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| COURT FILE NO. | 1703 12327 |
| COURT | COURT OF QUEEN'S BENCH OF ALBERTA |
| JUDICIAL CENTRE | EDMONTON |

JUDICIAL CENTRE OF EDMONTON
FILED
OCT 22 2018
Clerk of the Court

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF ARRANGEMENT OF 667402 ALBERTA LTD., 18512398 ALBERTA LTD., 816956 ALBERTA LTD., 1371047 ALBERTA LTD., 1919209 ALBERTA LTD. and CANADA NORTH GROUP LP HOLDINGS LTD.

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| DOCUMENT | **REPLY BRIEF OF ERNST & YOUNG INC. IN RESPONSE TO THE BRIEF OF WESLEASE INCOME GROWTH FUND GP LTD. AND WESLEASE INCOME GROWTH FUND LIMITED PARTNERSHIP** |


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## I. INTRODUCTION

1. Weslease Income Growth Fund GP Ltd. and Weslease Income Growth Fund Limited Partnership ("Weslease") is a sophisticated, but now insolvent, enterprise.

2. Weslease was sophisticated enough to establish an unincorporated, open-ended limited purpose mutual fund trust for the purpose of raising funds to be loaned to the Limited Partnership for use in conducting an equipment leasing business throughout the Province of Alberta.[1]

3. Weslease urges upon this Court an interpretation of its arrangements with 1919209 Alberta Ltd. ("191") and Paul McCracken ("McCracken"), and the Collateral Mortgages given by 1371047 Alberta Ltd. ("137") and Canada North Camps now 18512398 Alberta Ltd. ("CNC") (the mortgages are referred to collectively as the "Collateral Mortgages"[2]), which creates underlying obligations to pay Weslease on the part of each of 137 and CNC that, regardless of form, simply do not exist.

4. The interpretation urged would, if accepted, be unprecedented.

## II. FACTS

5. Weslease's Brief appears incomplete and silent on certain key facts.

6. Keith Talbot ("Talbot") has sworn two affidavits, one on October 5, 2018 (the "October 5 Affidavit") in response to the order of Justice Hillier dated September 6, 2018, and the other on October 12, 2018 (the "October 12 Affidavit") for the purpose of responding to the Monitor's position in respect of the validity of the Collateral Mortgages.

7. According to the Second Affidavit of Shayne McCracken sworn July 20, 2017:

   a. 191 was incorporated on September 8, 2015;

   b. she was the sole shareholder of 191, and that she controlled 191, as well as 137 indirectly;

   c. 191 was specifically incorporated to lease certain equipment from Weslease;

   d. with Weslease's knowledge, 191 in turn leased the equipment to CNC, which would pay 191 rent equal to the lease payments for 191 to then pay to Weslease; and

   e. 191 had no revenue other than lease income from CNC, and was dependent on payments from CNC to satisfy its obligations to Weslease.[3]

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[1] Affidavit of Keith Talbot sworn in CCAA Proceedings under Court of Queen's Bench of Alberta action number 1803-12265 (without exhibits) **[TAB 1]**. The entirety of the Affidavit may be found at https://www.pwc.com/ca/en/services/insolvency-assignments/weslease/application-materials.html

[2] October 12 Affidavit at Exhibits "L" and "N"

[3] Second Affidavit of Shayne McCracken sworn July 20, 2017 (without exhibits) at paras. 94-100 and Exhibit "H" **[TAB 2]**

8. The lease arrangements between Weslease and 191 and McCracken (collectively the "Lease Agreements") started in 2015, which is clear from the evidence given by Shayne McCracken in her Second Affidavit and Talbot in the October 5 Affidavit. As such, Weslease was not new to 191's operations, nor to the general operation of the Canada North Group, at the time the Collateral Mortgages were executed in March 2016.

9. Nowhere on the Notification of Approval of the Lease ("Lease Approval")[4] is there an indication that either 137 or CNC are being asked to sign onto the transaction. Neither name appears on the approval. Neither are listed as lessees. Neither are listed as guarantors. There is no reference whatsoever to those two entities in the Lease Approval.

