresses some concern that Matheson may not pay Alva's account in full. It reads in part: "Check asphalt aggregate file to see what was paid invoice from Kenzie. He is worrying me on not paying in full." Later the note refers to the fact that his brother Allan picked upon the cheque from Kenzie yesterday and concludes: "Will wait till it clears before I tell Kenzie what I think." This tends to refute AG's evidence that he clearly told Kenzie that he did not agree with Kenzie's adjustment.

[50] Kenzie says that on September 25, AG called and demanded payment of \$150,000.00 plus HST based on the May 4 quote for materials from Leitches Creek. They disagreed. During the call, AG offered \$25,000 to resolve the issue. Kenzie declined because Matheson had already reduced what Kenzie thought Matheson's share of trucking savings by \$100,000.00 as part of the September 11 phone call finally settling their accounts.

[51] On September 26, NSTIR's engineer left Matheson a voice message respecting Alva's Notice of Claim, and that Alva would not let Matheson back into Money Point to access the remaining gravel needed to complete the project. Matheson refers the Court to AG's handwritten note of September 20, which records his contact with NSTIR's engineer for more sand (aggregate) for the project. Matheson notes that Alva agreed to provide NSTIR the remainder of the material that Matheson was entitled to supply by its contract with NSTIR. Alva's subsequent e-mails show that Alva did in fact sell aggregate directly to NSTIR for the project.

[52] Matheson claimed, and Alva now (at the hearing) agrees, that Alva's invoices to Matheson contain an error. Alva invoiced Matheson for supplying and delivering 4,239 tonnes of material that were in fact supplied by Alva but trucked by Matheson. They disagree on the effect of this error on their claims against each other.

[53] Alva says that, pursuant to its version of the oral agreement between AG and Kenzie made at the project site on June 7 or 8 it owes NSTIR's Standard Highway Trucking Rate of \$3.94 per tonne to Matheson. AG says Alva asked, and Matheson agreed, that Alva would truck all of the stone and crusher dust and that if Matheson did truck any, Matheson would be paid on the approved NSTIR rate.

[54] Alva acknowledges that, apart from the 4,239 tonnes that was in fact trucked by Matheson, Alva trucked more than the 50% of total material contracted for by NSTIR with Matheson pursuant to the tender – Alva’s stipulation in the May 4 quote. Alva says this should make no difference as: it was guaranteed a minimum of 50% of the trucking and not just 50%; and, by the oral agreement made at the project site on June 7 or 8, Matheson agreed that it would only be paid the standard highway rate for any materials it trucked for Alva from Money Point.

[55] Kenzie denies making the oral agreement claimed by AG. However, if its claim that Alva and Matheson made a final settlement when it paid Alva on September 11 is not accepted, the credit for Alva’s erroneous invoice for trucking of materials should be at a rate equal to the trucking rate to the project site from Leitches Creek.

[56] The dispute, with regards to Alva’s invoicing error for the 4,239 tonnes, is an alternative claim by Matheson in the event the Court does not accept Matheson’s position that, on September 11, 2012, Alva and Matheson agreed to settle their differences based on a reduction of Alva’s last two invoices in the amount of \$150,000.00 plus HST.

The Issues

- A. What are terms of the contract or contracts, written or oral, between Alva and Matheson?
- B. Did Alva and Matheson made a settlement on September 11, that Alva is estopped from denying?
- C. If the answer to (B) is no, what is the credit Matheson is entitled to for trucking 4,239 tonnes of material erroneously invoiced to it by Alva?

[57] Answering these questions invokes legal and factual determinations. The legal issue involves the law of contract formation and interpretation. The factual dispute invokes application of the criteria for assessing credibility and reliability of the parties’ evidence.

The Law of Contract – Formation and Interpretation

[58] I adopt and incorporate the principles of contract formation and interpretation summarized in three previous decisions of this Court: *BC Rail Partnership v Standard Car Truck*, 2009 NSSC 240, paras 20 to 26; *Geophysical Services Inc. v Sable Mary Seismic Inc.*, 2009 NSSC 404, paras 80 to 86, and *Kings County v Berwick*, 2010 NSSC 128, paras 29 to 32. As in those decisions, I rely on the analysis by G. H. L. Fridman, Geoff R. Hall and John Swan.

[59] The principles are not complicated.

[60] As Fridman notes, agreement is at the basis of any legal enforceable contract. There must be consensus *ad idem*. The agreement must be clearly manifested, either expressly or by

implication. An inward or subjective intention will not suffice. The law judges the intention of parties to a contract by the outward expressions of their intentions.

