COURT OF APPEAL OF
NEW BRUNSWICK

COUR D'APPEL DU
NOUVEAU-BRUNSWICK

135-13-CA

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF NEW BRUNSWICK

APPELLANT

- and -

BRAD GOULD TRUCKING & EXCAVATING LTD.

RESPONDENT

- and -

BIRD CONSTRUCTION COMPANY

RESPONDENT

SA MAJESTÉ LA REINE DU CHEF DE LA PROVINCE DU NOUVEAU-BRUNSWICK

APPELANTE

- et -

BRAD GOULD TRUCKING & EXCAVATING LTD.

INTIMÉE

- et –

BIRD CONSTRUCTION COMPANY

INTIMÉE

Her Majesty the Queen in Right of the Province of New Brunswick v. Brad Gould Trucking & Excavating Ltd. and Bird Construction Company, 2015 NBCA 47

CORAM:
The Honourable Justice Richard
The Honourable Justice Bell
The Honourable Justice Green

Appeal from a decision of the Court of Queen's Bench:
November 21, 2013

History of Case:

Decision under appeal:
2013 NBQB 374

Preliminary or incidental proceedings:
[2014] N.B.J. No. 96

Appeal heard:
November 18, 2014
December 16, 2014

Sa Majesté la Reine du chef de la Province du Nouveau-Brunswick c. Brad Gould Trucking & Excavating Ltd. et Bird Construction Company, 2015 NBCA 47

CORAM :
l'honorable juge Richard
l'honorable juge Bell
l'honorable juge Green

Appel d'une décision de la Cour du Banc de la Reine :
le 21 novembre 2013

Historique de la cause :

Décision frappée d'appel :
2013 NBBR 374

Procédures préliminaires ou accessoires :
[2014] A.N.-B. n^{o} 96

Appel entendu :
le 18 novembre 2014
le 16 décembre 2014

Judgment rendered:
July 23, 2015

Reasons for judgment by:
The Honourable Justice Bell

Concurred in by:
The Honourable Justice Richard
The Honourable Justice Green

Counsel at hearing:

For the appellant:
Krista Lynn Colford and Michael Leonard Hynes

For the respondent Brad Gould Trucking & Excavating Ltd.:
Rodney J. Gillis, Q.C.
Gregory L. Englehutt

For the respondent Bird Construction Company:
Thomas G. O'Neil, Q.C.
Richard J. Scott, Q.C.

Jugement rendu :
le 23 juillet 2015

Motifs de jugement :
l'honorable juge Bell

Souscrivent aux motifs :
l'honorable juge Richard
l'honorable juge Green

Avocats à l'audience :

Pour l'appelante :
Krista Lynn Colford et Michael Leonard Hynes

Pour l'intimée Brad Gould Trucking & Excavating Ltd.:
Rodney J. Gillis, c.r.
Gregory L. Englehutt

Pour l'intimée Bird Construction Company :
Thomas G. O'Neil, c.r.
Richard J. Scott, c.r.

THE COURT

The appeal is allowed and the cross-appeal is dismissed. The judgment issued in the Court of Queen's Bench is set aside and the action is dismissed, with costs at trial to the Province as calculated using Scale 3 of Tariff A under Rule 59 and on appeal in accordance with Note 1 of the same Tariff.

LA COUR

L'appel est accueilli et l'appel reconventionnel est rejeté. Le jugement rendu par la Cour du Banc de la Reine est annulé et l'action est rejetée. La Cour accorde à la Province les dépens en première instance, calculés selon l'échelle 3 du tarif « A » de la règle 59, et ceux en appel, conformément à la remarque 1 du même tarif.

The judgment of the Court was delivered by

BELL, J.A.

I. Introduction

[1] This appeal involves the interpretation of the Change in Soil Conditions clause, Article 12(1), set out in a Standard Construction Contract made pursuant to the *Crown Construction Contracts Act*, R.S.N.B. 1973, c. C-36. The relevant portion of that article reads as follows:

> 12(1) No payment, in addition to the payment expressly promised by the contract, shall be made by the Owner to the Contractor on account of any extra expense, loss or damages incurred or sustained by the Contractor including a misunderstanding on the part of the Contractor as to any fact, whether or not such misunderstanding is attributable directly or indirectly to the Owner or any of the Owner's agents or servants, and whether or not any negligence or fraud on the part of the Owner's agents or servants is involved, unless, in the opinion of the Engineer-Architect the extra expense, loss or damage is directly attributable to
>
> > (a) A substantial difference between information relating to soil conditions at the site of the work, or a reasonable assumption of fact based thereon, in the Plans and Specifications or other documents or material communicated by the Owner to the Contractor for his use in preparing his tender and the real soil conditions encountered at the site of the work by the Contractor when executing the work,
>
> [...]

[2] In the present case, the respondents, Bird Construction Company (Bird) and Brad Gould Trucking & Excavating Ltd. (Gould) claimed extra compensation from the Province of New Brunswick due to a change in soil conditions. Essentially, their position was that they expected to excavate soil, the vast majority of which could be removed by excavators, the least expensive means of excavation, but encountered

"stronger" rock, which required mechanical breaking by means of hydraulic rock-breakers, a more expensive means of excavation. The Province's Engineer-Architect rejected the claim because he was of the view the extra expense incurred by the respondents was not the result of a change in soil conditions as contemplated by the clause. Gould sued Bird, and Bird claimed against the Province.

