

In the Court of Appeal for the Northwest Territories

Citation: *McCaw North Drilling and Blasting Ltd. v Clark Builders*, 2020 NWTCA 3

Date: 2020 05 07

Docket: A-1-AP-2019-000012

Registry: Yellowknife, N.W.T.

Between:

McCaw North Drilling and Blasting Ltd.

Respondent
(Plaintiff)

- and -

Clark Builders

Appellant
(Defendant)

- and -

The Guarantee Company of North America

Not Party to Appeal
(Defendant)

The Court:

**The Honourable Mr. Justice Peter Martin
The Honourable Mr. Justice Frans Slatter
The Honourable Madam Justice Frederica Schutz**

Memorandum of Judgment

Appeal from the Judgment by
The Honourable Madam Justice S.H. Smallwood
Dated the 29th day of November, 2019
Filed on the 29th day of November, 2019
(2019 NWTSC 49, Docket: S-1-CV-2015-000181)

Memorandum of Judgment

The Court:

[1] This is an appeal from a summary judgment granted to the respondent, arising from litigation over a construction contract: *McCaw North Drilling and Blasting Ltd v Clark Builders*, 2019 NWTSC 49.

Facts

[2] Gold was extracted from the Giant Mine in Yellowknife for decades. When the mine was abandoned the site was contaminated with arsenic trioxide. Public Works and Government Services Canada retained the appellant Clark Builders as the Interim Construction Manager for work related to the remediation of the site. Clark Builders retained the respondent subcontractor McCaw Drilling¹ to drill boreholes as a part of the remediation project.

[3] Disputes over payment arose between Clark Builders and McCaw Drilling. McCaw Drilling brought an application for summary judgment, and Clark Builders brought an application for summary dismissal. The cross applications centred on the same two issues:

- (a) The entitlement of McCaw Drilling for payment for boreholes that deviated from the specifications due to rock conditions. McCaw Drilling claimed \$212,512.32 in its application for summary judgment, but Clark Builders' application for summary dismissal asserted that only \$64,157.52 was owed. The chambers judge agreed with Clark Builders, and awarded McCaw Drilling \$64,157.52 plus tax and interest.
- (b) The entitlement of McCaw Drilling for standby costs that resulted because equipment contaminated with arsenic trioxide could not be used until it was properly decontaminated. Clark Builders' application for summary dismissal maintained that nothing was owed. The chambers judge agreed with McCaw Drilling's summary judgment application and granted it \$612,940 plus interest.

In this appeal Clark Builders challenges the judgment given for decontamination standby costs. The ruling on compensation for deviated borehole drilling has not been appealed.

¹ The respondent is sometimes referred to in the record as "MN", "McCaw North", "Tlicho/McCaw North Joint Venture", "FND&B" and "First Nations Drilling & Blasting JV".

[4] The presence of arsenic trioxide on the site was known, because its removal was the main purpose of the project. The standard CCDC 18 - 2001 contract that was used had generic provisions about hazardous substances. Under clause GC 9.3.1, the “Owner”, which was Clark Builders, was deemed to have control and management of the Place of the Work (EKE A84-85). Clark Builders was to determine whether hazardous substances were present, and take reasonable steps to ensure that no person was injured by them. Under clause GC 9.3.5 the “Contractor”, which was McCaw Drilling, was to report any unexpected hazardous materials that were discovered, and take necessary steps to avoid injury to any person. Of course, in this situation the hazardous circumstances were well known and anticipated.

[5] Since the removal of the hazardous arsenic trioxide was the objective of the project, the construction documents had more specific provisions about hazardous materials. For example, Article 2.0 General Drilling Requirements of the Request for Quote stated that the scope of work included drilling conduits between “surface and arsenic stope voids”, and that “target stope voids are filled, or partly filled with dry arsenic trioxide dust” (EKE A103). The Request for Quote had a lengthy section on safe practices:

5.0 Health and Safety

Prior to undertaking the work, the Successful Proponent [McCaw Drilling] and any subcontractors shall prepare a site specific Health and Safety Plan (HaSP) covering all aspects of the work including identifying all potential risks and hazards, providing mitigative actions and proposed procedures for dealing with the identified hazard in the event they do occur during the work.

...

Site specific Standard Operating Procedures for drilling in and around voids that contain arsenic trioxide dust are required. PWGSC, Clark and their consultants will work with the Proponent to develop such procedures. For example, standard operating procedures used for previous projects involving drilling into arsenic filled voids are available and can be used by the project team to assist the successful proponent in development of such procedures. . . . (Emphasis added)

The development of a “Standard Operating Procedure” for decontamination of equipment after drilling is central to this appeal.

[6] The source of McCaw Drilling’s claim was delay in decontaminating equipment, which prevented that equipment being used on other projects or returned to rental companies. The Special Procedures for Contaminated Sites Section 01 35 15 of the tender documents (EKE A714) required of McCaw Drilling:

1.6 Equipment Decontamination

.1 perform final decontamination of all equipment, tools, and materials which may have come in contact with potentially contaminated materials prior to removal from site.

.2 Notify ICM [Interim Construction Manager] for inspection after decontamination and prior to removal from site. ICM will have right to require additional decontamination to be completed, if deemed necessary.

Clause 1.9 provided: “Work under this section will not be measured. Include all costs in Item BOP item 01 35 43-1”.

