

**IN THE SUPREME COURT OF NOVA SCOTIA**

**Citation:** Millbrook First Nation v. Wilmot (Wilmot Drywall), 2007 NSSC 253

**Date:** 20070824

**Docket:** SCT 200367

**Registry:** Truro

**Between:**

Millbrook Band Council

Plaintiff/

Defendant by counterclaim

and

Kelly Wilmot, carrying on business as  
Wilmot Drywall

Defendant/

Plaintiff by counterclaim

**Judge:**

The Honourable Justice Kevin Coady

**Heard:**

June 11-15, 2007, in Truro, Nova Scotia

**Written Decision:**

August 24, 2007

**Counsel:**

Joseph M.J. Cooper, Q.C., for the plaintiff  
Dennis James, for the defendant

**By the Court:**

[1] **Overview**

This case is fundamentally a fact finding exercise. The parties rushed into a commercial arrangement with little thought or documentation. Once the conflict emerged, there was no foundation for a summary resolution. The players' recollections differ greatly and, as such, they all have a different view on the terms of their commercial arrangement. The role of the court has been to sort all of the evidence and then apply basic contract principles. In this decision everything flows from this factual exercise.

[2] **Background**

This litigation involves a dispute over a drywall contract between Millbrook Band Council and Kelly Wilmot, carrying on business as Wilmot Drywall. Mr. Wilmot was a member of the Millbrook Band at all material times. In 2002 the Millbrook Band Council were in the process of constructing a Band administration building. The Band Council retained Horner & Associates as consulting and design

engineers for the project. The majority of trades and services were arranged through Horner & Associates and were supervised by their engineer.

[3] The Millbrook Band Council recognized that they had many labourers and drywallers in their local community. Council was anxious to utilize these skills and, as such, withdrew the labour and drywall requirements from general tender through the engineering firm.

[4] The evidence clearly establishes that the Millbrook Band Council was not successful in getting the drywall contract arranged in time for other trade and suppliers to do their work. I conclude that by June, 2002 the Band Council was in a panic to retain a drywall contractor. It realized that there would be extensive and expensive delays if something were not done immediately. Inquiries determined that many of the Millbrook drywallers were employed elsewhere and could not assist with the Band administration building.

[5] On June 26, 2002 Mr. Wilmot provided a quotation to complete the drywalling. While that quotation stated a total price of \$16,128.00, there were a

number of other terms on the face of the document. It is those additional terms that are substantially in dispute.

[6] The evidence establishes that this quotation/contract was entered into without proper consideration and discussion. Consequently, the parties were never “ad idem” as to the terms of their agreement. I find that the urgency in finding drywallers precluded proper negotiations and documentation. Mr. Wilmot and his workers commenced work in mid June and by October 4, 2002 had submitted invoices totalling \$48,114.10. These invoices were promptly paid by Millbrook Band Council. Subsequent to October 4, 2002, the Council took the position that they had grossly overpaid on the quotation and they demanded reimbursement. They refused to pay Mr. Wilmot’s October 11, 2002 invoice in the amount of \$22,933.50. Additionally they terminated Mr. Wilmot’s \$2,500 per annum Treaty Allowance effective in 2002. Band Council also directed that Mr. Wilmot not be considered for any Band work while this dispute was outstanding.

[7] On May 26, 2003 Millbrook Band Council issued an Originating Notice and Statement of Claim against Mr. Wilmot seeking the following relief:

(a) Recovery of said overpayment in this amount of \$25,024.18;

- (b) The plaintiff's costs in this action;
- (c) Such other relief as this Honourable Court deems just.

[8] Paragraph 11 sets out the basis for the monetary claim. The plaintiff states that "the total paid to K. Wilmot was \$48,114.10. The total owing to K. Wilmot should be no greater than \$23,089.92 for 82,464 square feet of gyproc (the amount of gyproc delivered to the site) at 0.28 per square foot."

[9] On June 23, 2003 Mr. Wilmot filed a Statement of Defence and Counterclaim. Mr. Wilmot denied the overpayment and stated his position at paragraphs 2 and 4 as follows:

2. The Defendant provided an estimate of \$16,128 for the project based on the specifications and drawings made available to him by the Plaintiff. At the time of entering into the contract with the Plaintiff the Defendant asked about the process for dealing with extras and specifically asked that the Plaintiff use a system of written work orders. The Plaintiff did not accept the recommendation and indicated that all extras and or changes to the contract would be dealt with verbally. The Defendant indicated in his estimate that all extras would be billed separately.

