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COURT FILE NUMBER	25-3009380 / B301 009380
COURT	COURT OF KING'S BENCH OF ALBERTA IN BANKRUPTCY AND INSOLVENCY
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, RSC 1985, C B-3 AS AMENDED
	AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF ATHABASCA MINERALS INC., AMI SILICA INC., AMI AGGREGATES INC., AMI ROCKCHAIN INC., TERRASHIFT ENGINEERING LTD., 2132561 ALBERTA LTD., and 2140534 ALBERTA LTD.
APPLICANT	JMAC ENERGY SERVICES INC.
RESPONDENT	ATHABASCA MINERALS INC., AMI SILICA INC., AMI AGGREGATES INC., AMI ROCKCHAIN INC., TERRASHIFT ENGINEERING LTD., 2132561 ALBERTA LTD., and 2140534 ALBERTA LTD.
DOCUMENT	**BOOK OF AUTHORITIES TO BRIEF OF JMAC ENERGY SERVICES INC.**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Field LLP 400 – 444 – 7 Avenue SW Calgary AB T2P 0X8 Lawyer: Douglas Nishimura Phone Number: (403) 260-8500 Fax Number: (403) 264-7084 Email Address: dnishimura@fieldlaw.com File No. 77794-5

TABLE OF AUTHORITIES

1. Alberta *Rules of Court*, Reg 124/2010
2. *R. v. Barrette*, 1976 CanLII 180 (SCC)
3. *Lameman v. Alberta*, 2011 ABQB 40
4. *Attila Dogan Construction v AMEC Americas Limited*, 2015 ABQB 120
5. *Canadian Natural Resources Limited v. Encana Oil & Gas Partnership*, 2007 ABQB 460
6. *Blaze Energy Ltd v Imperial Oil Resources*, 2014 ABQB 326
7. *Consolidated-Bathurst v. Mutual Boiler*, 1979 CanLII 10 (SCC), [1980] 1 SCR 888

Province of Alberta

JUDICATURE ACT

ALBERTA RULES OF COURT

Alberta Regulation 124/2010

With amendments up to and including Alberta Regulation 218/2022

Current as of November 16, 2022

Office Consolidation

© Published by Alberta King's Printer

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Edmonton, AB T5K 2P7
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E-mail: kings-printer@gov.ab.ca
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Note

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(b) periodically evaluate dispute resolution process alternatives to a full trial, with or without assistance from the Court,

(c) refrain from filing applications or taking proceedings that do not further the purpose and intention of these rules, and

(d) when using publicly funded Court resources, use them effectively.

(4) The intention of these rules is that the Court, when exercising a discretion to grant a remedy or impose a sanction, will grant or impose a remedy or sanction proportional to the reason for granting or imposing it.

Division 2
Authority of the Court

General authority of the Court to provide remedies

1.3(1) The Court may do either or both of the following:

(a) give any relief or remedy described or referred to in the *Judicature Act*;

(b) give any relief or remedy described or referred to in or under these rules or any enactment.

(2) A remedy may be granted by the Court whether or not it is claimed or sought in an action.

Procedural orders

1.4(1) To implement and advance the purpose and intention of these rules described in rule 1.2 the Court may, subject to any specific provision of these rules, make any order with respect to practice or procedure, or both, in an action, application or proceeding before the Court.

(2) Without limiting subrule (1), and in addition to any specific authority the Court has under these rules, the Court may, unless specifically limited by these rules, do one or more of the following:

(a) grant, refuse or dismiss an application or proceeding;

(b) set aside any process exercised or purportedly exercised under these rules that is

(i) contrary to law,

(ii) an abuse of process, or

(iii) for an improper purpose;

(c) give orders or directions or make a ruling with respect to an action, application or proceeding, or a related matter;

(d) make a ruling with respect to how or if these rules apply in particular circumstances or to the operation, practice or procedure under these rules;

(e) impose terms, conditions and time limits;

(f) give consent, permission or approval;

(g) give advice, including making proposals, providing guidance, making suggestions and making recommendations;

(h) adjourn or stay all or any part of an action, application or proceeding, extend the time for doing anything in the proceeding, or stay the effect of a judgment or order;

(i) determine whether a judge is or is not seized with an action, application or proceeding;

(j) include any information in a judgment or order that the Court considers necessary.

(3) A decision of the Court affecting practice or procedure in an action, application or proceeding that is not a written order, direction or ruling must be

(a) recorded in the court file of the action by the court clerk, or

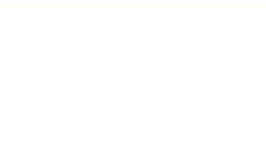
(b) endorsed by the court clerk on a commencement document, filed pleading or filed document or on a document to be filed.

Rule contravention, non-compliance and irregularities

1.5(1) If a person contravenes or does not comply with any procedural requirement, or if there is an irregularity in a commencement document, pleading, document, affidavit or prescribed form, a party may apply to the Court

(a) to cure the contravention, non-compliance or irregularity, or

(b) to set aside an act, application, proceeding or other thing because of prejudice to that party arising from the contravention, non-compliance or irregularity.



1976 CanLII 180 (SCC)

Serge Barrette *Appellant*;

and

Her Majesty The Queen *Respondent.*

1975: November 26 and 27; 1976: January 30.

Present: Laskin C.J. and Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz and de Grandpré JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Criminal law — Right to obtain the assistance of counsel — Application for adjournment — Judge's discretion — Prejudice suffered by accused — Criminal Code, R.S.C. 1970, c. C-34, ss. 577(3), 613.

Charged with assaulting a peace officer, appellant was sentenced to imprisonment for one year. At his trial on April 6, 1973 the accused filed an application for adjournment because his counsel was not present. The judge denied the application on the grounds that the case dated back to the previous November and that counsel, who was occupied elsewhere, had not justified his absence. Appellant was therefore directed to proceed without the assistance of counsel. The majority of the Court of Appeal held that appellant, even though not represented by counsel, was given the opportunity to make a full defence and received a fair trial, and refused to order a new trial. Hence the appeal to this Court.

Held (Martland, Ritchie and de Grandpré JJ. dissenting): The appeal should be allowed.

Per Laskin C.J. and Judson, Spence, Pigeon, Dickson and Beetz JJ.: However serious the fault of counsel, a fault which constituted *prima facie* contempt of court, there was nothing which authorized the trial judge to presume the connivance or complicity of the accused or without any evidence to lay the blame for the fault of counsel on him. The accused has the right "to make full . . . defence personally or by counsel" (s. 577(3) *Cr. C.*). Although the decision on an adjournment necessary for the exercise of this right is in the judge's discretion, he must exercise this discretion judicially. His decision may thus be reviewed on appeal if it is based on reasons which are not well founded in law. This right of review is especially wide when the consequence of the exercise of discretion was that someone was deprived of his rights, whether in criminal or in civil proceedings.

Serge Barrette *Appelant*;

et

Sa Majesté la Reine *Intimée.*

1975: les 26 et 27 novembre; 1976: le 30 janvier.

Presents: Le juge en chef Laskin et les juges Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz et de Grandpré.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit criminel — Droit à l'assistance d'un avocat — Demande d'ajournement — Discrétion du juge — Préjudice subi par l'inculpé — Code criminel, S.R.C. 1970, c. C-34, art. 577 (3), 613.

Inculpé de voies de fait sur la personne d'un agent de la paix, l'appelant a été condamné à un an d'emprisonnement. Lors de son procès, le 6 avril 1973, l'accusé a présenté une demande d'ajournement en raison de l'absence de son avocat. Le juge a refusé la requête sous prétexte que la cause était déjà fixée depuis le mois de novembre précédent et que l'avocat, occupé ailleurs, n'avait pas justifié son absence. L'appelant a donc été obligé de procéder sans l'assistance d'un avocat. La majorité de la Cour d'appel a considéré que l'appelant, même s'il n'était pas représenté par un avocat, avait eu l'occasion de présenter une pleine défense et avait eu une audition équitable, et elle a refusé un nouveau procès. D'où le pourvoi devant cette Cour.

Arrêt (les juges Martland, Ritchie et de Grandpré étant dissidents): Le pourvoi doit être accueilli.

Le juge en chef Laskin et les juges Judson, Spence, Pigeon, Dickson et Beetz: Quelle que soit la gravité de la faute de l'avocat, faute qui *prima facie* constituait un outrage au tribunal, il n'y avait rien qui permettait au juge du procès de présumer la connivence ou la complicité de l'accusé ou de lui imputer sans preuve la responsabilité de la faute de son avocat. C'est un droit pour l'accusé que «de présenter personnellement ou par avocat une pleine . . . défense» (art. 577(3) *C. cr.*). Même si la décision sur un ajournement nécessaire à l'exercice de ce droit relève de la discrétion du juge, celui-ci a le devoir d'exercer judicieusement cette discrétion. Sa décision pourra donc être révisée en appel si elle repose sur des motifs erronés en droit. Ce pouvoir de révision est particulièrement rigoureux lorsque l'exercice de la discrétion a eu pour conséquence la privation d'un droit que ce soit en matière civile ou en matière criminelle.

1976 CanLII 180 (SCC)

As to the English judgments where the Court refused to quash the conviction of accused persons deprived of the services of counsel, it must not be overlooked that at that time in England the quashing of a verdict by the Court of Appeal meant the definitive acquittal of the accused. Hence the tendency to uphold a conviction, despite an error of law, if there was no miscarriage of justice.

It cannot be said in the case at bar that the accused suffered no prejudice by being forced to defend himself without enjoying the assistance of counsel, and without being able to summon as a witness a person having knowledge of the incident which led up to the conviction. While it is true that counsel for the prosecution treated the accused with consideration, it cannot be concluded that he had a fair trial. The accused cannot be considered manifestly guilty when the evidence for the defence is incomplete and imperfect as a result of the absence of counsel and of a witness. The principle to be followed is as stated by the Court of Appeal of Quebec in *Talbot v. R.* ([1965] Que. Q.B. 159), namely, that if the offence was serious enough to warrant a sentence of six months imprisonment, it was serious enough to warrant that the appellant be allowed to be defended by a lawyer if he so wished.

Per Martland, Ritchie and de Grandpré JJ. *dissenting*: As it must be determined whether a miscarriage of justice was perpetrated by the trial judge in the exercise of his discretion, and his decision was upheld by the Court of Appeal, this Court must interfere only if it is clear that the judgment *a quo* is based on an error of principle. This rule is particularly important when the decision *a quo* presupposes an intimate knowledge of the local situation. The Court of Appeal of England, which has a much freer hand than this Court because it is a first court of appeal, has intervened in cases of this kind only when the fact that the accused was not represented by counsel might have constituted a denial of justice and have modified the result of the trial. The accused has not convinced this Court that the presence of his lawyer would have changed the outcome, indeed to the contrary. The right to the presence of counsel is a right which has limits, and the administration of justice requires that society be protected as well.

[*Talbot v. R.*, [1965] Qué. Q.B. 159, applied; *Spataro v. R.*, [1974] S.C.R. 253; *Mary Kingston* (1948), 32 Cr. App. Rep. 183, distinguished; *McKeown v. R.*, [1971] S.C.R. 446; *Frank v. Alpert*, [1971] S.C.R. 637; *Basarsky v. Quinlan*, [1972] S.C.R. 380; *Ladouceur v. Howarth*, [1974] S.C.R. 1111; *Whitco Chemical Co. v. Oakville*, [1975] 1 S.C.R. 273, (1974), 43 D.L.R. (3d)

Quant aux arrêts anglais où l'on a refusé d'annuler la condamnation d'accusés privés des services d'un avocat, il ne faut pas oublier qu'en Angleterre l'annulation du verdict par la Cour d'appel signifiait alors l'acquittement définitif de l'accusé. D'où la tendance à maintenir la condamnation malgré une erreur de droit s'il n'y avait pas déni de justice.

On ne peut dire en l'espèce que l'accusé n'a subi aucun tort important en étant forcé de se défendre sans l'aide d'un avocat et sans pouvoir citer à comparaître comme témoin une personne qui a eu connaissance de l'altercation qui a donné lieu à la condamnation. Tout en admettant que l'avocat de la poursuite a traité l'inculpé avec ménagement, on ne peut conclure qu'il a eu un procès équitable. L'inculpé ne peut être considéré comme une personne manifestement coupable lorsque la preuve de la défense est incomplète et imparfaite par suite de l'absence d'avocat et de témoin. Il y a lieu de suivre le principe énoncé par la Cour d'appel du Québec dans *Talbot c. R.* ([1965] B.R. 159), à savoir que si l'infraction est assez grave pour justifier une condamnation à six mois de prison, elle est certainement assez sérieuse pour que l'accusé soit autorisé à faire appel à un avocat pour sa défense, s'il le souhaite.

Les juges Martland, Ritchie et de Grandpré *dissidents*: Comme il s'agit de déterminer si une erreur judiciaire grave a été commise par le premier juge dans l'exercice de sa discrétion et que la décision de ce dernier a été confirmée par la Cour d'appel, cette Cour ne doit intervenir que s'il est manifeste que le jugement dont appel est entaché d'une erreur de principe. Cette règle a une importance particulière lorsque la décision attaquée présuppose une connaissance intime de la situation locale. Dans des matières semblables, la Cour d'appel d'Angleterre dont les coudées sont beaucoup plus franches que celles de cette Cour parce que premier tribunal d'appel, n'est intervenue que lorsque le fait de ne pas être représenté par un avocat a pu constituer un déni de justice et modifier le résultat du procès. L'accusé n'a pas convaincu cette Cour que la présence de son avocat aurait changé le résultat, bien au contraire. Le droit à la présence d'un avocat est un droit qui comporte des limites et l'administration de la justice exige que la société soit, elle aussi, protégée.

[Arrêt suivi: *Talbot c. R.*, [1965] B.R. 159; distinction faite avec les arrêts: *Spataro c. R.*, [1974] R.C.S. 253; *Mary Kingston* (1948), 32 Cr. App. Rep. 183; arrêts mentionnés: *McKeown c. R.*, [1971] R.C.S. 446; *Frank c. Alpert*, [1971] R.C.S. 637; *Basarsky c. Quinlan*, [1972] R.C.S. 380; *Ladouceur c. Howarth*, [1974] R.C.S. 1111; *Whitco Chemical Co. c. Oakville*, [1975] 1

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413; *General Foods v. Struthers*, [1974] S.C.R. 98; *Hamel v. Brunelle*, [1977] 1 S.C.R. 147; *Donald Winston Sowden* (1964), 49 Cr. App. Rep. 32; *Lacey and Wright* (1966), 50 Cr. App. Rep. 205; *R. v. Lane and Ross* (1969), 6 C.R.N.S. 273, referred to.]

APPEAL from a decision of the Court of Appeal of Quebec dismissing appellant's application for a new trial. Appeal allowed and a new trial ordered, Martland, Ritchie and de Grandpré JJ. dissenting.

D. Pontbriand, for the appellant.

Claude Millette, for the respondent.

The judgment of Laskin C.J. and Judson, Spence, Pigeon, Dickson and Beetz JJ. was delivered by

PIGEON J.—The report of the trial judge to the Court of Appeal reads as follows:

[TRANSLATION] The accused was charged, at Montreal, district of Montreal as follows:

> On September 27, 1972, Serge BARRETTE unlawfully assaulted Officer Gilles Lafond, No. 5694, a peace officer engaged in the execution of his duty, thereby committing an indictable offence specified in section 246(2)(*a*) of the *Criminal Code*.

I was in court at 10:15, and the accused was present but his lawyer was not. He then told me that his counsel was Mr. Shoofey. I sent a peace officer to ask Mr. Shoofey when he would be ready to proceed. He replied that he wanted the case postponed. I refused to do so because too many cases are postponed when lawyers, without informing anyone, either the judge or the Crown attorney, absent themselves for whatever reason. This is a case which dated back to September 27, 1972, and the accused had been committed to trial on November 3, 1972.

Although the accused ordinarily has the right to have counsel present, he may not delay cases of his own accord. At the present time we have a delay of six months and I directed the accused Barrette to proceed nevertheless. The case itself was simple. It was a question of an assault by Barrette on a peace officer engaged in the execution of his duty. In my opinion, there was ample evidence to prove Barrette's guilt, and I therefore found him guilty as charged. . . .

R.C.S. 273, (1974), 43 D.L.R. (3d) 413; *General Foods c. Struthers*, [1974] R.C.S. 98; *Hamel c. Brunelle*, [1977] 1 R.C.S. 147; *Donald Winston Sowden* (1964), 49 Cr. App. Rep. 32; *Lacey and Wright* (1966), 50 Cr. App. Rep. 205; *R. v. Lane and Ross* (1969), 6 C.R.N.S. 273.]

POURVOI contre un arrêt de la Cour d'appel du Québec qui a refusé la demande de l'appelant pour un nouveau procès. Pourvoi accueilli, et nouveau procès ordonné, les juges Martland, Ritchie et de Grandpré étant dissidents.

D. Pontbriand, pour l'appelant.

Claude Millette, pour l'intimée.

Le jugement du juge en chef Laskin et des juges Judson, Spence, Pigeon, Dickson, et Beetz a été rendu par

LE JUGE PIGEON—Le rapport fait à la Cour d'appel par le juge du procès se lit comme suit:

Le prévenu a été accusé, à Montréal, district de Montréal, de:

> Le 27 septembre 1972, Serge BARRETTE a illégalement commis des voies de fait sur la personne de l'agent Gilles Lafond, Mat. 5694, agent de la paix agissant dans l'exécution de ses fonctions, commettant par là un acte criminel prévu à l'article 246(2)*a*) du code criminel.

J'étais sur le banc à 10:15, l'accusé était présent mais non son avocat. Il m'a alors déclaré que son avocat était Me Shoofey. J'ai envoyé un officier de la paix demander à Me Shoofey quand il serait prêt à procéder. Il a répondu qu'il voulait remettre la cause. J'ai refusé de ce faire car il y a trop de causes qui sont remises parce que les avocats, sans notifier qui que ce soit, ni le juge, ni l'avocat de la Couronne, sont absents pour quelque raison que ce soit. C'est une cause qui datait du 27 septembre 1972 et l'accusé avait été envoyé à son procès le 3 novembre 1972.

Bien que l'accusé, en temps ordinaire, ait le droit d'avoir son avocat il ne faut pas retarder les causes de son propre gré. Actuellement nous sommes en retard de six mois et j'ai obligé l'accusé Barrette à procéder quand même. La cause en elle-même était simple. Il s'agissait de voies de fait de la part de Barrette contre un agent de la paix dans l'exécution de ses fonctions. La preuve, à mon point de vue, a été faite amplement et a prouvé la culpabilité de Barrette. Je l'ai donc trouvé coupable de l'accusation telle que libellée. . . .

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The appeal is based on the dissenting opinion of Casey J. who, after quoting the second paragraph of the report and the following two sentences, said:

While the unexplained conduct of Appellant's lawyer is to be deplored and while appropriate sanctions should be imposed or at least considered by the proper authorities, I see no justification for punishing Appellant for the sins of his lawyer or because the trial courts are running behind. These are matters over which Appellant had no control and they must not be allowed to deprive him of the full and fair trial to which he is entitled. By obliging him to go on without the benefit of counsel and by permitting, perhaps forcing, him to be examined at (p. 39) the trial judge did just that.

I agree with this view. Concerning the behaviour of the lawyer whose services the accused said he had retained, and who was not present when the case was called, it is certain that *prima facie* it constituted contempt of court (*McKeown v. Regina*[1]). It would nevertheless have been necessary to give him the opportunity to be heard before punishing him. However, even if he was really guilty of serious misconduct, there was nothing which authorized the trial judge to presume the connivance or complicity of the accused, as he seems to have done when, on the accused saying "I am taken by surprise", he commented: "You knew from November 3 that the case would be heard today: that is being taken by surprise? Liar".

There is nothing in the record which could legally support the presumption that counsel's absence was a premeditated scheme in complicity with the accused. It was the first time the case was being called and there was nothing to justify such inference rather than mere suspicion. The accused has the <u>right</u> "to make full . . . defence personally or by counsel" (s. 577(3) *Cr. C.*). An adjournment necessary for the exercise of this right may be refused only for a reason based on established facts.

Here the reason given by the trial judge is legally unavailable against the accused. He cannot be held responsible for the fact that "too many

[1] [1971] S.C.R. 446.

Le pourvoi est fondé sur la dissidence du juge Casey qui, après avoir cité le deuxième alinéa du rapport et les deux phrases qui suivent, a dit:

[TRADUCTION] La conduite inexplicable de l'avocat de l'appelant est à déplorer et ceux à qui il appartient de le faire devraient imposer la sanction voulue ou du moins examiner la possibilité de le faire, mais je ne vois pas de raison de punir l'appelant pour la faute de son avocat ou parce que les affaires sont en retard devant les tribunaux de première instance. L'appelant n'y peut rien et cela ne saurait le priver de son droit à un procès équitable. C'est précisément ce que le juge de première instance s'est trouvé à faire en obligeant l'appelant à subir son procès sans l'aide d'un avocat et en lui permettant, pour ne pas dire le contraignant, de témoigner (à la p. 39).

Cette opinion me paraît bien fondée. Pour ce qui est de la conduite de l'avocat dont l'accusé déclare avoir retenu les services et qui n'était pas présent lorsque la cause a été appelée, il est certain que *prima facie* elle constituait un outrage au tribunal (*McKeown c. La Reine*[1]). Il aurait néanmoins fallu lui donner l'occasion de se justifier avant de lui imposer une sanction. Mais, même s'il était réellement coupable de faute grave, il n'y avait rien qui permettait au juge du procès de présumer la connivence ou la complicité de l'accusé comme il semble l'avoir fait lorsqu'à l'accusé qui lui disait: «J'ai été pris au dépourvu», il a répondu: «vous saviez le 3 novembre que la cause passait aujourd'hui. C'est au dépourvu? Menteur».

On ne voit rien dans le dossier qui pouvait juridiquement permettre de présumer que l'absence de l'avocat était une manœuvre préméditée à la connaissance de l'accusé. C'était la première fois que la cause était appelée, il n'y avait aucune circonstance susceptible de justifier une déduction et non pas de simples soupçons. C'est un <u>droit</u> pour l'accusé que «de présenter personnellement ou par avocat une pleine . . . défense» (art. 577 (3) *C. cr.*). Pour lui refuser un ajournement nécessaire à l'exercice de ce droit, il faut un motif fondé sur des faits précis.

Ici, le motif énoncé par le juge du procès est juridiquement inadmissible contre l'accusé. On ne saurait lui imputer la responsabilité de ce qu'«il y a

[1] [1971] R.C.S. 446.

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cases are postponed when lawyers . . . absent themselves". When the learned judge adds that the accused "may not delay cases of his own accord", he is without any evidence laying the blame for the fault of counsel on the accused. The situation is quite different from that dealt with by this Court in *Spataro v. Regina*[2], where after the jury was sworn in, the accused without any valid reason claimed the right to dismiss his counsel, and thus obtain an adjournment.

It is true that a decision on an application for adjournment is in the judge's discretion. It is, however, a judicial discretion so that his decision may be reviewed on appeal if it is based on reasons which are not well founded in law. This right of review is especially wide when the consequence of the exercise of discretion is that someone is deprived of his rights, whether in criminal or in civil proceedings. At a glance, I have found in the last few years no less than half a dozen judgments in civil proceedings where a decision depriving a litigant of an important right was reversed on account of insufficient reasons given. (*Frank v. Alpert*[3]; *Basarsky v. Quinlan*[4]; *Ladouceur v. Howarth*[5]; *Whitco Chemical Co. v. Oakville*[6]; *General Foods v. Struthers*[7]; *Hamel v. Brunelle*[8]). This being so in civil proceedings, there is all the more reason to so regard a discretionary decision in criminal proceedings, the effect whereof is to deprive the accused of his right to obtain the assistance of counsel and to summon witnesses in his defence. This principle is fully recognized in the English case law which was cited to us. Thus, in *Mary Kingston*[9], where the case proceeded in the absence of counsel retained by the accused, and the judge had refused the suggestion of Crown prosecutor that other counsel be invited to provide services immediately, the Court of Appeal quashed the conviction and said (at p. 188):

[2] [1974] S.C.R. 253.
[3] [1971] S.C.R. 637.
[4] [1972] S.C.R. 380.
[5] [1974] S.C.R. 1111.
[6] [1975] 1 S.C.R. 273, (1974), 43 D.L.R. (3d) 413.
[7] [1974] S.C.R. 98.
[8] [1977] 1 S.C.R. 147.
[9] (1948), 32 Cr. App. Rep. 183.

trop de cause qui sont remises parce que les avocats . . . sont absents». Quand le savant juge ajoute que l'accusé «ne peut pas retarder les causes de son propre gré», il lui impute sans preuve la responsabilité de la faute de son avocat. La situation est tout à fait différente de celle qui a fait l'objet de notre arrêt *Spataro c. la Reine*[2] où, après l'assermentation du jury, l'accusé prétendait sans raison valable révoquer son avocat et ainsi obtenir un ajournement.

Il est vrai que la décision sur une demande d'ajournement relève de la discrétion du juge. Mais c'est une discrétion qu'il a le devoir d'exercer judicieusement de sorte que sa décision peut être revisée en appel si elle repose sur des motifs erronés en droit. Ce pouvoir de revision est particulièrement rigoureux lorsque l'exercice de la discrétion a eu pour conséquence la privation d'un droit, que ce soit en matière civile ou en matière criminelle. Une rapide revue m'a permis de relever au cours de ces dernières années, pas moins d'une demi-douzaine d'arrêts en matière civile où l'on a revisé pour insuffisance de motifs une décision privant une partie d'un droit important. (*Frank c. Alpert*[3]; *Basarsky c. Quinlan*[4]; *Ladouceur c. Howarth*[5]; *Whitco Chemical Co. c. Oakville*[6]; *General Foods c. Struthers*[7]; *Hamel c. Brunelle*[8].) S'il en est ainsi en matière civile, à plus forte raison doit-il être de même à l'égard d'une décision discrétionnaire en matière pénale dont l'effet est de priver un inculpé du droit à l'assistance d'un avocat et à l'assignation de témoins à décharge. Le principe est d'ailleurs bien reconnu dans la jurisprudence anglaise qu'on nous a citée. Ainsi, dans l'affaire de *Mary Kingston*[9] où la cause avait procédé en l'absence de l'avocat retenu par l'acusée et le juge avait refusé la suggestion du substitut d'inviter un autre avocat à fournir ses services immédiatement, la Cour d'appel a cassé la condamnation en disant (à la p. 188):

[2] [1974] R.C.S. 253.
[3] [1971] R.C.S. 637.
[4] [1972] R.C.S. 380.
[5] [1974] R.C.S. 1111.
[6] [1975] 1 R.C.S. 273, (1974), 43 D.L.R. (3d) 413.
[7] [1974] R.C.S. 98.
[8] [1977] 1 R.C.S. 147.
[9] (1948), 32 Cr. App. Rep. 183.

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it seems to us that that was tantamount to depriving the appellant of the right which she had of being defended by counsel.

As to the English judgments where the Court refused to quash the conviction of accused persons deprived of the services of counsel, it must not be overlooked that until quite recently in England the quashing of a verdict by the Court of Appeal meant the definitive acquittal of the accused, as was noted with regret in *Mary Kingston*. It is understandable that in such circumstances there was a tendency to apply as often as possible the provision which allows a conviction to be upheld, despite an error of law, if it is found that there has been no miscarriage of justice. This concern is apparent in *Donald Winston Sowden*[10]. The Court of first instance had refused to issue a second legal aid certificate after the first counsel appointed was authorized to withdraw. A conviction for fraud was quashed but a conviction for breach of the *Road Traffic Act* was upheld, on the grounds that this was a very simple case where the absence of counsel could not have caused any prejudice. As to the case of *Lacey and Wright*[11], of which the brief summary published in [1966] Crim. L.R. 387 was cited to this Court, it is necessary to read the complete text of the judgment rendered by Parker C.J. It will be seen that the Court did not, in the circumstances, find it necessary to consider whether it was certain that the accused had suffered no prejudice from the denial of legal aid, because it came to the conclusion that this discretionary denial was not reviewable.

In the case at bar, I cannot hold that the accused suffered no prejudice by being forced to defend himself without enjoying the assistance of counsel, and without being able to summon as a witness a person having knowledge of the incident which led up to the conviction. When the case against the accused is such that he cannot defend himself without testifying, he certainly is in great need of the assistance of counsel. When he denies in his testimony a significant part of what the witnesses for the prosecution relate against him, in

[10] (1964), 49 Cr. App. Rep. 32.
[11] (1966), 50 Cr. App. Rep. 205.

[TRADUCTION] il nous semble que cela revenait à priver l'appelant de son droit d'être défendu par un avocat.

Quant aux arrêts anglais où l'on a refusé d'annuler la condamnation de certains accusés privés des services d'un avocat, il ne faut pas oublier que jusqu'à tout récemment, en Angleterre, l'annulation du verdict par la Cour d'appel signifiait l'acquittement définitif de l'accusé comme on le souligne à regret dans l'affaire de *Mary Kingston*. On comprend que, dans ces conditions, l'on ait eu tendance à appliquer le plus souvent possible la disposition qui permet de maintenir la condamnation malgré une erreur de droit si l'on juge qu'il n'y a pas eu «miscarriage of justice». Cette préoccupation se révèle dans l'affaire *Donald Winston Sowden*[10]. La Cour de première instance avait refusé d'accorder un second certificat d'assistance judiciaire après que le premier avocat désigné eut été autorisé à se retirer. On a cassé une condamnation pour fraude mais maintenu une condamnation pour violation du code de la route en disant qu'il s'agissait là d'une affaire très simple où l'absence d'avocat n'avait pu causer de préjudice. Pour ce qui est de l'affaire *Lacey and Wright*[11] dont on nous a cité le bref résumé publié à [1966] Crim. L.R. 387, il faut lire le texte complet du jugement prononcé par le juge en chef Parker. On y voit que la Cour n'a pas, en l'occurrence, jugé nécessaire de rechercher s'il était certain que l'inculpé n'avait subi aucun préjudice du refus de l'assitance judiciaire car elle en est venue à la conclusion qu'il n'y avait aucun motif de reviser ce refus discrétionnaire.

Dans le cas présent, je ne puis en venir à la conclusion que l'accusé n'a subi aucun tort important en étant forcé de se défendre sans l'aide d'un avocat et sans pouvoir citer à comparaître comme témoin une personne qui a eu connaissance de l'altercation qui a donné lieu à la condamnation. Lorsque la cause faite contre l'inculpé est telle qu'il ne peut pas se défendre sans témoigner, il a sûrement grand besoin du secours d'un avocat. Lorsque dans son témoignage il nie une partie importante de ce dont les témoins de la poursuite

[10] (1964), 49 Cr. App. Rep. 32.
[11] (1966), 50 Cr. App. Rep. 205.

Court of Queen's Bench of Alberta

Citation: Lameman v. Alberta, 2011 ABQB 40

Date: 20110128
Docket: 0803 06718
Registry: Edmonton

2011 ABQB 40 (CanLII)

Between:

Alphonse Lameman on his own behalf and on behalf of all other Beaver Lake Cree Nations beneficiaries of Treaty 6, and the Beaver Lake Cree Nation

Plaintiffs/Applicants

\- and -

Her Majesty the Queen in Right of the Province of Alberta and the Attorney General of Canada

Defendants/Respondents

Decision of the
Honourable Mr. Justice K.D. Yamauchi

I. Introduction

[1] On October 19, 2010, the Plaintiffs sought an adjournment of the Defendants' applications ("Applications to Strike") pursuant to rule 129 of the *Alberta Rules of Court*, Alta. Reg. 390/68 ("*Old Rules*"). The Applications to Strike were to start on December 6, 2010, for 5 days. The Plaintiffs also sought an extension of the November 1, 2010 deadline for filing its brief opposing the Applications to Strike.

[2] The Plaintiffs ground their applications on the following:

1. they are prepared to amend their statement of claim concerning their "livelihood" claim, which would reduce the complexity of the Applications to Strike; and

2. they could not afford the legal fees necessary to respond to the Defendants' briefs and were about to retain another law firm that is prepared to do some of the work on a *pro bono* basis (the "*Pro Bono* Firm"), but the *Pro Bono* Firm cannot begin to work on this matter until sometime in the Spring of 2011.

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II. Facts - The Claim

[3] The Plaintiffs claim that various land developments in Alberta, in areas where they traditionally hunt, trap and fish (the "Core Traditional Territory"), have had, and continue to have, an adverse impact, individually or cumulatively, on the exercise of their treaty rights. Under Treaty 6, the Plaintiffs' ancestors ceded lands in what is now the province of Alberta, in exchange for reserves and other benefits including the right to hunt, trap and fish throughout the surrendered tract.

[4] The Plaintiffs claim that under Treaty 6, the Crown has an obligation to manage the cumulative effects of developments. More specifically, the Plaintiffs allege that their treaty rights impose an obligation on the Crown to discharge its duties consistently with the Crown's promise that it would not interfere with or deprive the Plaintiffs of the meaningful exercise of those rights, including managing wildlife populations, habitats and water resources to ensure the continuing meaningful exercise of the rights ("Management Duties"). Further, once it became evident that the Plaintiffs' treaty rights have been, or will be, compromised, the Crown had a duty to avoid further compromising, and to take active steps to restore the Plaintiffs' meaningful exercise of their treaty rights.

[5] The Defendants have authorized, or are in the process of authorizing, oil and gas-related activities, forestry activities, mining activities and other activities in or around areas in which the Plaintiffs hunt, trap and fish. While the Plaintiffs do not challenge the validity of individual assessments or authorizations relating to any particular development, they allege a systemic problem resulting from the Crown's overall failure to manage the "taking up" of lands, including a systemic failure to consult and accommodate the Plaintiffs on issues arising from the cumulative effects of developments on their treaty rights.

[6] In addition to damages, equitable compensation, or both, the Plaintiffs seek declarations that:

(a) they have a constitutional right to hunt, trap and fish certain species for subsistence, and for cultural, social and spiritual needs;

(b) the cumulative effects of the developments or any of them unjustifiably infringe their treaty rights;

(c) the Defendants have a duty to consult with and, if indicated, accommodate the Plaintiffs as to the cumulative effects of the developments on their treaty rights, under court supervision;

(d) the Defendants, or either of them, have a duty to revoke the authorizations for, or to otherwise limit and manage the effects of, the developments which unjustifiably infringe the Plaintiffs' treaty rights are of no force or effect; and

(e) the Defendants have a duty to address the following in a cumulative effects consultation with the Plaintiffs, with the goal of restoring, securing or both restoring and securing, the meaningful exercise of their treaty rights in perpetuity:

(i) the appropriate exercise of the Management Duties;

(ii) the appropriate process for addressing the infringements;

(iii) the appropriate way to address some or all of the failures listed in the Plaintiffs' claim;

(iv) revocation of authorizations for the developments, or limitations and management of the effects of the developments, which unjustifiably infringe the Plaintiffs' treaty rights;

(v) restoration of the Core Traditional Territory;

(vi) appropriate funding for the Plaintiffs to participate in cumulative effects consultation and related processes; and,

(vii) any other issues identified by the Court.

The claim originally sought a declaration that the Plaintiffs have a constitutional right to sell and trade certain wildlife species for livelihood purposes. The Plaintiffs have since amended the claim to delete this aspect.

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III. Facts - The Litigation to Date

[7] This matter involves an action that Beaver Lake Cree Nation, a small First Nation, commenced against Canada and Alberta. The legal issues are complex, involving constitutional and aboriginal law. The matter has been in case management for over two years.

[8] The Applications to Strike were commenced by Canada filing its notice of motion on May 29, 2009 and Alberta filing its notice of motion on June 1, 2009. This Court set deadlines for filing affidavit evidence to support the Applications to Strike. The Applications to Strike were originally set to be heard on March 15-19, 2010.

[9] The parties agreed to an extension of the Plaintiffs' affidavit filing deadline from September 30, 2009, to October 8, 2009, and this Court further extended that time to January 15, 2010.

[10] In October 2009, the Plaintiffs amended the statement of claim and in December 2009, they sought a further extension for filing affidavits to January 19, 2010, prompting new dates for the filing of briefs that would allow the parties to proceed with the March 15-19, 2010 hearing. At that time, the Plaintiffs indicated that they could meet a March 8, 2010 deadline for filing their brief. The Plaintiffs filed their affidavits on January 19, 2010, and served on January 20, 2010.

[11] At a case management meeting held on January 21, 2010, this Court decided that the Applications to Strike could not go forward in March 2010, and the parties used the March 2010 dates for cross-examinations. In June 2010, the parties exchanged emails regarding available dates in November 2010 and December 2010, for the Applications to Strike. During the June 21, 2010 case management meeting, this Court ordered that the Applications to Strike would be heard December 6-10, 2010, with the following deadlines for filing briefs:

Defendants' briefs due	August 30, 2010
Plaintiffs' brief due	November 1, 2010
Defendants' reply briefs due	November 30, 2010

[12] A case management meeting was held on September 8, 2010. The Plaintiffs raised no concerns at that time about meeting their November 1, 2010 deadline, or that they would require an adjournment of the December hearing dates.

[13] On October 19, 2010, the Plaintiffs served on the Defendants the affidavit of Gerald Whitford and a notice of motion seeking an extension of the time to file for them to file their brief and an adjournment of the Applications to Strike to a date uncertain.

[14] Mr. Whitford is Beaver Lake Cree Nations' administrator. In his affidavit, he swore that the Plaintiffs could not afford the estimated legal fees for its lawyers to amend their pleadings,

prepare the briefs and argue the Applications to Strike. His affidavit indicates that one of the Plaintiffs' lawyers informed him that the *Pro Bono* firm had offered to assist them, on a *pro bono* basis, in their preparation for the hearing and amendment to their pleadings. Mr. Whitford was also informed that due to scheduling conflicts, the *Pro Bono* firm would not be available to provide its assistance until the Spring of 2011.

[15] During his cross-examination on his affidavit, it became apparent that Mr. Whitford was unfamiliar with many of the facts to which he swore in his affidavit and that there were many questions he was unable to answer. It is apparent from counsels' submissions and the questions they raised during the cross-examination on Mr. Whitford's affidavit that the *Pro Bono* firm is located in England. This Court, however, initially had no sworn evidence on this point, or on the nature of the *Pro Bono* firm or its proposed retainer.

[16] At the adjournment application that this Court heard on October 27, 2010, the Defendants raised significant concerns about the lack of information that the Plaintiffs provided to them to justify their adjournment application. This Court granted an extension for filing the Plaintiff's brief to November 8, 2010 (the next case management meeting), and ordered that the Plaintiffs provide further information to justify the adjournment, as itemized by this Court, by Alberta, and by Canada. This information included information regarding the name of the *Pro Bono* firm, the name of the persons from the *Pro Bono* firm who will be involved with this matter, certain details of the *Pro Bono* firm's retainer, whether the Plaintiffs were seeking funds from other sources to fund this lawsuit, what the present law firm's role would be in the future, and whether there were sufficient funds to cover the Plaintiffs' costs on an on-going basis.

[17] The Plaintiffs filed two affidavits before the November 8, 2010 case management meeting. The first, sworn by Garry Benson, Q.C. instructing counsel for the Plaintiffs, attached a letter from Jane Russell of Tooks Chambers, the *Pro Bono* firm, which is a United Kingdom law firm. Ms. Russell's letter indicated that the *Pro Bono* firm would not be directly retained by the Plaintiffs, but would assist the Plaintiffs' law firm, Woodward & Company LLP ("Woodco"), in the litigation "including providing research and writing on the [Applications to Strike] and on other aspects of the legal action." The letter further stated that the *Pro Bono* firm's lawyers, are not members of the Law Society of Alberta, practice in several areas of human rights and indigenous rights law, and are not available to travel to Canada to work on this case until March 2011.

[18] Mr. Benson's affidavit confirmed that the Plaintiffs do not have funds to cover the cost of completing this litigation, but that Beaver Lake Cree Nation's chief was actively fundraising. Mr. Benson further indicated that he did not know how much money the Plaintiffs would save through the *Pro Bono* firm providing *pro bono* services. The Plaintiffs claimed solicitor-client privilege over many of the inquiries that this Court and the Defendants raised.

[19] Susan Patricia Smitten is the Executive Director of RAVEN, the acronym for Respecting Aboriginal Values & Environmental Needs, a registered charitable organization that provides financial support for litigation to a number of aboriginal groups, including Beaver Lake Cree

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Nation. Ms. Smitten swore the second affidavit on which the Plaintiffs rely. Ms. Smitten's affidavit provides details on the fundraising efforts RAVEN has undertaken on behalf of the Plaintiffs and states that, to date, RAVEN has raised $256,946.50 to help pay for this litigation.

[20] At the November 8, 2010 case management meeting, Alberta and Canada continued to oppose the adjournment application, and were critical of the Plaintiffs' response to this Court's order to provide more information. Canada argued that the Plaintiffs were treating this Court's orders as "suggestions," and that the Plaintiffs had waived solicitor-client privilege by providing some answers. It further argued that this Court cannot determine whether granting an adjournment is reasonable if it does not know how much money will be saved. Further, the scheduling conflict relates to two of *Pro Bono* firm's lawyers and is based on those lawyers' ability to travel to Canada. There was no explanation why other lawyers in the *Pro Bono* firm's chambers, who were assigned to work on the file, could not do the research and writing work earlier and from their chambers in England. Alberta argued that there were major deficiencies in the material that the Plaintiffs provided and that it was necessary to develop an overall litigation plan, rather than continue to do this in a piecemeal fashion.

[21] Mr. Jack Woodward of Woodco, attended the November 8, 2010 case management meeting by telephone conference call, and argued that the adjournment application was not only necessitated by the funding and new counsel issue, but also by the need to amend the statement of claim in response to the Applications to Strike briefs that the Defendants filed. Those amendments, he suggested, would shorten the Applications to Strike hearing by about 75%. He argued that it was not unreasonable for the Plaintiffs to request an adjournment to refine the issues and deal with the deficits in the claim that the Defendants raised in their briefs.

[22] The suggested amendments were in relation the Plaintiffs' "livelihood" claim. This Court asked Mr. Woodward if the proposed amendments would take out the "livelihood" claim completely. His answer was initially equivocal, and eventually he answered that the amendment would not assert a commercial right, but a right to sell and trade fish and game for a subsistence living. During the course of the December 10, 2010 hearing, this Court raised this question again with Mr. Mildon of Woodco, asking whether the Plaintiffs would be indirectly approaching the question of the livelihood claim. Mr. Mildon indicated that the amendments to the Statement of Claim entirely removed the question of whether there was a right to sell or trade fish and game, and that this decision was made to simplify the Applications to Strike.

[23] This Court ordered the Plaintiffs to file the amendments to the statement of claim by November 22, 2010. It further indicated that it was not granting the adjournment application, only adjourning the filing of the Plaintiffs' briefs until December 10, 2010. It left open the possibility that the hearing might proceed on that date. December 10, 2010, was also set to deal with the adjournment application, the amendments to the statement of claim, the development of a litigation plan, and other issues that might arise.

IV. Analysis

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A. What factors should a court consider when exercising its discretion to grant an adjournment?

[24] The Supreme Court of Canada articulated the general rule that applies to adjournments in ***R. v. Barrette***, [1977] 2 S.C.R. 121, 68 D.L.R. (3d) 260. It said at para. 6:

> It is true that a decision on an application for adjournment is in the judge's discretion. It is, however, a judicial discretion so that his decision may be reviewed on appeal if it is based on reasons which are not well founded in law. This right of review is especially wide when the consequence of the exercise of discretion is that someone is deprived of his rights, whether in criminal or in civil proceedings.

See also the *obiter dictum* of the Court of Appeal in ***Dreco Energy Services Ltd. v. Wenzel Downhole Tools Ltd.***, 2010 ABCA 257 at para. 14, to the effect that a case management judge has a wide discretion to grant adjournments to allow for the proper marshalling of evidence and prosecution of litigation, particularly in complex and multi-faceted law suits.[1]

[25] Courts, following the lead in ***Barrette,*** have held that deciding whether to grant adjournments requires the balancing of interests between the parties and the administration of justice in the orderly processing of civil trials, and have identified a number of factors in both the civil and criminal context.

Civil context

[26] In ***Khimji v. Dhanani*** (2004), 69 O.R. (3d) 790 at para.14 (C.A.), Laskin J. (in dissent) indicated that a trial judge exercising this discretion must balance the interests of the plaintiff, the interests of the defendant and the interests of the administration of justice in the orderly processing of civil trials on their merits. The factors he considered included, a just determination of the real matters in dispute; prejudice caused by refusing or granting an adjournment; the applicant's explanation for not being ready for trial; the length of the adjournment that the applicant is requesting; and the disruption to the court's trial schedule.

[27] The majority adopted Laskin J.'s statement of the principles governing the appeal**,** but concluded at para. 27, that a further factor was relevant, *viz.*, the need effectively to enforce court orders. The trial judge had granted an earlier adjournment application to allow the appellant to obtain legal counsel. That adjournment was peremptory on the appellant. Thus, the Court of Appeal dismissed the appeal.