[7] While the entire mine site was contaminated with arsenic trioxide dust, it was not anticipated that McCaw Drilling would be drilling boreholes directly into “hot spots of arsenic”, and, as anticipated, it did not actually drill directly into the known arsenic trioxide chambers (EKE A719). The exact subsurface conditions were not precisely known, and information emerged as the project progressed. While care was taken to protect the workers, an incident occurred in March 2014 that resulted in a worker being exposed to dangerously high levels of arsenic and being hospitalized. That incident occurred in a different part of the project, and did not involve McCaw Drilling.

[8] This incident, however, came to the attention of the Workers’ Safety and Compensation Commission. In March 2014 it was decided that the drilling work should be separated into two categories: drilling outside 10 m of a known underground chamber containing arsenic, and drilling within 10 m of a known chamber. Drilling in the latter situation would be done under a separate procedure, which came to be known as Standard Operating Procedure 3. There was a conference call on March 12, 2014 which focused on the heightened awareness of the dangers of working with arsenic, which was everywhere on the site (EKE A543-547). It was noted that a new procedure was being developed for drilling inside 10 m of a known chamber, and the focus was on the conditions under which drilling could continue outside that zone under the existing procedures. There was no recorded discussion at this meeting of contamination of equipment, or the need for decontamination procedures. The record is unclear as to whether there were discussions about whether decontamination procedures should be included in Standard Operating Procedure 3 (EKE A311, A579).

[9] McCaw Drilling commenced the drafting of Standard Operating Procedure 3. On March 20, 2014 it issued a Request for Information that recited the preparation of the new drilling procedure (EKE A553). It asked for further particulars about airborne arsenic on the site, something which would be unrelated to drilling activities. The Request for Information also indicated that McCaw Drilling could sample further cuttings and send them for analysis

that same day, if approval of further sampling was received immediately. This Request for Information was said to relate to concerns for worker safety. It contains no reference to contamination of equipment and its relationship to that topic is peripheral. No written response was received to this Request for Information from Clark Builders, but the inquiry about airborne arsenic was addressed at a site meeting on April 29, 2014: air monitoring results were “good” and “exposure limits are low” (EKE A558, A722).

[10] Issues about decontamination of equipment were raised directly at subsequent site meetings:

(a) The minutes of June 3, 2014 (EKE A255, A572) record:

15. Comments: Level of decontamination when rigs are removed from site: protocol for decontaminating equipment before leaving site?

This was identified in the “action by” column as an “information” item, and appears to be the first direct written reference to decontamination, and to a protocol for it.

(b) The minutes of June 6, 2014 (EKE A584) record:

13. Survey Equipment. Contaminated equipment that may not be accepted back by rental company (reflex tools etc.). Potentially fairly large cost impact. MN [McCaw North aka McCaw Drilling] to get more detail on what the issue is.

The “action by” column lists “MN”.

(c) The minutes of June 13, 2014 (EKE A588) record:

15. Survey Equipment. MN is still waiting on response about reflex tools and the return policy once they have been contaminated.

The “action by” column lists “MN”.

[11] On July 21, 2014 Standard Operating Procedure 3 was finalized (EKE A591). It mentions in passing the decontamination of equipment (EKE A595, 606, 607), but does not include a specific equipment decontamination procedure or standard. McCaw Drilling maintains it discussed including a decontamination procedure in SOP #3, but that Clark Builders wanted to defer the issue; Clark Builder’s representative did not recall this conversation (EKE A310-11).

[12] By July 22, 2014, some of the equipment on site was no longer needed. McCaw Drilling arranged (via its sub-contractor Quantum Murray and environmental consultant WESA - Water and Earth Science Associates) for swabs to be taken from some of its equipment. The site minutes for July 22, 2014 record (EKE A311-2, A621):

6. Comments:

3. MN is performing their washdown/cleanup/decontamination on the pad. Samples are going to be taken from the drill. QM is putting procedures together. MN is getting the cost together for the swabs - to confirm that they are decontaminated. (Identify which part of the drills need to be decontaminated - which drills need to be washed down).

The “action by” column lists “MN”. There is no indication that decontamination is contingent on a formal operating procedure being approved.

[13] The decontamination issue arose three days later at the site meeting of July 25, 2014 (EKE A624-5):

6. Review of Comments:

1. Demob, waiting for an answer on swabs and testing to confirm equipment leaving site is cleaned of any arsenic contamination. (“action by” DCNJV, PWGSC)

In the meeting Steve from Nuna confirmed that equipment on Giant Mine that is not involved in “high-risk” work does not require swabs for arsenic testing.

MN to confirm that equipment waiting for demobilization was not included in any near-arsenic drilling. If it wasn't, that there is no requirement from Nuna to swab and demobilization can occur at any time. (“action by” – “CHANGE”)

2. Dave on swabs will review notes and get back to CB [Clark Builders]. Requirement that the equipment be decontaminated before leaving site. (“action by” PWGSC)

3. All near arsenic holes were drilled by Foraco (“action by” CB)

4. MN is still concerned about the decontaminating process specified in revised SOP. (“action by” MN)

The reference to the “revised SOP” may be a reference to the recently completed Standard Operating Procedure 3, but as noted it did not contain a decontamination protocol.