[3] The issues before the trial judge, which are relevant to this appeal, were: (1) Was there a "change" in the soil conditions, from those reasonably assumed during the bid, encountered by the respondents during the excavation of the soil at the Saint John Law Courts project; and, (2) If so, what is the appropriate award of damages. In a decision reported at 2013 NBQB 374, 412 N.B.R (2d) 276, the trial judge concluded there was a change in soil conditions from those reasonably assumed to exist at the time of the bid and awarded damages in the amount of $713,808.19, plus interest and costs to Gould against Bird, and then awarded those same damages to Bird with respect to its third party claim against the appellant Province. The trial judge dismissed a claim by Bird for additional costs incurred for the removal of an increased volume of soil over that anticipated at the time of entering into the contract. He also dismissed Bird's claim for mark-up and additional costs of bonding, insurance and supervision.

[4] The Province appeals on the question of liability. In the event it is unsuccessful in that regard, it seeks a reduction in the award of damages. Bird cross-appeals the dismissal of the claims for mark-up, bonding, insurance and supervision.

[5] For the reasons set out below, I am of the view the Change in Soil Conditions clause was not engaged on the facts of the present case. I would allow the Province's appeal, and would dismiss Bird's cross-appeal on the basis the Province's liability is not engaged. Had I not reached this conclusion on the liability portion of the appeal, I would have reduced the damages awarded by the trial judge from $713,808.19 plus interest and costs to $215,110 plus interest and costs. In that event, I would also have allowed the cross-appeal, and awarded Bird $35,522 against the Province.

[6] Although at trial Gould claimed against Bird, and Bird brought a third party claim against the Province, Gould and Bird take the same position with respect to the issues on appeal. To adopt the words of Bird's counsel, "this is a flow through case" since the trial judge based the success of both respondents on the interpretation and application of Article 12. It is worth noting that the trial judge dismissed an alternate cause of action against Bird founded on an alleged collateral contract, and that this issue was not part of the appeal.

II. Summary of Relevant Facts

[7] In 2008, the Province planned to construct a new courthouse in Saint John (the Saint John Law Courts) through a public-private partnership. In that year, it retained Conquest Engineering Ltd. (Conquest) to prepare a geotechnical report (Conquest Report) to assist its consultant in the design of the foundations for the facility. In 2009, the Province decided not to proceed with the public-private partnership. It decided instead to construct the Saint John Law Courts in the traditional manner by calling for tenders in two phases. The first phase would be for the "Foundations and Steel", and the second phase would be for the completion of the structure. Tenders were called for the foundations and steel in December 2009.

[8] Although the Conquest Report was not listed as a Tender document, it was referred to in the instructions to bidders. While the ability of the respondents to rely upon the Conquest Report in preparing their bid was hotly debated at trial, this is not an issue on appeal. The Province accepts the trial judge's conclusion that the Conquest Report could be relied upon by Bird in preparing its bid, it having been incorporated by reference into the Contract Documents.

[9] Bird's estimator, Mark McGraw, used the Conquest Report to estimate the quantities of material to be excavated, and to categorize two different types of rock to be excavated: fractured shale and solid rock. Mr. McGraw provided this information to

Gould for the purpose of preparing its bid to Bird on the excavation portion of the project.

[10] Bird was awarded the Phase 1 contract with a bid of $6,389,999. Bird and the Province entered into a fixed-sum contract in that amount pursuant to the *Crown Construction Contracts Act* and N.B. Reg. 82-109. Bird and Gould subsequently entered into a fixed-sum contract for the excavation, supply, and installation of all earthworks at a price of $1.25 million. Gould's initial offer to Bird was $1.42 million; however, Gould agreed to the lower amount in hopes of having an increased payment due to "change orders". Gould commenced work on the site near the end of March 2010, and began the excavation of bedrock in early April. By April 7, Gould realized it could not remove the bedrock by digging with excavators and would have to employ rock-breakers. The trial judge concluded that by that time, Gould had "three rock breakers on site breaking rock as it was no longer able to simply dig the rock out due to the harder than anticipated rock conditions" (para. 15). Gould threatened to remove its equipment from the site if it did not receive compensation for the additional work. However, Bird prevailed upon Gould to continue the work in exchange for Bird's assistance in presenting an adjusted soils claim to the Province as contemplated by Article 12, set out above. The respondents submitted the claim and, as indicated, it was rejected by the Province.

III. The Law and Standard of Appellate Review

[11] Change in Soil Conditions clauses are not uncommon in construction matters. In *Corpex (1977) Inc. v. The Queen in Right of Canada*, [1982] 2 S.C.R. 643, the Court explained the purpose of such a clause is to overcome the difficulties that arise under traditional contract law when unforeseen soil conditions are encountered during construction. Beetz, J. stated:

> A clause like clause 12 of the General Conditions eliminates or at least reduces the problems mentioned above, resulting from a significant mistake as to the nature of the soil. However, by enabling the parties, for all practical purposes, to renegotiate the contract or part of the

> contract on terms which it stipulates, or to demand that it be renegotiated, it of necessity excludes annulling the contract for mistake, one of the effects of which would be to prevent such renegotiation. One of its objectives is to avoid interrupting the work and encourage its completion. [p. 664].
>
> [Emphasis added.]

[12] Article 12 provides that extra compensation will be payable only where there is a "substantial difference between information relating to soil conditions at the site, or a reasonable assumption of fact based thereon […] and […] the soil conditions encountered at the site […]".