4. There was a great deal of work over and above the original contract due to many changes in the contract, the specifications and drawings contract documents and the extent of the work performed by Wilmot. The total value of labour and materials supplied was \$71,047.60. Bernard approved and paid \$48,114.10 to the Defendant. The remaining balance for the work approved by Bernard on behalf of the Plaintiff and provided by the Defendant is \$22,933.50.

[10] Mr. Wilmot sought the following relief by way of counterclaim:

(a) Recovery for the unpaid invoice for work completed, numbered 112206 through 112212 (inclusive), and dated October 11, 2002, in the amount of \$22,933.50;

(b) Payment of unpaid Treaty entitlement monies that have been wrongly withheld, the amount of which is to be assessed at the time of trial;

(c) Damages for breaches of fiduciary duty;

(d) Damages as a result of to the Plaintiff's (Defendant by Counterclaim) unlawful interference with the Defendant's (Plaintiff by Counterclaim) economic relations, in an amount to be determined at trial;

(e) Damages as a result of the Plaintiff's (Defendant by Counterclaim) abuse of office in an amount to be determined at trial;

(f) Such further and other relief this Honourable Court may deem just;

(g) Pre-judgement interest at a rate to be determined;

(h) Costs of this Action.

[11] The discussions leading up to the Wilmot quotation, the quotation itself, and the circumstances surrounding the drywall work and the payment of invoices are

very much in dispute. This is not surprising given the way the parties did business in 2002. Consequently, credibility is a live issue and must be addressed in order to resolve this dispute.

[12] **Alex Cope**

Alex Cope was at all material times the plaintiff's Band administrator and a member of Millbrook Band Council. He is in charge of the Band's day to day operations. The construction of the new Band administration building was his responsibility. Mr. Cope reports to the Chief and Council. He has some experience in the drywall trade. While this project was within his administrative responsibility, I find that his involvement was limited. He had some involvement in retaining Mr. Wilmot to provide the drywalling. His next involvement arose when he realized that Mr. Wilmot had been paid \$48,114.10 by Millbrook Band Council.

[13] Mr. Cope testified that the drywall contract was not tendered as with other trades. It was his position that Mr. Wilmot approach the Band seeking the drywall contract. He acknowledged that the quotation process was quite informal. He

claims that the operative part of the quotation was the “\$0.28 per square foot.” It was his position that the draws envisaged in the quotation should have related to the amount of drywall done and not “weekly draws to cover payroll” as stated in the quotation.

[14] Mr. Cope acknowledged that there was no clear policy on who would sign the cheques to cover Mr. Wilmot’s weekly invoices. He acknowledged that he signed many of these cheques without checking any supporting documentation. He testified that a number of other cheques were signed by others without his knowledge.

[15] Mr. Cope testified that he did not suspect an overpayment throughout the summer of 2002 when these cheques were negotiated. He said that he “hit the roof” when he learned of the quantum of these payments. He blames the project manager, Bernie Bernard, for the drywall problem stating “Bernie lost control.” He denies that there were extras or changes for which Mr. Wilmot was entitled to compensation under the quotation.



[16] Mr. Cope accepted that he was aware of overruns on the project generally, and stated that it was “very clear early on that the drywall budget would be exceeded.” Yet he never requested clarification from Mr. Wilmot, and, in fact signed further cheques in favour of Mr. Wilmot.

[17] I did not find Mr. Cope to be a credible witness. I have concluded that his involvement in the project was peripheral. Yet, he attempted to give detailed evidence in support of his employer and community. I observed that Mr. Cope took this case personally and advanced a position that Mr. Wilmot’s actions were fraudulent. I was left with the impression that Mr. Cope wanted Mr. Wilmot figuratively run out of town.

[18] The evidence establishes that Mr. Cope “dropped the ball” on the drywall aspect of this project and his evidence amounts to an effort to avoid personal responsibility for that failure. He was jammed on the front end and summarily authorized Mr. Wilmot to do the work so as to avoid any delays and their attendant consequences on his positions in the community. He then ignored the project until problems arose alleging an overpayment. He recognized that he would be

accountable for the cost of drywalling. Mr. Copes reaction was to blame Bernie Bernard for all failings.

