Court of Appeal File No. COA-25-CV-0659
Court File No. CV-24-00715321-00CL

COURT OF APPEAL FOR ONTARIO

B E T W E E N

CONSTANTINE ENTERPRISES INC.

Applicant

– and –

MIZRAHI (128 HAZELTON) INC. and
MIZRAHI 128 HAZELTON RETAIL INC.

Respondents

SUPPLEMENTAL BOOK OF AUTHORITIES OF THE APPELLANT, DAVID BERRY

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See paras 121-124

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Charters v. Jordan,* 2024 BCCA 351

Date: 20241017
Docket: CA49195

Between:

Jolene-Ann Charters

Appellant
(Plaintiff)

And

Gary Lewis Jordan and Phung Nhi Luong

Respondents
(Defendants)

Before: The Honourable Madam Justice Fenlon
The Honourable Mr. Justice Abrioux
The Honourable Madam Justice Horsman

On appeal from: An order of the Supreme Court of British Columbia, dated June 5, 2023 (*Charters v. Jordan*, 2023 BCSC 954, Vancouver Docket M200182).

Counsel for the Appellant:	D. Bradshaw E. Lay
Counsel for the Respondents:	M.H. Wright
Place and Date of Hearing:	Vancouver, British Columbia September 6, 2024
Place and Date of Judgment:	Vancouver, British Columbia October 17, 2024

Dissenting Reasons by:
The Honourable Mr. Justice Abrioux

Written Reasons by:
The Honourable Madam Justice Horsman (Page 25, para. 97)

Concurred in by:
The Honourable Madam Justice Fenlon

Summary:

The appellant, who was 29 at the time of trial, was struck by the door of a parked car as she was riding her bicycle. Her injuries included a fractured right wrist. At the time of trial, the appellant continued to experience pain in her wrist, and she required accommodations in her employment as a server and a residential painter. The trial judge found that the appellant had reached maximum medical recovery within a few months of the accident. The trial judge concluded that the wrist injury had not affected the appellant's ability to earn an income, and he awarded no damages for future loss of earning capacity. The appellant says the judge made factual and legal errors in reaching this conclusion. Held: Appeal allowed.

Majority *(per Justice Horsman, Justice Fenlon concurring): An award of $80,000 for future loss of earning capacity is substituted for the judge's award of $0. The judge erred in failing to address the question of whether there was a real and substantial possibility of a future loss of income, which was a distinct question from whether the appellant had suffered an income loss by the time of trial. The fact that the appellant's symptoms were currently manageable did not answer the question of whether they might cause some pecuniary loss over the remaining decades of the appellant's working life. The required analysis could fairly be done on the record and the trial judge's findings. There was no need to remit the matter to the trial court.*

Dissent *(per Justice Abrioux): No reviewable error has been established. The judge articulated and correctly applied the legal framework. While there were alternative conclusions to be drawn, his dismissal of the future loss of earning capacity claim was supported by the facts as he found them, and the inferences drawn from the facts he found were reasonable.*

Reasons for Judgment of the Honourable Mr. Justice Abrioux:

Introduction

[1] The appellant, Ms. Charters, was injured in a motor vehicle accident in which she was riding her bicycle. At the time of trial, the principal ongoing injury was to her right wrist. At trial, Ms. Charters was awarded non-pecuniary damages, damages for past loss of income earning capacity, damages for costs of future care, and special damages. She also advanced a claim for loss of future earning capacity, which the trial judge dismissed.

[2] Ms. Charters argues that the trial judge's decision not to award damages for loss of future earning capacity warrants intervention by this Court because it is based upon a palpable and overriding error of fact as well as an error of law.

Specifically, she says that having found the wrist injury might lead to a future loss of capacity, the judge committed a material error in that he forgot, ignored, and/or misconceived the evidence in concluding that Ms. Charters had not established a "real and substantial possibility" that this injury would lead to a future pecuniary loss.

[3] For the reasons that follow, I would dismiss the appeal.

Background

[4] On January 12, 2019, Jolene-Ann Charters was riding her bicycle in Vancouver when she was struck by the door of a parked car that opened in front of her. Ms. Charters was thrown forward, landing on her left side, left elbow, and right wrist. She was transported by ambulance to the hospital, where an X-ray confirmed a right wrist fracture. Approximately one week after the accident, she reported feeling pain and discomfort in her right hip. A few months later, in May 2019, she reported mild knee pain.

[5] The respondents admitted liability for the accident.

[6] Ms. Charters was 25 years old at the time of the accident, and 29 at the time of trial. She was active, engaging in a variety of outdoor activities and exercising regularly at the gym. Following the accident, she reported intermittent pain and limitations posed primarily by her wrist, but for the most part continued to engage in the same activities as she had prior to the accident.

[7] Before the accident, Ms. Charters had a varied employment and educational history. She made several unsuccessful attempts to pursue post-secondary education, attending college from 2011 to 2013, one semester in 2015, and one semester in 2017. She worked during various periods of time as a server, landscaper, baker, care aide and painter.

[8] At the time of the accident, Ms. Charters was working as a baker. She missed six weeks of work at the bakery because of the accident. Three weeks after returning to work, she left that position for reasons unrelated to the accident. She

then worked as a server until early 2020, when she moved to Powell River to be closer to her father. At that time, she began to work as a personal care aide. In March 2021, Ms. Charters commenced work as a server to supplement her income from her job as a care aide. Shortly thereafter, this employment was terminated because her client was concerned that Ms. Charters might be exposed to COVID-19 while working as a server.

[9] In April 2021, Ms. Charters started to work as a house painter with DK Painting. She worked in this position until November 2022, when the painting business shut down temporarily over the winter months. This work resumed in 2022. During the summer of 2022, Ms. Charters also worked as a server.

[10] Ms. Charters testified that, as a result of her injuries, she experienced certain challenges in performing her duties as a server, care aide, and painter. Her primary issue was intermittent soreness and fatigue in her wrist, which caused her discomfort when carrying trays as a server and completing various physical tasks as a painter and care aide. When working as a painter, she was also fatigued to the point that she declined extra work opportunities.

[11] Ms. Charters' long-term career plans were uncertain before and after the accident. She considered working as a massage therapist or carpenter, but took no specific steps towards pursuing those vocations. Following the accident, she completed an online course to upgrade her high school math. At the time of the trial, she was taking an online course to upgrade her high school biology.

The Trial Reasons for Judgment

[12] In reasons for judgment indexed at 2023 BCSC 954, Basran J. found that the accident caused Ms. Charters' right wrist fracture, which was her most significant and enduring injury. He accepted that the accident may also have triggered some mild hip and knee discomfort, but found that those injuries did not meaningfully restrict Ms. Charters aside from preventing her from doing specific exercises and causing her some soreness on long hikes: at paras. 53–57.

[13] The judge awarded Ms. Charters' $70,000 for non-pecuniary damages, $2,500 for costs of future care, and $1,150 for special damages.

[14] He also awarded Ms. Charters $5,000 for past loss of income which reflected the wages she lost during the six weeks she was absent from work at the bakery following the accident: at para. 116. Aside from those six weeks, the judge was not satisfied that the gaps in Ms. Charters' work were attributable to the accident. He did not accept Ms. Charters' assertion that but-for the accident, she would have continued to work full-time at the bakery until moving to Powell River: at paras. 68, 72, 75, 111, 113.

[15] Central to this appeal are the judge's findings that:

> [77] In April, Ms. Charters began working as a painter for DK Painting. Darren Kochems owns and operates this business. He is a friend of Mr. McClinchey. The tasks Mr. Kochems assigned to Ms. Charters were quite physical. They included priming, sanding, brushwork, rolling, and cleaning up work sites. He was aware of her wrist injury and slightly modified her duties accordingly.
>
> [78] The painting work she performed for DK Painting is similar to the work she previously did for another painting company except it involves mostly interior painting. In her previous painting position, she had no issues or problems with her wrists but at DK Painting her wrist occasionally became sore and fatigued. She sometimes, but not more than 12 times, wore a wrist brace to ameliorate her right wrist pain symptoms. Approximately weekly, this work caused wrist soreness at the end of a shift but it did not cause pain symptoms in her hip or knee.
>
> [79] Mr. Kochems recalled that Ms. Charters wore a wrist brace approximately three to five times while working and she missed work two or three times because of medical appointments.
>
> [80] Mr. Kochems offered Ms. Charters additional work hours but she was unable to do more work for him because of her online studies and part-time work as a server, not because of pain symptoms caused by the Accident.
>
> [81] Ms. Charters stopped working for Mr. Kochems in November 2022 because he decided not to operate his painting business during the winter months. Mr. Kochems was entirely satisfied with Ms. Charters' work performance and he intends to rehire her when he resumes operating his painting business in 2023.
>
> [82] While working full-time for Mr. Kochems during the summer of 2022, Ms. Charters also worked 15 hours a week as a server in a bistro, for which she earned approximately $700 per week.
>
> [Emphasis added.]

[16] The judge declined to award Ms. Charters damages for future loss of income earning capacity. In his view, Ms. Charters' discomfort and pain resulting from her wrist injury was more appropriately dealt with as part of her claim for non-pecuniary damages: at para. 131.

[17] At para. 106 of his reasons, (quoted at para. 63 below) the judge referred to the three-step analytical framework for assessing claims for damages in respect of a loss of future earning capacity, which this Court outlined in *Rab v. Prescott*, 2021 BCCA 345 at para. 47:

[18] At the first stage of the *Rab* analysis, the judge found that because Ms. Charters' work as a painter and server aggravated her wrist injury, "it is possible that this injury could lead to a future loss of capacity": at para. 122.

[19] As to the second stage, the judge stated:

> [130] I accept that Ms. Charters' wrist injury might lead to a loss of capacity but I am not convinced that there is a real and substantial possibility that this injury will cause a future loss of income. It has not affected her ability to earn income in varied roles as a care aide, server, or painter, all of which involve some level of physical exertion. Accordingly, I do not find that she has established that she is less capable overall, less marketable, or unable to take advantage of all jobs that may be available to her because of this injury.
>
> [131] I therefore conclude that Ms. Charters is not entitled to damages for future loss of income-earning capacity and that the periodic pain symptoms she experiences are more appropriately dealt with as part of her claim for non-pecuniary damages.

[20] In reaching this conclusion, the judge accepted the evidence of some of the experts who testified at the trial, finding that:

(a) Despite her occasional wrist discomfort, Ms. Charters is physically capable of working as a residential painter and server: at para. 124;

(b) Dr. Barry Vaisler (Orthopaedic Hand Surgeon) and Dr. J.P. Thompson (Orthopaedic Surgeon) opined that Ms. Charters' wrist symptoms are unlikely to degenerate: at para. 125;

(c) Mr. Jeff Padvaiskas (Functional Capacity Evaluator) opined that the appellant's future vocational abilities as a painter and server are consistent with her work history; the wrist injury is in the nature of discomfort or annoyance, rather than disability: at para. 126; and

(d) While Ms. Charters aimed to become a carpenter or registered massage therapist, she had not taken any steps towards those objectives. The evidence did not establish "that she would have successfully pursued these careers, so…it is not necessary to consider them for the purpose of determining if there is a real and substantial possibility that [Ms. Charters'] wrist injury will lead to a future income loss": at para. 128.

[21] Mr. Nicholas Altieri, an occupational therapist who provided expert evidence on behalf of Ms. Charters, was of the view she "may not be able to durably continue working as a painter and server". The judge did not accept this opinion because "[Ms. Charters] had no difficulty finding and keeping these positions over the past few years": at para. 127.

[22] As I shall return to below, these findings, including the impugned finding at para. 80 of the reasons (quoted at para.15 above) were made in relation to Ms. Charters' claims with respect to *both* past and future loss of earning capacity.

The Issues on Appeal

[23] As framed by the appellant, the issues on appeal are whether the judge erred by committing:

(a) A palpable and overriding error of fact and/or misapprehension of evidence by finding that the appellant did not turn down additional hours from her painting job as a result of pain symptoms caused by the accident;

(b) A palpable and overriding error of fact and/or misapprehension of evidence by finding that the appellant turned down hours from her painting job as a result of online studies and part-time serving work; and

(c) An error of law by improperly assessing loss of future earning capacity.

Discussion

The Standard of Review

[24] Ms. Charters submits that the trial judge made errors of fact and law in reaching his decision not to award damages for future loss of earning capacity.

[25] Ms. Charters' first two grounds of appeal—challenging the trial judge's findings that she did not turn down additional work because of her wrist injury, but rather because of her other work and online studies—raise potential errors of fact. The standard of review applicable to questions of fact, including factual inferences, is "palpable and overriding error": *Housen v. Nikolaisen,* 2002 SCC 33 at paras. 19–23.

[26] Ms. Charters' third ground of appeal challenges the trial judge's decision not to award damages for future loss of earning capacity. In particular, she submits that the trial judge made an error of law in his application of the framework for assessing future loss of earning capacity. In her factum, Ms. Charters characterizes this as an error of law. However, a trial judge's assessment of damages is a question of mixed fact and law: *Gregory v. Insurance Corporation of British Columbia,* 2011 BCCA 144 at para. 14; *Ledwon v. Baines,* 2021 BCCA 239 at para. 16.

[27] For a question of mixed fact and law, the standard of review will only be correctness if the legal principle at issue is readily extricable from the factual context: *Housen* at para. 27. A trial judge's decision on whether to award damages is generally not such a case. Instead, the well-recognized standard of review applicable to damage awards is highly deferential, and an appellate court is not to intervene merely on the basis that it would have come to a different decision:

Westbroek v. Brizuela, 2014 BCCA 48 at para. 27; *Deegan v. L'Heureux,* 2023 BCCA 159 at para. 41. As this Court emphasized in *Deegan v. L'Heureux*:

> [41] … An appeal court may intervene only where there was no evidence upon which the trial judge could have reached their conclusion, where the judge proceeded upon a mistaken or wrong principle, or where the result at trial was so inordinately high or low that it must be a wholly erroneous estimate of the damage: *Woelk v. Halvorson*, [1980] 2 S.C.R. 430, 1980 CanLII 17 at 435–436.

The Parties' Positions

[28] Ms. Charters argues that the judge misapprehended certain facts, challenging his findings that:

- She did not miss additional work hours as a painter because of pain symptoms caused by the accident; and
- She turned down additional work hours as a painter because of online studies.

[29] In her factum, Ms. Charters argues that she testified that she turned down additional hours at DK Painting due to wrist symptoms, and emphasizes that she was not cross-examined on this evidence. Furthermore, Ms. Charters submits that the judge's finding that she did not miss time from work due to pain symptoms, but rather because of online courses, "appears to originate from the ambiguous and speculative testimony of Mr. Kochems", her employer at the painting position: Appellant's Factum at para. 23. She asserts that these misapprehensions constitute palpable and overriding errors in that they were material and could reasonably have affected the judge's conclusions.

[30] The respondents' position is that the judge was not required to accept all of Ms. Charters' evidence. They acknowledge that the ongoing problems in her wrist satisfied the first stage of the *Rab* analysis, that is, that the evidence discloses a potential future event that could lead to a loss of earning capacity. At the second stage, however, they say it was for Ms. Charters to prove that there was a real and substantial possibility that this minor ongoing problem would cause a pecuniary loss

in the future. The judge did not accept that she had done so and there was evidence on the record from both the lay and expert witnesses to which he referred in his reasons, that supported this conclusion.

Analysis

The Alleged Errors of Fact

[31] In light of Ms. Charters' submission that the trial judge materially misapprehended her and Mr. Kochems' evidence concerning additional painting hours and other work opportunities, it is helpful to set out the key portions of that testimony, as set out in her factum.

[32] Ms. Charters testified that when she was offered additional painting hours, she turned down these hours because of the way that her body, specifically her wrist, felt. She further testified that there were a few occasions where she left early or took an extra day off because of her wrist issues:

> Q. Did you ever work any overtime in this position?
>
> A No.
>
> Q And was it ever offered to you?
>
> A It was, yes.
>
> Q Was overtime regularly available or was this an every once in a while type of thing?
>
> A Regularly available. Darren had -- he had many jobs lined up. There was always work – work available.
>
> Q What was the reason that you didn't work any of this overtime?
>
> A Because of the way my body felt, the way my wrist felt.
>
> Q Did you miss any time from this position as a result of wrist issues?
>
> A Yes, I do believe that there are a few occasions that I did leave early or, you know, he allowed me to take an extra day off.
>
> Q Do you believe that your wrist issues prevented you from working additional hours?
>
> A Yes.

[33] Mr. Kochems testified that during Ms. Charters' employment, he had offered her additional hours and that she had turned down these hours because of

exhaustion. He went on to testify that she had told him that she was unable to take on more work due to school and her part-time work as a server:

> Q Did you ever offer Ms. Charters more hours than the usual amount that she would typically work in a day?
>
> A Yes.
>
> Q And what did she say when you asked her?
>
> A She was just too exhausted after eight hours to work any more, but I did offer her more work, not saying more than eight hours a day, just more jobs that I had.
>
> Q So you offered her more work and what did she say to that offer?
>
> A No, she was unable due to -- due to her having to go to school and working part-time as a server.

[34] It was suggested to Mr. Kochems in cross-examination that Ms. Charters had turned down some jobs because of having to go to school or serving, and he agreed with this statement:

> Q For the work offers that you made, I understand that she turned down some jobs at times because of having to go to school or having a different parttime job; is that accurate?
>
> A Yes.

[35] Mr. Kochems then stated:

> Q So it seems at times there was a bit of a scheduling conflict from your understanding?
>
> A Yes.

[36] Ms. Charters submits that the judge lost sight of her testimony that she turned down hours as a painter due to exhaustion and her overall physical condition. She says the judge misstated Mr. Kochems' evidence and did not deal with her own evidence regarding the link between her wrist injury and her decision to turn down further painting opportunities. She also argues that Mr. Kochems' evidence regarding hours of work and her exhaustion was ambiguous and that the judge erred in not linking the exhaustion she experienced from work to her turning down Mr. Kochems' offers of further work and, furthermore, to the injury to her wrist.

[37] The respondents submit that this evidence does not assist Ms. Charters, because it was not established that the exhaustion was linked to her current condition, in particular to her wrist. They point to her very active lifestyle outside work, emphasizing that she returned to rock climbing two months after the accident (an activity that is physically demanding on the wrist), that she swam regularly, and that she went to the gym three times a week. They also point out that Ms. Charters had two jobs at various periods after the accident. The respondents say that all of this could well have resulted in exhaustion at the end of an eight-hour shift of residential painting.

[38] The respondents argue that it was for Ms. Charters "to tie down" the cause of her exhaustion, and they say that she failed to do so.

[39] They maintain that, in any event, the judge relied on other evidence in concluding that Ms. Charters declined further work due to her online schooling and her work as a server, as outlined at para. 126 of the reasons. This evidence included that of Dr. Vaisler, Dr. Thompson and Mr. Padvaiskas, who opined that Ms. Charters' ongoing wrist symptoms were more in the nature of an annoyance or irritation and were not disabling from a vocational perspective.

Applicable Principles

[40] At this juncture, it is helpful to review the principles that apply when an appellate court considers whether a trial judge has made a palpable and overriding error of fact or mixed fact and law.

[41] First, it is not necessary for a judge to expressly refer to every piece of evidence underlying a finding of fact. Rather, the question of whether a trial judge's reasons are sufficient, factually speaking, is a "very low bar" that is reached when the factual basis of a decision can be understood, looking to the reasons as well as the record, as the case may be: *R. v. G.F.,* 2021 SCC 20 at paras. 71–73. Only in a "very rare case" will a decision fail for factual insufficiency: *G.F.* at para. 71.

[42] In addition, appellate courts are to assess reasons for judgment in a way that is "functional and contextual", considering whether they explain the judge's decision in light of the evidence before the trial court, the submissions of the parties, and the manner in which the trial unfolded: *G.F.* at para. 69, citing *R. v. R.E.M*, 2008 SCC 51 at para. 17. Deficient reasons *alone* are not an independent ground for appeal: if the reasons are deficient on their face but the "what" and the "why" of the decision are clear based on the record, no error based on insufficiency has been committed: at para. 70, citing *R.E.M* at paras. 38–40 and *R. v. Sheppard,* 2002 SCC 26 at paras. 46, 55.

[43] It also is not for an appellate court to re-weigh the evidence a trial judge considers in coming to their decision, or to draw alternative inferences in the absence of a palpable and overriding error. As the Supreme Court of Canada articulated in *Housen* at para. 23:

> 23. We reiterate that it is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence. If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion. The appellate court is not free to interfere with a factual conclusion that it disagrees with where such disagreement stems from a difference of opinion over the weight to be assigned to the underlying facts.
>
> [Emphasis added.]

[44] This Court recently considered the appellate standard of review in *Lee v. Bolduc,* 2024 BCCA 7. Madam Justice Newbury (dissenting, though not on this point) further clarified that questions about whether a trial judge misapprehended evidence (as specifically alleged in this case), made unreasonable findings or inferences, or made inferences not supported by the evidence are to be addressed prior to applying the "palpable and overriding error" standard: paras. 17–21, adopted by the majority of the division at para. 46. If an appellate court is satisfied that any such errors have occurred, the next step is to consider whether the error is both "palpable" and "overriding": at para. 46.

[45] Historically, a “palpable” error has been described in several different ways: as an error that is “plainly seen” (*Housen* at para. 6), that is “obvious” and “determinative of the outcome of the case” (*Saloman v. Matte-Thompson,* 2019 SCC 14 at para. 33), and that “is in the nature not of a needle in a haystack, but of a beam in the eye”: *Saloman* at para. 33. An error will be “overriding” where it is determinative of a case’s outcome (*Saloman* at para. 33) in the sense that the decision cannot stand without it: *Benhaim v. St-Germain,* 2016 SCC 48 at para. 38.

The Trial Judge’s Findings

[46] In considering the loss of future earning capacity claim, the judge recognized that “Ms. Charters is relatively young and her right wrist symptoms have persisted since the Accident” and that her right hand was dominant: at paras. 20, 122.

[47] The judge considered the first and second stages of the *Rab* framework. The first stage of the framework considers whether the evidence discloses a potential future event that could lead to a loss of capacity: *Rab* at para. 47. At para. 122 of his reasons, the judge found that Ms. Charters had satisfied the first stage because:

> She works as a residential painter and server and doing so periodically aggravates her right wrist symptoms. Her work actively engages her right wrist so it is possible that this injury could lead to a future loss of capacity.

[48] The second step considers whether, based on the evidence, there is a “real and substantial possibility that the future event in question will cause a pecuniary loss”: *Rab* at para. 47. The trial judge found that Ms. Charters had not satisfied this second step, stating that:

> [129] Ms. Charters’ income has not varied substantially since the Accident. Taking into account the totality of the evidence regarding her work history since the Accident, I find that she will continue to work as a painter, server, or in another similar vocation.
>
> [130] I accept that Ms. Charters’ wrist injury might lead to a loss of capacity but I am not convinced that there is a real and substantial possibility that this injury will cause a future loss of income. It has not affected her ability to earn income in varied roles as a care aide, server, or painter, all of which involve some level of physical exertion. Accordingly, I do not find that she has established that she is less capable overall, less marketable, or unable to take advantage of all jobs that may be available to her because of this injury.

[49] Ms. Charters argues that, given that she testified that she had missed out on additional work opportunities because of pain in her wrist, and given that the trial judge found her evidence credible, it was a palpable and overriding error for the judge *not* to find a real and substantial possibility that a future event would lead to income loss. Ms. Charters says that the trial judge instead relied on the evidence given by Mr. Kochems, even though "credible and reliable evidence…was available from the appellant's testimony": Appellant's Factum at para. 28.

[50] With the benefit of hindsight, I accept that when considering the second step, the judge could have been more precise in explaining or giving context to his earlier finding that:

> [80] Mr. Kochems offered Ms. Charters additional work hours but she was unable to do more work for him because of her online studies and part-time work as a server, not because of pain symptoms caused by the Accident.

[51] In particular, the judge could have more expressly correlated Mr. Kochems' testimony on the question of Ms. Charters' exhaustion and reasons for turning down work to Ms. Charters' evidence on this issue. This, however, in my view, is an insufficient basis to overturn his decision, since the factual basis is intelligible (*G.F.* at paras. 71–73) even if it was not expressed as well as it could have been.

[52] It is worth noting, moreover, that even if the judge had found that Ms. Charters *did* turn down extra work because of exhaustion relating to her wrist injury, it would not necessarily follow that she had established that the wrist injury—which he had found "might lead to a loss of capacity"—posed, on the totality of the evidence before him, a "real and substantial possibility [of causing] a future loss of income": at para. 130. To assume otherwise conflates the first and second stages of the analytical framework set out in *Rab.*

[53] In addition, as noted above, it is not for an appellate court to second-guess the weight that a trial judge attributes to particular pieces of evidence. The question before this Court is not whether the judge could have approached the evidence before him differently. Rather, it is whether his conclusions have a basis in the

evidence (*G.F.* at paras. 71–73) and are not the result of a palpable and overriding error.

[54] Reading the reasons contextually and as a whole, I am not prepared to conclude that the judge forgot or misapprehended Ms. Charters' testimony of being exhausted at the end of an eight-hour shift due to her wrist injury such that she did prove a real and substantial possibility of a future event leading to an income loss.

[55] In any event, even if the judge did misapprehend this evidence, I am of the view that this would not have amounted to a material misapprehension or an "overriding" error that would have altered the outcome in this case. The dismissal of the future loss of income earning capacity claim can be maintained on the evidence in the record: *Healey v. Mault*, 2024 BCCA 100 at para. 56; *Tigas v. Close*, 2024 BCCA 223 at para. 47.

[56] This is because there was other evidence that the judge referred to in his reasons for reaching his conclusion that the claim for loss of future earning capacity should be dismissed. This included the evidence of Dr. Vaisler, Dr. J.P. Thompson, and the occupational therapist Mr. Padvaiskas. The judge also referred to the evidence regarding a pre-existing congenital problem with Ms. Charters' right wrist and referred to expert testimony that a custom-made splint would help alleviate her irritation and discomfort. There was also the evidence of Mr. Kochems that he expected Ms. Charters to return to work for him when he recommenced his painting activities in the spring of 2023 and that he was very pleased with her performance.

[57] It is worth noting that on the hearing of this appeal, Counsel for Ms. Charters acknowledged that there was no direct evidence linking her claim that she was exhausted after eight hours of work to her wrist injury. In the context of Mr. Kochems' testimony about Ms. Charters' exhaustion and reasons for turning down overtime work, the following exchange occurred between the Court and Counsel for Ms. Charters:

> Q Do you accept that from what is set out at paragraph ten of your factum, there isn't a link to the plaintiff being too exhausted after 8

> hours of work due to symptomology arising from the wrist injury? She is too exhausted? She's got another job, she's got other things which don't link to the wrist injury. That doesn't appear to be considered here. Do you accept that?
>
> A I do accept that. But taken in conjunction with the appellant's own testimony, I believe an inference could be drawn that the exhaustion could be connected to the wrist symptoms.

[58] Furthermore, Counsel for Ms. Charters acknowledged that there was evidence before the judge to support the inference that he *did* draw, which was that she turned down overtime offers due to school and other work and not because of her wrist:

> Q Was it not open to [the judge] in this case to draw the inference that the wrist injury did not cause Ms. Charters to turn down extra work?
>
> A It was open to the trial judge to make that inference.

[59] Ms. Charters cannot also maintain, in my view, that the judge's finding that she did not turn down additional work due to her wrist injury was the result of a palpable and overriding error.

[60] Ms. Charters also submitted that an alternative inference—that she turned down work because of her wrist injury—was available to the trial judge. That may be so, but it is not for this Court to re-weigh the evidence and draw alternative inferences absent an error of fact that is both palpable and overriding.

[61] Overall, I am satisfied that there was sufficient evidence on the record for the judge to find that Ms. Charters had turned down additional work as a painter because of school and other work commitments, and not as a result of exhaustion specifically linked to her wrist injury.

The Trial Judge's Dismissal of the Claim

[62] I will turn now to whether the trial judge erred in declining to award Ms. Charters damages for loss of future income earning capacity.

[63] The judge correctly summarized the applicable analytical framework, which was set out in *Rab,* stating:

> [106] In *Rab v. Prescott*, 2021 BCCA 345 at para. 47, our Court of Appeal set out a three-step process to assess damages for the loss of future earning capacity:
>
> 1) Whether the evidence discloses a potential future event that could lead to a loss of capacity?
>
> 2) Whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss?
>
> 3) If yes, the court must assess the value of that possible future loss, which must include assessing the relative likelihood of the possibility occurring.
>
> This three-step process applies to both past and future income earning capacity claims: *Siu v. Regehr*, 2022 BCSC 1876 at paras. 162–163.

[64] In *Rab*, Grauer J.A. observed:

> [45] In *Perren*, this Court directly addressed *Pallos*, clarifying that it was not authority for the proposition that, in the absence of any real possibility of a future loss, a plaintiff is nevertheless entitled to an award for loss of earning capacity. As the Court observed at para 21, "there was no dispute that Mr. Pallos had proven a real possibility of future loss". Madam Justice Garson put the question before the Court this way:
>
> > [4] Put another way, the question is whether a plaintiff who demonstrates a diminishment in her earning capacity no matter how slight, is entitled to some award of damages, even where she cannot demonstrate <u>any substantial possibility that that lost capacity will result in a pecuniary loss</u>.
> >
> > [Emphasis in original.]
>
> [46] Justice Garson concluded:
>
> > [32] A plaintiff must <u>always</u> prove...that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach, as in [*Steenblok v. Funk* (1990), 46 B.C.L.R. (2d) 133 (C.A.)], or a capital asset approach, as in *Brown*. The former approach will be more useful when the loss is more easily measurable, as it was in *Steenblok*. The latter approach will be more useful when the loss is not as easily measurable, as in *Pallos* and [*Romanchych v. Vallianatos*, 2010 BCCA 20].
> >
> > [Emphasis in original.]

[65] The standard of proof to establish a real and substantial possibility of a future event leading to income loss “is a lower threshold than a balance of probabilities but

a higher threshold than that of something that is only possible and speculative": *Gao v. Dietrich*, 2018 BCCA 372 at para. 34 (cited post-*Rab* in *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at para. 15).

[66] Since the judge, in my view, correctly stated the applicable law, the only question at this juncture is whether on the totality of the evidence the judge made a reversible error in concluding that Ms. Charters had not satisfied the second stage of the *Rab* framework.

[67] In my view, he did not. The judge's correct statement of the applicable principles, along with the evidentiary basis for his decision, which included that of the experts to whom he referred, are sufficient to dispose of Ms. Charters' challenge to his decision not to award damages for future loss of earning capacity.

[68] The judge's dismissal of this claim is also supported, and is entirely consistent with his treatment of Ms. Charters' claim for past loss of earning capacity, which Ms. Charters has not appealed.

[69] The judge summarized the parties' positions regarding the past loss of income earning capacity claim this way:

> [108] Ms. Charters asserts that but for the Accident, she would have continued working full-time at Artisan until January 2020 when she moved to Powell River. Taking into account her actual earnings during this period, an estimate of $1,000 for lost wages as a painter, deductions for income taxes and employment insurance premiums, and other contingencies, she claims net past wage loss of $19,000.
>
> [109] The defendants deny that Ms. Charters regularly worked 40 hours a week at Artisan and point out that there was only one pay period in which she recorded this many hours. They therefore deny that she would have earned $38,000 per year as a baker at Artisan.
>
> [110] The defendants note that Ms. Charters was able to do all of the required tasks as a server, with some modifications, and that aside from the two month period immediately after the Accident, she did not miss any time from work for reasons attributable to it. They assert that Ms. Charters is entitled to $5,000 in respect of past wage loss, taking into account the necessary deductions for income tax and employment insurance premiums.
>
> [Emphasis added.]

[70] In his analysis of the past loss of earning capacity claim, the judge stated:

> [114] I agree with Mr. Padvaiskas' finding that the occasional wrist pain experienced by Ms. Charters is more of a temporary irritation rather than disabling and limiting level of pain and discomfort. This is because Ms. Charters successfully worked and thrived as a house painter and server while continuing to do a range of physically demanding recreational pursuits. Mr. Kochems is entirely satisfied with the quality of Ms. Charters' work and he intends to rehire her in 2023. She was unable to do more work for him because of her online studies and part-time work as a server, not because of symptoms from the Accident. Taken together, this evidence suggests that her wrist symptoms are not disabling.
>
> [115] Although Ms. Charters suggested that she aspired to become self-employed as a carpenter or a registered massage therapist, she took no concrete steps towards these career goals. Her academic history is uneven. Taking courses such as high school math and biology are not sufficiently tangible steps taken in furtherance of these career objectives. I accept that carpentry and massage therapy may be too hand-intensive for her but I am not convinced that she would have pursued these careers but for the Accident.
>
> [116] Ms. Charters is entitled to $5,000 in respect of past loss of income-earning capacity for the period of work she missed immediately after the Accident. She has not established a real and substantial possibility that she lost any other income attributable to it.
>
> [Emphasis added.]