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[1] See also ***Penton v. Metis Nation of Alberta Assn.*** (1995), 171 A.R. 140, 29 Alta. L.R. (3d) 223 at para. 37 (QB) ; ***Edward v. Niagara Neighbourhood Housing Cooperative Inc***. (2006), 210 O.A.C. 110, 23 C.B.R. (5th) 71 at paras. 33-35; ***Jovanovic v. Hamilton-Wentworth Regional Police Services Board***, [2009] O.J. No. 5384, 257 O.A.C. 3 at para. 12 (Ont. Sup. Ct. of Jus.); ***York Condominium Corp. No. 98 v. Jeffers***, [2008] O.J. No. 2646, 168 A.C.W.S. (3d) 297 at paras. 5-6.

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[28] **In *Bank of Montreal v. Lysyk***, 2003 ABQB 47, Veit J. was also dealing with an adjournment application to permit the defendant to retain legal counsel. She refused the application on the basis that the defendant, whose assets were frozen, had no income, and had been looking for representation for five months before the application, was unlikely to find a lawyer in the requested additional two to three weeks. She further noted that even if the defendant was in a position to retain a lawyer, that lawyer would not be prepared to proceed immediately. She relied on the decision of the Supreme Court of Canada in ***Darville v. R.*** (1956), 25 C.R. 1, in which the court held that a court will not grant an adjournment to allow a party to secure witnesses, unless there is "some realistic expectation" that the adjournment could produce such witnesses.

[29] ***Somerset Specialities Ltd. v. Keith Strub Construction Ltd.***, 2007 ONCA 885 also dealt with the question of whether to grant an adjournment to ensure the availability of preferred trial counsel. The Ontario Court of Appeal upheld the trial judge's refusal to grant an adjournment, noting at para. 6:

> ... [W]e see no error in the trial judge's treatment of the appellant's request at trial for an adjournment. The history of this matter as outlined for the trial judge included numerous earlier adjournments requested and obtained by the appellant and a denial by the Regional Senior Justice of an adjournment request by the appellant a mere ten days prior to the scheduled commencement date of the trial. On our reading of the trial judge's adjournment ruling, he simply declined to exercise his discretion to grant an adjournment at trial - as he was entitled to do - in light of this history. We note that the same ground for the adjournment request - the unavailability of the appellant's preferred trial counsel - was presented to the trial judge as had been advanced before the Regional Senior Justice ten days earlier.

[30] In ***Matthison v. Bradburn (Trustee of)***, 2007 ABCA 173, 412 A.R. 19, the defendant (appellant) had, on the day of trial, sought an adjournment to amend his pleadings. The trial judge denied the request. The Court of Appeal dismissed the appeal, noting that the trial judge had considered the following:

1. the issue at which the amendment was aimed, had been known to trial counsel for several years,

2. the appellant had many opportunities to amend in the meantime,

3. there had been lengthy and repeated delays in bringing the matter to trial at the Appellant's instance,

4. prejudice, both actual and presumed, due to the lapse of time, and

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5. that the application for adjournment was a "desperate attempt to delay this proceeding."

[31] The Court of Appeal in ***Barker v. Sowa***, 2003 ABCA 159, identified three factors relevant to an appeal of a decision to refuse an adjournment:

1. the chambers judge failed to provide reasons for the refusal;

2. the respondent tendered no evidence that a short adjournment would have prejudiced him; and

3. the respondent was also dilatory in prosecuting his defence.

This Court notes that other than, possibly, the issue of prejudice, these factors are not relevant to this application.

[32] In ***Sprostranov v. State Farm Mutual Automobile Insurance Co.,*** [2009] O.J. No. 923 (Sup. Ct. Jus.), Karakatsanis J. granted the plaintiff's appeal of the Deputy Judge's dismissal of his action after failing to grant an adjournment. He noted:

> The Deputy Judge's decision is understandable given the nature of the submissions made by Mr. Koskie in the morning. The Deputy Judge was patient and made every effort to be fair and reasonable. I am persuaded however that the interests of justice required that the plaintiff be granted the adjournment. Notwithstanding the other considerations, **it was necessary to consider the important principle that, as far as possible, cases should be resolved on their merits**. **The plaintiff should not bear the consequences of his counsel's failure to adequately assist** the Deputy Judge with respect to why it would be prejudicial to the plaintiff to proceed when this was a first appearance and prejudice to the defendant could have been easily remedied by a costs award.
>
> (Emphasis added)

[33] From the following cases, one can see that a court might consider the following factors when considering whether it should exercise its discretion to grant an adjournment:

1. courts should make a just determination of the real matters in dispute and they should decide cases on their merits;

2. the prejudice caused by granting or denying the adjournment;

3. the applicant's explanation for not being ready to proceed;

4. the length of the adjournment the applicant is seeking and the consequent disruption of the court's schedule;

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5. the importance of effectively enforcing previous court orders;

6. the proper marshalling of evidence and prosecution of complex and multi-faceted actions;

7. whether there is a realistic expectation that the adjournment will accomplish its stated purpose;

8. the history of the proceedings, including other adjournments and delays, and at whose instance those adjournments and delays occurred;

9. where a party is seeking the adjournment to amend pleadings, how long counsel has known of the issue to which the amendment is aimed and whether counsel has had previous opportunities to amend;

10. whether the application is merely an attempt to delay the proceedings; and

11. the party who seeks the adjournment should not bear the consequences of its counsel's failures.

Criminal context

[34] There are many criminal cases that deal with adjournment applications when the accused is seeking to retain legal counsel. Some of the factors raised in these cases might be adaptable to the civil context. However, one must be mindful of the fact that in the criminal context, the issue is not simply the question of a fair trial, but the constitutional right to a fair trial given the various interests at stake.

[35] Courts have considered the following:

(a) ***R. v. Currie*** 2008 ABCA 374, 446 A.R. 41 at paras. 63 and 70, the Court of Appeal approved the trial judge's consideration of whether the Applicant for the adjournment made diligent efforts to obtain counsel, whether there was some temporary obstacle to legal counsel acting or attending, and whether a request for an adjournment was actually made.

(b) ***R. v. Phillips,*** 2003 ABCA 4 at para. 11 and 12, aff'd ***R. v. Phillips***, 2003 SCC 57 the Court of Appeal upheld the trial judge's conclusion that the Applicant for the adjournment had not made diligent efforts to obtain counsel and that the adjournment application was an attempt to delay court proceedings. The Court of Appeal also held that the trial judge properly considered the complexity and nature of the case to determine that the Applicant was able to conduct the proceedings on his own.

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(c) ***R. v. Halnuck*** (1996), 107 C.C.C. (3d) 401 (NSCA); aff'd [1997] 1 S.C.R. 533, citing ***R. v. Beals*** (1993), 126 N.S.R. (2d) 130 (NSCA) set out a number of factors at para. 80, some of which can be summarized as follows**:**

1. The right to be represented by counsel must be exercised honestly and diligently so as not to delay a scheduled trial (at para. 80(4))**;**

2. Relevant facts to take into account include (at para. 80(5)):

   - whether there have been prior adjournments because counsel was unavailable,

   - the Applicant's familiarity with the justice system;

   - the complexity and seriousness of the case;

   - the public interest in the orderly and expeditious administration of justice,

   - the accused has been refused legal aid and when that refusal was communicated to the accused.

3. An adjournment should generally be granted if the absence of counsel is not the Applicant's fault and the Applicant is not complicit in the absence (at para. 80(6)).

(d) ***R. v. Tsvenar*** (1991), 126 A.R. 104 (Q.B.), considered that the applicant's actions contributed to the absence of counsel (at paras. 11-12), that there had been a previous adjournment application (para. 13), and that defence counsel applied for the adjournment on the day of trial despite having no contact with his client for four months prior to trial (at para. 13).

(e) ***R. v. Bruneau***, [1983] 5 W.W.R. 89, 44 A.R. 289 (C.A.), the Court of Appeal noted (at para. 12):

> We understand, then, the rule now to be that an accused is entitled to an adjournment when, on the date set for trial, his counsel fails to appear unless, on the facts of the specific case, the trial judge can reasonably infer that the failure was a deliberate tactic to which the accused was a party.

B. Is an adjournment appropriate in these circumstances?

The New Rules

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[36] Canada and Alberta brought the Applications to Strike under *Old Rules* r. 129. One now finds this type of application under rule 3.68 of *Alberta Rules of Court*, Alta. Reg 124/2010 ("*New Rules*"). This application was first heard on October 27, 2010. The *New Rules* came into effect on November 1, 2010. The parties made further submissions on November 8, 2010. Counsel for Alberta noted that the *New Rules* recognize the parties' responsibility to move litigation along and that the overarching Foundational Rules that one finds as Part 1 of the *New Rules*, provide that the *New Rules* are intended to be used to fairly and justly resolve claims in a timely and cost-effective way, *New Rules* r. 1.2(1).

[37] The Foundational Rules further provide that the *New Rules* are to be used to:

(a) identify the real issues in dispute;

(b) facilitate the quickest means to resolve a claim at the least expense;

(c) encourage early resolution by the parties themselves; and

(d) provide an effective, efficient and credible system of remedies and sanctions to enforce rules, orders and judgments.

[38] In particular, *New Rules* r. 1.2(2)(d) obliges the parties to communicate honestly, openly and in a timely manner. Further *New Rules* r. 1.2(3) places the obligation to achieve these purposes on the parties, including an obligation to facilitate the quickest means to resolve the claim at the least expense, to refrain from filing applications that do not further the purpose and intention of the *New Rules*, and to use publicly-funded court resources effectively.

[39] *New Rules* r. 15.12 , which one finds under *New Rules* Part 15 headed "Transitional Provisions and Coming into Force" provides:

> Where these rules impose a new test, provide new criteria or provide an additional ground for making an application in an existing proceeding, these rules apply in respect of the application <u>if the application was made but has not been heard prior to the coming into force of these rules</u>. [Emphasis added]

[40] Assuming, without deciding, that the Foundational Rules impose a new test or criteria, the *New Rules* do not apply to this adjournment application. It was heard initially before the *New Rules* came into effect. The adjournment application was continued after the rules changed.

[41] If this Court is wrong in this analysis, and the *New Rules* apply to the adjournment application, this Court finds that the actions of Plaintiffs' counsel have breached the Foundational Rules contained in the *New Rules*. There was no open communication in a timely manner. Alberta and Canada contemplated the Applications to Strike from virtually the beginning of this litigation and the Plaintiffs were aware of this contemplated application. Plaintiffs' counsel indicated that they were prepared to file a brief in opposition to the

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application on several occasions, and they agreed to comply with particular deadlines. This Court accepts that the adjournment application was not on the day the Plaintiffs' brief was due or on the date of the Applications to Strike. However, given the lengthy time lines in place, the previous extensions of deadlines, and Plaintiffs' counsel's failure to mention any concerns during the September 8, 2010 case management meeting, the 12 days between the Plaintiffs' notice of motion and the deadline for the filing of their brief was particularly short notice.

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[42] This is one factor that this Court must take into account when deciding whether to exercise its discretion to grant the adjournment.

Is the adjournment necessary to permit amendments to deal with the Defendants' Applications to Strike briefs?

[43] Plaintiffs' counsel argues that the Plaintiffs require the adjournment to amend their pleadings concerning their "livelihood" claim and to respond to the Defendants' filed briefs. He suggested that the amendments would reduce the complexity of the application by 75%.

[44] The Plaintiffs have now filed those amendments by way of the Further Amended Statement of Claim, along with a Better and Updated Particulars in Reply to Her Majesty the Queen in Right of the Province of Alberta's Demand for Particulars of the Amended Statement of Claim and Better and Updated Particulars in Reply to the Attorney General of Canada's Demand for Particulars of the Statement of Claim.

[45] The amendments removed the following from paragraph 9 of the statement of claim:

> ... and to sell and trade for livelihood purposes with other Tribes, settlers, the Hudson's Bay Company and others...

[46] The following phrase was added to the beginning of paragraph 9:

> "As part of their usual practices carried out..."

[47] The amendments further deleted the following from the prayer for relief:

> a.1) a declaration that the Plaintiffs have a constitutional right within the meaning of s. 35 of the *Constitution Act, 1982,* pursuant to the Treaty and/or the NRTA, to hunt and trap certain Wildlife species and to sell and trade for livelihood purposes;
>
> a.2) a declaration that the Plaintiffs have a constitutional right within the meaning of s. 35 of the *Constitution Act*, pursuant to the Treaty and/or the NRTA, to fish certain Wildlife species to sell and trade for livelihood purposes;

[48] Did the removal of the "livelihood" claim reduce the complexity of the Applications to Strike? This Court reviewed the Defendants' filed briefs and can summarize their arguments as follows. Canada argues in its brief that:

1. The action is too broad, vague and general, making it unmanageable and an abuse of process; the claim consists of allegations about the authorization and cumulative environmental effects of over 19,000 developments involving 321 different proponents.

2. The claim is an improper attack on administrative decisions relating to these developments and the Plaintiffs should have properly brought them as judicial review applications.

3. The developments are spread over a large geographic territory extending into areas covered by not just Treaty 6, but Treaties 8 and 10 as well.

4. The developments were authorized over an unknown period of time, but date back to at least 12 years before the Plaintiffs filed the claim.

5. The validity of these authorizations is a collateral attack that abuses the process of the court. It would be impossible to adjudicate how the cumulative effects of the developments ought to have been managed without understanding what was authorized, by whom, when, how each contributed to any alleged degradation of the environment, and how they were managed individually as well as collectively. Treating all the authorizations as forming one action is not possible given that the processes and enabling legislation for each development are fact-specific and unique.

6. Numerous individuals, including the 321 proponents, would be entitled to participate in the proceedings.

7. Environmental assessments under *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 ("*CEAA*"), the sole identified type of federal authorization, already require consideration of cumulative effects, defined as environmental effects "that are likely to result from the project in combination with other projects or activities that have been or will be carried out." The fact that statutorily mandated processes under the *CEAA* were conducted does not disclose a cause of action against Canada..

8. To consider whether Canada had a duty to consult a First Nation, there must first be federal Crown conduct that could adversely affect a treaty right. Without knowing what Crown conduct is alleged, one cannot determine whether a duty existed.

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9. The claim broadly alleges a failure to manage the environment, but raises no constitutional challenge to legislation. Portions of the claim appear to imply a duty to enact particular legislation or regulations, but the claim does not state this. The claim does not challenge the constitutionality or applicability of legislation or regulations that deal with environmental matters or management of development.

10. The Federal Court of Canada has exclusive jurisdiction to deal with the validity of decisions made by federal boards.

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[49] Canada's brief also raises concerns about the evidence that the Plaintiffs filed in support of their application.

[50] Alberta's brief argues that:

1. The claim is too broad and vague, as it challenges every Alberta authorization with respect to lands within or adjacent to the claimed traditional territory, spanning three treaty areas, and implicating all oil and gas, forestry, mining and resources activities, infrastructure activities, many Crown ministries, innumerable decisions government officials, public authorities, and independent arm's length agencies, boards and tribunals made, and all existing Crown leases, permits, agreements, contracts and licenses.

2. The administrative law challenges must be brought in the appropriate forum and within the applicable time limits, and future unknown administrative action or potential infringements cannot be addressed in a claim.

3. Alberta's policies on environmental protection and resource management are legislative in nature and not amenable to review in the absence of a challenge to the constitutionality of legislation.

4. The Energy Resources Conservation Board is already required to consider the temporal and cumulative effects of developments. The *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10, provides a comprehensive mechanism in which interested persons affected by orders may apply for standing and review. Suing an opposing party in an administrative proceeding for the effect of an "incorrect" decision, especially when that decision was not challenged through the appropriate channels of review, would bring the administration of justice into disrepute.

5. Any allegation that the breach of a commercial right to fish, hunt and trap other than for food is not viable, as such right was extinguished by the Natural Resources Transfer Agreement, as affirmed by binding precedent: ***R. v. Horseman***, [1990] 1 S.C.R. 901 at para. 67, ***R. v. Badger***, [1996] 1 S.C.R. 771 at

paras. 46 and 72, ***R. v. Gladue***, [1996] 1 C.N.L.R. 153 (Alta.C.A.), leave denied [1996] S.C.C.A. No. 52, ***R. v. Jacko***, 2000 ABCA 142, [2000] A.J. No. 565, leave denied [2000] S.C.C.A. No. 432.

6. Although the Plaintiffs deny they are attacking the granting of authorizations or the governing legislation, they seek a declaration that the Defendants have a duty to address revoking authorizations or limiting and managing their effects.

7. Many of the declarations sought amount to claims for injunctive relief against the Crown. Section 17 of the *Proceedings Against the Crown Act*, R.S.A. 2000, c. P-25 clearly states that the court cannot enjoin the provincial Crown.

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[51] Alberta also raises concerns about the evidence that the Plaintiffs seek to have admitted.

[52] Alberta and Canada have already addressed the "livelihood" issue in their briefs. As one can see, the "livelihood" claim is only one of a large number of issues that Alberta and Canada identify in their Applications to Strike. The other issues that they identify in their briefs form a significant portion of their submissions.

[53] In this Court's view, the "livelihood" question does not constitute anything close to 75% of the Applications to Strike. Accordingly, this Court rejects the Plaintiffs submission that an adjournment is necessary for them to amend the pleadings for the purposes of the Applications to Strike.

Applicable principles

[54] There are several factors that suggest that this Court should not grant the adjournment:

(a) The Applicants' explanation for not being ready to proceed with the Applications to Strike

[55] The Plaintiffs argue that they were not ready to proceed with the Applications to Strike because they needed time to respond to the Defendants' briefs. In particular, they needed time to amend their claim. As well, they cannot pay their present counsel and the *Pro Bono* firm requires time to assist Woodco in its preparation for the Applications to Strike.

[56] This Court has already dismissed the first explanation. As to the second, the Plaintiffs and Woodco would, or should, have known the expense involved in this litigation and must surely have known that this was an issue much earlier than 12 days before they were required to file their brief.

(b) The length of the adjournment and the disruption of the Court's schedule

[57] The Plaintiffs have not given this Court a date on which they are prepared to have their briefs filed and a date for the Applications to Strike hearing. Their only evidence is that the *Pro Bono* firm will not be available to work on this matter until March of 2011. There is no indication of how long Woodco will require to prepare the Plaintiffs' briefs. This Court had set down a week for the Applications to Strike. Further days will need to be scheduled, although a full week might not be necessary, given the removal of the "livelihood" claim. Given this Court's schedule for the Spring term, it might not be possible to schedule this matter until the Fall of 2011.

(c) The importance of effectively enforcing previous court orders and the history of the proceedings

[58] The Defendants filed their notice of motions on May 29, 2009 and June 1, 2009. This Court set deadlines for filing affidavit evidence, and the Applications to Strike were set for March 15-19, 2010. The parties agreed to a number of extensions of the Plaintiffs' filing deadlines and this Court further extended that time. In December 2009, the Plaintiffs indicated that they could meet a March 8, 2010 deadline for filing their brief, but at the January 21, 2010 case management meeting the parties decided that the Applications to Strike could not be heard in March and the parties used March dates for cross-examinations on affidavits.

[59] The Applications to Strike were set to be heard December 6-10, 2010. The Plaintiffs had indicated earlier that they would be able to file their brief by March 8, 2010. During the adjournment application on October 27, 2010, the Plaintiffs advised this Court that they have only commenced some preliminary research, and by March 2011, they will only have begun to prepare the Plaintiffs'brief, with the assistance the *Pro Bono* firm. This Court is extremely troubled by Woodco's lack of candour and the representations that Woodco made to it.

[60] This history of delays and extensions weighs against granting a further adjournment.

(d) Whether there is a realistic expectation that the adjournment will accomplish its stated purpose

[61] Woodco has advised this Court that the *Pro Bono* firm has indicated that it is prepared to work *pro bono* on the Applications to Strike by providing research and brief writing. Woodco, however, will continue to be the counsel of record and will be the lawyers making submissions during the Applications to Strike.

[62] There is no evidence before this Court that the Plaintiffs' funding problem will be resolved and that Woodco will appear and make submissions during the Applications to Strike if it is not paid. If the rationale for seeking the adjournment is that the Plaintiffs cannot pay their lawyers, then the fact that some portion of the work will be done *pro bono* by the *Pro Bono* firm does not realistically address whether the Plaintiffs will be able to proceed with the application itself.

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[63] This factor weighs against granting a further adjournment.

[64] On the other hand there are some factors that favour this Court granting an adjournment:

(a) There should be a just determination of the real matters in issue

[65] This is a complex and multifaceted law suit, and it is important that there be a determination on the issues that the Plaintiffs raise in their statement of claim. This would be done preliminarily during the Summary Judgment Applications. Woodco argues that if this Court does not grant the adjournment, the Plaintiffs will be "chased from the judgment seat."

[66] This Court finds that it would be unfortunate for the Plaintiffs to be denied the opportunity to argue their case on the merits only because of a lack of funds. This is not to suggest that a Plaintiffs have an absolute right to delay litigation because they cannot afford to continue, but it is a consideration. Any prejudice to the Defendants can be, and will be, dealt with in costs.

(b) The Plaintiffs should not have to bear the consequences of their lawyers' failures

[67] This Court finds that Woodco failed adequately to deal with the timeliness of the adjournment application and to address questions of financing. Based on the cross-examination on Mr. Whitford's affidavit, it seems that Mr. Woodward has been an active participant in seeking out the *pro bono* law firm or financing for the litigation, having gone to England with the chief of Beaver Lake First Nation. Mr. Woodward knew much earlier than October 2010, that there were serious financial concerns. Furthermore, it had been apparent for some time that the Plaintiffs would be seeking to make amendments to their statement of claim.

[68] The question then becomes whether the Plaintiffs should have to bear the consequences of their lawyers' actions, or lack of action.

(c) A deliberate delay tactic

[69] There is no evidence that the Plaintiffs are deliberately delaying the litigation as a tactic. In fact, Mr. Whitford's affidavit notes that delay in the main action will increase the impact on the fish and wildlife in Beaver Lake Cree Nation's traditional territory.

V. Conclusion

[70] This Court is extremely troubled by the approach Woodco has taken with respect to this litigation. The Defendants and this Court have spent a considerable amount of time attempting to move this litigation forward and setting realistic schedules for the parties to meet. As well, the Defendants and this Court have spent considerable time preparing for the Applications to Strike, not only on the basis that they would be proceeding at the scheduled time, but that they would proceed on the pleadings, as filed.

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[71] The Plaintiffs seek an adjournment, not on the basis that there has been a change in the law or a change in the approach they want to take, but on the basis of a lack of finances. While this Court and the Defendants might have been sympathetic to the Plaintiffs' financial situation had Woodco been forthright from the outset, this Court, and likely the Defendants, have little sympathy when Woodco raises this near to the eve of the hearing.

[72] The issues that the Plaintiffs raise in their pleadings are important on their face. A court should hear argument on the merits to determine whether it will grant the Applications to Strike. Whether the Plaintiffs will be in a position to raise sufficient funds that will allow Woodco to argue this case remains to be seen. This Court also has a concern with the delay attendant on this matter because of court scheduling.

[73] Despite this, balancing the Plaintiffs' interests, whose case could be irreparably damaged by refusing the adjournment, with the Defendants' interest, which can be addressed by costs, along with the Court's interest in not only efficient, but also effective, justice, this Court concludes that it should grant an adjournment.

[74] The parties will schedule a further case management meeting in which to schedule the timing of the filing of the Plaintiffs' briefs and the Defendants' reply briefs. As well, the parties will schedule a hearing at which this Court will deal with the issue of costs.

[75] Any scheduling of the Applications to Strike will, henceforth, be peremptory on the Plaintiffs; this Court will grant no further adjournments for any reason.

Heard on the 27th day October, 2010, 8th day of November, 2010, and the 10th day of December 2010.
Dated at Edmonton, Alberta this 28th day of January, 2011.

K.D. Yamauchi
J.C.Q.B.A.

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Appearances:

Kathleen Kohlman and Sukhi Sidhu
for The Attorney General of Canada

Everett Bunnell (Macleod Dixon) and Donald Kruk
for Her Majesty the Queen in Right of Alberta

JackWoodward, Pat Hutchings, Drew Mildon, and Sean Nixon
Woodward & Company
for the Plaintiffs

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Court of Queen's Bench of Alberta

Citation: Attila Dogan Construction v AMEC Americas Limited, 2015 ABQB 120

2015 ABQB 120 (CanLII)

Date: 20150218
Docket: 0701 09436
Registry: Calgary

Between:

Attila Dogan Construction and Installation Co. Inc.

Applicant

- and -

AMEC Americas Limited, formerly
AMEC E&C Services Limited and AGRA Monenco Inc.

Respondent

Reasons for Judgment
of the
Honourable Chief Justice
Neil Wittmann

Introduction

[1] These Reasons for Judgment address three applications:

(a) AMEC Americas Limited ("AMEC") seeks summary dismissal of the claims of Plaintiff Attila Dogan Construction and Installation Co. Inc. ("AD") against AMEC for alleged delays in AMEC's performance in a joint venture for the design and construction of a magnesium oxide plant (the "Summary Dismissal Application").

(b) AMEC seeks Summary Judgment on its counterclaim against AD for expenses to pursue and defend claims against a third party on behalf of both AMEC and AD (the "Summary Judgment Application"; together with the Summary Dismissal Application, the "Summary Applications").

(c) AD sought adjournment of the hearings of the above-noted Summary Applications (the "Adjournment Application").

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Background

[2] In October 1998, AD and AMEC entered into a Joint Venture Agreement ("the Joint Venture Agreement"). The Joint Venture was to bid on a contract to design and build a magnesium oxide plant in Jordan ("the Project") for the Jordan Magnesia Company Limited ("JorMag" or "JD"). AMEC was to do the engineering work for the Project, and AD was to complete the construction work. The Joint Venture's bid was accepted and in March, 1999 the Joint Venture entered into an agreement "the Design-Build Contract") with JorMag. On April 26, 2000, AMEC and AD entered into a Joint Venture Amending Agreement ("the Amending Agreement") whereby the parties agreed, *inter alia*, to obtain external financing from Export Development Canada to resolve cash flow problems encountered by the Joint Venture.

[3] The Project was plagued by delays and was ultimately terminated by JorMag on July 7, 2002. On November 17, 2003, AMEC and AD entered into an Agreement on Procedures Concerning Claims ("the Claims Agreement"), which provided for a suspension of claims between AMEC and AD until the dispute between the Joint Venture and JorMag was resolved. It further provided that, with regard to the dispute with JorMag, AMEC would be responsible for retaining and instructing outside legal counsel and any experts for and on behalf of the Joint Venture and that AMEC would, in the first instance, pay AD's share of all third party expenses required to prosecute or defend the claim which was to be arbitrated. Pursuant to the Claims Agreement, AMEC would not be responsible for AD's share of any judgment, award or cost award against the Joint Venture, the responsibility for which would be determined in accordance with the terms of the Joint Venture Agreement.

[4] The Joint Venture initiated arbitration proceedings with JorMag in February, 2004 ("the JorMag Arbitration"). The JorMag Arbitration did not go well, and the Joint Venture resolved the dispute with JorMag pursuant to a settlement agreement dated April 24, 2007, under which the Joint Venture agreed to pay $41 million to JorMag and to release it from all claims. On July 30, 2007, AD brought this action against AMEC, claiming damages from AMEC for negligence and a variety of alleged breaches of the Joint Venture Agreement. AMEC counterclaimed, alleging that AD failed to pay its proper share of expenses associated with the JorMag Arbitration. I have been the Case Management judge of this action since 2010.

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The Adjournment Application

[5] AD filed the Adjournment Application on September 4, 2014, arguing that newly retained counsel Gilbert's LLP ("Gilbert's) lacked access to the necessary materials and sufficient time to prepare adequate responses to the Summary Applications scheduled to be heard September 10th and 11th, 2014. AMEC protested that any further adjournment would unfairly draw out the already lengthy proceedings. I refused to adjourn the Summary Applications on September 10, 2014, with reasons to follow.

Background to Adjournment Application

[6] When AD filed its Statement of Claim on September 18, 2007 it was represented by Faber Bickman. AMEC, through Bryan & Company, its counsel at the time, filed a Statement of Defence and Counterclaim on February 27, 2009. On June 10, 2009 Bennett Jones took over conduct of the action for AD, and on May 4, 2010, Blake Cassels & Graydon took over as counsel for AMEC.

[7] The action proceeded in an orderly, if not particularly timely, way for nearly three years. Approximately 500,000 documents were produced, and 85 days of questioning occurred. A number of applications were heard, some of which resulted in reported decisions. On February 6, 2013, in the course of a case management hearing, I was advised by AMEC that it would be bringing the Summary Applications in respect of AD's claim and AMEC's counterclaim. A schedule was set by order dated February 6, 2013. The Summary Judgment Application in respect of the counterclaim was scheduled to be heard on May 15, 2013 and the Summary Dismissal Application in respect of AMEC's claim was set to be heard June 24, 2013.

[8] On March 25, 2013, AMEC filed the Summary Judgment Application and provided Bennett Jones with the supporting Affidavit of David Leonard ("the Leonard Affidavit"), which was filed on April 11, 2013.

[9] On April 22, 2013, after being advised that AD would be bringing an application to amend its Statement of Claim, I adjusted the dates of the Summary Judgment and Summary Dismissal Applications to June 24, 2013 and September 27, 2013, respectively. Argument in respect of the Amendment Application took place on May 15, 2013 instead of argument on the Summary Judgment Application, which had been scheduled for June 24, 2013. Reasons for judgment on the Amendment Application were issued on September 13, 2013: 2013 ABQB 525. The contested amendments proposed by AD were not allowed. On September 26, 2013, I vacated the April 22, 2013 Order concerning timing of the Summary Applications, in light of the timing of the Amendment Application decision and the likelihood that the decision would be appealed. AD filed its Notice of Appeal on October 2, 2013. On October 3, 2013, I directed that the Summary Judgment Application would be heard on May 14, 2014 and the Summary Dismissal Application on June 11, 2014, subject to change, if necessary, in light of the proceedings before the Court of Appeal. On November 29, 2013, I amended the schedule slightly so that the Summary Judgment Application would be heard on May 23, 2014.

[10] On February 21, 2014, the Court of Appeal rendered its decision in the Amendment Application, dismissing AD's appeal: 2014 ABCA 74. The same day, Bennett Jones withdrew as counsel for AD. On March 19, 2014 Fasken Martineau Dumoulin LLP ("Fasken") filed a Notice of Change of Representation, assuming conduct of the matter for AD.

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[11] As a result of a fee dispute, Bennett Jones maintained a solicitor's lien over the materials relating to the proceedings, including documentary evidence, discovery transcripts and legal research (the "Bennett Jones File"). The fee dispute was the subject of related proceedings, as was AD's effort to compel delivery by Bennett Jones of the AD File. At the time of this hearing, AD had not received access to the Bennett Jones File.

[12] AD sought another adjournment of the Summary Applications on April 7, 2014. By Case Management Order of that date, the tentative date of June 11, 2014 was set for the Summary Judgment Application. AMEC was also ordered to file its Summary Dismissal Application and supporting affidavit by May 6, 2014. In accordance with this schedule, on May 6, 2014, AMEC filed its Summary Dismissal Application, and on May 8, 2014, filed Michael Ingram's supporting Affidavit ("the Ingram Affidavit"). At a Case Management hearing on May 13, 2014, AD asked again to adjourn the dates of the Summary Applications. The Summary Judgment Application was adjourned to September 10, 2014 and the Summary Dismissal Application to September 11, 2014.

[13] On May 23rd, 2014, Fasken filed an Originating Application asking the Court to compel Bennett Jones to transfer the file to AD pursuant to the *Alberta Rules of Court* ("*ARC*") 10.25. Over the course of the following months, the parties sought to resolve issues arising out of the changes in AD's counsel. On June 6, 2014, Fasken withdrew as counsel of record for AD, though Fasken continued to act for AD through June. On June 17, 2014, the parties came before me again to address the outstanding issue of the solicitor's lien on the Bennett Jones File, which AD sought to adjourn to July 23, 2014. I granted the adjournment, but also ordered that the Summary Applications would proceed on September 10 and 11, 2014, as scheduled, "subject only to an ability of new counsel, if there is one, to ask or to apply to the Court to move the dates."

[14] On July 23rd, 2014, Bennett Jones was again represented by counsel and prepared to proceed with the hearing on the outstanding issue of the solicitor's lien on the Bennett Jones file. AD was represented by Macleod LLP at that hearing, apparently on three days' notice and requested an adjournment of it, which was denied. AMEC's counsel withdrew before the hearing on the merits and was not privy to any of the affidavits received by the Court, nor the submissions made by MacLeod Law LLP or counsel for Bennett Jones. Everything in support of or against AD's application the hearing including the transcript of it and my reasons for denying AD access to the Bennett Jones file and allowing Bennett Jones to maintain its solicitor's lien over it, were ordered sealed by me, except the Originating Application itself.

[15] Also, on the transcripts of the record before the Court, Counsel for AMEC offered Fasken and any counsel thereafter, to make available their database of documents and all transcripts and

pleadings. Counsel for AMEC affirmed that offer on July 23rd, 2014 to any new counsel that may be retained by AD.

[16] On July 23rd, 2014 I gave an Order setting out further dates in relation to the Summary Applications as follows:

(a) Questioning on the Affidavit of Michael Ingram, if any, was to be completed by August 14, 2014;

(b) The Affidavit of Kaan Dogan in relation to the Summary Judgement Application was to be filed by August 22, 2014;

(c) Questioning on Kaan Dogan's Affidavits was to be completed by August 27, 2014;

(d) AMEC's briefs were be filed by August 29, 2014; and

(e) AD's briefs were be filed by September 5, 2014.

[17] In accordance with this Order, the parties filed their briefs on August 29, 2014 and September 5, 2014. AD did not question Mr. Ingram on his Affidavit in support of the Summary Dismissal Application nor file Kaan Dogan's Affidavit by August 22nd, 2014 concerning the Summary Judgment Application. Rather, Kaan Dogan's Affidavit was filed September 9, 2014, and as a consequence, AMEC was not able to cross-examine him.

[18] In the interim, AD sought to obtain new representation. In June, July and August 2014, Kaan Dogan participated in discussions with prospective counsel. Between July 29 and August 1, 2014, Kaan Dogan met with three law firms in Canada. He also met with Fasken to determine whether they would return as AD's counsel, but no agreement was reached.

[19] On August 4, 2014, AMEC provided pleadings and additional documents directly to AD at Kaan Dogan's request. According to the record before me, AMEC received no response to its requests to cross-examine Kaan Dogan and AD declined to file an affidavit in relation to the Summary Dismissal Application.

[20] On August 13, 2014, Kaan Dogan informed AMEC that he had interviewed four law firms but was waiting for proposals. He then requested AMEC's consent to delay the proceedings. AMEC responded August 14, 2014, refusing consent. In the same email, AMEC also requested to cross-examine Kaan Dogan by August 27, 2014, in accordance with the July 23, 2014 Case Management Order. There is no response from AD on the record.

[21] On August 31, 2014, AD reached tentative business terms with its present counsel, Gilbert's LLP ("Gilbert's"), and formally retained the firm on September 4, 2014.

[22] The same day, AD filed the Adjournment Application, seeking an order adjourning sine die both Summary Applications, or, in the alternative, adjourning the applications until March 2015, or at the Court's earliest convenience thereafter.

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Arguments of the Parties - Adjournment

[23] AD argued that the factors set forth by this Court in ***Lameman v Alberta***, 2011 ABQB 40, warranted granting an adjournment. AD's principal argument was that the dispute could not be fairly decided on the merits where (a) its new counsel did not have sufficient time to familiarize itself adequately with the complex proceedings or prepare AD's defence, and (b) it did not have access to the Bennett Jones File. As a consequence, AD argued that it would suffer prejudice if this Court proceeded to rule on the multi-million dollar Summary Applications.

[24] AD further argued that a delay was warranted because with the conclusion of a review by the Assessment Officer of Bennett Jones' fees November 17-20, 2014, it could regain access to the Bennett Jones File, and that AMEC would suffer no prejudice that could not be addressed by an award on costs. During a Case Management hearing on June 17th, 2014 the Court indicated to counsel that the entire week of August 18th, 2014 could be made available for a review of Bennett Jones' fee by the Assessment Officer; that there was no need to wait until November 17th- 20th, 2014. AD was not amenable to accelerating the date. AD pointed to my order of June 17, 2014, which, it argues, contemplated that AD's new counsel would seek an adjournment.

[25] AMEC also relied on the factors set forth in ***Lameman***. AMEC pointed to the history of delay in these proceedings, noting that AD's requested adjournment to March 2015 would mean that the Summary Applications would be heard more than two years after this Court's first scheduling order. AMEC also argued that would be unjust to allow AD to benefit from failing to retain new counsel in a timely fashion, prejudicing AMEC with further costs and delay.

[26] AMEC further argued that there was no reason to believe the adjournment would accomplish its stated purpose. According to AMEC, AD is unlikely able to pay future counsel or address its alleged debt to Bennett Jones, and thus there was no assurance that existing counsel would still be acting for AD in March 2015, or that AD would regain access to the Bennett Jones File.

Analysis

[27] This Court has discretion to grant an adjournment. In ***Wenzel Downhole Tools Ltd v National Oilwell Varco Inc,*** 2010 ABCA 257 Bielby JA held, at para 14:

> [A] case management judge has a wide discretion to grant adjournments as he or she sees fit in those situations, to allow for the proper marshalling of evidence and prosecution of the litigation, particularly in such a complex and multi-faceted law suit as this. No doubt this Court would hesitate to make a decision which would tie the hands of a case management judge, familiar with and burdened with the on-going complexities of a large piece of litigation.

[28] Courts are, as always, called upon to exercise this discretion upon sound reasoning. As Pigeon J held in ***R v Barrette***, [1977] 2 SCR 121 at p.125:

> It is true that a decision on an application for adjournment is in the judge's discretion. It is, however, a judicial discretion so that his decision may be reviewed on appeal if it is based on reasons which are not well founded in law.

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[29] Yamauchi J. helpfully canvassed these and other decisions in ***Lameman*** to identify a list of factors courts may look to in considering whether to exercise their discretion to grant an adjournment, as set out at para 33:

> 1. courts should make a just determination of the real matters in dispute and they should decide cases on their merits;
>
> 2. the prejudice caused by granting or denying the adjournment;
>
> 3. the applicant's explanation for not being ready to proceed;
>
> 4. the length of the adjournment the applicant is seeking and the consequent disruption of the court's schedule;
>
> 5. the importance of effectively enforcing previous court orders;
>
> 6. the proper marshalling of evidence and prosecution of complex and multi-faceted actions;
>
> 7. whether there is a realistic expectation that the adjournment will accomplish its stated purpose;
>
> 8. the history of the proceedings, including other adjournments and delays, and at whose instance those adjournments and delays occurred;
>
> 9. where a party is seeking the adjournment to amend pleadings, how long counsel has known of the issue to which the amendment is aimed and whether counsel has had previous opportunities to amend;
>
> 10. whether the application is merely an attempt to delay the proceedings; and
>
> 11. the party who seeks the adjournment should not bear the consequences of its counsel's failures.

[30] These factors are by no means exhaustive, nor must a court consider all eleven factors. Rather, they provide some reference from which a court may begin its analysis. In the case at bar, I considered most relevant the history of the proceedings, prejudice to the parties, the explanation provided by AD for the adjournment, the likelihood the adjournment would achieve its stated aims, and whether an adjournment was necessary to make a just determination on the merits of the Summary Applications.

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History of the Proceedings

[31] The Summary Applications were first brought before me in February 2013. They have been pushed back at AD's instigation four times. On April 25, 2013, AD filed an application to amend its Statement of Claim, and as a result, on April 22, 2013, this Court adjusted the date of the Summary Judgment Application to June 24, 2013 and the Summary Dismissal Application to September 27, 2013. Then, following AD's appeal on the Amendment Application, on October 3, 2013 I directed that the Summary Applications be heard on May 14, 2014 and June 11, 2014. On May 13, 2014, AD again sought new dates and the applications were delayed to September 10 and 11, 2014.

[32] AD argued that a further adjournment was necessary as its new counsel lacks access to the Bennett Jones File. The File includes documentary evidence, discovery transcripts and legal research related to these proceedings. It is apparently voluminous, containing over 500,000 individual documents and 85 days of discovery transcripts. Bennett Jones had asserted a solicitor's lien over the File as security for outstanding fees after it withdrew as counsel in February 2014. AD sought to compel delivery of the file to Fasken, however the application was not granted. AD argued that the lien may be lifted after Bennett Jones' fees were reviewed.

[33] AD argued that without access, its counsel could not prepare a full defence. But AD, aware of the September dates set for the Summary Applications, has done little to resolve the fee dispute and gain access to the File. AD was given the option to meet with the Assessment Review Officer concerning the fee dispute in August 2014, but elected to proceed in November 2014 instead. In effect, AD has itself contributed to the delayed resolution of fee issue, and relies on that delay in support of the adjournment of the Summary Judgment Applications.

[34] Parties are fully entitled to amend claims, file appeals, and seek adjournments; however this Court cannot condone continual delay. Whether an intentional strategy or not, these delays frustrate the parties' and the Court's interest in a timely and cost-effective resolution of the dispute. The history of these proceedings is a factor that weighs heavily against the granting of an adjournment.

Explanation for the Delay

[35] AD justified the adjournment on the basis that Gilbert's did not have sufficient time nor access to the materials necessary to prepare for the Summary Applications.

[36] AD has had a lengthy and unstable history with counsel. Gilbert's is the fifth law firm to represent AD in these proceedings. AD was represented by Faber Bickman when its Statement of Claim was filed September 18, 2007. Bennett Jones took over on June 10, 2009, withdrawing in February 2014. Fasken was retained March 5, 2014 but withdrew on June 6, 2014. On July 23, 2014, McLeod made a brief appearance. Gilbert's was retained on September 4, 2014.

[37] When Fasken withdrew on June 6, 2014, AD was already on notice that the Summary Applications were scheduled for September 10 and 11, 2014. AD took three months to retain

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Gilbert's. In the interim, Mr. Dogan attested that he actively sought new counsel, however his efforts were underwhelming. Mr. Dogan attested that in June, July and August, he had ongoing discussions with counsel in Toronto and Calgary; however Mr. Bickman noted that he appeared for AD on July 23, 2014 with only three days' notice by email. Mr. Dogan also attests that he traveled to Canada to meet with three law firms between July 29th and August 1st, 2014. AMEC rightly points out that meeting with only three firms is hardly compelling, given the urgency of the matter.

[38] Mr. Dogan's only explanation for AD's failure to retain counsel within a reasonable period of time was that AD had been unable to reach business terms with counsel. AD has provided no evidence of being impecunious; and says only that its finances were "significantly strained." This Court was of course, not privy to the terms that counsel or AD sought. However it is difficult to believe that AD was wholly unable to find counsel amenable to reasonable terms and with the capacity to assume conduct of these proceedings.

[39] AD also argued that its counsel lacked the necessary documents to prepare AD's defence. AD's chief concern was access to the Bennett Jones File. It is doubtful that AD is at a significant disadvantage without the Bennett Jones File. Counsel for AD advises that as of September 4, 2014, he had only received fifty documents from AD. Some of these appear to have been those provided by AMEC to AD by email in August. On September 5, 2014, AD's new counsel also received eight boxes of materials that had been provided to Gilbert's by Fasken. According to Carol Yau, a law clerk at Gilbert's, these materials did not include documentary production, discovery transcripts or complete answers to undertakings – amounting to over 500,000 documents. But access to these documents was offered to Fasken by AMEC in May or June 2014 through the provision of its database.

[40] AD's explanation for the delay sought is not satisfactory, and it has done little to mitigate the situation in which it finds itself. AD has delayed, rather than aggressively pursued resolution of the fee dispute. By failing to retain counsel prior to September 4, 2014, AD has itself ensured that counsel would have very little time to obtain documentation from other sources, e.g. the AMEC database. Beyond Kaan Dogan's request for pleadings in August, AD has not taken steps to obtain documents from AMEC, despite AMEC having already offered access to its database. The remainder of the court file, including all the transcripts of questioning on affidavits, was available as part of the Court's record.

Likelihood the Adjournment Will Achieve Its Stated Aims and Prejudice

[41] There is no realistic expectation that the adjournment would remedy the problem in the short term. When I issued my decision on September 10, 2014, there was no guarantee that the Bennett Jones documents would be released to AD. In fact, it seemed improbable that resolution of the fee issue would result in a complete removal of the lien given AD's attested financial constraints.

[42] AD did not provide any evidence in support of its argument that the Bennett Jones File would in fact be released to AD in November 2014 or at all. It seems in fact possible that AD may never regain access to the Bennett Jones File.

[43] Further, there was no guarantee that AD would not change counsel again, requiring a further adjournment. The history of AD's relationship with counsel is logically a predictor of the future endurance of the solicitor-client relationship.

[44] The prejudice caused by yet another delay is clear. AMEC was brought into this litigation seven years ago and still awaits final resolution. Its interest in a timely and cost-effective resolution of the dispute has been undermined with each delay. AD argued that any prejudice suffered by AMEC could be addressed by costs, but given the nature of AD's fee dispute with Bennett Jones, I am not entirely satisfied with AD's position in this regard. Moreover, as this litigation enters its seventh year, and after repeated delays, the ability of AD to compensate by way of costs is a factor that acquires increasingly less weight in the absence of AD providing increased security for costs, which is at present in excess of $2,000,000.00.