10. Neither of 137 nor CNC are co-lessees under the terms of any Lease Agreements with Weslease.[5]

11. In the October 12 Affidavit, Talbot swears that McCracken refused to give a personal guarantee of the lease agreement indebtedness (amongst other documents), and cites that as part of the explanation for why the transactions were structured in the manner that they were structured. However, it is obvious from the Lease Agreements that McCracken is personally liable as a joint and several lessee under those agreements.[6]

12. The applicable Lease Agreements contain entire agreement clauses. The copies appended to the October 12 Affidavit are not clear. A clearer copy of the Lease Agreement number 160219A is attached at **Tab 3** to this brief.[7] This entire agreement clause reads as follows:

> "This Lease (Weslease form 2014-01) constitutes the entire agreement between the Lessor and Lessee respecting the Equipment. No one is authorized to waive, add to or alter any term or condition of this Lease except a duly authorized officer of the Lessor. Any alteration, amendment, or addition to this Lease must be in writing and duly executed by the Lessor and Lessee."

13. The Collateral Mortgages respectively also contain an entire agreement clause in paragraph 26(b) which reads as follows:

> "Unless expressly provided otherwise in this Mortgage, this Mortgage constitutes the entire agreement between the Mortgagor and the Mortgagee in respect of the subject matter of this Mortgage. No amendments or alterations to this Mortgage will be effective unless made in writing and executed by the Mortgagor and the Mortgagee."[8]

14. There is no evidence of any alteration, amendment or addition to the Lease Agreements adding 137 and CNC as co-lessees to them.

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[4] Clearer copy of the Lease Agreement number 160219A and related documents **[TAB 3]**
[5] See generally October 5 Affidavit
[6] See generally October 5 Affidavit
[7] Clearer copy of the Lease Agreement number 160219A and related documents **[TAB 3]**
[8] October 12 Affidavit at Exhibits "L" and "N"

15. There is no evidence of any modification to the Collateral Mortgages which indicates that either 137 or CNC are liable other than as direct obligants under and to the Lease Agreements.

16. The Collateral Mortgages appear identical in wording, except for the names of the mortgagors, the principal amounts of the Collateral Mortgages. They read as follows:

> "A. 1371047 Alberta Ltd. (herein called the "Mortgagor") has promised payment to WESLEASE OF CANADA LTD. OF 11464 149TH STREET, EDMONTON, ALBERTA, T5M 1W7 (herein called the "Mortgagee") of the liabilities which the Mortgagor has incurred or may incur pursuant to Lease Agreement(s) dated the 1st day of March, 2016, and such further and other agreements as may be entered into between the Mortgagor and the Mortgagee (the "Lease Agreements");
>
> B. The Mortgagor agrees that this Mortgage will secure repayment in favour of the Mortgagee pursuant to the Lease Agreements of all present and future indebtedness and liabilities of the Mortgagor, and any one or more persons or entities, to the Mortgagee pursuant to the Lease Agreements (all such present and future indebtedness is hereafter called the "Indebtedness"), and the Mortgagor has agreed to execute and deliver this mortgage as collateral security for the liabilities of the Mortgagor to the Mortgagee under the Lease Agreements;
>
> E. IN CONSIDERATION of the Mortgagee agreeing to provide financial assistance to the Mortgagor, and the Mortgagor being liable to or to become liable to the Mortgagee for the Indebtedness up to the specific principal amount of One Million Five Hundred Thousand ($1,500,000.00) DOLLARS (the "Principal Sum") of lawful money of Canada, and other good and valuable consideration, the receipt of which is hereby acknowledged, and to secure the due payment of the Indebtedness and interest thereon and other monies as hereby secured, THE MORTGAGOR covenants and agrees with the Mortgagee as follows:..." [emphasis added][9]

17. The Collateral Mortgages also contain the following collateral security provision (paragraph 29):

> "This Mortgage is executed as continuing collateral security of the indebtedness of the mortgagor to the mortgagee under the lease agreements, whereby the mortgagor has promised payment to the mortgagee..." [emphasis added][10]

18. There is no evidence of good and valuable consideration being given to 137 or CNC for the granting of the Collateral Mortgages, as the documents suggest.