[13] The interpretation of a contract generally raises a question of mixed fact and law: *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 50; *1298417 Ontario Ltd. v. Lakeshore (Town)*, 2014 ONCA 802, [2014] O.J. No. 5449 (QL), at para. 3. Since the purpose of contractual interpretation is to ascertain the objective intentions of the parties, the Court must consider the words of the contract in light of the factual matrix. Questions of mixed fact and law attract a standard of review based upon palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 36-37. Though there is arguably an exception to the rule that contractual interpretation is a question of mixed fact and law in the case of standard form contracts that are widely used (see *Vallieres v. Vozniak*, 2014 ABCA 290, [2014] A.J. No. 964 (QL), at paras. 12-13), I am of the view the interpretation of the portion of the contract in dispute in this case is largely fact driven. It is therefore subject to a standard of review based on palpable and overriding error. Absent such error, the decision of the trial judge must stand.

IV. Analysis – Liability (Change in Soil Conditions Clause)

[14] In order to engage the Change in Soil Conditions clause, there must first have been either a substantial difference between the information relating to soil conditions provided by the Province and the actual conditions encountered, or a

substantial difference between the respondents' reasonable assumptions of fact based on the soil conditions and the conditions encountered. The trial judge concluded, and I agree, that the information on soil conditions provided by the Province in the Conquest Report was not misleading. Specifically, the judge stated: "I do not disagree with the Province's submission that nothing in the Conquest Report has been shown to be incorrect" (para. 75). It follows that for the clause to be triggered, the respondents must have made reasonable assumptions based on the soil conditions, which differed from that actually encountered at the site.

[15] The trial judge framed the issue as being whether Bird/Gould were entitled to any additional payment on the contract due to a misunderstanding on their part based on "a reasonable assumption of fact" from the information communicated to them by the Province for their use in preparing their tender (para. 76). The trial judge found "it was reasonable for Bird and Gould, based on the documentation, material and information communicated to them by the Province, including the information provided in the Conquest Report, to assume that the vast majority, if not the entirety, of the bedrock excavation could be accomplished by the use of a mechanical excavator without the necessity of hydraulic rock breaking equipment" (para. 77). With respect, for the reasons I will outline below, I find this conclusion is the result of one or more palpable and overriding error(s).

[16] I conclude that the respondents' assumptions of what would be required to complete the contemplated work, based on the soil conditions contained in the Conquest Report, were not reasonable. In light of this conclusion, the condition precedent was not met, and the Change in Soil Conditions clause was not engaged. As a result, the Province is not liable to pay for extra work.

[17] The Conquest Report constitutes a rather comprehensive geotechnical report. For the purposes of assessing whether the respondents made "reasonable" assumptions of fact based on the soil conditions outlined in the Conquest Report, one must consider the Report as a whole, something the trial judge failed to do. It is

unreasonable to “cherry-pick” portions of the Report and disregard the remainder. As will become apparent from the analysis set out below, the trial judge failed to consider the definitions of “very weak to weak” rock set out in the Conquest Report, and generally overlooked its misinterpretation by Bird and Gould.

A. *Methods and Means Clause and the Impact of Conquest Report Statements that rock strength is “very weak to weak”*

[18] The Conquest Report included, as part of its narrative, what has been referred to by the parties as a “Methods and Means” clause, which states that bedrock excavation may be accomplished using excavators in zones of weaker rock and hydraulic breakers in zones of stronger rock. The clause also states: “blasting methods may also have to be employed where stronger rock proves too difficult to remove with rock breakers”. The trial judge points to the language of the Methods and Means clause to explain his conclusion that the respondents were reasonable to assume they could use excavators for the majority of the bedrock. He did this by contrasting the word “stronger” in the Methods and Means clause with the words “very weak to weak” in the borehole reports attached as an addendum to the narrative report. The trial judge states:

> […] In addition, [the Conquest Report] addressed the ways and means by which the excavation could be accomplished stating that "[b]edrock excavation may be accomplished with large excavators in zones of weaker rock and with hydraulic rock breakers in zones of stronger rock." In those circumstances, I concur with Bird's position that considering that the rock is described in every borehole as "very weak" to "weak" and that the terms "strong" or "stronger" are never used to describe the rock that it was reasonable for Gould and Bird to assume that they could excavate the vast majority of the bedrock with large excavators. [para. 81]

[19] In my view, the trial judge committed a palpable and overriding error in relying on the language in the Methods and Means clause to find the respondents made a reasonable assumption. As pointed out by the trial judge, the Conquest Report describes

the rock strength in each borehole as "very weak to weak". However, the Report also provides a table describing strength classification in terms of Uniaxial Compressive Strength (MPa). "Very Weak" is defined as an MPa of 1 – 5 and "Weak" is defined as an MPa of 5 – 25. The trial judge's conclusion regarding the "strong" and "weak" terminology in the Conquest Report, like the respondents', was made without any reference to the MPa values, which defined those words, and was clearly set out in the Report. Furthermore, he totally ignored the unchallenged evidence of experts who explained MPa values in terms of the "diggability" of the rock.