[71] In his reasons, the judge referred to *Siu v. Regehr*, 2022 BCSC 1876 at paras. 162–163, Citing *Siu,* the judge correctly observed that the *Rab* framework applies to both past and future income earning capacity claims: at para. 106. This was recently confirmed in *Hartman v. MMS Homes Ltd.,* 2023 BCCA 400 at para. 36.

[72] It is noteworthy, in my view, that the evidentiary basis for the alleged *past* lost of capacity to work as a painter was the same as that being advanced for the *future* loss of earning capacity claim: exhaustion at the end of an eight-hour shift due to the wrist injury which led Ms. Charters to decline other work opportunities which were offered to her. This is the evidence Ms. Charters submits that the judge misapprehended, and which she says constituted a palpable and overriding error.

[73] Indeed, it would have been internally inconsistent—and, I would observe, potentially in error—for the judge to dismiss the past loss of income claim (apart for

the $5,000 income loss sustained because Ms. Charters was absent from her work at the bakery immediately after the accident) and yet find that *the very same evidence, in light of the same legal test,* established that Ms. Charters had proven a real and substantial possibility of a future event causing income loss.

[74] I have had the privilege of reading in draft form the reasons for judgment of Horsman J.A. Respectfully, I do not agree with the result my colleague proposes, which is to grant the appeal on the basis that the judge committed an error in law in dismissing Ms. Charter's claim for damages for future loss of income earning capacity.

[75] While I generally accept her analysis of the legal framework, two examples from my colleague's reasons illustrate our disagreement. This difference of opinion stems from her approach to the application of the *Rab* framework, specifically the second stage, to the circumstances of this case.

[76] First, at para. 103 of her reasons, my colleague correctly recognizes the difference between the first two stages of the *Rab* approach, observing that "where the plaintiff establishes an impaired earning capacity by reference to the *Brown* factors, it is still necessary for the court to go on and determine whether there is a real and substantial possibility that the impairment will lead to a future income loss."

[77] Then, at para. 119, my colleague provides two examples of the judge's findings that she finds difficult to reconcile being: (1) that Ms. Charters is not less capable overall, less marketable, or unable to take advantage of all jobs, with his earlier conclusion, at the first stage of the *Rab* process, that her injury could lead to a future loss of capacity; and (2) with the evidence seemingly accepted by the judge that demonstrated Ms. Charters experienced physical limitations in carrying out tasks that required the repetitive use of her right hand, experienced persistent pain and required some modifications in carrying out her current employment duties, and she would be unable to perform heavy strength work.

[78] My colleague accepts, as observed in *Perren* and *Rab*, that "[a] plaintiff must always prove...that there is a real and substantial possibility of a future event leading to an income loss": *Perren* at para. 32; *Rab* at para. 46.

[79] At stage two of the analysis, however, the trial judge can only "go on and determine [that] there is a real and substantial possibility that the impairment will lead to a future income loss" *if the plaintiff has in fact proven* that real and substantial possibility on the lower burden of proof that governs hypothetical events. It is not for the court to determine that a real and substantial possibility of the hypothetical event has been established on the basis that the plaintiff has satisfied stage one. That is the purpose of stage two, where the plaintiff also bears the burden of proof.

[80] For my part, I have no difficulty reconciling the two examples of alleged error my colleague identifies at para. 119 of her reasons. This is because the analysis at stage two is different from that at stage one, and the requirements of the second stage are not automatically established on proof of those which apply to the first.

[81] I would add that when I consider the reasons contextually, I am of the view that the judge was very much alive to the *Brown v. Golaiy*, 26 B.C.L.R. (3d) 353, 1985 CanLII 149 (S.C.), capital asset approach at stage two of the analysis regarding *both* the past and the future loss of income-earning capacity claims. This approach is specifically referred to at para. 120 of the reasons, and the judge observed that the *Rab* framework applies to both past and future loss of earning capacity claims. It is true that the kinds of factual findings and inferences a judge is called upon to make may differ when considering the past and the future, but, as the judge and my colleague have both rightly noted, the same legal principles govern the analysis in both cases.

[82] In my view, this appeal comes down to whether, at stage two of the *Rab* framework, Ms. Charters proved, on the evidence, a real and substantial possibility that the future event will cause a pecuniary loss. And for the reasons I have identified above, the judge's conclusion that Ms. Charters had failed to do so was

open to him on the totality of the evidence, in particular the evidence he accepted and from which he took the inferences he considered appropriate.

[83] In other words, the judge did what my colleague indicates he ought to have done, when she observes, at para. 107 of her reasons, that "a plaintiff may suffer an impairment of earning capacity…yet cannot show, in light of their personal circumstances, that there is a real and substantial possibility that this impairment will lead to a future loss of income". This is precisely how the judge approached stage two of *Rab,* and in doing so he determined Ms. Charters had not proven a real and substantial possibility of future income loss.

[84] Respectfully, I also disagree with my colleague's views that the judge erroneously based his conclusion regarding stage two of his future loss of income earning capacity analysis in part on evidence that only related to the past loss of income earning capacity.

[85] It is of assistance to consider the manner in which the judge structured his reasons. Below para. 58, he includes the following headings:

> **Loss of Income-Earning Capacity**
>
> **Factual Findings**

[86] After a lengthy summary of the evidence presented and his factual findings, the judge went on to consider the past loss and future loss claims separately, both under the general "loss of income-earning capacity" heading. This structure indicates that the judge's factual findings applied, to the extent he considered appropriate, to both the past and future income earning capacity claims.

[87] At para. 121 of her reasons, my colleague addresses what I considered would have been an internal inconsistency had the judge awarded damages for the future claim having dismissed the past loss of capacity claim (except for the time frame immediately following the accident). While I agree that the dismissal of a past capacity claim is not necessarily "dispositive" of the future claim, in certain cases,

such as this one, it may well be that the analyses for past and future loss "hang together" based on the totality of the evidence.

[88] The judge's findings concerning the past loss of income earning capacity claim regarding, for example, Mr. Padvaiskas' evidence that the occasional wrist pain experienced by Ms. Charters is not disabling (at para. 114) are incorporated by reference in the judge's future loss of income-earning capacity analysis (for example, at para. 126). And this evidence informs, in part, the judge's conclusion that while Ms. Charters' injury might lead to a loss of capacity (stage one of the *Rab* framework):

> [130] … I am not convinced that there is a real and substantial possibility that this injury will cause a future loss of income. It has not affected her ability to earn income in varied roles as a care aide, server, or painter, all of which involve some level of physical exertion. Accordingly, I do not find that she has established that she is less capable overall, less marketable, or unable to take advantage of all jobs that may be available to her because of this injury.
>
> [Emphasis added.]

[89] At para. 118 of her reasons, my colleague suggests that the judge erred by drawing a conclusion about whether there was a real and substantial possibility of a future loss of income based on whether Ms. Charters' income had to the date of trial been affected by the accident.

[90] Reading his reasons as a whole, however, the judge did not entirely rely on evidence about the past. It is important to note that he accepted Dr. Vaisler and Dr. Thompson's evidence that Ms. Charters' wrist symptoms "are unlikely to degenerate": at para. 125. Viewing the reasons contextually, then, the judge's findings support the conclusion that Ms. Charters' wrist symptoms were unlikely to degenerate below their current level, that is, not disabling and, importantly, insufficient to ground a claim for future loss of income earning capacity.

[91] It is in this sense, and with the benefit of Dr. Vaisler and Dr. Thompson's evidence, that the judge relied upon evidence about the past to inform an inference about the future. And in this way, the claims of past and future loss are interrelated in the circumstances of this case.

[92] Had the judge viewed the totality of the evidence differently, including accepting Mr. Altieri's evidence that Ms. Charters' might not be able to durably continue working as a painter or server, then my colleague's analysis and conclusion at para. 129 of her reasons (which are premised on the finding of an error of law), is one that would have been open to him to make.

[93] But he did not. Instead, he accepted the evidence of Dr. Vaisler, Dr. Thompson, and the occupational therapist Mr. Padvaiskas, which spoke to both the past and future loss of earning capacity claims.

[94] In my view, the judge articulated and correctly applied the legal framework. While there were alternative conclusions to be drawn, his dismissal of the future loss of earning capacity claim was supported by the facts as he found them, and the inferences drawn from the facts he found were reasonable. To find otherwise, as would my colleague, respectfully goes beyond the appropriate parameters of appellate review in that it adopts alternative inferences on the same record, which this Court cannot do absent a palpable and overriding error. *West Moberly First Nations v. British Columbia*, 2020 BCCA 138 at para. 297; *Housen* at para. 10.

[95] I can see no basis for this Court to interfere with the judge's decision.

Disposition

[96] I would dismiss the appeal.

"The Honourable Mr. Justice Abrioux"

Reasons for Judgment of the Honourable Madam Justice Horsman:

[97] I have had the privilege of reading the reasons for judgment of my colleague, Justice Abrioux. I agree, for the reasons he states, that the judge did not make a palpable and overriding error of fact in finding that the appellant had not, by the time of trial, turned down additional hours in her painting job as a result of the physical symptoms caused by the accident. While the evidence on this point was ambiguous,

it was open to the trial judge to interpret it in the manner he did. The fact that alternative inferences might have been drawn from the evidence does not constitute palpable and overriding error.

[98] However, I depart from my colleague on the third issue raised on appeal—the trial judge's application of the principles that govern the assessment of a claim for loss of future earning capacity. I agree that, at paragraphs 117–118 of the trial judgment, the trial judge correctly states the principles that govern the assessment of a claim for future loss of earning capacity, including the three-step process set out in *Rab v. Prescott*, 2021 BCCA 345. However, for the reasons that follow, I conclude that he did not apply those principles correctly, which is an error of law: *Rooney v. Galloway*, 2024 BCCA 8 at para. 168; *Housen v. Nikolaisen*, 2002 SCC 33 at para. 36.

Legal principles

[99] To explain my view, it is necessary to review some of the guiding principles.

[100] The central task for a court faced with a claim for future loss of earning capacity is to compare the plaintiff's likely future working life with and without the accident: *Dornan v. Silva*, 2021 BCCA 228 at paras. 156–157. This is, as has often been observed, a "notoriously difficult task": *Davies v. Penner*, 2023 BCCA 300 at para. 3. Damages are only assessed once, and therefore the court must make findings about the pecuniary impact of the plaintiff's accident-related injuries over the remainder of their working life. In conducting the necessary analysis, the court must consider hypothetical future events, which need not be proved on a balance of probabilities. A hypothetical possibility will be accounted for as long as it is a real and substantial possibility and not mere speculation: *Reilly v. Lynn*, 2003 BCCA 49 at para. 101.

[101] As noted in *Rab*, some claims for loss of future earning capacity are less challenging than others. A plaintiff who has, as a result of the accident, suffered a significant disabling injury that leaves them unable to work at the time of trial and for the foreseeable future will clearly be entitled to an award of damages for future

income loss, although the quantification of the loss may prove challenging. More difficult are cases, such as the present one, where the plaintiff has suffered accident-related injuries that may impact their future ability to earn an income but that have not yet impacted their income as of the time of trial: *Rab* at paras. 29–30.

[102] Prior to *Rab*, British Columbia courts adopted a "capital asset" approach to quantifying claims for loss of future earning capacity in the latter category of cases. This approach recognizes that a plaintiff's ability to earn an income is an asset that may be impaired by the plaintiff's injuries, even if the impairment has not manifested in actual income loss at the time of trial. In his influential judgment in *Brown v. Golaiy*, 26 B.C.L.R. (3d) 353, 1985 CanLII 149 (S.C.) at para. 8, Finch J., as he then was, cited a list of factors to be taken into account in assessing the impairment of the asset:

> (1) The plaintiff has been rendered less capable overall from earning income from all types of employment;
>
> (2) The plaintiff is less marketable or attractive as an employee to potential employers;
>
> (3) The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
>
> (4) The plaintiff is less valuable to himself as a person capable of earning an income in a competitive labour market.

(the "*Brown* factors").

[103] In *Rab*, this Court clarified that the *Brown* factors do not provide a means for assessing the value of the future loss, but rather a means of assessing whether the capacity to earn an income has been impaired: *Rab* at para. 36. Put another way, even where the plaintiff establishes an impaired earning capacity by reference to the *Brown* factors, it is still necessary for the court to go on and determine whether there is a real and substantial possibility that the impairment will lead to a future income loss. The final step is to quantify that loss. Hence, the three-step approach set out in *Rab*:

> [47] From these cases, a three-step process emerges for considering claims for loss of future earning capacity, particularly where the evidence indicates no loss of income at the time of trial. The first is evidentiary: whether

> the evidence discloses a *potential* future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in *Brown*). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring—see the discussion in *Dornan* at paras 93–95.
>
> [Italic emphasis in original; underline emphasis added.]

[104] The distinction drawn in *Rab* between a loss or impairment of capacity and a real and substantial possibility of a future income loss is usefully illustrated by two cases that are reviewed in *Rab*.

[105] In *Steward v. Berezan*, 2007 BCCA 150, the plaintiff was 55 years old at the time of trial, and had been working as a realtor for 20 years. The trial judge found that the plaintiff's accident-related injuries prevented him from working in his former occupation as a carpenter, and she awarded him $50,000 in damages for future loss of earning capacity. This award was set aside on appeal. The Court held that the trial judge erred in awarding damages without addressing the prospect of the plaintiff returning to carpentry. On the evidence, given the plaintiff's age and successful experience in real estate, there was nothing to suggest that such a change in occupation was a realistic prospect, and therefore there was no basis for an award of damages for future loss of earning capacity.

[106] In *Perren v. Lalari*, 2010 BCCA 140, the plaintiff was employed as a manager in the provincial government at the time of trial. She suffered soft tissue injuries in the accident, leading to chronic symptoms that rendered her competitively unemployable in positions that required heavy or repetitive work. The trial judge noted that there was no real possibility that the plaintiff would ever turn to such employment, yet nevertheless awarded damages of $10,000 for future loss of earning capacity. The award was also set aside on appeal. This Court reaffirmed that a plaintiff must always prove that there is a real and substantial possibility of a future income loss. An inability to perform duties associated with a certain

occupation does not establish the possibility of a future income loss if the occupation is not a realistic prospect for the plaintiff: *Perren* at para. 32.

[107] These cases illustrate the principle that a plaintiff may suffer an impairment of earning capacity in the sense described in *Brown*, yet cannot show, in light of their personal circumstances, that there is a real and substantial possibility that this impairment will lead to a future loss of income: *Rab* at para. 44.

[108] The inquiry at the second step of *Rab* must be answered based on the whole of the relevant evidence. A real and substantial possibility is a higher bar than "mere speculation", but it does not require proof on a balance of probabilities: *Davies* at para. 27. Furthermore, the court should take a common-sense approach to the evidence in assessing the effect of pain on a plaintiff's ability to work over time. It is, for example, open to a trial judge to find as a matter of common sense that constant and continuous pain may take its toll over time in terms of a plaintiff's ability to work: *Gill v. Davis*, 2023 BCCA 381 at para. 12, citing *Morlan v. Barrett*, 2012 BCCA 66 at para. 41; *Davies* at para. 40.

Discussion

[109] With those principles in mind, I turn to the trial judgment.

[110] As my colleague has reviewed, the most serious injury suffered by the appellant in the accident is to the fracture of her right wrist. The trial judge made the following findings on the appellant's post-accident condition:

> [23] Her right wrist symptoms initially progressed but have not improved over the past three years. Her maximal recovery occurred within a few months of the Accident. She received treatment from a physiotherapist but did not find it helpful.
>
> [Emphasis added.]

[111] The trial judge found that as of the time of trial—that is, four years after the accident—the appellant continued to experience pain in her wrist on a weekly basis, particularly when engaging in activities using her dominant right hand: Trial Reasons at paras. 20, 57.

[112] The trial judge found that, with some modifications, the appellant was able to perform the necessary tasks for the occupations of residential painter and server. As my colleague notes, the judge accepted the evidence of Mr. Padvaiskas, an occupational therapist, that the appellant's wrist pain was in the nature of a "temporary irritation" rather than disabling. Notably, the judge addressed this evidence most directly in assessing the appellant's claim for past loss of earning capacity. It is worth re-quoting the key passage from the trial judgment on this point:

> [114] I agree with Mr. Padvaiskas' finding that the occasional wrist pain experienced by Ms. Charters is more of a temporary irritation rather than disabling and limiting level of pain and discomfort. This is because Ms. Charters successfully worked and thrived as a house painter and server while continuing to do a range of physically demanding recreational pursuits. Mr. Kochems is entirely satisfied with the quality of Ms. Charters' work and he intends to rehire her in 2023. She was unable to do more work for him because of her online studies and part-time work as a server, not because of symptoms from the Accident. Taken together, this evidence suggests that her wrist symptoms are not disabling.
>
> [Emphasis added.]

[113] It is clear in this passage that the judge is analyzing the issue of the appellant's ability to work in the pre-trial period, not the issue of whether there is a real and substantial possibility of a future income loss. As to the claim for future loss of earning capacity, it is relevant to note that Mr. Padvaiskas also opined that: (1) in terms of work endurance, the appellant may have issues associated with forceful gripping, impact jarring on the right, or handling non-neutral and extreme wrist postures; (2) she was susceptible to pain in her right wrist during some of the testing but was able to tolerate some of the tasks on an intermittent to occasional basis; (3) while the appellant is capable of working as a painter, she reported pain symptoms from doing some of the work; (4) the appellant would be capable of working as a food and beverage server, but may have to modify some of the upper extremity demands; and (5) she is not suited to heavy strength work. The judge seemingly accepted this evidence: Trial Reasons at paras. 98–104.

[114] The appellant testified that while she had been able to perform the necessary tasks involved in the occupations of painter and server in the pre-trial period, she

required some modifications. In her serving job, the appellant could not carry dishes and trays in the way she had before the accident, and she could not lift heavy items. The painting job involved tasks—such as using a paint roller or sanding—that required the repetitive use of her right-hand. The appellant sometimes used a wrist brace, which made the performance of tasks more difficult. She testified that she was fatigued at the end of a day of work, and her wrist was sore. The appellant communicated her limitations to her employer, Mr. Kochems, and he provided her with accommodations, such as allowing her to take breaks and performing tasks for her that she was unable to perform. Mr. Kochems confirmed in his evidence that he modified components of the job for the appellant; for example, by not requiring her to lift or carry heavy objects such as ladders and furniture. The trial judge found the appellant and Mr. Kochems to be credible witnesses: Trial Reasons at para. 13.

[115] The judge found, on the evidence, that the appellant had shown a potential future event that could lead to a loss of capacity; thus she met the first step of the *Rab* process. He stated:

> [122] Ms. Charters is relatively young and her right wrist symptoms have persisted since the Accident. She works as a residential painter and server and doing so periodically aggravates her right wrist symptoms. Her work actively engages her right wrist so it is possible that this injury could lead to a future loss of capacity. I am not convinced that any symptoms related to her right hip or knee could lead to a future loss of capacity.
>
> [Emphasis added.]

[116] The trial judge did not elaborate further on the nature of the future loss of capacity. In any event, the respondent does not challenge this finding on appeal, and the finding is amply supported by the evidence. The appellant suffered a significant injury that has led to physical limitations and persistent pain when she uses her dominant right wrist, requires modifications when she works as a painter or server, and restricts her ability to perform certain other types of jobs (i.e., heavy strength work). As found by the trial judge, the appellant had reached maximal recovery within a few months of the accident, and therefore her condition is unlikely to improve. Accordingly, the evidence disclosed a potential future event that could

lead to a loss of capacity; that is, a chronic injury "giving rise to the sort of considerations discussed in *Brown*": *Rab* at para. 47.

[117] Having identified a potential future event that could lead to a loss of capacity, the second stage of the *Rab* process required the judge to assess whether there is a real and substantial possibility that the appellant will suffer a future loss of income as a result of her right wrist injury. This, in my view, is where the judge fell into error.

[118] The task of hypothesizing about the future is undeniably challenging in a case such as this where there is a young plaintiff (29 at the time of trial) with a significant injury that has caused persistent pain symptoms, and who had no established career path and who had not suffered an income loss by the time of trial. The question for the judge was not how the appellant had fared in the pre-trial period, or how she appeared at the time of trial, but rather how her impaired capacity may affect her work prospects over the remainder of her working life. Instead of engaging in an analysis of the real and substantial future possibilities that arose on the evidence in this case, the judge focussed his analysis on the appellant's ability, to the date of trial, to manage her right-wrist pain and limitations without impact on her income. In effect, in assessing the claim for future loss of earning capacity, the judge repeated much of the analysis he had carried out in assessing past loss of earning capacity, including reliance on Mr. Padvaiskas' opinion. The core of the judge's analysis is reflected in the following passage:

> [130] I accept that Ms. Charters' wrist injury might lead to a loss of capacity but I am not convinced that there is a real and substantial possibility that this injury will cause a future loss of income. It has not affected her ability to earn income in varied roles as a care aide, server, or painter, all of which involve some level of physical exertion. Accordingly, I do not find that she has established that she is less capable overall, less marketable, or unable to take advantage of all jobs that may be available to her because of this injury.

[119] I make two observations about this analysis. First, the factors referenced by the judge in the last sentence of this paragraph are some of the *Brown* factors. As *Rab* clarifies, the *Brown* factors comprise a means of assessing whether there has been a loss or impairment of capacity, but not a means for assessing the value of the future loss: at para. 36. It is difficult to reconcile the judge's finding that the

appellant is not less capable overall, less marketable, or unable to take advantage of all jobs, with his earlier conclusion, at the first stage of the *Rab* process, that her injury could lead to a future loss of capacity. It is also difficult to reconcile this finding with the evidence, seemingly accepted by the judge, which demonstrated that the appellant experienced physical limitations in carrying out tasks that required the repetitive use of her right hand, that she experienced persistent pain and required some modifications in carrying out her current employment duties, and that she would be unable to perform heavy strength work.

[120] Second, and more critically, the central basis for the judge's conclusion that there was no real and substantial possibility of a future income loss was that the injury "has not affected her ability to earn income in her varied roles as a care aide, server, or painter, all of which involve some level of physical exertion": Trial Reasons at para. 130 (emphasis added). However, the finding that the appellant's ability to earn an income had not been affected by the time of trial was not dispositive of her claim for future loss of earning capacity. The task for the judge on the claim for future loss of capacity was to compare the plaintiff's likely future working life with and without the accident. Respectfully, I do not see anywhere in the trial judgment where the judge meaningfully engaged in such an analysis.

[121] It follows that I cannot agree with my colleague's conclusion (at para. 73 of his judgment) that it would have been inconsistent if the judge had concluded the evidence did not support an award for past loss of earning capacity in her job as a painter, but did support an award for future loss of earning capacity. Nor can I agree that the "the same legal test" applies to the assessment of claims for past and future loss of earning capacity. It is true that a single purpose underlies claims for past and future loss of earning capacity: to restore the plaintiff to the position they would have been in absent the accident. The restorative purpose of tort damages requires that a plaintiff be compensated for pecuniary loss arising from the impairment of earning capacity, whether the loss occurs before or after trial: *Hartman v. MMS Homes Ltd*., 2023 BCCA 400 at para. 35. It is also true that the same principles apply to the

assessment of past and future hypothetical events with respect to claims for past and future loss of earning capacity: *Tigas v. Close*, 2024 BCCA 223 at para. 22.

[122] However, the factual inquiries that a judge must undertake in valuing claims for past and future earning capacity are fundamentally different. An award of damages for loss of past earning capacity compensates the claimant for the loss of the value of the work they would have performed up to the time of trial, but were unable to perform due to the accident-related injury: *Lamarque v. Rouse*, 2023 BCCA 392 at para. 29. Not all of the relevant events are hypothetical, as by the time of trial we know what the plaintiff actually did earn prior to trial. In some cases, a claimant is able to work through their injuries up to the date of trial without a past income loss due to their stoicism. However, this does not answer the question of whether they will be able to continue to do so well into the future.

[123] An award of damages for loss of future earning capacity, by contrast, compensates the claimant for a real and substantial possibility they will experience future income loss at any time over the remainder of their working life. For the reasons I have stated, it is not the case that the dismissal of a plaintiff's claim for past loss of earning capacity is dispositive of their claim for future loss of earning capacity. This is made clear in many cases, including *Rab*. If there is a real and substantial possibility of a future income loss, regardless of whether the impaired capacity had led to a loss of income by the time of trial, then the plaintiff should be compensated. A trial judge's finding that a youthful and physically fit plaintiff who has persistent pain symptoms due to their accident-related injury has not suffered a pecuniary loss at the time of trial does not answer the question of whether the injury might lead to an income loss when the claimant is aged 40, or 60, or older.

[124] For these reasons, I conclude that the trial judge's failure to carry out the requisite analysis constitutes an error of law that justifies appellate intervention.

Remedy

[125] In my view, it is unnecessary to remit this matter back to the trial court. Rather, it is feasible and in the interests of justice for this Court to conduct the

necessary analysis. There are no credibility issues to resolve, and the analysis can be done fairly on the trial judge's findings of fact and the evidentiary record. In these circumstances, there is no need to put the parties to the expense and effort of a further hearing in the trial court: *West Moberly First Nations v. British Columbia,* 2020 BCCA 138 at paras. 135–136.

[126] The trial judge found at the first step of the *Rab* process that the evidence established a potential future event that could give rise to a loss of capacity. As I have noted, the respondent does not challenge this decision on appeal. For the reasons I have stated, the finding is unassailable. The trial judge's findings, and the evidence, disclose that the appellant suffers right wrist pain and limitations that impacts her ability to perform work-related tasks. While she had, by the time of trial, successfully managed the pain and limitations, she did so by making modifications to her work tasks. The appellant experiences pain and fatigue at the end of her work day. Certain occupations, those involving heavy strength, are not available to her because of her injury.

[127] The question, then, at the second stage of the *Rab* process is whether this loss of capacity gives rise to a real and substantial possibility of a future loss. This question is a very challenging one to answer on the facts of this case. The appellant was a relatively young plaintiff—29 years old at the time of trial. She had limited education and a varied work history. The trial judge found that the appellant will likely continue to work as a "painter, server, or in another similar vocation": Trial Reasons at para. 129. By this, I infer that he found the appellant was likely in the future to continue to work in occupations that involve physical activity and a relatively low income. This assessment appears to me to be well-supported by the evidence of the appellant's work history, limited post-high school education, and stated preference for jobs that keep her active.

[128] Absent the accident, there is a real and substantial possibility that the appellant would have attempted to maintain full-time, or close to full-time, hours in such an occupation in order to maximize her financial security as she gets older. I

would assess this possibility as strong. Other contingencies would have to be accounted for, including the real and substantial possibilities that the appellant would have worked part-time hours, or left the work force altogether for periods of time.

[129] With the accident, it may be that the appellant could pursue the same work trajectory, although I do note that her ability to sustain full-time hours in occupations such as painter and server has been relatively untested after the accident. Taking a common-sense approach to the evidence, I consider that there is a real and substantial possibility that the appellant's ability to work through her pain in performing her job-related tasks will diminish as she ages. Thus, she may work fewer hours than she otherwise would have, resulting in a pecuniary loss. I would assess the risk of such a loss occurring as moderate. There is also a real and substantial possibility that the appellant will have to switch jobs, and will have more prolonged periods of unemployment because her need for accommodation will limit her employment prospects. This is a relatively low risk at the moment, but may increase over time if her ability to work through her wrist pain diminishes as she ages, which is a common-sense proposition. There is also a real and substantial possibility that she will be foreclosed from pursuing reasonable alternative occupations because she is unable to perform heavy strength work. This also appears to be a low risk on the evidence in light of her job history, which has not involved heavy strength work.

[130] In sum, I consider that the evidence does disclose a real and substantial possibility of future income loss as a result of the appellant's loss of capacity. This is not a case, such as *Steward* and *Perren*, in which the accident-related injury impacts a plaintiff's capacity to work in occupations they had no reasonable prospect of pursuing. Here, the occupations that the appellant is likely to pursue in the future require her to perform duties that involve the repetitive use of her dominant right hand. The injury to her right wrist has already led her to modify work duties, and required her to work through pain. Even if the appellant's pain symptoms do not worsen over time, there is a real and substantial possibility that the continuation and accumulation of these symptoms will result in her in having to work through the pain

over a period of many years, and possibly until she retires. Accordingly, in light of the appellant's personal circumstances, and the fact that her physical abilities have been diminished and limited by the wrist injury, there is a real and substantial possibility of future income loss.

[131] In my view, it is appropriate to adopt the approach endorsed in *Pallos v. Insurance Corp. of British Columbia*, 100 B.C.L.R. (2d) 260, 1995 CanLII 2871 (C.A.) of valuing the appellant's future income loss based on one or more years of earnings. In *Rab*, this Court recognized that such an approach may be appropriate where the plaintiff continues to earn income at or close to pre-accident levels, but has suffered an impairment that may affect their ability to continue to do so in the future: at para. 72. In the circumstances of this case, I am of the view that appellant's future loss should be valued at $80,000. This is the equivalent of approximately two years of employment, assuming an hourly wage of $25 (the amount she currently earns in her painting job), and a 32-hour work week. Such an approach is warranted, in my view, because of the appellant's relatively young age and the fact that her pre-accident annual earnings do not reflect her likely future earnings trajectory. It is a fair and reasonable award, and reflects an appropriate balancing of the positive and negative contingencies in the challenging circumstances of this case.

Disposition

[132] I would allow the appeal, and substitute an award of damages of $80,000 for future loss of earning capacity in place of the trial judge's award of $0.

"The Honourable Madam Justice Horsman"

I AGREE:

"The Honourable Madam Justice Fenlon"

TAB 2

See page 5

Kernahan & Graves Real Estate Co. Ltd. v. National Trust Co. Ltd.

44 O.R. (2d) 53
3 D.L.R. (4th) 175

ONTARIO
COURT OF APPEAL
HOWLAND C.J.O., DUBIN
AND BLAIR JJ.A.
10TH NOVEMBER 1983.

Agency -- Real estate agents and brokers -- Listing agreement expiring -- Subsequent agreement that agent to "continue" to act on vendor's behalf -- Whether terms of earlier listing agreement incorporated.

By a listing agreement executed on March 31st the defendant gave the plaintiff the sole right to act as agent to sell a building until June 30th. A commission of 5% was payable on any sale effected during the currency of the agreement, and all inquiries and offers were to be referred to the plaintiff. An agreement was concluded, but later fell through. On September 5th the plaintiff was again asked to sell the property, and on September 8th the defendant wrote to "confirm that your firm will continue to act on our behalf as marketing agents ... up to ... September 29". The letter contained an undertaking to pay a commission of 5% on any offer over $410,000, but a negotiable commission on lower offers. A purchaser made an offer of $400,000 directly to the defendant on September 24th which was not referred to the plaintiff. The offer was accepted on October 2nd. An action for commission was dismissed at trial. On appeal to the Ontario Court of Appeal, held, allowing the appeal, the reference in the letter to "continuing" to act as agent had the effect of incorporating the terms of the earlier agreement, including the requirement that the defendant

refer all offers to the plaintiff. Consequently the defendant was in breach of the agreement and liable to pay damages equal to a 5% commission.

Cases referred to

Transcanada Pipelines Ltd. v. Northern & Central Gas Corp. Ltd. (1983), 41 O.R. (2d) 447, 146 D.L.R. (3d) 293; Leitch Gold Mines Ltd. et al. v. Texas Gulf Sulphur Co. (Incorporated) et al., [1969] 1 O.R. 469, 3 D.L.R. (3d) 161

APPEAL from a judgment of Osborne J. dismissing an action for a real estate commission.

Richard H. Barch, Q.C., for appellant.

Ian M. Thompson, for respondent.

The judgment of the court was delivered orally by

BLAIR J.A.:-- This appeal is from the decision of Osborne J. dismissing the appellant's claim for commission under a real estate listing agreement or, alternatively, damages for breach of the agreement.

On March 31, 1980, the respondent executed an agreement which listed a building for sale with the appellant real estate broker. The agreement gave the appellant "the sole, exclusive and irrevocable right to act" as agent to sell the property until June 30, 1980, for the price of $490,000 in cash or for such lesser price or on such other terms as the respondent might accept.

The agreement provided for payment to the appellant of a commission of 5% of the sale price "on any sale howsoever effected during the currency of this authority". It contained two clauses which are important in this case. The first provided that the commission would be payable:

> ... if the property is sold by me or anyone on my behalf within 90 days after the expiration of this authority to anyone who has been made aware of the property, through the marketing activities of you or your sub-agents during the term of this authority.

(Emphasis added.) The second specified that:

> ... during the currency of this Authority all enquiries from any source whatsoever shall be immediately referred to you, and all offers to purchase, rent, exchange or option, submitted to me are to be immediately brought to your attention before I accept or reject the same.

An agreement of purchase and sale was completed through the efforts of the appellant during the currency of the listing agreement. The purchaser, however, was unable to complete the transaction and the agreement terminated in August, 1980.

The purchaser named in the abortive sale agreement had attempted to resell the property to Merchandise Bargain Incorporated. After the termination of the agreement of purchase and sale, in August, 1980, Merchandise Bargain made a direct approach to the respondent with the view of purchasing the property but no agreement was reached.