[14] The August 12, 2014 site meeting minutes recorded (EKE A262-3, A644-5):

8. Comments:

10. Demobilization of the drill rigs: as far as PWGSC is concerned - there is no need to swab the rigs that are not used for the near arsenic drilling. FND&B [aka McCaw Drilling] have taken swabs anyway and we can discuss the results when they come in. . . . (“action by” - “info”)

12. Assumption is that swabs will come back clean. Can’t pull a rig from site for another job until it’s cleared. The problem is MN’s ability to send to future Mine Sites that have inspection protocols and also the perception issue in the local community. (“action by” - “info”)

13. FND&B needs to take precautions removing the rigs from site. Each mine has their own protocol. This site doesn’t have any protocols for swabbing. (i.e.; If these rigs went to Diavik they would be checked upon arrival and if they aren’t clean they would not be allowed on their site.) (“action by” “info”)

While these minutes note that there is no swabbing protocol at this site, there is no indication that a protocol for decontamination is needed, or is being developed. There is no mention of assigned responsibility for what is still thought to be an “information” item.

[15] The results of the WESA swab tests were received three days later, on August 15, 2014. WESA reported that there were no Canadian standards for surface arsenic concentrations, but that the arsenic on the uncleaned drills was above the standard provided by the Brookhaven National Laboratory. It recommended that the equipment be thoroughly cleaned, and then retested (EKE A629). Public Works subsequently took the position that all but one of the samples were below the levels accepted on the “Roaster” part of the Giant Mine Project (EKE A239).

[16] The WESA results were sent to Clark Builders, and on August 21 McCaw Drilling asked Clark Builders if it had received a response from Public Works. The email noted: “The equipment on site cannot be demobilized until it is decontaminated and there is costs absorbed. We need to know how to proceed.” This is a clear request from McCaw Drilling for directions on how it should proceed. It is also a clear mention of the costs that would result, although no distinction is drawn between cleaning costs and standby costs, and no specific mention is made of the need for a standard operating procedure.

[17] The development of Standard Operating Procedure 3 had taken several months, and had resulted in project delays and standby costs arising from equipment being idle while the new drilling program was developed. On August 15, 2014, McCaw Drilling submitted a claim for \$1,762,471 for “Standby for Labour and Equipment for Awaiting Approval of SOP #3” (EKE A236). McCaw Drilling indicated that it would accept a reduced amount of \$1,158,150 (a saving of \$604,313) if the claim was accepted by August 22, 2014.

[18] The decontamination issue came up again at the August 22, 2014 site meeting, as recorded in the minutes (EKE A268):

2. Swab test and reported findings on equipment was forwarded to PWGSC. PWGSC has reviewed. Jennifer states; PWGSC is maintaining their standing from all previous meetings. PWGSC is not entertaining paying for stand by for that equipment. McCaw’s needs to demob that equipment, that equipment is to be off the Giant Mine Site property, McCaw’s is to submit a claim, if they wish to. PWGSC wants confirmation of the removal of this equipment, demob to be completed by Tuesday. CB and PWGSC meeting to follow up with more details later. It is not considered contaminated by PWGSC and was stated clearly that it was not wanted on site any longer. McCaw’s not to store equipment on site. Prepare a claim and submit to PWGSC.

The “action by” column lists “MN CB”. The tone of this minute is that Public Works could not prevent McCaw Drilling from submitting a claim, via Clark Builders, related to decontamination, but Public Works was not acknowledging any obligation to pay that claim. A logical inference is that if Public Works was not going to pay such a claim from Clark Builders, then Clark Builders would not pay the claim from McCaw Drilling.

[19] On August 25, 2014 the Workers’ Safety and Compensation Commission issued a report of the Inspector of Mines. It noted that standard procedures for decontamination of equipment had been used for other parts of the Giant Mine project (EKE A246). The Commission issued Order #002 to Clark Builders (EKE A247):

Observation: McCaw North will need direction on what to do with the equipment to get it off site. This information is normally available in an SOP that would take into consideration potential and actual exposure as well as the cleaning process that identifies parts that are not easily visible and filters or other disposable components. . . .

Officer/Inspector Order: Develop an SOP that would take into consideration potential and actual exposure as well as the cleaning process that identifies parts that are not easily visible and filters or other disposable components.

This is the first firm reference on the record to the need for preparation of a decontamination procedure, although McCaw Drilling and the Workers' Safety and Compensation Commission had recognized this need during the drafting of SOP #3. The Order required compliance by September 1, 2014. This Order confirms that, as far as the Workers' Safety and Compensation Commission was concerned, a decontamination procedure was needed, and the obligation to prepare one was on Clark Builders as the project manager. The Order obviously did not consider whether McCaw Drilling had a contractual obligation to prepare that procedure, nor does it make any mention of responsibility for the costs of decontamination.

[20] A considerable amount of time was spent on the decontamination issue at the site meeting the next day, August 26, 2014 (EKE A270-71). The minutes recorded that decontamination was one of the three issues discussed at the meeting the previous day with the Workers' Safety and Compensation Commission:

1. . . . 3) What standards are to be used to demob equipment from site. We are talking specifically the drill equipment used to perform the work to date. There are a number of pieces of equipment that are ready to be moved. FNDB have washed the equipment and it remains on the wash-down pad and they had concerns about potentially arsenic. They initiated swab testing on their own accord and presented results to CB and it was passed on to PWGSC. Last meeting PWGSC stated their position to demob the equipment. During our meeting yesterday if there were concerns there should be an SOP written including an acceptable level within that procedure. The cleaning process for the drill rigs can occur while the SOP is being written. Performed is step one, writing the process is step 2 and getting it approved is step 3. Do not need to let it keep the equipment on site while being written. Based on the results that FNDB received they can continue to wash the equipment. MN to wash and develop the SOP for decontaminating their equipment. If there is a claim to be made based on this - MN can initialize it. (emphasis added)