19. In neither of the Affidavits sworn by Talbot does he specifically state that Weslease relied on the taking of the Collateral Mortgages or that the Lease Agreements would not have been entered in but for the granting of the Collateral Mortgages. The fact is that Weslease

[9] October 12 Affidavit at Exhibits "L" and "N"
[10] October 12 Affidavit at Exhibits "L" and "N"

already had ongoing dealings with 191 by March 2016, and Weslease had already entered into Lease Agreements with 191 and McCracken prior to March 2016.

20. The Collateral Mortgages are not executed under seal.[11]

## III. ISSUES

21. The real issue before this Honourable Court is whether 137 and CNC made enforceable promises to pay the obligations of 191 and McCracken under and pursuant to the Lease Agreements, which obligations are purportedly, in turn, secured by the Collateral Mortgages

22. The answer is no, 137 and CNC did not make enforceable promises to pay the obligations of 191 and McCracken under and pursuant to the Lease Agreements. There were no such promises made by either 137 or CNC, and there was no consideration flowing to either of those entities to support the Collateral Mortgages. This is made clear on the circumstances and a clear reading of the very documents themselves.

## IV. ARGUMENT

23. Weslease's position is that the documentation it has placed before this Honourable Court establish guarantees on the part of each of 137 and CNC to pay the obligations of 191 and McCracken under the Lease Agreements, which guarantees are secured by the Collateral Mortgages. In order to accept this proposition, this Honourable Court would have to enforce an alleged promise to pay by 137 and CNC for which they received no consideration, and ignore or re-write almost entirely the language of the applicable documents that Weslease relies upon. The Monitor respectfully submits that both would be unprecedented in the circumstances.

### *A. Basic Contract Law and Application*

24. Contracts do not result from a purely gratuitous promises with nothing given in return for them. That is trite law. Promises made without consideration are void and unenforceable.[12]

25. However, consideration need not be given or found where contracts are executed under seal.[13]

26. The Supreme Court of Canada in *Sattva Capital v. Creston Moly* has determined that "surrounding circumstances" can be considered in contractual interpretation issues; however, they must:

   a. never be allowed to overwhelm the words of the actual agreement;

   b. always be grounded in a text and read in the light of the entire contract; and

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11 October 12 Affidavit at Exhibits "L" and "N"

12 J.E. Cote, *An Introduction to the Law of Contract* (Edmonton: Juriliber Limited, 1974) pg. 43 **[TAB 4]**

13 Cote, *supra*, pg. 61 **[TAB 4]**

c. not be used to deviate from the text of the actual agreement such that the Court effectively creates a new agreement.[14]

27. The Court of Appeal in Alberta in *Houle v. Knelsen Sand and Gravel Ltd.* notes that in respect of entire agreement clauses, they too must be interpreted in accordance with the intentions of the parties, as reflected in the words used in their ordinary and grammatical meaning, and consistent with the surrounding circumstances known to the parties at the time of formation of the contract.[15]

28. The Monitor respectfully submits that, when applying these principles to the circumstances and agreements of this matter, the appropriate conclusion is that 137 and CNC did not guarantee the obligations of 191 and McCracken under and pursuant to the Lease Agreements, and the Collateral Mortgages are not valid and/or not enforceable.

29. As is already set out in the Monitor's main brief filed on September 11, 2018 (paragraphs 25-29), each of the Collateral Mortgages on their face expressly state that the indebtedness secured by them is that which the "Mortgagor" (CNC and 137 respectively) have incurred pursuant to lease agreements that are entered into between the "Mortgagor" and Weslease. The wording of the Collateral Mortgages could not be more clear on their face that they are meant to secure any direct indebtedness owing by CNC and 137 pursuant to any leases that they respectively entered into with Weslease.[16]

30. Neither "Mortgagor" has incurred any liabilities pursuant to the Lease Agreements, as they are not parties to them, nor are they parties to any other underlying agreements which require them to make payment to Weslease.