Resolving the Dispute upon Its Merits and Prejudice

[45] The Summary Applications raise complex issues. An adjournment would allow Gilbert's more time to access and review thoroughly the pertinent documents, familiarize itself with the issues and evidence in the proceedings and marshal AD's best defence to the two applications.

[46] This factor on its own does not justify an adjournment. I recognize that with more time, counsel for AD could have better familiarized himself with the record and better briefed the issues; however the short timeframe was a consequence of AD's actions. AD was advised of the Summary Judgment Applications in February 2013, nearly two years before they were finally heard. More importantly, Gilbert's admirably prepared extensive and thorough submissions on short notice, and those submissions addressed both the process and substance of the issues. Counsel may always benefit from more time, but after consideration of the questions at issue in the Summary Applications, it is my view that a proper resolution of the Summary Applications on the merits is possible and AD will not suffer prejudice. It is to be remembered that my refusal of the adjournment application was done not only after consideration of all of the above, but also after reviewing the comprehensive and thorough briefs Gilbert's submitted in response to the Summary Applications.

Decision: Adjournment

[47] In light of the foregoing, I rejected the Adjournment Application and proceeded to hear the Summary Applications.

Summary Judgment

[48] *ARC* 7.3 provides:

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7.3 (1) A party may apply to the Court for summary judgment in respect of all or part of a claim on one or more of the following grounds:

(a) there is no defence to a claim or part of it;

(b) there is no merit to a claim or part of it;

(c) the only real issue is the amount to be awarded.

(2) The application must be supported by an affidavit swearing positively that one or more of the grounds described in subrule (1) have been met or by other evidence to the effect that the grounds have been met.

(3) If the application is successful the Court may, with respect to all or part of a claim, and whether or not the claim is for a single and undivided debt, do one or more of the following:

(a) dismiss one or more claims in the action or give judgment for or in respect of all or part of the claim or for a lesser amount;

(b) if the only real issue to be tried is the amount of the award, determine the amount or refer the amount for determination by a referee;

(c) if judgment is given for part of a claim, refer the balance of the claim to trial or for determination by a referee, as the circumstances require.

[49] The appropriate approach to, and test for, summary judgment has recently been considered by both the Supreme Court of Canada and the Alberta Court of Appeal, respectively, in ***Hryniak v. Mauldin***, [2014] 1 SCR 87 and in ***Windsor v Canadian Pacific Railway Ltd***, 2014 ABCA 108. In ***Hryniak***, the Supreme Court called for a "culture shift" to broaden the application of summary proceedings, holding at para 2:

> Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pretrial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.

And, at paras.31-33:

> Even where proportionality is not specifically codified, applying rules of court that involve discretion "includes... an underlying principle of proportionality which means taking account of the appropriateness of the procedure, its cost and

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impact on the litigation, and its timeliness, given the nature and complexity of the litigation": ***Szeto v. Dwyer***, 2010 NLCA 36, 297 Nfld. & P.E.I.R. 311, at para. 53.

This culture shift requires judges to actively manage the legal process in line with the principle of proportionality. While summary judgment motions can save time and resources, like most pre-trial procedures, they can also slow down the proceedings if used inappropriately. While judges can and should play a role in controlling such risks, counsel must, in accordance with the traditions of their profession, act in a way that facilitates rather than frustrates access to justice. Lawyers should consider their client's limited means and the nature of their case and fashion proportionate means to achieve a fair and just result.

A complex claim may involve an extensive record and a significant commitment of time and expense. However, proportionality is inevitably comparative; even slow and expensive procedures can be proportionate when they are the fastest and most efficient alternative. The question is whether the added expense and delay of fact finding at trial is necessary to a fair process and just adjudication.

[50] In ***Windsor***, the Alberta Court of Appeal held that the principles set out in ***Hryniak*** are consistent with Alberta summary judgment practice, and held at paras 13 - 15:

The modern test for summary judgment is therefore to examine the record to see if a disposition that is fair and just to both parties can be made on the existing record.

... Ontario R. 20 and Alberta R. 7.3 are both procedures for resolving disputes without a trial (as compared with Alberta's summary trial procedure which is a form of trial). As in Ontario, viva voce evidence may exceptionally be allowed in chambers applications: R. 6.11(1)(g). New R. 7.3 calls for a more holistic analysis of whether the claim has "merit", and is not confined to the test of "a genuine issue for trial" found in the previous rules...

... ***Hryniak v. Mauldin*** refers several times to the need for a change in culture. In other words, the myth of trial should no longer govern civil procedure. It should be recognized that interlocutory proceedings are primarily to "prepare an action for resolution", and only rarely do they actually involve "preparing an action for trial". Interlocutory decisions that can resolve a dispute in whole or in part should be made when the record permits a fair and just adjudication...

[51] More recently, in ***Access Mortgage Corporation (2004) Limited v Arres Capital Inc.***, 2014 ABCA 280, the Alberta Court of Appeal summarized the principles governing summary judgment in Alberta, adopting the reasoning of Wakeling J. (as he then was) in ***Beier v Proper Cat Construction***, 2013 ABQB 351, at para 61:

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Rule 7.3 of the new Alberta Rules of Court allows a court to grant summary judgment to a moving party if the nonmoving party's position is without merit. A party's position is without merit if the facts and law make the moving party's position unassailable and entitle it to the relief it seeks. A party's position is unassailable if it is so compelling that the likelihood of success is very high.

And, at paras 63 – 70:

First, the moving party is entitled to summary judgment if, as a plaintiff, it presents uncontroverted facts and law which entitle it to judgment against the nonmoving party. The court must be satisfied that the plaintiff has presented uncontested facts which establish all the essential elements of the action

Second, the moving party is entitled to summary judgment if, as a defendant, it presents uncontroverted facts and law, which makes it highly unlikely the plaintiff will succeed. Again, the court must conclude that the uncontested facts before it do not establish an essential element of the plaintiff's action or do establish all the essential elements of a defence.

There are a number of relevant principles which underly the fundamental norm that claims or defences that are so compelling the likelihood they will succeed is very high should be dealt with summarily.

First, the legal or persuasive burden rests on the moving party... The moving party must present the facts which, in combination with the applicable law, make its position unassailable if the nonmoving party does not contest the facts and the law...

Second, the nonmoving party has no legal or persuasive burden to discharge.... In some circumstances the nonmoving party may be at risk of losing the summary judgment application if it fails to present a version of the facts which is inconsistent with that relied on by the moving party...

Third, the motions court may not make findings of credibility and resolve contested fact issues... That a controversy over nonmaterial facts exists is irrelevant.

Fourth, if the law is unclear, either because the moving party is seeking to extend the scope of a well established proposition or to make new law, a chambers judge may decline to resolve the dispute. This is so even though the trial judge is, arguably, in no better position to decide this challenging legal issue than the chambers judge. The chambers judge may legitimately conclude that her proper role is to identify unassailable positions, which assumes the law on the issue is settled, not develop the law in the course of a summary judgment chambers application.

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> Fifth, a nonmoving party's argument that questioning or trial may produce evidence which assists the nonmoving party is without merit.

[52] To this set of principles I would add some further points of direct application to the Summary Applications sought here. It is important to understand that the principle of proportionality and what has been described as the less stringent test for summary judgment in Alberta does not affect the evidentiary requirements for such applications. As discussed in further detail below, affidavit evidence sworn in support of summary judgment must comply with the provisions of the *ARC* and these are unaffected by ***Hryniak*** and ***Windsor***. Furthermore, a self-serving affidavit in and of itself is not sufficient to create a triable issue in the absence of detailed facts and supporting evidence: ***Guarantee Co. of North America v Gordon Capital Corp.***, [1999] 3 SCR 423, at para 31. Finally, the principle of proportionality will require that the procedure used to adjudicate the dispute should fit the nature of the claim, but proportionality has more than one aspect. The magnitude of the claim in terms of monetary value may have some place in this analysis, but the nature of the claim will as well. It has been recognized, for example, that disputes over the interpretation of an instrument, such as a contract, may lend themselves particularly well to summary judgment: ***Tottrup v Clearwater (Municipal District 99)***, 2006 ABCA 380.

Summary Judgment on the AMEC Counterclaim

The Leonard Affidavit

[53] In support of its application for Summary Judgment on the AMEC counterclaim, AMEC filed the Leonard Affidavit in April, 2013. AD contends the Leonard Affidavit attaches correspondence to which he was not party, and other documents of which he does not assert personal knowledge. Specifically, AD contends that the documents attached at Exhibits “E”, “G”, “I”, “J”, “K”, “M”, “N”, “O”, “R”, “S”, “T”, “W”, “X”, “II” and “JJ” fall into these categories and are inadmissible on this application. AD further contends that paragraphs 14 through 17 of the Leonard Affidavit are inadmissible because they refer to meetings that Mr. Leonard himself does not mention having attended.

[54] *ARC* 6.11 provides:

> 6.11(1) When making a decision about an application the Court may consider only the following evidence:
>
> (a) affidavit evidence, including an affidavit by an expert;
>
> (b) a transcript of questioning under this Part;
>
> (c) the written or oral answers, or both, to questions under Part 5 that may be used under rule 5.31;

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(d) an admissible record disclosed in an affidavit of records under rule 5.6;

(e) anything permitted by any other rule or by an enactment;

(f) evidence taken in any other action, but only if the party proposing to submit the evidence gives every other party written notice of that party's intention 5 days or more before the application is scheduled to be heard or considered and obtains the Court's permission to submit the evidence;

(g) with the Court's permission, oral evidence, which, if permitted, must be given in the same manner as at trial.

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[55] A summary judgment application is one that may dispose of all or part of a claim, such that *ARC* 13.18 applies:

13.18(1) An affidavit may be sworn

(a) on the basis of personal knowledge, or

(b) on the basis of information known to the person swearing the affidavit and that person's belief.

(2) If an affidavit is sworn on the basis of information and belief, the source of the information must be disclosed in the affidavit.

(3) If an affidavit is used in support of an application that may dispose of all or part of a claim, the affidavit must be sworn on the basis of the personal knowledge of the person swearing the affidavit.

[56] Every party to a proceeding must file and serve an affidavit of records on each of the other parties, disclosing and identifying all relevant and material records within that party's possession or power. *ARC* 5.15 provides:

5.15(1) In this rule, "authentic" includes the fact that

(a) a document that is said to be an original was printed, written, signed or executed as it purports to have been, and

(b) a document that is said to be a copy is a true copy of the original.

(2) Subject to subrules (3), (4), (5) and (6), a party who makes an affidavit of records or on whose behalf an affidavit of records is filed and a party on whom an affidavit of records is served are both presumed to admit that

(a) a record specified or referred to in the affidavit is authentic, and

(b) if a record purports or appears to have been transmitted, the original was sent by the sender and was received by the addressee.

(3) Subrule (2)

(a) does not apply if the maker or the recipient of the affidavit objects in accordance with subrule (4),

(b) does not prejudice the right of a party to object to the admission of a record in evidence, and

(c) does not constitute an agreement or acknowledgment that the record is relevant and material.

(4) The maker or recipient of an affidavit of records is not presumed to make the admission referred to in subrule (2) if, within 3 months after the date on which the records are produced, the maker or recipient serves notice on the other party that the authenticity or transmittal of a record, as the case may be, is disputed and that it must be proved at trial.

(5) Notwithstanding that the maker or recipient of an affidavit of records does not serve a notice under subrule (4) within the time provided by that subrule, the Court may order that the maker or recipient is not presumed to make the admission referred to in subrule (2).

(6) This rule does not apply to a record whose authenticity, receipt or transmission has been denied by a party in the party's pleadings.

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[57] AD argues that under *ARC* 13.18, an affidavit must be sworn on the basis of personal knowledge, and that the Leonard Affidavit attaches documents, the truth of the contents for which he asserts no personal knowledge. AD refers in particular to correspondence that Mr. Leonard was not party to, and a portion of the affidavit summarizing certain strategy meetings which Mr. Leonard did not attend. AD argues that the Leonard Affidavit constitutes the bulk of AMEC's evidence required to overcome AD's defenses to the Summary Judgment Application.

[58] AMEC responds in its oral submissions that *ARC* 6.11 permits broader inclusion of affidavit evidence, a transcript of evidence at questioning on an affidavit and written or oral answers that may be used in the read-in process under *ARC* 5.31. AMEC further points out that a number of the documents that Mr. Leonard attests to in his Affidavit are introduced not for the truth of their contents, but as evidence in support of the proposition that the documents are authentic and were sent and received. AMEC points to Sopinka, Lederman & Bryant, ***The Law of Evidence***, 4th Edition at 6.27:

> The hearsay rule is invoked only where an out-of court statement or conduct is tendered as evidence of proof of the facts asserted therein because it is only in that circumstance that there is a need to test the reliability of what is being stated. If

> such evidence is presented, not for this purpose, but for some other relevant purpose – for example, if it is tendered to show that a person received notice by the fact that a statement was made to her or him – then the statement is admissible as proof, not of its truth, but that the statement was made.

[59] *ARC* 13.18 recognizes that where an application concerns disposition of some or all claims in a case, as here, the Court requires evidence to meet the standards required at trial. As Veit J. states in ***Murphy v Cahill***, 2012 ABQB 793 at para 25:

> It's a sensible rule because litigants shouldn't be vulnerable to having their rights finally determined by evidence that would not be admissible at trial, and relying on inadmissible evidence is like having no evidence at all.

[60] *ARC* 13.18(3) clearly provides that an affiant must support his or her sworn statements in a final application with "personal knowledge." This requirement embodies the common law rule against hearsay – an affiant must be capable of being tested by cross-examination on his or her own knowledge.

[61] The "personal knowledge" requirement in *ARC* 13.18 heightens the former "knowledge" standard under old Rule 305(1). As Graesser J. points out, in ***ATA v Alberta (Information & Privacy Commissioner)***, 2011 ABQB 19 at para 45:

> Rule 13.18(3) is similar to old Rule 305, although it appears that the requirement of personal knowledge under the new rules may be more stringent than before, as 13.18(3) refers to affidavits used in support of applications which may 'dispose of all or part of a claim.'

[62] The personal knowledge requirement ensures that the opposing party may cross-examine the affiant on his or her knowledge, testing the soundness of the evidentiary foundation for the application. Older cases considering Rule 305(1) are instructive so long as they are viewed in light of this higher threshold. See, e.g., ***Renfrew Insurance Ltd v Donald***, 2012 ABQB 228 at para 19. But see ***Murphy v Cahill***, 2012 ABQB 793 at para 28.

[63] Thus, *ARC* 13.18 requires that the affiant know of a circumstance or fact through firsthand observation or experience, rather than learning of such circumstance or fact from some other person or source. In effect, the affiant may not rely on hearsay.

Personal Knowledge and the Corporate Representative

[64] This requirement presents specific issues in the context of a corporation, where a corporate representative speaks on behalf of the legal entity. In many cases, it would be enormously costly, if not impossible, and of limited use, to require each employee involved in a corporate matter to provide testimony on the corporation's behalf. AMEC relies on a line of Alberta authorities that thus hold that a corporate representative may establish personal knowledge by familiarizing his or herself with reliable corporate records.

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[65] In ***Alberta (Treasury Branches) v Leahy***, 1999 ABQB 185, Alberta Treasury Branches (ATB) brought suit against the defendants, alleging that Mr. Leahy, a senior manager within ATB, accepted bribes from the other defendants in exchange for having certain loans made. In support, ATB relied on an affidavit of a senior credit manager, Ms. Heibert, responsible for the management of the loans. The defendants submitted that the affidavit was not based on personal knowledge. Ms. Heibert only joined ATB and became responsible for the loans to the defendants in April 1997, three years after the loans were concluded. The defendants asserted that she was not at all personally involved in the transactions in dispute. Mason J. nonetheless found that she had "personal knowledge" within the meaning of old Rule 305(1).

[66] In assessing the affiant's knowledge of the matters deposed, Mason J. relied on paragraphs from her affidavit. Notably, he stated that her knowledge of the facts came in part by (at para 48(d)):

> ... reviewing the files and documents provided by ATB's solicitors who acted on the October 1994 refinancing, from the files maintained by or on behalf of ATB, from discussions with employees and former employees of ATB and from information obtained as a result of an investigation conducted by Bryan McBean of ATB's security department.

[67] Mason J. relied on a line of Alberta authorities in support, including ***Advance Rumely Thresher Co v LaClair***, [1917] 1 WWR 875 (ABCA); ***Alberta (Treasury Branches) v Wenley Enterprises & Sales Ltd*** (1985), 66 AR 232 (MC); and ***Principal Savings & Trust (Liquidator of) v Bowlen*** (1991) 1 CPC (3d) 206 (ABQB).

[68] In ***Advance Rumely Thresher Co. v Laclair*** [1917], 1 WWR 87 (Alta CA), the Court of Appeal found that as manager of the company, the deponent had access to all the relevant business records and it was not necessary that the manager be personally involved in all transactions in order to give evidence of them.

[69] In ***Bowlen***, the plaintiff applied for summary judgment against the maker and guarantors of a promissory note. In support of the application, the plaintiff submitted an affidavit of the general manager of the plaintiff's liquidator. In his affidavit, he asserts that his knowledge was obtained from "books and records of [the plaintiff] kept in the ordinary course of its business..." Master Quinn stated at para 13:

> Counsel for the defendants does not take the position that anything said in these affidavits is not true. His objection is that the affidavits are not admissible in evidence because the deponent cannot really swear that he has personal knowledge... In my opinion, his affidavits should be accepted as valid evidence in support of the plaintiff's application. Although he does not purport to have direct first-hand knowledge of the matters he deposes to, he had personal knowledge in the qualified sense that he obtained that knowledge from obtaining and perusing the records of the company in liquidation...

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[70] As the Court of Appeal stated in ***R v Monkhouse***, 1987 ABCA 227, in preparing a summary or extract of original records or documents, that summary or extract is not hearsay, at para 12:

> He is not saying that the original time records prepared by the appellant are true nor is he saying that the transcription of those records by some unknown person is correct. What he says to the Court is: "I read this document and my extract correctly summarizes it." He is able to say that because he personally read the document which he summarized, and he can be cross-examined about that.

[71] In ***Leahy***, Mason J. concluded at para 56:

> To the extent that activities of a corporation are recorded in reliable documents, an authorized person may obtain the requisite personal knowledge by reviewing these and then speak to those activities, subject to compliance with other rules of evidence.

[72] Thus, by having a corporate representative review its business records, a corporation can satisfy the "personal knowledge" requirement of *ARC* 13.18. The corporate representative is in a suitable position to put the corporate records before the court. Mason J. added at para 58:

> I question how else a corporation can give evidence under these circumstances, other than through a representative such as Hiebert who has the requisite position and authority and who has reviewed the records of the corporation; a corporation is incapable of personally comprehending facts.

[73] Allowing a corporate representative to establish personal knowledge by relying on hearsay in the form of corporate records parallels the business records exception to the hearsay rule. What is not entirely clear is whether an affiant can establish personal knowledge based on corporate records that are not admissible hearsay, or more broadly, whether the affiant can establish personal knowledge on the basis of any admissible hearsay, not just business records.

[74] In **Leahy**, Mason J. suggested that Ms. Hiebert established personal knowledge through both review of the company's records and discussions with its employees, which would almost certainly be inadmissible hearsay. He later noted, however, that the affiant was "not purporting to speak to matters that are not based on business records.": **Leahy** at para 59. This is consistent with other decisions wherein deponents not involved in bank transactions routinely swear on the basis of their review of the business records: see ***Scotia Mortgage Corp v Aab***, 2012 ABQB 464 at para 15 and cases cited therein.

[75] The intent of *ARC* 13.18 is not served where a corporate representative may rely on any hearsay in support of his or her affidavit. The accommodation to allow a corporate representative to familiarize themselves with business records to establish personal knowledge goes too far if that representative must also rely on conversations with other employees, emails, correspondence and other third-hand information.

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Where the Affiant Lacks Personal Knowledge

[76] In ***Murphy***, Veit J. held, at para 29:

> Where a litigant is applying for relief that may dispose of all or part of a claim, that litigant can only use in support affidavits containing either statements of fact within the knowledge of the deponent or statements containing hearsay evidence that would be admissible at trial for the truth of the content.

[77] Veit J.'s approach is consistent with ***Leahy***, which acknowledges an alternative route for the admission of documents under the old Rule 305 where the affiant lacks knowledge of the facts: rely on admissible material exhibited to the affidavit as direct evidence, thereby "curing" the hearsay. This less restrictive reading of the old rule permitted affidavits that attached relevant admissible documents of which the deponent had no personal knowledge. This reading furthered the view that documents, if admissible at trial, were admissible in chambers applications: see ***Leahy*** at para 73.

[78] Under this approach, even if the affiant knows little about the document other than where it was found, the document is introduced and the court can determine the reliability of the document. See, e.g., ***Kin Franchising Ltd v Donco Ltd*** (1993), 7 Alta LR (3d) 313 (ABCA) at para 6; ***Leahy*** at paras 55-66; ***Indian Residential Schools, Re*** (2002), 9 Alta LR (4th) 84 (ABCA) at para 36.

[79] The text of *ARC* 13.18(3) would seem to constrain this practice, however, requiring of the affiant some personal knowledge of the events or circumstances described in such admissible hearsay. Otherwise, the Rule would be meaningless, just allowing the admission of all admissible hearsay. The consequence is to limit the admission of evidence. Note, however, that cases decided under the old rule seemed totally satisfied that even if the affiant could only say where the document came from, it was enough of a personal connection. The judge would then keep that in mind for weight.

***ARC* 13.18 and Hearsay**

[80] Any admitted document containing hearsay must (1) be authenticated, and (2) fall under a common law or the principled exception to the hearsay rule. Per Dickson C.J. in ***R v Schwartz***, [1988] 2 SCR 443 at 476, dissenting.

> Before any document can be admitted into evidence there are two obstacles it must pass. First, it must be authenticated in some way by the party who wishes to rely on it. This authentication requires testimony by some witness; a document cannot simply be placed on the bench in front of the judge. Second, if the document is to be admitted as evidence of the truth of the statements it contains, it must be shown to fall within one of the exceptions to the hearsay rule . . . .

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Hearsay Exceptions

[81] Evidence admissible under common law and principled exceptions to the hearsay rule is not barred by the application of *ARC* 13.18 or its predecessor Rule 305: ***Murphy v Cahill***, 2012 ABQB 793 at para 29; ***Harco Holdings 2000 Inc. v. B. (M.)***, 2010 ABQB 442 at para 29; ***Horrey v Litterst*** (1995), 37 Alta LR (3d) 74.

[82] In ***Horrey***, the Alberta Court of Appeal suggested that Rule 305 may incorporate the common law exceptions to the hearsay rule so as to allow the admission of documents and reliance on them by a party who was not their author. See also ***Leahy***, at para 71. The principled exception to the hearsay rule was set out by the Supreme Court in ***R v Khan***, [1990] 2 SCR 532 and ***R v Smith (AL)***, [1992] 2 SCR 915. In ***Smith***, the Court held at p 933: "[h]earsay evidence is now admissible on a principled basis, the governing principles being the reliability of the evidence, and its necessity."

[83] A key exception to the hearsay rule is in regard to business records. In ***Ares v Venner***, [1970] SCR 608 , the Supreme Court held at para 26:

> Hospital records, including nurses' notes, made contemporaneously by someone having a personal knowledge of the matters then being recorded and under a duty to make the entry or record, should be received in evidence as prima facie proof of the facts stated therein. This should, in no way, preclude a party wishing to challenge the accuracy of the records or entries from doing so.

[84] Business records may be admitted "if the recorder is functioning in the usual and ordinary course of a system in effect for the preparation of business records.": ***R v Monkhouse***, 1987 ABCA 227 at para 24. Thus, (at para 25): "[w]here an established system in a business or other organization produces records which are regarded as reliable and customarily accepted by those affected by them, they should be admitted as prima facie evidence."

[85] In ***Monkhouse***, at para 104, Laycraft CJA noted several cases "where the witness gave testimony supporting a document about which he had no personal knowledge though the original documents containing the information recorded in the ledgers were undoubtedly prepared by persons with personal knowledge." Thus (at para 106), "records reliably kept in the ordinary way of business . . . should be admitted as prima facie evidence."

[86] Correspondence is generally not admissible where not "made or kept in the ordinary course of business" by a person under an obligation to accurately record the facts and thus such documents are unreliable third party hearsay evidence.

Summary

[87] An affiant must have "personal knowledge" as the basis of a sworn statement submitted in support of a final application.

[88] A corporate representative may, in familiarizing his or herself with corporate records, establish "personal knowledge" within the meaning of *ARC* 13.18(3). The representative may not, however, rely on otherwise inadmissible hearsay. Where the corporate representative lacks personal knowledge, he or she may rely on direct evidence exhibited to the affidavit or otherwise before the Court. Such direct evidence must be admissible in accordance with the common law rules of evidence, and thus hearsay must either fall under a common law or principled exception, or must be relied on for non-hearsay purposes.

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Admissibility of Exhibits and Sections of the Leonard Affidavit

[89] AD asserts that the Leonard Affidavit attaches correspondence and other documents of which he does not have personal knowledge. Mr. Leonard was the Commercial Director for AMEC's UK engineering business as of September 15, 1998. Given his position within the company, and personal involvement in the Jormag dispute, I am satisfied that Mr. Leonard has personal knowledge of the general course of the JorMag Arbitration. The Leonard Affidavit, however, attaches a number of documents to which Mr. Leonard was not a party and the contents of which does not assert personal knowledge. It is necessary to determine whether these documents may be admitted for the truth of their contents.

[90] The email documents at Exhibit "E" and "G", which contain correspondence between AMEC and the Nabulsi & Associates and Hammonds law firms do not fall within any exception to the hearsay rule, nor has AMEC established that Mr. Leonard has personal knowledge of the contents therein. They are inadmissible for the truth of their contents.

[91] In cross-examination on the Affidavit, Mr. Leonard confirmed that he was not the author of the meeting notes at Exhibit "I". There is no indication of authorship in the notes. Mr. Leonard did not attend the meeting and confirmed that he does not have personal knowledge of meeting described in the notes. In ***Setak Computer Services Corp v Burroughs Business Machines Ltd***, 15 O.R. (2d) 750 (Ont Sup Ct), the Court found that meeting minutes are admissible both as proof of the events that occurred at the meeting, and as proof of the events described. Here, however, there is no evidence as to who recorded the notes, whether the notes were intended as minutes to capture the meeting, their intended purpose, and whether they were made contemporaneously. They are therefore inadmissible.

[92] The summaries of legal advice at Exhibits "J", "K", "M" and "N" do not fall within an exception to the hearsay rule, nor has AMEC established that Mr. Leonard has personal knowledge of the advice. These are inadmissible for the truth of their contents.

[93] Exhibit "O" is a copy of a letter dated June 6, 2003 from Mr. Casselman of AMEC to JorMag, on behalf of the Joint Venture, enclosing a summary of the Joint Venture's position and its claim in the format of and ICC Request for Arbitration. Mr. Leonard has personal knowledge of the letter as a recipient, and in his capacity as AMEC's corporate officer responsible for the JorMag dispute. I am satisfied that Mr. Leonard's knowledge would extend to the contents of this correspondence. The letter is therefore admissible for the truth of its contents.

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[94] Exhibit "R" is a copy of an email dated October 3, 2003 from Mr. Palmer to Kaan Dogan and Mr. Casselman, providing an estimated cost for a 13 month arbitration, warning that some funding for the arbitration may not be provided by AIG [American International Group], the Joint Venture's insurer, and proposing a meeting to discuss how the resources of the Joint Venture would be deployed going forward. The email does not fall within an exception to the hearsay rule, nor has the defendant established that Mr. Leonard has personal knowledge of the information contained in the email. It is therefore inadmissible for the truth of its contents.

[95] Exhibit "S" is a copy of an email chain dated October 8, 2003. It contains the October 3, 2003 email from Mr. Palmer describing preparations for the JorMag arbitration at Exhibit "R", an inquiry from Kaan Dogan to Mr. Casselman of AMEC about the stance of AIG with respect to costs of the arbitration and the Joint Venture's financial position, and a response from Mr. Casselman indicating that the requested information would be provided that day. The email does not fall within an exception to the hearsay rule, nor has the defendant established that Mr. Leonard has personal knowledge of the email.

[96] Exhibit "T" is a copy of a chart of Joint Venture Claim costs up to September 28, 2003. Mr. Leonard is advised by Joe Browne, an employee of AMEC, that he recognizes it as a chart he would have prepared, though he could not remember preparing it, and that it was his practice to provide information to AD when he was directed by Mr. Casselman, but that he could not remember providing this particular chart to AD. The chart does not fall within an exception to the hearsay rule nor has the defendant established that Mr. Leonard has personal knowledge of the chart.

[97] Exhibits "W" and "X" are copies of email chains, in addition to a memo from Mr. Casselman to Kaan Dogan dated April 7, 2003, copied to Mr. Leonard and others. The letter and email chains do not fall within an exception to the hearsay rule and are not admissible for the truth of their contents.

[98] Exhibit "II" is a copy of an email dated September 8, 2005 in which Alex Chatham of AMEC provides AD with a chart containing a breakdown of all costs associated with the JV Claim up to that point, and Exhibit "JJ" is an email from Gokhan Dogan of AD to Mr. Chatham of AMEC requesting the number of the courier package containing the back up for the charts contained at Exhibit "II". These emails do not fall within an exception to the hearsay rule and are not admissible for the truth of its contents.

[99] Paragraph 14 of the Leonard Affidavit refers to strategy meetings in Jordan among Nabulsi, Hammonds, AD and AMEC in July 2002 to discuss Jordanian law and the strategy surrounding the JorMag claim. I am satisfied on the basis of his position and knowledge of the proceedings that Mr. Leonard can give evidence to the effect that such meetings took place. However, the summary of the meetings contained at Exhibit "J" and "K" was prepared by Simon Palmer and Mr. Leonard has no personal knowledge of the contents therein and they are therefore inadmissible for the truth of their contents.

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Analysis: Summary Judgment on the AMEC Counterclaim

[100] In its Counterclaim, AMEC contends that, pursuant to the Claims Agreement, AMEC and AD agreed that litigation costs incurred in pursuing the JorMag litigation were to be divided equally between AMEC and AD. The litigation costs totalled $31,150,233.38, comprised of $22,458,591.62 paid to legal firms; $7,872,793.26 paid to experts and $818,848.50 paid to arbitrators: paras 49, 50 of the Leonard Affidavit. After accounting for the 25% of the litigation costs paid by AMEC's insurers, AMEC paid a total of $23,362,674: para 62 of the Leonard Affidavit. AMEC claims that $11,681,337 is owed to it by AD: para 63 of the Leonard Affidavit.

[101] In its Defence to the AMEC Counterclaim, AD denies the amount of the litigation costs claims, denies that 25% of those costs were paid by AMEC's insurers, and denies that AMEC paid the remaining costs. AD admits that AD and AMEC agreed to split the costs of the JorMag Arbitration pursuant to the Claims Agreement, but contends that the fees claimed by AMEC are not recoverable because they were covered by insurance carried by AMEC with respect to the Project and, to the extent the fees are being claimed pursuant to a right of subrogation, AD is an insured or is entitled to a waiver of subrogation. In the alternative, AD contends that it was a term of the Claims Agreement that AMEC was required to inform AD of all costs incurred in relation to the JorMag Arbitration as they were incurred, and that all costs so incurred were to be reasonably necessary, and that AMEC failed to comply with these provisions. AD argues that it was an express term of the Claims Agreement that AMEC was required to provide AD with copies of all correspondence sent to or received from the Joint Venture's legal team, arbitrators and third parties, and copies of all internal progress reports, in connection with the JorMag Arbitration, and that AMEC failed to provide AD with copies of all such correspondence.

[102] The Claims Agreement between AD and AMEC is dated November 17, 2003 and contains the following provisions:

> 4. Claims by and Against JMC [JorMag]
>
> 4.1 Attila Dogan and AMEC and each of them will fully support the Joint Venture and each other and engage in the orderly exchange of information between themselves necessary for:
>
> > (a) the prosecution of the Joint Venture's claims against JMC to seek additional payments which the Joint Venture believes are due to the Joint Venture from JMC under the Design and Build Agreement;
> >
> > (b) the prosecution of any and all claims against JMC and others for damages which the Joint Venture alleges it has suffered as a result of the actions of JMC and others relating to or in any way connected with the Design and Build Agreement, the performance of work thereunder and the termination thereof by JMC; and

> (c) the defence of all claims which may be brought against the Joint Venture or either of its members by or on behalf of JMC relating to or in any way arising out of the Design and Build Agreement.

4.2 Notwithstanding the provisions of paragraph 4.1, but subject to the provisions of clause 5 hereof, in the first instance, AMEC shall be responsible for retaining outside legal counsel and any experts for and on behalf of the Joint Venture and AMEC agrees that in the first instance, it shall pay Attila Dogan's Joint Venture member's share of any and all such third party costs required to prosecute or defend those claims or actions set out in paragraph 4.1 hereof; Provided, however, nothing in this agreement shall obligate AMEC to make any payment for or on behalf of Attila Dogan of any judgment, award or cost award against the Joint Venture, the responsibility for which will be determined by and in accordance with the terms of the Joint Venture Agreement.

5.2 Any and all arbitration administrative expenses as well as arbitrators' fees or other third party costs incurred by mutual agreement and paid by AMEC, pursuant to paragraph 4.2 and subject to the limitations expressed in paragraph 5.1 hereof, to prosecute or defend any and all claims by or against the Joint Venture in connection with the Design and Build agreement shall be repaid from and form a first charge against the additional revenue or damage award actually paid to the Joint Venture in respect of such claims. If the Joint Venture becomes entitled to recover from insurers or from any other source (other than any arbitration award) any expenses incurred by the Joint Venture and paid in the first instance by AMEC with respect to the prosecution or defence of any claims prosecuted by or against the Joint Venture, AMEC shall be entitled to receive all such recoveries for its sole benefit. If no additional revenues or damage awards are actually paid to the Joint Venture from JMC then each of the JV partners are responsible to split the costs of pursuing a claim against JMC or defending a claim from JMC on a 50/50 basis and all such third party costs paid by AMEC, less any contribution to such third party costs AMEC might receive from insurers or from any other source, shall be charged to the Joint Venture and recovered by AMEC on a final Joint Venture accounting and distribution. The parties further agree that after payment of all costs as hereinbefore provided the parties shall divide equally between themselves the proceeds of any arbitration award actually received.

6.2 All correspondence or documents sent on behalf of the joint venture to [JorMag] in prosecution or defence of the claims made by or against [JorMag] shall be prepared by or on the instructions of AMEC. AMEC agrees to provide to Attila Dogan copies of all formal pleadings and submissions and all correspondence to or from [JorMag] in which the position of the joint venture with respect to the resolution of such claims is discussed. AMEC will also provide

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copies of any correspondence to the legal team, arbitrators, third parties and copies of internal progress reports.

7. All correspondence or documents sent on behalf of the Joint Venture to JMC in the prosecution or defense of the claims made by or against JMC shall be prepared by or on the instructions of AMEC. AMEC agrees to provide Attila Dogan copies of all formal pleadings and submissions and all correspondence to or from JMC in which the position of the Joint Venture with respect to the resolution of such claims is discussed. AMEC will also provide copies of any correspondence to the legal team, arbitrators, third parties and copies of internal progress reports.

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[103] The JorMag Arbitration commenced in February, 2004. Mr. Leonard's responsibilities in connection with the arbitration were to assist with the preparation of the claim and to supervise AMEC's internal resources engaged in it. He had some involvement with the payment of legal and expert invoices on behalf of the Joint Venture. Mr. Leonard attended the Arbitration and provided evidence on behalf of the Joint Venture. It is Mr. Leonard's uncontested evidence that AD actively participated in the arbitration. He states that Kaan Dogan attended the arbitration most of the time. It is not disputed that Kaan Dogan and Marwan Safadi provided witness statements and testimony at the Arbitration.

[104] On July 31, 2006 the arbitration panel rendered an interim decision dismissing most of the Joint Venture's claim and allowing some of JorMag's counterclaims. Subsequently, the Joint Venture and JorMag participated in mediation and the dispute between JorMag the Joint Venture was ultimately settled. Pursuant to a settlement agreement dated April 24, 2007, the sum of $41,000,000 US was paid by the Joint Venture to JorMag. The settlement agreement was signed by Mr. Leonard on behalf of AMEC and by Kaan Dogan on behalf of AD: para 42 of the Leonard Affidavit.

[105] On June 6, 2007, AMEC entered into a settlement agreement with its insurer (the "Insurance Settlement"), under two separate policies, one in favour of the Joint Venture and with a limit of liability in the amount of $15 million, the second AMEC's own umbrella policy, with a limit of liability in the amount of $50 million. Coverage under the latter policy had been diminished by unrelated claims to $27,793,114, and as the date of the Insurance Settlement, $2.5 million had already been paid under the Joint Venture's policy. Under the terms of the Insurance Settlement, $40,293,114.16 of the JorMag settlement was paid by the insurer. AMEC paid the balance, in the amount of $706,885.84: paras 47,48 of the Leonard Affidavit.

[106] According to Mr. Leonard, after the insurance contribution, a balance of $23,262,674 remained. This amount has already been paid by AMEC. To date, AD has not paid $11,681,337, representing a 50% share of this balance that AMEC claims to be entitled to recover under paragraph 5.2 of the Claims Agreement: paras 62, 63 of the Leonard Affidavit.

Equitable Set-Off

[107] AD contends that, while it denies AMEC's counterclaim, it also may prove that AMEC owes it an amount of money, that this amount should be counted against any amount AD is found to owe to AMEC, and equitable set-off in these circumstances operates as a defence to the AMEC counterclaim. AD points in this regard to ***Five Oaks Inc. v 784566 Alberta Ltd.***, 2000 ABQB 152. In that case, on appeal from a Master, Clackson J. upheld a decision to stay enforcement of summary judgment on a mortgage on the basis that the mortgage claim was clearly connected with a cross-claim under an architectural contract. There is nothing in ***Five Oaks Inc.*** to suggest that the potential for an equitable set-off is sufficient to operate as a defence such that summary judgment should be refused entirely, and counsel for AD did not direct me to any other authority that would support this proposition. The potential for set-off is no reason, in and of itself, to dismiss AMEC's application for summary judgment.

Proof of AMEC's Claim

[108] Having challenged, with some success, significant portions of the Leonard Affidavit, AD says that AMEC's record fails to meet the threshold required to grant summary judgment on the counterclaim.

[109] AD contends that AMEC has failed to prove mutual agreement under paragraph 5.2 of the Claims Agreement. There are two elements to AD's argument in this regard. AD contends that recovery for any costs predating November 17, 2003 is not contemplated under the Claims Agreement and that, on the record before me, it is impossible to separate those costs from costs incurred after that date. Moreover, AD argues that there is insufficient evidence on the whole to prove that any of the costs incurred by AMEC in the course of the JorMag arbitration were mutually agreed to.

[110] With respect to the first point, the Claims Agreement refers to "Any and all arbitration administrative expenses as well as arbitrators' fees or other third party costs incurred by mutual agreement and paid by AMEC", without reference to date (emphasis added). I agree with AMEC that the language of the Claims Agreement is unambiguous and does not contemplate a distinction between pre-Claims Agreement costs and post-Claims Agreement costs associated with the JorMag Arbitration. Any inability to distinguish between these costs is not a reason to deny summary judgment on the counterclaim.

[111] AD's argument that AMEC has failed to prove mutual agreement requires a careful consideration of the language in paragraph 5.2 of the Claims Agreement. Paragraph 5.2 provides:

> Any and all arbitration administrative expenses as well as arbitrators' fees or other third party costs incurred by mutual agreement and paid by AMEC pursuant to paragraph 4.2 to prosecute or defend any claims in connection with the Design and Build Agreement shall be repaid from and form a first charge against the additional revenue or damage award paid to the Joint Venture in respect of such

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> claims. If the Joint Venture becomes entitled to recover from insurers or any other source other than an arbitration award any expenses incurred by the Joint Venture and paid in the first instance by AMEC, AMEC shall be entitled to all such recoveries for its sole benefit. If no additional damage awards are paid to the Joint Venture as a result of the arbitration, then each of AMEC and AD are responsible to split the costs of pursuing the claim against JorMag or defending JorMag's claim on a 50/50 basis and all such third party costs paid by AMEC, less any contribution to such third party costs AMEC might receive from insurer or from any other source, shall be charged to the Joint Venture and recovered by AMEC on a final Joint Venture accounting and distribution. The parties further agree that after payment of all costs as hereinbefore provided the parties shall divide equally between themselves the proceeds of any arbitration award actually received.

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[112] It is not immediately apparent that the requirement for mutual agreement applies to anything more than those fees or third party costs that AMEC might be repaid from any additional revenue or damage award paid to the Joint Venture as a result of the JorMag Arbitration. Later in paragraph 5.2 there is reference to dividing costs on a 50/50 basis in the event that no additional damage awards are paid to the Joint Venture, which is what in fact occurred. Here, there is no reference to mutual agreement; instead, the parties have agreed simply to split the costs of pursuing or defending in the JorMag Arbitration. Ultimately, however, it is not necessary to determine whether the requirement for mutual agreement extends to all claim costs in the event that no damages are paid to the Joint Venture, because the evidence clearly indicates that neither AD nor AMEC interpreted paragraph 5.2 to mean that AMEC was obligated to obtain prior approval for third party costs from AD. The evidence in this regard is not limited to the Leonard Affidavit, but includes the cross-examination on Kaan Dogan's Affidavit of April 24, 2013 and read-ins from the questioning of Kaan Dogan in June and August, 2012.

[113] There is no dispute that the Claims Agreement was duly executed by both AD and AMEC, and that Kaan Dogan signed off on the settlement agreement with JorMag. There is no dispute that, as a result of the JorMag settlement, AMEC paid $42 million.

[114] In his read-ins from questioning, Kaan Dogan has acknowledged:

> (a) that he was involved in discussions and carriage of the arbitration between the Joint Venture and JorMag on behalf of AD;
>
> (b) he was involved in negotiations leading to the Claims Agreement;
>
> (c) Kaan Dogan and Marwan Safadi were the contact points for Mr. Palmer of Hammonds through the course of the arbitration for AD;
>
> (e) Mr. Safadi was involved with the Addleshaw firm and other experts with respect to the calculation of damages;

(f) AD acquiesced to the retention of the Hammonds firm for the conduct of the JorMag Arbitration on behalf of the Joint Venture.

[115] In a memorandum dated September 27, 2005 Kaan Dogan and Marwan Safadi provide a report of a claim review meeting attended by them, as well as Mr. Leonard of AMEC, Martin Bowdery, identified in the memorandum as the lawyer for the Joint Venture in the arbitration, and Simon Palmer and Jonathan Tattersall, now of the law firm Addleshaw Goddard. The memorandum demonstrates that AD had engaged, together with AMEC, the Joint Venture's counsel and experts in a thorough review of the Joint Venture's prospects and strategy in the dispute with JorMag. There is, therefore, considerable evidence to support AMEC's submission that AD clearly agreed to pursue the Joint Venture claim and to hire external legal and necessary experts to advance it.

[116] AD argues that this conduct does not amount of evidence of mutual agreement under paragraph 5.2 of the Claims Agreement. In his Affidavit of April 24, 2013, Kaan Dogan swears that AMEC retained Hammonds without informing AD or seeking its consent, that AMEC retained experts without informing or obtaining the consent of AD, and that AD did not know if a budget was set for any of the experts. The Claims Agreement is silent on the question of how mutual agreement was to be arrived at. It does not provide for a mechanism whereby AMEC would communicate cost estimates to AD for pre-approval. There is, however, some evidence before me with respect to the information that was provided to AD regarding preparation for the JorMag Arbitration. It is not necessary to rely on the truth of the contents of the exhibits to the Leonard Affidavit in order to find, in fact:

(a) Kaan Dogan advised Barry Casselman, on June 10, 2002, that the Joint Venture needed to take "remedial and severe actions" against JorMag (Exhibit "H");

(b) Simon Palmer provided an outline of the overall objective of the Joint Venture in the JorMag dispute; the work that Hammonds had undertaken to date; the major issues; the case plan and risk evaluation; and litigation and action strategy to both AMEC and AD on September 18, 2002 (Exhibit "L");

(c) Jonathan Tattersall of Hammonds provided an update on the status of the Joint Venture claim against JorMag, including a schedule outlining further documentation that he was seeking from AD to continue to build the claim against JorMag, on December 19, 2002 (Exhibit "M");

(d) By email dated February 26, 2003 and sent to both AD and AMEC, Mr. Palmer summarized JorMag's claim and the Joint Venture's defences and the Joint Venture's claim against JorMag, including the values ascribed to each head of claim by JorMag and the Joint Venture (Exhibit "N");

(e) By letter dated July 25, 2003, and copied to AD, Mr. Casselman advised JorMag that the Joint Venture was prepared to meet with JorMag to investigate

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the possibility of settlement (Exhibit "P") and by email dated July 29, 2003, Kaan Dogan confirmed receipt of this letter (Exhibit "Q");

(f) By email to AD and to AMEC and dated October 3, 2003, Mr. Palmer indicated that preparations for the arbitration were proceeding and estimated "costs for the full legal and expert team for a 13 month arbitration process" at between 3.65 million and 4.9 million pounds; (Exhibit "R")

(g) By email dated October 6, 2003, Kaan Dogan requested clarification from Mr. Casselman of AMEC about the Joint Venture's insurer's position with respect to the costs of preparation and seeking financial statements for the Joint Venture; (Exhibit "S"); and

(h) AD entered into the Claims Agreement after having received the correspondence and made the requests for further information described above;

(i) On September 8, 2005 Gokhan Dogan forwarded to AD and Kaan Dogan an email from Alex Chatham of AMEC, entitled "Cost of Preparing the Jormag Claim" and containing what appears to be a spreadsheet attachment entitled "Claim Cost Details to 31 July 05" (Exhibit "II").