During the discussion someone observed that it was backwards to do the work before the process was developed. There was further discussion about the nature of the contamination, what standard of cleanliness had to be achieved, the personnel required, and how decontamination had taken place at other parts of the Giant Mine site. The minutes continued:

8. MN will need to eat the cost of developing a decontamination SOP; MN has started it - we are looking to review the information that Mike will provide. SOP will need to be submitted to WSCC - Mines Inspector - they are looking to have it within 1 week. The sooner MN can get this done the better

for all involved. They have work for the drills. Who will be making the call that it is ready to leave site? Joe advised it is visually clean and that it is good to go now. Don't think we can do that now; Mines Inspector saw results and said there needs to be another attempt. The Industry standard is visually clean. Mines Inspector agreed that visually clean is acceptable. (emphasis added)

The "action by" column lists "DCNJ/MN". This minute assumes that it was the responsibility of McCaw Drilling to prepare the decontamination protocol, which became Standard Operating Procedure 4. This was consistent with McCaw Drilling's acknowledged responsibility under the contract to prepare drilling procedures, including SOP #1, SOP #2 and SOP #3 (EKE A250).

[21] On August 28 McCaw Drilling emailed Clark Builders: "Please advise on order #002" (EKE A651). Clark Builders forwarded a memo of that same date from Public Works which summarized the events of August 2014 (EKE A238). The memo repeated Public Work's position that some equipment was no longer required on site, and it should be demobilized. It continued:

5. Clark Builders and associate sub-contractors have decided to maintain the equipment on site to complete swab testing, which was not a requirement of a regulatory body or the Care and Maintenance Contractor.

The memo then summarized the "conversations and conclusions of the discussions". It asserted that "decontamination of equipment in low risk areas remains unchanged from previous requirements", and that the swab sample results, with one exception, met acceptable criteria. Public Works summarized what it thought was the position of the Workers' Safety and Compensation Commission:

4. The WSCC is not opposed to Clark Builders or its sub-contractors proceeding with decontamination of these drill rigs at the present time. A standard operating procedure (SOP) for decontamination was requested by WSCC as part of the near arsenic drilling SOP review process (please refer to the WSCC meeting transcript) and Clark Builders or its sub- contractors has not completed that document to date. . . .

The "near arsenic drilling SOP" is a reference to SOP #3, which had been completed on July 21, 2014. This memo implies that Public Works did not require a decontamination procedure for its own purposes, but did not challenge the Workers' Safety and Compensation Commission's directive.

[22] The Public Works memo of August 28 then summed up its position (EKE A239-40):

PWGSC expects that the path forward from this point should include the following steps:

1. Clark Builders, or appropriate sub-contractors, will complete the decontamination SOP, as requested previously by WSCC. This will include procedures specific to non-arsenic and near-arsenic work activities. This SOP is required ASAP, as this was requested prior to the June 11 approval of the near arsenic surface drilling SOP (SOP 3) by WSCC.
2. Clark Builders will proceed with the cleaning of the three drill rigs in question, and immediately after cleaning, the drill rigs will be inspected by the Mine Manager. In addition, the drill rigs will be immediately swabbed in the same sample locations as previously sampled to provide re-assurance that the decontamination process is effective. This data will be used to form the decontamination SOP. Once the inspection is completed the equipment can be demobilized from site.

As stated previously, PWGSC is of the opinion that this issue and the resolution of it did not incur any standby charges. Clark Builders subcontractor has notified Clark Builders in meetings attended by PWGSC that they will be submitting a claim for this issue, and the knowledge of that notification does not change this opinion. (Emphasis added)

The important points are that a decontamination standard operating procedure had apparently been requested as early as June, by the Workers' Safety and Compensation Commission, although that request is not on the court record. Public Works was maintaining its position that no standby charges were justified because of any delay in decontamination of the equipment.

[23] On August 29, McCaw Drilling submitted a Contract Change Request for \$16,940 for anticipated "development of an SOP for equipment decontamination" (EKE A281). By email of September 2, 2014, Public Works repeated its position that the SOP was requested as early as June 11, it should only be a few pages long, and that Public Works would not approve the Contract Change Request (EKE A285, A654). Clark Builders passed that news on to McCaw Drilling, which replied on September 3, quoting the August 25 Workers' Safety and Compensation Commission Order #002 that: "McCaw North will need direction on what to do with the equipment to get it off site". McCaw Drilling wrote:

WSCC has made it clear that FNDB requires direction on decontamination procedures. As such, the delays thus far are clearly due to a lack of direction

provided to FNDB. For this reason, all costs associated from delays and demobilization will be at the cost of others. . . . (EKE A284, A653)

On September 8, 2014 Clark Builders replied, suggesting that SOP #3 adequately covered decontamination, and that another standard operating procedure was not required (EKE A662).

[24] The decontamination issue was discussed again at the site meeting of September 9, 2014 (EKE A665-6). Some extracts are:

MN states; still waiting for approval of funds for creation of SOP. . . .

PWGSC submitted a memo to CB two weeks ago. This was passed on to MN. MN is waiting for direction on how to proceed. . . .

MN - are unable to handle arsenic filters. . . .

MN wants to create a specific SOP at a cost; retracting the CCN - this information was passed onto MN . . .

D. McCaw states; do not have anyone at MN that handles arsenic or things covered in arsenic - MN needs direction on how to handle it. . . . MN needs QM to prepare an SOP for this contamination . . .