The respondent, on September 5th, instructed the manager of its mortgage appraisal department to request the appellant to sell the property. The manager had not been informed of the negotiations with Merchandise Bargain. He telephoned the president of the appellant and asked the appellant to continue to attempt to sell the property. He confirmed his telephone conversation by letter dated September 8, 1980, the pertinent paragraphs of which read as follows:

> With reference to our telephone conversation of Friday, September 5, 1980, this is to confirm that your Firm will continue to act on our behalf as marketing agents for the above-noted property, up to and including the close of business on September 29, 1980.

> It was further agreed that should you be successful in obtaining an all cash Offer of not less than $410,000, a commission of 5 per cent will be honoured and paid to your Firm on the closing of the transaction. Any offer less than this amount which would be acceptable to National Trust Company, Limited is at a negotiable commission of less than 5 per cent.

Merchandise Bargain renewed its direct dealings with the head office of the respondent and on September 24th, made an offer to purchase the property for $400,000. The offer was accepted on October 2nd. Closing was fixed for November 1st.

The issue at trial and in this appeal was whether the contract confirmed by the letter of September 8th revived and continued the original listing agreement of March 31st or constituted, as the learned trial judge held, a fresh and independent agreement. He stated:

> The September 5, 1980 discussion between Mr. Windeler on behalf of the defendant and Mr. Losier on behalf of the plaintiff resulted in a new contract between the plaintiff and the defendant being concluded. The terms of that contract were recorded in the September 8, 1980 letter, which I have previously set out. It seems to me that that letter sets out the contractual provisions that were agreed to by the plaintiff and by the defendant. By its very wording, that contract between the plaintiff and the defendant gave the plaintiff what can be described as listing rights to the property, between September 5 and September 29, 1980. It gave the plaintiff the right to have paid a commission at 5% on a cash offer of not less than $410,000. The deal, however, was very much narrower than the listing contract or agreement of March 31, 1980. The September listing agreement restricted the plaintiff 's right to commission, to offers the plaintiff obtained. To hold that the original listing agreement was revived, subject to change in commission rate and listing price, is to ignore the plain and unambiguous wording of the September 8, 1980 letter.

With respect, we cannot agree that the letter of September 8th was so "plain and unambiguous" as to compel the conclusion that it contained the sole agreement between the parties. On its face, it calls for explanation by its assertion that the appellant would "continue to act on our behalf as marketing agents for the above-noted property" [emphasis added]. The proper construction of the agreement, which is a question of law, requires reference to the earlier relations between the parties to determine what marketing agency was being continued. Because of the ambiguity in the letter of September 8th, extrinsic evidence is admissible to explain its meaning: see Transcanada Pipelines Ltd. v. Northern & Central Gas Corp. Ltd. (1983), 41 O.R. (2d) 447, 146 D.L.R. (3d) 293; Leitch Gold Mines Ltd. et al. v. Texas Gulf Sulphur Co. (Incorporated) et al., [1969] 1 O.R. 469, 3 D.L.R. (3d) 161.

The president of the appellant and the mortgage appraisal manager of the respondent both testified that their intent was to "revive'' the previous listing agreement subject to changes in the rate of commission and expiry date. This evidence was fortified by the affidavit of merits completed by the mortgage appraisal manager of the respondent which stated that the September, 1980 letter "revived" the original listing with the appellant.

It is, therefore, clear that the terms of the original listing agreement continued to apply to the parties except for the variations in commission and expiry date already mentioned. Counsel for the respondent conceded that, if we reached this conclusion, the condition that the respondent would refer all offers during the term of the agreement to the appellant remained in force. The respondent breached this condition by failing to disclose the offer made by Merchandise Bargain Incorporated to the appellant. It is clear from the evidence that, but for this breach, the appellant would have been able to earn a commission of 5% on the sale price or $20,000 and this is the proper measure of damages in this case.

Accordingly, we allow the appeal with costs and direct that the judgment below be set aside and that, in its place, judgment be entered for the appellant for damages of $20,000

and costs.

Appeal allowed.

TAB 3

COURT FILE NO.: 01-CL-004074
DATE: 20040121

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
JOHN MIFSUD	)	Barrie Chercover
Applicant	)	*for the Applicant*
- and -	)	
OWENS CORNING CANADA INC.	)	Michael A. Penny
	)	Crawford Smith
Respondent	)	*for the Respondent*
	)	**MOTION HEARD:** November 13, 14 & 19, 2003

GROUND J.

REASONS

[1] This Application involves entitlement to surplus accrued in the pension plan of Owens Corning Canada Inc., formerly Fiberglas Canada Inc. ("Owens Corning"). The Applicant, John Mifsud is a representative applicant on his own behalf and on behalf of all persons who, on October 11, 2000 were members, retired members or deferred vested members of the Owens Corning Canada Inc. pension plan for hourly rated employees (the "Plan") and the beneficiaries of such persons who may be deceased.

Background

[2] Owens Corning has traditionally negotiated its pension plan and pension plan benefits with all unions representing employees at its various plants in Canada (the "Unions"). Such negotiations were conducted with all Unions at the same time but separately from other collective bargaining negotiations with the Unions.

[9]

[3] The Plan was established effective October 1, 1972 and succeeded a prior plan which had been in effect since 1955. The Plan provides defined benefits whereby members receive predetermined benefits on retirement regardless of whether the Plan is in a surplus or deficit position. Until 1985 the Plan was a contributory Plan and both Plan members and Owens Corning were responsible for contributions to the Plan. Benefits under the Plan are provided by a group annuity policy issued by Sun Life.

[4] The Pension Agreement between Owens Corning and the unions resulting from negotiations in 1972 was not entered in evidence. The 1972 pension plan Restatement (the "1972 Plan") was, however, entered in evidence and contains the following provisions:

> "Section VI
>
> COMPANY CONTRIBUTIONS
>
> During each calendar year of this Plan, in addition to contributions required from members which have been deducted from their earnings, the Company shall pay into the Pension Fund at least such amounts as are certified by the Plan Actuary as needed for systematic funding of the cost of normal pension benefits of members under this Plan and to liquidate any unfunded liability and experience deficiency which may arise under this Plan in accordance with the requirements of *The Pension Benefits Act*, 1965 of Ontario and regulations thereunder as amended from time to time.
>
> Section XV
>
> AMENDMENT OR TERMINATION OF THE PLAN
>
> The Company hopes and expects to continue the Plan indefinitely, but reserves the right to discontinue or amend the Plan should future conditions, in the judgment of the Company, warrant such action. Any such amendment or discontinuance shall be subject to the following provisions:
>
> 15.01.01 No amendment shall have the effect of reducing the existing interest in the Plan of any member or beneficiary or estate of any member.
>
> 15.01.02 No amendment shall cause or permit any part of the contributions to the Plan to be diverted to purposes other than for the exclusive benefit of the members and their beneficiaries or estates.
>
> 15.01.03 If the Company discontinues the Plan or ceases operations or becomes bankrupt or winds up, all contributions to the Plan shall be immediately and fully vested in the members of the

[6]

Plan at the date of discontinuance, and shall be used entirely for their benefit".

[5] Pension negotiations in 1977 resulted in the 1977 Pension Agreement which contains the following provision:

> "(h) This Agreement will be in effect through January 2nd, 1981 and from year to year thereafter as hereinafter provided. That not less than two (2) months nor more than three (3) months prior to the termination date of this Agreement, either the Unions or the Company may notify the other, by registered mail, of its desire that a top level meeting be held to review the Plan's application and operation to ensure proper understanding and to exchange views about the pension field, private and government, so significant changes and trends can be taken into account in determining whether Plan changes are warranted. In the event that the Company and the Unions cannot agree that Plan changes are warranted, or what they should be, this Agreement will immediately terminate upon written notification, by registered mail, from the Company to the Unions or vice versa. In the event changes are not deemed necessary, this Agreement will automatically renew itself for a period of one (1) year and for subsequent periods of one (1) year each in accordance with the terms of this section".

[6] The booklet issued to employees in 1978 describing the Pension Plan contained the following provision:

> "May I borrow or assign my share of the funds?
> No, because all funds are held in trust for the purpose of providing the benefits of this Plan".

[7] The 1981 pension negotiations resulted in the 1981 Pension Agreement which contained the following provisions:

> "5. This Agreement will be in effect through January 2, 1985, and from year to year thereafter as hereinafter provided. That no less than two (2) months nor more than three (3) months prior to the termination date of this Agreement, either the unions or date of this Agreement, either the unions or the Company may notify the other, by registered mail, of its desire that a top level meeting be held to review the Plan's application and operation to ensure proper understanding and to exchange views about the pension

field, private and government, so significant changes and trends can be taken into account in determining whether Plan changes are warranted. In the event that the Company and the unions cannot agree that Plan changes are warranted, or what they should be, t his Agreement will immediately terminate upon written notification, by registered mail, from the Company to the unions or vice versa. In the event changes are not deemed necessary, this Agreement will automatically renew itself for a period of one (1) year each in accordance with the terms of this section.

7. That should any surplus funds accrue under the Plan, the Company shall discuss with the unions, under paragraph 5 above, how the funds may be used to improve benefits under the Plan in accordance with the appropriate section".

[8] In 1985, after lengthy negotiations, the Plan was substantially amended. The most significant amendment being that the Plan became noncontributory so that, subsequent to September 1, 1985, the members were no longer required to make contributions to the Plan and the Plan was fully funded by contributions made by Owens Corning. These negotiations also resulted in significant improvements to pension benefits including improved vesting privileges of 50% after 5 years and 100% after 10 years; an increase in the early retirement supplement; an amendment to provide that the benefit to which a surviving spouse could become entitled would be continued regardless of whether he/she remarried; a substantial increase in the pension benefits for retirees and surviving spouses; and up to two years pension credit for employees on disability leave who returned to the company.

[9] The Memorandum of Settlement (the "1985 Agreement") entered into between the Unions and Owens Corning following the 1985 pension negotiations contained the following provisions:

"Section 1 ELIMINATION OF EMPLOYEE CONTRIBUTIONS

Effective the first of the month following the date of ratification, required contributions by members of the Pension Plan will be discontinued and the Pension Plan will be funded solely by Fiberglas Canada Inc.

As the Company is assuming full responsibility for funding the Pension Plan benefits and since a mechanism for the review of benefits is in place, the use of any Plan surplus remains at the Company's discretion, subject to Ontario Pension Legislation.

Section 14 This Agreement will be in effect through January 1, 1989, and from year to year thereafter unless not less than two (2) months nor more than three (3) months prior to the termination

> date of this Agreement. Either the unions or the Company notify the other, by registered mail, of its desire that a top level meeting be held to review the Plan's application and operation to ensure views about the pension field, private and government, so significant changes and trends can be taken into account in determining whether Plan changes are warranted. In the event that the Company and the unions cannot agree that Plan changes are warranted, or what they should be, this Agreement will immediately terminate upon written notification, by registered mail, from the company to the unions or vice versa. In the event changes are not deemed necessary, this Agreement will automatically renew itself for a period of one (1) year and for subsequent periods of one (1) year each in accordance with the terms of this section".

[10] In the 1985 Restatement of the Pension Plan (the "1985 Restatement") section 15 as it appeared in the 1972 Restatement, which provided that no amendments to the Plan could permit any part of contributions to be diverted to purposes other than for the exclusive benefit of members and their beneficiaries or estates and that on discontinuance all contributions would be fully vested in the members and used entirely for their benefit, was deleted. The 1985 Restatement contained the following provisions:

> "14.02(e). Any assets of the Fund in excess of those required to provide all accrued retirement income and other benefits pursuant to this Plan, may revert to the Company upon Company request, subject to Applicable Pension Laws and Revenue Canada rules and regulations.
>
> 17.03. Any assets of the Fund remaining after full provision has been made for the accrued retirement income and other benefits as described in Section 17.01 hereof, shall revert to the Company, subject to Applicable Pension Laws".

[11] The 1989 pension negotiations, the 1989 Pension Agreement, the 1995 pension negotiations and the 1995 Pension Agreement resulted in no change to the provisions contained in the 1985 Restatement with respect to the reversion of surplus in the Plan to Owens Corning while the Plan was ongoing and on discontinuance of the Plan.

[12] The evidence before the court was that at some time during 1995, a union representative first raised the issue of the validity of the 1985 amendments to the Plan with respect to entitlement to surplus and that this was followed by a letter dated November 29, 1996 from Mr. Trewin, a representative of one of the Unions, to Owens Corning stating:

> "This will confirm the Unions' position with regard to the above pension plan and the company's offer of settlement dated June 10,

[6]

> 1996. It is the Unions' intention to present this offer to its members for ratification.
>
> Please be advised however that if the package is accepted, it is without prejudice to the Unions' position that any surplus monies in the plan belongs to members of the plan, and must be applied for the exclusive benefit of those members in accordance with the term of the 1972 pension document. In that regard and for greater certainty, it is our position that any amendments to the 1972 plan which purport to deprive the plan members of their rights to the Plan surplus are invalid".

[13] As of September 1, 1985, the date of cessation of contributions by members of the Plan, the Plan was in a deficit position; a surplus in the Plan first accrued in 1986. It is estimated as of 2003, the surplus in the Plan was approximately $19,000,000 as a result of improved return on the Plan's investments during the period 1986 to 2003. From 1986 on, Owens Corning has not made contributions to fund the current service costs of the Plan but has, based on actuarial valuations, taken contribution holidays and applied surplus in the Plan to fund current service costs. The surplus applied to fund current service costs for the period 1986 to 1999 was approximately $26 million.

[14] The Amended Application now before this court seeks the following relief:

(a) a declaration that the Fiberglas Canada Limited Pension Plan for Hourly Rated Employees dated October 1, 1972 ("the 1972 plan document"), created a trust between the company and its employee members of the pension plan with respect to any surplus accruing in the plan ("the trust");

(b) a declaration that no power to revoke the trust was provided in the plan;

(c) a declaration that any amendments introduced to the plan, as periodically maintained, since 1972 giving the company ownership and/or use of the surplus accruing to the plan, including reversion of any portion of the surplus to the employer upon plan termination or use of surplus to satisfy its obligations to fund current service costs of the plan, have unlawfully varied, revoked or amended the trust, and are a breach of the trust;

(d) a declaration that any amendments introduced to the plan, as periodically kept in force, since 1972 giving the company ownership and/or use of the surplus accruing to the plan, including reversion of any portion of the surplus to the employer upon plan termination or use of surplus to satisfy its obligations to fund

current service costs of the plan, have not been agreed to by the members of the plan or the trade union bargaining agents, have been introduced unilaterally by the company and are inconsistent with agreements between the company and the trade union bargaining agents which provide for the continuation in force of the 1972 plan and which specify and limit amendments to the plan agreed to in pension plan negotiations and are without force or effect;

(e) a declaration that the surplus accruing to the Owens Corning Canada Inc. Pension Plan for Hourly-Rated Employees, and/or its predecessor the Fiberglas Canada Inc. Pension Plan for Hourly-Rated Employees, ("the pension plan" or "the plan") is the property of and belongs to the plan members or their beneficiaries and/or is solely for the exclusive benefit and use of plan members or their beneficiaries;

(f) a declaration that the Respondent, its predecessors or successors, has not been entitled to and is not entitled to have revert to it, either upon plan termination or while the plan is ongoing, the surplus in the plan or to in any way convert to its own use in any manner any surplus in the plan, including the surplus to satisfy any obligations to fund current service costs of the plan;

(g) a declaration that the surplus in the pension plan must be used exclusively to improve plan benefits;

(h) a declaration that the Respondent, and/or its predecessors, has improperly and without right used the surplus in the pension fund to fund all current service costs of the plan;

(i) an order requiring the company to cease and desist from using the plan surplus in the manner set forth in 1(h) above;

(j) an order requiring the company to make all funding contributions to the plan not made by it since the inception of the plan surplus due to its improper use of the surplus as set forth in 1(h) above;

(k) an order requiring the company to forthwith use all accrued and accruing surplus in the plan, including any additional surplus created by contributions ordered to be made to the plan pursuant to paragraph (j) above, to improve plan benefits and to retroactively improve benefits and/or compensate all retired members, their beneficiaries or estates for such from the inception of the surplus;

[6]

(l) an order directing an accounting.

Issues

[15] The entitlement of the Applicants to the relief sought raises five issues.

1. whether the documents establishing the Plan and amending the terms of the Plan should be construed as creating an implied trust of the pension fund for the benefit of the members or whether the documents should be interpreted as a contract;

2. if the Plan documentation is to be interpreted as a contract, how the provisions of Section 1 of the 1985 Agreement should be interpreted and whether the provisions of the 1985 Restatement providing for reversion of pension surplus to Owens Corning constituted a breach of contract;

3. whether, in any event, Owens Corning was entitled to apply surplus in the Plan against current service costs by taking contribution holidays;

4. whether the Applicants' claims are barred by waiver, estoppel, acquiescence, laches or the Statute of Limitations; and,

5. whether, if the Unions agreed to the amendments to the Plan to provide for reversion of plan surplus to Owens Corning, the Applicants are bound by the agreements entered into by the Unions.

[16] I will deal with the issues in the above order:

Analysis

Implied Trust or Contract

[17] The seminal case in the area of pension surplus is *Schmidt v. Air Products of Canada Ltd.* (1994) 115 D.L.R. (4th) 631 (SCC) relied upon by both counsel. It is acknowledged by counsel for the Applicants that there are no express references in the relevant documents to a trust or a trustee and no language explicitly stating that the pension fund is held in trust. The singular reference to a trust in all of the documentation before this Court is the above quoted reference in the 1978 booklet distributed to Plan members that "all funds held in trust for the purpose of providing the benefits of the Plan". This reference cannot be determinative of the issue. The booklet is not a constating document and is distributed to members to assist them in their understanding of their benefits under the Plan. The booklet itself states "Although the booklet tries to cover all the principal features of the Plan, it is merely an outline and the Plan itself is the governing document". With respect to the Plan Booklet, the statement that "all funds are held in trust" is in answer to the question "may I borrow or assign my share of the fund?" and does not purport to be an explanation of the nature of the pension fund or the entitlement of members to

the pension fund. There is also no evidence that any booklet using similar language was issued after 1985 or relied on by any Plan members after 1985. Accordingly, reference must be made to the constating documents of the Plan to determine whether a trust of the pension fund should be implied.

[18] It is settled law that whether or not a given pension fund is subject to a trust is to be determined by the principles of trust law and that a declaration of trust need not be express but may be implied. It *Schmidt*, supra Cory J. stated at page 654:

> Employer-funded defined benefit plans usually consist of an agreement whereby an employer promises to pay each employee upon retirement a pension which is defined by a formula contained in the plan. A pension fund is created pursuant to the plan, either by way of contract or by way of trust. Whether or not any given fund is subject to a trust is determined by the principles of trust law. If there has been some express or implied declaration of trust, and an alienation of trust property to a trustee for the benefit of the employees, then the pension fund will be a trust fund.

[19] It is also settled law that, in order to find that a trust is established, the intention of the settlor to create a trust must be clear, the subject matter of the trust must be certain and the objects or beneficiaries of the trust must be certain. In the case at bar, if a trust is found to have been established, the subject matter of the trust would be the pension fund and the beneficiaries would be the plan members. The issue then becomes whether there is a clear intention on the part of a settlor to create a trust. As at the date of the 1972 Restatement, if a trust is to be implied, the settlors of the trust would have to be the members making contributions to the trust fund and Owens Corning in respect of contributions it made to the trust fund. All contributions were transferred to Sun Life to be held by it and invested and applied toward the provision of pension benefits in accordance with the Group Annuity Policy entered into between Owens Corning and Sun Life. The Group Annuity Policy itself states that it is a contract and contains the following provision:

> "XVI. CONTRACT. This policy and the application therefore, a copy of which is attached hereto and made a part hereof, constitute the entire contract between the parties hereto".

[20] In my view, however, the question of whether the pension fund is held by Sun Life subject to an implied trust for the benefit of Plan members, must be determined by the constating documents of the Plan and the surrounding circumstances or factual matrix at the time that the 1972 Restatement was issued.

[21] With respect to the surrounding circumstances or factual matrix, Cory J. in *Schmidt*, supra, in determining that the Stearns Plan was not a trust, stated at page 674:

> Unlike the Catalytic plan, the Stearns plan makes no mention of any trust, trust fund or trustee. The Stearns fund was not created pursuant to a trust agreement but pursuant to a contract. This is so even though by 1970 the use of the trust in the creation of private employer pension plans had become a well-established practice. The absence of any reference to a trust in these circumstances indicates that there was a deliberate decision to avoid the use of a trust. Any argument that the employer merely "omitted" to state explicitly its intention to create a trust is difficult to accept.
>
> At the time of the 1970 plan, the employer tax benefits to be gained from the creation of a "trusted" pension fund were equally available to employers who preferred to purchase a group insurance policy.

[22] Counsel for the applicants places considerable reliance on the provisions of the 1972 Restatement as indicating an alienation of the Pension Fund to be applied exclusively for the benefit of the Plan members. I have some difficulty with this submission. I am not satisfied that an alienation or transfer of property, in and of itself, is a sufficient basis on which to imply a trust of that property. In *Crownx Inc. v. Edwards* (1994) 20 O.R. (3d) 710 (C.A.), Griffiths, J.A., in upholding the decision of Blair J., stated:

> In other respects the pension vehicles [1929 through to 1957] have simply been pension plans funded by insurance policies. As I see it, they do not represent the kind of arrangement that can readily be analyzed as a "trust". There may be "certainty of subject matter" and "certainty of object", two of the essential characteristics of a trust relationship, or, to put it in a slightly different way, there may be "a dedication of property to the carrying out of a purpose". I am not able to conclude, however, on the materials before me, that there is a "certainty of intention" to create a trust, the third essential characteristic for doing so: see D.W.M. Waters, *Law of Trusts in Canada*, 2nd ed. (Toronto: Carswell, 1984), pp.4-6 and 106.
>
> In my view, Blair J. was right. In *Schmidt*, Cory J. observed that the mere fact that the alleged subject matter of the trust, the pension plan, has been defined and that the beneficiaries had been clearly defined is not sufficient to create a trust, particularly where the plan makes absolutely no mention of any trust, trust fund or trustee. This reasoning applies to the 1972-73 plan which, in my view, should therefore be interpreted in accordance with the law of contract.

[23] In addition, the 1972 Restatement by its terms specifically reserves the right to Owens Corning to amend the Plan. Section 15.01 of the 1972 Restatement provides "the Company hopes and expects to continue the plan indefinitely, but reserves the right to discontinue or amend the plan should future conditions, in the judgment of the Company, warrant such action". Furthermore, the specific provisions of Section 15 dealing with amendments to the Plan or discontinuance of the Plan, states only that contributions cannot be diverted to purposes other than for the exclusive benefit of the members and that on discontinuance contributions shall be vested in the members of the Plan. There is no reference to income or surplus of the pension fund and the phrase "Pension Fund" is not used in Section 15. “Pension Fund” is defined in section 1.08 of the 1972 Restatement as meaning "the pension fund established under the terms of the Plan and the Pension Fund Contract for the accumulation of contributions made by the Company and members and the earnings thereof". There is, in my view, nothing in the 1972 Restatement or in subsequent constating documents of the Plan to evidence an intention on the part of Owens Corning that the income of the pension fund and any resulting surplus is to be permanently transferred to a trustee and to be used exclusively for the benefit of Plan members. The Pension Fund Contract is defined in the 1972 Restatement as "the contract entered into between this Company and the Insurer for the purposes of the Plan". As stated above, the Sun Life Group Annuity Policy defines itself as a contract and there is nothing in such policy indicating that any of the monies held by Sun Life are impressed with a trust.

[24] Accordingly, considering the wording of the 1972 Restatement and other constating documents of the Plan and in considering the surrounding circumstances and factual matrix at the time that the 1972 Restatement was issued, I am unable to conclude that a trust of the Pension Fund, being composed of the contributions and accumulated earnings and resulting surplus, for the exclusive benefit of the members of the pension plan ought to be implied by this court. Accordingly the terms of the constating documents of the Plan must be interpreted in accordance with the principles of contract law.

Breach of Contract

[25] It is the submission of counsel for the Applicants that the provisions of the 1985 Restatement which provide for the reversion of surplus to Owens Corning during the continuance of the Plan or on termination of the Plan are inconsistent with the 1985 Agreement and that the issuance of the 1985 Restatement containing such provisions constitute a breach of contract on the part of Owens Corning. It is acknowledged that the 1985 Restatement was prepared by senior human resources personnel of Owens Corning with input from the actuary of the pension plan. The provisions of the 1985 Restatement which are challenged by the applicants are section 14.02(e) which provides:

> Any assets of the Fund in excess of those required to provide all accrued retirement income and other benefits pursuant to this Plan, may revert to the Company upon Company request, subject to Applicable Pension Laws and Revenue Canada rules and regulations.

[6]

and section 17.03 which provides:

> Any assets of the Fund remaining after full provision has been made for the accrued retirement income and other benefits as described in Section 17.01 hereof, shall revert to the Company, subject to Applicable Pension Laws.

[26] The Applicants further submit that these provisions are in conflict with a proper interpretation of the second paragraph of section 1 of the 1985 Agreement which provides:

> "As the company is assuming full responsibility for funding the pension plan benefits and since the mechanism for the review of benefits is in place, the use of any plan surplus remains at the company's discretion, subject to Ontario Pension Legislation".

[27] The within Application was issued on October 11, 2000. On a motion heard September 17, 2003 in this Application I held that:

> "The wording of Section 1 of the 1985 Agreement is on its face susceptible of more than one interpretation and is accordingly, patently ambiguous. The weight of authority in this province in my view, supports the position of the Respondent that, in that situation, the court may consider the surrounding circumstances or factual matrix but if that does not resolve the ambiguity, the court must then consider objectively what reasonable persons would have meant by the word used and may not admit evidence of the subjective intention of the parties".

[28] I accept that the 1972 Restatement and other constating documents of the Plan entered into prior to the 1985 Restatement constitute part of the factual matrix against which the 1985 Agreement should be interpreted. Counsel for the Applicants submits that none of the constating documents prior to 1985 gave Owens Corning any proprietary interest in the income or surplus of the pension fund and that accordingly the reference to the surplus "remains" at the company's discretion should not be interpreted as creating new rights in the company to cause any ongoing surplus or surplus at termination to revert to it. Counsel for the Applicants submits that the dictionary definition of "remain" does not permit an interpretation of creating or establishing new rights in Owens Corning.

[29] With respect to the interpretation of the phrase "the use of" any planned surplus, counsel for the Applicants submit that it must be interpreted in the context of the use of the surplus that existed prior to the 1985 agreement and that reference should be made to section 15.02 of the 1972 Restatement which provided:

> If at any time, in the opinion of the Plan Actuary, an adequate reserve for contingencies has been established from any surplus

[6]

> which arises from the operation of this Plan, any further surplus accruing under this Plan shall be used to finance, in part or in whole, the cost of improvements in Plan benefits.

[30] He further submits that reference should also be made to the provisions of the 1977 Agreement and 1981 Agreement which required the company to discuss with the Union bargaining agents how any surplus funds accruing in the Plan were to be used to improve plan benefits and to the fact that in the 1985 Agreement the Unions' participatory role in this respect was dropped.

[31] In essence, it is the position of counsel for the Applicants that, taking into account the plain meaning of the language used and the factual matrix at the time of the negotiating of the 1985 Agreement, the appropriate interpretation of section 1 of the 1985 Agreement is that the employee contributions to the Plan were to cease in return for the Owens Corning having unfettered discretion to determine how surplus funds were to be used to fund improvements to pension benefits.

[32] Counsel for Owens Corning submits that the important factual matrix to be considered in interpreting the 1985 Agreement is that at that time there was no surplus in the Plan and that the Plan had been in a deficit position for a number of years. They point out that the most significant amendment to the Plan in 1985 was the elimination of employee contributions so that from that time forward the sole responsibility for the funding of the Plan was that of Owens Corning and any surplus which was accrued after 1985 would be as a result of the investment income of the pension fund and/or contributions made to the pension fund by Owens Corning and not as a result of employee contributions. They submit that the phrase "the use of" pension surplus in section 1 of the 1985 Agreement must be interpreted in light of the full sentence which provides "As the company is assuming full responsibility for funding the pension plan benefits and since a mechanism for the review of benefits is in place, the use of any Plan surplus remains at the company's discretion, …." and that, accordingly, the right to determine the use of surplus is tied in to the fact that Owens Corning's is assuming full responsibility for the funding of the Plan and that the quid quo pro for the elimination of employee contributions was that any future surplus in the Plan would be applied in the company's discretion. They submit that to interpret section 1 of the 1985 Agreement, as submitted by counsel for the Applicants, that the only quid quo pro for the elimination of employee contributions and all the other significant improvements to pension benefits provided for in the 1985 Agreement was that Owens Corning would no longer have to consult with the Unions as to the manner of using surplus to improve pension benefits is in their words, "absurd". They point out that, in fact, section 14 of the 1985 Agreement provides for a form of consultation in that it gives the Unions the right, on notice to Owens Corning, to require a top level meeting be held to review the Plan's application and operation and to exchange views about the pension field so that significant changes and trends can be taken into account in determining whether Plan changes are warranted.

[33] It is, in my view, inconceivable that Owens Corning would agree to the termination of employee contributions and agree to substantial improvements to pension benefits in consideration for only a slightly different obligation to consult with the Unions with respect to

changes to the pension benefits. It is also, in my view, most significant that at the time the 1985 Agreement was negotiated there was no accrued surplus in the Plan and that any future surplus arose from investment income or contributions from Owens Corning and not from contributions by employees. Accordingly the ambiguous wording of section 1 of the 1985 agreement must, in my view, be interpreted to mean that, in consideration for the cessation of employee contributions and the increased pension benefits and in view of the provision for continued consultation with the Unions with respect to changes to the Plan, it was agreed that any future surpluses in the Plan arising as a result of investment income or contributions by Owens Corning could be applied the discretion of Owens Corning. I am accordingly of the view that the provisions of the 1985 Restatement were not inconsistent with the proper interpretation of section 1 of the 1985 Agreement and did not constitute a breach of contract.

Entitlement to Contribution Holiday

[34] During the relevant period, the Regulations under the *Pension Benefits Act*, R.S.O. 1990 c.P8 provided that actuarial gains might be applied to reduce any employer contributions for the cost of normal pension benefits meaning the cost of pension benefits and ancillary benefits with respect to a fiscal year of the pension plan determined in accordance with the methods and actuarial assumptions used in a going concern valuation. The courts have held that, where the applicable legislation is permissive, an employer's right to take a contribution holiday will be determined by the provisions of the Plan. In *Schmidt*, supra, Cory J. stated at page 664:

> All of these cases are perfectly consistent with one another. Together they demonstrate only that whether or not a contribution holiday is permissible must be decided on the basis of the applicable plan provisions. I can see no objection in principle to employers taking contribution holidays when they are permitted to do so by the terms of the pension plan. When permission is not explicitly given in the plan, it may be implied from the wording of the employer's contribution obligation. Any provision which places the responsibility for the calculation of the amount needed to fund promised benefits in the hands of an actuary should be taken to incorporate accepted actuarial practice as to how that calculation will be made. That practice currently includes the application of calculated surplus funds to the determination of overall current service cost. It is a practice that is in keeping with the nature of a defined benefits plan, and one which is encouraged by the tax authorities
>
> While a plan which takes the form of a trust is in operation, the surplus is an actuarial surplus. Neither the employer nor the employees have a specific interest in this amount, since it only exists on paper, although the employee beneficiaries have an equitable interest in the total assets of the fund while it is in existence. When the plan is terminated, the actuarial surplus

> becomes an actual surplus and vests in the employee beneficiaries. The distinction between actual and actuarial surplus means that there is no inconsistency between the entitlement of the employer to contribution holidays and the disentitlement of the employer to recovery of the surplus on termination. The former relies on actuarial surplus, the latter on actual surplus.
>
> To permit a contribution holiday does not reduce the *corpus* of the fund nor does it amount to applying the moneys contained in it to something other than the exclusive benefit of the employees. The entitlement of the trust beneficiaries is not affected by a contribution holiday. That entitlement is to receive the defined benefits provided in the pension plan from the trust and, depending upon the terms of the trust, to receive a share of any surplus remaining upon termination of the plan.

[35] None of the 1972 Statement nor any subsequent Pension Agreement, or Pension Restatements entered into prior to the date of this Application contain any specific provisions with respect to contribution holidays. The provisions with respect to company contributions were generally similar to section 6.01 of the 1972 Restatement which stated:

> During each calendar year of this Plan, in addition to contributions required from members which have been deducted from their earnings, the Company shall pay into the Pension Fund at least such amounts as are certified by the Plan Actuary as needed for systematic funding of the cost of normal pension benefits of members under this Plan and to liquidate any unfunded liability and experience deficiency which may arise under this Plan in accordance with the requirements of The Pension Benefits Act, 1965 of Ontario and regulations thereunder as amended from time to time.