31. Weslease argues in its Brief, at paragraph 33, that Preamble B of the Collateral Mortgages obligates each of 137 and CNC to make payment under the Lease Agreements. However, the argument ignores the very last words of that paragraph which state that:

> "...this Mortgage as collateral security for the liabilities of the Mortgage or to the Mortgagee under the Lease Agreements."[17]

32. There is nothing in the documentation whereby 137 or CNC agreed to be liable to Weslease under the Lease Agreements.

33. Further, Weslease gave no consideration for the Collateral Mortgages.

34. Weslease also urges this Honourable Court to look at the surrounding circumstances to find an underlying obligation of each of 137 and CNC to have guaranteed the obligations of 191 and McCracken. They rely on the Lease Approval and alleged verbal statements of McCracken to give the Collateral Mortgages.

35. However, the Monitor respectfully submits that the surrounding circumstances do not actually assist Weslease, and certainly do not permit this Honourable Court to deviate from the text of the actual agreements and create a new guarantee agreements.

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[14] *Sattva Capital v. Creston Moly*, 2014 SCC 53 at para. 57 **[TAB 5]**
[15] *Houle v. Knelsen Sand and Gravel Ltd.*, 2016 ABCA 247 at para. 23 **[TAB 6]**
[16] October 12 Affidavit at Exhibits "L" and "N"
[17] October 12 Affidavit at Exhibits "L" and "N"

36. Weslease is a sophisticated party, and it must be taken to have known that the lands against which they were obtaining Collateral Mortgages were in the names of each of 137 and CNC. That is clear from the fact that they did prepare the Collateral Mortgages from those two entities.

37. Weslease could have obligated 137 and CNC to pay it in the following manners:

a. obtain guarantees of the indebtedness of 191 and McCracken under the Lease Agreements (Weslease takes the position that the Collateral Mortgages are *de facto* guarantees (or evidence thereof), but there are no independent documents which could be called guarantees);

b. make 137 and CNC co-lessees (and joint obligants) under the Lease Agreements, as they chose to do with McCracken;

c. obtain promissory notes from 137 and CNC; and/or

d. obtain the Collateral Mortgages under seal.

38. Weslease could have accomplished making 137 and CNC liable to it in any of the above manners, but even as a sophisticated lender, it chose not to do so, and there is nothing in the documentation whereby 137 and CNC agreed to pay the obligations of 191 and McCracken under the Lease Agreements.

39. Further, Talbot's evidence clearly indicates that he and Weslease understood at all material times what a guarantee is and why it was necessary in these circumstances, but there is nothing in the written documentation which can be construed as an agreement from each of 137 and CNC to pay the obligations of 191 and McCracken owing under the Lease Agreements.[18]

40. Still further, Weslease's evidence is clear that it was familiar with promissory notes and forms of security agreements, as it took promissory notes and general security agreements from 191 and McCracken as part of the transactions involving the Lease Agreements.[19]

41. Additionally, acceding to Weslease's interpretation of the surrounding circumstances ignores the entire agreement clauses contained within the Lease Agreements and the Collateral Mortgages, set out above.

42. These entire agreement provisions make it clear that one is to look at only the Lease Agreements and each Collateral Mortgage to interpret the obligations provided thereunder. The language utilized by Weslease in its own documents precludes it from advancing the argument that it urges upon this Honourable Court. The underlying obligations are contained in the Leases Agreements, and any other (in this case non-existent) lease agreements entered into directly with 137 and CNC. These constitute the entire agreement(s) between the parties. The Collateral Mortgages refer only to the Lease Agreements. They only secure the underlying obligations of each of 137 and CNC under

[18] October 12 Affidavit at para. 14-15

[19] Clearer copy of the Lease Agreement number 160219A and related documents **[TAB 3]**

the Lease Agreements. They have none, as neither 137 nor CNC are parties to those Lease Agreements.

43. Thus, by Weslease's very own language, there is no underlying liability for 137 and CNC. The surrounding circumstances cannot, and do not, assist Weslease, especially since Weslease was aware of the need for guarantees and it is a sophisticated lender.

44. The Collateral Mortgages are therefore unenforceable. To find otherwise would require this Honourable Court to re-write the agreements, which the Monitor respectfully submits is something that this Court ought not do.