The minutes contemplated further discussions between McCaw Drilling and Clark Builders, to be followed by further discussions with Public Works.

[25] On September 10, 2014 Clark Builders sent McCaw Drilling an official "5 Day Notice" under clause 7.1.2 of the contract (EKE A279). It recited:

Clark Builders have requested an SOP on various occasions to properly clean and remove equipment from site in order to satisfy the Mine Manager and WSCC. This document was a requirement of the Geotechnical Drilling Contract. . . .

The notice required production of the SOP, or Clark Builders would retain a third party to do so, and ". . . all costs incurred by Clark Builders on your behalf will be back charged against the demobilization cost included in your tender".

[26] There was further email discussion on the decontamination standard used at the "Roaster" at the Giant Mine site, and the level of decontamination that had to be achieved (EKE A670-73). Clark Builders asked if McCaw Drilling was going to draft SOP #4, and

McCaw Drilling replied that it wanted confirmation of the decontamination standard that had to be met (EKE A670, A676). Clark Builders retained Enviro-Vac to prepare SOP #4. The site meeting minutes of September 19 reported: “3. Decontamination SOP: Is being prepared and will be submitted for approval. This is not being created by FNDB. It will be processed through CB” (EKE A680). SOP #4 was eventually approved on September 29, 2014, and McCaw Drilling removed its equipment from the site shortly thereafter (EKE A287, A315).

[27] Following further discussions between the parties, on November 21 2014 Clark Builders approved a change order for \$841,347 for “LME Standby Request” (EKE A242). This related to the claim that had been asserted on August 15, 2014 (*supra*, para. 17). (No explanation is provided as to why this standby claim was approved; it may be an acceptance that there was a change in the scope of the work when the drilling was split into two components: within 10 m, and outside 10 m). The final amount agreed to was \$921,124 below McCaw Drilling’s initial claim (\$1,762,471 - \$841,347 = \$921,124). The letter provided: “Upon agreement from [McCaw Drilling] there will be no further claims against the Geotechnical Drilling Program (Project #13301.007) with regards to the LME Standby”. McCaw Drilling signed off on November 24, 2014.

[28] Under clause GC 6.6.1 of the contract, McCaw Drilling was required to give written notice of a claim for additional payment within ten working days of the events giving rise to the claim. Failure to give notice “shall invalidate the claim” (EKE A80). Since it removed its equipment at the end of September, notice should have been given by the middle of October 2014. McCaw Drilling had been reminded of this requirement in August, 2014 (EKE A294-99). No notice was sent.

[29] On February 13, 2015, McCaw Drilling’s solicitors sent a demand letter to Clark Builders (EKE A232). It included a claim for “Unpaid standby charges” of \$921,124.00, which was the difference between its original claim and the amount paid, as set out in para. 27, *supra*. During these proceedings, McCaw Drilling confirmed that the standby claim due to delays in decontamination of equipment was actually \$612,940, and provided particulars of that amount (EKE A726).

The Summary Judgment Reasons

[30] After the production of documents, and some examinations for discovery, the parties brought cross applications for summary judgment and summary dismissal. The chambers judge dealt first with the issue of deviated boreholes, which is not under appeal.

[31] The chambers judge summarized the chronology of events, as set out above. She noted that the issue of decontamination of equipment arose as early as June 2014, and continued into August (reasons at paras. 49-53). She concluded that Clark Builders never

specifically asked McCaw Drilling to prepare a standard operating procedure for decontamination before the formal notice of September 10 (*supra*, para. 25). The topic was discussed at several meetings, but responsibility was never directly assigned (reasons at paras. 61-64). On the other hand, McCaw Drilling made several inquiries about such a procedure (reasons at paras. 64-5).

[32] The chambers judge recited the standard provisions in the contract on hazardous substances (GC 9.3.1, *supra*, para. 4) and concluded:

74. Clark was also responsible for taking all necessary steps to dispose of or render harmless, toxic or hazardous substances at the place of work. It is not reasonable to interpret Clark's obligation, pursuant to section 9.3.4 of Contract 2, literally, as the whole purpose of the Project was to properly store or dispose of the arsenic on the site. It was known by all parties that the site was contaminated with arsenic trioxide prior to commencing work. The parties also knew that there was the potential to encounter arsenic trioxide during the course of the work, and it was a risk known and accepted by all. However, the contract placed obligations on Clark to take all necessary steps to address toxic or hazardous substances at the place of work, to minimize the risk, and this included developing Standard Operating Procedures to address risks to the health and safety of people and the decontamination of equipment.

The source of the reference to “developing Standard Operating Procedures to address risks to the health and safety of people and the decontamination of equipment” is unclear, as this obligation is not found in GC 9.

[33] The chambers judge referred to the Request for Quote:

Site specific Standard Operating Procedures for drilling in and around voids that contain arsenic trioxide dust are required. PWGSC, Clark and their consultants will work with the Proponent to develop such procedures.

She concluded that preparation of SOP #4 was not the obligation of McCaw Drilling, but was an obligation shared by Public Works, Clark Builders and Golder (reasons at paras. 77-8).

[34] McCaw Drilling had raised the issue of equipment contamination, but had never received clear directions (reasons at paras. 80-1). The chambers judge concluded:

82. The terms of the Contract, in my view, obligated Clark to take all necessary steps to address risks to the health and safety of people and the

decontamination of equipment and that included being responsible for developing Standard Operating Procedures. Ultimately, Clark is responsible for the failure to develop SOP4 until September 29, 2014 and pursuant to the terms of Contract 2 is liable to reimburse McCaw for the reasonable costs incurred as a result of the delay.