[36] Such provisions in my view clearly contemplate that, if no amount is required to fund the cost of normal pension benefits or to liquidate unfunded liabilities and experience deficiencies in a particular year, Owens Corning would not be required to make any contributions to the Plan. The taking of a contribution holiday simply relieves an employer of the requirement to make contributions to a pension plan in respect of a particular fiscal year. It does not result in a reversion of surplus to the employer or the application of surplus for other than pension benefits. Accordingly, even if the Applicants were successful in their submissions that the 1985 Agreement must be interpreted as preserving the provisions of the 1972 Restatement with respect to the application of contributions entirely to the improvement of pension benefits, the taking of contribution holidays would not be inconsistent with such provision of the 1972 Restatement.

[37] Accordingly whichever interpretation one takes of the provisions of the 1985 Agreement, Owens Corning was entitled to take contribution holidays in the years following 1985 where the

actuarial calculations determined that no employer contributions were required to fund the Plan in that particular year.

Waiver; Estoppel; Acquiescence/Laches; Statutory Limitation

[38] Counsel for Owens Corning submits that, even if the Applicants were successful on their trust or contract submissions, this Application cannot succeed. They rely on the doctrine of waiver which requires a finding that a party has acted in a manner which waives reliance on a known right of that party or on a known failure or defect on the part of the other party. The acts of the Unions on which Owens Corning relies as constituting waiver are that the Unions were provided with a copy of the 1985 Restatement, that they had access to an actuary to assist them in their review of the 1985 Restatement, that they were aware prior to 1989 that Owens Corning was taking contribution holidays and that they were advised by the company in the 1989 negotiations that it intended to follow the language of the 1985 Restatement with respect to the application of surplus and that they entered into a new six year agreement in 1989 in which the provisions of the 1985 Restatement with respect to surplus remained unchanged.

[39] In *Marchischuk vs. Dominion Industrial Supplies Ltd. et al*, (1989) 39 C.C.L.1 the trial judge, Kennedy J. stated with respect to waiver at page 270-71:

> The second issue of waiver comes into effect when a party knowingly acts in a manner where he waives or foregoes reliance upon some known right or defect. It is important that the right or defect, as the case may be, be known, since one should not be able to waive rights of which he was not fully aware or apprised.

and at pp.272-3:

> In determining whether waiver applies, the defendant must take steps in the proceedings knowingly and to its prejudice, which amount to foregoing a reliance upon some right or defect. In order to waive a right it must be a known right.

The findings of the trial judge with respect to waiver were upheld by the Manitoba Court of Appeal and by the Supreme Court of Canada.

[40] In my view, in order to constitute waiver the acts of the waiving party must be much definite, intentional and unequivocal. In *Saskatchewan River Bungalows Ltd. et al v. Maritime Life Assurance Co.*, (1994) 115 D.L.R. (4th) 478 (S.C.C.), Major J. stated:

> The elements of waiver are thus full knowledge of the deficiency which might be relied upon and the unequivocal intention to relinquish the right to rely on it. That intention may be expressed in a formal legal document, it may be expressed in some informal fashion or it may be inferred from conduct. In whatever fashion

> the intention to relinquish the right is communicated, however, the conscious intention to do so is what must be ascertained.

[41] In the case at bar, I am not satisfied that the above facts relied upon by Owens Corning as constituting a waiver by the Unions constituted knowing, positive acts on the part of the Unions which indicated the foregoing of a right to claim that the pension fund was subject to an implied trust or to claim that the provisions of the 1985 Restatement were in conflict with a proper interpretation of the 1985 Agreement. Accordingly, I do not think that the principle of waiver applies so as to preclude this Application being successful.

[42] With respect to estoppel, although the inaction of the unions from 1986 to 1996 in failing to object to the contribution holidays taken by Owens Corning may amount to a representation by the Unions which would tend to affect the legal relations between the Unions and Owens Corning and which was relied upon by Owens Corning in taking contribution holidays, such representation does not, in my view, relate to the question of reversion of surplus and could not have been relied upon by Owens Corning with respect to its entitlement to a reversion of surplus both while the Plan was ongoing or on termination of the Plan. Accordingly, I am of the view that the doctrine of estoppel does not apply so as to preclude the Unions from taking the position on this Application that the pension fund is subject to an implied trust or that the provisions of the 1985 Restatement with respect to surplus are in conflict with the proper interpretation of the 1985 Agreement.

[43] With respect to acquiescence or laches, acquiescence requires an express or implied representation by a party that it intends not to insist on its rights to require performance of a contract or obligation by the other party where the other party has been prejudiced by relying on such representation. Laches requires a neglect to assert a claim which, taken together with the lapse of time, causes prejudice to the adverse party. Although one might be able to find that acquiescence or laches applies with respect to the failure of the Unions to object to contribution holidays during the period 1986 to 2000, I do not find the elements of either acquiescence or laches with respect to the Unions' right to assert the position that the pension fund is subject to an implied trust or that the provisions of the 1985 Restatement with respect to surplus are inconsistent with the 1985 Agreement. Accordingly, I am of the view that neither the doctrine of acquiescence nor the doctrine of laches applies to preclude the Applicants from bringing this Application based on the trust and contract positions with respect to surplus taken by the Applicants in this Application.

[44] An action to enforce contractual obligations must be commenced within a six year period from the date that the cause of action arose pursuant sub-section 45(1)(g) of the *Limitations Act*, R.S.O. (1990) c.L15. The discoverability principle provides that the statutory limitation period does not commence to run until the plaintiff knows, or by the exercise of reasonable diligence ought to have known, the material facts upon which the cause of action is based. (See: *Peixeiro v. Haberman*, (1997) 3 S.C.R. 549). As I have concluded above that the pension fund is not subject to an implied trust and that the constating documents of the Pension Plan must be interpreted in accordance with the principles of contract law, a claim based taking contribution holidays or on the failure of Owens Corning to apply surplus for the benefit of the Plan members

would have to be brought within a six-year period from the date as of which the Unions knew, or ought to have known, of the material facts on which such claims are based. With respect to the taking of contribution holidays, the Unions were clearly aware by 1986, or certainly by 1989, that Owens Corning was taking contribution holidays and making no contributions to the Pension Plan in that they were provided with the annual actuarial valuations throughout this period. Also, it is clear from the evidence before this court that, at the time of the 1989 negotiations, the Unions were fully aware that Owens Corning had taken contribution holidays. Accordingly, to the extent that the Application is based upon Owens Corning being in breach of contract by virtue of having taken contribution holidays and failing to make contributions to the Pension Plan during years subsequent to 1986, the Application is in my view statute barred by virtue of section 45(1)(g) of the *Limitations Act*.

[45] With respect to the relief sought in the Application for a declaration as to entitlement to surplus and an order that the surplus be applied toward increased benefits, I do not think the Limitations Act is applicable. Owens Corning has taken no steps to apply surplus in the ongoing Plan to anything other than the funding of benefits or the improvement of benefits and the Plan has not been discontinued so that the application of surplus on discontinuance is moot. Accordingly, no material facts or actions have occurred on which a claim against Owen Corning for breach of contractual obligations to apply ongoing surplus or surplus at termination to the provision of or the improvement of pension benefits could be based and accordingly the limitation period with respect to such claims has not in my view commenced to run.

[46] The result is that estoppel, acquiescence, laches or limitations may apply to preclude the Application from proceeding with respect to the relief sought as to contribution holidays. I have however concluded above that, regardless of which interpretation one takes of the provisions of the 1985 Agreement, Owens Corning was entitled to take contribution holidays. I find however that none of the doctrines of waiver, estoppel, acquiescence or laches or the provisions of the *Limitations Act* are a bar to the Application proceeding with respect to the declaratory relief sought as to ownership of the surplus or the application of the surplus to the improvement of pension benefits.

Applicants Bound by Actions of the Union

[47] The Applicants in this Application consist of persons who on October 11, 2000 were employees of Owens Corning and accordingly active members of the Plan as well as persons who, as of October 11, 2000, were retired members or deferred vested members of the Plan and beneficiaries of deceased persons who were members of the Plan (collectively "non-active members"). The Applicants, for the first time in their Reply Factum, have raised the issue of whether agreements entered into by the Unions are binding on the Applicants and whether actions, admissions, assertions or knowledge of Union officials can be imputed to the Applicants. It was the submission of the Applicants in their Reply Factum that agreements, actions, admissions, assertions or knowledge of Union representatives cannot be imputed to bind Plan members or function either as consent to amendments to the Plan or as procedural bars to the Application.

[6]

[48] The Applicants refer to the definitions in section 1 of the Labour Relations Act, R.S.O. 1995, c.1 (the "LRA") which defines "bargaining unit" as a unit of employees appropriate for collective bargaining and the defines "trade union" as an organization of employees and to section 7 of the LRA which refers to a trade union being certified as a bargaining agent for employees. On the hearing of this Application, counsel for the Applicants conceded that the Unions are statutory agents to bargain on behalf of active members and accordingly agreements made by the unions are binding on active members and actions, admissions, assertions or knowledge of the Union could be imputed to active members. The Applicants accordingly only take the position that the Unions, in the case at bar, have no statutory authority to bargain as agent on behalf of the non-active members or to enter into agreements binding upon the non-active members and that the actions, admissions, assertions, or knowledge of the Unions cannot be imputed to the non-active members.

[49] It is also conceded by the Applicants that collective agreements may include a recognition clause whereby the employer recognizes the union as representing in negotiations persons such as retirees who are not members of the bargaining unit. There was no evidence entered in the case at bar that any of the collective agreements between the unions and Owens Corning during the relevant period contained any such recognition clauses. The evidence before this court is however clear that the Unions did in fact, in negotiations throughout the relevant period, negotiate improved pension benefits for both active and non-active members.

[50] The Applicants referred to the decision of Adams J. in *Bathgate et al v. National Hockey League Pension Society*, (1992) 98 D.L.R. (4th) 326 where Adams J. concluded that the *National Hockey League Players Association* in entering into a grievance with respect to the surplus in a pension fund did not represent the applicants being retired former professional hockey players who had been employed by the various hockey clubs, all of whom had made contributions to the pension fund. In that application Adams J. concluded that the applicants were not bound by agreements entered into by the NHLPA with respect to the application of surplus in the pension fund and the applicants were successful in their application for a declaration of entitlement to surplus funds in the pension fund.

[51] In *Pulp and Paper Industrial Relations Bureau v. Canadian Paper Workers' Union*, (1997) No. 62/77, the British Columbia Labour Relations Board, in what it described as a "precedent setting case in Canadian labour law" stated as follows:

> In this precedent-setting case in Canadian labour law, this Board has had to consider how the subject of pensions for retired workers fits into the bargaining regime under the Labour Code. We are conscious that our analysis of that question has been lengthy and detailed. But we believe that our conclusions can be distilled in these propositions.
>
> (i) It is perfectly compatible with the Labour Code that a trade-union, acting on behalf of the active employees, "bargains collectively" -- in the full-blooded sense of that

> term under the statute--about the situation of individuals who may not come within the scope of its bargaining unit. Thus, even if it is true that retired workers are not "employees" in the legal sense--an issue which we do not propose to resolve here--the CPU is entitled to pursue the subject of their pension benefits in negotiations with the Bureau, and to use the normal routes available in the Labour Code to resolve any "dispute" which might arise regarding that issue.
>
> (ii) The legal duty to bargain imposed by the Labour Code is a single, global obligation to negotiate a settlement of an entire collective agreement. Section 6 does not create a set of separate duties to bargain, duties which are attachable to each of the items placed on the bargaining table by the other side. While making bona fide and reasonable efforts to settle a collective agreement with the CPU, the Bureau is legally entitled to refuse to discuss with the CPU the one issue of pension benefits for retired workers. That stance leaves it up to the union membership to decide whether retiree benefits are sufficiently vital to their conditions of employment that they should take strike action in order to change the Bureau's mind.

[52] In *Bohemier v. Centra Manitoba*, (1999) M.J. No. 68, an action brought by retirees against Centra arising out of an agreement between Centra and a union to dispose of surplus benefits for the mutual benefit of Centra and union members but excluding retirees was dismissed by the motions judge who held that the dispute arose out of the collective agreement and that the retired employees were required to bring their grievance before the Labour Relations Board. The Manitoba Court of Appeal allowed the appeal as against Centra and the action was reinstated. The Court held that the retired employees were no longer union members and were not therefore not parties to the collective agreement and accordingly their claim was not a grievable matter. The Court also held that the retired employees were not represented by the union as bargaining agent in negotiating in the collective agreement. Huband J.A. stated at paragraph 24:

> There is no doubt, as argued by counsel for Centra, that the pension plan contemplates that future changes in the pension plan are to be negotiated between Centra and the union. However, those provisions, to which the plaintiffs are not a party, do not confer upon the union the authority to speak for retired employees in a manner which is detrimental to their interests.

and in his conclusions, after referring to the decision of the Supreme Court of Canada in *Dayco (Canada) Ltd. v. CAW - Canada* (1993) 2 S.C.R. 230, stated:

[6]

1. It does not seem to me that the pension plan forms part of or has been incorporated into the collective agreement, either directly or by implication. The pension plan, as amended, is a stand-alone document. It is true that it contemplates future changes through a bargaining process between the union and Centra, but as has been noted, that anomaly does not bring a dispute concerning its maladministration within the dispute resolution system contemplated by the Act.

2. Even if the pension plan was made part of the collective agreement, in the absence of a union grievance, retired employees, being non-parties to the agreement, have a right to an independent cause of action in court for an alleged violation of their pensions rights.

[53] In *Dayco*, supra, in dealing with the right of the union to file a grievance on behalf of retired workers LaForest J. stated:

> I turn now to the one area in which there may be a crucial difference in the nature (but not the existence) of vested retirement benefits in Ontario as compared to the United States. This is the range of remedial choices available to individual retired workers. In the United States there is an independent right to sue in a court of law when benefits promised in a collective agreement are withdrawn, even if that withdrawal occurs pursuant to a new collective agreement between management and labour. As well, retired workers, although no longer part of the bargaining unit, can bring an unfair representation complaint against a union that fails to consider the interests of retired workers during the course of bargaining. In Canada, it is unclear whether either of these routes is open to retired workers, who may be completely reliant upon their former bargaining agent to bring a grievance on their behalf when an employer unilaterally revokes vested benefits. And the grievance route may be foreclosed, as the union may be unwilling to grieve the issue on behalf of the retirees. This may arise because of an inevitable conflict of interest facing the union. If it were successful in grieving under an old collective agreement on behalf of retired workers, the employer would face increased overall labour costs, perhaps leading to harder bargaining over current employees' compensation. The union may well be reluctant to carry forward a grievance on behalf of retirees, as success on that front might well be contrary to the interests of current members of the bargaining unit.

[6]

> In these circumstances, Canadian retirees may well find themselves in possession a right without a remedy. The grievance procedure may be foreclosed, as described above. Retirees may not be entitled to bring a claim against the union for unfair representation, as such rights in Ontario appear to be limited to current members of the bargaining unit: see s. 68 of the Act. Finally, Ontario's *Rights of Labour Law Act*, R.S.O. 1980, c. 456, s. 3(3), and like provisions in other jurisdictions, may foreclose the possibility of a court action by the retirees; see Adams, *Canadian Labour Law* (2nd ed. 1993), at §§ 7.40-7.90. This problem does not arise in this case, as the union here did pursue a grievance on behalf of the retired workers. But in another case it seems to me that such a remedial vacuum, arising because the retirees are not party to the arbitration procedures guaranteed by the Act, may possibly be justification for allowing a court action to proceed; see *St. Anne-Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union*, Local 219 (1982), 142 D.L.R. (3d) 678 (N.B.C.A.), at pp. 686 and 691; and see [1986] 1 S.C.R. 704, at pp.713 and 721. Indeed, counsel for the company submitted that a court action was not only possible, but that the courts were the only a forum available to these retirees. But this submission was made in passing, and was not developed in argument. As such I do not propose to go into the issue, except to say that it would appear to be irrelevant in this case. Assuming a court action is available, I know of no reason or authority that would preclude arbitration as an alternative forum for the retirees.

[54] If there is any consistent theme that can be gleaned from the above decisions, it would appear to me to be that, although non-active members are not members of the bargaining unit and the union is not authorized by statute to bargain on their behalf and that therefore an employer is entitled to refuse to negotiate with a union with respect to benefits to non-active members, unions may, and in fact do, with the participation of the employer, bargain for improved pension benefits on behalf of both active and non-active members. In the case at bar, this is clearly what happened during the relevant period and, although retirees may not be able to enforce their entitlement to improved benefits through grievance procedures, they would be entitled to enforce them through action in the courts. Although the authorities in this area do not deal with the issue, it appears to me that the employer negotiates with the union on behalf of retirees on the basis of the apparent or ostensible authority of the unions to bargain on their behalf. The evidence before the court is consistent that the Unions, in negotiations with Owens Corning, purported to negotiate improved pension benefits and amendments to the Plan on behalf of both active and non-active members. The affidavits of Mr. Mifsud filed with this Court clearly state that the unions have in negotiations since 1972 negotiated improvements to the Plan for all beneficiaries of the Pension Plan and the transcript of the cross-examination of Mr. Sullivan, a retired union representative who had been involved in such negotiations verifies that in negotiating pension matters with Owens Corning he was negotiating on behalf of "all pension

plan members, not just current Owens Corning employees" and that he negotiated "numerous benefits for people who had long retired".

[55] In my view the evidence establishes that the Unions did purport to negotiate on behalf of both active and non-active members of the Plan and did in fact negotiate improved benefits for both categories of members. Owens Corning clearly participated in such negotiations relying on the apparent or ostensible authority of the Unions to negotiate on behalf of non-active members of the Plan. Accordingly, I am of the view that agreements entered into by the Union with respect to the Plan are binding on non-active members and that actions, admissions, assertions or knowledge of the Unions relating to matters in issue in this Application can be imputed to non-active as well as active members of the Plan.

Conclusion

[56] Accordingly, on the issues raised in this Application, my determination is as follows:

1. The documents establishing the Plan and amending the terms of the Plan should not be construed as creating an implied trust of the pension fund for the benefit of the members but should be construed as a contract.

2. The provisions of section 1 of the 1985 Agreement should be interpreted as being consistent with the provisions of the 1985 Restatement that surplus in the Plan during the continuance of the Plan may revert to Owens Corning and that surplus on termination of the Plan shall revert to Owens Corning subject in both cases to applicable laws.

3. Owens Corning was entitled to apply surplus in the Plan during the period following 1986 against current service costs by taking contribution holidays.

4. The claims of the Applicants with respect to Owens Corning having taken contribution holidays are barred by estoppel, acquiescence or laches and by the Statute of Limitations but the other claims of the Applicants are not barred by waiver, estoppel, acquiescence, laches or the Statute of Limitations.

5. Agreements made by the Unions in the course of negotiations of pension benefits are binding on active and non-active members of the Plan and actions, admissions, assertions or knowledge of the Unions relating to such matters may be imputed to active and non-active members of the Plan.

[57] The Application is dismissed.

[58] Counsel may make brief written submissions to me as to the costs of these proceedings on or before February 15, 2004.

[6]

Ground J.

Released: January 21, 2004

[6]

COURT FILE NO.: 01-CL-004074
DATE: 20040121

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

JOHN MIFSUD

- and -

OWENS CORNING CANADA INC.

REASONS

Ground J.

Released: January 21, 2004

[9]

TAB 4

See paras 30-38

COURT OF APPEAL FOR ONTARIO

CITATION: Northwinds Brewery Ltd. v. Caralyse Inc., 2023 ONCA 17
DATE: 20230112
DOCKET: C70134

van Rensburg, Sossin and Copeland JJ.A.

BETWEEN

Northwinds Brewery Ltd.

Plaintiff/Defendant by Counterclaim (Respondent)

and

Caralyse Inc.

Defendant/Plaintiff by Counterclaim (Appellant)

Bryan Fromstein and A. Fabio Longo, for the appellant

Gasper Galati and Phillip Wallner, for the respondent

Heard: November 21, 2022

On appeal from the judgment of Justice John R. McCarthy of the Superior Court of Justice, dated November 26, 2021, with reasons reported at 2021 ONSC 7682, and from the costs order, dated March 16, 2022, with reasons reported at 2022 ONSC 1659.

van Rensburg J.A.:

A. OVERVIEW

[1] This is an appeal of a judgment in an action concerning a commercial lease (the “Lease”) between the appellant, Caralyse Inc. (the “Landlord”), and the

respondent, Northwinds Brewery Ltd. (the “Tenant”). The Landlord challenges the trial judge’s conclusions that it was not entitled to receive rent in accordance with the Lease in respect of a part of the Common Area where the Tenant had installed equipment and constructed a shed (the “Shed Area”) and a mezzanine it installed in the Premises, and that the Tenant had validly exercised an option to extend the Lease for a second five-year term. The Landlord also seeks to appeal the award of costs in favour of the Tenant.

[2] For the reasons that follow, I would allow the appeal on one issue only: although the trial judge was entitled to fix “non-lease-based rent” at 50% of the combined rent under the Lease for the Shed Area, he erred in limiting the Landlord’s recovery of arrears of such rent to two years preceding the commencement of its counterclaim, applying the basic limitation period under the *Limitations Act, 2002*, S.O. 2002, c. 24, Schedule B (the “*Limitations Act”),* instead of the six-year limitation period under s. 17(1) of the *Real Property Limitations Act*, R.S.O. 1990, c. L.15 (the “*RPLA*”). I would refuse leave to appeal costs and I would dismiss the balance of the appeal.

B. THE PROCEEDINGS

[3] The Landlord owns a commercial plaza in Collingwood, Ontario, where the Tenant, leasing two units (the “Premises”), operates a restaurant, brewpub, and retail business. The Lease, which is dated January 6, 2014 was for an initial five-

year term that began July 1, 2014 (the “Commencement Date”), after a six-month fixturing period. The Lease provides for annual minimum rent of $12 per square foot, and requires the Tenant to pay as “Additional Rent” its proportionate share of annual taxes, maintenance and insurance (“TMI”) and operating costs, which for the first year was fixed at $7.40 per square foot. After the Tenant gave notice in October 2018 to extend the Lease for a second five-year term, the Landlord issued a series of default notices. The Tenant obtained interim and interlocutory injunctions restraining the Landlord from terminating the Lease and interfering with its quiet enjoyment of the Premises. The proceeding was converted into an action in which the parties exchanged pleadings, including the Landlord’s Statement of Defence and Counterclaim which was dated January 29, 2021.

C. THE TRIAL DECISION

[4] Several issues proceeded to trial, including: (1) whether the Tenant was in default under the Lease; (2) whether the Landlord was in default; (3) whether the Landlord was entitled to receive rent for (i) the Shed Area and (ii) the mezzanine; (4) whether the Tenant had validly exercised its option to extend the Lease for a second five-year term; and (5) the applicable limitation periods for the various claims.

[5] The Tenant was largely successful. The trial judge observed that the parties had a relationship that was “plagued by difficulties, disagreements, and

misunderstandings from the outset". He generally preferred the evidence of the Tenant's principal to that of the Landlord's principal.

[6] The trial judge found that it was not until the Tenant served a notice of extension in October 2018 that the Landlord raised any serious concerns, including issues about the Shed Area and mezzanine, and TMI. He rejected the Landlord's evidence that it had sent Additional Rent statements to the Tenant in each of the years 2015 to 2017 setting out the Tenant's proportionate share of TMI and operating expenses. He concluded that the Landlord had not proven any rent arrears, any default by the Tenant or any other reason for the Landlord to terminate the Lease, and that the Tenant had validly exercised its option to extend the Lease for a second five-year term. He awarded the Tenant damages for breach of the Landlord's covenant to repair in the sum of $7,159.04 (after concluding the Tenant had incurred costs of $29,352.53 to repair and maintain the roof and HVAC systems since the Commencement Date, and after applying the two-year limitation period under the *Limitations Act*).

[7] The trial judge concluded that the "Rentable Area of the Premises" did not include the mezzanine, and therefore that no rent was payable under the Lease for this area. As for the Shed Area, while it was not part of the Rentable Area of the Premises, the Landlord was entitled to receive "non-lease-based rent" at a rate of 50% of the "combined rent" (minimum rent plus the Tenant's share of TMI and operating expenses) under the Lease. The Landlord was awarded the sum of

$1,791.80 (non-lease-based rent arrears retroactive to February 1, 2019, again applying the two-year limitation period under the *Limitations Act*), and the trial judge declared that the Tenant was to continue paying non-lease-based rent at the rate of $52.70 monthly "until the earlier of the Tenant ceasing to utilize [the] shed space, the parties agreeing otherwise, the termination of the Lease or further court order".

[8] The trial judge awarded the Tenant costs on a partial indemnity basis in the inclusive sum of $116,516.71, the amount sought by the Tenant, which the trial judge found to be reasonable and proportional to the result in what he described as "intense, high stakes litigation which demanded the time and attention of diligent counsel and support staff".

D. ISSUES

[9] The Landlord raises four issues in this appeal:

1. Did the trial judge err in his approach to the Shed Area by (a) awarding non-lease-based rent at 50% of the combined rent under the Lease; and (b) applying the two-year limitation period under the *Limitations Act*, rather than the six-year limitation period applicable to "rent arrears" under the *RPLA*?
2. Did the trial judge err in concluding that the mezzanine was not part of the Rentable Area of the Premises?

3. Did the trial judge err in concluding that the Tenant had validly exercised its option to extend the Lease?
4. Did the trial judge err in his award of costs?

E. DISCUSSION

(1) Issue One: Did the trial judge err in respect of the Shed Area?

[10] The shed is a 62 square foot wooden structure located outside the Premises in the Common Area of the Landlord's commercial plaza. The shed houses external ground level machinery required for the Tenant's use of the premises, including a glycol chiller, a CO2 tank and a beer fridge condenser. The equipment and shed were installed before the Tenant began operating its business. The shed, which is locked, provides security for the equipment and protects it from the elements.

[11] After the Tenant gave notice of its intention to extend the Lease, the Landlord asserted that it had never authorized the shed, and that the Tenant had made a structural change to the Premises without permission, encroaching outside the space it paid rent for. Although the Landlord initially requested the removal of the shed, by the time the matter proceeded to trial, its claim was that the construction of the shed without prior approval was an act of default under the Lease, or alternatively that the Tenant was required to pay rent for the Shed Area retroactive to the Commencement Date. The Tenant's position was that the shed

was not structural in nature, such that the Landlord's approval was not required, and it was a permitted addition that did not increase the Rentable Area of the Premises.

[12] In addressing these claims, the trial judge made two findings in favour of the Tenant. First, he concluded that the installation of the brewing equipment and exterior shed was not a structural alteration to the Premises requiring the Landlord's authorization. Second, he rejected the Landlord's assertion that the Rentable Area of the Premises included any portion of the Common Area, saying, "[t]here is nothing that would permit me to do so in the lease and that definition cannot support a more liberal interpretation".

[13] However, the trial judge also recognized that the Tenant had "made bold with an exterior space which does not form part of the demised premises under the lease". Although he observed in passing that the shed was an addition authorized under Article 10.2 of the Lease, he ultimately characterized the shed as an unauthorized use of the Common Area. Accordingly, he indicated that he would impose rent on the Tenant for such use, which he noted was "independent of the lease itself", and which he characterized as "non-lease-based rent". He stated that "the imposed obligation is justified based upon fairness, equity, and commercial exigencies".

[14] In determining the appropriate rate for the non-lease-based rent of the Shed Area, the trial judge considered what a reasonable tenant in the position of the Tenant would expect to be charged and what a reasonable landlord would expect to receive. He noted that the space was small, appurtenant to the Premises, and could not otherwise serve as a source of revenue for the Landlord. Even so, the Tenant put the space to profitable use while the Landlord continued to own it, insure it, and pay taxes on it. There was no evidence that the Landlord had to maintain or service the Shed Area, and the Tenant had "effectively appropriated" the space and taken on the care, control and maintenance of it. The trial judge fixed the non-lease-based rent at 50% of the combined rent for the Premises, which he stated was $10.20 per square foot, in accordance with the Lease calculated annually and paid monthly.[1] Such rent was payable until the earlier of the Tenant ceasing to utilize the shed space, the parties agreeing otherwise, the termination of the Lease or further court order.

[15] In awarding the Landlord non-lease-based rent retroactive only to February 1, 2019, two years before the Landlord asserted its counterclaim, the trial judge stated that the two-year limitation period under the *Limitations Act* that was applicable to the Tenant's claim for damages for breach of the covenant to repair

[1] In arriving at this figure, the trial judge appears to have used $13 per square foot as the minimum rent amount and $7.40 per square foot as the additional rent (the Tenant's share of TMI and operating expenses) amount. The minimum rent under the Lease only increased from $12 to $13 per square foot on July 1, 2019, the commencement date for the second term of the Lease.

"should similarly operate to disentitle the Landlord to claim arrears on non-lease-based rent beyond 2 years from when the counterclaim was issued".

[16] The Landlord asserts that the trial judge erred in the amount awarded in respect of the Shed Area. The Landlord says that the trial judge erred in creating a new contract between the parties when he imposed "non-leased based rent" at a rate of 50% of the rent payable under the Lease instead of the full rate. The Landlord also contends that the trial judge erred in applying the *Limitations Act*: it was entitled to rent arrears retroactive to six years prior to the issuance of the counterclaim pursuant to s. 17(1) of the *RPLA.*

[17] The Tenant contends that the trial judge made no error in his treatment of the Shed Area: the trial judge was entitled to award the Landlord "non-lease-based rent" that was based on a reasonable amount considering all the circumstances. The Tenant asserts that the trial judge correctly applied the two-year limitation period to the Landlord's claim for what was essentially a licence to use the Shed Area or an award of damages, and not a claim for arrears of rent under the *RPLA*.

[18] In my view, the trial judge did not err when he declared the Tenant's continued right to occupy the Shed Area, and fixed rent for that space at a rate that was 50% of the combined rent under the Lease. As I will explain, however, he ought to have applied the six-year limitation period under the *RPLA* to the Landlord's claim for arrears of such rent.

[19] As I have already noted, by the time the parties reached trial, the Landlord did not seek an order requiring the Tenant to remove the shed and prohibiting the Tenant from continuing to use the Shed Area. Rather (in addition to claiming that the Tenant was in breach of the Lease for having constructed the shed), the Landlord sought rent for the Shed Area at the rate provided for under the Lease retroactive to the Commencement Date, while the Tenant requested a declaration that the shed need not be removed, and asserted that no rent was payable for the shed.

[20] After concluding that the Shed Area did not form part of the Rentable Area of the Premises, and recognizing that, if the Lease continued, the Landlord was prepared to permit the Tenant to continue to occupy the Shed Area provided it received rent, the trial judge provided for a remedy that protected the *status quo* and was responsive to the respective interests of the parties. He recognized that the Tenant had installed the shed prior to the Commencement Date under the Lease, and that the shed and the equipment it housed were essential to the Tenant's business. He recognized the Tenant's continuing right to exclusively occupy the Shed Area going forward, while also accepting that the Landlord was entitled to future rent for the Shed Area, as well as arrears of rent. Because the Tenant's use of the Shed Area, although an appropriation of the Common Area, was not covered by the Lease, the Lease rental rate did not necessarily apply. In fixing the rate at 50% of the combined rent under the Lease, the trial judge

considered, based on the circumstances of the parties, what would be a reasonable rate for the Shed Area. I am not persuaded that there was any reversible error in the trial judge's determination of an appropriate rent for the Tenant's past and future use and occupation of the Shed Area.

[21] As for the limitation period issue, the trial judge stated that the same two-year limitation period that was applicable to the Tenant's claim for damages for breach of the Landlord's duty to repair should apply to the non-lease-based rent arrears. He did not consider whether the Landlord's claim for rent was subject to s. 17(1) of the *RPLA.*

[22] In my view, the trial judge erred in law in applying a two-year limitation period to the Landlord's claim for the Tenant's past use and occupation of the space. The claim is governed by the six-year limitation period for rent arrears under the *RPLA.*

[23] Section 17(1) of the *RPLA* provides that "no arrears of rent, or of interest in respect of any sum of money charged upon or payable out of any land or rent … or any damages in respect of such arrears of rent or interest, shall be recovered by any distress or action but within six years next after the same respectively has become due". "Rent" is defined under the *RPLA* as including "all annuities and periodical sums of money charged upon or payable out of land".

[24] The term "arrears of rent" has an objective meaning under the *RPLA.* As Mew J. noted in *Pickering Square Inc. v. Trillium College Inc.*, 2014 ONSC 2629,

44 R.P.R. (5th) 251, aff'd on other grounds, 2016 ONCA 179, 64 R.P.R. (5th) 175, the term does not depend on how rent is defined by the parties in their lease; it is not "an empty vessel that the parties may fill at their discretion". It must be interpreted in light of the context, scheme and object of that statute and the law of limitations in Ontario: at para. 52.

[25] Although the Shed Area was not part of the Rentable Area of the Premises (and therefore did not attract rent under the Lease), this conclusion did not take it outside the terms of the *RPLA*. Monthly payments by the Tenant to the Landlord for the exclusive occupation of the Shed Area fit neatly within the *RPLA*'s definition of "rent" as they constitute "periodical sums of money charged upon or payable out of land".