[117] Moreover, in his own Affidavit, Kaan Dogan acknowledges:

(a) Information on JorMag claim costs was provided to AD on an "irregular basis";

(b) AMEC provided an Excel spreadsheet of claim costs to July 31, 2005 which, printed and reproduced in AD's own production, exceeds 500 pages in length.

[118] The only evidence that AD ever sought information about the budget for or expenses incurred in preparation for the JorMag Arbitration is contained in paragraphs 53 to 59 of the Kaan Dogan Affidavit, April 24th, 2013. That evidence shows that AD made requests for a budget on June 8, 2005, July 28, 2005 and August 16, 2005, and finally received the Excel spreadsheet referred to above in September, 2005. Kaan Dogan says that supporting documentation was sought by AD shortly thereafter and refused by AMEC. Nevertheless, there is no evidence that AD objected to any of the costs disclosed in the spreadsheet it received in September, 2005.

[119] By far the largest part of the JorMag Claim Costs is the $22,458,591.62 paid to legal firms, of which $22,416,379.58 was paid to the Hammonds and Addleshaw Goddard: Exhibit EE to the Leonard Affidavit. AD agreed to allow AMEC to retain counsel for the Joint Venture in the JorMag arbitration. Representatives of AD met and consulted with those lawyers on numerous occasions. Representatives of AD attended at the JorMag arbitration where those lawyers represented AD's interests as a party in the Joint Venture, and AD later signed the settlement agreement that ultimately resulted. AD is a large and sophisticated construction company. Its representatives had to have known that a highly complex international arbitration is

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a costly enterprise. Upon receipt of the detailed spreadsheet of costs in September, 2005, AD did not communicate disapproval of all or any of the expenses set out therein to AMEC.

[120] The proper approach to the interpretation of any written agreement is to read the words in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of the agreement, its object and intention. Even in the event of ambiguity, it is not always necessary to have recourse to extrinsic evidence if the meaning of the provision in question can be determined from a review of the agreement as a whole: ***Alberta Medical Assn. v Alberta***, 2012 ABQB 113 (leave to appeal refused: 2012 ABCA 391); ***Calgary (City) v International Assn. of Fire Fighters (Local 255)***, 2006 ABQB 133 (aff'd: 2008 ABCA 77). The Supreme Court of Canada recently emphasized this practical, common-sense approach to contractual interpretation in ***Sattva Capital Corp. v. Creston Moly Corp.***, 2014 SCC 53, at paras. 47- 48:

> ...the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" (***Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada***, 2006 SCC 21 (CanLII), [2006] 1 S.C.R. 744, at para. 27 per LeBel J.; see also ***Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)***, 2010 SCC 4 (CanLII), [2010] 1 S.C.R. 69, at paras. 64-65 per Cromwell J.). To do so, 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. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:
>
> > No contracts are made in a vacuum: there is always a setting in which they have to be placed. . . . In a commercial contract it is certainly 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.
>
> (Reardon Smith Line, at p. 574, per Lord Wilberforce)
>
> The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement (see ***Moore Realty Inc. v. Manitoba Motor League***, 2003 MBCA 71 (CanLII), 173 Man. R. (2d) 300, at para. 15, per Hamilton J.A.; see also Hall, at p. 22; and McCamus, at pp. 749-50). As stated by Lord Hoffmann in ***Investors Compensation Scheme Ltd. v. West Bromwich Building Society***, [1998] 1 All E.R. 98 (H.L.):

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> The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. [p. 115]

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[121] In Waddams, ***The Law of Contracts***, 5th ed. at p.417, the performance of contractual terms is defined as follows:

> The meaning of performance in any case will depend on the agreement of the parties to be deduced from their words and conduct in all the surrounding circumstances.

[122] The evidence is clear that both AD and AMEC were eager to pursue action against JorMag and AD entered into an agreement with AMEC that gave AMEC control over the proceedings. AD received some information on the costs of the preparations for the JorMag Arbitration, and consulted and shared information with the lawyers and experts that were retained. AD participated in the JorMag Arbitration and signed the settlement agreement that ultimately resulted. Taking a view of the Claims Agreement as a whole, the broad powers conferred upon AMEC to direct the conduct of the JorMag Arbitration, the absence of any specific provision by which mutual agreement in respect of costs was to be achieved, and AD's conduct in participating fully in the JorMag Arbitration, it is impossible to conclude that AMEC and AD were not mutually agreed with respect to the costs of legal counsel and experts that both parties must have known would be essential to the conduct of complex international arbitration proceedings. In my view, the evidence is sufficient to establish mutual agreement in respect of Hammonds and Addleshaw legal fees and the experts retained for the JorMag arbitration.

AD'S Defences to the AMEC Counterclaim

[123] AD's bare denial that 25% of the claim costs were paid by AMEC's insurers and that AMEC has paid the remaining costs is not supported by evidence.

[124] AD has denied the amount of the litigation costs claims, but has not provided any evidence that would support a challenge to the costs claimed by AMEC for the Hammonds and Addleshaw legal fees and the costs of the experts in the JorMag Arbitration. The fact that Hammonds has denied that AD was its client is not evidence that the Hammonds' fees were not incurred at the instruction of AMEC and on behalf of the Joint Venture in the JorMag Arbitration. AMEC has acknowledged that one of the invoices it relies upon, from the law firm of McCarthy Tetrault in Exhibit FF to the Leonard Affidavit in the sum of $6,500.00, should not form part of its counterclaim. On questioning, Mr. Leonard confirmed that some of the advice and AMEC received from the law firm of Nabulsi & Associates was related to disputes between AMEC and AD. I am therefore of the view that a sufficient factual dispute exists with respect to

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the services of the Nabulsi firm such that summary judgment in respect of those costs is not appropriate. According to Exhibit EE to the Leonard Affidavit, these amounts total $42,212.04.

[125] Finally, AD argues that it was an express term of the Claims Agreement that AMEC was required to provide AD with copies of all correspondence sent to or received from the Joint Venture's legal team, arbitrators and third parties, and copies of all internal progress reports, in connection with the JorMag Arbitration, and that AMEC failed to provide AD with copies of all such correspondence. In his Affidavit, Kaan Dogan provides one example: an Agreed-To Litigation Plan that was drafted to be provided to the insurer AIG on September 16, 2005.

[126] In ***Windsor***, the Court of Appeal held, at para 21:

> A party faced with an application for summary judgment must put its best foot forward, and present evidence to show sufficient "merit" to establish a genuine issue requiring a trial with respect to the outstanding issues... Speculating that evidence might be available at a trial is not sufficient to create a genuine issue requiring a trial.

[127] Evidence of one occasion on which one document generated in the course of the JorMag Arbitration was not shared with AD is not evidence of sufficient merit to establish a genuine issue requiring trial with respect to AD's obligation to share in the expenses associated with the arbitration. I agree with AMEC that it can hardly be said that the failure to provide this report, or some other documentation, pursuant to paragraph 7 of the Amending Agreement is a breach that goes to the very root of that agreement that would absolve AD of all liability under the Claims Agreement.

[128] This Court is also mindful of recent authority calling for systemic change of procedure in civil cases that respects and considers proportionality, discourages delay and encourages a fair resolution of dispute with these factors in mind: ***Hryniak***; ***Access Mortgage***; ***Canadian Natural Resources Ltd v Shaw Cor Ltd.*** 2014 ABCA 289. Enhancing a fair resolution of a dispute by viewing the process through the lens of proportionality, the avoidance of delay and cost, at the same time preserving fairness, is an embedded premise in the new *Alberta Rules of Court (ARC)* since November 1st, 2010.

Conclusion: Summary Judgment on the AMEC Counterclaim

[129] AMEC is entitled to summary judgment in respect of 50% costs incurred by the Hammonds and Addleshaw firms, and experts retained in the preparation and course of the JorMag Arbitration. Summary judgment is not possible with respect to the costs incurred by the Nabulsi & Associates firm. The resultant sum is $22,458,591.62 – 45,212.04 – 6,500.00 = $22,406,779.58 for legal fees plus experts and consultants in the sum of $818,848.50, totalling $23,225,628.08, divided by two: $11,612,814.04.

[130] No submission was made with respect to interest on the amount, but interest was claimed at the rates prescribed in the *Judgment Interest Act,* RSA 2000 c.J-1 and interest will be awarded,

according to the prescribed rates from February 27th, 2009, the date of the Counterclaim, or such other time as the parties may agree on, or the Court may order, in the event of a dispute.

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Summary Dismissal of AD's Delay Claim

[131] AMEC seeks summary dismissal of AD's claims for alleged delays in AMEC's performance on the Project. AMEC relies upon paragraph 2 of the Amending Agreement, which provides:

> Notwithstanding the Agreement and subject to section 3 of this Amending Agreement, each Member ("the Indemnifying Member") shall be solely responsible for and shall defend, indemnify and hold harmless the other Member ("the Indemnified Member") against all losses, damages, costs and expenses (including but not limited to legal expenses) suffered by the Indemnifying Member and/or any member of the Indemnifying Member's Group to the extent arising from any delay in the performance of the Work, whether occurring in the past, the present or the future and howsoever caused; provided that this paragraph 2 shall not apply to delays suffered or caused by AD-Demirel Steel Construction and Machine Industry Co. Inc. after the date of the Amending Agreement.

[132] Hereafter I will refer to "all losses, damages, costs and expenses ... to the extent arising from any delay in the performance of the Work, whether occurring in the past, the present or the future and howsoever caused" as the delay claim.

[133] AD contends that AMEC has failed to meet the threshold required for summary dismissal because paragraph 2 of the Amending Agreement is not a mutual release as alleged by AMEC; because AMEC's record with respect to AD's misrepresentation claims is deficient; and because none of AD's claims for which AMEC seeks summary dismissal arise solely from AMEC's delay.

[134] At issue are a number of claims contained at paragraph 60 of the Amended Statement of Claim:

> 60. AMEC's Actions or Inactions had the following impacts, caused the following costs, expenses, losses and/or damages to AD and give rise to the following claims:
>
>> (b) variations and changes set out in FTRs that were required to be made by AD because of AMEC's failure to provide timely complete, accurate and sufficient design and engineering totaling $145,915;
>>
>> (c) claims that were not advanced to JorMag in a timely manner or at all, resulting in additional compensation that should have been

paid to AD in an amount to be proved at trial, after AD is given full access to all JV financial records, plus interest;

(d) reduced productivity of AD's personnel as a result of late incomplete, inaccurate and insufficient design and engineering. The cost impact on productivity is calculated to be $586,333;

(f) impacting AD in its bulk procurement and build work as a result of late, incomplete, inaccurate and insufficient design and engineering. The damages caused as a result of this delay and interest are in an amount to be proved at trial;

(g) additional costs, in an amount to be proved at trial, plus interest, resulting from the increased Scope of Work from that originally anticipated in an extended Time of Completion, caused by AMEC's Actions or Inactions;

(j) reduced joint venture profits to AD as a result of late, incomplete, inaccurate and insufficient design, engineering and quantity take-offs, in an amount to be proved at trial, plus interest, after AD has been given full access to all JV financial records;

(k) additional costs to extend bank security and insurance totaling $1,722,290.13;

(l) the termination of the Design-Build Agreement and resulting loss or diminution of value of AD's Equipment totaling $2,870,683.92

(m) the calling by JorMag of AD's portion of the JorMag Security in the amount of $7,650,390.35, as a result of AMEC's Actions or Inactions and the termination of the Design-Build Agreement caused by the AMEC Actions or Inactions, or further or in the alternative, the failure of AMEC to recover the same from its insurers;

(o) actual significant financing costs for forgoing claims and damages based on AD's actual cost of borrowing from the date such claims and damages accrued to present in an amount of $18,231,756.54.

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Mutual Release

[135] AD argues that, contrary to AMEC's characterization, paragraph 2 of the Amending Agreement does not constitute a mutual release. It is worth noting that this is inconsistent with AD's own Amended Statement of Claim, where at paragraph 60(e) AD claims AMEC:

> Induc[ed] AD to enter into the Joint Venture Amending Agreement in April 2000, as a result of AMEC's gross negligence, bad faith and false representations, *resulting in AD mistakenly agreeing to release any delay claims* (emphasis added).

[136] Nevertheless, AD points to the use in paragraph 2 of the term "indemnify" and cites ***Black's Law Dictionary, 10th ed.*** as follows:

> "Indemnification
>
> 1. The action of compensating for loss or damage sustained.
>
> 2. The compensation so made.
>
> "Indemnify"
>
> 1. To reimburse (another) for a loss suffered because of a third party's or one's own act or default.
>
> 2. To promise to reimburse (another) for such a loss.
>
> 3. To give (another) security against such a loss.
>
> "Indemnity"
>
> 1. A duty to make good any loss, damage, or liability incurred by another.
>
> 2. The right of an injured party to claim reimbursement for its loss, damage or liability from a person who has such a duty.
>
> 3. Reimbursement or compensation for loss, damage, or liability in tort; esp., the right of a party who is secondarily liable to recover from the party who is primarily liable for reimbursement of expenditures paid to a third party for injuries resulting from a violation of a common law duty.

[137] Counsel for AD points out that in all of the foregoing definitions, an indemnity involves one party that has a duty to compensate or reimburse a second party for that second party's loss, whereas in the case of paragraph 2 of the Amending Agreement, the indemnifying party is obliged to indemnify the second party for the indemnifying party's own loss. AD contends that paragraph 2 is therefore ambiguous and not susceptible to interpretation in a summary proceeding.

[138] In my view, while paragraph 2 could have been more clearly written, there is no doubt about its intention and effect, and no ambiguity arises. Under paragraph 2, AD has promised AMEC that AD will indemnify AMEC, ie. ensure AMEC does not pay for, losses, damages, costs or expenses suffered by AD arising from any delay in the performance of the work. It might have been preferable to use the term "release", but the effect is the same because AD is effectively promising AMEC that AMEC will not have to pay for AD's losses (and vice versa), arising from delay. I am supported in this conclusion by the use of the term "hold harmless". AD argues that "hold harmless" is no more than a synonym for "indemnify", pointing again to ***Black's Law Dictionary, 10th ed.*** But, notwithstanding the inclusion of "hold harmless" among the synonyms for indemnify, it is worth pointing out that "hold harmless" is itself separately defined:

> hold harmless, vb. (18c) To absolve (another party) from any responsibility for damage or other liability arising from the transaction; IMDENIFY – Also termed save harmless.

[139] In holding one another harmless for all losses, damages, costs or expenses to the extent arising from any delay in the performance of the Work, AD and AMEC effectively agreed to a absolve one another for all claims arising out of delay. This is, in effect, a mutual release.

Misrepresentation

[140] Having determined that paragraph 2 of the Amending Agreement bars claims by either party for losses arising out of delay, it is necessary to consider AD's argument that it relied upon misrepresentations made by AMEC when it entered into the Amending Agreement.

[141] The test for fraudulent representation requires proof of four elements:

> (a) the representations complained of were made by the wrongdoer to the victim;
>
> (b) the representations were false in fact;
>
> (c) the wrongdoer, when he made the representations, either knew that they were false or made them recklessly without knowing they were false or true; and
>
> (d) the victim was thereby induced to enter into the contract in question.

[142] In its Reply to the Demand for Particulars, AD points to three alleged misrepresentations with respect to engineering status of the Project that induced it into entering into the Amending Agreement. These are:

> (a) AMEC's representations at a project recovery plan meeting with JorMag on April 9, 2000, wherein AMEC stated that the percent completion of the overall engineering deliverables was 75% as of March 31, 2000, and further stated that the progress of drawings that had already been issued IFC was 37%;

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(b) the Monthly Progress Report for the period ending March 31, 2000 that submitted to JorMag that the overall engineering completion was 75.2%; and

(c) the project recovery plan schedule JM15, dated April 30, 2000, which indicated that most of AMEC's engineering efforts were completed and that only a small portion remained.

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[143] AMEC points out that AD did not receive the March 31, 2000 Monthly Progress Report until May 3, 2000, and that the April 30 project recovery plan was actually made and dated after AD entered into the Amending Agreement. I agree with AMEC, therefore, that AD cannot claim to have relied on the representations made therein when it entered into the Amending Agreement. What remains at issue is AMEC's representations at the project recovery plan meeting on April 9, 2000, with respect to the overall state of the engineering for the Project at that time. As AMEC points out, AD has not filed any evidence in opposition to the application for summary dismissal of the delay claims, nor has AD questioned Mr. Ingram on the Ingram Affidavit he has filed in support of the application. Instead, AD contends that AMEC has simply not put forth a record that would allow for the necessary findings of fact relating to AD's reliance upon misrepresentations made by AMEC.

[144] Leaving aside the Ingram Affidavit, it is clear that on November 5, 1999 AD retained the services of Martin Hacker of MH-Project Management Ltd. ("MH") and MH agreed to provide an independent review/audit and report on the current status of the Jormag project, including engineering. In questioning, Kaan Dogan confirmed his understanding that MH was retained in connection with AD's concerns about the state of the engineering on the Project. In questioning, Mr. Hacker has stated that he was paid by AD to conduct the audit. On March 6, 2000, Mr. Hacker sent his analysis of the status of AMEC's engineering to AD, under cover of an email wherein he wrote:

> Attached find my analysis of the status of issue of engineering deliverables from [AMEC]. This information was for the period ending 25th Feb. There has been updated this week so the latest data indicates approx. 39% of IFC drgs have been issued. The %ages used to calculate the overall amount of engineering completed is subjective. It is my opinion, however that the detailed engineering is now approximately 70% complete.

[145] AD was not satisfied with Mr. Hacker's assessment of the state of the engineering work. In questioning, Kaan Dogan acknowledged that he did not accept a chart prepared by Mr. Hacker describing the status of engineering deliverables as of the end of March 2000 as 75% completed. Kaan Dogan, in questioning, was referred to his own correspondence to AD employee Dale Richards, dated March 13, 2000, wherein he also questioned the engineering estimates provided by the Project Recovery Team. It is clear from that correspondence that AD had surveyed its own employees and come up with its own estimates for completion figures for various aspects of the engineering work. In short, it is clear from AD's own evidence that instead of relying upon AMEC's own estimates of the state of its engineering work, AD retained and relied upon a

consultant, whose conclusion was very similar to AMEC's own, and also relied upon its own review.

[146] I am satisfied, therefore, that AD did not rely upon representations made by AMEC to JorMag on April 9, 2000 in entering into the Amending Agreement. In any event, I am not satisfied that those representations were demonstrably false. Even if it could be established that AMEC's representations regarding the status of its engineering progress were overstated (and the assessment of the Mr. Hacker suggests that they were not), I agree with AMEC that the reasoning of the Alberta Court of Appeal in ***Radhakrishnan v University of Calgary Faculty Assn.***, 2002 ABCA 182, at para 71, is apt:

> Any suggestion that one party could upset a contract freely entered into, because of prior failure to disclose to him a fact which he suspected and believed before the contract, is startling. The whole idea of misrepresentation as a ground to upset a contract is that one entered into the contract under a false belief induced by the other party to the contract. Relief from a contract for breach of a duty to disclose proceeds on similar reasoning. We have already seen that one could not upset a contract for failure to disclose a fact which the other party already knew.

[147] AD's allegation that the AMEC misrepresented the status of the Joint Venture's financial position fails for the same reason. In paragraph 17 of the Reply to Demand for Particulars, AD pleads:

> Throughout the Project, there was inaccurate, late, or unavailable financial reporting by AMEC that gave AD an unclear picture of the JV's cash flow and financial status at or around the time of the Project Recovery Plan and the Joint Venture Amending Agreement. In certain cases, misrepresentations were not contained in specific documents as the misrepresentations came instead from AMEC's failure to provide financial documentation in a timely manner or at all. For example, there is no record of AMEC providing AD with financial information for March 2000, which was the period of time during which the Project Recovery plan and Joint Venture Agreement were being negotiated.

[148] In his Affidavit of April 25, 2013, Kaan Dogan states that he was advised by AMEC that the Joint Venture "had a serious cash flow situation resulting in about a negative $22 million" in December, 1999. He describes a course of dealings and negotiations thereafter wherein AMEC demanded a cash contribution from AD, withheld construction progress payments and proposed an alternative plan whereby AMEC would arrange for financing from Export Development Canada and AMEC and AD would waive their rights to pursue claims against each other in respect of delays on the Project. The fact that the Joint Venture was in dire financial straits was well known to AD at the time that it entered into the Amending Agreement. AD has led no evidence in support of the proposition that it relied upon any particular misrepresentation or failure to disclose any particular fact in respect of the Joint Venture's financial position. Instead,

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the only evidence from AD on the point indicates quite clearly that it was well aware, at least in a general sense, that the Joint Venture was in financial trouble.

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Delay and the Claims at Issue

[149] AD contends that AMEC's attempt to summarily dismiss the claims at paragraphs 60(b), (c), (d), (f), (g), (j), (k),(l), (m) and (o) is vastly overreaching because AMEC has not brought any evidence that the claims set out in those paragraphs arise solely out of delay. AD points out that in addition to delay, those paragraphs describe allegations, *inter alia*, of inaccurate and insufficient design, the failure to advance claims, and increased scope of work because of AMEC's actions or inactions.

[150] Perhaps AD's allegations extend beyond delay. In argument, AMEC conceded that it was not seeking to strike those paragraphs from the Amended Statement of Claim in their entirety. AMEC seeks dismissal in respect of the issue of claims arising out of delay itself. AD responded that summary judgment with respect to delay alone may not result in any savings because there would be a need to desegregate the non-delay and delay aspects of the claims. I am somewhat sympathetic to AD's position in this regard, but nevertheless I am of the view that it would be appropriate to grant summary judgment on the terms proposed by AMEC. Separating delay from non-delay claims may be difficult and might require the assistance of experts. In other instances, the question may be straightforward and summary judgment in respect of the issue now may significantly reduce the complexity and the number of issues at trial. Where a summary judgment in respect of an issue is possible on the merits, and has a significant potential to shorten the proceedings, it should be granted.

Summary: Delay Claim

[151] The claims of AD "arising from any delay in the performance of the Work, whether occurring in the past, the present or the future and howsoever caused" are dismissed.

Costs

[152] AMEC has been significantly and largely successful on the two Summary Applications it has brought. It has asked for solicitor-client costs or enhanced costs. I decline to give solicitor-client or enhanced costs. There will however, be costs for each Summary Application separately, including the hearing of each. The Court could have issued a separate judgment in respect of each application rather than one judgment dealing with the two applications. Accordingly, there will be two sets of costs to be assessed on double Column 5 of Schedule "C" of the *ARC* in favour of AMEC and two separate judgments prepared and entered. If there is any dispute as to quantum, the parties may return the matter to this Court.

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Heard on the 10th and 11th days of September, 2014.
Dated at the City of Calgary, Alberta this 18th day of February, 2015.

Neil Wittmann
C.J.C.Q.B.A.

Appearances:

Matthew Diskin
Salim Dharssi
Zarya Cynader
for Attila Dogan Construction and Installation Co. Inc.

David Tupper
Chris Petrucci
for AMEC Americas Limited, Formerly AMEC E&C Services Limited
and Agra Monenco Inc.

Court of Queen's Bench of Alberta

Citation: Canadian Natural Resources Limited v. Encana Oil & Gas Partnership, 2007 ABQB 460

Date: 20070709
Docket: 0701 02752
Registry: Calgary

2007 ABQB 460 (CanLII)

Between:

Canadian Natural Resources Limited

Applicant

- and -

Encana Oil & Gas Partnership

Respondent

Reasons for Judgment
of the
Honourable Madam Justice C.L. Kenny

Background

[1] This matter involves the interpretation of an agreement between Canadian Natural Resources Limited ("CNRL") and Encana Oil & Gas Partnership ("Encana") which arose when CNRL exercised a right of first refusal ("ROFR").

Facts

[2] AEC Oil and Gas (now Encana) and CNRL entered into a Pooling Agreement on November 27, 2000 (the "Pooling Agreement") with respect to certain lands in the Ladyfern area of British Columbia. Each obtained a 50% interest in the pooled land.

[3] The Pooling Agreement incorporated by reference the 1990 CAPL Operating Procedure (the "CAPL Operating Procedure"), thus granting to CNRL a ROFR.

[4] By written agreement dated October 24, 2005 (the "Marauder Farmout Agreement"), Encana agreed to farm out its rights to drill wells on certain lands including pooled lands to Marauder Resources West Coast Inc. ("Marauder").

[5] Two of the 15 parcels of land in the Marauder Farmout Agreement were located within the pooled lands with CNRL and were therefore subject to the ROFR to CNRL.

[6] Prior to entering into the Marauder Farmout Agreement, Encana asked CNRL if they were interested in entering into a farmout agreement on the same terms and conditions as the Marauder Farmout Agreement. CNRL indicated they were not interested.

[7] The Marauder Farmout Agreement granted Marauder the right to decide the locations of their test wells. The sites chosen determined what lands Marauder could earn on completion of the test wells.

[8] Marauder selected their test well locations for their 2006 drilling program. Encana determined that the disposition of the pooled lands affected by the selection fell within the five percent exception set out in the CAPL Operating Procedure. They so advised CNRL, who appeared satisfied with the information.

[9] On November 30, 2006, Encana received Marauder's selection of their three test-well locations and earning lands for 2007. Encana determined that Marauder's selection gave them the right to earn a working interest in pooled lands. The interest was, therefore, subject to a ROFR to CNRL.

[10] On December 6, 2006, Encana provided CNRL with a Notice of Disposition and Request for Waiver of First Refusal (the "Notice of Disposition"). On January 5, 2007, CNRL elected to exercise its ROFR and served written notice to that effect on Encana.

[11] The Notice of Disposition required the first test well to be drilled by January 15, 2007 and all of the farmee's obligations with respect to drilling to be completed by April 30, 2007. CNRL decided they could not meet this deadline and purported to invoke a clause in the Marauder Farmout Agreement which provided for extensions.

[12] CNRL followed up with correspondence which, among other things, indicated they wished to change the drilling time frames and also wanted to select their own drill sites rather than the sites chosen by Marauder.

[13] CNRL did not drill the test wells. As a result of the failure of CNRL to drill the test wells at the locations agreed to and to meet the contractual timelines for completion of the test wells, Encana served written notice of default pursuant to the Marauder Farmout Agreement and the Notice of Disposition which provide for $300,000 in liquidated damages for each test well not drilled.

Issues

[14] The following issues fall to be determined:

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1. Is CNRL entitled under the ROFR to choose its own locations for the three test well sites on the pooled lands?

2. Is CNRL entitled to more time to drill its three test wells or is it bound by the timelines provided in the Pooling Agreement entitling Encana to invoke the default and liquidated damages clause?

3. Was CNRL entitled to receive a ROFR disposition notice with respect to all of the pooled land?

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Documents

[15] The following relevant documents were provided by the parties.

a) Pooling Agreement

[16] As noted above, the Pooling Agreement between CNRL and Encana incorporated by reference the CAPL Operating Procedure. Of interest therein is Article XXIV which grants to CNRL a ROFR exercisable in accordance with Clause 2401 Alternate B. The relevant portions of this clause are as set out in Appendix “A” hereto.

b) Marauder Farmout Agreement

[17] The relevant portions of the Marauder Farmout Agreement between Encana and Marauder are set out in Appendix “B” hereto. Attached to the Marauder Farmout Agreement as Schedule “A” is a list of 15 parcels of land; 13 of those are owned 100% by Encana and 2 are pooled lands with CNRL subject to the ROFR. The latter were identified as such in the Schedule.

c) Notice of Disposition

[18] The relevant portions of the Notice of Disposition are set out in Appendix “C” attached hereto.

Events Leading to Court Application

a) December 6, 2006

[19] Encana sent the Notice of Disposition, particulars of which are set out in Appendix C, to CNRL.

b) January 4, 2007

[20] CNRL sought further information from Encana. Of note in that email correspondence are two paragraphs which read as follows:

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(4) By exercising the ROFR, CNRL would also have the same access to the joint option lands. CNRL would be required to enter a farmout on similar terms agreed to by Marauder. Obviously, such a farmout could not create a conflict with the existing Marauder Agreement.

(5) Confirmation that the test well location is d-62-F/94-H-1 and NOT d-63-F/94-H-1 which is shown on some of the AFEs and as well as the OGC licence site. The test well location is d-62-F/94-H-1 as indicated in the ROFR Notice. I believe that two locations were licensed back in November as there was some uncertainty as to which location would be chosen.

c) January 5, 2007

[21] CNRL exercises its preferential ROFR by signing the Notice of Disposition as follows:

> "The undersigned hereby elects to exercise its preferential right of first refusal to acquire the Subject Interest on the same terms and conditions offered to Marauder."

d) January 12, 2007

[22] CNRL sent a letter to Encana invoking the provisions of Clause 14 of the Marauder Farmout Agreement. The relevant portions of the letter read as follows:

> "In our sole opinion, governmental restrictions have made the Test Well drillsites inaccessible and preclude us from drilling such wells on or before January 15, 2007. Accordingly, pursuant to the provision described in Clause 14., CNRL is granted an extension to spud such wells until such time as governmental restrictions and ground conditions permit us to access the drillsite together with such reasonable additional time as may be necessary to permit us to organize and effect the spudding thereof."

e) January 12, 2007

[23] Encana acknowledged receipt of the letter and offered to assist in organizing access to the drillsites. They also attached a draft of a farmout agreement (the "CNRL Farmout Agreement") to be executed by the parties. The CNRL Farmout Agreement defined the "Test Well" as the three well sites chosen by Marauder pursuant to the Marauder Farmout Agreement. These were the same three sites identified in the Notice of Disposition.

f) January 19, 2007

[24] CNRL sent correspondence to Encana requesting certain amendments to the Farmout Agreement. In particular, they asked that the identified test wells be deleted and that “Test Well” be defined as in the Marauder Farmout Agreement - that is, that the farmee choose and commit to drill three test wells. This would have allowed them to select their own test well sites. They also asked that the timelines set forth in the Notice of Disposition and in the proposed CNRL Farmout Agreement be re-negotiated.

g) January 26, 2007

[25] Encana responded to CNRL saying that by acceptance of the Notice of Disposition, the parties are under certain legal obligations. While Encana was prepared to make some of the amendments suggested by CNRL, they were not prepared to change the definition of “Test Wells” or to allow CNRL to select their own test well locations. Encana was also not prepared to change the commitment dates which had been agreed to for completion of the farmee’s obligations.

h) February 14, 2007

[26] CNRL responded to Encana saying that, in their view, the Marauder Farmout Agreement allowed CNRL to pre-select in writing their test wells. They then went on to advise which test wells they intended to drill. One of the test wells selected by CNRL was the same as one selected by Marauder. The other two were in different locations. CNRL advised that they would have the first well drilled and tied in the current winter drilling season and the two remaining wells drilled and tied in in the 2007-2008 winter drilling season. They advised that they would proceed with a Court application in the event that Encana did not agree with their position.

Issue No. 1

1. Is CNRL entitled under the ROFR to choose its own locations for the three test well sites on the pooled lands?

Parties’ Positions

[27] Encana’s position is that the farmee, Marauder, was entitled under the Marauder Farmout Agreement to select the sites where it would drill test wells and, accordingly, the lands it would earn. Only once Marauder selected earning lands within the lands affected by the Pooling Agreement was the ROFR triggered because only then was there a possible disposition of a working interest in the pooled lands. The selection of earning lands within the pooled lands by Marauder gave rise to CNRL’s peremptory option to receive those selected lands for the same price. It did not give rise to any entitlement to select other earning lands or to select test well sites on entirely different lands as if CNRL were itself the farmee.

[28] CNRL says that the purpose underlying the grant of a ROFR is to protect the parties’ respective interests by ensuring that if one party decides to dispose of all or a portion of its

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interest to a third party, the other party has the pre-emptive right to acquire that interest first on the same terms and conditions as is offered to the third party. In this way, a party is protected against having an unwanted co-owner foisted upon it. Clause 3 of the Marauder Farmout Agreement vests in the farmee the right to choose the test well locations. CNRL says that having exercised its preferential ROFR, it is entitled to the same rights that the original farmee had. Were it otherwise, the ROFR would be diminished and negatively impacted by the choices and decisions made by the original farmee, who is a stranger to the Pooling Agreement and the ROFR.

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Discussion

[29] Under the CAPL Operating Procedure, the ROFR arises when either party wishes to *dispose of any of its working interest* in the pooled lands. Encana argues that there is no disposition of working interest until Marauder selects its test well sites. They may select test well sites on land owned 100% by Encana in which case there is no disposition of a working interest in pooled lands.

[30] CNRL says they should have been given notice of disposition upon Encana signing the Marauder Farmout Agreement. As indicated earlier, the Marauder Farmout Agreement includes a parcel of lands, the majority of which are owned 100% by Encana. It would not make sense that Encana would be required to provide the ROFR notice when they did not even know on which parcels of land Marauder would elect to drill. There could not be a disposition of pooled lands subject to the ROFR until those selections were made.

[31] In fact, it appears that the selection of test wells made by Marauder for the 2006 drilling program included lands which were subject to an exception under the CAPL Operating Procedure and no notice of disposition was given. Notice of the exception was given to CNRL in a timely fashion. CNRL made inquiries with respect to the total net hectares involved. That information was provided to CNRL and acknowledged by them. No further inquiries were made.

[32] When Marauder selected their three test wells for the 2007 drilling program, Encana determined that, by drilling on those particular sites, Marauder would earn a working interest in those lands. Once Marauder selects the sites for its test wells, the Marauder Farmout Agreement is very specific as to what Marauder must do and the time frames in which it must do it in order to earn its interests in the farmout lands.

[33] CNRL takes no issue with the Notice of Disposition other than the timing of it; I will deal with that as Issue No. 2. Included in the material terms in the Notice of Disposition are the number of wells, the timing for completion of the farmee's obligations, the identification of the three test well sites in the test well block and the repercussions for failure to meet obligations.

[34] On January 5, 2007, CNRL signed the Notice of Disposition, thereby exercising its ROFR to acquire the subject interests on the same terms and conditions offered to Marauder.

[35] Other than the correspondence referred to above, there is no evidence before the Court that any issues were raised by CNRL with respect to the location of the drillsites or the timing of the obligations prior to the exercise of their ROFR. It was certainly open to CNRL to raise those issues prior to exercising the ROFR. They did not do so. Nothing was said until the letter of January 12, 2007 indicating that CNRL would be unable to drill on or before January 15, 2007, which was the date required in the Notice of Disposition for the first test well to be spudded

[36] That same day, January 12, 2007, the draft CNRL Farmout Agreement was provided by Encana. It was generally on the same terms as the Marauder Farmout Agreement and incorporated the terms set out in the Notice of Disposition. It was at that point, by letter dated January 19, 2007, that CNRL first requested amendments to the CNRL Farmout Agreement, the most relevant of which are the dates by which their obligations as farmees would be completed and the option to CNRL to select alternate test well locations.

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The Law

[37] The purpose of the ROFR is to "prevent a party from being forced into an undesired partnership": *DeBeers Canada Inc. v. Shore Gold Inc.* (2006), 278 Sask. R. 226, 2006 SKQB 154 at para. 46, aff'd. (2006), 285 Sask. R. 152, 2006 SKCA 58. See also *Calcrude Oils Limited v. Langiven Resources* (2004), 349 A.R. 353, 2004 ABQB 1051 at para. 55. The party electing to dispose of a working interest must first allow the other party the right to acquire the interest on the same terms as offered to the third party. See *Calcrude* at. para. 54 and *Canadian Long Island Petroleums Ltd. v. Irving Wire Products,* [1973] 2 W.W.R. 526 (Alta. T.D.), aff'd. [1973] 5 W.W.R. 99 (Alta. C.A.), aff'd. [1975] 2 S.C.R. 715 at para. 35.

[38] CNRL does not have the same broad rights that Marauder has under the Marauder Farmout Agreement. Marauder may select test well sites anywhere on fifteen parcels of land, not necessarily the two parcels of pooled land. Therefore, when CNRL exercises its ROFR, it does not acquire all of the rights Marauder has under the Marauder Farmout Agreement. For instance, it does not have the right to drill on Encana lands. That is a right that only Marauder has pursuant to the Marauder Farmout Agreement.

[39] CNRL argues that they step into the place of Marauder in the Marauder Farmout Agreement once they exercise their ROFR. I disagree. In the circumstances of this case, the Marauder Farmout Agreement is a much broader agreement encompassing property and rights over which there is no ROFR to CNRL. (*Southland Canada Inc. v. Zarcan Equities Ltd.* (1999), 254 A.R. 59 (Q.B.) at paras. 92 and 93.) CNRL is limited to any rights they may have under the ROFR as it relates to a disposition by Encana of working interests in pooled lands.

[40] CAPL clause 2401 Alternate B sub (d) says a Notice of Acceptance creates "a binding contractual obligation upon the disposing party to sell, and upon an offeree giving a notice of acceptance to purchase, for the applicable price, all of the working interest included in such disposition notice on the terms and conditions set forth in the disposition notice".

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[41] Some of the correspondence between the parties between the date of the Notice of Disposition and the date of acceptance is relevant to these issues. In particular, upon receipt of the Notice of Disposition, CNRL followed up with confirmation and questions. What was not said in that exchange is as important as were the queries made in the correspondence. In particular, there is no mention whatsoever of the drillsites or any suggestion that CNRL is requesting confirmation that they are entitled to drill their own test sites at locations chosen by them and not at locations chosen by Marauder. There is also no mention of the timing required with respect to the drilling. Again, this is clearly set out in the Notice of Disposition and no mention is made by CNRL at that time about the need to extend the dates because of late notice or any other reason.

[42] Also, under the CAPL Operating Procedure, CNRL could have indicated that they wanted cash rather than an earned interest in the land and, in the event the parties could not agree on a cash value for the consideration, they were entitled to seek arbitration. These options were not raised by CNRL. What happened instead was that Encana issued the Notice of Disposition, confirmed some matters that CNRL had questions or concerns about and then CNRL exercised its ROFR. In doing so, they specifically referred to the interest described in the Notice of Disposition dated December 6, 2006.

[43] In my view, the terms of the Notice of Disposition are clear. The disposition here is for non-cash consideration. Under the ROFR, there is specific provision for the situation where the consideration cannot be matched in kind. In the event that CNRL felt that they were unable to meet the timelines, they had recourse to the CAPL Operating Procedure. They chose not to invoke that clause. By not invoking that clause and exercising their ROFR, they indicated their ability and willingness to comply with the provisions in the Notice of Disposition, including specified timelines.

[44] Encana argues that the timing of drilling has huge economic significance and it is for that reason that time periods were spelled out in the Marauder Farmout Agreement and in the Notice of Disposition. As Encana asserts, it is important from a business point of view that the gas flows as quickly as possible and to have it flow a year later has significant economic repercussions.

[45] I am satisfied that CNRL is bound by the terms of the Notice of Disposition. The ROFR, once exercised, creates binding legal obligations. It is a contract. The contract contains the location of the working interests to be earned. What Encana is disposing of and what Marauder is entitled to earn relates directly to the well sites chosen. CNRL is not entitled under the ROFR to choose its own locations for the three test well sites.

Issue No. 2

2. Is CNRL entitled to more time to drill its three test wells or is it bound by the timelines provided in the Pooling Agreement, thus entitling Encana to invoke the default and liquidated damages clause?

[46] CNRL provided a letter to Encana on January 12, 2007 purporting to invoke the provisions of clause 14 of the Marauder Farmout Agreement. In that correspondence, they said "in our sole opinion, governmental restrictions have made the Test Well drillsites inaccessible and preclude us from drilling such wells on or before January 15, 2007." Through the Affidavit of Mr. Hunter, CNRL indicated that the delay in receiving the Notice of Disposition also negatively impacted the timing for the drilling of the test well. In particular, they note that the Marauder Farmout Agreement was signed in October of 2005 but CNRL did not acquire its ROFR until December 2006. Mr. Hunter further comments that the need for a judicial determination of CNRL's rights to select their own test well drilling locations has impacted their ability to drill the test wells. He goes on to cite the demand for and usage of drilling equipment generally and the need for governmental regulatory approvals as further obstacles precluding CNRL from completing the drilling of the test wells prior to April 30, 2007.

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[47] CNRL says that clause 14. of the Marauder Farmout Agreement refers to "in the Farmee's sole opinion". In their view, they are entitled to make the decision as to whether governmental restrictions or ground conditions make the test well site inaccessible.

[48] Encana, by contrast, says that "sole opinion" cannot be exercised in an arbitrary or fickle manner. In their view, CNRL's opinion must be reasonable and must be an opinion held in good faith. See *869125 Ontario Inc. v. Angeli* in para. 30 quoting from *Greenburg v. Meffert*. The clause further defines the parameters of the opinion, requiring it to relate to governmental restrictions or ground conditions.

[49] The timelines are tight. A Notice of Disposition was sent out December 6, 2006. The first test well was to be spud by January 15, 2007 with all of the farmee's obligations completed by April 30, 2007. That was the arrangement entered into with Marauder and the basis upon which Marauder was prepared to complete.

[50] There is nothing indicating that governmental restrictions or ground conditions affected Marauder when they made their well site selections and no objective evidence that those conditions affected CNRL other than their statement that they did. It appears that the primary reasons for not drilling were the dispute with respect to drilling locations and CNRL's inability to have the necessary equipment available to do the drilling. Those are not reasons entitling a party to an extension under Clause 14.

[51] CNRL further relies on the length of time which Marauder had under the Marauder Farmout Agreement to get its drilling program in order. They suggest that, by virtue of the tight timelines under which they were operating pursuant to the ROFR, they are entitled to additional time to fulfill their obligations and, should Encana refuse such additional time, they are breaching their obligations of reasonableness and good faith. CNRL suggests that they must be put in the same position as Marauder as the original farmee so that they might have a reasonable opportunity to earn their interest.

[52] Unfortunately for CNRL, those are not the terms of the ROFR. Encana has done nothing which would breach its obligations of reasonableness and good faith. Immediately upon becoming aware of the need to issue a Notice of Disposition, they did so. They answered all inquiries with respect to the Notice of Disposition in a timely fashion. They provided a draft CNRL Farmout Agreement in a reasonable period after the exercise by CNRL of their ROFR. They had every reason to expect that CNRL, having exercised the ROFR, would abide by the terms of it. It is akin in my view to the exercise of a ROFR on the sale of a home when a prospective third party purchaser comes forward with an Offer to Purchase with a set closing date, a set price and set conditions. The party exercising the ROFR must decide whether or not they can meet those terms and conditions. If so, they exercise their ROFR or negotiate adjustments prior to exercising the ROFR. Once the ROFR is exercised, they are bound by the same terms and conditions as the third party purchaser and cannot be heard later to complain that they are unreasonable.

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[53] While it may seem harsh, these parties are sophisticated business entities and the entire industry depends on the ability to enter into and rely on contracts. In this case, once the ROFR was exercised, it became a binding contract. That was the expectation of the parties entering into it. It is not, as Encana says, the right to enter into negotiations. If CNRL was unable to comply with the Notice of Disposition under the same arrangement Marauder was, then they had options available to them which they chose not to exercise. As such, I find that CNRL is not entitled to more time to drill its three test well locations.

[54] This, then, raises the issue of the liquidated damages invoked on default. Both the Marauder Farmout Agreement and the Notice of Disposition provide that if the farmee fails to drill the test well and complete its obligations, the farmee shall pay to the farmor $300,000 as liquidated damages for each test well not drilled within 10 business days of being provided with written notice of such default.

[55] CNRL did not drill the test wells. Encana provided a Notice of Default and seeks its contractual rights. In exercising its ROFR, CNRL acknowledged the default provisions and the payment of liquidated damages. No basis has been provided to suggest that such damages are not properly payable pursuant to the contract. As such, Encana is entitled to liquidated damages in the sum of $900,000.

Issue No. 3

3. Was CNRL entitled to receive a ROFR disposition notice with respect to all of the pooled land?

[56] CNRL advises that, based on their review of "publicly available information" and of Schedule "A" of the Marauder Farmout Agreement, it appears that Marauder had selected two other locations to drill wells located on the pooled lands. CNRL says that they did not receive any ROFR notice from Encana with respect to those lands. While CNRL is not specific with respect to the wells that they are talking about, Encana makes the assumption that the test wells

they are referring to are the test wells included in Marauder's 2006 drilling program. As indicated earlier, CNRL was given notice of those test well sites and advised that in Encana's opinion they fell within the exception under the CAPL Operating Procedure being a net disposition of less than 5% of the total net hectares being disposed of. Encana was therefore not required under the CAPL Operating Procedure to provide a Notice of Disposition with respect to those lands. As discussed under Issue No. 1, the disposition notice is required only where Encana intends to dispose of part of its working interest in the pooled land. That occurred with respect to the lands which were the subject of the Notice of Disposition. Only when Marauder selected test well sites that resulted in a disposition of a working interest in pooled lands was a Notice of Disposition required. Therefore, in answer to Issue No. 3, Encana was not obliged to provide a ROFR to CNRL with respect to all of the pooled lands.