[61] The process of interpretation focuses almost exclusively on what a reasonable person in the position of the offeree would understand by what the offeror said, even though that understanding might be quite different from what the offeror actually meant.

[62] Said differently, words mean what a reasonable person would take them to mean, and the parties' subjective intentions are not considered.

[63] Few words can be understood, apart from their context. Contractual language cannot be understood without some knowledge of the context and the purpose of the contract. The factual matrix must be assessed objectively.

[64] In this case, like in *Geophysical Service*, the contract consists of not just a single written document but a series of communications, the contents of which are in dispute, that together constitute a complete agreement.

[65] The fifth of Geoff R. Hall's nine precepts for the interpretation of contracts is particularly relevant to this dispute. Commercial contracts must be interpreted in accordance with sound commercial principles and good business sense. Hall calls it the principle of commercial efficacy. The principle is grounded in the intentions of the parties. It is not determined from the prospective of only one contracting party. It is applied with reference to the entire context - the language of the contract as a whole and the factual matrix.

[66] Hall's sixth precept recognizes that substantive contract law holds that if an agreement's essential terms lack sufficient certainty, because they are too vague or incomplete, there is no binding contract. He observes that the application of this principle can sometimes defeat the intention of the parties and therefore requires the application of the interpretative principle that directs courts to make every effort to find a meaning for a contract, and to avoid, if possible, finding a contract to be void for uncertainty.

The Law of Credibility

[67] Triers of fact are required to assess evidence in respect of reliability and credibility. Reliability relates primarily to the assessment of a witness's capacity to observe, recall and communicate accurately. Credibility involves the assessment of the believability or truthfulness of evidence.

[68] In *R v Béland* [1987], 2 SCR 398, at para 20, the Supreme Court recognized the significance of oral evidence and the assessment of credibility since litigation replaced trial by combat as the method for resolution of disputes.

I would seek to preserve the principle that in the resolution of disputes in litigation, issues of credibility will be decided by human triers of fact, using their experience of human affairs and basing judgment upon their assessment of the witness and on consideration of how an individual's evidence fits into the general picture revealed on a consideration of the whole of the case.

[69] To assist in the assessment of credibility, courts have approved of many tools.

[70] Relying largely on the perceptive analysis of O'Halloran, J.A., of the British Columbia Court of Appeal in *Faryna v Chorny*, 1951 CarswellBC 133, this Court summarized the tools it applies in *Re Novak Estate*, 2008 NSSC 283, at paras 36 and 37.

[71] Justice Lynn Smith recently reviewed those principles in "The Ring of Truth, The Clang of Lies: Assessing Credibility in the Courtroom", (2012) 63 UNB Law J 10. Her tools include:

1. It is important to consider the motives that witnesses may have to fabricate evidence.
2. Consistency or inconsistency over time as between the witness's different iterations of the account. (This includes internal inconsistencies within the evidence and prior inconsistent statements).
3. The presence or absence of corroboratory or supporting evidence.
4. The witness's demeanor or manner in giving the evidence, including whether the witness was hesitant, argumentative, or forthcoming and straight forward, but demeanor is to be assessed with caution.

[72] To the above, I add the assessment of whether a witness's testimony is plausible or, as stated in *Faryna v Chorny*, "in harmony with the preponderance of probabilities which a practical [and] informed person would readily recognize as reasonable in that place and in those conditions."

[73] Finally, in *Novack* at paragraph 37, I wrote:

There is no principle of law that requires a trier of fact to believe or disbelieve a witness's testimony in its entirety. On the contrary, a trier may believe none, part or all of a witness's evidence, and may attach different weight to different parts of a witness's evidence. (See *R. v. D.R.* [1966], 2 S.C.R. 291 at ¶ 93 and *R. v. J.H.* supra)

[74] These tools do not relate solely to credibility, an assessment of the honesty of a witness, but also to reliability, the assessment of the accuracy of the evidence.

[75] For this decision, I have applied these tools to the evidence of A. G. MacDonald and Kenzie Matheson. Their direct evidence was by affidavit, but both were extensively cross-examined.

Analysis

[76] The original contract between Alva and Matheson became effective when Matheson was awarded the tender by NSTIR. The original contract was Alva's written quote to Matheson of May 4, 2012.

[77] I find as a fact that the quote was based on the supply by Alva of stone and unwashed crusher dust from Leitches Creek. That quarry was identified as the quarry in the quote. More important, the evidence of AG with respect to how he determined the price per tonne quoted for delivery to the project site clearly was made in the context that the materials were to be delivered from Leitches Creek, 157 kilometres from the project site, as opposed to a location that was nearer or further away from Bay St. Lawrence than Leitches Creek.