[26] I will briefly deal with the Tenant's assertion that, notwithstanding that he used the term "non-lease-based rent", the trial judge recognized and imposed a licence fee, or alternatively that the amount was a form of damages – both of which, according to the Tenant, would fall under the two-year limitation period under the *Limitations Act*.

[27] The Tenant asserts that the arrangement imposed by the trial judge was accurately described in his subsequent reasons[2] as granting the Landlord "rent in

[2] The trial judge released Reasons on Motion to Amend Reasons for Judgment and Costs on March 4, 2022, in which he corrected the non-lease-based rent to $52.70 monthly.

the nature of a license fee", which would take it outside the definition of rent arrears under the *RPLA*. However, as the parties acknowledged in oral argument on the appeal, no one at trial argued that the Tenant's occupation of the Shed Area was in the nature of a licence. In addition, the trial judge's findings that the Tenant had occupied the Shed Area exclusively since the Commencement Date and that the space was essential to the Tenant, his recognition that the Tenant had ongoing rights to the Shed Area that were not dependent on the Landlord's agreement, and his award of "non-lease-based rent" are consistent with a lease, not a licence.

[28] Nor, as the Tenant argues, did the Landlord claim or the trial judge award the Landlord damages. The award of "non-lease-based rent" is unlike the landlord's claim for damages for its tenant's intentional interference with contractual relations and oppression in *Sterling Waterhouse Inc. v. LMC Endocrinology Centres (Toronto) Ltd.*, 2015 ONSC 3987, aff'd on other grounds, 2016 ONCA 343, a case relied on by the Tenant. In that case, the nature of the misconduct for each cause of action "[distanced] the claims from the type of real property claim that would fall under s. 17 of the *RPLA*, even though the damages [related] to rent": at para. 35. By contrast, the Landlord's claim in this case in relation to the Shed Area was consistently referred to by the trial judge as a claim for rent retroactive to the Commencement Date: see paras. 33, 50 and 97. And, that is precisely what the trial judge ordered: non-lease-based rent from the Commencement Date (subject to the applicable limitation period), together with a

declaration that the Tenant had an ongoing right to occupy the space, and an ongoing obligation to pay rent. In any event, even if the arrears could be characterized as a form of damages, the six-year limitation period prescribed by s. 17 applies not only to arrears of rent but also to "damages in respect of such arrears".

[29] For these reasons, I would allow the Landlord's appeal in relation to the Shed Area, only to the extent that the Landlord is entitled to recover arrears of non-lease-based rent retroactive to six years prior to the issuance of its counterclaim.

(2) Issue Two: Did the trial judge err in respect of the mezzanine?

[30] During the fixturing period in early 2014, the Tenant constructed an internal mezzanine that measures 781 square feet and sits above an office and washrooms also installed by the Tenant. The Landlord claimed that the mezzanine increased the Rentable Area of the Premises. The trial judge disagreed.

[31] The Landlord asserts that the trial judge made three reversible errors in finding that Tenant did not have to pay rent for the mezzanine because it was not included in the Rentable Area of the Premises. First, he referred to wording in the offer to lease that was not included in the Lease, notwithstanding that there was an entire agreement clause. Second, he relied on the parties' post-contractual conduct to determine the parties' intentions in relation to the rentable space when there was no ambiguity in the Lease, contrary to *Shewchuk v. Blackmont Capital*

Inc., 2016 ONCA 912, 404 D.L.R. (4th) 512. Third, he failed to consider Schedule B of the Lease, which describes the Tenant's permitted work and required the Tenant to remove existing mezzanines.

[32] The Tenant asserts that there is no extricable legal error in the trial judge's interpretation of the Lease, which is entitled to deference: see *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 50.

[33] I would not give effect to this ground of appeal.

[34] In determining whether the mezzanine was included in the Rentable Area of the Premises, the trial judge properly focused on the wording of the Lease. The Lease defines the "Rentable Area of the Premises" as "the rentable area of the Premises, expressed in square feet, measured from (a) the inside surface of all walls, doors, and windows of the Premises". Article 1.1(e) of the Lease provides that the Rentable Area of the Premises is "[a]pproximately 5,600 square feet, subject to certification in accordance with [Article] 3.7". Article 3.7 in turn provides for the Tenant to have the Rentable Area of the Premises measured and certified by its architect or surveyor, and to have the certificate of measurement sent to the Landlord. If the certified Rentable Area of the Premises differs from the measurement set out in Article 1.1(e), the rent will be adjusted retroactive to the later of the Lease Commencement Date and the date of any change or alteration

in or to the Premises, which increases or decreases the Rentable Area of the Premises.

[35] Based on these provisions, the trial judge held that Rentable Area of the Premises simply meant the "square footage measured at the ground floor encompassed within the walls of the building structure". He concluded that the term could not bear the interpretation suggested by the Landlord as there was nothing in the Lease or any other document to suggest that the mezzanine should be included.

[36] In coming to this conclusion, the trial judge did not err by referring to the offer to lease. The Landlord had relied on the fact that a mezzanine was specifically excluded from the rentable area in the offer to lease, and that it was not mentioned in the Lease itself, to argue that the mezzanine the Tenant installed was part of the rentable area. The trial judge rejected this interpretation, concluding instead that since the offer to lease specifically excluded the mezzanine that was onsite before the Tenant made its alterations, the omission of any mention of a mezzanine in the Lease represented a mutual understanding that it was not to be included. Both parties relied on the offer to lease as part of the circumstances surrounding the execution of the Lease.

[37] Nor did the trial judge err in considering the communications between the parties, which the Landlord characterizes as irrelevant subsequent conduct. These

communications included: (a) the Tenant providing the Landlord with an architectural drawing in 2014 that measured the Rentable Area of the Premises at 5,106 square feet based on the inside surface of all walls, doors, and windows; (b) the Landlord providing the Tenant its own measurement of the space in July 2015, which bore the notation “Mezzanine: Not Measured (as per client’s instructions)”; and (c) the Landlord’s failure to dispute the Tenant’s 2014 architectural drawings (which depicted the mezzanine) and square footage measurements for more than a year. The trial judge inferred from this conduct that the Landlord accepted that the mezzanine would not be included in the Rentable Area of the Premises. Given that Article 3.7 of the Lease expressly contemplates further actions which might affect the size of the Rentable Area of the Premises, these communications between the parties were directly relevant to the determination of whether the mezzanine was included. Moreover, the trial judge was not only interpreting the Lease in these passages; he was also considering the conduct of the Landlord and its timing in raising issues, including taking issue with the Rentable Area of the Premises after the Tenant gave notice of its intention to extend the Lease.

[38] Finally, the trial judge did not err by failing to consider Schedule B of the Lease. This argument, raised for the first time on appeal, does not assist the Landlord. Schedule B refers to the Tenant’s removal of any existing mezzanine as part of the “Base Building Work” the Tenant would perform to ready the Premises for its own improvements. While it provides for the Tenant to complete the

"Tenant's Work" – work required to ready the Premises for its business – it does not specify the work that will be done and says nothing about the mezzanine the Tenant was installing.

(3) Issue Three: Did the trial judge err in concluding that the Tenant had validly exercised its option to extend the Lease?

[39] The Lease provides for three options to extend the initial term for successive five-year periods on the same terms, subject to increases in the rent (including an increase in minimum rent to $13 per square foot for the first extension period). The Tenant was required to provide at least six months' written notice. On October 28, 2018 the Tenant gave written notice to extend the initial term for a further five years commencing on July 1, 2019 and expiring on June 30, 2024. Approximately six weeks later the Landlord raised alleged breaches of the Lease by the Tenant.

[40] At trial the Landlord argued that the Tenant was in breach of the Lease or had committed various acts of default and was therefore not entitled to extend the Lease, and also asserted that the notice was defective because it was conditional. The trial judge disagreed and declared that the option to extend had been validly exercised.

[41] On appeal, the Landlord advances two arguments. First, it asserts that, while the trial judge recited the correct test in considering whether the exercise of the option was "clear, explicit, unambiguous and unequivocal", he failed to apply the

test to the uncontroverted facts. The Landlord contends that, in its notice purporting to exercise the option to extend, the Tenant unilaterally set Additional Rent for the extension period at $7.40 per square foot, notwithstanding that the Landlord provided a statement on January 30, 2019 estimating Additional Rent at $11 per square foot. The Tenant was seeking to negotiate further, and therefore failed to provide an unequivocal and clear exercise of its option to extend. Second, the Landlord asserts that the trial judge erred in concluding that none of the TMI notices (including the January 30, 2019 notice) had been properly delivered by the Landlord because they were not emailed, when the Lease provides for the parties to provide written notice by mail.

[42] I would not give effect to these arguments. The trial judge accepted that the Tenant had given notice that was clear, explicit, unambiguous and unequivocal. He rejected the argument, made here, that the notice was invalid because the Tenant purported to exercise the option on conditions, saying that the Tenant was doing nothing more than confirming the extension based on the provisions of the Lease and the reality on the ground. The validity of the notice was not affected by the fact that the Landlord subsequently purported to set out a different rate for the Additional Rent. The notice was not, as the Landlord asserts, an attempt to unilaterally fix the Tenant's proportionate share of the TMI and operating expenses for the second five-year term. The rights and obligations of the parties (including

the increase in minimum rent for the second term and any increase in Additional Rent) continue to be governed by the Lease.

[43] As for the Landlord's submission that the trial judge erred in asserting that the TMI notices should have been provided by email, when the Lease provides for notice to be given in writing, nothing turns on this submission. Irrespective of how the Lease contemplated written notice to be given, there was no evidence of the Landlord ever delivering notice or communicating by mail. As the trial judge found, email was overwhelmingly the preferred method of communication between the parties. Moreover, the trial judge disbelieved the evidence of the Landlord's principal that the 2015, 2016 and 2017 statements of TMI and operating expenses had been delivered contemporaneous to their dates: there were no covering letters, proofs of delivery or accompanying communications for any of these statements before they were attached to the Landlord's email of December 14, 2018, objecting to the exercise of the Tenant's option to extend the Lease.

(4) Issue Four: Did the trial judge err in his award of costs?

[44] The Tenant was awarded partial indemnity costs with HST and disbursements in the amount of $116,516.71, the amount it sought in its bill of costs. The Landlord asserts that the trial judge erred in principle by not considering its own bill of costs in determining the reasonable expectations of the losing party. The Landlord contends that the trial judge appears to have overlooked the bill of

costs that it provided, pointing to para. 10 of the costs reasons where the trial judge said: “It is often difficult to appreciate what the losing party’s expectations of costs might have been. Without evidence on the point, the court is left to speculate”.

[45] I disagree. The trial judge referred to the fact that the parties provided both oral and written submissions on costs. He specifically adverted to the Landlord’s position that the Tenant should recover no more than 50% of reasonable partial indemnity costs or $34,174.59, (which was alternative to its argument that, because of the divided success in the action, the parties should bear their own costs). Although the Landlord’s bill of costs and written submissions before the trial judge were not included in the record on appeal, the parties confirmed that the specific amount adverted to by the trial judge was indeed one half of the partial indemnity costs set out in the Landlord’s bill of costs.

[46] This is not a case where a judge drew a permissible inference that the amount claimed by the successful party was reasonable because the losing party failed to file its own bill of costs: see *Smith Estate v. Rotstein*, 2011 ONCA 491, 106 O.R. (3d) 161, at para. 50, leave to appeal refused, [2011] S.C.C.A. No. 441. Rather, the trial judge determined a reasonable and proportional amount after considering all relevant factors under r. 57 of the *Rules of Civil Procedure*, including the complexity and number of issues in dispute, the size of the evidentiary record, the lengthy and detailed submissions of counsel, and the fact that, although the Landlord was successful on one issue, the Tenant was

presumptively entitled to costs. The trial judge addressed the factor of proportionality, noting that, while at first glance the amount claimed for costs greatly exceeded any monetary award granted to the Tenant, there was much more at stake: the Landlord sought very serious orders and declarations from the court, including a significant judgment for arrears of rent, a lifting of the injunction, mandatory orders, and a termination of the Lease. He concluded that the partial indemnity costs claimed by the Tenant were reasonable and proportional to the result in the case, noting that the Tenant's bill of costs was thorough and detailed and there was no suggestion that any of the disbursements were unreasonable or that any of the work done on the file was duplicative or unnecessary.

[47] I see no reversible error in the trial judge's award of costs to the Tenant or in the amount he fixed for reasonable partial indemnity costs. Nor does the Landlord meet the test for leave to appeal costs. The Landlord has not established "strong grounds upon which [this court] could find that the judge erred in exercising his discretion": *Brad-Jay Investments Limited v. Village Developments Limited* (2006), 218 O.A.C. 315 (C.A.), at para. 21, leave to appeal refused, [2007] S.C.C.A. No. 92.

[48] Finally, even with the Landlord's limited success in respect of the Shed Area on this appeal, there is no reason to interfere with the costs awarded in the court below.

F. DISPOSITION

[49] For these reasons I would allow the appeal in respect of the Shed Area, such that the Landlord is entitled to non-lease-based rent for the Shed Area retroactive to six years prior to the issuance of its counterclaim. I would dismiss the balance of the appeal and refuse leave to appeal costs. If the parties are unable to agree on the costs of the appeal, the court will receive written submissions from the parties limited to three pages each, exclusive of any bill of costs, to be provided within 20 days of these reasons.

Released: January 12, 2023 “KMvR”

“K. van Rensburg J.A.”
“I agree Sossin J.A.”
“I agree J. Copeland J.A.”

TAB 5

See para 52

COURT FILE NO.: 04-CV-272021 CM2
DATE: 20050106

ONTARIO

SUPERIOR COURT OF JUSTICE

IN THE MATTER of the *Arbitration Act*, 1991, S. O. 1991, c. 17
AND IN THE MATTER of an arbitration award dated July 10, 2004
AND IN THE MATTER of an arbitration between 407 ETR Concession Company Limited ("407 ETR") and Her Majesty the Queen in Right of the Province of Ontario as represented by the Minister of Transportation and the Minister of Transportation for Ontario ("Province")

APPLICATION UNDER section 45 of the *Arbitration Act*, 1991, S. O. 1991, c. 17 and under section 25 of the Concession Ground Lease Agreement dated April 6, 1999 and Section 5 of the Tolling, Congestion Relief and Expansion Agreement dated April 6, 1999

B E T W E E N:	)	
HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO AS REPRESENTED BY THE MINISTER OF TRANSPORTATION and THE MINISTER OF TRANSPORTATION FOR ONTARIO	)	***John Keefe, Jessica Kimmel*** and ***Julie Rosenthal*** - - for Her Majesty the Queen
Applicants	)	
- and -	)	
407 ETR CONCESSION COMPANY LIMITED	)	***J. Thomas Curry*** and ***Nina Bombier*** - - for 407 Concession Company Limited
Respondent	)	
	)	**HEARD:** December 1 and 10, 2004

REASONS FOR DECISION

CULLITY J.

[1] By notice of application, the Province appealed from a decision of the Honourable J. Drew Hudson Q.C. (the "Arbitrator") who conducted an arbitration between the parties pursuant to the provisions of the *Arbitration Act, 1991*, S.O. 1991, c. 17, and of an agreement between them. Under these provisions there is a right of appeal only on questions of law. Any findings of the Arbitrator on questions of fact, or questions of mixed law and fact, are binding on the parties and must be accepted on this appeal.

A. The Dispute

[2] The background to the dispute between the parties - and the issues submitted to arbitration - were described by the Arbitrator as follows:

> There has been a tremendous amount of work done since 1950 in trying to understand what the transportation requirements of the GTA will be as it grows and develops.
>
> In 1993 the Ontario Government attempted to interest the private sector in constructing Highway 407. This was unsuccessful because the risk/reward relationship was not attractive to the private sector.
>
> The Ontario Transportation Capital Corporation ("OTCC") was therefore established by the province as a Crown Agency to oversee the design, construction, operation maintenance and management of Highway 407. OTCC's operation of Highway 407 was pursuant to the legislative authority granted to it under the Capital Investment Plan Act, 1993 ("CIPA") and its regulations.
>
> Actual construction of Highway 407 commenced in 1994. Highway 407 opened initially under the management of the OTCC on June 7, 1997. The OTCC only began to charge tolls on October 14, 1997. At the time of opening, Highway 407 was 36 kilometres long and had 79 entry and exit points.
>
> OTCC was continued as a corporation with share capital as 407 ETR Concession Company Limited ("407 ETR") by Articles of Continuance dated April 6, 1999.
>
> Also on April 6, 1999, 407 ETR entered into the Concession and Ground Lease Agreement ("CGLA"), a 99 year concession

agreement, with the Province. Also on April 6, 1999, 407 ETR entered into the Tolling, Congestion Relief and Expansion Agreement ("TCREA") with the Province and this was schedule 22 to the CGLA.

Both the CGLA and the TCREA were agreements between 407 ETR and the Province. Both were executed by "THE CROWN IN RIGHT OF ONTARIO, AS REPRESENTED BY THE MINISTER WITHOUT PORTFOLIO WITH RESPONSIBILITY FOR PRIVATISATION" and "407 ETR CONCESSION COMPANY LIMITED. It should be observed that the CGLA and the TCREA were agreements entered into between the Province and a Crown Agency of the Province.

It should also be observed that there are 24 schedules attached to the CGLA and of these only the TCREA and schedules 13, 15, 18 and 19 are called agreements. In my opinion this is not relevant to the resolution of the present dispute.

The shares of 407 ETR were acquired by 407 International Inc, a consortium of non-public corporations, from the Province under a share purchase agreement dated April 12, 1999 with a closing date of May 5, 1999.

The Province operated Highway 407 first through OTCC and then 407 ETR as a toll highway from October 14, 1997 to May 5, 1999. On May 5, 1999 the highway was 68 kilometres long and had 28 interchanges and a total of 146 entry and exit points.

Over the next 28 months Highway 407 was extended to 108 kilometres and now has 40 interchanges and a total of 193 entry and exit points.

I understand that the cost to the Province of building the 68 kilometre length was about $2 billion dollars. The Province sold the shares of 407 ETR for $3.107 billion dollars. The Province and its taxpayers made a profit of at least $1 billion dollars (50 %) over a period of about three years from the start of construction to the closing of the sale. The cost of extending the highway from 68 kilometres to its present 108 kilometres was about $1 billion dollars which cost was borne entirely by the consortium and at absolutely no cost to the Province.

There is now a dispute between the parties as to the interpretation of the TCREA and certain provisions of the CGLA itself. At issue

> is whether the Applicant is required to obtain any form of approval or consent from the Province before revising toll rates or administration fees on Highway 407.
>
> The parties have agreed that the issues to be determined in this arbitration are:
>
> (a) Is the only requirement to be met by 407 ETR prior to the change of any toll or administration fee the provision of notice under Article 2.3 of the TCREA and are the tolls and administration fees set by 407 ETR after compliance with article 2.3 of the TCREA valid and enforceable?
>
> (b) Is 407 ETR required to seek or obtain any form of consent or approval, apart from the provisions of notice under Article 2.3 of the TCREA, prior to the implementation of a change in tolls or administration fees charged in connection with the use of Highway 407?
>
> (c) Did 407 ETR's toll rate increase of February 1, 2004 comply with the terms of the CGLA and the TCREA and was it therefore a valid exercise of the rights of 407 ETR to implement a toll rate change?
>
> (d) Was 407 ETR in default of the CGLA, the TCREA, or the ACT as a result of the February 1, 2004 toll rate increase?
>
> In order to answer these questions we must determine the intention of the parties on April 6, 1999 from the words used in the CGLA and the TCREA and any extrinsic evidence which can be properly considered.

[3] To the above summary I believe it is necessary to add only that the dispute arose as a consequence of 407 ETR's implementation of increased tolls on February 1, 2004 without requesting, or obtaining the approval of the Province. The Province subsequently gave notice that this constituted a default under the CGLA and that 407 ETR was to roll back the increases within 60 days.

B. The Arbitrator's Decision

[4] In his award dated July 10, 2004, the Arbitrator answered questions (a) and (c) in the affirmative and questions (b) and (d) in the negative. The essential issue between the parties was whether pursuant to the provisions of the *Highway 407 Act, 1998* S.O. 1998, c. 28 (the " 407

Act”), and the agreements between them, the approval and consent of the Province was required for the increases in tolls and administration fees that 407 ETR had purported to make. In answering this question in the negative, the Arbitrator relied first on what he considered to be the plain meaning of the provisions. He concluded:

> The contract should, if possible, be interpreted according to its plain meaning. In my opinion, the plain meaning is that the Concessionaire is not required to obtain any form of approval or consent from the Province before revising toll rates or administration fees on Highway 407.

[5] The Arbitrator then continued:

> If I am wrong and there is no plain meaning then I can refer to extrinsic evidence.

[6] He distinguished between three types of extrinsic evidence: *first*, the factual matrix - or the circumstances surrounding the formulation of the contract; *second*, parol evidence - "evidence of subjective intent outside the four corners of the contract”; and, *third*, evidence of the manner in which the contract had previously been performed. The first type of extrinsic evidence he considered to be always admissible but the second and third types would be so only when a finding that a provision in a contract was ambiguous in the sense of being "reasonably susceptible of more than one meaning". Being evidently satisfied that such an ambiguity would exist if the relevant provisions of the agreements had no plain meaning, the Arbitrator then reviewed evidence that included statements made by officials of the Province to the effect that the Concessionaire of Highway 407 would have control over the level of the tolls and fees that would be charged. In addition to this evidence that confirmed the conclusion he had reached independently of it, the Arbitrator found further support for his conclusion in the *contra proferentem* principle, the previous behaviour of the parties and the "commercial absurdity" of the interpretation advanced on behalf of the Province.

C. The Appeal

[7] In the appeal, the Province seeks to have the award varied pursuant to section 45 (5) of the *Arbitration Act* so that questions (a) and (c) would be answered in the negative and questions (b) and (d) in the affirmative. The grounds for the appeal are that the Arbitrator erred in law in interpreting the relevant provisions of the CGLA and the TCREA, and in his consideration of extrinsic evidence for that purpose. Counsel were agreed at the hearing that, the admissibility of such evidence and, to the extent that it could be ascertained from the words of the agreements - without the aid of extrinsic evidence - the question of interpretation, were questions of law that could properly be the subject of an appeal. Counsel for 407 ETR, however, submitted that to the extent that the Arbitrator based his interpretation of the agreements in part on extrinsic evidence, its correctness, or otherwise, was a question of fact or, at least, one of mixed law and fact that

could not be reviewed on the appeal. It was accepted that a standard of correctness was to be applied for the purpose of the appeal on the questions of law.

[8] It will be convenient to deal, first, with the Province's challenge to the correctness of the Arbitrator's finding that, on the plain meaning of the agreements between the parties, the approval, or consent, of the province was not required. The questions relating to the admissibility of extrinsic evidence will then be considered.

1. The plain meaning of the agreements

(a) The Arbitrator's reasons

[9] In his references, and findings, with respect to the plain meaning of the agreements, the Arbitrator's approach to their interpretation was consistent with that of the Supreme Court of Canada in *Eli Lilly & Co v. Novopharm Ltd* (1998), 161 D.L.R. (4th) 1, of the Court of Appeal in *Hi-Tech Group Inc. v. Sears of Canada Inc*. (2001), 52 O.R. (3d) 97 and of courts in numerous other cases. The governing principle was stated by Iacobucci J. in *Eli Lilly* as follows:

> … it is unnecessary to consider any extrinsic evidence at all when the document is clear and unambiguous on its face. In the words of Lord Atkinson in *Lampson v. City of Quebec* (1920), 54 D.L.R. 344 (P.C.):
>
> > … the intention by which the deed is to be construed is that of the parties as revealed by the language they have chosen to use in the deed itself.…[I]f the meaning of the deed, reading its words in their ordinary sense, be plain and unambiguous it is not permissible for the parties to it, while it stands unreformed, to come into a Court of justice and say: "our intention was wholly different from that which the language of the deed expresses..."
>
> … [T]o interpret a plainly worded document in accordance with the true contractual intent of the parties is not difficult, if it is presumed that the parties intended the legal consequences of their words. This is consistent with the following dictum of this court, in *Joy Oil Co. v. The King*, [1951] S.C.R. 624 at p. 641, [1951] 3 D.L.R.582:
>
> > … in construing a written document, the question is not as to the meaning of the words alone, nor the meaning of the writer alone, but the meaning of the words as used by the writer.

[10] In determining that the plain meaning of the agreements between the parties was that 407 ETR was not required to obtain the approval of the Province to changes in the tolls or administration fees, the Arbitrator took as his starting point section 14 of the 407 Act which was intended to implement the decision of the Province to privatise the construction, maintenance, expansion and operation of the highway. This decision was announced in February, 1998. The legislation received Royal Assent on December 18, 1998. Section 14 sets out the powers of a tenant under a ground lease of Highway 407 lands - a person referred to in the statute as the "owner" of the highway. Among other things, section 14 (1) confers upon the owner the power "to establish, collect and enforce payment of tolls" and of "administration fees based on such criteria as the owner considers appropriate". Such powers are conferred subject to the provisions of section 14 (2) that provide that they "shall only be exercised in accordance with the terms and conditions set forth in an agreement to be entered into between the Minister for Privatisation and the owner."

[11] The Arbitrator found that the agreement referred to in section 14 (2) of the 407 Act was the TCREA which was intended to be a "stand alone agreement". Section 2.2 of the TCREA confers on the Concessionaire the right to exercise powers - defined in the same terms as those in section 14 (1) of the 407 Act - at "any time while this agreement is in force in accordance with the provisions of this Agreement".

[12] Section 1.1 of the TCREA defines "Agreement" as "this tolling, congestion relief and expansion agreement including, for the avoidance of doubt, all schedules referred to herein".

[13] The TCREA contains no requirement for the Concessionaire to obtain the approval, or consent, of the Province to a change in tolls or administration fees. The only obligations with respect to such changes are imposed by section 2.3 that requires notice of them to be given to the Province and to the public. In part, it reads as follows:

> 2.3 Notice Of Toll Changes
>
> (a) If the Concessionaire desires to change any toll or administration fee, it shall give notice of such change (the "Pending Toll Change") to the [Province] at least four (4) weeks prior to the implementation of such change.
>
> (b) The Concessionaire shall make commercially reasonable efforts to inform the public of all tolls and administration fees for the use of Highway 407. After the giving of the notice referred to in subsection 2.3 (a), the Concessionaire shall include a description of the pending toll change on or with all invoices or statement sent by the Concessionaire to users of Highway 407 …
>
> (c) Notwithstanding subsection 2.3 (a), if the Concessionaire desires to establish or terminate a temporary discount in respect of

> any fee or charge, it shall give notice of the establishment or termination of the said temporary discount to the [Province] at least one (1) Business Day prior to the implementation or termination of the said temporary discount.

[14] In the opinion of the Arbitrator, it followed that, if an obligation of 407 ETR to obtain the approval, or consent, of the Province is to be found in provisions of the TCREA - if, insofar as the establishment, and revision, of tolls and fees are concerned, it was intended to be a "stand alone" agreement – there was no such obligation.

[15] In finding that this was the intention of the parties as revealed by the words of the agreements, the Arbitrator referred to the substantively verbatim inclusion in the TCREA of the powers conferred in section 14 (1) of the 407 Act, an "entire agreement" clause in section 1.14 of the TCREA and a description of the purpose of the agreement in section 1.22. These provisions read as follows:

> 1.14 Entire Agreement
>
> This Agreement constitutes the entire agreement between the parties hereto pertaining to the subject matter hereof and supersedes all prior agreements, negotiations, discussions and understandings, written or oral, between the parties hereto. There are no representations, warranties, conditions or other agreements, whether direct or collateral, or express or implied that form part of or affect this Agreement, or which induced any party hereto to enter into this Agreement or on which reliance is placed by any party hereto, except as specifically set forth in this Agreement.
>
> 1.22 Purpose of Agreement
>
> The purpose of this Agreement is to establish a regime which offers the Concessionaire flexibility to manage the basis on which tolls will be established, the assurance of a minimum level of tolls, administration fees and charges which will be acceptable regardless of traffic levels and the freedom to establish higher tolls if prescribed traffic levels are achieved, while offering to the [Province] the assurance that the Concessionaire will be financially motivated to provide congestion relief to other roads and highways by achieving prescribed traffic levels, providing open access to all highways, providing access on reasonable terms to trucks and expanding Highway 407 as required.

[16] The Arbitrator inferred that the references in the above provisions to "this Agreement" referred to the TCREA in which, as previously indicated, the word "Agreement" was defined - "for the purposes of this Agreement" - to mean "this tolling, congestion relief and expansion agreement, including, for the avoidance of doubt, all schedules referred to herein." He concluded:

> There is no express or implied requirement in section 2.3 of the TCREA to obtain the consent of the Province. If such consent was required then it would have been expressly provided in the TCREA. It defies commercial reality and common sense that the Province, in drafting these agreements, would fail to provide for pre-approval of toll rate or fee increases if that was intended. The Concessionaire is only required to give four (4) weeks prior notice to the Province and make "commercially reasonable efforts to inform the Public" of the Pending Toll Change.
>
> Article 3 of the TCREA deals with CONGESTION RELIEF. It is at once apparent that congestion in any calendar year can only be determined after the end of the calendar year. Section 3.2 provides that in the event of Congestion, the concessionaire shall pay the Province an amount equal to two (2) times the excess amount of tolls that have been collected.
>
> In my opinion this would be grossly unfair if the Concessionaire had first to obtain the consent of the Province to the increase. In my opinion no reasonable business executives would agree to such an arrangement.

[17] The Arbitrator then referred to the submissions of counsel for the Province that the agreement referred to in section 14 (2) of the 407 Act was the CGLA and a further submission that 407 ETR requires the Province's approval of changes in toll rates. This further submission was based on an interpretation of provisions of the CGLA to which I will refer. It was rejected on the ground that the complexity of the reasoning on which the interpretation was based precluded a finding that it represented the plain meaning of the agreement.

[18] The Arbitrator referred to two other aspects of the agreements he considered to be relevant to his conclusion with respect to their plain meaning. One was a perceived conflict between the definitions of the word "Agreement" in the CGLA and the TCREA - a conflict that, in his opinion, was required, under the provisions of the former, to be resolved in favour of the definition in the TCREA. Counsel for 407 ETR did not attempt to support this conclusion. In their submission, as in that of counsel for the Province, there is no conflict between the CGLA and the TCREA.

[19] Finally, in support of his conclusion that the TCREA was intended to "stand alone", the Arbitrator referred to the inclusion in it of dispute resolution provisions that are also contained in the CGLA.

(b) Appellant's submissions on the plain meaning

[20] In the submission of counsel for the Province, the Arbitrator erred in law in finding that the TCREA alone was the agreement referred to in section 14 (2) of the 407 Act. In their submission, this agreement is the CGLA in its entirety - and not merely the TCREA that, as schedule 22, forms part of the CGLA.

[21] It was not disputed that the correctness of the submission turns on the construction of the CGLA and the TCREA. As neither agreement is expressed to be that referred to in section 14 (2) of the 407 Act, the question is essentially which of them should be considered to contain the terms and conditions attaching to the exercise of the powers conferred by section 14 (1) of the statute and section 2.2 of the TCREA. I note that the question does not relate to the interpretation of the 407 Act but, rather to that of the agreements that were executed after its enactment. Section 14 (2) restricts the exercise of the powers in section 14 (1) by reference to terms and conditions to be agreed between the parties. The identification of the terms and conditions - and of the agreement that contains them - depends on the interpretation of the agreements between them and not of the statute.

[22] The significance of the question of interpretation lies in the existence of section 3.3 (b) of the CGLA that reads as follows:

> (b) Change Requests. The Concessionaire may submit or cause to be submitted Change Requests together with all appropriate supporting documentation to the [Province]. No Change Request shall be implemented or incorporated as part of the Work unless and until such Change Request has been approved.

[23] The position of the Province at the arbitration, and on this appeal, is that a variation of the tolls and administration fees requires a Change Request to be made and approved. Section 3.3 (b) does not expressly prohibit changes to be made without the submission of a Change Request. Construed strictly, the prohibition it contains is attached only to the implementation of Change Requests. These are permitted - but not expressly required - to be made. I am satisfied, however, that it is implicit in section 3.3 (b) – when read together with the definition of Change Request in the CGLA - that 407 ETR is not entitled to make changes that fall within the definition without first submitting a Change Request and obtaining the approval of the Province in accordance with the provisions of the CGLA that govern the giving, and withholding, of approval.

[24] Change Request is defined in section 1.1 of the CGLA, in part, as follows:

> "Change Request" means a written request in respect of the Project prepared by or on behalf of the Concessionaire and addressed to the [Province] seeking to(i) dispense with, delete or change the dimensions, character, quantity, quality, description, location or position of the whole or any part of the Work or make other changes to the Work in respect of Highway 407, provided that, for the avoidance of doubt, no Change Request shall be necessary to implement any change in the Work not specifically mandated or prohibited or otherwise regulated by the Governing Documentation or Laws and Regulations, …

[25] In the submission of counsel for the Province, changes to toll rates and administration fees are changes to the Work in respect of the highway. This was said to follow from the definition of "Work" in section 1.1 of the CGLA and the definition of “OMM Work” which it incorporates and which, in turn, refers to "tolling". These definitions are as follows:

> “Work" means the DDB Work and the OMM Work
>
> “OMM Work” means the operation, management, maintenance, rehabilitation and/or a tolling of the Project in accordance with the Governing Documentation and Laws and Regulations.