[20] Mr. Michael Whitford, a geotechnical engineer, testified as follows on cross-examination: "[…] if you got less than one MP[a], for sure you can dig it. If you've got greater than one MP[a], you may be able to dig it; you may not be able to dig it. It goes back to the fracture". Mr. Ross Whitcomb, another geotechnical engineer and author of the Conquest Report, testified that in his opinion "[g]reater than 1 MPa is not diggable". Importantly, none of the MPa readings from the boreholes recorded less than 1 MPa. The trial judge concluded the references to "very weak to weak" rock strength in the Conquest Report justified the respondents' claim for a change in soil conditions. In my view, the MPa values and their impact upon the "diggability" of the bedrock required at least some consideration by the respondents prior to making any assumptions regarding the soil conditions, and prior to making their bid. To the extent the trial judge concluded the respondents' assumption regarding soil conditions was reasonable based upon the words "very weak to weak" without any consideration of the MPa values, he committed a palpable and overriding error. In the event Bird's estimator did not know the meaning of those descriptive terms, he was required, in my view, to inform himself prior to relying upon them, and making consequent assumptions.

[21] I would also note here that the trial judge made no reference to the expert witnesses' testimony regarding MPa values and their impact upon the "diggability" of the rock.

[22] In summary, the Conquest Report described exactly what Gould encountered during excavation. Some rock could be removed with excavators, while other rock required hydraulic breaking; and, although blasting was considered, it was prohibited because of the proximity to other structures. The trial judge held, correctly in my view, that the Conquest Report, including the Methods and Means clause, was not misleading. Through minimal enquiry, Bird could have avoided its own error regarding the "diggability" of the bedrock.

B. *Boreholes and RQD Data*

[23] The Conquest Report describes the results from 15 boreholes, which were drilled into the rock at the site and tested in a laboratory. Under the title "Soil and Bedrock Profile", the Report informed potential readers that soil classification was based on procedures described in ASTM D 2488 (Standard Practice for Description and Identification of Soils, Visual-Manual Procedure) and that the classification of bedrock was based on the International Society of Rock Mechanics Commission on standardization of laboratory and field tests. The Report describes only two types of subsurface conditions: fill and bedrock.

[24] During the trial, Bird's estimator was asked about his knowledge of the ASTM D and the International Society of Rock Mechanics Commission. He was unfamiliar with both standards. The following is an excerpt from his cross-examination in that regard:

> **Q:** Do you agree that soil classification was an important part of what you were looking at when reading this report?
> A: Yes.
> **Q:** And you see the second sentence of the first paragraph under Soil and Bedrock Profile: Soil classification was based on the procedures described in ASTM D 2488?
> **A:** Yes.
> **Q:** You didn't read that did you?
> **A:** No.
> **Q:** So you couldn't have a full understanding of the soil classification?

> **A:** No.
> **Q:** And the next paragraph says the classification of bedrock was based on the International Society of Rock Mechanics Commission, and it goes on. You didn't read that publication either did you?
> **A:** No.
> **Q:** So you couldn't have a full understanding of how bedrock was classified?
> **A:** No.

[25] I am of the view no reasonable assumptions about the soil conditions were possible without some knowledge of, or at least some reference to, the two standards that explain how Conquest described the soil in its Report.

[26] In addition to its failure to refer to the soil standards applied by the Province, Bird misinterpreted another major part of the Conquest Report (this, in addition to the failure to consider MPa values). The Bird estimator was asked how he concluded which bedrock was "diggable" by excavators (the cheaper method of extraction) and which bedrock required mechanical breaking by hydraulic breakers. He replied that he based his analysis upon the Rock Quality Designation (RQD) set out in the Conquest Report. He testified that he assumed rock with an RQD factor less than 50 could be dug by excavators. The remainder of the bedrock was, according to him, "more solid", and would require the use of hydraulic rock breakers. This approach formed the basis of the claim Bird submitted to the Province. It reads in part:

> […] we were, however prudent and allowed for better quality rock in areas where the RQD was found to be over 50%. As indicated in the Table of RQD values above, only 20% of the values exceed an RQD of 50, and only 9% exceed an RQD of 55. […] The vast majority of the rock excavation […] was assumed to be excavated using a large excavator.

[27] The conclusion or assumption on the part of Bird and Gould linking RQD to the rock strength for the purposes of determining what rock could be dug, is as unreasonable as the failure to review the standards set out by ASTM D 2488 and the

International Society of Rock Mechanics Commission, and the failure to consider MPa values.

[28] At least two witnesses called by the Province testified regarding the impossibility of using RQD as a factor to determine whether bedrock is "diggable" by using excavators. Mr. Ross Whitcomb testified that he was consulted by the Province on the Change in Soil Conditions claim submitted by Bird and Gould. He testified the claim was rejected because the respondents primarily used the RQD factor to assess the "hardness of the rock". He then stated that such an approach is not appropriate because "RQD speaks to the degree of fracturing in the rock. It doesn't speak to the strength of the rock". Michael Whitford, who was asked to "review and provide comment on the documentation related to the issue contained in the third party action commenced by Bird", was even more frank about relying upon RQD factors to determine whether rock can be dug with excavators or must be broken using hydraulic breakers. He said: "RQD doesn't really come into it at all". In commenting upon Mr. McGraw's (Bird's estimator) use of RQD to determine rock strength and whether or not it can be dug, Mr. Whitford reported: "These conclusions are flawed in that there is no correlation between RQD and rock strength nor between core recovery and rock strength […] rock quality designation and core recovery are not measures of rock strength and cannot be used to determine the 'dig-ability' of in-tact rock" (Exhibit 41).