[78] By the contract, Matheson did not have the choice of simply purchasing the stone and unwashed crusher dust Leitches Creek for \$8.65 per tonne and do all the trucking itself. Matheson was obligated by the May 4 quote to permit Alva to truck 50% of the materials to be delivered by Matheson pursuant to the NSTIR tender, or about 20,000 tonnes of the total material (not necessarily the stone and unwashed crusher dust) called for in the tender.

[79] AG acknowledged that Alva's quoted price of \$30.00 per tonne delivered consisted of \$6.85 per tonne for the material at Leitches Creek plus \$23.15 for trucking the material 157 kilometres from Leitches Creek to the Bay St. Lawrence Project Site.

[80] This is significant. NSTIR posted standard trucking rates for highway materials. The standard trucking rate for trucking 1 tonne of material 157 kilometres was \$23.15, exactly the amount calculated by Alva in its May 4 quote.

[81] The Court heard no direct evidence on how the standard trucking rates published by NSTIR for trucking were arrived at, but infers that that the trucking rate was commercially viable for truckers; that is, that it provided sufficient revenue as to encourage truckers to truck materials for NSTIR.

[82] Kenzie states that when Alva was able to make a deal with Dexter to source the materials from Money Point, only 18 kilometres from the Bay St. Lawrence Project Site, he and AG (both experienced road contractors in Nova Scotia) knew that this would not affect the amount tendered by Matheson to NSTIR for materials to be supplied and stock piled at the Bay St. Lawrence Project Site. Said differently, the fact that Alva was now able to source the materials only 18 kilometres from the project site was not going to reduce the amount NSTIR agreed to pay Matheson in respect of the contract between Matheson and NSTIR. Matheson would still receive from NSTIR the price for materials supplied and stock piled at the project site, once his bid was accepted by NSTIR, regardless of the quarry from which the materials were sourced.

[83] This significant and unanticipated windfall arising from the savings in the truck costs – 139 kilometres each way, was a significant and material change in circumstances. It increased significantly the profit to Matheson or Alva or both.

[84] Kenzie says that he and AG discussed sharing this unanticipated windfall in early June (June 7 or 8) and agreed to share the windfall created as a result of Alva's ability to source materials from Money Point. AG denies any such discussion or agreement, but in other parts of his evidence seemed to say that he did consider sharing some of this extra profit with Matheson. AG says that Kenzie was simply happy that sourcing materials from a closer quarry would make the job go quicker.

[85] During this same conversation, AG further says that he suggested and Kenzie agreed that "to keep it clean" Alva would truck all of the stone and crusher dust as its 50% of the trucking stipulated in Alva's May 4 quote and that Matheson would truck the other materials.

[86] Kenzie acknowledged that he agreed to try this division of trucking, but only on the basis that they had already agreed to share the profit from the substantial unanticipated reduction in trucking costs.

[87] As between these two versions of the late May-early June conversations about whether or not that agreed to share the extra profits, I accept Kenzie Matheson's evidence and reject the evidence of A. G. MacDonald.

[88] AG's evidence is not plausible for several reasons. It does not make common sense that Matheson, who was the one with the contract with NSTIR, would agree that a substantial portion of unanticipated profit from the NSTIR contract – trucking the materials to the project site would benefit Alva only. The total contract price was \$1,059,000.00, plus tax. Alva's three invoices to Matheson totaled \$918,662.04.

[89] By AG's evidence, Matheson agree to truck the gravel, blend sand and washed crusher dust, the former two for which NSTIR was paying \$15.00 per tonne (supplied and delivered), while Alva trucked the stone and unwashed crusher dust for \$30.00 per tonne (on top of which Matheson would receive \$6.00 per tonne. The difference was overwhelmingly related to trucking for which Alva was claimed a windfall of \$19.21 per tonne (the difference in the trucking rate between Leitches Creek and Money Point).

[90] To suggest that the conversation never took place or that Kenzie would agree to dividing the trucking quote to "keep it clean" in a manner that Alva would retain the entire benefit of the saved 139 kilometer trucking costs is not credible, reasonable or plausible.

[91] Other than the costs of setting up at Money Point (which costs were not identified in the evidence before the Court) and the royalty fees paid to Dexter, the direct savings with respect to the trucking of the stone and unwashed crusher dust to the project from Money Point as opposed to Leitches Creek was \$19.21 per tonne, or about \$400,000.00.