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Summary

[57] On the basis of the foregoing analysis, I have arrived at the following conclusions:

a) CNRL was not entitled to select test well sites pursuant to the Pooling Agreement.

b) CNRL was not entitled to an extension of time to drill and complete the test wells.

c) CNRL is in breach of the Pooling Agreement.

d) Encana is entitled to liquidated damages in the amount of $900,000 plus interest thereon.

[58] Costs shall be in the cause on a party and party scale.

Heard on the 18th day of May, 2007.
Dated at the City of Calgary, Alberta this 9th day of July, 2007.

C.L. Kenny
J.C.Q.B.A.

Appearances:

Mr. Edward W. Halt, Q.C. of Peacock Linder & Halt LLP
for the Applicant

Mr. William T. Corbett, Q.C. of Field LLP
for the Respondent

Appendix A

Excerpts from Article XXIV

Disposition of Interests

2401 - Right to Assign, Sell or Dispose - Other than as required and allowed one party to another elsewhere in this Operating Procedure and subject to Clause 2402, a party shall not dispose of any of its working interest, whether by assignment, sale, trade, lease, sublease, farmout or otherwise, without first complying with the provisions of Alternate ____ below (Specify A or B): . . .

Alternate B:

(a) The party wishing to make the disposition (in this Article called “the disposing party”) shall, by notice, advise each other party (in this Article called an “offeree”) of its intention to make the disposition, including in such notice a description of the working interest proposed to be disposed, the identity of the proposed assignee, the price or other consideration for which the disposing party is prepared to make such disposition, the proposed effective date and closing date of the transaction and any other information respecting the transaction which the disposing party reasonably believes would be material to the exercise of the offerees’ rights hereunder (such notice in this Article called “the disposition notice”).

(b) In the event the consideration described in the disposition notice cannot be matched in kind and the disposition notice does not include the disposing party’s bona fide estimate of the value, in cash, of such consideration, an offeree may, within seven (7) days of the receipt by the offerees of the disposition notice, request the disposing party to provide such estimate to the offerees, whereupon the disposing party shall provide such estimate in a timely manner and the election period provided herein to the offerees shall be suspended until such estimate is received by the offerees.

(c) In the event of a dispute as to the reasonableness of an estimate of the cash value of the consideration described in the disposition notice or provided pursuant to Subclause (b), as the case may be, the matter shall be referred to arbitration under the provisions of the *Arbitration Act* or Ordinance of the province, state or territory where the joint lands are situated within seven (7) days of the receipt of such estimate. The disposing party and the applicable offeree shall thereupon diligently attempt to complete such arbitration in a timely manner. The equivalent cash consideration determined in such arbitration shall thereupon be deemed to be the sale price for the working interest described in the disposition notice.

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(d) Within the later of: I) thirty (30) days from the receipt of the disposition notice, as modified by any suspension pursuant to Subclause (b) of this Alternate B; or ii), if applicable, fifteen (15) days from receipt of notice of the arbitrated value determined pursuant to the preceding Subclause, an offeree may give notice to the disposing party that it elects to purchase the working interest described in the disposition notice for the applicable price (in this Article called a "notice of acceptance"). A notice of acceptance shall create a binding contractual obligation upon the disposing party to sell, and upon an offeree giving a notice of acceptance to purchase, for the

applicable price, all of the working interest included in such disposition notice on the terms and conditions set forth in the disposition notice. However, if more than one offeree gives a notice of acceptance, each such offeree shall purchase the working interest to which such notice of acceptance pertains in the proportion its working interest bears to the total working interest of such offerees . . .

2402 - Exceptions to Clause 2401 - Clause 2401 shall not apply in the following instances, namely:

. . . (d) A disposition by a party in which the net hectares being disposed of by that party in the joint lands represent less than five percent (5%) of the total net hectares being disposed of by that party pursuant to that disposition.

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Appendix B

3. Test Well

A. Subject to surface accessibility and government regulatory approvals, on or before April 30, 2006 Farmee shall Spud and thereafter drill to Contract Depth, complete, equip, tie-in and/or abandon 10 Test Wells at locations of its choice on the Farmout Lands (the "2006 Program") at its sole cost, risk and expense. The first Test Well shall be Spud on or before January 5, 2006.

B. On or before April 30, 2006 Farmee shall, on a best efforts basis, Spud and thereafter drill to Contract Depth, complete, equip, tie-in and/or abandon up to 5 additional Test Wells on the Farmout Lands at its sole cost, risk and expense. For clarity, it is understood that all operations associated with the Test Wells and Farmee's obligations with respect thereto as described in subclause 3A hereof shall be completed on or before April 30, 2006.

C. On or before April 30, 2007 Farmee shall Spud and thereafter drill to Contract Depth, complete, equip, tie-in and/or abandon that number of additional Test Wells (the "2007 Program") such that an aggregate of 20 Test Wells shall have been drilled under this Agreement. The first Test Well for the 2007 drilling program shall be Spud on or before January 15, 2007 and Farmee's obligations in respect thereof shall be completed on or before April 30, 2007.

D. A minimum of 30 days prior to Spudding the first Test Well, Farmee shall pre-select by notice in writing to Farmor, all Test Well locations for the 2006 Program, including the locations of the additional Test Wells to be drilled under clause 3 B, as well as one additional laterally adjoining section per Test Well to be earned by drilling such Test Well (collectively the "Test Well Block"). Farmee shall select a Test Well section and a laterally adjoining section that are owned by EnCana as to an undivided 100% interest (the "ECA 100% Lands"). Any section of land that is selected as a laterally adjoining section shall not qualify, and may not later be selected as a Test Well section. In the event that Farmee selects a section for a Test Well that is not on ECA 100% Lands, then the additional laterally or diagonally adjoining section selected for earning by Farmee may not be located on ECA 100% Lands. A minimum of 80% of the Test Wells shall be located on ECA 100% Lands. Notwithstanding the foregoing, Farmee may select a diagonally adjoining section, as an additional earned section, in respect of a Test Well which may be located in a spacing unit containing "3-A", "77-A", "83-B" and "22-F" wherein reference to a number indicates a unit and reference to a letter indicates a block under the NTS system. The foregoing provisions of this subclause shall apply mutatis mutandis in respect of the 2007 Program, provided

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that Farmee shall make such selection 30 days prior to Spudding the first Test Well under the 2007 Program.

E. Subject to this clause and Article 3.00 of the Farmout & Royalty Procedure, the Farmee will earn the following interests in the Farmout Lands, to the base of the deepest formation evaluated by drilling to Contract Depth, but no lower than the Bluesky formation, and fully logged in each of the Test Wells:

a) 60% of the Farmor's Working interest in the Test Well Block unit down to the base of the deepest formation evaluated but no deeper than the Bluesky formation.

9. Performance Default

In the event Farmee, subject to force majeure, fails to drill the Test Wells and complete its obligations contemplated in Clause 3 of this Agreement, Farmee shall pay to Farmor $300,000.00 for not drilling each Test Well as liquidated damages within 10 business days of Farmor providing Farmee with written notice of such default. It is further agreed that $300,000.00 is a genuine pre-estimate of the damages and Farmor does not need to establish that any actual damage occurred upon the failure of Farmee to complete the well commitment, it being the intention of the Parties to establish the damage that can be foreseen from the failure of Farmee to complete its Test Well commitments at the time of making this Agreement. Upon making such payment, this Agreement shall terminate between the Parties and Farmee shall be fully released from any further liability hereunder. If Farmee diligently and conscientiously sought surface access and has documented proof, to Farmor's satisfaction, of such actions but was unable to gain surface access then surface access shall qualify as an event of force majeure and this performance default clause shall not apply.

11. Right of First Refusal

A. If any portions of the pre-selected Test Well Block are governed by a Prior Agreement that is subject to a Right of First Refusal ("ROFR"), the Farmor will serve all required notices within 10 days of receipt of the farmee's pre-selected Test Well Block. Each notice will include a request for waiver of the ROFR.

B. The Farmee will not initiate operations set forth in Clause 3 until the ROFR has been waived by all third parties or the provisions of Clause 11C are satisfied.

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C. If the Test Well Block is encumbered by a ROFR, and if the Parties agree that the terms of the ROFR cannot be matched in kind, the Test Well Block will be assigned a cash value. If the Parties cannot come to agreement on the value of the lands, a mutually appointed independent land consultant will determine the value. If the ROFR on the Test Well spacing unit is exercised by a third party, the consideration shall be paid to the Farmor. If the consideration can be matched in kind, then the number of Test Wells to be drilled by Farmee under this Agreement shall be reduced accordingly. The Farmee will then have the right to elect to drill a Test Well on the remaining Farmout lands.

14. Reasonable Extension

If in Farmee's sole opinion, either or both governmental restrictions and ground conditions make the Test Well drillsite inaccessible and preclude Farmee from drilling such well on or before the date provided herein, Farmor shall grant Farmee an extension to Spud such well until such time as either or both governmental restrictions and ground conditions permit Farmee to access the well drillsite together with such reasonable additional time as may be necessary to permit Farmee to organize and effect the Spudding thereof.

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Appendix C

Re: Notice of Disposition and Request for Waiver of Right of First Refusal Pursuant to a Pooling Agreement Dated November 27, 2000 Between AEC Oil & Gas and Canadian Natural Resources Limited (hereinafter referred to as "the Agreement")
Ladyfern area British Columbia
EnCana File Number: C008417

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EnCana Oil & Gas Partnership ("EnCana") has entered into a Farmout Agreement dated October 24, 2005 (the "Farmout Agreement"), with Marauder Resources West Coast Inc. ("Marauder") whereby EnCana has agreed to farmout to Marauder certain lands, including those set forth and described in Schedule "A" attached hereto (hereinafter described as the "Subject Interests").

Pursuant to the Agreement, your company, as a party to the Agreement or successor in interest thereto, holds a right of First Refusal in the Subject Interests. Your company may elect to exercise its Right of First Refusal to acquire the Subject Interests, in accordance with the terms and conditions of the 1990 CAPL Operating Procedure attached to and made part of the Agreement (the "Operating Procedure").

EnCana hereby gives notice pursuant to the Operating Procedure of its intention to make a disposition of the Subject Interests to Marauder by way of farmout. The pertinent terms and conditions of this transaction are as follows:

1. The Effective Date is October 24, 2005.

2. Consideration comprises the obligations provided in the Farmout Agreement. Accordingly, if you exercise your Preferential Right to Purchase pursuant to this notice, you will be required to enter a farmout agreement with EnCana on the identical terms offered to Marauder within 30 days of exercising such rights.

3. The material terms of the Farmout Agreement include:

   (I) Commitment to drill to Contract Depth, complete, equip, tie-in and/or abandon three (3) wells with the first Test Well being Spud on or before January 15, 2007. All Farmee's obligations shall be completed on or before April 30, 2007 . . .

   (iv) Test Well Block means the Test Well spacing unit for the proposed wells at: a-001-F/94-H-1; d-018-G/94-H-1; and d-062-F/94-H-1, plus an additional laterally or diagonally adjoining section to that Test Well spacing unit that does not comprise lands held 100% by EnCana or its affiliates. Farmee must select its earning lands 30 days prior to spudding its first Earning Well.

(vi) In the event Farmee, subject to force majeure, fails to drill the Test Wells and complete its obligations, Farmee shall pay to Farmor $300,000.00 for not drilling each Test Well as liquidated damages within 10 business days of Farmor providing Farmee with written notice of such default.

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Court of Queen's Bench of Alberta

Citation: Blaze Energy Ltd v Imperial Oil Resources, 2014 ABQB 326

2014 ABQB 326 (CanLII)

Date: 20140530
Docket: 1401 04421
Registry: Calgary

Between:

Blaze Energy Ltd.

Plaintiff

- and -

Imperial Oil Resources, Whitecap Resources Inc., Keyera Partnership, and Keyera Corp.

Defendants

Reasons for Judgment
of the
Honourable Madam Justice F. Schutz

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Summary

[1] Imperial Oil Resources ("**IOR**") and Blaze Energy Ltd. ("**Blaze**") were parties (as successors to the original parties) to two separate agreements.

[2] One is an owners' agreement (the "**1960 Lands Agreement**") with respect to oil and gas interests or oil and gas leases located in four specific parcels of land (the "**1960 Lands**"). IOR and Blaze own some of the 1960 Lands on a 50/50 basis. The other land interests under the 1960 Lands Agreement are owned by parties not involved in this action.

[3] The other is a 1988 Construction Ownership and Operation Agreement (the "**1988 CO&O**") regarding the 6-28 West Pembina Gas Plant (the "**Plant**") which was built after 1988. Prior to selling its interest to Whitecap Resources Inc. ("**Whitecap**"), IOR owned 90% of the Plant. Blaze owns 8% of the Plant. The remaining 2% is held among three other parties, none of whom have an interest in the 1960 Lands.

[4] The correct interpretation of some of the wording in these agreements is at the heart of this matter, in particular Blazes' rights of first refusal ("**ROFR**").

[5] IOR's evidence is that it agreed to dispose of and sell $855 million in assets ("**Disposition Offer**") to Whitecap. Disposition Offer assets included IOR's entire interest (90%) in the Plant together with IOR's entire working interest in the "**West Pembina Area**" (as defined in the 1988 CO&O and including, but not limited to, the 1960 Lands).

[6] Whitecap's evidence is that it agreed to dispose of and sell $113 million of the Disposition Offer assets to Keyera Partnership ("**Keyera**"). This sale disposed of 85% of Whitecap's ownership interest in the Plant which was sold to Keyera in conjunction with a portion of the West Pembina Area lands. (Whitecap retained its remaining 5% interest in the Plant.)

[7] In its April 23, 2014 Statement of Claim at para 10 "Blaze claims a ROFR on IOR's sale of the Lands and the *corresponding* interest in the Plant to Whitecap, under the CO&O and the 1960 Operating Agreement." [italics mine]

[8] In its April 23, 2014 Statement of Claim at para 11 "Blaze also claims a ROFR on Whitecap's sale of a portion of the Lands and the *corresponding* interest in the Plant to Keyera under the CO&O and 1960 Operating Agreement." [italics mine]

[9] (Blaze defines in its claim, "Lands" to mean certain petroleum and natural gas reserves, wells, and facilities nearby the Plant located in the West Pembina area of the Province of Alberta.)

[10] Article 1102 of the 1988 CO&O provides for a right of refusal in respect of Plant interests ("**Plant ROFR**").

[11] Article 1101 of the 1988 CO&O provides an exemption to requiring issuance of a Plant ROFR. Article 1101 says: "Any Owner may, without restriction, dispose of an interest in the Plant in conjunction with the disposal of the Owner's corresponding working interest in the lands in the West Pembina Area from which Gas is being produced into the Plant...." ("**Gas**" and "**West Pembina Area**" are defined contractual terms.)

[12] IOR, Whitecap and Keyera assert that this in respect of the sales transactions relating to the Disposition Offer assets, these exact dispositions under Article 1101 occurred; therefore, the Article 1101 Plant ROFR exemption applies: IOR and Whitecap, respectively, say they disposed of their interest in the Plant in conjunction with the disposal of their corresponding working interest in the lands in the West Pembina Area from which Gas is being produced into the Plant. Keyera supports their respective positions.

[13] On May 2, 2014 Blaze issued an Amended Statement of Claim. At paras 10 and 11 of the Amended Statement of Claim, the word "*corresponding*" is deleted. [italics mine]

[14] On April 29, 2014, Chief Justice Wittmann granted a Consent Order for this expedited trail.

[15] The Consent Order defines "**Assets**" to mean: "The ownership interest in the gas plant under the terms of the Agreement for the Construction, Ownership and Operation of the West Pembina 6-28 Gas Plant and the lands under the Operating Agreement dated June 27, 1960 in which Blaze Energy Ltd. claims a right of first refusal pursuant to the Statement of Claim".

[16] The Consent Order directs an expedited trial to determine the following issues:

(a) Does Blaze have the rights of first refusal it claims to have in respect of the Assets as set out in the Statement of Claim arising from the transaction between Imperial Oil Resources and Whitecap Resources Inc.?

(b) Does Blaze have the rights of first refusal it claims to have in respect of the Assets as set out in the Statement of Claim arising from the transaction between Whitecap Resources Inc. and Keyera Partnership?

(c) If Blaze Energy Ltd. has rights of first refusal, is it entitled to specific performance?

[17] This expedited trial is expressly limited to these three issues.

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[18] The parties were unable to file an Agreed Statement of Facts, as required by para 6(b). The Consent Order stipulates that there shall be no questioning or *viva voce* evidence.

[19] All parties agree that the exhibits for purposes of this expedited trial would be the six affidavits filed, the exhibits attached thereto and the transcripts from cross-examination on some of those affidavits:

(i) David G. Smith, sworn May 12, 2014,

(ii) Gary Lebsack, sworn May 12, 2014,

(iii) Mark Pinsent, sworn May 12, 2014,

(iv) Mark Pinsent, sworn May 22, 2014,

(v) Biago Mele, sworn April 23, 2014,

(vi) Biago Mele, sworn May 16, 2014, and

transcripts from cross-examinations of Lebsack, Smith and Pinsent.

[20] A Confidentiality Order in place does not concern the evidence before me.

[21] At the conclusion of this trial on May 26, 2014 the parties respectfully impressed upon me the urgency of a timely decision and, further, that it would be optimal to have judgment by the end of May 2014, by reason that there are significant collateral matters outstanding in respect of the Plant that concern third parties.

[22] I accede to this respectful request, acknowledging that all infelicities of expression or editing are my own. I am grateful to counsel for their able submissions and thorough briefs, which I have relied upon. I have decided the issues, as set out following.

[23] In answer to issue (a) of the Order of April 29, 2014, I find that Blaze does not have the rights of first refusal it claims to have in respect of the Assets as set out in the Statement of Claim arising from the transaction between IOR and Whitecap.

[24] In answer to issue (b) of the Order of April 29, 2014, I find that Blaze does not have the rights of first refusal it claims to have in respect of the Assets as set out in the Statement of Claim arising from the transaction between Whitecap and Keyera.

[25] In answer to issue (c) of the Order of April 29, 2014, I find that even if Blaze has the rights of first refusal it claims, Blaze is not entitled to specific performance.

Cases Provided by Blaze Energy Ltd.:

1. *Canadian Natural Resources Ltd. v Encana Oil & Gas Partnership*, 2008 ABCA 267, [2008] AWLD 4909, 49 BLR (4th) 163
2. *Calcrude Oils Ltd v Langevin Resources*, 2003 ABQB 1051, [2004] AWLD 180. 349 AR353
3. *APEX Corp v Ceco Developments Ltd*, 2005 ABQB 656, [2005] AWLD 3693, 387 AR 211
4. *APEX Corp v Ceco Developments Ltd*, 2008 ABCA 125, [2008] 6 WWR 393, 41 BLR (4th)

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5. *Hanen v Cartwright*, 2007 ABQB 184 paras 48-53, [2007] 6 WWR 481, 54 RPR (4th) 66, 71 Alta LR (4) 284
6. *Chase Manhattan Bank of Canada v Sunoma Energy Corp*, 2001ABQB142, [2001] AWLD 288, [2001] AJ No 245 affd 2002 ABCA 286, [2002] AJ No 1550
7. *Bearspaw Petroleum Ltd. v. ConocoPhillips Western Canada Partnership*, 2009 ABQB 202, [2009] 7 WWR 125, 4 Alta LR (5th) 393
8. *GATX Corp. v Hawker Siddeley Canada Inc*., [1996] OJ No 1492 (Ont. Gen. Div.)
9. *Canadian Natural Resources Ltd. v Encana Oil & Gas Partnership*, 2007 ABQB 460, [2007] AWLD 3176, 33 BLR 163
10. *Georgia Construction Co v Pacific Great Eastern Railway*, [1929] SCR 630, 36 CRC 23, [1929] 4 DLR 161
11. *Canadian Long Island Petroleums Ltd v Irving Wire Products*, [1975] 2 SCR 715, [1974] 6 WWR 385, 3 NR 430
12. *Law of Property Act*, RS.A. 2000, c.L-7, s. 63
13. *Semelhago v Paramadeven*, [1996] 2 SCR 415, 28 OR (rd) 639, 3 RPR (3d)
14. *Colvin v Minhas*, 2009 ABQB 42 at para 43, [2009] 7 WWR 544, [2009] AJ No 74, AM Lutz, J. [Colvin v Minhas], affd 2009 ABCA 404, [201 O] 3 WWR 48
15. *2475813 Nova Scotia Ltd v Lundrigan*, 2003 NSSC 48, 213 NSR (2d) 53 (NSSC)

Cases Provided by Imperial Oil Resources:

1. *Southland Canada Inc v Zarcan Equities Ltd* (1999), 254 AR 59, 1999 CarswellAlta 1034 (QB)
2. *Scurry-Rainbow Oil Ltd v Kasha*, 1996 ABCA 206, 184 AR 177, 1996 CarswellAlta 402
3. *Consolidated Bathurst Export Ltd v Mutual Boiler and Machinery Insurance* (1979), (1980) 1 SCR 888, 1979 CarswellQue 157
4. *Bell v Lever Bros Ltd*, [1931] All ER Rep 1, [1932] AC 161 (UK HL) (Excerpt only)
5. *Catre Industries v Alberta*, 1989 ABCA 243, 99 AR 321, 1989 CarswellAlta 527
6. *Alberta Oil Sands Pipeline Ltd v Canadian Oil Sands Ltd*, 2012 ABQB 524 at para 67, 7 BLR (5th) 142, 2012 CarswellAlta
7. *Chase Manhattan Bank of Canada v Sunoma Energy Corp*, 2001 ABQB 142, 283 AR 260, 2001 CarswellAlta 264
8. *Pierce v Empey*, [1939] SCR 247, 1939 CarswellOnt 97

Cases Provided by Whitecap Oil Resources Inc.:

1. *Two Forty Engineering Ltd. v. Platte River Resources Ltd.*, 1995 CarswellAlta 5 (Q.B.)
2. *Consolidated-Bathurst·Export Ltd. v. Mutual Boiler & Machinery Insurance Co.* (1979), 112 D.L.R. (3d) 49

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3. *GATX Corp. v. Hawker Siddeley Canada Inc.* 1996CarswellOnt1435 (Ont. Ct. Gen. Div.)
4. *Canadian Long Island Petroleum Ltd. et. Al. v. Irving Industries (Irving Wire Products Division) Ltd. et al.*, [1975] 2 S.C.R. 715
5. *Calcrude Oils Ltd v. Langevin Resources*, 2003 ABQB 1051
6. *Mesa Operating Ltd v. Amoco Canada Resources Ltd*, 1994 CarswelWta 89 (CA)
7. *Southland Canada Inc. v. Zarcan Equities Ltd.*, (1999), CarswellAlta 1034 (QB)
8. *Adesa Auctions of Canada Corp. v. Southern Railway of British Columbia* 2001 BCSC 1421
9. *Saskatchewan Oil & Gas Corp. v. Mobil Oil Canada Ltd*, 1989 CarswellSask 574
10. *Equinox Engineering Ltd. v. Lavalin L.P. Inv.*, 2012 ABCA 204
11. Shorter Oxford English Dictionary, 5th ed, *sub vero*, “correspond”
12. *Sackville-West v Holmesdale (Viscount)* 1870 LR 4 HL 543 at 576, per Lord Cairns
13. *Carson v. Luncheonette Ltd*, 1987 CarswellNfld 98 (S.C.T.D.)
14. *Merritt & District Industrial Co-Operative Society Ltd v. Young*, 1916 CarswellBC 100
15. *NAL GP Ltd v. BP Canada Energy Co.*, 2010 ABQB 626
16. *Captain Developments Ltd v. Nu-West Group Ltd.* (1982), 136 D.L.R. (3d) 502 (Ont. H.C.)
17. *Peterson v. Canadian Imperial Banko/Commerce*, (1992) 105 Sask. R. 113 (C.A.) .
18. *Chase Manhattan Bank of Canada v. Sunoma Energy Corp.*, 2001 ABQB 142
19. *Horizon Resource Management ltd v. Blaze Energy Ltd.*, 2011ABQB658; appeal dismissed, cross-appeal allowed in part 2013 ABCA 139
20. *Power Consolidated (China) Pulp Inc. v British Columbia Resources Investment*, 1989 CarswellBC 1705 (S.C.)
21. *Incanore Resources Ltd v High River Gold Mines Ltd.*, 2008 CarswellOnt 5071 (S.C.)
22. *Transamerica Life Canada Inc. v. ING Canada Inc.* (2003), 68 O.R. (3d) 457 (Ont. C.A.)
23. *Semelhago v. Paramadevan*, [1996] S.C.J. No. 71
24. *Strategy Summit Ltd. v. Remington Development Corp.*, 2009 ABCA 30
25. *Southcott Estate Inc. v. Toronto Catholic District School Board*, 2012 SCC 51

Cases provided by Keyera Partnership and Keyera Corp.:

1. *Alberta Oil Sands Pipeline Ltd. v. Canadian Oil Sands Limited*, 2012 ABQB 524
2. *Southland Canada Inc. v. Zarcan Equities Ltd*, 1999 ABQB 831
3. Undertaking Response of David G. Smith
4. *Imperial Life Assurance Co. of Canada v. Sanderlea Corp.*, [1991] O.J. No. 2705
5. *Chase Manhattan Bank of Canada v. Sunoma Energy Corp.*, 2002 ABCA 286

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6. *Bank of America v. Mutual Trust Co.*, [1992] 0.J. No. 2662, 1992 CarswellOnt 4072
7. *Australian Hardwood Property Ltd. v. Commissioner for Railways*, [1961] 1 W.L.R. 425 (P.C.)
8. *Black's Law Dictionary*, 6th ed. at 250
9. D. Dukelow, ed. *Dictionary of Canadian Law*, 3rd ed. at 198

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I will now explain why I have decided these matters as I have.

I. The Two Agreements at Issue

[26] IOR and Blaze were parties (as successors to the original parties) to two separate agreements. The June 27, 1960 owners' agreement (the "**1960 Lands Agreement**") is an agreement with respect to oil and gas interests or oil and gas leases in four specified parcels of land (the "**1960 Lands**"). IOR and Blaze own some of the 1960 Lands on a 50/50 basis. The other land interests under the 1960 Lands Agreement are owned by parties not involved in this action. At issue is the wording of some contractual provisions found in this agreement.

[27] Also at issue is the wording of some contractual provisions found in a 1988 Construction Ownership and Operation agreement (the "**1988 CO&O**") regarding the 6-28 West Pembina Gas Plant (the "**Plant**") which was built after 1988. IOR owned 90% of the Plant - prior to selling same to Whitecap - and Blaze owned 8% of the Plant. The remaining 2% is held amongst three other parties, none of whom have an interest in the 1960 Lands.

A. The 1960 Lands Agreement

[28] The 1960 Lands that are subject to the 1960 Lands Agreement are described on page one of the agreement by specific legal description and the owners' oil and gas interests and oil and gas lease interests are affixed as a schedule to the agreement. [Affidavit of Biago Mele sworn April 23, 2014, Exhibit A).

[29] The 1960 Lands are also shown on coloured-coded township and range schematics in the Affidavit of P. Gary Lebsack (hereafter "Lebsack" sworn May 12, 2014, Exhibits D and H.

[30] Clause 18 of the 1960 Lands Agreement [Mele Affidavit sworn April 23, 2014, Exhibit A] grants Blaze a preferential right of purchase (the "**Lands ROFR Notice**") in respect of the 1960 Lands governed by it.

[31] Clause 18 says:

> In the event any part desires to sell all or any part of his or its interests which are subject to this agreement, the other party or parties hereto shall have a preferential right to purchase the same. In such event, the selling party shall promptly communicate to the other party or parties hereto the offer received by him or it from a prospective purchaser ready, willing and able to purchase the same, together with the name and address of such prospective purchaser, and said other party or parties or anyone or more of them shall thereupon have an option for a period of ten (10) days after the receipt of said notice to purchase such interest at and for the offered price and upon the offered terms for the benefit of such remaining parties hereto as may agree to purchase the same. Any interest so

acquired by more than one party hereto shall be shared by the parties purchasing the same in the proportion that the interest of each party so acquiring bears to the total interest of all parties so acquiring. The limitations of this paragraph shall not apply where any party hereto desires to mortgage his or its interest or to dispose of his or its interest by merger, reorganization, consolidation or sale of all his or its assets, or a sale of his or its interest hereunder to an affiliate, subsidiary or parent company.

In event of a sale by Operator of the interests owned by it which are subject hereto, the holders of a majority interest in the premises subject hereto shall be entitled to select a new operator but unless such selection is made the transferee of the Operator shall act as operator hereunder.

[32] The current parties to the 1960 Lands Agreement are Whitecap, Blaze, ARC Resources General Partnership, Penn West Petroleum and Zargon Oil & Gas Partnership.

[33] The 1960 Lands Agreement was executed in June of 1960, predating by almost three decades the construction of the Plant, which occurred after 1988.

B. The 1988 CO&O Agreement

[34] The 1988 CO&O is the agreement respecting the Plant. IOR pointed out that there are owners of the Plant who do not own any of the 1960 Lands. The current parties to the 1988 CO&O are Whitecap, Keyera Partnership, Blaze, Enerplus Partnership, TAQA North and Vermillion Resources.

[35] Article 1102 of the 1988 CO&O also provides a right of first refusal to Plant owners in respect of the sale of an interest in the Plant (“**Plant ROFR Notice”)**. [Affidavit of Biago Mele (hereafter “**Mele**”) sworn April 23, 2014, Exhibit B.]

[36] Article 1102 says:

1102. SALE OF AN INTEREST IN THE PLANT

If an Owner (the “Selling Owner”) wishes to dispose of all or any portion of its interest in the Plant, the Selling Owner shall inform the other Owners in writing of its intention, the interest proposed to be disposed of, the terms and conditions upon which the disposition is to be made, and, if the consideration is not cash, the fair market value of the consideration, and the identity of the person to whom the disposition is made. Each other Owner shall have the option for thirty (30) Days after receipt of the disposal notice to elect to acquire, on the same terms and conditions specified in the disposal notice, a share of the interest to be disposed; but in no event can the other Owners elect to acquire less than the total interest proposed to be disposed. If more than one (1) Owner elects to acquire the interest, then the interest shall be acquired by those Owners in proportion the their respective Plant Participations. Those Owners shall, within thirty (3) Days after their election, pay the consideration for the interest or, when the consideration is other than cash and an Owner cannot supply that type of consideration, the fair market value of it. Unless the option is exercised within the thirty (30) Day period, the Selling Owner shall have the right for a period of one hundred and twenty (120) Days after the giving of the disposal notice to dispose of the interest described in the disposal notice to the person named in it upon the terms and conditions specified in it. If a purchase and sale

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agreement is not executed within the one hundred and twenty day (120) Day period, it must be re-offered to the other Owners prior to any subsequent disposition.

[37] Article 1101 of the 1988 CO&O, however, provides an exemption to the foregoing Pland ROFR Notice: under Article 1101 an Owner may, without restriction, dispose of an interest in the Plant in conjunction with the disposal of the Owner's corresponding working interest in the lands in the West Pembina Area from which Gas is being produced into the Plant:

1101. DISPOSAL OF AN INTEREST

Any Owner may, without restriction, dispose of an interest in the Plant in conjunction with the disposal of the Owner's corresponding working interest in the lands in the West Pembina Area from which Gas is being produced into the Plant. Operator shall immediately revise Exhibit "A" to show the new Owner's Plant Capacity and Plant Participation and supply each Owner with a copy of the revision.

[38] **Gas** is a defined term, found at Article 1, the Definitions section of the 1988 CO&O: "**Gas**" and "means natural gas, together with other hydrocarbon substances, before it has been subjected to any processing except water removal and includes all hydrogen sulphide, carbon dioxide and fluid hydrocarbons not defined as crude oil under the provisions of the Oil and Gas Conservation Act, Chapter O-5 of the revised Statutes of Alberta, 1980, and amendments to it or substitutions for it"[101(i)]. (There is a separate definition for "**Outside Gas**" which is Gas belonging to an Owner and produced from outside the West Pembina Area....).

[39] The "**West Pembina Area**" is also a defined term [101(ee)] and "means the lands in the Province of Alberta outlined by heavy broken black lines on the West Pembina Area map shown in Exhibit "B"".

[40] The borders of the West Pembina Area are also clearly delineated in red outlining on township and range schematics: Lebsack , Exhibits D and H. The schematics also clearly show: (1) the 1960 Lands; (2) the lands sold by IOR to Whitecap; and, (3) the Nisku lands and Nisku wells sold by Whitecap to Keyera. I note that the Plant is not situated within the boundaries of the 1960 Lands but it is situated inside the boundaries of the West Pembina Area, surrounded by IOR lands now sold to Whitecap.

[41] I am satisfied from the evidence of Mr. Lebsack and these schematics that under the 1988 CO&O, the 1960 Lands fall within but form only a small portion of the West Pembina Area lands. Gas is produced to the Plant from West Pembina Area lands, including the 1960 Lands and also from other lands outside the West Pembina Area: see, also Affidavit of Mark Pinsent (hereafter "**Pinsent**" sworn May 12, 2014, paras 11, 12 and Exhibit D (which also shows the 1960 Lands and the Pembina Nisku Units).

[42] I have reviewed the 1988 CO&O and I can locate no reference to the 1960 Lands Agreement or to any rights thereunder. I have reviewed the 1960 Lands Agreement and I can find no reference to any gas processing facility or any mention of future construction or ownership of any such facility.

[43] The 1988 CO&O does not incorporate by reference the 1960 Lands Agreement.

[44] The parties to the two agreements are not the same and were not the same when the 1988 CO&O was executed.

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[45] I note, also, that the 1988 CO&O says:

301. INTENT

This agreement is intended to cover the construction, ownership and operation of the Plant that has been designed to process the Gas produced from within the West Pembina Area. The Owners will operate and maintain the Plant under the terms and conditions contained in this agreement. This agreement replaces and supersedes all previous agreements and understanding between the parties, whether written or oral, concerning the construction, ownership and operation of the Plant.

....

1708. WAIVERS

No waiver by or on behalf of an Owner of any breach of a provision of this agreement shall be binding upon the Owner unless it is expressed in writing and duly executed by the Owner or signed by its fully authorized representative, and that waiver shall not operate as a waiver of any future breach, whether of a like or different character.

....

1711. NO IMPLIED COVENANTS

The Owners have expressed herein their entire understanding and agreement concerning the subject matter of this agreement and no implied covenant, condition, term, or reservation shall be read into this agreement relating to or concerning the subject matter, nor shall any oral or written understanding previously entered into modify or compromise any of the terms and conditions in this agreement.

II. Facts

[46] In 2012, Blaze acquired all of the interests of MMCII Energy ULC in the Plant and in some West Pembina Area lands, those lands comprising Blaze's current interest in some of the 1960 Lands - including those 1960 Lands in which IOR and Blaze have a 50/50 ownership - from which gas was produced to the Plant. Blaze acquired these interests in a single transaction. Blaze notified IOR that Blaze was invoking Article 1101, the exemption provision, and would not be issuing IOR a Plant ROFR. [Pinsent, May 12, 2014, Exhibit J.]

[47] In September 2013, IOR initiated a private and confidential bid process for the disposition of a large collection of petroleum and natural gas producing and processing assets (the Disposition Offer assets) located in the Pembina, Boundary Lake and Rocky Mountain House areas of Alberta and British Columbia. The Disposition Offer assets included approximately 1400 wells, in excess of 184,000 gross acres of land, oil and gas production (in 2013) of over 15,000 boe/d and four gas processing facilities. The Disposition Offer assets include, but are not limited to, all IOR's interests in the Plant and all of IOR's lands in the West Pembina Area, including all of the lands from which gas is being produced to the Plant, including the 1960 Lands: Lebsack, paras 6-9

[48] Whitecap placed a bid on all of the Disposition Offer assets and was the highest bidder.

[49] On March 14, 2014, IOR and Whitecap entered into an agreement of purchase and sale of all Disposition Offer assets under which Whitecap purchased and IOR sold all Disposition Offer

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assets for the approximate price of $855,130,000.00. Again, the Disposition Offer assets included all of IOR's Plant interests and interests in West Pembina Area lands from which gas is produced to the Plant: Lebsack, para 7

[50] On March 17, 2014, pursuant to Clause 18 of the 1960 Lands Agreement, IOR issued the Lands ROFR Notice to Blaze stating that IOR and Blaze were current parties to the 1960 Lands Agreement, notifying Blaze that IOR has received an offer to purchase its participating interest in all the joint lands - that is the 1960 Lands in which Blaze also had a working interest (the "**ROFR Lands**") - and notifying Blaze that this was an offer that IOR was prepared to accept. IOR copied Whitecap with this Lands ROFR Notice. [See **Appendix "A"** to these Reasons for Judgment, Lebsack, Exhibit E and Mele sworn April 13, 2014, Exhibit C]

[51] IOR calculates that the price of $17,000,000.00 stated in the Lands ROFR Notice is less than 2% of the total consideration for the Disposition Offer assets under the purchase and sale agreement made between IOR and Whitecap.

[52] On March 17, 2014, IOR also notified Blaze and the other working interest owners of the Plant that the sale of IOR's interest in the Plant to Whitecap was exempt from the Article 1102 requirement to provide a Plant ROFR, expressly pursuant to the exemption set out in Article 1101 of the 1988 CO&O [Mele sworn April 23, 2014, Exhibit D; Pinsent sworn May 12, 2014, Exhibit L]. This was as in essence what Blaze had done, in 2012, when it acquired land and Plant assets.

[53] IOR contends that Blaze did not exercise its rights under the IOR Lands ROFR Notice; rather, IOR asserts that Blaze requested information about the Plant [Mele sworn April 23, 2014, Exhibit F], information to which Blaze was not entitled under Article 1101. In particular, Blaze sought the purchase price being ascribed to the Plant and the corresponding working interest <u>percentage</u> Blaze would be entitled to acquire in the Plant if it elected to purchase the Preferential Lands. [emphasis mine] The word "percentage" does not appear in Article 1101.

[54] In a series of communications with Blaze, IOR reiterated that the sale of Disposition Offer assets to Whitecap was being made pursuant to Article 1101 of the 1988 CO&O. [Pinsent sworn May 12, 2014, Exhibit M, N, O, P]

[55] Based upon the evidence before me, I find that IOR did not waive strict compliance with the terms of Clause 18 respecting the IOR Lands ROFR Notice. I find that IOR did expressly state that its sale to Whitecap of Disposition Offer assets fell within Article 1101 of the 1988 CO&O and that the Lands ROFR was "under the land contract as described in Schedule A of the notice".

[56] In cross-examination Mr. Pinsent confirms that the schedule of lands attached were the lands in which IOR and Blaze shared a working interest. [See: point 5, cross-examination summary at page 22 of these Reasons]

[57] The sale by IOR of the Disposition Offer assets to Whitecap, pursuant to the March 14, 2014 purchase and sale agreement, closed on May 1, 2014. [cross-examination Lebsack held May 14, 2014, page 5, lines 17-27]

[58] Mr. Lebsack agreed on cross-examination that one function of the Plant is to produce natural gas and this function still occurs at the Plant.

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[59] Another function of the Plant – the injection of gas back into certain wells in the West Pembina Area of part of an enhanced oil recovery process – no longer occurs because the pools have produced the crude oil that was being miscible flooded and is now blown down and producing natural gas. That is, these wells are no longer being miscible flooded, they are simply producing out the hydrocarbon that was injected into the pools, the full composition of which hydrocarbon was not known to Mr. Lebsack but was known by him to include gas.[Lebsack cross-examination held May 14, 2014, page 8, lines 2-27, page 9, lines 1-3]

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[60] "**Gas**" under article 1101 means gas together with other hydrocarbon substances: see above, para 38, for the entire definition of "**Gas**". IOR has no remaining interest in the Plant nor in any lands from which gas is being produced to the Plant. This includes the 1960 Lands and the ROFR Lands.

[61] On May 1, 2014, Whitecap also issued Blaze a Lands ROFR Notice under Clause 18 of the 1960 Lands Agreement (the "**Whitecap ROFR Notice**"). This Whitecap ROFR Notice to Blaze did not include a Plant ROFR. [See **Appendix "B"** to these Reasons and Lebsack, para 15, Exhibit G].

[62] Mr. Lebsack confirms that Whitecap did not issue a Plant ROFR Notice to Blaze or any other parties to the 1988 CO&O because Whitecap carefully analyzed the provisions of the 1960 Lands Agreement and the 1988 CO&O and concluded that no Plant ROFR Notice was required.

[63] Whitecap came to that conclusion because Whitecap's sale to Keyera of an 85% interest in the Plant was in conjunction with Whitecap's sale of its corresponding working interest in the lands in the West Pembina Area which produce gas into the Plant. In particular:

(a) the interest that Whitecap was selling to Keyera were the Nisku Natural Gas Reserves (the "**Nisku Reserves**"). The Nisku Reserves are all of the properties in the West Pembina Area that primarily produce gas, which Whitecap had acquired from IOR. Whitecap did not keep any properties in the West Pembina Area which primarily produce gas; and,

(b) the lands in the West Pembina Area that Whitecap was keeping and not selling on to Keyera were comprised of either non-producing lands or properties that primarily produce crude oil. These crude oil properties produce a small amount of gas, which is produced incidentally as a necessary by-product of the retained oil production." [Lebsack, para 17]

[64] On May 9, 2014, Blaze purported to exercise its rights under the Whitecap Lands ROFR Notice and thereupon claimed – if I understand correctly - that since there was now no corresponding interest in the lands being sold to Keyera, Blaze required that Whitecap issue a Plant ROFR Notice for the entire 85% interest in the Plant that Keyera had hitherto offered to purchase. In other words, by exercising its Whitecap Lands ROFR Notice, Blaze took the position that it had taken the Whitecap-Keyera purchase and sale transaction out of the exemption provisions of Article 1101, in consequence requiring the selling party (Whitecap) to revert to the Plant ROFR provisions under Article 1102. [May 9, 2014 letter from Blaze to Whitecap, Lebsack, Exhibit I]

[65] Whitecap maintained that it had no contractual obligation to issue a Plant ROFR merely because Blaze was exercising its option on the Whitecap Lands ROFR Notice. Whitecap countered Blaze's assertion - that there was an immediate triggering of an obligation on the part

of Whitecap to issue a Plant ROFR - by stating that notwithstanding Blaze's exercise of its preferential option under the Whitecap Lands ROFR Notice, this did not entitle Blaze to claim an entitlement to a Plant ROFR under the 1988 CO&O. Whitecap confirmed that it would not be issuing a Plant ROFR in respect to the Plant or any interest in it. [Lebsack, Exhibit J]

[66] Mr. Mele, at para 7 of his April 23, 2014 Affidavit, expresses the opinion that the purchase and sale agreement between IOR and Whitecap provides for the sale of IOR's interest in the Lands "together" with IOR's interest in the Plant and, accordingly, the sale of the Lands must create an entitlement in favour of Blaze for an option on the Plant.

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III. Law and Analysis

A. Principles Relating to Interpreting Contracts and Rights of First Refusal

[67] If I correctly understand, Blaze asserts that the wording of Clause 18 of the 1960 Lands Agreement and Article 1102 of the 1988 CO&O agreement must be interpreted so as to somehow give Blaze a contractual entitlement to a Plant ROFR.

[68] With respect, I do not agree: Blaze's position is not correct and it would render meaningless, nugatory the exemption to a Plant ROFR permitted under Article 1101 of the 1988 CO&O.

[69] If find that the IOR-Whitecap transaction and the Whitecap-Keyera transaction fit squarely within the wording of the exemption to requiring a Plant ROFR, as contemplated by Article 1101, upon which provision IOR, Whitecap and Keyera properly relied.

[70] I entirely agree that to find otherwise would be patently unreasonable and could well lead to contractual and commercial chaos in the oil and gas industry: there is no principle of law or equity and there is nothing in these agreements or the conduct of the parties that compels such an untenable result.

[71] A right of first refusal is based in contract. The meaning of a ROFR must be determined by analysis of the contract that created it.

[72] In ***Consolidated-Bathurst Export Ltd. v Mutual Boiler & Machinery Insurance Co*** (1979), 112 DLR (3d) 49, at para 26, the Supreme Court of Canada provided the following guidance when interpreting a right of first refusal:

> ... [T]he normal rules of construction lead a court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract. Consequently, literal meaning should not be applied where to do so would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the [contract was made]. Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties. Similarly, an interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation of the policy which promotes a sensible commercial result. It is trite to observe that an interpretation of an ambiguous contractual

> provision which would render the endeavour on the part of the insured to obtain insurance protection nugatory, should be avoided.