*B. Part Performance*

45. The Monitor submits that Weslease's part performance argument is really a red herring. The fact is that Weslease is stating that it asked for Collateral Mortgages from each of 137 and CNC. The Collateral Mortgages were delivered. As such, this is not an issue of "part" performance. Rather, this is an issue of the enforceability of the Collateral Mortgages, and not the delivery of them.

46. Further, Talbot does not actually swear at any point that Weslease relied on the Collateral Mortgages in order to enter into the Lease Agreements and that it would not have done so but for alleged guarantees secured by the Collateral Mortgages. That is an interpretation from the evidence which Weslease urges, but it is clearly not specifically expressed, particularly when other security in addition to the Water Treatment Plants and the Collateral Mortgages appears to have been taken as part of the transaction(s) through general security agreements granted by 191 and McCracken.[20]

47. What Weslease is submitting is that this Honourable Court should find that there was some form of agreement to give a guarantee by each of 137 and CNC, which were not delivered, and the doctrine of part performance mandates the Court accept and find guarantees exist. Another way to look at it is that they were additional documents which should have been delivered as part of the additional documents and assurances that could be asked for, but were not delivered. These are the only circumstances in which the part performance argument makes sense.

48. However, what is clear from the evidence is that there was no hint of guarantees, promissory notes or leases (that included 137 or CNC) being requested and prepared, but then simply not delivered.

49. There were no such underlying agreements on the part of 137 or CNC. As a result, Weslease's request and position cannot be honoured by this Court.

## V. CONCLUSION

50. The Monitor respectfully submits that Weslease urges an interpretation of its documents on this Honourable Court which would, in essence, require the Court to rewrite the agreements and find the existence of guarantees or other contracts, which were supportable by consideration, that simply do not exist in these circumstances. Contract

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[20] Lease Approval, pg. 2, at Exhibit "K" of the October 12 Affidavit, and Exhibits "I", "K" and "M" of the October 5 Affidavit.

law is still rooted in the basic tenets of enforceable promises, including that there needs to a promise, given for appropriate consideration or under seal, that is agreed by the parties before that promise can be enforced. It is that underlying promises in the Lease Agreements for which the Collateral Mortgages were given, and by their own language, the documents clearly do not support the existence of an underlying promise on the part of either 137 or CNC to make payments under the Lease Agreements.

51. In the circumstances, the underlying Mortgages are not enforceable, and ought to be discharged.

52. In the circumstances, the Monitor seeks costs on a solicitor client full indemnity basis from the Weslease Receivsership Estate as against Wslease.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22 day of October, 2018.

**DUNCAN CRAIG LLP**

Per ______________________

DARREN R. BIEGANEK, Q.C./RYAN F.T. QUINLAN
Counsel for Ernst & Young Inc., in its capacity as Monitor of 667402 Alberta Ltd., 18512398 Alberta Ltd., 816956 Alberta Ltd., 1371047 Alberta Ltd.,1919209 Alberta Ltd., and Canada North Group LP Holdings Ltd., and not in its personal or corporate capacity

## LIST OF AUTHORITIES

**Tab**

1. Affidavit of Keith Talbot sworn in Court of Queen's Bench of Alberta action number 1803-12265 (without exhibits)
2. Second Affidavit of Shayne McCracken sworn July 20, 2017 (without exhibits)
3. Clear copy of the Lease Agreement number 160219A
4. J.E. Cote, *An Introduction to the Law of Contract* (Edmonton: Juriliber Limited, 1974)
5. *Sattva Capital v. Creston Moly*, 2014 SCC 53
6. *Houle v. Knelsen Sand and Gravel Ltd.*, 2016 ABCA 247

# TAB 1

COURT FILE NO. 1803-12265

COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE EDMONTON

Clerk's Stamp
JUDICIAL CENTRE OF EDMONTON
FILED
JUN 15 2018
Clerk of the Court

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF WESLEASE INCOME GROWTH FUND GP LTD. AND WESLEASE INCOME GROWTH FUND LIMITED PARTNERSHIP

COURT FILE NO. 24-2386232

COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE EDMONTON

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-36, AS AMENDED

AND IN THE MATTER OF THE PROPOSAL OF WESLEASE INCOME GROWTH FUND GP LTD.