[26] Counsel submitted that the clear meaning of these provisions of the CGLA is that changes to tolling - including changes to toll rates - require the consent of the Province and that the Arbitrator erred in law in finding to the contrary.

[27] Counsel submitted, further, that the finding that the TCREA is a stand-alone agreement is plainly contradicted by the reference to tolling in the definition of OMM Work and by other provisions of the CGLA that grant to 407 ETR the exclusive concession to levy and retain tolls. They relied also on the requirement in section 2.11 of the CGLA that 407 ETR was to

> comply with, and shall cause the Project and the development, design, construction, operation, management, maintenance, rehabilitation and tolling thereof to be in compliance with, all Governing Documentation and Laws and Regulations. …

[28] “Governing Documentation” is defined in section 1.1 of the CGLA as including, among other things, the CGLA and its schedules and Approved Change Requests.

[29] These submissions on the central issue - which the Arbitrator described as "a tribute to the skill of counsel" - were supplemented by the following criticisms of the reasons of the Arbitrator that were said to disclose subsidiary errors of law:

> 1. the complexity of the process of interpreting an agreement is not antithetical to its plain meaning;

> 2. given the requirement for Change Requests in the CGLA, it cannot be said to defy commercial reality and common sense to accept that the province would neglect to provide for the pre-approval of toll increases in the TCREA if that was intended; and
>
> 3. the Arbitrator erred in finding that there was a conflict between the definitions of "Agreement" in the CGLA and the TCREA. The error was compounded by the further finding that the conflicting provisions of the TCREA were to be considered to be an express statement, pursuant to section 1.21 of the CGLA, that would be required, and effective, to exclude the stipulation that the provisions of the CGLA are to take precedence over conflicting provisions of its schedules.

(c) Conclusion on Plain Meaning

[30] I do not believe that the Arbitrator's finding with respect to the plain meaning of the agreements between the parties was vitiated by any error, or errors, of law. Section 2.2 of the TCREA repeats the provisions of section 14 (1) of the 407 Act by giving 407 ETR the right to establish tolls and adds "at any time while this Agreement is in force". In the absence of any provision to the contrary, it must include the power to determine the rates at which tolls are to be levied from time to time and to make changes to them. Clause 1.14 of the TCREA indicates that it was intended to constitute the entire agreement between the parties "pertaining to the subject matter hereof". The relevant subject matter consists of the right, or power, to establish tolls. I believe it is clear that any limitations that define the ambit of the power, or restrictions that might be imposed on its exercise - as contemplated by section 14 (2) of the 407 Act - pertain to the same subject matter and, in consequence, are intended to be found in the TCREA. It was in this sense that the Arbitrator referred to the TCREA as a stand-alone agreement and I believe he was correct in so doing. The TCREA does deal expressly with changes in tolls or administration fees and imposes restrictions on the exercise of 407 ETR's powers to make such changes. Apart from a few specific exemptions for ambulances and fire-fighting, law-enforcement and diplomatic vehicles, the restrictions are confined to the giving of notice to the Province and to the public and impose no obligation to obtain the consent, or approval, of the former.

[31] In my opinion, the expressed purpose of the TCREA to establish a regime that would provide 407 ETR with "flexibility to manage the basis on which the tolls will be established" supports the correctness of the Arbitrator's conclusion. Section 1.22 includes as one of the purposes of the TCREA "the freedom to establish higher tolls if prescribed traffic levels are achieved". This contrasts with the provision that administration fees and charges may be levied "regardless of traffic levels". As the Arbitrator noted, given the imposition of congestion penalties if tolls are increased without achieving higher traffic levels, it is difficult to understand why prior approval of the Province would be necessary or appropriate. A more reasonable interpretation is that the flexibility and freedom that the TCREA was to confer with respect to the establishment of tolls was intended to be limited, and controlled, only by the existence of the

congestion penalties that would be levied if prescribed traffic levels were not achieved. Whether congestion on other roads and highways has been reduced is to be determined by reference to the level of traffic on Highway 407. The penalties imposed if congestion has not been reduced are dependent on, and vary in accordance with, the level of the tolls charged to users of the highway.

[32] I accept that, if an obligation to obtain the consent of the Province was to be found in the body of the CGLA, the relevant provisions would take precedence over those of the TCREA. However, I do not accept that the provisions dealing with Change Requests - on which the Province relies - have that effect. The definition of Change Requests expressly excludes changes "not specifically mandated, prohibited or otherwise regulated by the Governing Documentation or Laws and Regulations." The Governing Documentation includes the TCREA, but I do not consider that changes in toll rates - let alone changes in administration fees - can be said to be a change in tolling specifically mandated, prohibited or regulated by the TCREA or any other provision of the agreements. To argue that changes in toll rates are “regulated” for this purpose because of the notice requirements would be to place a strained construction on the words of the definition. The more natural meaning is, I believe, that which counsel for 407 ETR supported: namely, Change Requests are required only where the change would conflict with an obligation, prohibition or restriction imposed elsewhere in the Governing Documentation.

[33] The criticisms leveled at the Arbitrator's description of the TCREA as a “stand-alone agreement” by counsel for the Province were, in my opinion, unjustified. I do not understand the Arbitrator to have implied that the TCREA exists, and is to be construed, independently of the CGLA for all purposes. This is obviously not the case as the TCREA is one of 24 schedules that form part of the CGLA and which are included in references to " this Agreement" throughout the body of the CGLA. As well as containing the ground lease and transfers of assets, the CGLA provides a framework for, and general provisions applicable to, the matters dealt with specifically in the schedules. Among these general provisions are those relating to Change Requests which are designed to introduce flexibility into the administration of the agreements by providing a procedure for consensual departures from the manner in which specific obligations of 407 ETR would otherwise be required to be performed.

[34] Change Requests would, for example, be required if 407 ETR wished to defer performance of any of its obligations to expand the highway pursuant to the provisions of the TCREA. Hence, the inclusion of section 5.3 of the CGLA that provides that such requests are not required for expansion of the highway in advance of the times stipulated in the TCREA. The section is expressed to be inserted for the avoidance of doubt and I believe it underlines the intention that Change Requests are to be required only to relieve 407 ETR from restrictions, or obligations, with which it was intended to comply. Similarly, if, in particular circumstances, 407 ETR wished to be relieved from strict compliance with the notice provisions of section 2.3 of the TCREA, a Change Request would, I think, be required. Apart from the few specific exemptions, no other restrictions are imposed on the power to establish tolls and administration fees in the TCREA and it "stands alone" in the sense that it is in its provisions that any restrictions, or limitations, on the powers are to be found.

[35] I do not attach significant weight to the other less fundamental criticisms of the Arbitrator's reasoning. While it may be correct that a plain meaning can emerge from a complex process of interpretation, the process to which the Arbitrator referred does not, in my opinion, do so.

[36] Like counsel, I am not sure that I understand fully the Arbitrator's references to - and treatment of - a conflict between the definitions of "Agreement" in the CGLA and the TCREA. In the relevant passages, he was, I think, addressing what he considered to be a flaw in the submissions of counsel for the Province, rather than providing an additional reason for his conclusion on the plain meaning. Even if his analysis in this part of his decision was in error, I do not believe it would invalidate the conclusion or detract from the other reasons for it that he provided.

[37] In consequence, I find that the Arbitrator was correct in law in finding that, on the plain meaning of the agreements between the parties, 407 ETR was not obligated to obtain the approval of the Province to increases in toll rates and administration fees. His answers to the questions to be determined in the arbitration were, in my opinion, correct.

[38] I have reached the above conclusion without regard to the Arbitrator's comments on the unfairness of – and the unlikelihood that reasonable business executives would agree to – provisions requiring the Province's approval to toll increases. It is not clear whether the comments reflect a conclusion of the Arbitrator from the words of the documents alone, or whether they result from an acceptance of evidence of the Chief Financial Officer of 407 ETR with respect to the commercial consequences of the interpretation favoured by the Province. If the latter was the case, the reasoning of Iacobucci J. in *Eli Lilly*, at paras 55 - 56, that I have quoted earlier in these reasons, might suggest that they were out of place in a consideration of the plain meaning of the documents and should have been deferred until after a decision on the plain meaning had been made, and then considered only if no plain meaning had been found. The Arbitrator's comments were, in effect, repeated at the end of his reasons when he was reconsidering the question of interpretation on the hypothesis that his finding with respect to the plain meaning was not correct, and where he found that the interpretation supported by the Province would be commercially absurd. Even if the earlier comments must be considered to have been based on the evidence of the Chief Financial Officer, I believe the evidence was admissible as part of the factual matrix that explains the commercial consequences and effects of the provisions of the agreements and thereby throws light on their meaning. As Lord Wilberforce stated in *Reardon Smith Line Ltd v. Hansen-Tangen*, [1976] 3 All E. R. 570 (H.L.), at page 574 in a passage quoted with approval in *Hi-Tech*:

> No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what it is legitimate to have regard to is usually described as "the surrounding circumstances" but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is only right that the

> court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

[39] Evidence of the matters referred to by Lord Wilberforce must, in my opinion, extend to the commercial consequences of competing interpretations advanced by the parties; see, also, *Investors' Compensation Scheme v. West Bromwich Building Society*, [1998] 1 W.L.R. 896 (H.L.), at page 913.

[40] The Court of Appeal in *Hi-Tech* recognised - and the Arbitrator noted – that evidence of surrounding circumstances has been regarded as always admissible although, as Iacobucci J. insisted in *Eli Lilly*, it will be unnecessary if it merely confirms the meaning of the documents that is indicated by their clear and unambiguous language, and, if it is inconsistent with that meaning, it will not be permitted to displace it. Whether the language is reasonably susceptible of more than one interpretation may, however, appear only when the documents are read in their commercial context. Thus, in *Arthur Andersen Inc v. Toronto-Dominion Bank* (1994), 17 O.R. (3d) 363 (C.A.), Grange and McKinlay JJ. A. stated:

> The factual matrix in this case has been referred to earlier in these reasons. The purpose of the agreement was to provide for decreased administrative complexity in the operation of all accounts of the Stolp companies, to decrease administrative costs, to allow for transfer of funds between companies, and to provide for payment of interest on credit balances. All of these objectives were accomplished by the agreement, but they could not have been accomplished unless the agreement operated in one way only - by a real transfer of funds into and out of the concentration account. That being the case, viewing the contract in the context of its execution points to only one possible meaning … .

[41] It was held that it followed that the contract in question was not ambiguous.

[42] I am satisfied that the evidence of the commercial consequences of the interpretation favoured by the Province merely confirms the interpretation required by the words of the documents and that – if it was relied on by the Arbitrator - the most serious criticism that could be made is that this was unnecessary for the purpose of determining their plain meaning. In my opinion, the Arbitrator's use of the evidence would not be an error of law that would require his decision to be set aside, varied or remitted for further consideration pursuant to section 45 (5) of the *Arbitration Act*.

2. The Admission of Extrinsic Evidence

[43] In view of my conclusion with respect to the plain meaning of the agreements between the parties, it is not necessary to deal with the grounds for appeal based on the Arbitrator's

consideration of extrinsic evidence. I believe this is so notwithstanding the submission of counsel for the Province that the Arbitrator's finding with respect to the plain meaning of the agreements was in some way tainted by his subsequent consideration of extrinsic evidence. I do not accept this submission. The Arbitrator indicated clearly that the subsequent discussion was undertaken only on the supposition that his finding with respect to the plain meaning was wrong. By doing this, he could reduce the likelihood that it would be necessary for the matter to be remitted to him if, on an appeal, his finding on the plain meaning was held to be incorrect. I believe he was entitled to do this and I will adopt essentially the same approach.

[44] As the right to appeal is limited to questions of law, the issue I was asked to address was not whether the extrinsic evidence considered by the Arbitrator confirmed the conclusion he had reached independently of it, but whether the evidence was admissible for the purpose of interpreting the agreements if they had no plain meaning and whether it was properly used for that purpose. The submission of counsel for the Province was, essentially, that the agreements were not ambiguous, the Arbitrator did not identify any ambiguity and, in consequence, the evidence of extrinsic evidence on which he was prepared to rely was not admissible.

[45] As I indicated earlier in these reasons, the Arbitrator distinguished evidence of surrounding circumstances - the factual matrix - from extrinsic evidence of the subjective intention of the parties and of the manner in which the agreements had been performed by them in years prior to 2004.

[46] I do not believe that any serious objection can properly be taken to the Arbitrator's references to extrinsic evidence of surrounding circumstances. If, as counsel for the Province suggested, the purpose for which the evidence was considered to be admissible is not completely clear, this I think, simply reflects the difficulty of reconciling some of the statements in *Eli Lilly* with those referred to in *Hi-Tech* that suggest that some such evidence is always admissible to explain the factual context in which agreements have been made and, by doing so, to cast light on their objectively-determined meaning. I doubt that the Supreme Court of Canada intended to deny the correctness of that proposition. Rather, the decision supports a narrower proposition, which I must accept, that there may be cases where, despite the imperfections of language as a means of communicating intentions, the meaning of a document appears clearly and unambiguously from its words. In such cases inferences from surrounding circumstances will not be permitted to displace that meaning and those that confirm it will be unnecessary. The Arbitrator's reasons are not inconsistent with that approach and, apart from his possible reliance on the evidence of the Chief Financial Officer that I have mentioned, the evidence of surrounding circumstances to which he referred in the event that there was no plain meaning does not appear to have had any significant bearing on the issues he had to decide. It related primarily to the problem of congestion on highways in the Greater Toronto Area and the advantages that privatisation was intended to achieve. In addition, of course, the Arbitrator's description of the background to the dispute between the parties was based to a very large extent on extrinsic evidence of surrounding circumstances.

[47] There are, I believe, difficulties with the Arbitrator's treatment of "parol evidence". Although this term originally referred to evidence given orally, it has long been extended to cover all types of extrinsic evidence - that is, evidence outside the document that is being interpreted. As I indicated earlier in these reasons, the Arbitrator used it in a different, and more limited, sense. Under the heading "Use of Parol Evidence", he stated:

> In Hi-Tech the Ontario Court of Appeal noted that a provision in an agreement is ambiguous when it is "reasonably susceptible of more than one meaning". A finding of ambiguity allows for a consideration of parol evidence (that is, evidence of subjective intent outside the four corners of a contract) and evidence of past performance in interpreting the meaning of the contract.

[48] My understanding of this part of the Arbitrator's reasons is that, if - contrary to his finding - a plain meaning did not emerge from the words of the agreements, it would follow that the relevant provisions of the agreement were reasonably susceptible of more than one meaning; and that that this would constitute an ambiguity that would justify the admission of extrinsic evidence of the parties subjective - or actual – intentions as well as evidence of their conduct in relation to the performance of the agreements in years before 2004.

[49] I am satisfied that the authority cited by the Arbitrator - and, in particular, *Adolf Lumber Co. v. Meadow Creek Lumber Co.* (1919), 58 S.C.R. 306 and *Corporate Properties Ltd. v. Manufacturers Life Insurance Co.* (1989), 63 D.L.R. (4th) 703 (Ont. C.A.) - supported his conclusion that, where an ambiguity in this sense exists, evidence of the past conduct of the parties is admissible: see, also, *Montreal Trust Company of Canada v. Barn Lodge Ltd et al* (1995), 24 O.R. (3d) 97 (C.A.), at page 108. I do not accept that the Arbitrator's reliance on such evidence required him to "effectively write-out" section 1.15 of the CGLA as counsel for the Province suggested. The section provides that no failure of a party to exercise a right under the agreement shall operate as a waiver of it. Before one determines whether there has been a failure to exercise a right, the documents must be interpreted. The authorities establish that, for this purpose, the conduct of the parties subsequent to execution may be relevant and persuasive. The logic of the reasoning that implies that, taken in isolation, past conduct is equivocal assumes, contrary to experience, that parties are as likely to breach their obligations as to perform them. The no-waiver provision can be applied only after the process of interpretation has been completed and it does not, in my opinion, exclude past conduct from a role in that process.

[50] However, I do not believe the finding that evidence of subjective intention would be admissible was correct in law. I do not think that there is any doubt as to the purpose for which the Arbitrator believed such evidence could be used. It included, for example, evidence of a Vice-President of Corporate Development in the Privatisation Secretariat of the Ministry that government approval of the toll rate setting was specifically rejected as an approach in favour of congestion payments. The Arbitrator considered this to be reliable evidence of a person who could speak to the intention of the Province. If this evidence had been relied on by the Arbitrator as an essential ground for his decision, I would have felt compelled to allow the appeal.

[51] Unfortunately, "parol evidence" is not the only term that has been used in more than one sense in connection with the legal interpretation of documents. The phrase “plain meaning” may, for example, be confined to cases such as *Eli Lilly* where the meaning of a document is found to appear clearly and unambiguously from its words construed in isolation – if, and to the extent, that is ever possible - or it may be extended to cases such as *Arthur Andersen* where the meaning is held to appear unambiguously after extrinsic evidence of the surrounding circumstances – or the factual matrix - has been considered. As those cases illustrate, the converse – “ambiguity” – is similarly ambiguous. Difficulties in distinguishing between evidence of "subjective intention" and evidence of surrounding circumstances – and in determining the inferences that can, and cannot, legitimately be drawn from the latter - do not appear to arise in this case. The evidence that the Arbitrator treated as evidence of subjective intention cannot legitimately be recharacterized as evidence of surrounding circumstances.

[52] Traditional usage of the word "ambiguity" requires a further distinction to be drawn. In the law of wills it is commonly – although not invariably - used in a narrow sense to refer to latent ambiguities or “equivocations” as illustrated by many cases of which *Re Jackson*, [1933] Ch. 237 (Ch. D.) might be considered to be a classic example. In the law of contracts, it is often applied, more broadly, to cases where, for some reason, the provisions of a contract are reasonably susceptible of more than one interpretation. However, the venerable distinction between patent and latent ambiguities in the law of wills and deeds has been imported into the principles applied for the purpose of interpreting commercial contracts: Holdsworth, *History of English Law*, Volume 9, pages 221 – 2; *Chitty on Contracts* (29th edition, 2004), paras 12-124 and 12-125; Lewison, *The Interpretation of Contracts* (3rd edition, 2004), paras 8.02 - 8.05. In either context, extrinsic evidence of the parties’ subjective intentions has traditionally been admissible in cases of latent ambiguity but not otherwise. If I am correct in my understanding of the nature of the ambiguity hypothesised by the Arbitrator, it was not a latent ambiguity that permits the admission of evidence of subjective intention. The traditional approach was applied by Ground J. in *Misfud v. Owens Corning Canada Inc*, [2003] O.J. No. 3866 (S.C.J.) where the learned judge stated:

> It is the position of counsel for the respondent that the only exception to the principle of objective interpretation is in the case of latent ambiguity which arises where the ambiguity is not apparent from the face of the document but becomes apparent when the surrounding circumstances or the factual matrix are considered. Classic examples are where a contract refers to a railway station by name and it is discovered that two railway stations bear that name or where the contract refers to a "plan agreed upon" and it is discovered that two plans had been considered by the parties. The latent ambiguity exception was described in *Alampi v. Swartz et al* (1964), 43 D.L.R. (2d) 11 (Ont. C. A.), by McGillivray J.A. at pages 15 and 16 as follows:

> [Parol evidence] is, however, admitted for the purpose of explaining terms of the contract and to prove the facts upon which the interpretation of the written documents depends and so is admissible to establish the validity of the document or the identity of the parties, to explain technical terms or commercial usage, and in all other places where the admission of such evidence is necessary to enable the Court to construe the document before it: …
>
> Pursuant to the above principle where it is necessary to do so, evidence to ascertain and identify property referred to in a document is admissible so long as it does not contradict a clear description of the property; and so has been admitted to identify properties bearing descriptions such as "the farm", "the Mill Property", "my house", "Mr O's House", or property described as being in a particular parish or place.
>
> Evidence so admitted does not offend against the general rule. It may not contradict a term in the contract but, as has been said, is adduced to assign definite meaning to the terms used or to relate them to the proper subject-matter. If, however, after such evidence has been led it then appears that the term under construction is ambiguous and capable of more than one meaning evidence of a different class may be admitted, namely evidence of intention. Such an ambiguity, a "latent ambiguity", because not apparent upon the face of the writing, demands evidence of intention to establish whether there was an agreement at all, or if the parties intended a particular one of alternate meanings to prevail. Such latent ambiguities have arisen where it was found that two railway stations bore the name of the one mentioned in the contract … or where an agreement was made for a lease of premises "as per plan agreed upon" and it appeared that two plans had been inspected.

In the case at bar, there is no such latent ambiguity. The provisions of the [agreements] which form part of the factual matrix surrounding the entering into of [a later agreement], must lead one to conclude that the words "the use" of any plan surplus and "remains at the company's discretion" in the [later agreement] are susceptible of more than one interpretation and that there is a patent ambiguity on the face of [the later agreement] itself.

[53] I would reach the same conclusion with respect to the hypothesis considered by the Arbitrator: where the words of the agreement are "reasonably susceptible of more than one meaning". An ambiguity in this broad sense would be apparent on the face of the documentation and, in consequence, it would not justify the admission of extrinsic evidence of the actual intentions of the parties. If the Arbitrator had found that the ambiguity existed and had relied on the extrinsic evidence of subjective intention as an essential ground of his decision, I would have allowed the appeal.

[54] In reaching the above conclusion, I have not overlooked the criticism directed in some recent English cases at some of the traditional significance given to the distinction between latent and patent ambiguities. This criticism was referred to by Lewison, *op. cit*. at para 802 where, after citing *dicta* of Lord Simon in *L. Schuler v. Wickman Machine Tool Sales Ltd,* [1974] A.C. 235 (H. L.) and of Lord Hoffman in *Mannai Ltd v. The Eagle Star Life Assurance Co Ltd,* [1997] A.C. 749 (H. L.), the learned author commented:

> It seems unlikely that the traditional distinction between these two types of ambiguity has survived into the modern law.

[55] However, in neither of those cases was there an issue relating to direct evidence of the actual, or subjective, intentions of contracting parties. In each case, the inadmissibility of evidence of subjective intention was accepted. In *Schuler*, the question was whether evidence of subsequent conduct was admissible and, in *Mannai*, the issue concerned evidence of surrounding circumstances. Lord Simon was of the opinion that the distinction between direct and circumstantial evidence of intention was unsound and that, even where a document was ambiguous on its face, evidence of subsequent conduct - like direct evidence of subjective intention - should be held to be inadmissible. In *Mannai,* a rule that was described by Lord Hoffmann as "not merely capricious but also … incoherent" was not that which excludes direct evidence of intention in cases of patent ambiguity and admits it in cases of latent ambiguity but, rather, a supposed rule that

> … if the words of the document were capable of referring unambiguously to a person or thing …

extrinsic evidence of surrounding circumstances was not admissible.

[56] While there may be difficulty in reconciling Lord Simon's conclusion with respect to subsequent conduct with the Canadian authorities I have cited, I do not believe any such problem arises from Lord Hoffmann's finding that evidence of surrounding circumstances would be admissible in *Mannai* unless, perhaps, the reasoning in *Eli Lilly* is to be applied to support the "rule" that he rejected.

[57] It may well be that, with the importance given to the factual matrix, or context, in modern principles of interpretation, the distinction between latent and patent ambiguities should be discarded as having outlived its usefulness, and that, instead, attention should be given to the justification for distinguishing between direct, and circumstantial, evidence of intention.

However, I have found nothing in the decisions in this jurisdiction - or in the English decisions I have mentioned - to support the proposition that evidence of subjective intention is admissible where there is an ambiguity of the kind considered by the Arbitrator.

[58] As I have indicated, I do not believe a similar objection could validly be made to the Arbitrator's willingness to obtain assistance from the past conduct of the parties in the event that he had found that the provisions of the agreements were reasonably susceptible of more than one interpretation. Nor do I believe it would have been an error of law in such circumstances to place some reliance on the *contra proferentem* principle. The facts with respect to these matters were not materially in dispute. The approval of the Province to toll rate increases in previous years had not been sought, or required, and there was evidence at the arbitration that, although drafts of the agreements were discussed by officials of the Province and prospective purchasers of the shares of 407 ETR, their terms had not been negotiated. If the Arbitrator's conclusion that the past conduct of the parties and the *contra proferentem* principle supported the interpretation he would otherwise have placed on the agreements is open for reconsideration on this appeal, I would agree with it.

[59] The final consideration on which the Arbitrator was prepared to rely if the agreements were found to be ambiguous was the duty of the court to avoid an interpretation that would result in a commercial absurdity. In my opinion, a consideration of the extrinsic evidence of the consequences of the competing interpretations for this purpose would not have been objectionable: *cf., Kentucky Fried Chicken of Canada v. Scott's Food Services Inc.*, [1998] O.J. No. 4368 (C.A.), at para 27.

D. Decision

[60] The Arbitrator found that the agreements entered into by the Province in 1999 did not require 407 ETR to obtain the consent, or approval, of the Province to increases in toll rates and administration fees. For the reasons I have given, I am satisfied that the Arbitrator's decision on the issues of interpretation involved in this appeal was correct on the plain meaning of the agreements in the sense in which that concept was used in *Eli Lilly* - as well as in a wider sense that, as in *Arthur Andersen*, permits a limited use of extrinsic evidence of surrounding circumstances for the purpose of determining whether there is an ambiguity. Accordingly, the decision was not, in my opinion, vitiated by any error of law. If I had found that the meaning of the agreements was not sufficiently clear and unambiguous to compel the decision, I would have found that he was entitled to have recourse to the evidence of past conduct, and to apply the *contra proferentem* principle in the manner he indicated. He was not, however, entitled to rely upon evidence of the subjective intentions of the parties.

[61] Notwithstanding the position now adopted by the Province, it appears that its control over the level of tolls and administration fees charged to users of Highway 407 may be confined to its

right to ensure that congestion payments are made by 407 ETR in accordance with the agreements. All, or some, of the implications of that right are to be determined by arbitration in accordance with my earlier decision: [2004] O.J. No. 4516 (S.C.J.).

[62] In view of the above findings, the appeal is dismissed.

[63] Costs may be spoken to or, if counsel would prefer to make their submissions in writing, those of 407 ETR should be filed within 14 days of the release of these reasons and those on behalf of the Province within a further 7 days.

_____

CULLITY J.

Released: January 6, 2004

COURT FILE NO.: 04-CV-27202CM2
DATE: 20050106

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO AS REPRESENTED BY THE MINISTER OF TRANSPORTATION and THE MINISTER OF TRANSPORTATION FOR ONTARIO

Applicants

- and -

407 ETR CONCESSION COMPANY LIMITED

Respondent

REASONS FOR DECISION

CULLITY J.

Released: January 6, 2005

TAB 6

CITATION: Prism Resources Inc. v. Detour Gold Corporation, 2021 ONSC 1693
COURT FILE NO.: CV-19-00618850-0000
DATE: 20210104

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
PRISM RESOURCES INC.	)	Bonnie Roberts Jones, for the Plaintiff (Moving Party)
	)	
Plaintiff (Moving Party)	)	
	)	
– and –	)	
	)	
DETOUR GOLD CORPORATION	)	Zohar R. Levy, for the Defendant (Responding Party)
	)	
Defendant (Responding Party)	)	
	)	
	)	
	)	
	)	**HEARD:** March 5, 2021

PAPAGEORGIOU J.

[1] The defendant, Detour Gold Corporation ("Detour"), is the registered owner of certain mining claims and leases in Northern Ontario (the Properties, as defined below). Prism Resources Inc. ("Prism") has brought this action and this summary judgment motion seeking a declaration that it has a valid and enforceable royalty which is an interest in land in two properties known as the Aurora Property and the Sunday Lake Property (collectively the "Properties").

[2] Detour denies that any such alleged royalty agreements encumber the Properties or that it has any contractual or other obligations to Prism.

[3] For the reasons that follow I am granting Prism summary judgment as requested.

What is the test on a summary judgment motion?

[4] In accordance with r. 20.04(2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the "Rules"), the court shall grant summary judgment if:

> (a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or
>
> (b) the parties agree to have all or part of the claim determined by summary judgment and the court is satisfied that it is appropriate to grant summary judgment.

[5] In determining whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and a judge may exercise any of the following powers under r. 20.04(2.1): (1) weighing the evidence; (2) evaluating the credibility of a deponent; and (3) drawing any reasonable inference from the evidence.

[6] The Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 49, explained when there will be no genuine issue for trial:

> There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process: (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

[7] In order to defeat a motion for summary judgment, the responding party must put forward some evidence to show that there is a genuine issue requiring a trial. A responding party on a summary judgment motion cannot rest solely on allegations in a pleading. Each side must "put their best foot forward" with respect to the existence or non-existence of material issues to be tried: *Sweda Farms v. Egg Farmers of Ontario*, 2014 ONSC 1200, at paras. 32-33, aff'd 2014 ONCA 878.

[8] Furthermore, "the motion judge is entitled to presume that the evidentiary record is complete and there will be nothing further if the issue were to go to trial": *Tim Ludwig Professional Corporation v. BDO Canada LLP*, 2017 ONCA 292, 137 O.R. (3d) 570, at para. 54. Parties must present sufficiently precise evidence to show there is a genuine issue for trial:

"a summary judgment motion cannot be defeated by vague references as to what may be adduced if the matter is allowed to proceed to trial": *Diao v. Zhao*, 2017 ONSC 5511, at para. 18.

Background

[9] Prism is a Canadian-based precious metal explorer and developer incorporated in British Columbia.

[10] Detour is a Canadian intermediate gold producer and current owner of the lands in issue, as described below.

[11] The Properties in question are Crown lands and over time, various corporate entities have obtained mining rights over the Properties. It is important to understand that the various transactions described below relate to the transfer of leases and mining rights which various parties have held over time, as opposed to the ownership of the land itself.

[12] Boliden Westmin (Canada) Limited ("Boliden") was the initial owner of these Properties. On or about December 31, 1999, Prism entered into Joint Venture Agreement with Boliden to develop the Properties (the "Boliden Agreement"). Pursuant to the Boliden Agreement, it also acquired the right to earn an undivided 100 percent interest in the Properties through an option.

[13] On March 7, 2002, Prism and Conquest Resources Inc. ("Conquest") entered into a joint venture to explore, acquire and if warranted develop the Properties (the "Prism/Conquest Joint Venture Agreement")

[14] On June 29, 2004, Prism and Conquest entered into a subsequent letter agreement (the "Prism/Conquest Letter Agreement") which set out various obligations between Prism and Conquest.

[15] Thereafter, through a series of transactions between 2010 and 2014, Detour acquired the Properties from Conquest. The agreements between Detour and Conquest specifically referenced Prism's royalty interest in the Properties as a permitted encumbrance and for a long time, Detour acknowledged that Prism had a royalty interest which encumbered the Properties.

[16] However, in 2017, Detour advised Prism that having reviewed the matter further, it had been mistaken in this belief. Detour now asserts that Prism's royalty claim is not a property interest and that any rights which it had were merely contractual rights against Conquest which do not bind Detour.

[17] The issue in this proceeding is whether the agreements which Prism and Conquest had entered into created an interest in land and/or whether Detour is otherwise obligated to acknowledge and abide by Prism's claim to royalty rights in the Properties.

Do the agreements between Conquest and Prism create an interest in land?

[18] In *Bank of Montreal v. Dynex Petroleum*, 2002 SCC 7, [2002] 1 S.C.R. 146 ("*Dynex*"), the Court held that a royalty interest is an interest in land if: 1) the language used in describing the interest is sufficiently precise to show that the parties intended the royalty to be a grant of an interest in land, rather than a contractual right to a portion of the oil and gas substances recovered from the land; and 2) the interest, out of which the royalty is carved, is itself an interest in land. The ruling in *Dynex* specifically changed the law to bring it in line with industry practice, to permit a royalty that consists of a right to payment of profits to be an interest in land: *Dynex*, at para. 18.

[19] There is no issue in this case that the second part of the test set out in *Dynex* is satisfied in that the property interest claimed by Prism has been carved out of Conquest's property interest.

[20] With respect to the first part of the test set out in *Dynex*, in *Blue Note Mining Inc. v. Fern Trust (Trustee of)*, 2008 NBQB 310, aff'd 2009 NBCA 17, at para. 34, the Court held that there are no particular words required for such a property interest to be recognized. See also *Third Eye Capital Corporation v. Resources Dianor Inc.,* 2018 ONCA 253, at para 65, where the Court of Appeal for Ontario stated that "The contractual terms are not necessarily determinative of whether an interest in land was intended; the language does not require magic words to demonstrate the parties' intention."

[21] Therefore, I must examine the Letter Agreement between Prism and Conquest to ascertain whether, properly construed, it creates an interest in land.