[73] In ***Canadian Long Island Petroleum Ltd et al v Irving Industries (Irving Wire Products Division) Ltd. et al***, [1975] 2 SCR 715, the Supreme Court of Canada describes the substance of the ROFR at para 10:

> This agreement was one which governed the joint operation and development of certain oil properties. Clause 13, which is the important clause under consideration in this case, was a part of that agreement. It was one of the conditions governing the joint ownership of the property. It was designed to protect the desire of each of the joint owners that it should not be forced into a joint ownership with another party against its will.

and

> ... As mentioned previously, the clause is a part of an agreement between joint owners of a property, governing the operation and development of it. In essence it is a negative covenant whereby each party agrees not to substitute a third party as a joint owner with the other, without permitting the other party the opportunity, by meeting the proposed terms of sale, to acquire full ownership. [para 35]

[74] In ***Calcrude Oils Ltd v Langevin Resources***, 2003 ABQB 1051, the Court explains the general purpose of a ROFR:

> ... It is to protect the parties' respective interests by ensuring that if one party decides to dispose of all or a portion of its shares to a third party the other party has the pre-emptive right to acquire those shares first, on the same terms and conditions, including price, as that being offered by the third party. In this way, a party is protected against having an unwanted co-shareholder foisted upon it. [para 55]

[75] In ***Mesa Operating Ltd v Amoco Canada Resources Ltd***, 1994 CarswellAlta 89 (CA) at para 22, the Alberta Court of Appeal says:

> The rule that governs here can, therefore, be expressed much more narrowly than to speak of good faith, although I suspect it is in reality the sort of thing some judges have in mind when they speak of good faith. As the trial judge said, a party cannot exercise a power granted in a contract in a way that "substantially nullifies the contractual objectives or causes significant harm to the other contrary to the original purposes or expectations of the parties."

[76] And, at paras 19 and 20:

> In any event, it is not necessary for this case that I go further into this difficult area. This is because this case turns on a rule founded in the agreement of the parties, not in the law. In my view, as a matter of fact, this contract created certain expectations between the parties about its meaning, and about performance standards. If those expectations are reasonable, they should be enforced because that is what the parties had in mind. They are reasonable if they were shared. Of course, those expectations must also, to be reasonable, be consistent with the express terms agreed upon. The contract should be

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> performed in accordance with the reasonable expectations created by it. [Emphasis added]

> The assessment of those expectations should include regard to the commercial context.

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[77] In this case, there are two agreements with two separate and unrelated ROFRs on completely separate and unrelated interests. The 1960 Lands Agreement bestows upon Blaze a preferential ROFR on certain lands and the 1988 CO&O Agreement provides a ROFR – subject to an exemption – on the Plant.

[78] The reasonable expectations of the parties in respect of these agreements, what they had in mind, were shared. If find that Blaze's expectations are not consistent with the express terms agreed upon. Perforce, I find that Blazes' expectations are unreasonable.

[79] I find that it would be unreasonable to extend the Clause 18 Lands ROFR beyond the plain wording of the 1960 Lands Agreement, from which it gains it meaning and having regard to the commercial context in which the parties' agreement was made. I agree with the submissions of IOR, Whitecap and Keyera on this crucial aspect, because:

(a) The 1960 Lands Agreement applies to the 1960 Lands, including the Lands ROFR Notice, and nothing more.

(b) The 1960 Lands are only a small portion of the West Pembina Area lands that process gas through the Plant.

(c) There are other lands outside the West Pembina Area that process gas through the Plant.

(d) The 1960 Agreement was entered into almost 30 years before the Plant was even constructed and its construction was not contemplated or referenced in the 1960 Lands Agreement.

(e) The parties to the 1960 Lands Agreement are not the same as the owners of the Plant or the parties to the 1988 CO&O Agreement.

(f) No reference is made in the 1988 CO&O that modifies the plain wording of Clause 18 and the 1960 Lands Agreement is neither mentioned nor incorporated by reference into the 1988 CO&O.

[80] The intention of the parties at the time of their entry into and execution of the 1960 Lands Agreement simply could not have been to include an interest in the Plant.

[81] I find that it is not a reasonable construction or interpretation to read such an intention into the express words and plain meaning of clause 18. The plain and ordinary meaning of Clause 18 is that the Lands ROFR Notice applies to the 1960 Lands and nothing more. I find that this was the objective intention of the parties.

[82] I agree with the proposition that the contracting parties to the 1960 Lands Agreement were free to determine their rights and to construct a contract to clearly define those rights. I find that the parties did so. The 1960 Lands Agreement was never amended.

[83] Moreover, the parties to the 1988 CO&O entered into that agreement with full knowledge of the provisions of the 1960 Lands Agreement and still made not changes to it. That fact, and

the fact that there was no incorporation of the earlier agreement into the later agreement, assists in understanding the reasonable expectations of the parties, their shared understanding

[84] I agree with defendant counsels' submissions and find that the two agreements are completely independent of one other and language or meaning or expectations from one cannot and will not be imported into the other: the 1960 Lands Agreement relates to the 1960 Lands and the 1988 CO&O relates to the Plant.

B. The Clause 18 "offered price and offered terms" Wording Does Not Give Rise to a Right to an interest in the Plant

[85] Blaze asserts that clause 18 of the 1960 Agreement and, specifically, the words "for the offered price and upon the offered terms" creates a contractual right to an interest in the Plant. I find that this assertion is incorrect.

[86] The lands under the 1960 Agreement were one small part of an $855 million deal between IOR and Whitecap. The IOR-Whitecap purchase and allocation of consideration to some Disposition Offer assets that were subject to discrete ROFRs (including an allocation to IOR's working contract interests in the portion of the 1960 Lands in which Blaze also had a working interest – the ROFR Lands) does not mean what Mr. Mele opines. No specific allocation of consideration to IOR's interest in the Plant was made in the IOR-Whitecap sale agreement and the terms of the purchase and sale agreement did not create an indivisible nexus between the sold lands and the Plant.

[87] By issuing the IOR Lands ROFR Notice, as it was contractually bound to do, IOR was not taking itself out of the protection of Article 1101 because the simple fact remains that IOR disposed of an interest in the Plant in conjunction with the disposal of its corresponding working interest in the lands in the West Pembina Area from which Gas is being produced into the Plant. Thus, in my view, fitting squarely within Article 1101.

[88] ***Adesa Auctions of Canada Corp v Southern Railway of British Columbia***, 2001 BCSC 1421, at para 30, the British Columbia Supreme Court held that the holder of a ROFR over one parcel of land did not have the option to purchase a package of lands that included that single parcel. A seller is obliged to offer only the single parcel to the ROFR holder and not the entire package or other parts of it.

[89] Similarly, the court in ***Saskatchewan Oil & Gas Corp v Mobil Oil Canada Ltd***, 1989 CarwellSask 574, at paras 8, 11 and 17, held that the plaintiff only had a ROFR over the joint lands described in the agreement and not over other lands that made up part of a package deal.

[90] This is the essence of Blaze's position:

> In order to have been offered to Blaze on the same terms and conditions as offered to Whitecap, and at the same time to abide by 1101 of the CO&O, a portion of the Plant needed to have been offered to Blaze. [Blaze brief, para 29.]

[91] Principles of contractual interpretation do not support this proposition and I find no basis for giving effect to Blaze's interpretation. Simply put, Blaze had an ROFR over the ROFR Lands the subject of the IOR ROFR Lands Notice and also had a ROFR over the lands subject to the Whitecap ROFR Lands Notice but Blaze did not and does not now have any contractual rights over the other Disposition Offer assets including, but not limited to, the Plant.

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[92] There is nothing in the contract language that requires me to consider or read into the contractual language a functional nexus or benefit between owning the producing lands and an interest in the Plant. Even if such nexus or benefit was categorically proven (and I am not persuaded), given that many land owners are not Plant owners and given that many Plant owners are not land owners, I find that such an interpretation is unreasonable and is not consistent with the parties' agreement and the clear contract language expressing same.

[93] Indeed, the Court of Appeal decision in ***Equinox Engineering Ltd v Lavalin L.P. Inv.***, 2012 ABCA 204 is to opposite effect. In ***Equinox***, the Alberta Court of Appeal held that not only does a ROFR not apply to any other interest being sold in a package deal, the ROFR is not triggered on a package deal in every circumstance.

[94] In ***Equinox***, a tenant's lease included a ROFR, which provided that when the landlord received an "offer to lease any floor" the tenant had first right to lease "the said floor on the terms and conditions set out in that offer." The landlord received an offer to lease six floors. The Court of Appeal finds that this did not entitle the tenant to bid on floors of its choice from the offer:

> [13] The interpretation advanced by Equinox effectively requires that the offer be divided into a series of six or possibly eight individual offers, enabling Equinox to choose only one of those offers. But this interpretation is inconsistent with the offer. The offer cannot be divided or severed. The offeror wanted all of the available floors, not every other floor or space which was not contiguous. The offer contains a provision to reduce space on an annual basis by surrendering the top or bottom floor. This offer contemplated a lease of all of the SNC Lavalin space, 50 parking stalls, and roof top signage.
>
> [14] Equinox contends that the interpretation advanced by Lavalin has the effect of eviscerating the right of first refusal and is contrary to the principle that a grantor of a right of first refusal must act reasonably and in good faith in relation to that right and not act in a fashion designed to eviscerate the very right which has been given: *GATX Corp v Hawker Siddeley Canada Inc*, [1996] OJ No 1462 (Gen Div) at para 71, 1 OTC 322. In our view Lavalin's interpretation accords with the plain meaning of the words in the right of first refusal and corresponds with the right which Equinox bargained for: a right of refusal when a single floor became available. The right so interpreted may be narrower than under the interpretation of the chambers judge, but it is not eviscerated and is consistent with the expectations of the parties.

[95] In ***Southland Canada Inc,*** (1999) CarswellAlta 1034, Clark J considers whether an offer to purchase the whole of the property, of which the leased portion was a part, triggered a ROFR in favour of Southland. The ROFR provided a right of first refusal in respect of the "demised premises". Zarcan was selling Block B. Southland occupied and leased part of Block B. The issue was whether Southland's ROFR was only with respect to the leased portion of Block B or encompassed all of Block B, at para 57:

> The wording of the ROFR is clear and unambiguous. In this case the ROFR is a right in respect only of the portion of Block B exclusively occupied and leased by

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Southland. This conclusion is consistent with the commercial context of the lease agreement.

[96] The ROFR referred to "demised premises", which included only the land that was being leased:

> [62] The wording of the ROFR is unambiguous. Although Zarcan initially conducted itself in a manner which could indicate that Southland's ROFR pertained to all of Block B., this course of conduct did not create a ROFR in the whole of Block B. What Southland said in its caveat, and what the parties said and did in 1997 in regards to the ROFR, does not bear on the meaning or operation of the ROFR. The subsequent dealings between the parties did not change the rights and obligations arising under the ROFR.
>
> [64] The consequence of interpreting "demised premises" to mean "shopping centre" or something different than the property leased, would be severe. Landlords reading the Southland lease form would unwittingly be trapped by the misdescription. A landlord leasing to Southland a small portion of a large shopping centre with a "demised premises" ROFR would be unable to give a similar ROFR to any other tenant and would be unable to sell his centre without offering to sell to Southland.

[97] Blaze refers in its brief to ***Canadian Natural Resources Ltd v Encana Oil & Gas Partnership***, 2008 ABCA 267, ***Calcrude Oils Ltd v Langevin Resources***, 2003 ABQB 1051, and ***Hanen v Cartwright***, 2007 ABQB 184 in support of its submissions that "offered terms" includes a Plant interest.

[98] I agree with defendant counsels' submissions: these cases do not offer support for Blaze's contention. And, I find that it would be commercially unreasonable and inconsistent with principles of contractual interpretation and the parties' reasonable expectations were I to find that the phrase "offered terms" in Clause 18 meant that Blaze gets to pick and choose from amongst the variety of Disposition Offer assets sold as part of the IOR-Whitecap transaction, or the Whitecap-Keyera transaction.

[99] I do not view the cases cited by Blaze as standing for, or expanding to embrace, the proposition promoted:

(a) In ***Canadian Natural Resources***, the Court of Appeal considers a ROFR under a pooling agreement. The question was whether the ROFR was triggered at the time a farm-out agreement was signed or at the time well sites had been selected on the pooled lands and earnings were imminent. The timing for the ROFR trigger was important Although the Court of Appeal did not make a finding because the ROFR wording was ambiguous, neither did it suggest that the ROFR holder was entitled to interests other than those specifically included under the pooling agreement.

(b) ***Calcrude*** considers a ROFR that governed all the working interest owners of a natural gas well. The only interest referred to was that well and nothing more.

(c) ***Hanen*** considers whether an option to purchase triggered a ROFR, when that option was made effective 15 days after expiration of the ROFR. The only interest in issue was the lands the ROFR covered, not any other terms under the option to purchase.

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[100] Moreover, I find that in the circumstances of this case, to provide Blaze with a 4% percentage interest in the Plant (or any other portion of the Plant) would give it far more than that to which it is entitled under the 1960 Lands Agreement, or for which it had bargained when it acquired its own 2012 (ROFR Lands) interest in the 1960 Lands Agreement. ROFRs are intended to protect the parties' respective interests, as defined by the express wording of the particular ROFR. The 1960 Lands ROFR protects the parties' respective interests in the 1960 Lands and the ROFR appertaining to that agreement, no more and no less.

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[101] Blaze contends that under the 1960 Operating Agreement, Blaze also clearly has a ROFR on working interests in lands in the West Pembina Area from which Gas is being produced into the Plant. I find that the 1960 Lands Agreement does not say this. What of the working interests in lands in the West Pembina Area from which Gas is being produced into the Plant that are not and never have been owned by IOR, Whitecap or Keyara? If find that Blaze's contention does not withstand scrutiny.

[102] In summary, I find that there is no juridical basis for giving effect to Blaze's strained interpretations of either the 1960 Lands Agreement contractual wording or the 1980 CO&O contractual wording, or in combination.

[103] I now turn away from contractual interpretation to a more specific discussion of the three issues ordered to be determined in this expedited trial.

C. Issue (a) of the Order of April 29, 2014: "Does Blaze Have the Rights of First Refusal It Claims to Have in Respect of the Assets as set out in the Statement of Claim arising from the Transaction between Imperial Oil Resources and Whitecap Resources Inc.?"

[104] Blaze seeks relief against IOR by claiming an entitlement to a ROFR on 4% of the Plant ownership in conjunction with IOR's sale of Disposition Offer assets. Blaze claims that this 4% Plant interest corresponds to the ROFR Lands because roughly 4% of IOR's total gas produced to the Plant from its interest in West Pembina Area Lands came, on a five year average, from the ROFR Lands.

[105] IOR vehemently disputes that there is any Plant interest that "corresponds to" the 1960 Lands sold to Whitecap, and, further, disputes that 4% would be the measure of that interest in any event.

[106] On March 17, 2014, under Clause 18 of the 1960 Lands Agreement, IOR issued a Lands ROFR Notice to Blaze in respect of IOR's proposed sale of the 1960 Lands to Whitecap.

[107] On March 17, 2014, IOR also notified Blaze, and the other working interest owners of the Plant, that the sale of IOR's interest in the Plant to Whitecap was exempt from any ROFR requirement, pursuant to Clause 1101 of the 1988 CO&O Agreement.

[108] On March 27, 2014, and in response to the IOR Lands ROFR Notice, Blaze claimed that the IOR Lands ROFR Notice was invalid:

> Given that the proposed disposition of Imperial's working interest in the Preferential Lands to Whitecap Resources Inc. is being made in conjunction with a disposition of Imperials [*sic*] corresponding working interest in the West Pembina 6-28 Gas Plant, in order for Blaze to exercise its rights on the same

terms and conditions as offered to Whitecap, Blaze requires additional information relating to the following:

(i) the purchase value being ascribed to the West Pembina 6-28 Gas Plant; and

(ii) the corresponding working interest percentage Blaze would be entitled to acquire in the West Pembina 6-28 Gas Plant if it elects to purchase Imperial's interest in the Preferential Lands.

[Pinsent sworn May 12, 2014, para 28 and Exhibits N and O]

[109] The Blaze email advises that Blaze is entitled to exercise its rights on the same terms and conditions as offered to Whitecap, so that Blaze would be entitled to acquire a corresponding interest in the West Pembina 6-28 Gas Plant if it elected to purchase IOR's interest in the 1960 Lands.

[110] It seems trite to say, but Blaze must seek the claimed ROFR with respect to the Plant either through the 1960 Lands Agreement or the 1988 CO&O Agreement. I agree with IOR's submission that ROFRs do not exist independently of contract. This is made clear in ***Southland Canada Inc*** at paras 56, 58. A ROFR is a contractual right which is deemed to be an interest in land by section 59.1 of *Law of Property Act,* RSA 1980 c. L-8.

[111] The terms of any ROFR are specified by the parties to the contract. I agree with Clark J in the ***Southland*** case that subject to satisfying the basic elements that define a valid right, the parties are free to construct whatever arrangement meets their particular needs: para 58. I also note with approval the reference to Hastings v North Eastern Railway, [1900] AC 260 (UKHL), wherein it is said at page 263:

> No principle has ever been more universally or rigorously insisted upon than that written instruments, if plain and unambiguous, must be construed according to the plain and unambiguous language of the instrument itself.

[112] While it has been acknowledged, from time to time, that one of the purposes of including ROFRs in joint operating and development agreements is "to prevent a party from being forced into an undesired partnership", that principle does not assist Blaze in these circumstances because I find that the language of the 1960 Lands Agreement and the 1988 CO&O Agreement are clear and the parties have unambiguously specified their rights and obligations.

[113] The relevant part of the 1960 Lands Agreement is Clause 18, recited in full above. I find that the wording is unambiguous and clearly delineates the terms of the Lands ROFR. It creates a ROFR regarding the 1960 Lands only. The wording is clear:

(a) Clause 18 refers to "interests which are subject of this agreement" and specifies the right to purchase only "such interests";

(b) Clause 18 is expressly made "with respect" to the interests of the parties in the 1960 Lands and only those interests;

(c) Clause 18 does not mention or contemplate the future construction of the Plant and does not restrict any disposition of interest in the Plant; and

(d) Clause 18 does not incorporate the concept of interests in <u>other assets</u> "corresponding to" interests in the 1960 Lands.

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[114] The 1960 Lands Agreement does not contemplate or mention future construction of the Plant and simply confers no rights to that which was not in the contemplation of the parties, and could not have been.

[115] It bears repeating that the 1960 Lands Agreement is clear and unambiguous in its expression that the ROFR is a right only in respect of the interests which are subject of the 1960 Lands Agreement. Such interests are with respect to the oil and gas interests and oil and gas leases expressly described therein.

[116] I agree that Blaze seeks to avoid the clear and unambiguous Clause 18 Lands ROFR by suggesting that the Lands IOR ROFR gives Blaze the same rights to purchase the Plant "for the offered price and the offered terms". To import a Plant ROFR by pulling this phrase out of Clause 18 and not reading it in the context of Clause 18 and the balance of the 1960 Lands Agreement is not a reasonable contractual interpretation. See preceding section of these Reasons.

[117] Put plainly, the 1960 Lands Agreement has nothing whatsoever to do with rights or interests in the Plant and nothing subsequent to the 1960 Lands Agreement has changed that fact. While I agree that a party seeking to dispose of an interest in the 1960 Lands subject to the Lands ROFR must first offer <u>that interest</u> to the holder of the ROFR upon the same terms as the offer for <u>that</u> interest received from a third party, this obligation does not and cannot extend to a requirement that other or additional assets outside of the 1960 Lands Agreement must be offered as well. Nothing in the language of the two agreements would require such an interpretation and nothing would compel me to find such a construction.

[118] Even if I were to agree with Blaze that there is significant benefit to owning gas-producing lands and having an interest in the Plant, such consideration does not alter my interpretation of Clause 18 or my interpretation of Articles 1101 or 1102.

[119] In any event, Blaze in fact owns an interest in the Plant (an 8% interest), a Plant which is operating under capacity. Blaze can utilize its priority processing rights under the 1988 CO&O to process whatever hydrocarbon interests that it can process through that Plant.

[120] Blaze says that since Whitecap and Keyera have formed a voting block, these defendants can thwart Blaze's rights to priority processing. First, there is no evidence that this has occurred. Second, should it occur, Blaze will no doubt seek legal recourse.

[121] Blaze asserts that the grantor of the ROFR does not have discretion to select which part of the third party offer is to be included in its notice to the ROFR holder. I agree. I do not agree, however, that the grantor of this Lands ROFR has any discretion to add or otherwise seek to re-define what assets are in fact included in the Lands ROFR. IOR was obliged under the 1960 Lands Agreement and the Lands ROFR to offer the subject-matter of the Lands ROFR to Blaze upon the same terms and conditions as received in the offer from the third party offeror.

[122] Blaze took the position that IOR's Lands ROFR Notice was invalid by reason that IOR did not provide information about the offered price for the Plant (or, for that matter, any of the other non-1960 Lands Disposition Offer assets).I disagree. I find that the IOR Lands ROFR Notice is valid on its face, that the failure to include an address for Whitecap was not material nor substantial non-compliance because Whitecap's full name was on the face of the Lands ROFR Notice and, finally, that Blaze was well aware of its contractual obligations to elect to exercise its rights to the ROFR Lands within the time limited, or lose its option rights under the ROFR.

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[123] I find that having failed to exercise its rights to ROFR Lands, Blaze has lost its right of first refusal.

[124] The defendants' evidence strongly supports my conclusions and I find that the affidavit evidence was strengthened, not diminished or weakened, by the cross-examination evidence from the questioning of Messrs. Pinsent, Lebsack and Smith on their affidavits, all of which evidence I am entitled to, and have, taken into account.

[125] Mr. Mark Pinsent was cross-examined on the affidavit he swore on May 12, 2014. Mr. Pinsent is the asset enhancement manager for IOR and has been employed by IOR for 33 years.

[126] I have reviewed the entire transcript from the cross-examination of Mr. Pinsent but I note, in particular, the following evidence, most of which I have summarized:

1. Page 7, lines 16-18

   Mr. Pinsent does not have any understanding of the motivations or reasons for constructing the Plant.

2. Page 9, lines 18-24:

   The function of the plant in the West Pembina area is that it processes gas in part for delivery to the market.

3. Page 9, lines 25-27:

   Mr. Pinsent does not know if the plant also processes gas as part of an enhanced oil recovery scheme.

4. Page 10, lines 23-27 and page 11, lines 1-2:

   Mr. Pinsent does not have an understanding that the configuration of the plant and the wells in the West Pembina area is such that it consists of pipelines from each of the wells to the plant to deliver product to the plant for processing, but there are also pipelines from the plant to each of the wells for injection purposes.

5. Page 14, lines 25-27 and page 15, line 1:

   The schedule of lands attached to the March 17, 2014 letter from IOR to Blaze were the lands in which IOR and Blaze shared a working interest. [the Blaze Energy lands in which it shared a working interest with IOR is found at Exhibit "C" of the affidavit of Mr. Pinsent sworn May 12, 2014, delineated by red coloured cross-hatching] This confirms that the Blaze lands in which it shared a working interest with IOR is but a small subset of the West Pembina Area Lands.

6. Page 16, lines 10-12:

   What IOR offered to Blaze with respect to the ROFR was the interest which IOR and Blaze shared in the 1960 Agreement.

7. Page 17, lines 21-27:

   At the time the land ROFR was sent out by IOR to Blaze, Mr. Pinsent did not have any concerns that an interest in the Plant was not being offered to Blaze.

8. Page 19, lines 8-11:

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Mr. Pinsent was aware from a weekly update meeting with respect to the project that Blaze was requesting additional information with respect to the Plant and the Lands.

9. Page 19, lines 23-27 and page 20, lines 1-2:

   Exhibit "Q" of the affidavit of Mark Pinsent sworn May 12, 2014 outlines the information Blaze was seeking "(i) the purchase value being ascribed to the West Pembina 6-28 Gas Plant and (ii) the corresponding working interest percentage Blaze would be entitled to acquire in the West Pembina 6-28 Gas Plant if it elects to purchase Imperial's interest in the Preferential Lands."

10. Page 20, lines 15-18:

    As a result of Blaze's March 28, 2014 letter [Exhibit "Q"], no additional information was provided by IOR to Blaze.

11. Page 22, lines 4-9:

    The calculation for the lands valued at $17 million was received from Whitecap.

12. Page 22, lines 12-27:

    IOR did a test for the reasonableness for this number through an IOR engineer who IOR considered to be an evaluator for properties.

13. Page 24, lines 1-12:

    It is a requirement by IOR that a purchaser is required to determine the value associated with each of the properties that are subject to ROFRs. The purchaser comes up with a total purchase price and it is incumbent upon them to break it [*sic*], as they see fit, among the assets.

14. When asked to provide the calculations done by the evaluating engineer, counsel for IOR objected on the basis that what was being asked for did not, in any way, relate to the three issues going to an expedited trial in May at the end of the month. Counsel for IOR does not agree that the issue goes to whether Blaze is entitled to specific performance.

15. On May 6, 2014, counsel for IOR provided to counsel for Blaze the production data requested, on specified terms and conditions including that IOR was making no admission that this data is relevant in this action or that it was appropriate for the purposes of considering an owner's "corresponding working interest in the lands in the West Pembina area" as that phrase is used in the 1988 Plant CO&O: [Exhibit "A" to the affidavit of Biago Mele, sworn May 16, 2014]. [On May 9, 2014, in furtherance of the May 6, 2014 IOR email, Blaze claimed a right of first refusal in respect of a 4% interest in the Plant and took the position that the Lands ROFR Notice of IOR dated March 17, 2014, was invalid for not including this 4% interest in the notice.]

16. Page 26, lines 20-23:

    The data provided in the May 6, 2014 email from IOR is data available in the public domain. [Both counsel for Keyera and counsel for IOR stated on the record that the information provided was not relevant to these court proceedings.]

17. Page 34, lines 7-10:

    Blaze acquired the entire interest of MMCII in the Plant and the West Pembina lands.

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18. Page 34, lines 11-17:

    As a result of the bid process and the March 14, 2014 contract with Whitecap, IOR is disposing of its entire interests in all lands in the West Pembina Area and its entire interests in the West Pembina Plant also.

19. Page 36, lines 1-6:

    With reference to the 1988 CO&O "the owner's Plant participation with respect to Blaze Energy, indicates that its interest participation of 8% equates to a capacity of 156,000 cubic metres per day".

20. Page 36, lines 20-24:

    To the extent that IOR does not have any involvement in the Plant any longer, IOR has no involvement in Blaze's access to the Plant.

[127] The undertaking to produce the calculations of relative natural gas production was provided and forms part of the evidence in this expedited trial. The complete answer to undertaking is attached as **Appendix "C"**.

[128] Taking into consideration all of the forgoing, my answer to Issue (a) of the Consent Order of April 29, 2014 is this: Blaze Energy Ltd. does not have the rights to first refusal it claims to have in respect of the Assets as set out in the Statement of Claim arising from the transaction between Imperial Oil Resources and Whitecap Resources Inc..

D. Issue (b) of the Order of April 29, 2014: "Does Blaze Have the Rights of First Refusal It Claims to Have In Respect of the Assets as Set Out in the Statement of Claim Arising From the Transaction Between Whitecap Resources Inc. and Keyera Partnership?

[129] Immediately following the closing of the IOR transaction, Whitecap closed a sale of some of the Disposition Offer assets to Keyera Partnership, including:

(a) an 85% interest in the Plant, and

(b) Whitecap's corresponding working interest in the lands in the West Pembina Area from which gas is produced into the Plant. [Labsack, para 11]

[130] On May 1, 2014, under clause 18 of the 1960 Agreement, Whitecap issued its Whitecap ROFR Notice to Blaze for Whitecap's proposed sale of some of the 1960 Lands to Keyera Partnership.

[131] On May 9, 2014, Blaze responded to the Whitecap ROFR Notice. Blaze indicated that it intended to acquire the interests in the 1960 Lands being sold to Keyera. Blaze further stated that: "... it is Blaze's view that this ROFR exercise under the Notice will trigger an immediate obligation for Whitecap to issue a ROFR ... under the 1988 CO&O. [Lebsack, para 18 and Exhibit I]

[132] As previously mentioned, Whitecap did not issue a Plant ROFR Notice to Blaze, or any Plant owner, following the sale of an 85% Plant interest to Keyera. It carefully analyzed the provisions of both the 1988 CO&O and the 1960 Agreement and concluded that no Plant ROFR was required. [Lebsack affidavit, para 17]

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[133] Both Whitecap and Keyera concluded that clause 1101 of the 1988 CO&O applied because Whitecap was selling an interest in the Plant along with its corresponding interest in the lands in the West Pembina Area from which gas is being produced in to the Plant.

[134] In particular, Whitecap was selling 94.4% of the 90% interest it was acquiring from IOR and retaining 5.6% of that 90%. [Affidavit of David Smith (hereafter "**Smith**") sworn May 12, 2014, para 5, 21; Labsack affidavit, para 17]

[135] Whitecap and Keyera identified the properties that produce gas and considered historical and forecasted production:

(i) The interests Whitecap was selling to Keyera were the Nisku natural gas reserves. Of the lands that Whitecap had purchased from IOR in the West Pembina Area, the Nisku Reserves are all of the properties that primarily produce gas. Whitecap looked at the lands that produced gas to the Plant, and those were the lands that it sold to Keyera. [Lebsack cross-examination May 12, 2014, at p 12/12 – 112/18] It considered historical production as well as forecast production and determined that the corresponding interest was the Nisku Reserves. [Lebsack cross-examination May 12, 2014, at p 18/15 – 19/15]

(ii) The lands in the West Pembina Area that Whitecap was keeping and not selling on to Keyera were comprised of either non-producing lands or properties that primarily produce crude oil. The crude oil properties produce a small amount of gas, which is produced incidentally as a necessary by-product of the retained oil production. [Smith, para 26]

(iii) Keyera used the most current publicly available production data and ascertained that its purchase of an 85% interest in the Plant was in conjunction with Whitecap's corresponding working interest in the lands in the West Pembina Area from which gas is being produced into the Plant. [Pinsent sworn May 12, 2014, Exhibit E]

(iv) The calculation of relative natural gas production was done in March 2014 when Keyera was considering the purchase of assets from whitecap. At that time the most current publicly available production data was from November 2013. Gas production from the Nisku Reserves was calculated to be 96.53% based on that data. By the effective date of the transaction – May 1, 2014 – production from the Nisku Reserves was estimated to be 94.4%. This matched precisely the 94.4% Plant interest Keyera was acquiring.

[136] Blaze asserts that the calculations do not support this split, but rather skew the numbers in Keyera's favour by not including hydrocarbons and condensate as required in the definition of "Gas" in the CO&O and by using largely forecasted future production – whereas David Smith's own evidence referred to current production, Blaze asserts that Clause 1101 requires actual production by using the words "being produced".

[137] I agree with defendant counsels' objection that there is no evidence that the production referred to in Mr. Smith's evidence is based on a calculation of anything other than total gas production into the Plant and I am not persuaded and I find there is no persuasive evidence to support Blaze's contention that these numbers are "skewed".

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[138] I find from the evidence that it is clear that Whitecap was disposing of an interest in the Plant in conjunction with the disposal of its corresponding working interest in the lands in the West Pembina Area from which Gas is produced into the Plant.

[139] I find that the 1960 Lands ROFR and the clause 1101 from the CO&O Agreement can be read harmoniously and are devoid of ambiguity.

[140] The Whitecap Lands ROFR Notice relates to a defined corpus of lands, that is, those discrete lands under the 1960 Lands Agreement in which Blaze has a ROFR.

[141] Article 1101 of the CO&O, too, is unambiguous. There is no need for a selling owner to issue a ROFR notice when the selling owner is disposing of its interest in the Plant in conjunction with the disposal of its corresponding working interest in the lands in the West Pembina Area from which Gas is produced into the Plant.

[142] Nothing in Article 1101 requires that said disposition be to the same party. Article 1101 does not say that where an owner disposes of an interest in the Plant in conjunction with the disposal of its corresponding working interest in the lands to which a discrete ROFR attaches, Article 1101 is no longer operative or applicable.

[143] Put another way, the exercise by Blaze of the Whitecap Lands ROFR Notice cannot affect the meaning of clause 1101 such that Blaze can succeed in its argument that since Blaze could take the ROFR lands out of the disposition, then Article 1101 is no longer applicable. To my mind, "disposition" means just that. IOR and Whitecap, respectively, disposed of an interest in the Plant in conjunction with their respective disposals of their corresponding working interest in the lands in the West Pembina Area from which Gas is produced into the Plant. The exercise of the Lands ROFR would certainly divert those discrete lands to Blaze but that is not the same as saying that IOR, or Whitecap, were not then disposing of an interest in the Plant in conjunction with the disposal of the corresponding working interest in the lands ... .

[144] Moreover, "corresponding" does not usually, or properly, mean "identical". The Oxford Dictionary gives various definitions: "to be congruous or in harmony with"; to be "similar or analogous". I agree that "corresponding" in the context of the CO&O Agreement means similar or analogous to. I find that Whitecap was selling 94.4% of the 90% interest in the Plant that it was acquiring from IOR. Whitecap was also selling the gas producing properties in the West Pembina Area – the Nisku Reserves – to Keyera. Production from the Nisku Reserves was estimated to be 94.4% at the time the transaction was to close. As such, Whitecap was selling 94.4% of its interests in the Plant in conjunction with the disposal of its corresponding 94.4% working interest in the lands from which gas is produced into the Plant. That harmonizes with or is congruent or in harmony with the Plant interest being sold.

[145] The word "corresponding" does not import a requirement that a disposing owner sell all of its interest in the Plant nor does the word "corresponding" mean that a disposing owner must sell all of the lands from which gas is produced into the plant.

[146] I agree that if, in the context of this commercial arrangement, the intention of the parties was that Article 1101 was intended by the parties to be other than this construction, the parties would have been at liberty to add different clear and unambiguous language. The clear and unambiguous language presently expressly set out in Article 1101 does not require any such interpretation.

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[147] Nor does the interpretation of clause 1101 require that "corresponding working interest", be based solely on current production because I am persuaded that such an interpretation would not comport with industry practice or reality. I accept that current production numbers are not publicly available until months following the production month. Accordingly, parties would never be entitled to avail themselves of Article 1101 because parties would never have current production numbers with which to do so.

[148] With respect, Blaze was not entitled to a Plant ROFR following its exercise on the Whitecap ROFR Lands Notice. It is not reasonable to say that it was the parties' intention that the exercise of a ROFR outside of the actual CO&O Agreement could eviscerate the agreed rights of the parties under Article 1101. Such a construction of Article 1101 would render it completely uncertain and would mean that no selling owner could ever, with any certainty, tell its willing purchaser what would or would not trigger an obligation to issue an ROFR on the Plant. Such a construction would render Article 1101 meaningless and if not meaningless, nugatory.

[149] I reviewed the cross-examination evidence from the questioning of Gary Lebsack that occurred on May 14, 2014. Having reviewed the entire transcript, I note in particular the following, most of which I have summarized:

1. Page 12, lines 12-18

   When asked what work did Whitecap do to determine the corresponding working interest in the Lands and how the Lands were determined whether they were corresponding or not, Mr. Lebsack answered:

   > We looked at lands that produce gas to the Plant and those were the lands we sold to Keyera.

2. At page 15, lines 1-15:

   Whitecap understood that in transferring its 85% of the 90% interest it purchased from IOR in the Plant, that a 94% interest in the lands that produced gas had to accompany the transfer.

3. At page 15, lines 13-15:

   Whitecap excluded land that produced oil "because they are not land that produce gas".

4. Page 18, line 23-25:

   In determining what the corresponding interest in the land was, Whitecap "looked at what lands produced gas to the Plant within the area".

5. Page 18, lines 12-15:

   Whitecap looked at historical production and forecast production into the future.

6. Page 40, 12-27, and page 41, lines 1-21:

   Mr. Lebsack clarifies his understanding, as follows:

   MR . VIPOND: I thought, when we spoke this morning, one of the factors that Whitecap – you understood Whitecap was looking at with respect to ROFR values was forecasted production. Do you recall giving that evidence this morning?

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A I'm not sure. How about I clarify, then, that the only way you can determine a net present value on an asset -- I shouldn't say only, but the producing value is to present value the sum of the future cash flows. So the future cash flows are just that, and so we would have to forecast --

Q Right.

A -- to see what the future -- to -- you know, give our estimate of what future cash flows are.

Q Right. And if I understand you, in calculating that future cash flow, Whitecap took into account probable production, correct?

A Well, there's a number of ways that you can evaluate. In sorry. Can you rephrase your question maybe?

Q Sure. And I think probable production is a term you used, instead that it may have been one of the factors that you were looking at in forecasting production. I think that's where we got to -- to now. So now my follow-up question to that is: Was probable production a factor used in the forecasting?

A In the forecasting of the value or in the forecasting --

Q In the forecasting of the assessment of the Keyera ROFR number for Blaze?

A I don't know.

Q In assessing the appropriateness of the $23,600,000 ROFR number that Whitecap received from Keyera, did you or Whitecap forecast any of the production coming from the Cardium zone in the future?

A No. Because we only used the zone that they were purchasing and had the ROFR on, which was the Nisku.

7. As to what accounted for the increase in value in the producing lands – from $17 million to $23.6 million – this is explained by Mr. Lebsack commencing at page 19. Specifically, at page 26, lines 13-20:

   The producing lands were the same and the production from those lands was greater at May 1, 2014 than at November 13, 2013.

8. Further examination ensues between pages 26-31, and at page 31, lines 18-20, the following exchange occurs:

   Q Was the price of the lands over which Blaze had a ROFR interest changed?

   A So I believe that the original document signed was -- had used the Imperial value of $17 million –

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Q Okay. Of 17 million.

A -- and was updated for the change in effective date.

Q Okay. So that change resulted in the value being changed from 17 million, for the properties of which Blaze had a ROFR interest, to $23,600,000?

A That's correct.

Q And that change occurred between March 14, 2014, and May 1, 2014?

A It would have, yes

9. And, at page 32, lines 10-18:

Q What’s your understanding of the split between the plant and the natural gas rights?

A There is no obligation. There’s one – one price.

Q So it’s your understanding that there was just one price for the plant and all of the assets?

A The $113 million was, yes, the price for the entire package that we sold to Keyera. We obviously split out the ROFR lands, as we were obligated to. Outside of that, there’s no price allocation to certain assets.

[150] Having reviewed the totality of the evidence on behalf of Whitecap and Keyara, I find no basis upon which I could reasonably conclude on the evidence before me that there has been “loading up” of the land valuation subject to the Whitecap Lands ROFR and nor can I find any reasonable basis to conclude that either Whitecap or Keyera was acting in bad faith in providing the allocated values for the Whitecap Lands ROFR.

[151] If find that the cross-examination evidence of David Smith, a representative of Keyera, strengthened, not diminished or weakened, the affidavit evidence. I am entitled to, and have, taken into account all of the evidence from the cross-examination of Mr. Smith on his May 12, 2014 sworn affidavit. This cross-examination occurred on May 15, 2014. I note the following, most of which I have summarized:

1. Keyera’s counsel objected to any cross-examination with respect to the value of the Land ROFR on the basis that it was not relevant as it was not an issue in this law suit.

2. At page 12, lines 19-22:

   The corresponding working interest in the lands were the lands that Keyera acquired as part of the transaction, namely the sale from Whitecap to Keyera.

   At page 13, lines 16-21:

   The lands that Keyera purchased from Whitecap were the lands that were from the Nisku zone, which were primarily gas producing. The lands that Whitecap acquired from IOR, they kept within this area where the Cardium zones, which were primarily crude oil producing.

3. Also at page 13, lines 22-27, the factor that determined corresponding working interest was whether or not the lands were Cardium or Nisku zones.

4. Page 14, lines 21-25:

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A portion of what Keyera refers to as "corresponding working interest" has now been elected to be taken up by Blaze through Blaze's right of first refusal on some of the lands.

5. Page 15, lines 18-21:

   Keyera agrees that the lands that was subject to its agreement with Whitecap will be reduced by the lands that Blaze has now elected to exercise its right of first refusal on.

6. Page 16, lines 5-6:

   Keyera does not know the current production would be from these specific lands.

7. Page 16, lines 17-22:

   When asked about his understanding as to how the number for the lands became $23,600,000, counsel objected on the basis of relevance.

8. Page 17, line 3-8:

   A miscible pool is a pool which has been subject to miscible flooding, which is the introduction of additional hydrocarbons intended to enhance the production of crude oil. This is a type of enhanced oil recovery.

9. Page 19, lines 2-22:

   Mr. Smith personally has not had any discussions with Whitecap or IOR as to the purpose of the configuration of the Plant.

10. Page 21, lines 1-4:

    Most companies would have a process for having an AFE (Authorization For Expenditure) procedure but Mr. Smith does not know whether that would have been the case here.

11. Page 22, lines 15-23:

    There were no calculations involved in determining what the corresponding working interest in lands was. There were lots of calculations done in terms of what the reserves were, as part of the negotiations of the purchase and sale agreement between Whitecap and Keyera.

12. Page 23, lines 20-27:

    Keyera did not do a calculation of the proportion of the reserves that were acquired by Keyera of the properties that Whitecap acquired from IOR. Keyera did a calculation of the proportion of the natural gas production from those properties in order to comply with clause 1101 of the 1988 CO&O Agreement.

13. Page 24, lines 7-27, and page 25, lines 1-9, Mr. Smith further explains as follows:

    A That's correct. Your question, I think, at the -- earlier was was there with a calculation of the corresponding working interest in the lands, and there was no calculation involved in determining what the lands were. There was an agreement that we were acquiring the Nisku reserves and Whitecap was keeping the Cardium reserves.

    Q Okay. And through that, then Keyera knew what the proportionate natural gas production was that was being received by Keyera, right?

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A Correct.

Q Okay. And what was that proportionate natural gas production?

A With respect to the lands that were subject to the acquisition of the -- from Imperial to -- by Whitecap, the ratio was 85 percent, based on current natural gas production associated with the Nisku reserves that that Keyera subsequently acquired and 5 percent to the Cardium lands that -- I'm sorry. I said reserves. I meant the lands that Keyera was acquired from Whitecap and 5 percent to the Whitecap Cardium lands that they were keeping that they acquired from Imperial.

Q Okay. And this was based upon natural gas production, right?

A That's right.

Q Okay. And does Keyera still have those calculations, sir?

A Yes.

Q Okay. I would ask that you undertake to produce those calculations of relative natural gas production?

[152] The undertaking to produce the calculations of relative natural gas production was provided and forms part of the evidence in this expedited trial. The complete answer to undertaking is attached as **Appendix "C"** to these Reasons.

[153] Taking into consideration all of the foregoing, my answer to issue (b) in the Consent Order of April 29,2014 is this: Blaze does not have the rights of first refusal it claims to have in respect of the Assets as set out in the Statement of Claim arising from the transaction between Whitecap Resources Inc. and Keyera Partnership.

[154] (Blaze does have a ROFR in respect of the subject-matter of the Whitecap ROFR Lands Notice.)

E. Issue (c) of the Order of April 29, 2014: "If Blaze has rights of first refusal, is it entitled to specific performance?"

[155] I would be content to end my decision at this juncture but cannot. If I am wrong in my answers to issues (a) and (b), I must explain why I would nevertheless decline to give Blaze relief in the nature of specific performance.

[156] In its Amended Statement of Claim, Blaze seeks the following relief:

(a) a Declaration that IOR's March 17, 2014 Notice is invalid;

(b) specific performance of the CO&O and 1960 Operating Agreement determining the interest in the Plant that corresponds to production from the Lands and transferring to Blaze the Lands and that corresponding interest in the Plant to Blaze or, alternatively the entire interest in the Plant on the same terms as that offered by Whitecap or, alternatively, Keyera;

(c) an interim and permanent injunction enjoining, restraining, and forbidding the May 1, 2014 or any other closing of a sale of the Lands and corresponding interest in the Plant until the Lands and corresponding interest in the Plant has been properly offered to Blaze;

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(d) an interim custody and preservation order with respect to the Lands and corresponding interest in the Plant;

(e) the costs of this action on a solicitor and its own client (full indemnity) basis; and

(f) such further and other relief as this Honourable Court finds just and equitable.

[157] At paras 60 of Blaze's brief, Blaze seeks the following relief:

(a) a Declaration that Blaze is entitled to a right of first refusal on Whitecap's proposed sale of an 85% interest in the West Pembina 6-28 Plant to Keyera Partnership and an order for specific performance directing Whitecap to offer that interest to Blaze in accordance with the provisions of the CO&O, including paragraph 1102 thereof;

(b) in the alternative, a Declaration that Imperial Oil Resources has not provided a valid ROFR notice to Blaze under the provisions of the 1960 Operating Agreement and CO&O and an order for specific performance directing Imperial Oil Resources to offer Blaze Energy Ltd. the lands described in its March 17, 2014 notice of disposition together with a 4% interest in the West Pembina 6-28 Plant on the same terms offered by Whitecap or to offer Blaze Energy Ltd. a 90% interest in the Plant on the same terms offered by Whitecap;

(c) the costs of this action on a solicitor and its own client (full indemnity) basis; and

(d) such further and other relief as this Honourable Court finds just and equitable.

[158] From this, it is apparent that Blaze seeks specific performance directing IOR and Whitecap (or Keyera, as the case may be) to offer a Plant ROFR. Blaze insists that this Court enforce a contractual right: that is all that a ROFR is. Yet, Blaze cannot persuade me on the evidence before me that there is unambiguous content or object or subject-matter to the claimed Plant ROFR, even though Blaze resorts to altering the express contractual language by adding the word "percentage" to the end of the phrase "corresponding working interest" and contorts the plain meanings of Clause 18 and Articles 1101 and 1102. This simply will not do. Certainly, none of the other parties agree that there is an unambiguous description attaching to Blaze's sought after remedy.