COURT FILE NO. 24-2382635

COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE EDMONTON

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-36, AS AMENDED

AND IN THE MATTER OF THE PROPOSAL OF WESLEASE INCOME GROWTH FUND LIMITED PARTNERSHIP

DOCUMENT **FIRST AFFIDAVIT OF KEITH TALBOT**


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File No.: 182478

**AFFIDAVIT OF KEITH TALBOT**

**SWORN ON THE 15TH DAY OF JUNE, 2018**

I, Keith Talbot, of the City of Edmonton, in the Province of Alberta, MAKE OATH AND SAY THAT:

1. I am a director of Weslease Income Growth Fund GP Ltd. (the "**GP**") as general partner of Weslease Income Growth Fund Limited Partnership (the "**LP**") (collectively, the "**Applicants**") and as such have a personal knowledge of the facts and matters hereinafter deposed to except where stated to be based on information and belief, in which case I verily believe the same to be true. I am authorized by the Applicants to make this Affidavit.

2. I make this Affidavit in support of an application of behalf of the Applicants for relief pursuant to the *Companies Creditors Arrangement Act*, RSC 1985 c. C-36, as amended (the "**CCAA**") in order to allow the Applicants to restructure their business and financial affairs. In the alternative, I make this Affidavit in support of an application to extend the stay of proceedings in the proposal proceedings for a further 45 days so that the Applicants may make viable proposals in bankruptcy.

**OVERVIEW AND STRUCTURE**

3. On or about April 4, 2014, an unincorporated, open-ended limited purpose mutual fund trust was formed under the laws of the Province of Alberta under the name of Weslease Income Growth Fund (the "**Trust**"). Marvin Jones and I are currently the trustees of the Trust.

4. The Trust was established to raise funds to be loaned by the Trust to the LP with the objective of generating returns for the investors / beneficial owners of the Trust.

5. The LP was established on or about April 4, 2014, pursuant to the laws of the Province of Alberta. The sole limited partner of the LP is Weslease of Canada Ltd.

6. Weslease US LP ("**Weslease US**") is a limited partnership established under the laws of the Province of Alberta on or about February 5, 2015. The sole partner of Weslease US is the LP. Weslease US is not active in business at present.

7. The GP is the general partner of the LP and was established under the laws of the Province of Alberta on or about January 1, 2014. Rick Morawski, Neil McLennan, Bruce Moisey, Phillip De Montigny and I are currently the directors of the GP.

8. The LP operates a leasing and financing business as more fully explained below (the "**Business**"). The GP has the sole power and exclusive authority to manage the business and affairs of the LP.

9. The Applicants are headquartered in Edmonton, Alberta.

## RELIEF REQUESTED

10. This Affidavit is made in support of an application by the Applicants for an Order (the "**Initial Order**") pursuant to the CCAA seeking among other things:

    a. A declaration that the GP is a company to which the CCAA applies;

    b. A declaration that the LP is a necessary party to this CCAA proceeding;

    c. A stay for 30 days of proceedings and remedies, taken or that may be taken, in respect of the Applicants or any of their property, except as otherwise set forth in the Initial Order or as otherwise permitted by law;

    d. An Order authorizing the Applicants to carry on the Business in a manner consistent with the preservation thereof;

    e. An Order appointing PricewaterhouseCoopers Inc. ("**PWC**") as Monitor of the Applicants in these CCAA proceedings; and

    f. An Order deeming service of the Application for the Initial Order to be good and sufficient.

11. In the alternative, this Affidavit is made in support of an application by the Applicants for an Order extending the time within which the Applicants may file proposals in bankruptcy, for a further 45 days.

## BACKGROUND AND BUSINESS OPERATIONS

12. The Trust is governed by the terms of the Declaration of Trust and the amendments thereto. Attached as **Exhibit "A"** is a copy of the Declaration of Trust and the amendments.