[22] With respect to the first branch of the *Dynex* test, in *Sattva Capital Corp. v. Creston Moly Corp*, 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 47 ("*Sattva*"), the Court held that to interpret a contract, "a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract." As explained, admissible evidence of surrounding circumstances is "objective evidence of the background facts at the time of the execution of the contract […] that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting": *Sattva*, at paras. 58, 60. Subjective evidence of the parties' intentions, however, is generally inadmissible: *Sattva*, at paras. 59-61; *2484234 Ontario Inc. v. Hanley Park Developments Inc*., 2020 ONCA 273, 150 O.R. (3d) 481.

[23] Detour's position is that properly construed, the ordinary and grammatical meaning of the words used do not show an intention to create an interest in land. Detour points out that Prism never registered the Letter Agreement against the Properties.

[24] Detour further says that Prism has failed to adduce evidence of surrounding circumstances (such as emails, letters, draft agreements, or contemporaneous evidence of discussions between the parties) to support its claim. Detour argues that this should give rise to an adverse inference that the surrounding circumstances would demonstrate that the parties intended only to create contractual rights and not an interest in land. Detour further says that in the alternative, in the absence of admissible evidence of surrounding circumstances, there are genuine issues requiring a trial.

[25] In order to consider this issue, it is important to understand all the various interests which Prism has held in the Properties pursuant to the various agreements before me. In my view, these are part of the surrounding circumstances.

The Boliden Agreement

[26] As noted above, Prism's initial involvement with the Properties began when it entered into the Boliden Agreement. Pursuant to the Boliden Agreement, Prism acquired a right and option to acquire a 60 % interest in Boliden's mining claims and leases in the Properties upon payment of certain sums as well as an option to acquire the remaining 40 %. It is clear that this agreement created an interest in land. Section 6.3 specifically provided that the Agreement could be registered against the Property. The Joint Venture Agreement between Boliden and Prism, which formed a schedule to the Boliden Agreement, also confirmed that an interest in land was created. See for example section 3.1.

[27] Prism ultimately acquired a 100 % interest in the Properties. Prism conducted exploration activities on the Properties until on or about March 7, 2002 when it granted an option to Conquest.

The Prism/Conquest Joint Venture Agreement

[28] Pursuant to the Prism/Conquest Joint Venture Agreement, Prism granted Conquest an option to acquire 60 percent of Prism's interest under the Boliden Agreement. As well, Prism and Conquest formed a joint venture to explore, acquire, and, if warranted, develop the Properties.

[29] It is also clear that this agreement acknowledged Prism's property rights based upon the following terms:

> Recital B: Prism has agreed to grant to Conquest the sole and exclusive right and option to acquire up to an undivided (60%) percent right title and interest in and to Prism's interest in the Property pursuant to the Boliden Agreement subject to the terms and conditions of this agreement.
>
> 1.1(p) "Interest" means the undivided beneficial percentage interest of a Participant in the Assets following the Participation Date and shall be equal to the right, title and interest in and to the Property as determined pursuant to this Agreement.
>
> 1.1(ll) "Property" means the contiguous unpatented mining claims and the mining leases collectively totaling hectares described in Schedule "B" together with all mineral interests acquired within the Area of, other Tenements, and all surface rights, mineral rights,

> personal property and permits and associated therewith and shall include any renewal thereof and any other form of successor or substitute title thereto or tenure derived therefrom.

[30] Pursuant to section 3.1 of the Prism/Conquest Joint Venture Agreement, Prism agreed that it would make required payments pursuant to the Boliden Agreement to ensure that it remained in good standing and that if Prism could not, then Conquest could make such payments on its behalf, whereupon Conquest's interest in Prism's interest in the Property would increase from 60 to 90 percent.

[31] Pursuant to section 10.5, if a Participant's Interest in the Property was reduced to less than 10 percent or if the participant elected not to pay its share of the costs, then that participant's interest would be deemed to be transferred to the other participant and the party whose interest was deemed to be transferred would be entitled to Net Smelter Returns Royalties calculated in accordance with the Agreement. Further, the remaining participant would not be permitted to transfer any of its interest in the Properties without first causing the transferee to assume the Net Smelter Returns Royalty.

The Prism/Conquest Letter Agreement

[32] As set out above, on June 25, 2004, Prism and Conquest entered into the Letter Agreement which I have reproduced in full below because of its centrality to the issues in this motion. (Note that at the time of this Letter Agreement, Prism's interest stated to be reduced to 10 % because of its non-payment of expenses)

> I have had a telephone conversation this morning with Jim Jock of Boliden who advises me that their arrangement to sell Boliden Westmin Canada Limited to Breakwater Resources is effective as of June 1, 2004 but will not actually close until later in July.
>
> Jim has advised me that he would prefer to have Conquest shares rather than Prism shares for the $200,000 payment due on June 30, 2004. As I understand him he is not receptive to the idea that if he accepted Prism shares that they would be facing a possible 10:1 roll-back. He indicated to me that he is not in a position to enter into fresh negotiations with

respect to an alternative arrangement of cash and a smelter number of shares as you were proposing.

Under the terms of our agreement, Prism is responsible for making the payment due on June 30. However, Conquest would be prepared to entertain the following:

1. Conquest would make the $200,000 payment to Boliden in cash or shares of Conquest;
2. Conquest would forgive Prism's outstanding contribution to the earning and subsequent exploration expenditure;
3. Prism would relinquish its current participating interest (10% less current dilution for non-payment of outstanding contributions and cash calls and right to any net smelter royalty) in return for a carried interest in the project equal to seven and one-half percent (7.5%) of Conquest's net profit from the Aurora property after deduction of interest charges, income and other applicable taxes, depreciation and amortization determined in accordance with generally accepted accounting principles applied in Canada. [Emphasis added] In the event Conquest's interest in the Property is converted to a net smelter return royalty, Prism's entitlement shall be to receive 7.5 % of all royalty payments actually received by Conquest. Any disagreement between the parties as to the amount or determination of such net profit or royalty shall be resolved by Conquest's auditors whose determination shall be final and binding on the parties.
4. These terms will replace the original letter agreement (as amended) between Prism and Conquest in its entirety. Conquest agrees to remise, release and forever discharge Prism Resources Inc., its officers directors and shareholders from any claim, right of action, account, debt or other demand relating directly or indirectly to the Aurora Property, or as a consequence of any other understanding, correspondence, negotiation or other matter respecting the Aurora Property however arising to the date of this Agreement.

On payment of $200,000 to Boliden as described in paragraph 1, Conquest will use reasonable commercial efforts to obtain a release from Boliden in favour of Prism Resources Inc., whereby Boliden shall remise, release and forever discharge Prism, its officers, directors and shareholders from any claim, right or action, account, debt or other demand relating directly or indirectly to the Aurora Property, or as a consequence of any other understanding, correspondence, negotiating or other matter respecting the Aurora Property however arising to the date of this Agreement.

The benefit to Prism would be (1) 1.7 M shares loss dilution; (2) forgiveness of current $19,883 due to Conquest; (3) no need to contribute to planned $1.2 M program commencing in August or to future programs.

> If this proposal is not agreeable to you, then we will have to seek immediate reimbursement of the outstanding cash contribution due from Prism for past and current exploration programs and seek Prism's shares of the drill program ($120,000) due in August. I will be away from Toronto as of Wednesday of next week and need to have this resolved prior to then. Please let me have your thoughts by return. Time is of the essence as the June 30 deadline is quickly approaching and Jim Jack's ability to influence decisions on this agreement will evaporate after July 1. [Emphasis added.]

[33] Prism signed this Letter Agreement back. (I note that even though the Letter Agreement only specifically refers to the Aurora Property, there was no dispute that it was intended to apply to both the Aurora Property and the Sunday Lake Property.)

[34] What the Letter Agreement shows is that there were some issues with payments that Prism was required to make pursuant to the Prism/Conquest Joint Venture Agreement and the Boliden Agreement. Conquest was offering to make these payments and forgive any outstanding costs expenditures which Prism was required to make pursuant to the agreement if Prism gave up its 10 % participating interest in return for a carried interest in the project equal to seven and one-half percent (7.5%) of Conquest's net profit from the Aurora Property after deduction of expenses.

[35] Detour says that this created only a contractual right in favour of Prism as opposed to an interest which would run with the land. It points to the inelegance of the language and the fact that the words "property interest", or something similar, are not specifically used. Therefore, it argues, the parties did not clearly intend to create a property interest in favour of Prism as per *Dynex*. Detour argues that the parties would have used clearer language to comply with *Dynex*, but as the case law above cited, there is no magic language.

[36] I note that the Letter Agreement was not a formal agreement like the Prism/Conquest Joint Venture Agreement, but appears to have been drafted by Conquest's President and CEO and accepted by one of Prism's Directors. While there is no evidence before me as to whether they had legal training, this Letter Agreement is written in a very informal manner, is about one and one half pages long and contains no legalese. It is very different than the detailed and precise formal Prism/Conquest Joint Venture Agreement, which is more than 40 pages long, single

spaced and appears to have been crafted by a team of lawyers, and it is important to take that into account. Comparisons of the wording used in the Letter Agreement and the wording used in the other complex agreements before me is not persuasive.

[37] If the parties intended to express a mere contractual right in favour of Detour, the words "carried interest in the project equal to" could be completely deleted and the phrase that is left would still give Prism a contractual right. In that regard, deleting these words would result in the following wording:

> Prism would relinquish its current participating interest (10% less current dilution for non-payment of outstanding contributions and cash calls and right to any net smelter royalty) in return for [**Deleted: a carried interest in the project equal to**] seven and one-half percent (7.5%) of Conquest's net profit from the Aurora property after deduction of interest charges, income and other applicable taxes, depreciation and amortization determined in accordance with generally accepted accounting principles applied in Canada. [Emphasis added.]

[38] The words "carried interest in the project" must mean something. The interpretation urged upon me by Detour would render the words "carried interest in the project" meaningless.

[39] In my view, the words "carried interest in the project" are arguably a layperson's way or an informal manner of indicating an interest which would run with the land and be enforceable against whoever owned the property and earned profits which was Conquest at that time. However, I do note that the Letter Agreement says "carried interest in the project" and not "carried interest in the property." As well, there is specific reference to Conquest as opposed to anyone who owns the land. This raises some ambiguity as to whether the carried interest may refer to the joint venture as opposed to the Properties, although Prism's counsel argues that "project" means the mines. Recall that the property interests that various parties have held are not ownership of the lands in question, but interests in the mines and leases.

[40] However, there are some surrounding circumstances support the interpretation that the parties intended to create a property interest.

[41] First, as pointed out by Detour's counsel, the *Dynex* decision was released in January 2002, and changed the law so that royalty interests could be property interests. Detour's counsel argued, and I infer and accept, that people in the mining industry knew about this change in the law. Therefore, when the parties negotiated the Letter Agreement, I infer that they knew about the *Dynex* decision.

[42] Before it negotiated the Letter Agreement, Prism had a clear and well-defined property interest in the Properties pursuant to the Boliden Agreement and the Prism/Conquest Joint Venture Agreement. Even if its property interest was converted to Net Smelter Returns Royalty, as set out above, pursuant to section 10.5, Conquest agreed that it would not be able to transfer its interest in the Properties without first causing the transferee to assume the Net Smelter Returns Royalty. As well, section 10.6 of the Prism/Conquest Joint Venture Agreement provided that if Prism's interest was ever converted to Net Smelter Returns Royalty, Conquest would have the right to purchase this from Prism for $1 million.

[43] It would not have been commercially reasonable for Prism to agree to give up its property rights and its protected Net Smelter Returns Royalty which appears to be valued at $1 million at that time, in exchange for a mere contractual right against Conquest which could evaporate instantly if Conquest sold the Property. In my view, this would only make sense because the parties knew that *Dynex* had changed the law and they could create a property interest in a royalty stream.

[44] While Detour's counsel argues that the purpose of the Letter Agreement was to relieve Prism of expenses that it was required to make, the only consequence pursuant to section 10.5 of the Joint Venture Agreement of Prism not making these payments is that its remaining interest would be transferred to Conquest and then it would be entitled to Net Smelter Returns Royalties calculated pursuant to the Agreement, and as stated above, if Conquest ever sold the property, it would have to ensure that the purchaser assumed this obligation.

[45] Again, it makes no commercial sense for Prism to give up its property rights, its Net Smelter Returns Royalties which apparently were valued at $1 million in exchange for being

relieved of required payments when it could have simply not paid these costs and still maintained a Royalty Interest which Conquest would have to protect if it ever sold its interest or which Conquest would have to purchase for $1 million.

[46] Prism also cites authority that the court may look to the subsequent actions of the parties to determine intent: *Montreal Trust Co of Canada v. Birmingham Lodge Ltd* (1995), 24 O.R. (3d) 97 (Ont. C.A.), at para. 23; *Thunder Bay (City) v. Canadian National Railway Company***,** 2018 ONCA 517, 424 D.L.R. (4th) 588, at paras. 62-32; *London Medical and Dental Building Ltd. v. Middlesex Condominium Corp. No. 83*, 2016 ONSC 6141, at paras. 93-95 ("*London Medical*"); *Newman v. Beta Maritime Ltd*, 2018 BCSC 1442, at paras. 31-32; *Shewchuk v. Blackmont Capital Inc.*, 2016 ONCA 912, 404 D.L.R. (4th) 512.

[47] In *London Medical*, for example, the Court found at paras. 93-95 that any doubt of the parties' intention when they signed the agreement was "eliminated by their post-agreement conduct". In *2123201 Ontario Inc. v. Israel Estate*, 2016 ONCA 409, 130 O.R. (3d) 641, at paras. 41-43, when determining whether the parties' intent was to create an interest in the land, rather than just a right of first refusal, the Court looked to a subsequent agreement that conveyed a portion of the land. The parties' conduct with respect to that agreement supported the claim that the original agreement created an interest in the land.

[48] Similarly, in *2284064 Ontario Inc. v. Shunock*, 2017 ONSC 7146, at paras. 58-63, the Court looked to a purchase agreement that contained a provision acknowledging that the property was subject to a "first right of refusal to purchase" in order to establish whether the intent of an earlier agreement was to create a right of first refusal or an option to purchase (thereby creating an interest in the land). The Court found that the clause, in a contract drafted five years later, was an acknowledgement of the interest created by the earlier agreement.

[49] In this case Conquest negotiated contracts with Detour which expressly acknowledged Prism's property rights:

a. Asset Purchase Agreement dated September 27, 2010:

Section 5.5 states that Conquest is the beneficial owner of the purchased assets subject to Permitted Encumbrances.

Schedule 1.1(cc) entitled "Permitted Encumbrances" includes "Net profit interest in favour of Prism Resources Inc. equal to 7.5 % of the net profits from mining operations as provided in and calculated in accordance with the letter agreement dated June 25, 2004 between Prism Resources and the Vendor.

b. Sunday Lake Claim Block Option and Joint Venture Agreement dated September 27, 2010:

Section 1.1 (jjj) defines Royalty Holder as "Prism Resources Inc., who holds a carried interest in the Property equal to 7.5 % of the net profit from the Property after deduction of interest charges, income and other applicable taxes, depreciation and amortization determined in accordance with generally accepted accounting principles applied in Canada."

Section 2.1(c) states "…Except for the permitted encumbrances there are no other agreements, options, contracts or commitments to sell or otherwise dispose of the Leases or Claims or which would restrict the ability of Conquest to transfer its interest in such Leases and Claims to Detour"

Section 2.1(e) states that "Conquest has the full legal right, power and authority to grant the Option, and thereinafter transfer the Property to Detour in accordance with the terms of this Agreement free of all Encumbrances other than the Permitted Encumbrances."

Schedule 1.1(zz) entitled "Permitted Encumbrances" includes "Net profit interest in favour of Prism Resources Inc. equal to 7.5 % of the net profits from mining operations as provided in and calculated in accordance with the letter agreement dated June 25, 2004 between Prism Resources Inc and Conquest.

Section 21.1 states: The parties confirm that prior to the Effective Date, Conquest, as assignee or directly entered into the Underlying Agreement with the Royalty Holder. Detour acknowledges that the Property is subject to the Underlying Agreement and that any payments due under the Underlying Agreement to the Royalty Holder are attributable to the Property will be a cost to the Venture and considered part of the Costs pursuant to this Agreement. The Parties acknowledge that to the extent the payments are not attributable to the Property, that Conquest will be solely responsible for those portions of such payments to the Royalty Holder.

Section 1.1(mmm) states: "Underlying Agreement means the Prism Letter Agreement"

> Section 1.1(bbb) states: "Prism Letter Agreement means the letter agreement dated June 25, 2004 between Prism Resources and Conquest.

[50] Detour's response to these arguments is that subsequent conduct is only admissible if there is ambiguity: *Shewchuk v. Blackmont Capital Inc.*, 2016 ONCA 212 at para 50, *Tham v. Bronco Industries Inc.*, 2018 BCCA 207 at para 14; *Wade v. Duck*, 2018 BCCA 176 at paras 27-28.

[51] Detour references *Shewchuk*, at para 46, where the British Columbia Court of Appeal cautioned that subsequent conduct "has greater potential to undermine contractual certainty in contractual interpretation and override the meaning of a contract's written language" than evidence of surrounding circumstances. The dangers discussed by the Court were that: i) parties behaviour could change over time while performing the contract; ii) evidence of subsequent conduct may be ambiguous itself; and iii) it may reward self-serving subsequent conduct where a party deliberately conducts itself in a way that would lend support to its preferred interpretation of the contract.

[52] Counsel for Detour referred to a further agreement between Detour and Conquest dated November 21, 2014 which she says does not make reference to Prism's interest. Section 1.1(e) states:

> Conquest is the absolute registered and beneficial owner of the Purchased Interest and has good and marketable title thereto, free and clear of all Encumbrances. As of the date hereof, Conquest has the full legal right, power an authority to transfer the Purchased Interest to Detour in accordance with the terms of this Agreement free of all Encumbrances.

[53] Counsel argues that this is significant and is evidence of the parties' changing behaviour over time which is ambiguous in itself. However, this November 21, 2014 agreement does not purport to deal with the Properties at all. It is a transfer of Conquest's interest in the September 27, 2010 Joint Venture Agreement. The recitals make this clear:

> A. Detour and Conquest are parties to an option and joint venture agreement entered into as of September 27, 2010 (the "Joint Venture Agreement") in respect of the Property and Assets;

B. Detour is the beneficial owner of a 50% Participating Interest in the Venture, and Conquest is the beneficial owner of a 50 % Participating Interest in the Venture (the "Purchased Interest")

C. Conquest desires to sell and Detour desires to purchase the Purchased Interest on the terms and subject to the conditions herein contained.

[54] I note again that the September 27, 2010 Joint Venture Agreement expressly acknowledged Prism's property interest, and it is Conquest's interest in this Joint Venture Agreement which is being conveyed pursuant to the November 21, 2014 Agreement.

[55] Therefore, in my view there is nothing inconsistent about the November 21, 2014 Agreement and concluding that Conquest's subsequent conduct demonstrates that it had an intention to create a property interest with the Letter Agreement.

[56] In my view, the subsequent conduct evidence cited by Prism does not have any of the dangers cited by the Court in *Shewchuk*. In particular, all of this subsequent conduct occurred prior to any dispute between Prism and Detour—therefore, it could not possibly have been contrived to benefit Prism in this proceeding. It can only have been a sincere expression from Conquest as to what it intended by the Letter Agreement.

[57] Notably, in *Shewchuk*, despite remarking on the potential dangers of subsequent conduct evidence the Court also noted that evidence of subsequent conduct can be "useful in resolving ambiguities. It may help to show the meaning the parties gave to the words of their contract after its execution, and this may support an inference concerning their intentions at the time they made the agreement.": para 48.

[58] As well, in *Shewchuk*, at para 57,the Court found that the trial judge had properly taken into account evidence of subsequent conduct in interpreting the contract in question.

[59] In my view, Conquest's conduct in continually making reference to the Letter Agreement as a permitted encumbrance in its agreements with Detour is objective evidence from which I infer that Prism and Conquest intended at the time they made the agreement, that the Letter Agreement would create an interest in land. As directed in the case law, I have considered the

weight to be given to this evidence, which in my view in this case is high given its consistency and the fact that it was demonstrably intentional given it involves what they included in detailed and elaborate negotiated agreements which appear to have been drafted by lawyers: *Shewchuk* at para 54. This subsequent conduct is overwhelmingly consistent with the interpretation that Prism and Conquest had intended to create an interest in land.

[60] Prism also relied on many documents where Detour acknowledged Prism's proprietary interest in both properties including:

a. press releases made by Detour;

b. annual filings it made on SEDAR;

c. Annual Information Forms filed in 2011, 2012, 2013 and 2014;

d. a letter to its auditor; and

e. a Mineral Resource and Reserve Estimate dated January 25, 2016.

[61] I agree with Detour that this is subjective evidence about how Detour interpreted the Letter Agreement and is not relevant to the contractual issue before me. In his affidavit, Mr. Scott Ross, the Corporate Secretary & Interim Chief Financial Officer of Prism gave evidence that his father, John (Jock) Bethune Ross who negotiated the Letter Agreement on behalf of Prism told him that the parties intended to create an interest in land. Again, I agree with Detour that this subjective evidence of intention is not relevant to the contractual issue before me.

[62] Clearly, it would have been better if Prism had registered its interest. However, I am not influenced by Prism's failure to do so because based upon the title abstract attached to Detour's materials, it appears that Prism has never registered any of the agreements on title, even the ones cited above which clearly created a property interest, used the words "property interest" and even the Boliden Agreement which specified that it could be registered on title.

[63] In all the circumstances, I am satisfied that the Letter Agreement created a property interest which runs with the lands in question and that the value of this property interest is equal to 7.5 percent of the owner's net profits after deduction of expenses as set out below. I recognize that this requires substitution of Conquest's name for the current owners. However, Conquest was the owner at the time and in my view, in all the circumstances, it was intended that this property interest would run with the land and be calculated based upon the profits of the existing owner which is why Conquest's name was specifically used.

[64] I do not agree with Detour that there is any need for any examination of any additional surrounding circumstances to interpret the Letter Agreement. Any ambiguity can be resolved on the basis of the surrounding circumstances and Conquest's subsequent conduct in evidence before me. I note that the Letter Agreement was entered into in 2004, more than 16 years ago. The likelihood of discovering written drafts or other such documents is slim in my view in any event given the passage of time; so too would the possibility of obtaining reliable evidence of any verbal negotiations which may have taken place given the passage of time. In my view, Conquest's subsequent conduct is compelling objective evidence of the parties' intention and there is nothing to contradict it.

[65] If Detour thought that there are other relevant surrounding circumstances, like emails and drafts, then it should have led that evidence or sought to obtain it through cross-examination.

[66] On a motion for summary judgment I am entitled to assume that all the relevant evidence is before me.

[67] As I have determined that the Letter Agreement creates an interest in lands it is not necessary for me to consider Prism's secondary arguments.

[68] I am satisfied that I have been able to fairly and justly determine this issue on the basis of the materials before me, that a motion for summary judgment in this case is a just and proportionate manner of determining this matter and that there is no genuine issue requiring a trial.

[69] Accordingly, I declare that the Letter Agreement creates a property interest in favour of Prism which is equal to seven and one-half (7.5) percent of the owner's net profit from the Properties after deduction of interest charges, income and other applicable taxes, depreciation and amortization determined in accordance with generally accepted accounting principles applied in Canada.

Costs

[70] Pursuant to section 131(1) of the *Courts of Justice Act*, costs are in the discretion of the court. The general approach to fixing costs in Ontario is: (i) costs follow the event premised on a 'loser pays' approach; (ii) costs are on a partial indemnity basis; and (iii) costs are payable forthwith, being within 30 days. *DUCA Financial Services Credit Union Ltd. v. Bozzo*, 2010 ONSC 4601 at para 5.

[71] Rule 57 sets out the factors which courts should have regard to when awarding costs. The main overall objective is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding, rather than an amount fixed by the actual costs incurred by the successful litigant. The reasonable expectations of the unsuccessful party are also a relevant factor: *Zesta Engineering Ltd. v. Cloutier*, 202 CanLII 25577 (ONCA), at para 4, *Anderson St. Jude Medical Inc*., 2006 CanLII 85158, at para 37.

[72] The parties have submitted Bills of Costs as follows:

	Partial Indemnity costs re motion inclusive of disbursements	Partial Indemnity costs of the action inclusive of disbursement	Total
Detour	76,157.25	97,132.33	$173,289.58
Prism			$38,370.11

[73] Prism is the successful party and presumptively entitled to its costs. This case involved medium complexity. However, the amount recovered and importance of the issues are

significant in this case as Prism has obtained a declaration of an interest in lands. Given Detour's costs request which is more than four times greater than Detour's, I find Prism's costs request fair and reasonable and in the reasonable expectations of Detour and award Prism $38,370.11 in costs inclusive of disbursements. Costs shall be payable within 30 days of this decision and shall bear post judgment interest at the rate set out the Courts of Justice Act, commencing after 30 days.

Papageorgiou J.

Released: April 1 2021

CITATION: Prism Resources Inc. v. Detour Gold Corporation, 2021 ONSC 1693

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

PRISM RESOURCES INC.

Plaintiff (Moving Party)

– and –

DETOUR GOLD CORPORATION

Defendant (Responding Party)

REASONS FOR JUDGMENT

Papageorgiou J.

Released: April 1, 2021

TAB 7

See paras 35-41

COURT OF APPEAL FOR ONTARIO

CITATION: Prism Resources Inc. v. Detour Gold Corporation, 2022 ONCA 326
DATE: 20220427
DOCKET: C69430

Lauwers, Huscroft and Coroza JJ.A.

BETWEEN

Prism Resources Inc.

Plaintiff (Respondent)

and

Detour Gold Corporation

Defendant (Appellant)

Zohar Levy and Harry Skinner, for the appellant

David Sischy and Bethanie Pascutto, for the respondent

Heard: January 25, 2022 by video conference

On appeal from the judgment of Justice Eugenia Papageorgiou of the Superior Court of Justice, dated April 1, 2021, reported at 2021 ONSC 1693.

Lauwers J.A.:

OVERVIEW

[1] The appellant Detour Gold Corporation is the registered owner of certain mining claims and leases in Northern Ontario. It acquired its interest from Conquest Resources Inc. The respondent, Prism Resources Inc., sued Detour for a declaration that it has a valid and enforceable royalty interest in Detour's mining

claims and leases in two properties known as the Aurora Property and the Sunday Lake Property.

[2] The motion judge granted summary judgment, concluding that Prism's royalty interest was an interest in land under the principles of law set by the Supreme Court in *Bank of Montreal v. Dynex Petroleum Ltd.*, 2002 SCC 7, [2002] 1 S.C.R. 146, as explained by this court in *Third Eye Capital Corp. v. Dianor Resources Inc.*, 2018 ONCA 253, 141 O.R. (3d) 192.

[3] For the reasons that follow, I would dismiss Detour's appeal.

[4] I observe that none of the facts, the documents, or the evidence are as well-developed as they would have been had Prism's summary judgment motion been brought after completion of the ordinary discovery process. But r. 20.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, permits such a motion. Detour criticizes Prism for its spare approach to the evidence, but the *Rules* provide avenues by which either party, as well-advised as they are, could have put a more robust record before the motion judge, in accordance with their obligation to put their best foot forward. The too-frequent strategy of playing the onuses and burdens in a summary judgment motion often causes remorse.

THE FACTUAL CONTEXT

[5] Prism's interest in the properties has changed over the years, through a sequence of options and joint venture agreements:

- **1999:** Prism acquired the option to a 60% interest in the mining rights from Boliden Westmin Ltd. Prism also acquired the option to increase its 60% interest to 100%. These options were to be exercised and maintained by spending specific sums of money to explore the properties (the "1999 Agreement").

- **March 2002:** Prism entered into a joint venture agreement with Conquest. Prism granted Conquest an exclusive option to acquire up to 60% of Prism's interest in the Properties. Prism agreed to pay the necessary expenditures to secure its 60%, in accordance with the 1999 Agreement. Prism also agreed that if it failed to do so, Conquest could make the payments and increase its option to 90% of Prism's interest. The agreement also provided that if either party's interest was reduced to less than 10%, or it failed to make payments under the 1999 Agreement, the defaulting party's interest would be transferred to the non-defaulting party. The defaulting party would then receive a Net Smelter Returns Royalty of 0.5%.

- **March 2004:** Prism's interest was reduced to 10% or less.

- **June 2004:** By letter agreement, Prism transferred its remaining interest to Conquest in exchange for a 7.5% "carried interest in the project['s]" net profits (the "2004 Letter Agreement").

- **2010:** Conquest, which then owned 60% of the properties, bought the remaining 40% from Boliden's successor, NVI Mining Ltd.

- **2010-2014:** Conquest sold its entire interest in a series of agreements so that by November 21, 2014, Detour owned both properties, subject to Prism's interest.

[6] The precise nature of Prism's interest is in issue. Prism asserts that it has an interest in land enforceable against Detour. Detour takes the position that Prism

had only a contractual relationship with Conquest. Upon the transfer of Conquest's interest to Detour, Prism's contractual interest fell away because it was not an interest in land. Detour first took this position in 2017.

THE ISSUES

[7] The outcome depends on the interpretation of the 2004 Letter Agreement between Prism and Conquest. The appellant argues that the motion judge erred:

i. In making palpable and overriding factual errors;

ii. In her approach to the governing law in *Dynex*;

iii. In her approach to contractual interpretation;

iv. In taking into account the post-transaction conduct of the parties.

I address each issue in turn.

ANALYSIS

[8] I begin with the governing principles, next review the motion judge's reasons, and then apply the governing principles.

(1) The Governing Principles

[9] There are three interlocking sets of governing principles, the first concerning *Dynex*, the second concerning contractual interpretation, and the third concerning the permissible use of post-event conduct in contractual interpretation.

(a) The Governing Principles set out in *Dynex*

[10] It is common ground that *Dynex* changed property law in Canada, and that Prism and Conquest were both aware of that change when they negotiated the 2004 Letter Agreement.

[11] At para. 22 of *Dynex*, Major J. noted that Canadian common law should recognize that a "royalty interest" or an "overriding royalty interest" can be an interest in land under two conditions: first, if "the language used in describing the interest is sufficiently precise to show that the parties intended the royalty to be a grant of an interest in land, rather than a contractual right to a portion of the oil and gas substances recovered from the land"; and, second, if "the interest, out of which the royalty is carved, is itself an interest in land".

[12] The motion judge was well-aware of the reasoning in *Dynex*, noting, at para. 18: "The ruling in *Dynex* specifically changed the law to bring it in line with industry practice, to permit a royalty that consists of a right to payment of profits to be an interest in land". After specifying the two-part test in *Dynex*, the motion judge said, at para. 19: "There is no issue in this case that the second part of the test set out in *Dynex* is satisfied in that the property interest claimed by Prism has been carved out of Conquest's property interest". This finding was not appealed, and is incontestable in any event because Prism's interest in the lands owned by Boliden was registrable although never registered. The 1999 Agreement provided that: "A

party will be entitled to register this Agreement or notice thereof against the Property, subject in the case of the Leases to the consent of the Ministry, and each party will cooperate in effecting the registration of any such notice and execute any documentation required in connection therewith".

[13] Writing for this court in *Third Eye*, in glossing *Dynex*, I made several statements that are pertinent to this appeal. I noted that the Supreme Court had upheld the approach of the Court of Appeal of Alberta in *Dynex*, which was that "[t]he parties' intent could be inferred": at para. 46. About the application of *Dynex*, I noted, at paras. 54-55:

> Several points in the decision are of continuing importance. Justice Major noted, at para. 6: "For substantially the same reasons as the Court of Appeal, I conclude that overriding royalty interests can be interests in land." He added, at para. 19, that he much preferred that court's "compelling insight into the evolution of the law". In my view, this language gives continuing relevance to the approach and the ruling of the Court of Appeal of Alberta, especially its statement, at para. 73, that a court must "examine the parties' intentions from the agreement as a whole, along with the surrounding circumstances, as opposed to searching for some magic words."
>
> I also note that Major J. approved the holding of Laskin J. in dissent in *Saskatchewan Minerals*. He noted, at para. 11, that: "[t]he effect of Laskin J.'s reasons was to render inapplicable, at least insofar as overriding royalties, the common law rule against creating interests in land out of incorporeal interests." He described Laskin J.'s holding, at para. 12: "[T]he intentions of the

> parties judged by the language creating the royalty would determine whether the parties intended to create an interest in land or to create contractual rights only." This was the Supreme Court's ultimate holding in *Dynex*.

[14] This analysis led me to conclude, at para. 65 of *Third Eye,* that "contractual terms are not necessarily determinative of whether an interest in land was intended; the language does not require magic words to demonstrate the parties' intention". The New Brunswick courts took a similar approach in *Blue Note Mining Inc. v. Fern Trust (Trustee of)*, 2008 NBQB 310, 337 N.B.R. (2d) 116, aff'd 2009 NBCA 17, 342 N.B.R. (2d) 151.