[92] The existence of an oral agreement between Alva and Matheson to divide the trucking so that Alva kept the entire benefit of the trucking of the stone and unwashed crusher dust and Matheson kept the benefit of the trucking of the gravel, blend sand and wash crusher dust (which he quoted at \$15.00 per tonne (supplied and trucked) based on sourcing it close to the project site) only makes sense on the basis that Alva agreed to share the unanticipated profits by reason of trucking from Money Point as opposed to Leitches Creek.

[93] On June 30, Alva invoiced Matheson based on the May 4 quote, as if the materials had been sourced from Leitches Creek. I find that Kenzie called AG on July 13 and asked for an explanation of the June 30 invoice in light of their post May 4 agreement to share the unanticipated extra profits arising from access to Money Point. Kenzie's version of the call is set out in this decision. I accept Kenzie's evidence and find that his payment of the invoice was based on AG's promise to adjust the final invoice(s) when those savings would be better known.

[94] It is logical that on June 30, Alva would not know what the savings/extra profits would likely be. I find that Matheson's payment of Alva's first invoice, as presented, did not constitute acceptance of the May 4 quote as the then existing deal between them.

[95] Alva never quantified its additional costs arising from sourcing materials at Money Point, except in respect of the payment of the royalty to Dexter at the rate of \$5.00 per tonne of materials sourced. AG did speak in generalities about some activities that likely added to its costs.

[96] The job was completed on July 16. Alva sent two final invoices, both dated July 31, but it appears that one of them was only sent about August 30.

[97] On September 11, AG and Kenzie had a phone conversation to discuss the final invoices. Kenzie says that during the call he offered to accept \$150,000.00 as Matheson's share of the extra profits. He believed that it was less than one-half of the total savings in trucking costs, but acknowledged that Alva had extra costs associated with relocating from Leitches Creek to Money Point. AG said that he feared that Matheson may not pay his bill at all and therefore agreed to accept \$150,000.00 off the final invoices at that time but, at the same conversation, he made it clear that he was not agreeing to the \$150,000.00 adjustment to the final invoices. He also stated that he had no idea before September 11 that Matheson would not pay Alva's invoices in full.

[98] AG's evidence does not make sense.

[99] If he intended that Alva would reduce its final invoices to Matheson, it does not make sense that he would not have disclosed the figure he proposed.

[100] If AG was afraid to disclose his proposed figure because Matheson might not pay, it does not make sense that he would have "made it clear" to Kenzie that he was not agreeing to Matheson's proposed adjustment.

[101] AG's statement that he had no idea before September 11 that Matheson would not pay his invoices in full is not credible. Matheson sought a share in the unanticipated extra profit from savings in trucking costs from early June.

[102] Separate from the incongruity of AG's evidence, the note made by him in his business journal on September 12, 2012, contradicts the substance of his oral evidence. It does not say that he made it clear to Kenzie that he did not accept the \$150,000.00 adjustment as a settlement of the trucking savings. The entry shows that AG was worried about Matheson paying the invoice and he writes: "Will wait til it [Matheson's cheque] clears before I tell Kenzie what I think".

[103] Demeanour is a tool, used with caution, and in the context of the other tools, to access the credibility of evidence. The Court found Kenzie Matheson's evidence was given without hesitation and in a straight forward manner. The Court found A. G. MacDonald to be guarded and hesitant in answering questions with respect to some of the key evidence relating to the key issue of the discussions between them arising from the very significant savings (as a percentage of the total contract price) arising from Alva's ability to source the materials from Money Point.

[104] I find as a fact that AG agreed, after he obtained access to Money Point, to share the significant savings in trucking costs with Matheson on an equitable basis. I find as a fact that during the September 11, 2012, phone conversation between them that Alva agreed to settle the last invoices, on a final basis, on the basis of Kenzie's proposed \$150,000.00 adjustment.

[105] During the hearing it became apparent that Alva had erred in its final invoices by a claim for trucking 4,239 tonnes of material (at \$30.00 per tonne), actually trucked by Matheson. Alva acknowledged the error. The parties dispute the amount of the adjustment in Matheson's favour because it trucked the material and not Alva. In light of the Court's finding that Alva and Matheson made a final settlement of the amount owed by Matheson to Alva on September 11, 2012, it is not necessary to answer the third question or issue raised by the parties.

[106] I find that May 4 written quote was altered by subsequent oral agreements, the final one being to call their claims even on September 11, with the immediate payment by Matheson of Alva's final two invoices, less \$150,000.00 and tax.

[107] I find that Alva is not owed the \$150,000.00 plus tax claimed by it.

[108] If the parties are unable to agree upon costs, the Court will receive written submissions within 30 days of the day of this judgment.