[29] What is significant for purposes of this appeal is that neither expert was challenged upon his statement that RQD factors should not be used to determine the strength or "diggability" of bedrock. The trial judge made no reference to the testimony of Mr. Whitford and Mr. Whitcomb regarding the inapplicability of RQD data to determining the strength of rock. Because Bird relied heavily upon RQD data in making its assumptions about which rock could be dug and which would require excavating by way of hydraulic breakers, the trial judge should have expressly dealt with the only evidence that addressed that issue.

C. *Misinterpretation of "very severely fractured" rock by Bird's Estimator*

[30] The fact that "very severely fractured to fractured grey laminated shale" was encountered at higher elevations than anticipated was an integral component of Bird's claim based upon a change in soil conditions. It claimed the more "solid" rock at a higher elevation forced it to start using hydraulic breakers earlier than anticipated. Bird presumed that fractured shale could be more easily excavated than "solid rock". Here, I would make two observations: (1) As already indicated, the Conquest Report described only two types of soil: fill and bedrock; and (2) the words "solid rock" are not found in the Report. The trial judge, in adopting Bird's language, explained Gould's position in these terms:

> In preparing his bid, Mr. Gould adopted Bird's calculations for the volume of material to be excavated and priced the job for the estimated 15,786 cubic meters for the MAJORITY SHALE ROCK, FRACTURED ROCK EXCAVATION portion which he understood could be excavated with large excavators at $22.00 per cubic foot for a price of $347,292.00 and for the estimated 2,355 cubic meters for the SOLID ROCK portion that would require mechanical breaking of the rock at $75.00 per cubic meter for a price of $176,625.00. Gould's total price for this portion of the contract was $523,917.00. [Emphasis in original]

[31] Importantly, the trial judge concluded that Bird's assumption that fractured shale bedrock could more easily be excavated was "reasonable". In making such a conclusion regarding the reasonableness of Bird's assumption, the trial judge ignored the evidence of Mr. Whitford, which, once again, was unchallenged. Mr. Whitford described fractured shale as similar to the pages of a book. Whether rock featuring such fractures can be excavated by digging, or requires the more expensive process of hydraulic breaking, is not determined by the presence of the fractures but by "[…] the joints and the condition of the joints". He said:

> […] and in order for me to determine whether the – whether that would be rip[p]able, dig[g]able or whatever,

> I'd have to know if the joints were tight, loose, filled with soil, filled with water, heater locked, cemented or whatever and it would all – The thing about, you know, if you just take one of these examples here, one of these books, you think of that as the rock mass and that's and let's say that the – you know it's sitting like that and these are the joints. Well, we can open these pages fairly easily, fairly straight forwardly because there's nothing between them. But, if in the same token I took those pages and glued them all together like interlock them or had a lot of friction between them, you couldn't open them. So, that would make the whole thing much, much more difficult […]

[32] In fairness to Bird and Gould, Mr. Whitford testified that, in his opinion, there was insufficient information in the Conquest Report to determine the characteristics of the joints. Had he been consulted, he would have recommended going to the site with the "back hoe you're going to use […] do a few test bits and see what you see".

[33] I am of the view that Bird's and Gould's assumptions regarding the depth at which the "solid rock" started were unreasonable. Those assumptions had nothing to do with the fact the shale was fractured. The assumptions in that regard were as unreasonable as failing to inform oneself about the use of the standards applied by Conquest, and the impact of MPa values and RQD data on whether the bedrock could be dug with an excavator or would require the use of hydraulic breakers.

D. *Cost of properly informing oneself regarding the contents of the Conquest Report*

[34] Counsel for the respondents contend that bidders in the position of the respondents should not be required to conduct independent geotechnical assessments. They argue that such a requirement would add to the cost of bidding and would unnecessarily limit the pool of bidders. The result would be less competitive bids. This same argument was made before the trial judge, who agreed with their contention. He stated:

> Further, it was reasonable, if not necessary, for Bird and Gould to consider the information in the report [Conquest

> Report] to prepare their tenders. It was the only geotechnical soils information available at the time. In hindsight, it might have been prudent for Bird and/or Gould to engage their own expert to either prepare a separate report for them or to review the Conquest report or to dig a test pit on site to confirm whether or not the rock could be dug by a large excavator, however, the costs of obtaining a geotechnical report are significant, estimated to be up to $15,000.00 for one in a case such as this. [para. 79]

[35] The trial judge's conclusion that potential costs prohibited Bird and Gould from informing themselves regarding the proper interpretation of the Conquest Report is, in my view, simply not supported by the evidence. There was no evidence the errors Bird, a large Canada-wide construction corporation, made in assessing the Conquest Report could only have been avoided by obtaining its own $15,000 geotechnical report. With respect, it is self-evident that a summary review by a geotechnical engineer or someone with experience in the field could have informed Bird about the meaning and impact of RQD and MPa data without the need for a full-blown investigation. In fact, the following exchange between Mr. Whitford and the Province's counsel puts this whole issue of the cost of obtaining a "proper interpretation" of the Conquest Report in perspective:

> **Q:** If Bird Construction had come to you and requested a review of the Conquest report and asked your comments on the method of excavation, what would you have charged them?
> **A:** For Bird?
> **Q:** For that kind of review?
> **A:** Nothing.
> **Q:** Why is that?
> **A:** They're basically a good client.