She accordingly gave McCaw Drilling judgment for the standby costs during the whole period of delay.

Issues and Standard of Review

[35] This appeal is essentially about contractual interpretation. The primary issues are:

- (a) Which party was contractually obligated to (i) decontaminate the equipment and (ii) prepare a standard operating procedure for decontamination, if one was required?
- (b) Who was responsible for the delay in preparing the standard operating procedure?

[36] The standards of review are summarized in *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235:

- (a) conclusions on issues of law are reviewed for correctness: *Housen* at para. 8,
- (b) findings of fact, including inferences drawn from the facts, are reviewed for palpable and overriding error: *Housen* at paras. 10, 23; see also *H.L. v Canada (Attorney General)*, 2005 SCC 25 at para. 74, [2005] 1 SCR 401, and
- (c) findings on questions of mixed fact and law call for a “higher standard” of review, because “matters of mixed law and fact fall along a spectrum of particularity”: *Housen* at paras. 28, 36. A deferential standard is appropriate where the decision results more from a consideration of the evidence as a whole, but a correctness standard can be applied when the error arises from the statement of the legal test: *Housen* at paras. 33, 36.

On this appeal, the facts are largely settled. Most of what occurred is recorded in the emails, site minutes, and memos. There are only a few areas where memories or perceptions of the witnesses differ. Any differences about the facts are primarily related to inferences that should be drawn from the record.

[37] The interpretation of standard form contracts is reviewed for correctness. The interpretation of other contracts depends on the factual context, and the intention of the contracting parties, and the interpretation of the chambers judge is entitled to deference: *Ledcor Construction Ltd v Northbridge Indemnity Insurance Co*, 2016 SCC 37 at para. 24, [2016] 2 SCR 23.

Interpretation of the Contract

[38] A contract must be interpreted in accordance with the factual context known to the parties. The parties used the standard CCDC 18 - 2001, which has generic clauses about hazardous substances. However, in this case all the parties knew about the hazardous substance (arsenic trioxide), and the whole purpose of the contract was to remediate the site. As the chambers judge noted:

74. . . . It is not reasonable to interpret Clark’s obligation, pursuant to section 9.3.4 of Contract 2, literally, as the whole purpose of the Project was to properly store or dispose of the arsenic on the site. It was known by all parties that the site was contaminated with arsenic trioxide prior to commencing work. The parties also knew that there was the potential to encounter arsenic trioxide during the course of the work, and it was a risk known and accepted by all. . . .

Under this contract, the specific provisions about dealing with the arsenic trioxide must prevail over the generic wording of CCDC 18 - 2001.

[39] The chambers judge, however, allowed the generic standard form clauses to override the obvious purpose of the contract. She found that the general obligation in GC 9.3.3 of “Clark to take all necessary steps to address risks to the health and safety of people” prevailed. This is inconsistent with the finding that arsenic trioxide was a known factor, and that the intention of the contract was that all the parties would have to work with it. Further, the extension of this standard form obligation to “the decontamination of equipment and that included being responsible for developing Standard Operating Procedures”, was not available on a reasonable reading of the contract. GC 9.1 makes no mention of either decontamination or standard operating procedures.

[40] The finding at para. 82 of the reasons that Clark Builders was responsible for “decontamination of equipment” is inconsistent with the contractual documents. Potential contamination of equipment was a known issue. Regardless of what GC 9 of CCDC 18 - 2001 said, the obligation to decontaminate equipment under the tender documents was on McCaw Drilling:

1.6 Equipment Decontamination

- .1 perform final decontamination of all equipment, tools, and materials which may have come in contact with potentially contaminated materials prior to removal from site.

Placing this responsibility on Clark Builders reflected reviewable error.

[41] There is no evidence on this record of a change in the scope of the work as a result of encountering arsenic trioxide. The Giant Mine site was known to be contaminated. It was not anticipated that McCaw Drilling would be drilling boreholes directly into “hot spots of arsenic”, and it never did (*supra*, para. 7). There was nothing that happened during the project that displaced the obligation of McCaw Drilling to decontaminate its equipment after the completion of the work.

[42] McCaw Drilling was the sub-contractor retained to do the drilling. It supplied the equipment and operators, decided how to complete the work, and was responsible for decontamination and demobilization at the end. Without more, McCaw Drilling would be assumed to be responsible for preparing any standard operating procedures to complete that work. In fact, McCaw Drilling prepared SOP #1, SOP #2 and SOP #3. The chambers judge, however, noted at para. 77 of the reasons, the provisions of the Request for Quote:

Site specific Standard Operating Procedures for drilling in and around voids that contain arsenic trioxide dust are required. PWGSC, Clark and their consultants will work with the Proponent to develop such procedures.

It must first be noted that this clause relates to standard operating procedures “for drilling in and around voids”. It stretches the language of this clause to extend it to decontamination of equipment, especially where other parts of the contract place the specific responsibility for that on McCaw Drilling.