[159] The remedy of specific performance is equitable. It is long established that specific performance is a discretionary relief, for example: ***Bank of America v Mutual Trust Co***, [1992] OJ No 2662, 1992 CarswellOnt 4072; also see ***Australian Hardwood Property Ltd v Commissioner for Railways***, [1961] 1 WLR 425 (PC) at 432-433.

[160] Elemental principles forming the foundation of this discretionary relief of specific performance include:

1. Specific performance is to be granted only where the party seeking the Court's assistance can show that it is ready, willing and able to perform its side of the bargain.
2. Being ready, willing and able is a substantive and constitutive part of the claim for relief.

[161] Starting with specific performance in the context of the IOR Land ROFR Notice, ***Chase Manhattan Bank*** at paras 40 and 41 makes clear that a holder of ROFR rights must strictly comply with any time periods specified in the ROFR. The holder of the right loses its rights if it fails to elect within that period.

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[162] I have already decided that Blaze did not strictly comply and it has lost its rights under the IOR Lands ROFR Notice. I now find that specific performance is not available to revive Blaze's rights.

[163] ***Pierce v Empey***, [1939] SCR 247, 1939 CarswellOnt 97, at para 11, provides clear guidance:

> It is well settled that a plaintiff invoking the aid of the court for the enforcement for the sale of land must show that the terms of the option as to time and otherwise have been strictly complied with. The owner incurs no obligation to sell unless the conditions precedent are fully or as a result of his conduct, the holder of the option is on some equitable ground relieved from the strict fulfillment of them. [*Cushing v Knight*, (1912) 46 Can SCR 555; *Hughes v Metropolitan Rly Co*, (1877) 2 App Cas 439; *Bruner v Moore*, [1904] 1 Ch 305]

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[164] In ***Chase Manhattan Bank of Canada***, the circumstances are somewhat analogous to those in the case at bar, in that the ROFR holder disputed the validity of the ROFR notice. At para 42 of ***Chase Manhattan Bank of Canada***, commencing at para 40, the Court cites Pierce v Empey for the proposition that once a proper ROFR notice has been given, the ROFR holder must comply strictly with its terms and conditions if it wishes to exercise its right. Furthermore, the owner incurs no obligation to sell to the ROFR holder unless the conditions precedent in the notice are fulfilled or as a result of his conduct the holder of the option is on some equitable ground relieved from the strict fulfillment of them.

[165] As was the case in ***Chase Manhattan Bank of Canada***, in this case clause 18 is clear and on a plain reading, the ROFR holder (Blaze) loses its right if it declines the offer in the notice or if it fails to elect within the ten-day period after the receipt of said notice to purchase such interest.

[166] In ***Chase Manhattan Bank of Canada***, the ROFR sent a letter to the receiver within the notice period stating (in effect) that the notice was invalid. The learned judge finds that the ROFR did not, however, take any other action before the expiry of the notice and explains at para 42:

> ... That expiry operates like a limitation and, at minimum; Best Pacific should have filed a Notice of Motion before that time. The Receiver sold the Hillsdown Assets to Eravista within a period of 60 days following the expiry of the Notice. This Court will not interfere with that sale

[167] Again, I find that Clause 18 of the 1960 Lands Agreement is unambiguous and that Blaze could have complied with the consideration stipulated in the IOR Lands ROFR Notice. Moreover, I find that the merely because Blaze erroneously decided that the IOR ROFR Lands Notice was invalid does not entitle Blaze to equitable relief from the strict fulfillment of the conditions set out in clause 18 because I find that IOR has does nothing wrong.

[168] The determinative wording in Clause 18 is this:

> ... and said other party or parties or any one or more of them shall thereupon have an option for a period of ten (10) days after the receipt of said notice to purchase such interest at and for the offered price and upon the offered terms for the benefit of such remaining parties hereto as may agree to purchase the same.

[169] The IOR Lands ROFR Notice clearly relates to the "interest which are subject to this agreement" and clearly specifies the right to purchase "the same". "Such interest" is expressly made "with respect to" interests of the parties specified in the the1960 Lands Agreement.

[170] The March 17, 2014 IOR Lands ROFR Notice is clear; see **Appendix "A"**.

[171] There is no evidence before me to suggest that IOR waived its strict contractual rights. There is no evidence before me that the IOR Lands ROFR were in any sense "invalid". There is no evidence before me that Blaze exercised its rights as the Lands ROFR holder in respect of the IOR ROFR Notice. The rights Blaze had in respect of the IOR ROFR Notice have been irretrievably lost.

[172] Similarly, the Whitecap Lands ROFR Notice is clear; see **Appendix "B"**.

[173] In respect of the Whitecap Lands ROFR Notice, Blaze has indicated its intention to exercise its rights. That is all that needs to be said, other than to reiterate that Blaze's exercise of its rights under the Whitecap Lands ROFR Notice does not entitle Blaze in equity, contract or otherwise to claim any right to any interest in the Plant that Whitecap acquired by purchase from IOR, or disposed of by sale to Keyera, or retained.

[174] In respect of any claim to a remedy in the nature of specific performance under the provisions of the 1988 CO&O, I find on the evidence presented in this expedited trial that Blaze is in breach of the 1988 CO&O and has been continuously in breach of the 1988 CO&O since shortly after its 2012 acquisition of an interest in the Plant.

[175] While Blaze complained about the sufficiency of the business records provided in support of this contention, Blaze neither refutes this assertion nor did Blaze cross-examine Mr. Smith on his statement, made at para 25 of his affidavit sworn May 12, 2014:

> 25. In the course of the Keyera Transaction we received the business records that Imperial kept relating to ownership and operation of the Plant. The records show that Blaze is in default of payment under the terms of the 1988 CO&O, and has been since July 2012. Attached and marked as Exhibit "C" is Imperial's accounts receivable statement demonstrating the default.

[176] Mr. Smith was examined on his affidavit on May 15, 2014, before Mr. Mele swore his second affidavit on May 16, 2014. Mr. Mele did not take the opportunity to explain why Mr. Smith's evidence is false. Blaze proffered no evidence to contradict Mr. Smith's statement or to contradict the IOR accounts receivable statement upon which he relies.

[177] Citing to the "clean hands" doctrine, Keyera submits that I ought to apply the well-known equitable doctrine that equity will not grant relief to a party, who, as actor, seeks to set judicial machinery in motion and obtain some remedy, if such party in prior conduct has violated conscious or good faith or other equitable principle. I agree.

[178] Therefore, if I am wrong in finding that Blaze is not entitled to any Plant ROFR, I nonetheless find that Blaze is not entitled to the equitable relief of specific performance, in any event, firstly because Blaze has on the evidence before me breached its obligations under the 1988 CO&O and, secondly, because the interest that Blaze seeks to acquire through a presumed exercise of a Plant ROFR is uncertain, incapable of description and is non-specific.

[179] IOR disputes that Blaze's entitlement to a Plant ROFR on 4% of the Plant ownership. There is nothing in the language of the 1988CO&O that imports a "percentage" requirement into

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the phrase “corresponding working interest”. I can think of no juridical basis upon which I could or ought to import such a criterion into the 1988 CO&O.

[180] In respect of allegations of bad faith concerning valuation of the IOR ROFR Notice lands or the Whitecap ROFR Notice lands, it is clear that Blaze has the evidentiary burden of proving that the other parties have breached their duty of good faith in allocating value. In support of my findings in this regard, I refer to para 34 of the ***Chase Manhattan Bank of Canada*** decision which says:

> In any event, the ROFR holder clearly has the evidentiary burden of proving that the other parties have breached their duty of good faith in allocating value. In Johnson and Stanford, “Rights of First Refusal in Oil and Gas Transactions: A Progressive Analysis” (1999) 37 Alta L Rev (No 2) 316, the authors write (at para. 61):
>
>> From the perspective of the ROFR holder, it will not suffice to simply argue that the allocated price does not in its view represent fair market value. While that may provide an indication that the allocation has been unfairly made or ‘loaded up,’ that alone will certainly not be conclusive. The ROFR holder will have to demonstrate on the evidence that the allocation principles applied by the purchaser and accepted by the vendor were unreasonable in the circumstances, or in other words that a duty of good faith has been breached.

[181] I am also persuaded by the submissions of IOR, Whitecap and Keyera that value is not an issue in this expedited trial. The issues in this expedited trial were set out in the Consent Order.

[182] Keyera states that the parties expressly agreed that value allocated to the lands of either the Imperial ROFR notice or the Whitecap ROFR notice would be dealt with later, if necessary.

[183] In the result, Whitecap did not include any evidence to address the value issues under either ROFR Notices. [para 106, page 27 Whitecap brief]

[184] In light of these statements by counsel and in light of the wording of the Consent Order of April 29, 2014, I decline to further discuss or make any findings with respect to valuation, other than to say that I agree that Blaze bears the evidentiary burden in this regard and that in the context of the evidence presented in this expedited trial, Blaze has not met the burden cast upon it.

F. Custom or Usage and Matters of Estoppel

[185] Given the findings above, I will not consider these alternate arguments in aid of interpretation of contractual language. I acknowledge that submissions on these points were ably made and disputed but I find that I do not need to revert to them in determining the three issues answered in this expedited trial.

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IV. CONCLUSION

[186] I have given my answers to the issues to be determined in this expedited trial. If counsel cannot agree on costs, counsel may provide brief written submissions to me, no later than 30 days from the date hereof.

Heard on the 26th day of May, 2014.
Dated at the City of Calgary, Alberta this 30th day of May, 2014.

F. Schutz
J.C.Q.B.A.

Appearances:

Grant Vipond & Aron Taylor
Vipond Law Firm
for the Plaintiff

Alex Kotkas & Katie Clayton
Fasken Martineau DuMoulin LLP
for the Keyera Defendants

Grant Vogeli, Q.C. & Melanie Teetaert
Burnet, Duckworth & Palmer LLP
for the Whitecap Resources Ltd. Defendants

Gordon L. Tarnowsky, Q.C. & Thomas O'Leary
Dentons Canada LLP
for the Imperial Oil Resources Defendants

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Appendix "A"

Imperial Oil

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THIS IS EXHIBIT " C "
Referred to in the Affidavit of
Biagio Mele
Sworn before me this 23rd day of
April, 2014

A COMMISSIONER FOR OATHS IN AND FOR THE PROVINCE OF ALBERTA

Katherine Jean Chalowski
Commissioner for Oaths
in and for the Province of Alberta
My Commission expires on November 15, 2014

March 17, 2014

File: 07667.00
(A)

Blaze Energy Ltd.
1010, 900-6th Ave S.W.
Calgary, AB T2P 3K2

Attention: Land Manager

RE: **Notice of Proposed Disposition of Interest and Request for Waiver of Right of First Refusal**
Operating Agreement dated June 27, 1960
Pembina Area, Alberta
Land Ref: Twp 49 Rge 11 W5M E 33, Sec 34

According to our records, Imperial Oil Resources and Blaze Energy Ltd. are current parties to the Operating Agreement dated June 27, 1960 (the "Agreement") pertaining to lands in the subject area (note that lands jointly held by the parties to this agreement and the parties rights therein may vary).

Pursuant to Clause 18 of the Agreement, Imperial Oil Resources notifies you that it has received an offer to purchase its participating interest in all the joint lands under the Agreement which it is prepared to accept. Blaze Energy Ltd. (the "ROFR Party") has a preferential right to purchase Imperial's interest in the joint lands set out in Schedule 'A' attached ("Preferential Lands"). The Preferential Lands comprise petroleum and natural gas rights and related assets.

Whitecap Resources Inc. is the proposed purchaser of our interest. The consideration for the purchase of our interest in the Preferential Lands is SEVENTEEN MILLION DOLLARS ($17,000,000.00) CDN. The effective date of the sale is November 1, 2013 with a proposed closing date of May 1, 2014.

The preceding paragraphs outline the terms of the sale agreement; however, if you wish to review a copy of the executed agreement, you may review it at our offices during regular business hours by contacting the writer at 403-237-4372.

Imperial Oil Resources requests that you waive your right to purchase our interest in the Preferential Lands under the Agreement. Please note that if you are not prepared to waive your right, you are required to elect in writing within 10 days of receipt of this notice, if you wish to acquire the subject interest for the price and on the terms and conditions as set forth in this notice and as reflected in the sale agreement.

an Alberta limited partnership

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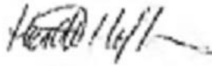
Whether you intend to purchase the interest of Imperial Oil Resources or to waive your right of first refusal, Imperial Oil Resources requests that you sign and return one copy of this letter to the attention of the writer as soon as possible.

Yours truly,

IMPERIAL OIL RESOURCES



Heidi Hofbauer
Mineral Negotiator
Asset Enhancement

Company Name:

____

hereby elects to purchase the interest of Imperial Oil Resources for a purchase price of SEVENTEEN MILLION DOLLARS ($17,000,000.00) CDN and on the same terms and conditions as offered by Whitecap Resources Inc.

Dated this _____ day of _______________, 2014.

Per: ________________________________

Name: ________________________________

Title: ________________________________

Company Name:

____

hereby waives its preferential right to purchase the interest of Imperial Oil Resources and consents to the transfer of the interest to Whitecap Resources Inc.

Dated this _____ day of _______________, 2014.

Per: ________________________________

Name: ________________________________

Title: ________________________________

c.c. Whitecap Resources Inc.

2014 ABQB 326 (CanLII)

07667.00 (A)

This is Schedule "A" to
Notice of Proposed Disposition of Interest and Request for Waiver of Right of First Refusal dated March 17, 2014

PREFERENTIAL LANDS:

LANDS AND PETROLEUM AND NATURAL GAS RIGHTS	IOR INTEREST	ENCUMBRANCES	LEASES, EXPIRY DATE AND EXTENSION	IOR LEASE FILE	IOR CONTRACT FILE
TWP 49 RGE 11 W5M E/2 33 PNG TO TOP CARDIUM	50.00000	CSS BASED ON 100.0% PDBY IOR 50.0%	LSE TYPE: CR PNG CR: 119688 LSE DATE: 1960 Aug 02 EFF DATE: 1960 Aug 02 EXP DATE: 1961 Aug 01 MNRL INT: 100.0 EXT CODE: S15	MAB012234 02	07667.00 A
TWP 49 RGE 11 W5M SEC 34 PNG TO TOP CARDIUM	50.00000	CSS BASED ON 100.0% PDBY IOR 50.0%	LSE TYPE: CR PNG CR: 118635 LSE DATE: 1960 Apr 26 EFF DATE: 1960 Apr 26 EXP DATE: 1961 Apr 25 MNRL INT: 100.0 EXT CODE: S15	MAB012228 01	07667.00 A
TWP 49 RGE 11 W5M SE 34 PNG BELOW BASE ROCK CREEK TO BASE NISKU (EXCL PNG IN BLUE RIDGE MEMBER)	50.00000	CSS BASED ON 100.0% PDBY IOR 50.0%	LSE TYPE: CR PNG CR: 118635 LSE DATE: 1960 Apr 26 EFF DATE: 1960 Apr 26 EXP DATE: 1961 Apr 25 MNRL INT: 100.0 EXT CODE: S15	MAB012228 03	07667.00 E AU000347 B
TWP 50 RGE 11 W5M SW 3 PNG TO BASE NISKU (EXCL PNG BELOW TOP CARDIUM TO BASE ROCK CREEK)	50.00000	CSS BASED ON 100.0% PDBY IOR 50.0%	LSE TYPE: CR PNG CR: 118637 LSE DATE: 1960 Apr 26 EFF DATE: 1960 Apr 26 EXP DATE: 1961 Apr 25 MNRL INT: 100.0 EXT CODE: S15	MAB012231 04	07667.00 G AU000349 A
TWP 50 RGE 11 W5M S/2 2 PNG FROM BASE UPPER HORSESHOE CANYON TO TOP CARDIUM	50.00000	CSS BASED ON 100.0% PDBY IOR 50.0%	LSE TYPE: CR PNG CR: 118637 LSE DATE: 1960 Apr 26 EFF DATE: 1960 Apr 26 EXP DATE: 1961 Apr 25 MNRL INT: 100.0 EXT CODE: S15	MAB012231 05	07667.00 H

2014 ABQB 326 (CanLII)

07667.00 (A)

This is Schedule "A" to
Notice of Proposed Disposition of Interest and Request for Waiver of Right of First Refusal dated March 17, 2014

PREFERENTIAL LANDS:

LANDS AND PETROLEUM AND NATURAL GAS RIGHTS	IOR INTEREST	ENCUMBRANCES	LEASES, EXPIRY DATE AND EXTENSION	IOR LEASE FILE	IOR CONTRACT FILE
TWP 50 RGE 11 W5M SE 3 PNG TO BASE NISKU (EXCL PNG BELOW TOP CARDIUM TO BASE ROCK CREEK)	50.00000	CSS BASED ON 100.0% PDBY IOR 50.0%	LSE TYPE: CR PNG CR: 118637 LSE DATE: 1960 Apr 26 EFF DATE: 1960 Apr 26 EXP DATE: 1981 Apr 25 MNRL INT: 100.0 EXT CODE: S15	MAB012231 07	07667.00 G
TWP 50 RGE 11 W5M SE 4 PNG TO TOP CARDIUM	50.00000	CSS BASED ON 100.0% PDBY IOR 50.0%	LSE TYPE: CR PNG CR: 119689 LSE DATE: 1960 Aug 02 EFF DATE: 1960 Aug 02 EXP DATE: 1981 Aug 01 MNRL INT: 100.0 EXT CODE: S15	MAB012235 02	07667.00 A
TWP 50 RGE 11 W5M W/2 12 PNG FROM BASE ROCK CREEK TO BASE NISKU	50.00000	CSS BASED ON 100.0% PDBY IOR 50.0%	LSE TYPE: CR PNG CR: 118638 LSE DATE: 1960 Apr 26 EFF DATE: 1960 Apr 26 EXP DATE: 1981 Apr 25 MNRL INT: 100.0 EXT CODE: S15	MAB012230 01	07667.00 F AU000348 B

IOR CONTRACT FILES:

07667.00 - Operating Agreement dated June 27, 1960
AU000347 - Pembina Nisku M Unit
AU000348 - Pembina Nisku N Pool Unit No. 1
AU000349 - Pembina Nisku O Pool Unit No. 1

2014 ABQB 326 (CanLII)

Appendix "B"

2014 ABQB 326 (CanLII)

May 1, 2014

Blaze Energy Ltd.
1010, 900-6th Avenue SW
Calgary, Alberta
T2P 3K2

Attention: Land Manager

Re: Notice of Proposed Disposition of Interest and Request for Waiver of Right of First Refusal
Operating Agreement dated June 27, 1960
Pembina Area, Alberta
Lands: Twp 49 Rge 11 W5M: SE34 (PNG in Nisku)
Lands: Twp 50 Rge 11 W5M: S3 & W12 (PNG in Nisku)

According to our records, Whitecap Resources Inc. and Blaze Energy Ltd. are current parties to the Operating Agreement dated June 27, 1960 (the "Agreement") pertaining to lands in the subject area (note that lands jointly held by the parties to this agreement and the parties rights therein may vary).

Pursuant to Clause 18 of the Agreement, Whitecap Resources Inc. notifies you that it has received an offer to purchase its participating interest in a portion of the joint lands under the Agreement which it is prepared to accept. Blaze Energy Ltd. has a preferential right to purchase Whitecap's interest in the joint lands set out in Schedule "A" attached ("Preferential Lands").
Keyera Partnership is the proposed purchaser of our interest. Their address is: 600, 144-4th Avenue SW, Calgary, Alberta, T2P 3N4. The offered price for the purchase of our interest in the Preferential Lands is TWENTY THREE MILLION, SIX HUNDRED THOUSAND DOLLARS ($23,600,000.00) CDN. The effective date of the sale is May 1, 2014 with a closing date of May 1, 2014.

The preceding paragraphs outline the relevant terms of the sale agreement as they relate to the Preferential Lands in which Blaze Energy Ltd. has a preferential right. If you wish to review a copy of the executed agreement, you may review it at our offices during regular business hours by contacting the writer at 403-817-2170.

Whitecap Resources Inc. requests that you waive your right to purchase our interest in the Preferential Lands under the Agreement. Please note that if you are not prepared to waive your right, you are required to elect in writing within 10 days of receipt of this notice. If you fail to elect within the 10 day period provided for in the Agreement you will lose your preferential right to purchase Whitecap Resources Inc.'s interest in the Preferential Lands.

Whether you intend to purchase the interest of Whitecap Resources Inc. in the Preferential Lands or to waive your preferential right, Whitecap Resources Inc. requests that you sign and return one copy of this letter to the attention of the writer.

Yours truly,

WHITECAP RESOURCES INC.

Heather Darrah
Manager, Contracts & Lease Admin

Company Name:	Company Name:
Hereby elects to purchase the interest of Whitecap Resources Inc. in the Preferential Lands for the offered price of TWENTY THREE MILLION, SIX HUNDRED THOUSAND DOLLARS ($23,600,000.00) CDN and on the terms pursuant to the Agreement as offered by Keyera Partnership.	Hereby waives its preferential right to purchase the interest of Whitecap Resources Inc. in the Preferential Lands
Dated this day of , 2014.	Dated this day of , 2014.
Per:	Per:
Name:	Name:
Title:	Title:

cc: Keyera Partnership

DM_CGY/287146.00005/203953.1

2014 ABQB 326 (CanLII)

07667(A)
This is Schedule "A" to Notice of Proposed Disposition of Interest and Request for Waiver of Right of First Refusal dated May 1, 2014

PREFERENTIAL LANDS:

Lands and PNG Rights	Whitecap Interest	Encumbrances	Leases, Expiry Date and Extension	Whitecap File	Whitecap Contract File
Twp 49 Rge 11 W5M: SE 34 PNG in Nisku	50%	CSS Based on 100% Paid by Whitecap 50%	Crown Lease 118635 Lease Date: Apr 26/60 Effective Date: Apr 26/60 Expiry Date: Apr 25/81 Min Int: 100% Ext Code: Section 15	MAB012228 03	07667.00 E AU000347 B
Twp 50 Rge 11 W5M: SW3 PNG in Nisku	50%	CSS Based on 100% Paid by Whitecap 50%	Crown Lease 118637 Lease Date: Apr 26/60 Effective Date: Apr 26/60 Expiry Date: Apr 25/81 Min Int: 100% Ext Code: Section 15	MAB012231 04	07667.00 G AU00349 A
Twp 50 Rge 11 W5M: SE3 PNG in Nisku	50%	CSS Based on 100% Paid by Whitecap 50%	Crown Lease 118637 Lease Date: Apr 26/60 Effective Date: Apr 26/60 Expiry Date: Apr 25/81 Min Int: 100% Ext Code: Section 15	MAB012231 07	07667.00 G
Twp 50 Rge 11 W5M: W12 PNG in Nisku	50%	CSS Based on 100% Paid by Whitecap 50%	Crown Lease 118638 Lease Date: Apr 26/60 Effective Date: Apr 26/60 Expiry Date: Apr 25/81 Min Int: 100% Ext Code: Section 15	MAB012230 01	07667.00 F

2014 ABQB 326 (CanLII)

Appendix "C"

2014 ABQB 326 (CanLII)

Form 11
[Rule 3.31]

COURT FILE NUMBER	1401-04421
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFF	BLAZE ENERGY LTD.
DEFENDANTS	IMPERIAL OIL RESOURCES, WHITECAP RESOURCES INC., KEYERA PARTNERSHIP and KEYERA CORP.
DOCUMENT	UNDERTAKING RESPONSE
PARTIES FILING THIS DOCUMENT	KEYERA PARTNERSHIP and KEYERA CORP.
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Fasken Martineau DuMoulin LLP Barristers and Solicitors 3400 First Canadian Centre 350 – 7 Avenue SW Calgary, Alberta T2P 3N9 **Alex Kotkas/Katie Clayton** Tel: (403) 261-5358/261-5376 Fax: (403) 261-5351 File No.: 287146.00005

UNDERTAKING RESPONSE OF DAVID G. SMITH GIVEN AT THE CROSS EXAMINATION ON MAY 15, 2014

NO.	PG.	UNDERTAKING
1.	22	TO PRODUCE THE CALCULATIONS OF RELATIVE NATURAL GAS PRODUCTIONS (TAKEN UNDER ADVISEMENT) **Response: May 20, 2014** The calculation of relative natural gas production was done in March 2014 when Keyera was considering the purchase of assets from Whitecap. At that time the most current publicly available production data was from November 2013. Nisku gas production was calculated to be 96.53% based on that data (see Schedule "A"). The trend in the data was that Nisku gas production was decreasing while Cardium gas production was increasing. Accordingly an evaluation was done to estimate what the likely Nisku and Cardium gas production would be by the effective date of the transaction, being May 1, 2014. That calculation was not recorded in writing at the time, but an analysis taking into account the factors considered in March is attached at Schedule "B".

SCHEDULE "A"

Imperial Oil Gross Production from Designated Area by Formation (e3m3/d)

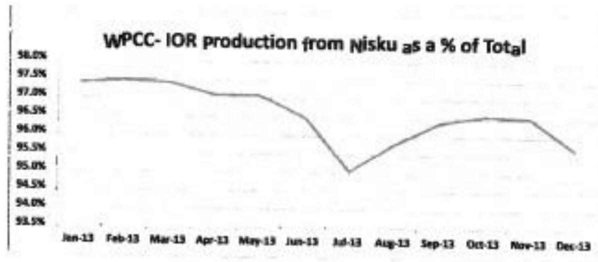
Twp-Rge	Nisku	Cardium	Other	Total
48-10	0.9	0.81		1.7
49-11	1302.0	15.4	0	1317.4
50-10	-	0.78		0.8
50-11	2.4	30		32.4
51-10	-			0.0
51-11	-			0.0
Total	1305.3	47.0	0.0	1352.3
% Nisku/ Cardium	96.53%	3.47%	0.00%	100.00%

1. Designated Area as per Exhibit B of CO&O for West Pembina 6-28 gas plant
2. Production based on November 2013 rpoduction month

2014 ABQB 326 (CanLII)

	IOR Nisku, mcf/d	IOR Cardium, mcf/d	Total IOR, mcf/d	% Nisku
Jan-13	42,721	1,143	43,864	97.4%
Feb-13	42,846	1,111	43,957	97.5%
Mar-13	42,868	1,136	44,004	97.4%
Apr-13	30,457	912	31,369	97.1%
May-13	42,005	1,258	43,263	97.1%
Jun-13	41,783	1,506	43,289	96.5%
Jul-13	28,595	1,490	30,086	95.0%
Aug-13	29,733	1,308	31,041	95.8%
Sep-13	40,054	1,510	41,563	96.4%
Oct-13	39,224	1,389	40,613	96.6%
Nov-13	41,286	1,480	42,766	96.5%
Dec-13	33,850	1,528	35,378	95.7%
Jan-14	33,118	1,577	34,696	95.5%
Feb-14	32,404	1,629	34,032	95.2%
Mar-14	31,706	1,681	33,387	95.0%
Apr-14	31,025	1,736	32,761	94.7%
May-14	30,360	1,792	32,152	94.4%
Jun-14	29,710	1,850	31,560	94.1%
Jul-14	29,076	1,910	30,986	93.8%
Aug-14	28,457	1,972	30,429	93.5%
Sep-14	27,852	2,036	29,888	93.2%
Oct-14	27,261	2,102	29,363	92.8%
Nov-14	26,684	2,170	28,853	92.5%
Dec-14	26,120	2,240	28,360	92.1%

1. Cardium production growth rate 3.24%/mo post November 2013



Schedule "B"

2014 ABQB 326 (CanLII)

1979 CanLII 10 (SCC)

Consolidated-Bathurst Export Limited (*Plaintiff*) *Appellant*;

and

Mutual Boiler and Machinery Insurance Company (*Defendant*) *Respondent.*

1979: March 13; 1979: December 21.

Present: Martland, Ritchie, Pigeon, Dickson, Beetz, Estey, and McIntyre JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Insurance — Interpretation of insurance contracts — Definition of accident — Direct and consequential damages.

The appellant, a manufacturer of paper products, was required to shut down part of its facilities because of the failure of three heat exchangers and thereby suffered a loss of $158,289.24 of which $15,604.44 was direct damage to the tubes in the heaters. The respondent is the insurer under a policy issued in respect of certain property of the appellant including these heat exchangers. The respondent resists the appellant's claim for the above mentioned loss on the basis that the damage was caused by corrosion of the tubes inside the heat exchangers and this risk was specifically excluded from the coverage provided by the policy of insurance. This position was adopted in both the Superior Court and the Court of Appeal. Hence the appeal of the plaintiff to this Court.

Held (Martland, Ritchie and McIntyre JJ. dissenting): The appeal should be allowed.

Per Pigeon, Dickson, Beetz and Estey JJ.: The issue is whether the loss occasioned by the corrosion of the heat exchangers is recoverable under the terms of the policy. The heart of the argument is that while the definition of accident in the policy does not include the event of corrosion or similar events such as "wear and tear, deterioration, depletion, or erosion of material" the definition does include, in the appellant's submission, events which succeed and which may be due to the event of corrosion.

In interpreting an insurance contract, effect must first be given to the intention of the parties, to be gathered from the words they have used, just as in any other contract. Step two is the application, when ambiguity is found, of the *contra proferentem* doctrine by which any doubt as to the meaning and scope of the excluding or limiting term is to be resolved against the party who has inserted it and who is now relying on it. Even apart from

Exportations Consolidated Bathurst Limitée (*Demanderesse*) *Appelante*;

et

Mutual Boiler and Machinery Insurance Company (*Défenderesse*) *Intimée.*

1979: 13 mars; 1979: 21 décembre.

Présents: Les juges Martland, Ritchie, Pigeon, Dickson, Beetz, Estey et McIntyre.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Assurance — Interprétation des contrats d'assurance — Définition d'accident — Dommages directs et indirects.

L'appelante, un fabricant de produits du papier, a dû fermer une partie de son usine en raison de la panne de trois échangeurs de chaleur, ce qui lui a occasionné une perte de $158,289.24, dont $15,604.44 de dommages directs aux tubes des échangeurs. L'intimée est l'assureur aux termes d'une police relative à certains biens de l'appelante, y compris ces échangeurs de chaleur. L'intimée conteste la réclamation de l'appelante pour la perte susmentionnée au motif que les dommages résultent de la corrosion des tubes à l'intérieur des échangeurs de chaleur et que ce risque est spécifiquement exclu de la protection offerte par la police d'assurance. La Cour supérieure et la Cour d'appel ont toutes deux adopté cette position. La demanderesse se pourvoit donc devant cette Cour.

Arrêt (les juges Martland, Ritchie et McIntyre sont dissidents): Le pourvoi est accueilli.

Les juges Pigeon, Dickson, Beetz et Estey: La question est de savoir si la perte causée par la corrosion des échangeurs de chaleur est garantie par les clauses de la police. Le cœur de l'argument est que bien que la définition du mot accident dans la police ne comprenne pas le cas de la corrosion ou des cas semblables tels que «l'usure normale, la détérioration, l'épuisement ou l'érosion du matériel», la définition inclut, aux dires de l'appelante, ce qui suit la corrosion et qui peut en résulter.

Dans l'interprétation d'un contrat d'assurance, tout comme dans n'importe quel autre contrat, il faut d'abord donner effet à l'intention des parties qui se dégage des mots qu'elles ont employés. La deuxième étape est l'application, lorsqu'il y a ambiguïté, de la doctrine *contra proferentem*; elle prévoit que le doute quant au sens et à la portée de la clause d'exclusion ou limitative sera résolu contre la partie qui l'a introduite et

1979 CanLII 10 (SCC)

this doctrine the normal rules of construction lead a court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract. There is no dispute that the heat exchangers were covered by the insurance contract. There is also no serious dispute that corrosion of the tubes inside the heat exchanger, probably caused by the presence of sea water, was the effective cause of the breakdown of the heat exchanger. The insurer, as was its right, sought in the terms of the contract to limit its exposure to accidental loss and did so by seeking to confine the definition of accident. To interpret "corrosion" as that word is employed in the definition of accident in the manner sought by the respondent would be to eliminate from the insurance coverage any and all loss suffered by the insured mill operator by reason of the intervention of the condition of corrosion. Such an interpretation would necessarily result in a substantial nullification of coverage under the contract.

Per Martland, Ritchie and McIntyre JJ., *dissenting*: While the policy here covers damage to property other than the object itself, the coverage is limited to indemnity in respect of loss or damage to property of the insured directly caused to an object by an accident as that word is defined in the policy. Therefore an interpretation which would result in affording coverage to the insured for consequential damages whether it was due to corrosion or otherwise cannot be adopted. The only "direct" damage to any object in the appellant's plant was the damage to the tubes themselves and the plain language of the insuring agreement in defining "accident" appears to contemplate and exclude from coverage the very event which happened here, namely, damage being caused to an object which was the property of the insured as a result of "corrosion of . . . material".

[*Indemnity Insurance Company of North America v. Excel Cleaning Service*, [1954] S.C.R. 169, followed; *Pense v. Northern Life Assurance Co.* (1907), 15 O.L.R. 131, aff'd (1908), 42 S.C.R. 246; *Stevenson v. Reliance Petroleum Ltd.; Reliance Petroleum Ltd. v. Canadian General Insurance Co.*, [1956] S.C.R. 936; *Cornish v. Accident Insurance Co.* (1889), 23 Q.B. 453 (C.A.) referred to.]

APPEAL from a judgment of the Court of Appeal of Quebec affirming a judgment of the Superior Court. Appeal allowed, Martland, Ritchie and McIntyre JJ. dissenting.

qui cherche maintenant à l'invoquer. Même indépendamment de cette doctrine, les règles normales d'interprétation amènent une cour à rechercher une interprétation qui, vu l'ensemble du contrat, tend à traduire et à présenter l'intention véritable des parties au moment où elles ont contracté. Il n'est pas contesté que les échangeurs de chaleur sont protégés par le contrat d'assurance. Il n'est pas non plus sérieusement contesté que la corrosion des tubes à l'intérieur des échangeurs de chaleur, probablement causée par la présence d'eau de mer, a été la cause réelle de leur panne. Comme il en a le droit, l'assureur a cherché dans les termes du contrat à limiter sa protection à la perte accidentelle, ce qu'il a fait en essayant de restreindre la définition d'accident. Interpréter la «corrosion» au sens où ce mot est employé dans la définition d'accident, comme le désire l'intimée, équivaudrait à éliminer de la protection de l'assurance toutes les pertes subies par l'assurée en raison de la présence de corrosion. Pareille interprétation entraînerait nécessairement la suppression d'une partie importante de la protection prévue au contrat.

Les juges Martland, Ritchie et McIntyre, *dissidents*: Bien que la police en l'espèce garantisse les dommages à des biens autres que l'objet lui-même, la garantie est limitée à une indemnité relativement à la perte des biens de l'assurée ou aux dommages subis par eux résultant directement d'un accident au sens donné à ce mot par la définition de la police. En conséquence, on ne peut adopter une interprétation qui protégerait l'assurée des dommages indirects qu'ils aient été causés par la corrosion ou par autre chose. Les seuls dommages «directs» à un objet quelconque dans l'usine de l'appelante sont ceux subis par les tubes eux-mêmes et les termes clairs employés dans le contrat d'assurance pour définir le mot «accident» prévoient l'événement même qui s'est produit ici, savoir, les dommages causés à un objet appartenant à l'assurée suite à la «corrosion du ... matériel», et l'excluent de la garantie.

[Jurisprudence: *Indemnity Insurance Company of North America c. Excel Cleaning Service*, [1954] R.C.S. 169, arrêt suivi; *Pense v. Northern Life Assurance Co.* (1907), 15 O.L.R. 131, conf. par (1908), 42 R.C.S. 246; *Stevenson c. Reliance Petroleum Ltd.; Reliance Petroleum Ltd. c. Canadian General Insurance Co.*, [1956] R.C.S. 936; *Cornish v. Accident Insurance Co.* (1889), 23 Q.B. 453 (C.A.).]

POURVOI à l'encontre d'un arrêt de la Cour d'appel du Québec qui a confirmé un jugement de la Cour supérieure. Pourvoi accueilli, les juges Martland, Ritchie et McIntyre étant dissidents.

1979 CanLII 10 (SCC)

Guy Desjardins, Q.C., for the appellant.

Marcel Cinq-Mars, Q.C., for the respondent.

The reasons of Martland, Ritchie and McIntyre JJ. were delivered by

RITCHIE J. (*dissenting*)—This is an appeal from a judgment of the Court of Appeal of the Province of Quebec affirming the judgment rendered at trial by Mr. Justice Bisson and dismissing the claim of the appellant against its insurer for damage sustained to its property located at a plant which it operated at New Richmond in the Province of Quebec, where it was engaged in the manufacture of paper and paper and wood products.

By reason of their malfunction, direct damage was caused to several tubes in the heaters employed for the heating of bunker "C" fuel with the consequence that temporary closing of the plant became necessary. The appellant's claim in this action encompasses not only the direct damage done to the tubes, but the consequential loss allegedly sustained because of the breakdown of the tubes.

I have had the privilege of reading the reasons for judgment prepared for delivery by my brother Estey in this case, but as I reach a different conclusion concerning the risk insured against by the policy in question, I have found it necessary to express my views separately.

The appellant's claim is made pursuant to the terms of an insurance agreement with the respondent which was in force at the time of the events above referred to whereby the respondent agreed

In consideration of the Premium the Company does hereby agree with the named Insured respecting loss from an Accident, as defined herein, as follows:

. . .

1. ... To pay the Insured for loss or damage to property of the Insured directly caused by such Accident *to an Object*, or if the Company so elects, to repair or replace such damaged property; ...

(The italics are my own.)

The objects covered by the policy are defined in the 1st Schedule thereof as follows:

Guy Desjardins, c.r., pour l'appelante.

Marcel Cinq-Mars, c.r., pour l'intimée.

Version française des motifs des juges Martland, Ritchie et McIntyre rendus par

LE JUGE RITCHIE (*dissident*)—Il s'agit d'un pourvoi à l'encontre d'un arrêt de la Cour d'appel de la province de Québec qui confirme le jugement rendu en première instance par le juge Bisson et rejette la réclamation de l'appelante contre son assureur pour dommages à ses biens situés dans une usine qu'elle exploite à New Richmond dans la province de Québec, où elle fabrique du papier et des sous-produits du papier et du bois.

Suite à leur mauvais fonctionnement, des dommages directs ont été causés à plusieurs tubes dans les échangeurs de chaleur utilisés pour chauffer du mazout lourd de catégorie «C», ce qui a nécessité la fermeture temporaire de l'usine. La réclamation de l'appelante dans cette action comprend non seulement les dommages directs aux tubes, mais la perte indirecte présumément subie suite à l'avarie des tubes.

J'ai eu l'avantage de lire les motifs de jugement préparés par mon collègue le juge Estey dans cette affaire mais, puisque je parviens à une conclusion différente quant au risque assuré par la police en question, j'ai jugé nécessaire d'exposer mon point de vue séparément.

La réclamation de l'appelante est fondée sur un contrat d'assurance qu'elle a conclu avec l'intimée et qui était en vigueur au moment des événements susmentionnés et aux termes duquel l'intimée

[TRADUCTION] Eu égard au paiement de la prime la Compagnie convient par la présente avec l'Assurée désignée, relativement à la perte résultant d'un accident, tel que défini dans la présente:

. . .

1. ... D'indemniser l'Assurée pour la perte de ses biens ou les dommages subis par eux, résultant directement d'un accident *à un objet* ou, si la Compagnie le préfère, de réparer ou de remplacer lesdits biens endommagés; ...

(Les italiques sont de moi.)

Les objets protégés par la police sont définis comme suit dans la première annexe:

1979 CanLII 10 (SCC)

The Objects covered under this Schedule are of the type designated as follows:

1. Any metal fired or metal unfired pressure valve; and

2. Any piping, on or between premises of the Insured, connected with such vessel and which contains steam or other heat transfer medium or condensate thereof, air, refrigerant, or boiler feedwater between the feed pump or injector and a boiler, together with the valves, fittings, separators and traps on all such piping.

[TRADUCTION] Les objets protégés par cette annexe sont de la catégorie désignée comme suit:

1. Toute soupape de métal soumise ou non soumise à la flamme; et

2. Toute tuyauterie dans l'usine de l'assurée ou entre ces bâtiments, reliée à un tel récipient et qui contient de la vapeur ou un autre moyen d'échange de chaleur ou condensat de celle-ci, air, réfrigérant ou eau d'alimentation de chaudière entre la pompe d'alimentation ou l'injecteur et une chaudière, ainsi que les soupapes, accessoires, séparateurs et purgeurs de toute ladite tuyauterie.

What is insured against by this agreement in my opinion is damage to the property of the insured "directly caused to an "object" by an "accident" as that word is defined in the policy. While the policy covers damage to property other than the object itself, it only covers that damage when it has been directly caused by "accident" to an "object". I am satisfied that the tubes were "objects" within the meaning of the above definition and that damage directly caused to the tubes would have been covered by the insurance agreement had it not been for the terms of the definition of "accident" contained therein which reads as follows:

C. Definition of Accident—As respects any Object covered under this Schedule, 'Accident' shall mean any sudden and accidental occurrence to the Object, or a part thereof, which results in damage to the Object and necessitates repair or replacement of the Object or part thereof; but Accident shall not mean (a) *depletion, deterioration, corrosion, or erosion of material*, (b) wear and tear (c) leakage at any valve, fitting, shaft seal, gland packing, joint or connection, (d) the breakdown of any vacuum tube, gas tube or brush, (e) the breakdown of any structure or foundation supporting the Object or any part thereof, nor (f) the functioning of any safety device or protection device.

(The italics are my own.)

A mon avis, sont assurés par cette convention les dommages aux biens de l'assurée «causés directement» à un «objet» par un «accident» au sens donné à ce mot par la définition de la police. Bien que la police garantisse les dommages à des biens autres que l'objet lui-même, elle ne les garantit que lorsqu'il ont été causés directement par un «accident» à un «objet». Je suis convaincu que les tubes sont des «objets» au sens de la définition susmentionnée et que les dommages directement causés aux tubes auraient été garantis par le contrat d'assurance n'eût été les termes de la définition d'«accident» y contenue dont voici le texte:

[TRADUCTION] C. Définition d'accident—En ce qui concerne un objet garanti par cette Annexe, «accident» signifie un événement soudain et accidentel touchant l'objet, ou une partie de celui-ci, qui l'endommage et en nécessite la réparation ou le remplacement total ou partiel; mais accident ne signifie pas a) *l'épuisement, la détérioration, la corrosion ou l'érosion du matériel*, b) l'usure normale, c) la fuite d'un raccord, d'un calage, d'un joint d'étanchéité, d'un presse-étoupe, d'un joint ou d'un contact, d) l'avarie d'un tube à vide, d'un tube à gaz ou d'une brosse, e) l'avarie d'une structure ou d'une fondation soutenant l'objet ou une partie de celui-ci, ni f) le fonctionnement d'un dispositif de sécurité ou de sûreté.

(Les italiques sont de moi.)

Both the trial judge and the Court of Appeal were satisfied that the damage to the tubes was occasioned by corrosion and this conclusion is supported by the fact that quantities of salt water did flow through the pipes. Expert evidence was called on behalf of the appellant directed to supporting the submission that the damage was caused by an hydraulic hammer effect of sudden

Le juge de première instance et la Cour d'appel étaient convaincus que les dommages aux tubes ont été causés par la corrosion et cette conclusion est confirmée par le fait qu'une grande quantité d'eau salée a circulé dans les tuyaux. Un témoin expert a été cité par l'appelante pour appuyer la prétention que les dommages ont été causés par un effet de coup de bélier d'origine soudaine qui a

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origin which placed an inordinate strain on the pipes and tubes causing them to break. This evidence was, however, not accepted either at trial or in the Court of Appeal and I do not find it necessary to discuss it. In the result it has been concurrently found at trial and on appeal that corrosion was the cause of the damage to the tubes and pipes and it follows from the terms of the "definition of accident" that this damage is not insured against by the policy in question.

It was contended also that even if the coverage afforded by the policy did not include damage by "depletion, deterioration, corrosion" or "wear and tear" within the meaning of the definition of "accident", it was nevertheless effective to make the insurer responsible for consequential loss suffered by the insured as a result of a sudden rupture of the heat exchanger, whether due to corrosion or not. In view of the fact that the coverage is limited to indemnity in respect of loss or "damage to property of the insured directly caused by such accident to an Object", I cannot adopt an interpretation which would result in affording coverage to the insured for consequential damage whether it was due to "corrosion" or otherwise. In my opinion, the only "direct" damage to any object in the appellant's plant was the damage to the tubes themselves and the plain language of the insuring agreement in defining "accident" appears to me to contemplate and exclude from coverage the very event which happened here, namely, damage being caused to an object which was the property of the insured as a result of "corrosion of . . . material".

It has been suggested that the language employed in the policy should be construed against the insurance company which was the author of it in accordance with the *contra proferentem* rule which is frequently invoked in the construction of insurance contracts when it is found that all other rules of construction fail to assist the Court in determining the true meaning of the policy.