[36] Thus, I find the trial judge erred in choosing to rely upon the potential cost of a full-blown geotechnical report to excuse Bird's errors in interpreting the Report. That error, to the extent it was used to justify the reasonableness of the assumptions made by Bird and Gould about the soil conditions, was palpable and overriding.

[37] Here, I wish to add that the respondents aggressively advanced the position that any requirement for bidders to conduct their own soil investigation or inquiry would result in less competitive bidding and increased costs to the Province. I find such a position does not "square" with the fact that Gould initially offered to perform its sub-contract for $1.42 million, but was encouraged by Bird to reduce it to $1.25 million on Bird's suggestion that the difference could be made up via "change orders". I also note that, according to the evidence, the next highest bid for the earthwork component (that performed by Gould) was $1.37 million. While the implications of Bird's suggestion that Gould might increase its revenue by means of "change orders" was not argued before us, I would simply observe that bidding based upon planned change orders does nothing to ensure bids are competitive.

E. *Conclusion regarding liability*

[38] *Waxman v. Waxman*, [2004] O.J. No. 1765 (C.A.) (QL), leave to appeal refused [2004] S.C.C.A. No. 291 (QL), is instructive regarding the type of error that is alleged in this appeal: "the mere absence of any reference to evidence in reasons for judgment does not establish that the trial judge failed to consider that evidence. The appellants must point to something in the trial record, usually in the reasons, which justifies the conclusion that the trial judge failed to consider certain evidence" (para. 343). The Court provides an approach to deal with this type of error:

> When assessing an argument that a trial judge failed to consider relevant evidence, it is helpful to begin with an overview of the reasons provided by the trial judge. If that overview demonstrates a strong command of the trial record and a careful analysis of evidence leading to detailed findings of fact, it will be difficult for an appellant to suggest that the mere failure to refer to a specific piece of evidence demonstrates a failure to consider that evidence. The failure to refer to evidence in the course of careful and detailed reasons for judgment suggests, not that the trial judge ignored that evidence, but rather that she did not regard that evidence as significant. [para. 344]

[39] With respect, a review of the trial judge's reasons reveals he simply lifted two unrelated excerpts, those being the references to "very weak to weak" rock and the method of excavation for "stronger" rock, from a lengthy and technical report to justify the change in soil conditions claim. The reasons do not reveal a "careful analysis of evidence leading to detailed findings of fact" (*Waxman*, at para. 344), but rather demonstrate conclusions premised primarily, if not exclusively, on a cursory analysis of one excerpt from the Conquest Report. The reasons do not explain how Bird and Gould's assumptions could be reasonable in light of the expert witnesses' testimony regarding MPa values and their impact upon the "diggability" of the rock; they do not address the respondents' failure to take steps to inform themselves of the soil standards applied by the Province; they do not deal with the Province's response to Bird's reliance on the RDQ data; and, they do not address Mr. Whitford's unchallenged testimony regarding the impact of the nature of the fractures upon the method of excavation. The conclusion the trial judge reached is one that endorses the approach taken by Bird's engineers and estimators, which was to make assumptions that were not only erroneous, but which could have been tested by a simple phone call to a geotechnical engineer. In all of these circumstances, I am convinced he failed to consider critical evidence, and that his conclusion on the reasonableness of the assumptions is one that is tainted with palpable and overriding error.

[40] In my respectful view, when the Methods and Means clause is considered not in isolation, but in the context of the entire Conquest Report, together with the rest of the evidence adduced at trial, much of which was unchallenged or uncontradicted, the inescapable conclusion is that the assumptions made by Bird and Gould regarding the "diggability" of the rock are simply unreasonable. Thus, the Change in Soil Conditions clause was not engaged, and the Province bears no liability for the additional costs.

[41] For these reasons, I would allow the appeal and set aside the judgment issued in the Court of Queen's Bench.

V. Analysis – Damages

[42] In view of my conclusion the Province is not liable, it is not necessary to deal with the appeal against the damage assessment. However, I opt to do so in any event.

[43] Every plaintiff has a two-fold duty with respect to damages: he or she must first prove them, and then must take reasonable steps to mitigate them. If it is alleged the plaintiff has failed to mitigate, the defendant must prove that mitigation is possible and that the plaintiff has failed to make reasonable efforts to do so: *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2012 SCC 51, [2012] 2 S.C.R 675, at para. 24.

[44] A trial judge's conclusion with respect to damages is entitled to deference in the absence of: (1) an error of principle of law, (2) a misapprehension of evidence, (3) a conclusion based on an absence of evidence, (4) a failure to consider relevant factors, (5) a consideration of irrelevant factors, or, (6) a wholly erroneous or palpably incorrect assessment: see *Naylor Group Inc. v. Ellis-Don Construction Ltd*., 2001 SCC 58, [2001] 2 S.C.R. 943, at para. 80; *AMEC Americas Limited v. MacWilliams*, 2012 NBCA 46, 388 N.B.R. (2d) 254, at para. 54, leave to appeal refused [2012] S.C.C.A. No. 304 (QL); and *Covered Bridge Golf and Country Club v. Schurman*, 2009 NBCA 1, 340 N.B.R. (2d) 168, at para. 30. In this case, I am satisfied the trial judge erred in applying the principles of law as they relate to damages arising from Crown construction contracts, thereby requiring appellate intervention (see *Consolidated Development Co. Ltd. v. Evariste M. Diotte and E.M. Diotte Construction Inc.*, 2014 NBCA 55, 425 N.B.R. (2d) 271, at para. 10).