[43] This provision must also be read in context. The immediately preceding clause reads (*supra*, para. 5):

. . . [McCaw Drilling] shall prepare a site-specific Health and Safety Plan (HaSP) covering all aspects of the work including identifying all potential risks and hazards, providing mitigative actions and proposed procedures for dealing with the identified hazard in the event they do occur during the work.
. . . (Emphasis added)

The chambers judge reasonably found that the responsibility for preparing standard operating procedures “for drilling in and around voids” was shared, but in context the

contract requires McCaw Drilling to lead the process. As noted, it was the drilling contractor with primary responsibility for that part of the work. This is especially so with respect to “providing mitigative actions and proposed procedures” such as SOP #4, as McCaw Drilling had specific responsibility for decontamination of its equipment.

[44] In addition, if the responsibility under the Request for Quote for preparing standard operating procedures was shared, and if that extended to decontamination of equipment, it was inconsistent to find that: “Ultimately, Clark is responsible for the failure to develop SOP4”. Even if Clark Builders had a role to play it was not an exclusive role, and McCaw Drilling was primarily responsible for SOP #4, especially as it related to decontamination, a responsibility directly assigned to it.

[45] The parties were unfortunately distracted by (i) the order of the Workers’ Safety and Compensation Commission: “McCaw North will need direction on what to do with the equipment to get it off site” (*supra*, para. 19); and (ii) the Public Works memo: “Clark Builders, or appropriate sub-contractors, will complete the decontamination SOP, as requested previously by WSCC” (*supra*, para. 22). As far as these two parties were concerned, Clark Builders was responsible for all the work on the site, whether it did that work by its own forces or through sub-contractors. Those parties had no interest in the contractual relationship between McCaw Drilling and Clark Builders. As McCaw Drilling admits, it never had a contractual relationship with Public Works, and “McCaw’s contractual relationship was at all times with Clark”: EKE A313, A317

[46] A distinction must be drawn between the contractual obligations between McCaw Drilling and Clark Builders, and their public obligations. Public Works and the Workers’ Safety and Compensation Commission would, from time to time, provide directions to Clark Builders, which they regarded as being the party primarily responsible for the work. McCaw Drilling, as one of Clark Builders’ subcontractors, had actually covenanted to perform some of that work. The Workers’ Safety and Compensation Commission’s order may create public law obligations, but it cannot change the contractual obligations of the parties between themselves. When the Commission said “McCaw North will need direction” it was not commenting on the parties’ contractual arrangement, under which McCaw Drilling was responsible for decontamination of equipment. Likewise, Public Works’ reference to the “appropriate sub-contractors” merely confirmed that how the work got done was up to Clark Builders. Clark Builders and McCaw Drilling knew the latter was the “appropriate sub-contractor”.

[47] McCaw Drilling argues that it was never directly asked to prepare a standard operating procedure for decontamination until the “5 Day Notice” of September 10, 2014 (*supra*, para. 25). The short answer is that McCaw Drilling’s obligations under the contract were not conditional on notice; it was to perform the drilling program it had agreed to

without specific demand. The other answer is that McCaw Drilling knew a standard operating procedure for decontamination was required. It was aware of the order of the Workers' Safety and Compensation Commission and the position of Public Works (*supra*, paras. 19-20, 22). McCaw Drilling submits that it pressed for a procedure for decontamination to be included in SOP #3. It had the results of the WESA swabs. It did not have to be told again by Clark Builders that a decontamination procedure was needed.

[48] The real problem was not the absence of a demand to prepare SOP #4, but McCaw Drilling's mistaken belief that it was not obliged to do so under the contract. This is best illustrated by its Contract Change Request of August 29, 2014, in which it asked for more money for that purpose (*supra*, para. 23). Preparation of SOP #4, however, was a part of its core obligation (even if it was a shared obligation). McCaw Drilling had been told it would not receive further compensation for this part of its work. As early as August 26, 2014, the site minutes recorded: "MN will need to eat the cost of developing a decontamination SOP; MN has started it" (*supra*, para. 20). Public Works had made it clear it would not provide further funding (*supra*, paras. 18, 22). The problem was not an absence of a demand, but McCaw Drilling's reluctance to do the work without more money.

[49] McCaw Drilling asserted it did not have the in-house expertise to prepare SOP #4. That, however, only meant it should have retained a consultant like Quantum Murray, WESA or Enviro-Vac to assist.

[50] In summary, the conclusion that Clark Builders was responsible for the preparation of a standard operating procedure for decontamination of equipment is the result of reviewable error. It results from an overemphasis on the generic clauses in the standard form contract, which the chambers judge acknowledged should not be "read literally". It unreasonably extends the reference to "drilling in and around voids" to include decontamination. It discounts the specific provisions of the contract respecting decontamination. The primary, if not the exclusive responsibility, for preparing SOP #4 was on McCaw Drilling.

The Delay Claim

[51] McCaw Drilling does not claim for the cost of decontaminating its equipment. It does not claim extra cleaning costs, due to unanticipated levels of contamination. The claim is limited to delays in cleaning the equipment, which resulted from McCaw Drilling's own decision to delay cleaning pending preparation of a standard operating procedure for cleaning. If McCaw Drilling was responsible for preparing SOP #4, then it can have no claim for its own delay. The delay claim, at its highest, depends on Clark Builders having a role to play in assisting in the preparation of SOP #4 under the Request for Quote (*supra*, paras. 5, 42-43).

[52] The magnitude of the task is now known. When Clark Builders took over, and retained Enviro-Vac to prepare SOP #4, the whole process took about two weeks (*supra*, para. 26). SOP #4 is less than three pages long (EKE A290). It describes how to prepare the work area, how a worker should put on protective gear, how to exit the work area, and how to dispose of waste. It says nothing about the standard of decontamination to be achieved, except: “Surfaces are to be clean”.