(b) The Governing Principles of Contractual Interpretation

[15] The parties agree that the Supreme Court's decision in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, sets out the governing principles of contractual interpretation. The relevant principles are also addressed in this court's decisions in *Weyerhauser Co. v. Ontario (Attorney General)*, 2017 ONCA 1007, 77 B.L.R. (5th) 175, at para. 65, *per* Brown J.A., rev'd on other grounds, *Resolute FP Canada Inc. v. Ontario (Attorney General)*, 2019 SCC 60, 444 D.L.R. (4th) 77; *Ontario First Nations (2008) Limited Partnership v. Ontario Lottery and Gaming Corp.*, 2021 ONCA 592, at para. 46, *per* Jamal J.A.; *Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust*, 2007 ONCA 205, 85 O.R. (3d) 254, at para. 24, *per* Blair J.A.; and *Dumbrell v. The*

Regional Group of Companies Inc., 2007 ONCA 59, 85 O.R. (3d) 616, at paras. 52-56, *per* Doherty J.A.

[16] These principles were conveniently summarized by Brown J.A. in *Weyerhauser*, at para. 65. A judge interpreting a contract should:

> i) determine the intention of the parties in accordance with the language they have used in the written document, based upon the "cardinal presumption" that they have intended what they have said;
>
> ii) read the text of the written agreement as a whole, giving the words used their ordinary and grammatical meaning, in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective;
>
> iii) read the contract in the context of the surrounding circumstances known to the parties at the time of the formation of the contract. The surrounding circumstances, or factual matrix, include facts that were known or reasonably capable of being known by the parties when they entered into the written agreement, such as facts concerning the genesis of the agreement, its purpose, and the commercial context in which the agreement was made. However, the factual matrix cannot include evidence about the subjective intention of the parties; and
>
> iv) read the text in a fashion that accords with sound commercial principles and good business sense, avoiding a commercially absurd result, objectively assessed.

[17] Brown J.A. added several observations about the proper consideration of the "factual matrix" by a judge interpreting a contract, at paras. 66-68, to the effect

that it comprises, as stated in *Sattva* at para. 58, only "objective evidence of the background facts at the time of the execution of the contract... that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting". The "surrounding circumstances", *Sattva* noted, at para. 57, "must never be allowed to overwhelm the words of that agreement" and cannot be used "to deviate from the text such that the court effectively creates a new agreement".

(c) The Governing Principles on the Use of Post-Event Conduct in Contractual Interpretation

[18] Strathy C.J.O. thoroughly canvassed the authorities governing the use of subsequent conduct evidence in contractual interpretation in *Shewchuk v. Blackmont Capital Inc.*, 2016 ONCA 912, 404 D.L.R. (4th) 512. In considering *Sattva*, he noted that "subsequent conduct, or evidence of the behaviour of the parties after the execution of the contract, is not part of the factual matrix": at para. 41. Unlike the factual matrix, which "relates solely to events at the time of contract formation," evidence of which is "admissible in every case," evidence of the parties' subsequent conduct is only admissible in certain circumstances: Geoff R. Hall, *Canadian Contractual Interpretation Law*, 4th ed. (Toronto: LexisNexis, 2020), at p. 112. If, after considering the text and the factual matrix, the contract remains ambiguous, then subsequent conduct evidence may be admitted to help resolve that ambiguity: *Shewchuk*, at para. 46. As Lambert J.A.

put it in *Re Canadian National Railways and Canadian Pacific Ltd.* (1978), 95 D.L.R. (3d) 242, (B.C.C.A.), aff'd, [1979] 2 S.C.R. 668, at para. 82:

> In Canada the rule with respect to subsequent conduct is that if, after considering the agreement itself, including the particular words used in their immediate context and in the context of the agreement as a whole, there remain two reasonable alternative interpretations, then certain additional evidence may be both admitted and taken to have legal relevance if that additional evidence will help to determine which of the two reasonable alternative interpretations is the correct one. [Emphasis added.]

[19] Subsequent conduct evidence may be probative because it can shed light on "the meaning the parties gave to the words of their contract after its execution", which "may support an inference concerning their intentions at the time they made their agreement" (emphasis in original): *Shewchuk*, at para. 48. However, relying on evidence of subsequent conduct poses certain risks, and can "be an unreliable guide to parties' intent at the time they entered into an agreement": *Thunder Bay (City) v. Canadian National Railway Co.*, 2018 ONCA 517, 424 D.L.R. (4th) 588, at para. 63. Parties' conduct may change over time, the evidence itself may be ambiguous, and parties may deliberately conduct themselves in a manner consistent with their preferred interpretation of the contract: *Shewchuk*, at paras. 43-45.

[20] In light of the dangers subsequent conduct evidence poses, once it has been admitted, the court should carefully consider what weight to assign to it. Such

evidence “will be more reliable if the acts it considers are the acts of both parties, are intentional, are consistent over time, and are acts of individuals rather than agents of corporations”: *Shewchuk*, at para. 53. This evidence may also be given greater weight if it is “unequivocal in the sense of being consistent with only one of the two alternative interpretations of the contract” and if it is closer in time to the contract’s execution: *Shewchuk*, at paras. 54-55.

(2) The Decision Under Appeal

[21] This appeal turns on the motion judge’s determination of the first *Dynex* requirement for finding an interest in land: Did the parties to the 2004 Letter Agreement use sufficiently clear language to show their intention to create an interest in land, rather than just a contractual right to a portion of the substances recovered? The motion judge answered in the affirmative.

[22] As noted, the motion judge instructed herself on *Dynex* and *Third Eye*. This is the critical passage from the text of the 2004 Letter Agreement between Prism and Conquest:

> Prism would relinquish its current participating interest (10% less current dilution for non-payment of outstanding contributions and cash calls) and right to any net smelter royalty in return for a carried interest in the project equal to seven and one-half percent (7.5%) of Conquest's net profit from the Aurora property after deduction of interest charges, income and other applicable taxes, depreciation and amortization determined in accordance with

> generally accepted accounting principles applied in Canada. [Emphasis added.]

Even though the letter agreement referred only to the Aurora property, it is common ground that it applied to both the Aurora property and the Sunday Lake property.

[23] The motion judge rejected Detour's argument that the intention of the parties to create an interest in land was not clear because the term "property interest" was not used in the 2004 Letter Agreement. She observed that the Agreement was short and informal. It appeared to have been drafted by Conquest's President and then signed by one of Prism's directors.

[24] The motion judge inferred that the parties, as people in the mining industry, knew that *Dynex* had changed the law and that royalty interests could be property interests. She also found that it would not be commercially reasonable for Prism to give up its property rights, in exchange for a mere contractual right that could evaporate as soon as Conquest sold its interest.

[25] The motion judge found there to be "some ambiguity as to whether the carried interest may refer to the joint venture as opposed to the Properties". She then considered Conquest's subsequent conduct and noted that Conquest repeatedly referred to the 2004 Letter Agreement as a "permitted encumbrance"

in its agreements with Detour. She concluded that the royalty interest was an interest in land and not just a contractual interest.

(3) The Principles Applied

[26] First, the appellant asserts that the motion judge clearly erred when she said, at para. 27: “Prism ultimately acquired a 100% interest in the Properties”. Detour argues that this error is so serious that it overrides the rest of the decision. I would reject this overly dramatic submission because it does not fit with other statements in the reasons that show the motion judge’s complete and accurate grasp of the true situation. The appellant also argues that the motion judge made a similar error at para. 63, when she said that at the time of the 2004 Letter Agreement “Conquest was the owner”. I would reject this argument. Paragraphs 26 and 28 show that the motion judge knew throughout that the issue was about an interest in an interest. This comes out most clearly in para. 30: “Conquest could make such payments on its behalf, whereupon Conquest's interest in Prism's interest in the Property would increase…” (emphasis added). I address the alleged valuation error below.

[27] Second, the appellant makes a textual argument. The language in the 2004 Letter Agreement provides that Prism is to continue with “a carried interest in the project”. The appellant argues that “[t]he 2004 agreement does not state that Prism’s interest was ‘in the land’ or contain any other language conveying an

intention to create a right that would bind future owners of the Properties". But this argument is what brings *Dynex* into play.

[28] The appellant concedes that the contracting parties were aware of *Dynex*'s change in the law but argues that the gloss put on *Dynex* in *Third Eye* was not part of their knowledge. *Dynex*, they say, required more specificity in contractual language. As a result, after finding that the 2004 Letter Agreement was ambiguous, the motion judge should have dismissed Prism's claim, since ambiguous language cannot meet the "sufficiently precise" requirement set out in *Dynex*. I would reject this argument because it is inconsistent with the text of *Dynex*, as explained in *Third Eye,* which focused on the parties' intention, not the language they used: *Dynex*, at para. 14. There is no doubt that the motion judge was fully conversant with the principles in *Dynex*, which she laid out in her reasons.

[29] Third, the appellant argues that the motion judge made improper use of the evidence of the "surrounding circumstances", which she permitted to "overwhelm" the text of the 2004 Letter Agreement, contrary to the Supreme Court's instructions in *Sattva*, at para. 57. I would reject this argument. The motion judge was careful in instructing herself on the proper use of the evidence of the surrounding circumstances according to *Sattva*. Relatedly, the appellant argues that the motion judge failed to consider the possibility that there had been material amendments to the 2002 joint venture agreement, since the 2004 Letter Agreement referred to

those changes. The onus, says the appellant, was on Prism to make full disclosure, which might have affected the motion judge's understanding of the surrounding circumstances. This underplays the appellant's own responsibility to put forward its best foot through whatever means the *Rules of Civil Procedure* provide. The surrounding circumstances the motion judge considered were set out in the evidence the parties filed and over which they argued. She did not err in making the reasonable assumption that any amendments to the joint venture agreement were not material to the issues before her.

[30] The motion judge made reference to the interpretative principle of commercial reasonableness in her contractual analysis The appellant argues that this was a "breach of natural justice" because there was no argument or evidence addressed to her on the subject of commercial reasonableness, as it related to Prism's interests in the Properties at the time of entering the 2004 Letter Agreement. There is no merit to this argument. While *Sattva* does not use the expression "commercially reasonable", it is implicit in the Supreme Court's logic in that case. Moreover, it is basic to the interpretation of commercial contracts, as this court pointed out in *Weyerhauser*.

[31] The appellant adds that, as part of her assessment of commercial reasonableness, the motion judge incorrectly referred to the value of Prism's interest at "$1 million". The appellant argues in its factum that: "Prism never

adduced evidence or argued that as June 28, 2004, it had an interest in land with $1 million or that it would have been commercially unreasonable to convert that interest to a contractual right".

[32] The passages in which the motion judge refers to the value are found in paras. 43 and 45 of her decision:

> It would not have been commercially reasonable for Prism to agree to give up its property rights and its protected Net Smelter Returns Royalty which appears to be valued at $1 million at that time, in exchange for a mere contractual right against Conquest which could evaporate instantly if Conquest sold the Property. In my view, this would only make sense because the parties knew that *Dynex* had changed the law and they could create a property interest in a royalty stream.
>
> …
>
> Again, it makes no commercial sense for Prism to give up its property rights, its Net Smelter Returns Royalties which apparently were valued at $1 million in exchange for being relieved of required payments when it could have simply not paid these costs and still maintained a Royalty Interest which Conquest would have to protect if it ever sold its interest or which Conquest would have to purchase for $1 million. [Emphasis added.]

[33] I observe that the $1 million figure appears to have come from the joint venture agreement between Prism and Conquest, which the appellant summarized in its factum, explaining: "Further, the Remaining Participant also has

the right to purchase the Diluted Participant's Net Smelter Returns Royalty for $1.0 million "at any time" emphasis in original).

[34] The critical element of commercial reasonableness, as I interpret these paragraphs of the motion judge's reasons, is in the obvious point that it would make no commercial sense for Prism to give up a property right in exchange for an ephemeral contractual right. The fact that the property itself was valuable also seems obvious from the evidence on the record including this action itself. The precise value is immaterial to the motion judge's reasoning.

[35] Fourth, the appellant argues that the motion judge made improper use of "subsequent conduct evidence without first making a finding that even after looking at surrounding circumstances, the 2004 Agreement was ambiguous". I would not accept this argument. The motion judge was scrupulous in her self-instruction on the use to which subsequent conduct could be put, including this court's decision in *Shewchuk.* Her analysis did engage with the factual question of whether there was an ambiguity. She stated, at para. 39:

> In my view, the words "carried interest in the project" are arguably a layperson's way or an informal manner of indicating an interest which would run with the land and be enforceable against whoever owned the property and earned profits which was Conquest at that time. However, I do note that the Letter Agreement says "carried interest in the project" and not "carried interest in the property." As well, there is specific reference to Conquest as opposed to anyone who owns the land. This

> raises some ambiguity as to whether the carried interest may refer to the joint venture as opposed to the Properties, although Prism's counsel argues that "project" means the mines. [Emphasis added.]

[36] Immediately after pointing this ambiguity out, the motion judge dealt with surrounding circumstances, which she was entitled to consider under *Sattva*, even without an ambiguity. Only then did she turn to subsequent conduct. There was nothing erroneous in this methodology.

[37] The motion judge concluded that the subsequent conduct showed that Prism's royalty interests were considered by Conquest, and hence by its contracting party, Detour, to be a permitted encumbrance. She said, at para. 59:

> In my view, Conquest's conduct in continually making reference to the Letter Agreement as a permitted encumbrance in its agreements with Detour is objective evidence from which I infer that Prism and Conquest intended at the time they made the agreement, that the Letter Agreement would create an interest in land. As directed in the case law, I have considered the weight to be given to this evidence, which in my view in this case is high given its consistency and the fact that it was demonstrably intentional given it involves what they included in detailed and elaborate negotiated agreements which appear to have been drafted by lawyers: *Shewchuk* at para 54. This subsequent conduct is overwhelmingly consistent with the interpretation that Prism and Conquest had intended to create an interest in land.

[38] The motion judge expressly noted that Conquest's subsequent conduct on which Prism relied did not have the dangers referred to by this court in *Shewchuk*

because the conduct occurred before any dispute between Prism and Detour, so "it could not possibly have been contrived to benefit Prism in this proceeding. It could only have been a sincere expression from Conquest as to what it intended by the letter agreement," which was known to and binding on Detour.

[39] The motion judge's chain of reasoning led her to conclude: "In all the circumstances, I am satisfied that the Letter Agreement created a property interest which runs with the lands in question". The appellant has demonstrated no error in the motion judge's methodology or chain of reasoning, nor any error in principle or palpable and overriding error of fact.

[40] Finally, the appellant argues that, upon finding an ambiguity in the 2004 Letter Agreement, the motion judge ought to have ordered the trial of that issue and refused summary judgment. This argument misunderstands the nature of summary judgment. As the motion judge pointed out, on the "best foot forward" principle, she was entitled to assume that all the relevant evidence was before her. Her decision on that evidence was well-rooted in the evidence.

[41] I would dismiss the appeal with costs payable to the respondent in the amount of $25,000, all-inclusive.

Released: April 27, 2022 "P.L."

"P. Lauwers J.A."
"I agree. Grant Huscroft J.A."
"I agree. Coroza J.A."

TAB 8

See para 19

CHATHAM COURT FILE NO.: 2552/03 SR

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
TRANSIT TRAILER LEASING LIMITED and TRANSIT TRAILER LIMITED	)	Stanley G. Mayes, for the Plaintiffs
	)	
Plaintiffs	)	
	)	
- and -	)	
	)	
NORM ELLIS TRUCKING LTD., carrying on business as NORM ELLIS TRUCKING and also carrying on business as ELLIS TRUCKING and NORM ELLIS	)	Robert J. Foster, for the Defendants
	)	
Defendants	)	
	)	
	)	**HEARD:** November 15, 16, 2004

ROSS J.

[1] Transit Trailer Leasing Limited, (Transit Trailer Leasing) and Transit Trailer Limited (Transit Trailer) bring this action to recover money owing on their respective accounts. Transit Trailer Leasing's claim is for money owing under certain lease agreements relating to the leasing of trailers. Transit Trailer's claim is for the cost of repairs done to certain trailers. The companies are related and Mr. Murray Campbell is the president and owner of both companies. Transit Trailer Leasing is in the business of leasing trailers. Transit Trailer sells trailers as well as repairing them. The action arises out of six trailer rental agreements where, in the first five of those leases, the lessee is described as "Ellis Trucking". Although the action is brought against

Norm Ellis Trucking Ltd., carrying on business under various names, the central issue in the trial was whether the leasing contracts were entered into by the plaintiff Transit Trailer Leasing with Norm Ellis Trucking Ltd. or with the defendant, Norm Ellis, personally.

[2] One of the issues raised by the defendants was the rate of interest rate being charged by the plaintiffs on the outstanding balances of the accounts. The lease agreements provided that unpaid balances would be subject to an interest rate of 30% per annum compounded monthly. The statement of claim claimed interest at 24% per annum and it was the evidence of Murray Campbell that in fact a rate 1% per month, was charged on the outstanding balances. The lease agreements did not comply with section 4 of the *Interest Act*, in that the lease agreements did not contain an express statement of the yearly rate or percentage of interest equivalent to the rate being charged and compounded monthly. The plaintiffs agreed at trial that they would seek interest on the outstanding accounts at the rate of 5% as provided for in s. 4 of the *Interest Act*. Accordingly the interest hereinafter mentioned is calculated at the rate of 5% per annum.

[3] There is no dispute as to the amount owing to the respective plaintiffs. It was agreed at trial that the principal owing on the leases to Transit Trailer Leasing is $18,717.07 plus interest of $3,119.50; and in respect of repair work done by Transit Trailer the principal owing on the account is $7,172.39 plus interest of $1,195.40, for a total of $30,204.36. That figure is accurate as of November 30, 2004, that being the date to which interest had been calculated during the course of the trial. The plaintiffs seek additional prejudgment interest on the principal amounts calculated at the rate of 5% per annum.

[4] The defendant Norm Ellis had worked as a truck driver and subsequently decided to go into business for himself. He incorporated Norm Ellis Trucking Ltd. on the 16th of February, 1998. It is his position that in dealing with the plaintiff, Transit Trailer Leasing, he was acting as agent or representative of his company and was not entering into the trailer leases in his personal capacity. In the statement of defence, the defendants plead that the plaintiffs rented their trailers to the defendant corporation and not to Norm Ellis personally.

[5] The procedure for leasing a trailer was relatively informal. After having set up an account with Transit Trailer Leasing, the customer would contact the plaintiff to obtain the use of a trailer. The customer or the customer's driver would attend at the plaintiff's yard. The party picking up the trailer was required to sign an "inspection report" the purpose of which was to acknowledge that the trailer being picked up was free of damage or if the trailer showed existing damage it would be noted on the report. The driver and someone on behalf of Transit Trailer Leasing would sign the inspection report. The driver would leave with the trailer. Transit Trailer Leasing would then prepare the trailer rental agreement and forward it by mail to the customer requesting the customer sign the agreement and return the “white copy”, being the original signed copy, to Transit Trailer Leasing. Mr. Campbell testified that the lease agreement was usually returned but in some cases the customer did not return the lease agreement to his office, in which case his secretary would call the customer requesting it be returned. In some cases the trailer would have been returned before the lease was returned to the plaintiff. When the customer returned the trailer to the plaintiff's yard the driver would be required to sign a "return receipt" which would record any damage that had occurred to the trailer while in the possession of the customer. If the damage had occurred it would be repaired by Transit Trailer and the account for that repair would be sent to the customer. Transit Trailer Leasing would then prepare an invoice in respect of the amount owing for the use of the trailer in accordance with the trailer rental agreement, which would be sent to the customer. Invoices were sent to customers as the account was incurred. Statements of the customer's account were sent monthly.

[6] The six inspection reports were made out in the name of Ellis Trucking and either signed by Norm Ellis or his driver. These documents as well as the return receipt only relate to the condition of the trailer at the time of pickup and return.

[7] Two witnesses were called in by the plaintiffs, Mr. Campbell, the president and owner of the two plaintiff companies and Mr. Horney, the director of finance of the two plaintiffs. Mr. Ellis was the only defence witness. Mr. Ellis testified that he had incorporated his business in 1998. He approached Mr. Campbell to set up a leasing account in October 1999. This date seems unlikely, since the first lease was signed in June 1999. At this initial meeting to set up

their business arrangements, Mr. Ellis said he took with him to Mr. Campbell's office his articles of incorporation of his company. He said he also brought with him his insurance papers as Mr. Campbell had requested or required that he produced those papers. He said that he represented himself to Mr. Campbell as a representative of his company, Norm Ellis Trucking Ltd., and produced insurance papers showing that it was Norm Ellis Trucking Ltd. who was the insured. Mr. Campbell said that he assumed he must have met initially with Mr. Ellis but that he did not particularly remember the meeting. He said his business practice at the time was somewhat loose and that knowing Mr. Ellis as a neighbor who lived down the road from Mr. Campbell's office, he made no credit check on Mr. Ellis. Although having stated he did not particularly recall the meeting, nevertheless, he said that Mr. Ellis had not produced articles of incorporation of a limited company, nor had he in 30 years of business ever required a potential customer to produce his articles of incorporation.

.[8] Mr. Campbell said his practice in dealing with potential customers who were corporations was, that where the customer was a large operator having hundreds of trucks, he would not require the individual principal or principals to undertake personal liability for the account. On the other hand, when dealing with small operators who had only a handful of trucks he would require that both the limited company and the personal individual whose company it was, to undertake personal liability. He had been given legal advise in the past, that he could accomplish this result by putting both the corporate name and the individual's name on the rental agreement as the "lessee(s)". Mr. Campbell said he believed he was dealing with Norm Ellis personally and that he did not know until later on that there was a Norm Ellis Trucking Limited. Mr. Ellis said that he produced to Mr. Campbell his articles of incorporation and his insurance papers at their initial meeting. A copy of a certificate of insurance dated January 2000 was marked as an exhibit in the trial and shows the insured as Norm Ellis Trucking Ltd. with loss payable to Transit Trailer Leasing Limited as an additional insured.

[9] There were six lease agreements drawn up and five were executed. They are all on the same standard printed form. On the first five leases the "Lessee's Name" is shown as "Ellis Trucking". Each contract refers to the name of the lessee's insurance company, broker and policy

number. This would suggest that someone of the plaintiff's staff had looked at the policy certificate. The six contracts are dated June 14, 1999; August 26, 1999; December 23, 1999; January 7, 2000; January 10, 2000 and January 23, 2001. Of the first five contracts four were signed by Mr. Ellis as "Norm Ellis" over a printed line reading "signature of authorized agent". One contract was signed by a Scott Suk, again signing over the printed words "signature of authorized agent". The last lease contract of January 23, 2001 showed the lessee as "Norm Ellis Trucking Ltd. and Norm Ellis". Mr. Ellis did not sign this contract, his reason being that he had not agreed to be personally liable for the accounts. Although Mr. Ellis or his company received and used a trailer provided for under this lease, that lease was never executed.

[10] Mr. Ellis said that in January 2001 his company was having financial difficulties meeting its bills and that a couple of cheques issued by Norm Ellis Trucking Ltd. to the plaintiffs were returned NSF.

[11] According to Mr. Ellis there were two meetings between himself and Mr. Campbell in January 2001. It is difficult to put these meetings in chronological order. Mr. Ellis said that in early January 2001 he met with Mr. Campbell about the NSF cheques and arranged to have them replaced or certified. He told Mr. Campbell of his company's financial difficulty and that the account was that of his company and not himself. I am unable from his evidence to determine exactly when the second meeting took place, that is, whether before or after January 23, 2001 Mr. Ellis said that Mr. Campbell called him into his office and wanted him to sign a large amount of documentation. The documentation was not produced by either party. Form Mr. Ellis' evidence it appears that the intent of the documents was to have Mr. Ellis sign them and assume personal liability for the accounts owing by "Ellis Trucking" to the plaintiffs. Mr. Ellis refused to sign those documents pointing out to Mr. Campbell that the party liable was Norm Ellis Trucking Limited.

[12] Mr. Ellis obtained a trailer from the plaintiff, Transit Trailer Leasing, on January 23, 2001. Around January 25th, he received in the mail the lease contract dated January 23, 2001 which set out "Norm Ellis Trucking Ltd. and Norm Ellis" as the lessee. That is the contract

which was never signed. Mr. Ellis said that within one or two days after receiving that lease in the mail he went into Mr. Campbell's office and told him he would not sign the lease, because he personally was not the lessee.

[13] Mr. Campbell acknowledged that Mr. Ellis dropped into his office from time to time. He recalls specifically only one meeting and that was much later on in August 2001. He said he did not recall the episode spoken of by Mr. Ellis regarding having documents signed by Mr. Ellis to assume personal liability. He said he thought he was dealing with Mr. Norm Ellis and not Mr. Ellis' corporation and that he did not know there was such a corporation until at some later point in time and that he could not fix a date at which he learned of the corporation. He acknowledged that somehow he learned that Mr. Ellis had incorporated his business. He admitted that it may have been Mr. Ellis himself who told him directly about the corporation or that possibly Mr. Ellis had told his secretary.

[14] It is evident from the change in the name of the lessee in the January 23rd lease document that some time in January 2001 and prior to January 23rd, Mr. Campbell or someone on behalf of Transit Trailer Leasing became aware of Mr. Ellis' corporation. It is evident that the lessee named in the leases changed in the January 23rd lease from "Ellis Trucking" as the lessee to "Norm Ellis Trucking Ltd. and Norm Ellis". In his evidence, Mr. Ellis said that had the last lease of January 23, 2001 set out the lessee as only Norm Ellis Trucking Ltd., he would have signed the contract as a representative of the company.

[15] In my view, an important issue to be resolved is who or what was "Ellis Trucking". There is no evidence before this court that prior to setting up the leasing account Norm Ellis had carried on business personally using the name Ellis Trucking or that he had held himself out as or was known publicly as Ellis Trucking. There was no evidence from Mr. Campbell that in the initial meeting between himself and Mr. Ellis that Mr. Ellis told him to set up the account as "Ellis Trucking". Nor was there evidence that Mr. Ellis told him that he was "Ellis Trucking". Upon the evidence I find that the name Ellis trucking was simply a name chosen by Mr. Campbell or someone of his staff to identify an account. Mr. Campbell believed that Ellis

Trucking was Norm Ellis personally. Mr. Ellis on the other hand, said he was new in the business, whereas the plaintiffs had been in business for many years. He assumed the plaintiffs, in setting up their accounts, knew what they were doing and that how they set up their accounts internally was of no concern to him. He believed that all times he represented himself as an agent or officer of his corporation.

[16] In my opinion, the name Ellis Trucking had no legal significance. There is no evidence that Mr. Ellis used it as his personal business name. His evidence is to the contrary. He testified that he did business as Norm Ellis Trucking Ltd. and that he represented himself as agent for his company. The name, Ellis Trucking, was not a registered business name of his company. There is no evidence of any cheque being drawn on a bank account of an entity known as Ellis Trucking. Two cheques were produced at trial payable to the plaintiff, Transit Trailer Leasing, dated March 25, 2001 and August 31, 2001. Both were drawn upon Norm Ellis Trucking Ltd. The cheque of March 25, 2001 had an additional name as the drawer of the cheque, "Norm Ellis Trucking". The use of that name and its registration as a business name of Norm Ellis Trucking Ltd. occurred long after the contractual relations between the parties ceased.

[17] In my view, the plaintiff, Transit Trailer Leasing, drafted the form of the lease and prepared the lease contracts. It inserted the name "Ellis Trucking" as lessee. As I've said earlier, that name has no legal significance, except perhaps as the name chosen by the plaintiff for the purpose of its invoices, payments of which, to the extent that payment was made, came from Norm Ellis Trucking Ltd. It is reasonable to conclude that Norm Ellis Trucking Ltd. accepted responsibility for the accounts of Ellis Trucking. It is also my view, that by inserting the name "Ellis Trucking", as the lessee, in the circumstances of this case, created an ambiguity in regard to an important element of the lease contracts, i.e., who the lessee was. It is evident that Mr. Ellis signed his name and not that of Norm Ellis Tracking Ltd. to four of the lease contracts, but the form of the contracts provided that he was signing them in such a manner that his signature was that of the "signature of authorized agent". The contracts on their face described the signatory as agent and not as a person signing on his own personal account.

[18] Mr. Campbell believed he was dealing with Mr. Ellis personally in the lease arrangement. However, if that was his belief, his company did not insert the name “Norm Ellis” as the lessee named in the first of five contracts, which had it done so, would clearly have made it plain to Mr. Ellis that it was himself personally that the plaintiff was looking to as the party responsible under the lease and responsible for the money owing to the plaintiffs.

[19] As I stated earlier, the first five leases are ambiguous as to who the lessee was intended to be. Parol evidence is admissible to explain a latent ambiguity found in a contract. . I conclude that the naming of Ellis Trucking as lessee constitutes a latent ambiguity in the contract. While the contract showing Ellis Trucking as lessee, appears on its face to be complete and regular, the ambiguity arises when attempting to determine who the lessee was intended to be. In my view, Mr. Ellis' evidence does not contradict a written document, rather it explains an ambiguity therein, which ambiguity was created by the plaintiff, Transit Trailer Leasing in describing the lessee and in providing a document which on its face indicated the signatory was signing as an agent

[20] There is an issue of credibility in this case which must be resolved since the two principal witnesses have given conflicting evidence on a major issue. That issue is, who is the lessee? In resolving that issue I find that on important points in this case, Mr. Ellis had a better recall of the events and what transpired in meetings between Mr. Campbell and himself. Mr. Campbell could not recall their initial meeting, while at the same time denying that Mr. Ellis produces articles of incorporation. Mr. Ellis said he provided Mr. Campbell with proof of insurance showing his corporation as the principal insured. Mr. Campbell's evidence was that he did not deal with the insurance matters himself and that one of his staff would check to see that the plaintiff had received proof that the plaintiff was shown as an insured on the policy. Other than Mr. Horney, who dealt only with the plaintiffs’ accounts, no member of the plaintiffs’ staff, who dealt with the certificates of insurance, was called as a witness. In respect of cheques coming in to Mr. Campbell's office in payment of the account of Ellis Trucking, I find those cheques were issued by and drawn on the account of Norm Ellis Trucking Ltd. There is no evidence before the court that any payment came from the account of Norm Ellis personally or that he drew cheques upon an account in the name of Ellis Trucking.

[21] In the result, on the issue of credibility, while I do not disbelieve Mr. Campbell's evidence that he thought he was dealing personally with Norm Ellis, on the other hand, Mr. Ellis' evidence was fuller and demonstrated a greater recall of the events and the details of those events than did the evidence of Mr. Campbell. Accordingly, I prefer Mr. Ellis' evidence as to what occurred between the parties in respect of the lease arrangements. I find that the evidence of Mr. Ellis is admissible to explain the ambiguity in the lease contracts in respect of who the lessee was. Upon the evidence and after considering the manner of execution of the lease contracts, i.e., the form of the contract provided that the signatory's signature was being appended as "signature of authorized agent", I find that Mr. Ellis was signing as an agent only on behalf of Norm Ellis Trucking Ltd. and as a result find that he is not personally liable for the plaintiffs accounts.

[22] The last matter in issue was a defence raised by Mr. Ellis in his pleadings on behalf of all defendants. In his evidence he said that by accepting his company's cheque for $5,000 dated August 31, 2001, Mr. Campbell had agreed that such amount was to be in full payment of the plaintiffs' accounts. I do not accept that as being the case. Mr. Campbell recalled specifically only one meeting with Mr. Ellis where the accounts were discussed. He acknowledged that the August 31st., cheque was received by his company. He denies telling Mr. Ellis that upon such payment the account was to be treated as paid in full. To the contrary he said that he was looking to the accounts being paid in full. There is nothing on that cheque indicating that it was "payment in full" or pursuant to an agreed upon settlement . There is nothing in writing from either party that the cheque was to be accepted as payment in full satisfaction of the plaintiffs' accounts. I accept Mr. Campbell's evidence on this point in preference to that of Mr. Ellis. I find that following August 31, 2001, the plaintffs continued sending monthly statements of the accounts addressed to Norm Ellis Trucking Ltd. and Norm Ellis. I also find that such statements were sent until January 2003 and that the plaintiffs did not write off the Ellis Trucking accounts for bookkeeping purposes until March 2003. I find there was no compromise reached regarding the accounts. Further, the defendants, through their counsel agreed at trial on the amounts that are properly owing to the plaintiffs.

[]23] In summary, the plaintiffs will have judgment against the defendant, Norm Ellis Trucking Ltd. The plaintiff, Transit Trailer Leasing Limited, shall have judgment for $18,717.07, plus interest of $3,119.50 up to November 30, 2004, plus prejudgment interest on $18, 717.07 from November 30, 2004 to the date of this judgment, calculated at the rate of 5% per annum. The plaintiff, Transit Trailer Limited, shall have judgment for $7,172.39 plus interest of $1,195.40 up to November 30, 2004, together with prejudgment interest on $7,172.39 from November 30, 2004 to the date of this judgment, calculated at the rate of 5% per annum. The action against Norm Ellis, personally, is dismissed. If counsel are unable to agree upon costs, they may submit written submissions within 30 days.

Released January 24, 2005

"K. F. Ross"

Justice K. F. Ross

Court of Appeal File No.: COA-25-CV-0659
Court File No.: CV-24-00715321-00CL

CONSTANTINE ENTERPRISES INC. -and- MIZRAHI (128 HAZELTON) INC., ET AL

ONTARIO COURT OF APPEAL

Proceeding commenced at TORONTO

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