[45] In this part of my judgment, I intend to address 3 questions: (1) Did Gould properly prove the damages claimed by him; to which I respond in the negative; (2) Did Gould take steps to mitigate its damages; to which I respond in the positive; and (3) What is the appropriate award of damages in the circumstances.

A. *Gould's proof of the damages claimed*

[46] When Bird was preparing the adjusted soils claim, it twice requested "breakdown information" on the extra costs incurred by Gould. Essentially, Bird requested Gould provide the breakdown of the costs of the extra rock-breakers required to accomplish the excavation arising out of the perceived change in soil conditions.

[47] The following sets out the exchange between Mr. Gould and the Province's counsel on this issue:

> **Q:** […] Do you recall that information being requested from you at the meeting?
> **A:** I can't remember.
> **Q**: Then there were at least two e-mails sent to you requesting that information?
> **A:** There might have been. I can't remember.
> **Q:** Well let's take a look at Exhibit 33, Tab B, page 55.
>
> […]
>
> **Q:** Sixty-five.
> **A:** Sixty-five. Okay.
> **Q:** Okay, the e-mail at the bottom was sent first?
> **A:** You (inaudible) as discussed, can you forward the breakdown information to us on excavator – is that the one you're referring to?
> **Q:** Yes. For backup to the claim.
> **A:** Okay.
> **Q:** To DSS, that's Department of Supply and Services, who have been asking for this information, so it would be prudent to get working on this.
> **A:** Yes.
> **Q:** So did you get working on it?
> **A:** I don't know.
> **Q:** Did you ever supply the information to Bird?
> **A:** I don't think we did.
> **Q:** Why not?
> **A:** I don't know.
> **Q:** Okay. And on June the 30th, Mr. DeWinter again wrote to you and said any updates on this information.
> **A:** Okay.

> **Q:** So did you update Mr. DeWinter and supply the information to him?
> **A:** I don't know if I did or not to be honest with you. Probably not because I never really actually – I mean we submitted – we agreed on the cubic meter number. We put the bill in at the cubic meter. He's requesting this stuff, we were busy on site, year, probably I should have, but yeah, I don't think I did. No.

[48] I would note that the reference to an agreement on the "cubic meter number" (hereinafter referred to as "unit price basis") has nothing to do with any agreement with the Province. Bird decided to forward the claim to the Province on a unit price basis, in part, because Gould did not or could not provide the "breakdown" of actual additional costs, as requested.

[49] General Condition 47 of the contract required Bird to maintain records of the actual cost of the additional work. While Bird made its best effort in June 2010 to obtain those records from Gould, they were not provided. Gould claims it could not provide the information at trial because it lost its records during a fire at Mr. Gould's residence in October 2010. However, the fire loss does not explain why the information was not forwarded to Bird at the time it was requested in June 2010.

[50] General Condition 43, which prescribes an assessment of damages based upon a "unit price table", does not apply in circumstances involving lump sum contracts. Bird does not contest that it bid the contract on a lump sum basis and Gould does not contest that it contracted with Bird for the lump sum amount of $1.25 million. In *Goodfellow's Trucking Ltd. v. Province of New Brunswick*, 2005 NBCA 73, 288 N.B.R. (2d) 97, at para. 35, the Court held that a claim under General Condition 12 must be assessed on the basis of the provisions of the contract. In that case, the Court upheld an assessment based upon a cost-plus analysis pursuant to General Condition 45. This is the same approach that was adopted in *Miller Contracting Ltd. v. Canada*, [1996] F.C.J. No. 1292 (C.A.) (QL), where the Court concluded that since the construction contract "was a lump sum contract with no unit prices specified, the method of calculating the cost of

work qualifying for extra payment" (para. 11) in accordance with the soil condition clause should be determined by the cost plus clauses in the standard contract.

[51] Gould and Bird failed to prove damages based on a "cost-plus basis". As a consequence, the trial judge applied a unit price basis in assessing the damages. Based upon the language of the contract and the law set out in *Goodfellow's Trucking Ltd*., I am of the view he erred in law. If damages were not proven on a cost-plus basis, it was not open for the trial judge to automatically default to a "unit price" basis for their assessment. If the cost-plus approach is not employed, the defendant is entitled to the least burdensome award of damages

B. *Did Gould take steps to mitigate its Damages?*

[52] The answer to this question is evident. Mr. Gould has a long-standing business relationship with Andrew Simpson, another contractor in the Saint John area. Mr. Simpson needed shale and trucks with which to haul it. Gould needed rock-breakers. Gould had access to shale and owned trucks. Mr. Simpson owned rock-breakers. The two made an exchange. As a result of their barter, Gould was able to limit its losses.

C. *Assessment of Damages*

[53] The cost-plus approach referred to in the Contract and adopted in *Goodfellow's Trucking Ltd*. is informed by the principle that the amount of damages to be awarded constitutes the smallest amount payable by the defendant to the plaintiff. In other words, once Bird failed to prove its claim on a cost-plus basis, the trial judge was required to make an award that was the least burdensome on the Province. Such an approach finds support in the text Thomas G. Heintzman & Immanuel Goldsmith, *Canadian Building Contracts*, 4th ed. (Toronto: Carswell, 1988) (loose-leaf updated 2013, release 3), where the authors state:

> In calculating the damages to which a party to a contract is entitled, the court will assume that the defendant could

> have insisted upon a method of performance least onerous to him, in that it results in the smallest amount of damages payable by him. [ch. 6 at 10.2]

[54] See also *Hamilton v. Open Window Bakery Ltd*., 2004 SCC 9, [2004] 1 S.C.R. 303, at para. 11, in which the Court quoted with approval the following excerpt from *Cockburn v. Alexander* (1848), 6 C.B. 791, where Maule, J. states:

> Generally speaking, where there are several ways in which the contract might be performed, that mode is adopted which is the least profitable to the plaintiff, and the least burthensome to the defendant.