[53] McCaw Drilling advanced two main reasons why it did not prepare SOP #4. The first was the erroneous view that it was entitled to extra payment for that task (see *supra*, paras. 40-43, 50). The second was that it did not receive timely input from Clark Builders on the standard of decontamination that was to be achieved. The latter did not turn out to be the cause of any delay. When Enviro-Vac prepared SOP #4, which contained no standard of decontamination, McCaw Drilling was nevertheless able to quickly clean its equipment and demobilize without any problem.

[54] The reasons under appeal find that McCaw Drilling was not given ample instructions or directions in preparing a standard operating procedure for decontamination of equipment, which caused the delay in decontamination, which in turn generated the standby losses. This finding is inconsistent with the record:

- (a) The Workers’ Safety and Compensation Commission had requested such a standard procedure as early as June. There were repeated references to the need for a decontamination procedure in the site meetings starting in June, 2014 (*supra*, paras. 10-20). McCaw Drilling had ample notice that one was required.
- (b) McCaw Drilling argues that it pressed for a decontamination procedure to be included in SOP #3. But McCaw Drilling was responsible for drafting SOP #3, and if it felt that decontamination procedures were required it could simply have inserted them. If delay in preparing SOP #3 was an issue, it could have worked on SOP #4 as soon as SOP #3 was finished. In any event, this argument shows McCaw Drilling was aware of the need for a decontamination procedure; no instructions were needed.
- (c) Further, McCaw Drilling had accepted that it was responsible for preparing SOP #1, SOP #2 and SOP #3, and there was no reason to believe that someone else would be responsible for drafting SOP #4, especially since McCaw Drilling was responsible for decontaminating its equipment.
- (d) The site minutes of August 26, 2014 clearly stated: “MN will need to eat the cost of developing a decontamination SOP”. The Public Works memo of

August 28 confirmed that a decontamination SOP was needed. (*supra*, paras. 20, 22).

- (e) Input on the standard of decontamination to be achieved was given. On August 12 Public Works indicated no swabbing was needed for equipment not used in “near arsenic” drilling (*supra*, para. 14). WESA provided the Brookhaven National Laboratory standard (*supra*, para. 15). The standard used at the “Roaster” was available (*supra*, paras. 15, 26). The Mines Inspector was prepared to accept the “industry standard” of “visibly clean” (*supra*, para. 20). McCaw Drilling was responsible for preparing SOP #4, which included having its consultants reconcile this information to the extent needed to prepare SOP #4. As noted, the final draft of SOP #4 actually contained no standard of decontamination.
- (f) McCaw Drilling argues it received no written response to the March 20, 2014 Request for Information, but it read-in Clark Builder’s undertaking response that the reply was given at the April 29, 2014 site meeting (*supra*, para. 9). In any event, the Request for Information related to airborne arsenic on the site, a known risk, and not to decontamination of equipment.

[55] In summary, the real source of delay in preparing SOP #4 was McCaw Drilling’s failure to recognize that it was responsible for its preparation, and that it was not entitled to further compensation. McCaw Drilling repeatedly deflected calls for preparation of the decontamination procedure pending confirmation that others would pay the costs. Repeated requests were made for a decontamination standard, but McCaw Drilling failed to proceed with drafting the procedure based on input that was given. In any event, a standard was not included in the final draft of SOP #4, and did not prevent cleaning and demobilization of the equipment.

[56] In conclusion, McCaw Drilling has not established a valid claim for delay in decontamination of its equipment. Decontamination was part of its contractual obligations, and it was primarily responsible for preparing any required decontamination procedure. Public Works and Clark Builders provided adequate assistance when requested, but McCaw Drilling failed to act reasonably on that input.

Other Issues

[57] This disposition of the appeal makes it unnecessary to deal with other issues. For example, Clark Builders argues that McCaw Drilling agreed in November that “there will be no further claims” (*supra*, para. 27). The chamber judge interpreted this as relating to further claims respecting the preparation of SOP #3, not SOP #4 (reasons at paras. 68-71). Clark Builders argues that McCaw Drilling is precluded from making this claim since it gave no

notice of its claim as required under the contract (*supra*, para. 28). The chambers judge did not deal with this issue.

[58] The appellant argues that the formal judgment erroneously recorded the “dismissal” of its application for summary dismissal, whereas it was actually “allowed in part”. Given the symmetry of the two cross applications, this does not affect the substance of the judgment. If the appellant was concerned about this issue of form it should have raised it with the chambers judge prior to approving the formal judgment.

Conclusion

[59] In conclusion the appeal is allowed and the judgment for \$612,940 plus interest granted to the respondent is set aside. The award of \$64,157.52 relating to borehole drilling is undisturbed.

Written submissions filed on February 20 and April 7, 2020

Memorandum filed at Yellowknife, NWT
This 7th day of May, 2020

Authorized to sign for: Martin J.A.

Slatter J.A.

Schutz J.A.

Submissions:

T. Kruger
for the Respondent

A.C. Bochinsk/J.E. Black
for the Appellant

IN THE COURT OF APPEAL
FOR THE NORTHWEST TERRITORIES

Between:

McCaw North Drilling and Blasting Ltd.

Respondent
(Plaintiff)

- and -

Clark Builders

Appellant
(Defendant)

- and -

The Guarantee Company of North America

Not Party to Appeal
(Defendant)

MEMORANDUM OF JUDGMENT