[19] Mr. Copes evidence is highly suspect and I have relied on little of it to resolve this case.

[20] **Bernie Bernard**

In 2002 Bernie Bernard was a carpenter employed by the Millbrook Band Council as a construction supervisor. The construction of the Band administration building came within his responsibility. Mr. Bernard grew up with Mr. Wilmot and prior to 2002 he employed him to drywall several residential projects. They had a cordial relationship over the years.

[21] The evidence of Mr. Bernard was forthright and I find that he made every attempt to be accurate. However, he did not have the overall understanding of what transpired over the summer of 2002. I do make the following findings of fact in relation to Mr. Bernard's evidence:

- He was not sufficiently trained or skilled to handle a project of this size and complexity.

- The Band Council relied on Mr. Bernard to protect their interests in this project, yet they gave him very little direction.
- Mr. Bernard had very little, if any, understanding or involvement in the financial aspects of this project.
- Decisions made by Mr. Bernard were not based on knowledge and judgement but rather as a response to the “heat” he was taking from Mr. Cope, Mr. Wilmot and the other trades and suppliers.
- Mr. Bernard was not capable of guaranteeing the quality and timing of his workforce prior to the drywalling work.
- Mr. Bernard was not involved in ensuring cost estimate compliance and possessed a very vague view of what the quotation meant.
- When Mr. Wilmot and Mr. Bernard were negotiating a resolution of the final account, Mr. Bernard agreed that the final figure of \$6,511.76 would be an acceptable solution and would be paid by the Band Council within days.

[22] In essence, Mr. Bernard was thrown into a project well beyond his experience. He made an honest effort to keep the construction on track but it had been compromised from the start. He also made an honest effort to resolve this dispute but without success. When the reality of the situation struck home to the Band Council, their response was to blame Mr. Bernard and Mr. Wilmot.

[23] I find as fact that Mr. Cope directed Mr. Bernard to approach Mr. Wilmot to submit a quotation for the drywalling contract. There was a sense of urgency advanced by Mr. Cope. I find that initially Mr. Wilmot said “no” but was persuaded by Mr. Bernard to reconsider. Mr. Wilmot submitted his quote to Mr.

Bernard and it was approved by Mr. Cope. I accept Mr. Bernard's evidence that he was focused on the "\$0.28 a square foot" term and that he paid no attention to the remaining terms of the quotation. I also find that Mr. Wilmot relied minimally on the blueprints and this too was the result of the urgency that existed at the time.

[24] Mr. Bernard was extensively involved in the 14 payments made to Mr. Wilmot between June 28 and October 4, 2002. I find as a fact that his role was as a conduit between the Band Council and Mr. Wilmot. I accept his evidence that he received the invoices from Mr. Wilmot and that he took them to the Band office where he would exchange them for a cheque. He then delivered the cheque to Mr. Wilmot. I find that he would get the cheques signed by whichever signing officer was available at the time. Often this individual was Mr. Cope. It is clear there was no contemporaneous internal accounting taking place when the cheques were signed. I further find that Mr. Bernard paid no attention to the invoices beyond getting them paid. He took no steps to determine whether they were consistent with the quotation. Mr. Bernard's main concern was to keep the drywalling going thereby avoiding any delays and their consequences.

[25] I find as a fact that towards the end of the drywalling Mr. Bernard felt that the accounts “seem to be a bit high”. When he finally spoke to Mr. Wilmot about this he received assurances that there was documentation supporting all payments. This satisfied Mr. Bernard and it was agreed it would be sorted out in the end. I accept his evidence that he was not aware of the cumulative amount paid to Mr. Wilmot until this dispute arose.

[26] I accept Mr. Bernard’s evidence that it was very clear from the beginning that the invoices were based on payroll and not on a unit price of \$0.28. He testified that “it was not my responsibility to work within the budget. I did not pay attention to the quote when I was approving invoices but the existence of the quote was in the back of my mind.”

[27] I also accept as fact Mr. Bernard’s evidence that there was never a meeting between him the engineers and Mr. Wilmot to discuss extras or changes to the quotation. I am satisfied that Mr. Bernard approved many extras and changes.