In this regard my brother Estey has made reference to the reasons for judgment of Cartwright J., as he then was, in *Stevenson v. Reliance Petroleum Limited; Reliance Petroleum Limited*

imposé une pression excessive dans les tuyaux et les tubes, causant leur rupture. Cependant, cette preuve n'a pas été acceptée en première instance ni en Cour d'appel et je n'estime pas nécessaire de l'examiner. Finalement, il a été jugé en première instance et en appel que la corrosion était la cause des dommages aux tubes et aux tuyaux et il découle des termes de la «définition d'accident» que ces dommages ne sont pas assurés par la police en question.

On a également prétendu que même si la protection accordée par la police ne comprenait pas les dommages causés par «l'épuisement, la détérioration, la corrosion» ou «l'usure normale» au sens de la définition d'«accident», elle rendait néanmoins l'assureur responsable de la perte indirecte subie par l'assurée suite à la rupture soudaine de l'échangeur de chaleur, qu'elle ait ou non été causée par la corrosion. Étant donné que la garantie est limitée à une indemnité relativement à la perte des biens de l'assurée ou aux «dommages subis par eux résultant directement d'un accident à un objet», je ne peux adopter une interprétation qui protégerait l'assurée des dommages indirects qu'ils aient été causés par la «corrosion» ou par autre chose. A mon avis, les seuls dommages «directs» à un objet quelconque dans l'usine de l'appelante sont ceux subis par les tubes eux-mêmes et les termes clairs employés dans le contrat d'assurance pour définir le mot «accident» prévoient, selon moi, l'événement même qui s'est produit ici, savoir, les dommages causés à un objet appartenant à l'assurée suite à la «corrosion du . . . matériel», et l'excluent de la garantie.

On a avancé que les termes employés dans la police devraient être interprétés contre la compagnie d'assurances qui en est l'auteur, conformément à la règle *contra proferentem* qui est fréquemment invoquée dans l'interprétation des contrats d'assurance lorsque la cour arrive à la conclusion qu'aucune autre règle d'interprétation ne lui permet d'établir le sens réel de la police.

A cet égard, mon collègue le juge Estey a fait référence aux motifs du juge Cartwright, alors juge puîné, dans *Stevenson c. Reliance Petroleum Limited*; *Reliance Petroleum Limited c. Canadian*

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v. Canadian General Insurance Company[1] where he said at p. 953:

The rule expressed in the maxim, *verba fortius accipiuntur contra proferentem*, was pressed upon us in argument, but resort is to be had to this rule only when all other rules of construction fail to enable the Court of construction to ascertain the meaning of a document.

It will however be seen from what I have said that I do not find it necessary to resort to this rule in the interpretation of the policy here at issue.

My brother Estey has, however, adopted the view that in construing the policy and particularly the definition of accident contained therein in the manner adopted in these reasons and in those of the majority of the Court of Appeal, the result is to "largely, if not completely, nullify the purpose for which the insurance was sold" which is "a circumstances to be avoided so far as the language used will permit". In this regard reliance is placed on the judgment of this Court in *Indemnity Insurance Company of North America v. Excel Cleaning Service*[2], at pp. 177-178, but with the greatest respect I am unable to relate the circumstances of that case to those with which we are here concerned.

The *Excel Cleaning Service* case was one in which an "on location cleaning service" business was covered by a property damage liability policy insuring it for damage to property caused by accident arising out of its work. This policy however contained an exclusion relating "to damage to or destruction of property owned, rented, occupied or used by or in the care, custody and control of the insured", and the insurer contended that a wall to wall carpet fixed to the floor of a house where the insured was employed which was damaged was "in the care, custody and control of the insured" and therefore excluded from the coverage. Consistent with this reasoning all of the customer's belongings on which the insured was working were similarly exclusions which would have meant that the policy afforded no coverage whatever for the business of the insured. It was in this connection that this Court said, at pp. 177-178:

[1] [1956] S.C.R. 936.
[2] [1954] S.C.R. 169.

General Insurance Company[1] où il est dit à la p. 953:

[TRADUCTION] Les plaidoiries ont insisté sur la règle exprimée dans la maxime *verba fortius accipiuntur contra proferentem*, mais il faut recourir à cette règle seulement lorsque aucune autre règle d'interprétation ne permet à la Cour de s'assurer du sens d'un document.

Ce que j'ai dit indique toutefois que je n'estime pas nécessaire de recourir à cette règle pour interpréter la police examinée ici.

Toutefois, mon collègue le juge Estey est d'avis qu'en interprétant la police et en particulier la définition du mot accident y contenue de la manière adoptée dans les présents motifs et dans ceux de la majorité de la Cour d'appel, on [TRADUCTION] «annulerait en grande partie, sinon totalement, l'objet de l'assurance» ce qui constitue «une situation qui doit être évitée, dans la mesure où les termes employés le permettent». A cet égard, on s'appuie sur l'arrêt de cette Cour, *Indemnity Insurance Company of North America c. Excel Cleaning Service*[2], aux pp. 177 et 178, mais, avec égards, je ne puis établir un rapport entre les circonstances de cette affaire et celles de la présente.

Dans l'affaire *Excel Cleaning Service* une entreprise de «service de nettoyage à domicile» était protégée par une police d'assurance responsabilité civile pour les dommages matériels causés par un accident survenant dans l'exécution de ses travaux. Cette police contenait cependant une exclusion relative [TRADUCTION] «aux dommages ou à la destruction des biens appartenant à l'assurée, loués, occupés, utilisés par celle-ci ou sous sa responsabilité, sa garde et son contrôle». L'assureur a prétendu qu'une moquette couvrant le plancher d'une maison où l'assurée avait travaillé et qui avait été endommagée était sous «sa responsabilité, sa garde ou son contrôle» et donc exclue de la garantie. Selon ce raisonnement, tous les biens du client sur lesquels l'assurée travaillait étaient aussi exclus, ce qui aurait signifié que la police n'offrait absolument aucune protection à l'entreprise de l'assurée. C'est à ce sujet que la Cour a dit aux pp. 177 et 178:

[1] [1956] R.C.S. 936.
[2] [1954] R.C.S. 169.

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Such a construction [as advanced by the insurer] would largely, if not completely, nullify the purpose for which the insurance was sold—a circumstance to be avoided, so far as the language used will permit.

I am respectfully of the opinion that this case involves a very different situation from the one with which we are here concerned. The construction sought to be placed on the Excel Cleaning Service Policy would have meant that although it purported to be a property damage liability policy covering the insured's business, it in fact insured nothing whereas the present policy affords insurance "for loss or damage to property of the insured" directly caused by an accident as defined therein. The meaning assigned to the word "accident" in the policy does not constitute an exclusion from the coverage but is rather a part of the definition of the risk insured against.

For all these reasons, as well as for those stated by Mr. Justice Turgeon, I would dismiss this appeal with costs.

The judgment of Pigeon, Dickson, Beetz and Estey JJ. was delivered by

ESTEY J.—The appellant operates a manufacturing facility for the production of paper products, including paper boxes, at New Richmond, Quebec, and the respondent is the insurer under a policy of insurance issued in respect of certain property of the appellant including the property with which this action is concerned, being three heat exchangers. The heat exchangers in question are described by the trial judge as follows:

[TRANSLATION] The parts of this system with which we are particularly concerned are three heat exchangers, a type of pipe measuring fifteen feet long with an interior diameter of ten inches.

Within each of these three exchangers there are 102 tubes thirteen feet long, with an exterior diameter of 5/8 inch and a metal casing measuring 1/16 inch, or .065 inch.

Inside each exchanger at the ends the 102 pipes pass through a tubular metal plate one inch thick.

Further, the 102 tubes of each exchanger are themselves divided into three groups of 34 tubes each, so that oil flowing in the tubes passes around the exchanger

[TRADUCTION] Une telle interprétation [celle de l'assureur] annulerait en grande partie, sinon totalement, l'objet de l'assurance—une situation qui doit être évitée, dans la mesure où les termes employés le permettent.

Je suis respectueusement d'avis que cette affaire-là porte sur une situation très différente de celle qui nous occupe ici. L'interprétation qu'on a voulu donner à la police d'Excel Cleaning Service aurait signifié que, bien qu'elle se veuille une police d'assurance responsabilité civile pour les dommages matériels protégeant l'entreprise de l'assurée, cette police n'assurait en fait rien, alors que la présente police offre une assurance à [TRADUCTION] «l'assurée pour la perte de ses biens ou les dommages à eux causés» résultant directement d'un accident suivant la définition de ce mot dans la police. Le sens donné au mot «accident» dans la police ne constitue pas une exclusion de la garantie mais est plutôt une partie de la définition du risque assuré.

Pour tous ces motifs, de même que pour ceux énoncés par le juge Turgeon, je suis d'avis de rejeter ce pourvoi avec dépens.

Version française du jugement des juges Pigeon, Dickson, Beetz et Estey rendu par

LE JUGE ESTEY—L'appelante exploite une usine de fabrication de produits du papier, y compris des boîtes de carton, à New Richmond (Québec) et l'intimée est l'assureur aux termes d'une police d'assurance relative à certains biens de l'appelante, y compris les biens qui font l'objet de cette action, savoir, trois échangeurs de chaleur. Le juge de première instance décrit les échangeurs de chaleur en ces termes:

Les pièces qui nous intéressent plus particulièrement dans ce système sont trois échangeurs de chaleur, sorte de tuyaux mesurant quinze pieds de long avec un diamètre inférieur de dix pouces.

A l'intérieur de chacun des ces trois échangeurs, on retrouve 102 tubes de treize pieds de longueur, d'un diamètre extérieur de 5/8 de pouce et dont la paroi métallique mesure 1/16 de pouce ou .065 pouce.

A chacune de leurs extrémités, à l'intérieur de l'échangeur, les 102 tuyaux pénètrent dans une plaque tubulaire métallique d'un pouce d'épaisseur.

D'autre part, les 102 tubes de chaque échangeur sont eux-mêmes divisés en trois groupes de 34 tubes chacun, de façon à ce que l'huile s'écoulant dans les tubes fasse

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three times and is heated to the right level before emerging and being directed towards the boilers as a fuel.

Steam circulates in the exchangers, passing in through the left end immediately to the right of the tubular plate and emerging at the right end, just as it strikes the other tubular plate.

Each exchanger is sealed at each end by a lid.

As the exchanger measures fifteen feet and the tubes thirteen feet, it follows that a space of one foot remains at each end between the tubular plate and the lid closing the exchanger.

The whole apparatus forms a sealed unit, which it was established cannot be opened without causing a breakdown and considerable damage.

Due to the failure of these heat exchangers, the appellant was required to shut down part of their facilities and thereby suffered a loss which the parties have agreed amounted to $158,289.24. This sum is set out in the Plaintiff's Declaration and includes "Direct Damage Loss" of $15,604.44. The insurer resists the appellant's claim on the basis that the damage was caused by corrosion of the tubes inside the heat exchanger and this risk was specifically excluded from the coverage provided by the policy of insurance. The material provisions of the policy of insurance issued by the respondent are as follows:

INSURING AGREEMENT

In consideration of the Premium the Company does hereby agree with the named Insured respecting loss from an Accident, as defined herein, as follows:

COVERAGE A—PROPERTY OF THE INSURED

1. ACTUAL CASH VALUE—To pay the Insured for loss of or damage to property of the Insured directly caused by such Accident to an Object, or if the Company so elects, to repair or replace such damaged property; and

The definition of accident as employed in the above excerpt is as follows:

As respects any Object covered under this Schedule, "Accident" shall mean any sudden and accidental occurrence to the Object, or a part thereof, which results in damage to the Object and necessitates repair or

trois fois le circuit de l'échangeur pour être chauffée à point avant d'en sortir pour se diriger comme combustible vers les bouilloires.

Quant à la vapeur, elle circule dans les échangeurs, pénétrant par l'extrémité de gauche immédiatement à droite de la plaque tubulaire, pour en ressortir à l'extrémité de droite, tout juste au moment où elle frappe l'autre plaque tubulaire.

Chaque échangeur est scellé à chacune des deux extrémités par un couvercle.

L'échangeur mesurant quinze pieds, et les tubes, treize pieds, il faut en conclure qu'il reste un espace d'un pied à chaque extrémité entre la plaque tubulaire et le couvercle qui ferme l'échangeur.

Le tout forme une unité scellée dont on a établi qu'il ne saurait être question de l'ouvrir sans la démanteler et y causer des dommages considérables.

En raison de la panne de ces échangeurs de chaleur, l'appelante a dû fermer une partie de son usine, ce qui lui a occasionné une perte évaluée par les parties à $158,289.24. Ce montant est détaillé dans la déclaration de l'appelante et comprend la «perte directe» de $15,604.44. L'assureur conteste la réclamation de l'appelante au motif que les dommages résultent de la corrosion des tubes à l'intérieur des échangeurs de chaleur et que ce risque est spécifiquement exclu de la protection offerte par la police d'assurance. Les clauses essentielles de la police d'assurance délivrée par l'intimée sont les suivantes:

[TRADUCTION]

CONVENTION D'ASSURANCE

Eu égard au paiement de la prime la Compagnie convient par la présente avec l'Assurée désignée, relativement à la perte résultant d'un accident, tel que défini dans la présente:

GARANTIE A—BIENS DE L'ASSURÉE

1. VALEUR RÉELLE—D'indemniser l'Assurée pour la perte de ses biens ou les dommages subis par eux, résultant directement d'un accident à un objet ou, si la Compagnie le préfère, de réparer ou de remplacer lesdits biens endommagés; et

Voici la définition du mot accident employé dans l'extrait ci-dessus:

[TRADUCTION] En ce qui concerne un objet garanti par cette Annexe, «accident» signifie un événement soudain et accidentel touchant l'objet, ou une partie de celui-ci, qui l'endommage et en nécessite la réparation ou le

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replacement of the Object or part thereof; but Accident shall not mean (a) depletion, deterioration, corrosion, or erosion of material, (b) wear and tear, (c) leakage at any value, fitting, shaft seal, gland packing, joint or connection, (d) the breakdown of any vacuum tube, gas tube or brush, (e) the breakdown of any structure or foundation supporting the Object or any part thereof, nor (f) the functioning of any safety device or protective device.

The employees of the appellant became aware of the failure of the heat exchangers when small fuel oil spots were noticed on linerboard being produced in the mill. The source of the oil was traced to the boiler and hence to the heat exchangers where a number of ruptured tubes were discovered.

The appellant advanced two main submissions:

(a) that the damage was caused by hydraulic hammer effect; and,
(b) alternatively, that the damage was caused by corrosion and that the terms of the policy do not exclude damage thus occasioned.

The learned trial judge found that the damage was caused by corrosion and discusses the contribution of pressure changes as follows:

[TRANSLATION] There is no doubt that the damage occurred suddenly, but the phenomenon which led up to it, namely the chemical process of corrosion, was not of a sudden and accidental nature, so that it could not be regarded as an "accident".

On December 4, 1968 some occurrence, probably a fall in the steam pressure in the heat exchanger, caused a failure in certain oil tubes, which moreover apparently broke in a relatively short space of time.

The fact remains, however, that corrosion was the cause of the damage.

The majority of the Court of Appeal found the damage was the result of corrosion and thereby excluded from policy coverage. Turgeon J.A. dealt with the hydraulic hammer theory as follows:

[TRANSLATION] This was a possibility, not a probability, mentioned by appellant's expert witness Mahoney in his examination in chief. However, when he was

remplacement total ou partiel; mais accident ne signifie pas a) l'épuisement, la détérioration, la corrosion ou l'érosion du matériel, b) l'usure normale, c) la fuite d'un raccord, d'un calage, d'un joint d'étanchéité, d'un presse-étoupe, d'un joint ou d'un contact, d) l'avarie d'un tube à vide, d'un tube à gaz ou d'une brosse, e) l'avarie d'une structure ou d'une fondation soutenant l'objet ou une partie de celui-ci, ni f) le fonctionnement d'un dispositif de sécurité ou de sûreté.

Les employés de l'appelante se sont aperçus de la panne des échangeurs de chaleur lorsqu'ils ont remarqué des taches d'huile sur des feuilles de carton en voie de fabrication à l'usine. La source de l'huile a été retracée dans la chaudière et de là dans les échangeurs de chaleur où l'on a découvert un certain nombre de tuyaux fissurés.

Voici les deux prétentions principales de l'appelante:

a) que les dommages ont été causés par l'effet d'un coup de bélier; et,
b) subsidiairement, que les dommages ont été causés par la corrosion et que les termes de la police n'excluent pas les dommages ainsi causés.

Le savant juge de première instance a jugé que les dommages avaient été causés par la corrosion et discute ainsi de l'effet de la chute de pression:

Que le dommage se soit manifesté de façon soudaine, cela ne fait aucun doute, mais le phénomène qui l'a entraîné c'est-à-dire le processus chimique de la corrosion ne s'est pas réalisé de façon soudaine et accidentelle, de sorte qu'on ne peut dire qu'il y a eu «accident».

Le 4 décembre 1968, un événement, vraisemblablement la chute de pression de vapeur d'eau dans l'échangeur de chaleur, a provoqué la rupture de certains tubes d'huile, qui se seraient d'ailleurs rupturés à plus ou moins brève échéance.

Mais il n'en reste pas moins que la cause du dommage a été la corrosion.

La majorité de la Cour d'appel a jugé que les dommages avaient été causés par la corrosion et qu'ils étaient donc exclus de la protection de la police. Le juge Turgeon a traité ainsi de la théorie du coup de bélier:

Il s'agit là d'une possibilité invoquée par l'expert Mahoney de l'appelante à son interrogatoire en chef, non d'une probabilité. Cependant, lorsqu'il fut contre-

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cross-examined, he admitted that he could not provide any direct evidence that a "hydraulic hammer" effect was produced, or that there was excessive pressure, or that the safety valves did not operate effectively.

Dissenting from the majority, Kaufman J.A. appears to have adopted in part the hydraulic hammer theory as being a "trigger" which precipitated the leaks in the tubes. The learned justice went on to state:

But where, as here, the pressure suddenly increased, it will not do for the insurer to point to the corrosion and say that, sooner or later, the tubes would have burst anyway.

Thus it will be seen that in both courts below the cause of the damage was found to be corrosion of the tubes which both courts went on to conclude was a risk or peril not covered by the insurance contract.

The issue is simply, therefore, whether the admitted loss suffered by the appellant and which was occasioned by the corrosion of the heat exchangers is a loss recoverable under the above-quoted terms of the policy of insurance issued by the respondent to the appellant. This leaves the alternative submission advanced by the appellant, namely that the term of the contract of insurance covers the damages suffered by the appellant. The heart of this argument is that while the definition of accident does not include the event of corrosion or similar events such as "wear and tear, deterioration, depletion, or erosion of material", the definition does include, in the appellant's submission, events which succeed and which may be due to the event of corrosion. Thus the insurer would not be liable under the contract for the cost of repairing or replacing any insured property damaged by "depletion, deterioration, corrosion, wear and tear, etc.", but would be responsible for any consequential loss to the insured following the sudden rupture of the heat exchanger whether or not it be due to "corrosion" or "wear and tear", etc.

In the preliminary provisions setting up the coverage under the policy of insurance, the definition of accident is, of course, fundamental, and strip-

interrogé, il a admis qu'il ne pouvait fournir aucune preuve directe qu'il se serait produit un «hydraulic hammer» ni qu'il y avait eu une pression excessive, ni enfin que les valves de sécurité n'avaient pas fonctionné adéquatement.

Le juge Kaufman, dissident, a retenu en partie la théorie que le coup de bélier a joué comme «déclic» qui a accéléré les fuites dans les tubes. Le savant juge a poursuivi:

[TRADUCTION] Mais lorsque, comme en l'espèce, la pression augmente soudainement, l'assureur ne peut accuser la corrosion et dire que, dans un avenir plus ou moins rapproché, les tubes auraient éclaté de toute façon.

Il est donc clair que les deux cours d'instance inférieure ont conclu que la cause des dommages était la corrosion des tubes qui, selon elles, n'est pas un risque ou un péril garanti par le contrat d'assurance.

Donc, la question est simplement de savoir si la perte que l'on admet avoir été subie par l'appelante et qui a été causée par la corrosion des échangeurs de chaleur est une perte garantie par les clauses précitées de la police d'assurance délivrée par l'intimée à l'appelante. Ceci laisse la prétention subsidiaire de l'appelante, savoir, que les clauses du contrat d'assurance garantissent les dommages qu'elle a subis. Le cœur de cet argument est que bien que la définition du mot accident ne comprenne pas le cas de la corrosion ou des cas semblables tels que «l'usure normale, la détérioration, l'épuisement ou l'érosion du matériel», la définition inclut, aux dires de l'appelante, ce qui suit la corrosion et qui peut en résulter. Ainsi, l'assureur ne serait pas responsable en vertu du contrat du coût des réparations ou du remplacement d'un bien assuré endommagé par «épuisement, détérioration, corrosion, usure normale etc.», mais le serait de toute perte indirecte subie par l'assurée après la rupture soudaine de l'échangeur de chaleur, qu'elle soit ou non causée par la «corrosion» ou «l'usure normale» etc.

Dans les dispositions préliminaires sur la garantie accordée par la police d'assurance, la définition d'accident est, bien sûr, fondamentale et, si l'on ne

ping out the words not here relevant, the definition reads as follows:

Accident shall mean a sudden and accidental occurrence to the object . . . but accident shall not mean . . . corrosion . . .

Some light may be thrown on this interpretation difficulty by reference to a latter portion of the policy of insurance headed "Exclusions". The following excerpts illustrate the drafting technique employed in the policy where risks are to be excluded from its coverage:

EXCLUSIONS

This policy does not apply to

1. **WAR DAMAGE**—Loss from an Accident caused directly or indirectly by

(a) Hostile or warlike action, including action in hindering, combating or defending against an actual, impending or expected attack, by

. . .

2. **NUCLEAR HAZARDS**—Loss, whether it be direct or indirect, proximate or remote,

(a) From an Accident caused directly or indirectly by nuclear reaction . . .

(b) From nuclear reaction, nuclear radiation or radioactive contamination, all whether controlled or uncontrolled, caused directly or indirectly by, contributed to or aggravated by an Accident;

. . .

3. **MISCELLANEOUS PERILS**—Loss under Coverages A and B from

. . .

(b) An Accident caused directly or indirectly by fire or from the use of water or other means to extinguish fire;

. . .

(d) Flood unless an Accident ensues and the Company shall then be liable only for loss from such ensuing Accident;

. . .

(Emphasis added.)

Thus it may be argued that when the draftsman wished to exclude consequences from an event, the words "directly or indirectly" were employed. Had

retient que les mots pertinents à l'espèce, la définition devient:

Accident signifie un événement soudain et accidentel touchant l'objet . . . mais accident ne signifie pas . . . la corrosion . . .

L'examen d'un chapitre de la police que l'on trouve plus loin et qui est intitulé «Exclusions» peut jeter un peu de lumière sur cette difficulté d'interprétation. Les extraits suivants illustrent la technique de rédaction utilisée dans la police lorsque des risques en sont exclus:

[TRADUCTION]

EXCLUSIONS

Cette police ne s'applique pas aux

1. **AVARIES CAUSÉES PAR LA GUERRE**—La perte résultant d'un accident causé directement ou indirectement par

a) une action hostile ou belliqueuse, comprenant une manœuvre de diversion, de combat ou de défense contre une attaque réelle, imminente ou prévue, par

. . .

2. **DANGERS NUCLÉAIRES**—La perte, qu'elle soit directe ou indirecte, immédiate ou éloignée,

a) résultant d'un accident causé directement ou indirectement par une réaction nucléaire . . .

b) résultant d'une réaction nucléaire, d'une radiation nucléaire ou d'une contamination radioactive, qu'elles soient ou non contrôlées, causées directement ou indirectement, entraînées ou aggravées par un accident;

. . .

3. **RISQUES DIVERS**—La perte en vertu des garanties A et B résultant

. . .

b) d'un accident causé directement ou indirectement par le feu ou l'usage de l'eau ou d'un autre moyen d'extinction du feu;

. . .

d) l'inondation, à moins qu'un accident s'ensuive, et la Compagnie sera alors seulement responsable de la perte résultant d'un tel accident subséquent;

. . .

(C'est moi qui souligne.)

On peut donc prétendre que lorsque le rédacteur a voulu exclure les conséquences d'un événement, il a employé les mots «directement ou indirecte-

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this technique been adopted in the primary coverage provisions excerpted above, it would have read;

Accident does not mean that which directly or indirectly results from corrosion.

Alternatively, if the consequences of corrosion were intended by the parties to be beyond the protection of the contract, such circumstances would have been included under the heading "Exclusions" as a subparagraph comparable to one of those set out above.

At best, one must conclude that the definition of accident, including as it does the reference to corrosion, leaves two clear alternative interpretations open. Firstly, the definition may not include an event relating to corrosion. Secondly, the definition may exclude only the cost of making good the corrosion itself.

Insurance contracts and the interpretative difficulties arising therein have been before courts for at least two centuries, and it is trite to say that where an ambiguity is found to exist in the terminology employed in the contract, such terminology shall be construed against the insurance carrier as being the author, or at least the party in control of the contents of the contract. This is, of course, not entirely true because of statutory modifications to the contract, but we are not here concerned with any such mandated provisions. Meredith J.A. put the proposition in *Pense v. Northern Life Assurance Co.*[3] at p. 137:

There is no just reason for applying any different rule of construction to a contract of insurance from that of a contract of any other kind; and there can be no sort of excuse for casting a doubt upon the meaning of such a contract with a view to solving it against the insurer, however much the claim against him may play upon the chords of sympathy, or touch a natural bias. In such a contract, just as in all other contracts, effect must be given to the intention of the parties, to be gathered from the words they have used. A plaintiff must make out from the terms of the contract a right to recover; a defendant must likewise make out any defence based upon the agreement. The onus of proof, if I may use such a term in reference to the interpretation of a writing, is, upon each party respectively, precisely the same. We are all, doubtless, insured, and none insurers,

[3] (1907), 15 O.L.R. 131.

ment». Si cette technique avait été adoptée dans les dispositions de garantie de base citées précédemment, le texte aurait été:

Accident ne signifie pas ce qui résulte directement ou indirectement de la corrosion.

Subsidiairement, si les parties ne désiraient pas que les conséquences de la corrosion soient visées par le contrat, ces circonstances auraient été incluses sous le tire «Exclusions» dans un alinéa comparable à l'un de ceux que j'ai cités.

Au mieux, il faut conclure que la définition d'accident, qui mentionne effectivement la corrosion, laisse deux interprétations possibles évidentes. Premièrement, la définition peut n'inclure aucun événement relié à la corrosion. Deuxièmement, la définition peut exclure seulement ce qu'il en coûte pour réparer la corrosion elle-même.

Les contrats d'assurance et les difficultés d'interprétation qu'ils posent ont été examinés par les cours depuis au moins deux siècles, et c'est un truisme de dire que lorsque l'on conclut que le texte du contrat est ambigu, il doit être interprété contre l'assureur qui est l'auteur, ou du moins la partie qui a la haute main sur le contenu du contrat. Ceci n'est pas entièrement vrai, bien sûr, à cause des modifications au contrat imposées par la loi, mais aucune de ces dispositions imposées n'est en litige ici. Dans l'arrêt *Pense v. Northern Life Assurance Co.*[3] à la p. 137, le juge Meredith de la Cour d'appel a formulé la proposition que:

[TRADUCTION] Il n'y a aucune raison valable pour appliquer à un contrat d'assurance une règle d'interprétation différente de celle applicable à un contrat d'une autre nature; et il ne peut y avoir aucune sorte d'excuse pour jeter le doute sur le sens de pareil contrat en vue de l'interpréter contre l'assureur, quel grand que soit le parti pris naturel ou la sympathie que peut éveiller la demande d'indemnité qu'on lui adresse. Dans ce contrat, tout comme dans tous les autres, il faut donner effet à l'intention des parties qui se dégage des mots qu'elles ont employés. Un demandeur doit pouvoir établir son droit de recouvrer une indemnité d'après les termes du contrat; un défendeur doit de même établir une défense fondée sur la convention. Le fardeau de la preuve, si je peux utiliser cette expression à l'égard de l'interprétation d'un écrit, est exactement le même pour chaque

[3] (1907), 15 O.L.R. 131.

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and so, doubtless, all more or less affected by the natural bias arising from such a position; and so ought to beware lest that bias be not counteracted by a full apprehension of its existence.

(Adopted in this Court in 1908[4].)

Such a proposition may be referred to as step one in the interpretative process. Step two is the application, when ambiguity is found, of the *contra proferentem* doctrine. This doctrine finds much expression in our law, and one example which may be referred to is found in *Cheshire and Fifoot's Law of Contract* (9th ed.), at pp. 152-3:

> If there is any doubt as to the meaning and scope of the excluding or limiting term, the ambiguity will be resolved against the party who has inserted it and who is now relying on it. As he seeks to protect himself against liability to which he would otherwise be subject, it is for him to prove that his words clearly and aptly describe the contingency that has in fact arisen.

This Court applied the doctrine in *Indemnity Insurance Company of North America v. Excel Cleaning Service*[5] where at pp. 179-180 it was stated:

> It is, in such a case, a general rule to construe the language used in a manner favourable to the insured. The basis for such being that the insurer, by such clauses, seeks to impose exceptions and limitations to the coverage he has already described and, therefore, should use language that clearly expresses the extent and scope of these exceptions and limitations and, in so far as he fails to do so, the language of the coverage should obtain ... Furthermore, the language of Lord Greene in *Woolfall & Rimmer, Ltd.* v. *Moyle*, [1942] 1 K.B. 66 at 73, is appropriate. He there states:
>
> > I cannot help thinking that, if underwriters wish to limit by some qualification a risk which, prima facie, they are undertaking in plain terms, they should make it perfectly clear what that qualification is.

As has already been stated, this is, of course, the second phase of interpretation of such a contract. Cartwright J., as he then was, stated in *Stevenson*

[4] (1908), 42 S.C.R. 246.

[5] [1954] S.C.R. 169.

partie respectivement. Nous sommes tous, très probablement, assurés et non assureurs et donc, très probablement, plus ou moins influencés par le parti pris naturel qui se dégage d'une telle position; aussi, faut-il prendre garde aux effets de ce parti pris en prenant entièrement conscience de son existence.

(Adoptée par cette Cour en 1908.[4])

On peut qualifier pareille proposition de première étape du processus d'interprétation. La deuxième étape est l'application, lorsqu'il y a ambiguïté, de la doctrine *contra proferentem*. Cette doctrine est souvent exposée dans notre droit et on peut citer à titre d'exemple ce qu'en dit *Cheshire and Fifoot's Law of Contract* (9e éd.), aux pp. 152 et 153:

> [TRADUCTION] S'il y a le moindre doute quant au sens et à la portée de la clause d'exclusion ou limitative, l'ambiguïté sera résolue contre la partie qui l'a introduite et qui cherche maintenant à l'invoquer. Puisqu'elle cherche à se protéger contre une responsabilité à laquelle elle serait autrement assujettie, il lui incombe de prouver que les mots qu'elle a employés décrivent clairement et convenablement l'éventualité qui s'est en fait produite.

Cette Cour a appliqué la doctrine dans *Indemnity Insurance Company of North America c. Excel Cleaning Service*[5] où elle a dit, aux pp. 179 et 180:

> [TRADUCTION] C'est, dans un tel cas, une règle générale que de donner aux termes employés une interprétation qui soit favorable à l'assuré. Le fondement de cette règle est que l'assureur cherche par de semblables clauses à imposer des exceptions et des restrictions à la protection qu'il a déjà décrite et, par conséquent, doit employer des termes qui expriment clairement l'étendue et l'importance de ces exceptions et restrictions, et, dans la mesure où il omet de le faire, ce sont les termes décrivant la protection qui doivent prévaloir ... De plus, les paroles de lord Greene dans *Woolfall & Rimmer, Ltd. v. Moyle*, [1942] 1 K.B. 66 à la p. 73, sont appropriées. Il a dit:
>
> > Je ne peux m'empêcher de penser que si les assureurs désirent limiter par quelque condition un risque qu'à première vue, ils acceptent en des termes clairs, ils devraient très nettement l'énoncer.

Comme je l'ai déjà dit, il s'agit bien sûr de la deuxième étape de l'interprétation d'un tel contrat. Le juge Cartwright, alors juge puîné, a dit dans

[4] (1908), 42 R.C.S. 246.

[5] [1954] R.C.S. 169.

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v. *Reliance Petroleum Limited; Reliance Petroleum Limited* v. *Canadian General Insurance Company*[6] at p. 953:

> The rule expressed in the maxim, *verba fortius accipiuntur contra proferentem*, was pressed upon us in argument, but resort is to be had to this rule only when all other rules of construction fail to enable the Court of construction to ascertain the meaning of a document.

Lindley L.J. put it this way:

> In a case on the line, in a case of real doubt, the policy ought to be construed most strongly against the insurers; they frame the policy and insert the exceptions. But this principle ought only to be applied for the purpose of removing a doubt, not for the purpose of creating a doubt, or magnifying an ambiguity, when the circumstances of the case raise no real difficulty.

Cornish v. Accident Insurance Company[7], at p. 456.

Even apart from the doctrine of *contra proferentem* as it may be applied in the construction of contracts, the normal rules of construction lead a court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract. Consequently, literal meaning should not be applied where to do so would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the insurance was contracted. Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties. Similarly, an interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation of the policy which promotes a sensible commercial result. It is trite to observe that an interpretation of an ambiguous contractual provision which would render the endeavour on the part of the insured to obtain insurance protection nugatory, should be avoided. Said another way, the courts should be loath to support a construction which would either enable the insurer to pocket the premium without risk or

[6] [1956] S.C.R. 936.
[7] (1889), 23 Q.B. 453 (C.A.).

Stevenson c. Reliance Petroleum Limited; Reliance Petroleum Limited c. Canadian General Insurance Company[6] à la p. 953:

> [TRADUCTION] Les plaidoiries ont insisté sur la règle exprimée dans la maxime *verba fortius accipiuntur contra preferentem*, mais il faut recourir à cette règle seulement lorsque aucune autre règle d'interprétation ne permet à la Cour de s'assurer du sens d'un document.

Le lord juge Lindley l'a dit en ces termes:

> [TRADUCTION] Dans un cas limite, lorsqu'il y a un doute réel, il faut interpréter la police de façon plus stricte contre les assureurs; ils conçoivent la police et introduisent les exceptions. Mais ce principe ne doit être appliqué que pour écarter un doute et non pour en créer un ou grossir une ambiguïté, lorsque les circonstances de l'affaire ne soulèvent aucune difficulté réelle.

Cornish v. Accident Insurance Company[7], à la p. 456.

Même indépendamment de la doctrine *contra proferentem* dans la mesure où elle est applicable à l'interprétation des contrats, les règles normales d'interprétation amènent une cour à rechercher une interprétation qui, vu l'ensemble du contrat, tend à traduire et à présenter l'intention véritable des parties au moment où elles ont contracté. Dès lors, on ne doit pas utiliser le sens littéral lorsque cela entraînerait un résultat irréaliste ou qui ne serait pas envisagé dans le climat commercial dans lequel l'assurance a été contractée. Lorsque des mots sont susceptibles de deux interprétations, la plus raisonnable, celle qui assure un résultat équitable, doit certainement être choisie comme l'interprétation qui traduit l'intention des parties. De même, une interprétation qui va à l'encontre des intentions des parties et du but pour lequel elles ont à l'origine conclu une opération commerciale doit être écartée en faveur d'une interprétation de la police qui favorise un résultat commercial raisonnable. C'est un truisme de faire remarquer que l'on doit éviter une interprétation d'une clause contractuelle ambiguë qui rendrait futile l'effort déployé par l'assuré pour obtenir la protection d'une assurance. En d'autres mots, les cours devraient être réticentes à appuyer une interprétation qui permettrait soit à l'assureur de toucher une prime sans risque soit à l'assuré d'obtenir une

[6] [1956] R.C.S. 936.
[7] (1889), 23 Q.B. 453 (C.A.).

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the insured to achieve a recovery which could neither be sensibly sought nor anticipated at the time of the contract.

The *Cornish* case, *supra*, illustrates a course generally taken when such contracts reach the courts. There the court was interpreting an insurance contract in the light of the death of the insured while crossing a railway track. The policy included an exception from insured risks resulting from "exposure of the insured to obvious risk of injury". Lindley L.J., in the course of judgment, stated:

The words are "exposure of the insured to obvious risk of injury." These words suggest the following questions: Exposure by whom? Obvious when? Obvious to whom? It is to be observed that the words are very general. There is no such word as "wilful," or "reckless," or "careless"; and to ascertain the true meaning of the exception the whole document must be studied and the object of the parties to it must be steadily borne in mind. The object of the contract is to insure against accidental death and injuries, and the contract must not be construed so as to defeat that object, nor so as to render it practically illusory. A man who crosses an ordinary crowded street is exposed to obvious risk of injury; and, if the words in question are construed literally, the defendants would not be liable in the event of an insured being killed or injured in so crossing, even if he was taking reasonable care of himself. Such a result is so manifestly contrary to the real intention of the parties that a construction which leads to it ought to be rejected. But, if this be true, a literal construction is inadmissible, and some qualification must be put on the words used. (at p. 456)

An example of the application of the same principles is found in the *Indemnity Insurance Company of North America v. Excel Cleaning Service*, *supra*, where, at pp. 177-8, it was concluded:

Such a construction [as advanced by the insurer] would largely, if not completely, nullify the purpose for which the insurance was sold—a circumstance to be avoided, so far as the language used will permit.

The appellant, as the owner and operator of a large forest products facility, sought insurance protection of the machinery employed in the plant in its industrial processes. There is no dispute that the heat exchangers in question were covered by the insurance contract. There is also no serious dispute, at least by the time the litigation had

indemnité que l'on n'a pas pu raisonnablement rechercher ni escompter au moment du contrat.

L'arrêt *Cornish*, précité, illustre la ligne de conduite généralement suivie lorsque pareils contrats sont soumis aux tribunaux. La cour y interprète un contrat d'assurance dans le contexte du décès de l'assuré survenu alors qu'il traversait une voie ferrée. La police comportait une exception aux risques assurés en cas de [TRADUCTION] «risques évidents de blessures pris par l'assuré». Dans le cours de son jugement, le lord juge Lindley a dit:

[TRADUCTION] Les mots sont «risques évidents de blessures pris par l'assuré». Ces mots suggèrent les questions suivantes: Risques pris par qui? Évidents: quand et pour qui? Il faut remarquer que ces mots sont très généraux. Il n'y a aucun mot tel que «intentionnel» ou «téméraire» ou «négligent»; et pour s'assurer du sens réel de l'exception, il faut examiner le document dans son ensemble et garder toujours à l'esprit l'objet qu'avaient les parties à ce contrat. L'objet du contrat est d'assurer contre la mort ou les blessures accidentelles, et le contrat ne doit pas être interprété d'une manière telle qu'il détruise cet objet, ou le rende pratiquement illusoire. Un homme qui traverse une rue ordinairement encombrée s'expose à des risques évidents de blessures; et, si l'on interprète littéralement les mots en question, les défendeurs ne seront pas responsables si l'assuré est tué ou blessé en traversant, même s'il a été raisonnablement prudent. Pareil résultat est si manifestement contraire à l'intention réelle des parties que l'on doit rejeter une interprétation qui y mène. Mais, si cela est vrai, une interprétation littérale est irrecevable et il faut assortir les mots employés de certaines réserves. (à la p. 456)

On trouve un exemple de l'application des mêmes principes dans *Indemnity Insurance Company of North America c. Excel Cleaning Service*, précité, où l'on a conclu aux pp. 177 et 178:

[TRADUCTION] Une telle interprétation [celle de l'assureur] annulerait en grande partie, sinon totalement, l'objet de l'assurance—une situation qui doit être évitée, dans la mesure où les termes employés le permettent.

L'appelante, en qualité de propriétaire et d'exploitant d'une grande usine de produits forestiers, a voulu assurer la machinerie utilisée dans l'usine à des fins industrielles. Il n'est pas contesté que les échangeurs de chaleur en question sont protégés par le contrat d'assurance. Il n'est pas non plus sérieusement contesté, du moins lorsque le litige

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reached this Court, that corrosion of the tubes inside the heat exchanger, probably caused by the presence of sea water, was the effective cause of the breakdown of the heat exchanger, and the consequential release of oil into the processed steam. The insurer, as was its right, sought in the terms of the contract to limit its exposure to accidental loss and did so by seeking to confine the definition of accident. If a court were to accept the submissions of the respondent, that loss suffered by the insured by reason of the failure of a machine due to wear and tear and the consequential downtime of the plant was excluded by the definition of accident, then the insured would have purchased, by its premiums, no coverage for what may well be the most likely source of loss, or certainly a risk pervasive through much of the plant. Similarly, to interpret corrosion as that word is employed in the definition of accident in the manner sought by the respondent would be to eliminate from the insurance coverage any and all loss suffered by the insured mill operator by reason of the intervention of the condition of corrosion. Such an interpretation would necessarily result in a substantial nullification of coverage under the contract. It may well be argued by insurers that the premium will reflect such a narrowed coverage. There is no evidence that such is the case here.

It may also be argued by the insurance industry that applying the more favourable construction to this ambiguous provision will be to unnecessarily and unfairly burden the carrier. The carrier under this policy has at least two defensive mechanisms which it can readily call to its aid: firstly, the right of inspection which was exercised here both before and during the contract; and secondly, the right to terminate in the event the insurance carrier determines that the condition of the insured machinery is such as to make it impractical to extend coverage in the manner required by the contract.

I therefore would allow the appeal, set aside the judgment at trial and of the Court of Appeal and direct the entry of judgment in favour of the appellant in the amount of $158,289.24 with interest from the 1st of April, 1969, as claimed (it

est venu devant cette Cour, que la corrosion des tubes à l'intérieur des échangeurs de chaleur, probablement causée par la présence d'eau de mer, a été la cause réelle de leur panne et de la fuite consécutive d'huile dans l'eau de condensation. Comme il en a le droit, l'assureur a cherché dans les termes du contrat à limiter sa protection à la perte accidentelle, ce qu'il a fait en essayant de restreindre la définition d'accident. Si une cour devait accepter la prétention de l'intimée, que la perte subie par l'assurée en raison de la panne de la machinerie causée par l'usure normale et que l'immobilisation consécutive de l'usine étaient exclues par la définition d'accident, alors l'assurée n'aurait obtenu, par ses primes, aucune garantie pour ce qui peut bien être la source de perte la plus vraisemblable, ou certainement un risque constant dans presque toute l'usine. De même, interpréter la corrosion au sens où ce mot est employé dans la définition d'accident, comme le désire l'intimée, équivaudrait à éliminer de la protection de l'assurance toutes les pertes subies par l'assurée en raison de la présence de corrosion. Pareille interprétation entraînerait nécessairement la suppression d'une partie importante de la protection prévue au contrat. Il est possible que des assureurs prétendent que la prime sera fixée en fonction d'une garantie aussi limitée. Il n'y a aucune preuve à cet effet en l'espèce.

Il est également bien possible que l'industrie des assurances prétende qu'appliquer l'interprétation la plus favorable à cette disposition ambiguë va imposer un fardeau inutile et injuste à l'assureur. L'assureur en vertu de cette police peut invoquer au moins deux mécanismes de défense pour lui venir facilement en aide: premièrement, le droit d'inspection qui a été exercé en l'espèce, avant et pendant le contrat; et, deuxièmement le droit de mettre fin au contrat si l'assureur est d'avis que l'état de la machinerie est tel qu'il est impossible d'accorder la garantie de la manière stipulée au contrat.

Je suis donc d'avis d'accueillir le pourvoi, d'infirmer le jugement de la cour de première instance et l'arrêt de la Cour d'appel et d'ordonner que l'appelante a le droit de recouvrer $158,289.24 avec intérêt à compter du 1er avril 1969, tel que

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being the date of submission of claim and which date has not been contested in any court in these proceedings), together with costs throughout. In the event the parties are in disagreement as to whether the "Direct Damage" in the amount of $15,604.44 mentioned above is, in fact, repairs of the actual corrosion damage and should not therefore, on the basis of these reasons be included in judgment granted, the matter shall be determined on application to a Judge of the Superior Court.

Appeal allowed with costs, MARTLAND, RITCHIE *and* MCINTYRE JJ. *dissenting.*

Solicitors for the appellant: Desjardins, Ducharme, Desjardins & Bourque, Montreal.

Solicitors for the respondent: Martineau, Walker, Allison, Beaulieu, MacKell & Clermont, Montreal.

demandé (soit la date du dépôt de la réclamation, date qui n'a été contestée devant aucune cour dans les présentes procédures), et les dépens dans toutes les cours. Si les parties ne s'entendent pas sur la question de savoir si les dommages-intérêts pour la «perte directe» au montant de $15,604.44 susmentionné s'appliquent en fait à la réparation des dommages causés par la corrosion et ne devraient donc pas être inclus dans les dommages-intérêts accordés, compte tenu des présents motifs, elles devront s'adresser à un juge de la Cour supérieure pour faire trancher cette question.

Pourvoi accueilli avec dépens, les juges MARTLAND, RITCHIE *et* MCINTYRE étant *dissidents.*

Procureurs de l'appelante: Desjardins, Ducharme, Desjardins & Bourque, Montréal.

Procureurs de l'intimée: Martineau, Walker, Allison, Beaulieu, MacKell & Clermont, Montréal.