[55] Not only did the trial judge err in adopting a unit price approach to damages, in the absence of proof of damages based upon a cost-plus analysis, he failed to adopt an approach which would be the least burdensome for the defendant.

[56] Given that the trial judge applied the wrong legal principles to the assessment of damages, and the record is sufficient to decide the issue, this Court may proceed with its own assessment pursuant to Rules 62.21(1) and 1.02.1 of the *Rules of Court of New Brunswick,* N.B. Reg. 82-73: see *Leger v. G & G Carnival Amusements Inc. et al*., 2015 NBCA 20, [2015] N.B.J. No 79 (QL), at para. 19; *Johnson v. State Farm Fire and Casualty Company*, 2015 NBCA 4, [2015] N.B.J. No. 13 (QL), at paras. 19-20; *J.H. v. T.H.*, 2014 NBCA 52, 422 N.B.R. (2d) 388, at para. 11.

[57] In the event the Change in Soil Conditions clause applies, there is no doubt that some award of damages is appropriate. The Province appears to admit as much when it attempted, at trial, to estimate Gould's losses. It made its estimate based upon : (i) Bird's daily progress reports, (ii) evidence from its own engineer who was on site for much of the time, (iii) photographic evidence of equipment that was on site at various times, and (iv) the equipment rental rates set out in the *Machine Rental Regulation*, N.B. Reg. 82-113 under the *Crown Construction Contracts Act*. However, rather than apply the Province's estimate of Gould's losses, I prefer to rely on the most sound evidence of

damages which was before the trial judge; namely, the evidence from Mr. Gould and Mr. Simpson regarding their exchange of trucks and shale for the use of rock-breakers.

[58] Mr. Gould testified that Gould rented extra rock-breaking equipment from Mr. Simpson due to the unforeseen "stronger" rock. Mr. Gould denied that Mr. Simpson's provision of rock-breakers was the result of an exchange for the excavated shale, but he also testified that he could not remember whether or how Mr. Simpson was paid for the breakers. Mr. Simpson, on the other hand, testified that he provided the rock-breaking equipment and operators to Gould in exchange for the shale delivered by Gould's trucks to Mr. Simpson's property, for which there was no invoice from him to Gould. Mr. Simpson considered the exchange to be "fair". He also testified that the delivered shale was worth $5 per ton ($3 to $4 per ton for delivery, leaving the rock itself worth $1 to $2 per ton). The total "stronger" rock excavation, applying the industry standard to convert shale rock to tonnage, amounted to 43,022 tons. I note that this amount of 43,022 tons presumes the Change in Soil Conditions clause applies to all of the "stronger" rock. This presumption clearly favours Gould, who entered into its contract with Bird on the assumption that the excavation of some of the bedrock would require the use of mechanical rock-breaking equipment. Applying the $5 per ton value of the shale delivered to Mr. Simpson, the damages suffered by Gould total $215,110. I would therefore award damages to Gould in that amount.

VI. Cross-Appeal

[59] Bird cross-appeals from the trial judge's decision to disallow its claim for mark-up, supervision costs, bonds and insurance. It contends the evidence in support of those amounts was unchallenged and is therefore sufficient to prove the additional claims. Again, although I do not need to address the cross-appeal in light of how I would dispose of the appeal, I opt to state that, on this point, I would agree with Bird. The trial judge appears to have disregarded the evidence of Bird's manager, Durck deWinter in this regard. As has already been indicated, ignoring unchallenged evidence amounts to palpable and overriding error where that evidence has an impact upon the outcome. But

for how I would dispose of the appeal, I would have allowed the cross-appeal based upon the following amounts which I have rounded to the nearest dollar:

General Condition 45(1)(b) mark-up of 5%:		$10,756.00
Supervision (General Conditions) for 3 weeks		$21,544.00
Bonds		$1,611.00
Insurance		$1,611.00
	TOTAL:	**$35,522.00**

VII. Conclusion

[60] I would allow the Province's appeal, set aside the judgment, and dismiss the action, with costs at trial to the Province as calculated using Scale 3 of Tariff A under Rule 59 using $715,000 as the amount involved. It follows that I would dismiss the cross-appeal. In accordance with Note 1 of Tariff A under Rule 59, I would order the respondents to pay costs on appeal to the Province in the amount corresponding to 40% of the sum determined to be payable as trial costs.

[61] Since the hearing of this appeal, I have been appointed to another Court. According to s. 8(6.1) of the *Judicature Act*, R.S.N.B. 1973, c. J-2, I may continue to exercise my powers as a judge of the Court of Appeal of New Brunswick for six months from the date of my appointment. To ensure this time frame is respected, I would order pursuant to s. 24(2) of the *Official Languages Act*, S.N.B. 2002, c. O-0.5, that the English version of these reasons be published first, with the French version to follow.