[28] **Jamie Chisholm**

Mr. Chisholm is a professional engineer. In 2002 he was employed by Horner & Associates who were the consulting engineers on the Band administration building. His title on this project was construction manager. It was his responsibility to supervise all aspects of construction which included the quality of the work, scheduling and budgeting. He was on site daily and had close contact with all involved in the project.

[29] I find as fact that there were two areas of construction that were exempted from the general contract; general labour (Millbrook Construction Force) and drywalling. I accept Mr. Chisholm's evidence, and that of others, that this exemption was meant to facilitate employment in the Millbrook community.

[30] I accept Mr. Chisholm's evidence, supported by Mr. Bernard, that the Millbrook work force provided work that had to be completed in advance of the drywallers. This group were under the supervision and direction of Bernie Bernard.

[31] I also accept that Mr. Chisholm was not involved in retaining Mr. Wilmot. Throughout the construction the drywallers were answerable to Mr. Bernard. I

accept that at one point Mr. Wilmot refused to deal with the engineers because he blamed them for the building errors that they encountered when his crew were doing their work.

[32] I further accept Mr. Chisholm's evidence that he was not involved in approving payments and monitoring the budget in these two areas. I accept that he was responsible for quality control and that his effectiveness was compromised by his relationship with the Band and Mr. Wilmot. I have no doubt that if these two trades had been dealt in the same way as others, there would have been a more seamless construction process. I sensed that Mr. Chisholm was frustrated by the above referenced exemptions.

[33] I accept Mr. Chisholm's evidence that he approved some extras and changes but that he never discussed the cost of same with Mr. Bernard or Mr. Wilmot.

[34] **Janet Wilmot**

Janet Wilmot is the spouse of Kelly Wilmot. In 2002 she was the record keeper/office manager for Wilmot Drywalling. She was the office person while

Mr. Wilmot spent most of his time on the job site. I found Ms. Wilmot to be knowledgeable about their business.

[35] I accept her evidence that in May or June, 2002 Mr. Bernard came to her home/office in an effort to interest them in quoting on the drywall contract. Initially they were hesitant because of previous problems with the Band.

[36] I accept Ms. Wilmot's evidence surrounding the writing of the quotation. She was present but did not write it. Also present were Kelly Wilmot, Allister Wilmot and Bernie Bernard. She stated that Mr. Bernard needed the quotation right away. I make the following findings of fact in relation to Ms. Wilmot's evidence:

- The quotation meeting Mr. Wilmot indicated to Mr. Bernard that he would require regular draws to cover payroll. She stated that they could not afford to carry payroll until the end of the project given the size of the project.
- They were all aware that 1200 sheets of gyproc were on site but acknowledged that more would be provided if required.
- The individuals at the meeting did discuss "extras" and there was a lot of discussion about "bullnosing", a more expensive technique.
- There was a discussion between Mr. Wilmot and Mr. Bernard that Wilmot Drywalling would not work under the direction of



the engineers and that everything had to go through Mr. Bernard.

- The quotation was signed by Mr. Bernard.
- Mr. Bernard required Mr. Wilmot to start the work immediately.
- Ms. Wilmot prepared all the invoices on information provided to her by either Kelly or Allister Wilmot. Also, the invoices were based on payroll rather than on square footage completed.
- Bernie Bernard would usually pick up the invoices on Thursdays and would return with a cheque in the next day or two.
- There were no discussions about the invoices until “near the end”. I accept that one week before completion she told Mr. Bernard that it was getting to be “high priced”. I accept that Mr. Bernard’s response was to not worry about it, that it would be worked out in the end.
- Prior to the immediately preceding discussion, no one from the Band spoke to them about cost or construction concerns.
- The first sign of conflict arose in October, 2002 when Bernie Bernard did not provide a cheque for the October 11<sup>th</sup> invoice.
- Mr. Wilmot and Bernie Bernard attempted to devise a final account that would resolve all outstanding issues. That exercise resulted in 3 declining accounts (exhibit 1(a), tabs 6,7 & 8). These efforts did not satisfy the Band Council which concluded that the Wilmot’s actions were fraudulent. That attitude on the part of Mr. Cope resulted in the letter of October 16, 2002 (Exhibit 1(b) tab 25).
- Mr. Wilmot was denied his grant money since 2002 and the total outstanding at the time of this trial is \$12,500.
- Mr. Wilmot has not received any Band work since October, 2002.

I found Kelly Wilmot to be a hard working drywall contractor. He presented as an honest and forthright witness. It was clear to me that he was emotionally distraught by the actions of his Band Council and its employees. Prior to 2002 he viewed himself as a valued member of his community. He now feels that he is viewed as a fraud and a failure. I make the following findings of fact in relation to Mr. Wilmot's evidence:

- In early June, 2002 Bernie Bernard approached him indicating that they were looking for a drywall contractor and admitted that the band was having trouble finding one. Mr. Wilmot advised that he would consider getting involved.
- In mid June, 2002 Bernie Bernard approached him indicating they needed a contractor badly and soon. Mr. Bernard gave him a set of plans but no "terms" were discussed at that time.
- The following day he did a "walk through" and discovered many imperfections that stood in the way of commencing drywall work. Mr. Wilmot then advised the Band that he was not going to do the job because the building was not ready for drywall. He left the site.
- One June 26, 2002 Bernie Bernard approached him expressing concern that there was no contractor available and time was critical. Mr. Wilmot and Mr. Bernard then came to terms which are reflected in the quotation appearing at Exhibit 1(a), tab 1. Mr. Wilmot agreed to do the job.
- Mr. Wilmot agreed to do the job on the following terms and

conditions:

- There would be weekly draws to cover their payroll
- The drywall would be hung for \$0.28 a square foot

- The figure of \$16,128 was based on hanging 1200 sheets of drywall with an area of 57,600 square feet
- If more drywall was required, it would be hung at \$0.28 per square foot.
- The Millbrook Band would provide all materials.
- All changes and repairs would be billed in addition to all hanging costs
- All extras, including bullnose trim would be billed in addition to all hanging costs.
- The Band administration building presented, after June 26, 2002, with an unending series of obstacles to the drywallers. This included improper construction methods requiring alterations and demolitions. These required changes and extras plagued the project for the entire time Mr. Wilmot was on site.
- Mr. Wilmot billed all invoices on the basis of the payroll required to hang the drywall and to effect all of the changes and extras required to complete the drywall component of the building.

- Bernie Bernard authorized the payment of \$48,114.10 between June 28, 2002 and October 4, 2002 and never objected to any changes and extras including the bullnose trim.

[38] There were some inconsistencies in Mr. Wilmot's evidence and in his documentation. I do not attribute them to Mr. Wilmot specifically. They are the product of the haphazard way in which records were created and handled. They are the product of not finalizing all terms before construction commenced.

[39] **Allister Wilmot**

I find that Mr. A. Wilmot's evidence did little to resolve the issues in this trial.

[40] **Chief Lawrence Paul**

Chief Paul's testimony came into evidence by way of Exhibit 13, portions of discovery transcripts. I did not find it of much help with the issues. It did, however, reflect the way in which this entire contract was handled by the Band and its employees. Chief Paul was asked:

Q. Okay. Was it your understanding that the payments made to Mr. Wilmot were recommended by Mr. Bernard?

A. I couldn't answer that truthfully because I ... I mean I'm kind of in the dark on that, eh.

This was a very substantial project for the Millbrook Community.

[41] **Mr. Wes Campbell**

I did not find Mr. Campbell's expert evidence to be of assistance in resolving these issues. The most basic dispute centered around changes and extras and he did not address these in his evidence.

[42] **The Quotation**

The Band Council's pre-trial submissions focused on whether the quotation of June 26, 2002 was a set price contract or a cost plus contract.

[43] I cannot conclude that this was a set price contract. I have no doubt that initially the Band wanted a set price contract. However, the rushed and vague quotation process led to anything but a set price contract. The only aspect that could be said to be set was "57,600 square feet of gyproc at \$0.28 per square foot for a total cost of \$16,128."

[44] I do conclude that Kelly Wilmot entered into a cost plus contract which included the following additional terms:

- Weekly draws to cover payroll;
- Any changes or damages that occur will be billed accordingly;
- Any extras including bullnose trim, etc will be billed accordingly;

[45] I am not convinced that in these circumstances, the distinction between set price or cost plus makes a great deal of difference in the final analysis. A set price determination would allow compensation to Mr. Wilmot on the basis of changes and extras approved. A cost plus determination would allow compensation to Mr.

Wilmot on a quantum merit basis. In all of the circumstances I will proceed on the basis that this was a cost plus contract.

[46] I am satisfied that the \$48,114 paid to Mr. Wilmot was based on payroll expenditures. The hourly wages were properly maintained and the hourly rates were reasonable. I am satisfied that the invoices to October 4, 2002 accurately reflected work completed by Mr. Wilmot and his crew.

[47] I am satisfied that Mr. Wilmot was asked to make many changes and to add extra features as the drywalling was ongoing. While the parties failed to nail down the exact cost of these changes and extras, there was always approval to proceed. These approvals were given by Mr. Bernard. This is reinforced by the fact that he, without hesitation or question, approved payment of all invoices. It was clear that Mr. Bernard was well aware of the \$16,128 figure but was, on the other hand, not concerned about the ongoing accounts which included changes and extras. These changes/extras included the use of bullnose trim, archways and skylights. Also included in this list are dropped ceilings and doorway alterations to the front entrance and the installation of 5/8" gyproc to replace 1/2" gyproc. These are but a few.

[48] I am further satisfied that there were many errors made in the planning for the project and in its construction. These created a situation where Mr. Wilmot was required to alter and repair so that the drywalling could proceed. I am satisfied that Mr. Bernard was aware of these problems and approved their corrections. These errors were caused by the Millbrook work force and other trades.

[49] I approve all accounts submitted by Mr. Wilmot to October 4, 2002 in the total amount of \$48,114.10. Mr. Wilmot will not be required to repay any of these amounts as they have been properly earned and are consistent with the cost plus contract. The math produced by both parties is very imprecise. This is not surprising given the lack of any kind of record relating to the many repairs, changes and additions incurred during construction. These parties must accept that what “goes in affects what comes out”. The bottom line is that I am satisfied that Mr. Wilmot did all the work that he claimed and that he billed it at fair rates and within the framework of the quotation.

[50] In light of my findings, it is not necessary to address the arguments concerning “payments by mistake”. There is no evidence to support an argument



that the \$48,114.10 was paid to Mr. Wilmot by mistake. This is an argument designed to deal with the litigation. It has no substantive support.

[51] **The Final Account**

It was the submission of Mr. Wilmot's last account on October 11, 2002 that brought this dispute to life. Until that point 14 accounts had been submitted to Mr. Bernard for approval. He approved each without comment. Mr. Bernard had Mr. Cope sign 7 of the 14 cheques issued. It was on October 11<sup>th</sup> that Mr. Cope "hit the roof" and requested Ms. Wilmot to indicate what had been paid to date. Mr. Cope knew nothing about the changes and extras that had been approved by Mr. Bernard and he jumped to the conclusion that Mr. Wilmot's accounts were fraudulent. It was as a result of this conclusion that he sent his October 16, 2002 letter to Mr. Bernard. This letter (exhibit 1(b), tab 25) alleged "serious irregularities" and directed no further payment to Mr. Wilmot and no further work on the Band administration building.

[52] On October 11<sup>th</sup> there was a major effort to resolve the issue of the outstanding account. Mr. Bernard represented the Band Council but Mr. Cope was directing his actions. Mr. Bernard found himself in a very difficult position in that

Mr. Cope was accusing him of losing control of the project. Mr. Wilmot was very upset because the integrity of his work and accounts were being questioned by his own community. Mr. Bernard and Mr. Wilmot made a concerted effort to resolve the outstanding account. This represented an effort by both to placate Mr. Cope and Band Council.

[53] The initial October 11<sup>th</sup> account showed a balance of \$22,933.50. This figure was computed by adding the total changes and extra's (\$54,919.60) to the quotation (\$16,128) and deducting the amounts already paid (\$48,114.10). Mr. Bernard took this account to Mr. Cope who refused to pay it. Mr. Cope sent him back to Mr. Wilmot seeking a further reduction. It is noteworthy that on this account appeared the words "this is not the total sheet count as we have been trying to get a total sheet count and been unable to. We need invoices from you for this! Have been asking daily for 6 weeks - nothing yet!"

[54] A second October 11<sup>th</sup> account was provided to Mr. Bernard. The sheet count was increased to \$23,157.12 from the quote of \$16,128. The changes and extras were reduced from \$54,919.60 to \$40,298.32 leaving a balance of

\$15,341.34. Mr. Cope rejected this invoice and directed Mr. Bernard to return to Mr. Wilmot seeking a further reduction.

[55] A third invoice followed shortly and has never been paid. The \$23,157.12 figure based on square footage remained the same. Changes and extras were further reduced to \$31,468.74 leaving a balance of \$6,511.76.

[56] I am satisfied that when Mr. Wilmot reduced these accounts, he was not acknowledging that they were excessive. He was engaged in settlement discussions with Band Council representatives. Their goal was to arrive at a without prejudice settlement of the outstanding account. While Mr. Bernard accepted the \$6,511.76 on behalf of Band Council, they refused to pay the account.

[57] I have accepted that the first 14 accounts were correct and in compliance with the quotation. I have no reason to question the initial final account in the amount of \$22,933.50. However, I am satisfied that the parties came to agreement on \$6,511.76. When Mr. Wilmot lowered the balance to \$6,511.76 Mr. Bernard confirmed that this amount was acceptable and would be paid “on Tuesday” and, as such, negotiations were finalized.

[58] Further, at trial, Mr. Wilmot sought \$6,511.76. It would be unfair to the Band Council to order more than was sought. I order the Millbrook Bank Council to pay Mr. Wilmot a further payment of \$6,511.76

[59] **Treaty Entitlement Payments**

The evidence establishes that Mr. Wilmot was entitled to \$2,500 per annum in Treaty entitlement payments. There is no dispute that he has not received these payments from 2002 to 2007. The Band Council withheld these monies as security for any obligation owed to them as a result of this action. I have decided that there are no monies owed to the Band Council. Consequently, it stands to reason that the Band Council should now provide Mr. Wilmot with his outstanding Treaty Entitlement payments in the amount of \$12,500. While I accept that these monies were held as security, I can not conclude that, in the circumstances, such action was inappropriate. Consequently, I am not persuaded to grant damages as sought by Mr. Wilmot.

[60] **Interference with Employment**

Mr. Wilmot in his counterclaim seeks \$15,000 in general damages to compensate him for being cut out of drywall work for the Band Council since 2002. The following represents the evidence on this issue:

- Alex Cope told Mr. Bernard that he should not permit Mr. Wilmot to work on a residential project while the dispute was ongoing.
- Alex Cope testified that since 2002 the general contractor decides who gets the drywall work and it is not tied to Band members only.
- Alex Cope stated that since 2002 Mr. Wilmot never sought work from the Band and that he has been employed by other companies.
- Mr. Bernard testified that Mr. Wilmot has not sought work from the Band since the administration building project.
- Mr. Bernard stated that Mr. Cope instructed him that Mr. Wilmot should not be working for the Band while he is involved in this court proceeding. He testified that he was given this instruction on one occasion only.
- Janet Wilmot testified that Mr. Wilmot always did work for individuals off the reserve and after October 2002, he had other contracts lined up but that he was too “emotionally devastated” to do them.
- Kelly Wilmot testified that since 2003 he has been employed by others, namely Kent Homes and Grand Cove Construction.
- Kelly Wilmot acknowledged that between October, 2002 and May, 2003 he did “various jobs”.
- Mr. Wilmot confirmed that since October, 2002 he has not applied for Millbrook Band Council drywalling.
- Mr. Wilmot conceded that Millbrook Band Council work, prior to 2002, represented only a portion of his work.

[61] The evidence does not satisfy me that Mr. Wilmot has suffered a loss of income as a result of the actions of Mr. Cope. I have no financial evidence

respecting the periods before and after 2002. There has been no indication that the Band is responsible for any decline in income, if such a decline occurred.

Consequently, I dismiss this aspect of Mr. Wilmot's counterclaim.

[62] I am satisfied that the relief available to Mr. Wilmot is limited to payment of the following:

- \$6,511.76 to complete payment of Mr. Wilmot for work on the Band administration building.
- \$12,500 as repayment of the treaty grants for the years 2002 through 2007.
- Prejudgement interest on these 2 amounts.

[63] I will hear from the parties on the subject of costs.

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Justice Kevin Coady