13. Each time the Trust issued units to investors, the proceeds from the sale of the units would be loaned to the LP. In exchange, the LP would grant a promissory note to the Trust pursuant to which the LP promised to pay interest on the principal amount of the loan at a rate of 12% per annum, payable each month. Attached as **Exhibit "B"** is a copy of the original loan agreement dated effective May 27, 2014, with amendment dated June 29, 2016 between the Trust and the LP. Attached as **Exhibit "C"** is a copy of the Omnibus Amendment to Promissory Notes that was executed by the Trust and the LP on June 29, 2016.

14. On or about May 27, 2014, the Trust was issued a General Security Agreement (the "**GSA**") by the Applicants which granted the Trust a secured interest in all the Applicants' present and after acquired personal property. The GSA is attached to this my Affidavit as **Exhibit "D"**. The Trust registered its interest at the Alberta Personal Property Registry ("PPR") and a PPR search confirming same is attached to this my Affidavit as **Exhibit "E"**.

15. Attached hereto and marked as **Exhibit "F"** is a true copy of the Limited Partnership Agreement which created the LP, together with associated materials.

16. In turn, the LP provided financing to its customers, secured by the following types of assets:

    a. Industrial cleaning equipment;

    b. Computers and electronics;

    c. Restaurant equipment;

    d. General office and machine shop equipment;

    e. Light or heavy-duty construction machinery;

    f. Fitness equipment;

    g. Office equipment;

    h. Dental and medical office equipment;

    i. Industrial equipment;

    j. Signage;

    k. Oil and gas equipment;

    l. Retail equipment; and

    m. Other such equipment that the GP determined would be beneficial to the operation of the LP's leasing business.

17. The LP typically entered into finance agreements with customers that either did not qualify for or chose not to obtain conventional institutional lending, but who met the LP's detailed application process and lending criteria. The LP maintains a diversified lease portfolio with lessees falling within a range of credit worthiness.

18. In exchange for advancing financing to customers who chose not to obtain traditional institutional financing, the LP charged interest rates that were greater than standard borrowing rates.

19. Occasionally, the LP would enter into loan to lease transactions in which the LP would loan money to customers by way of a conventional secured loan, to enable the customers to purchase equipment from vendors. After purchasing the equipment, the customers would then enter into agreements with the LP to convert the conventional loans into leases.

20. The LP established relationships with partner vendor corporations such as Bunzl Canada Inc., Freudenberg Household Products Inc., Swish Maintenance Limited and Waxie Sanitary Supply. These vendor partners directed their customers to obtain financing from the LP.

21. The Applicants no longer have secured lending facilities with Canadian Western Bank, although the registration at PPR has not yet been removed.

22. The Applicants do not own any real property.

**CURRENT INSOLVENCY**

23. In 2016, Alberta went through one of its worst recessions in a generation as oil prices plunged, crude production was reduced and wildfires spread through Fort McMurray causing significant disruption to regional oil and gas production.

24. The LP's customer base suffered significant setbacks during the recession, that put their businesses in peril and rendered some customers insolvent. Over 50% of the leases entered into by the LP are located in Alberta, which make up over 30% of the lease receivables.

25. Although Alberta has begun to emerge from the recession, and the Alberta government forecasts that the Alberta economy is to expand at a rate of 2.7% in 2018, investor confidence in the equipment leasing business is only slowly returning.

26. As a result of these market constraints, the LP has had limited access to cash to originate new leases and instead has had to rely solely on internal cash flows to maintain its existing portfolio and originate new leases.

27. In the year ending December 31, 2017, the LP incurred a net loss of $9,054,930.60, bringing the LP's net deficit to $49,482,487.00.

28. The LP believes that the equipment leasing business remains an economically sound venture and that a return of higher oil and gas prices ought to coincide with a renewed interest in new equipment leasing agreements.

29. Some of the Trust's unitholders are requesting redemption of their investment from the Trust. The Trust has not paid cash redemptions since December 2016 and is required to pay interest on June 30, 2018, with respect to June 2017 Redemption Notes, which payment would require the Trust to obtain funds from the LP to cover the liability, further aggravating the LP's cashflow deficiency.

**ASSETS AND LIABILITIES**

30. Attached hereto and marked as **Exhibit "G"** are copies of the consolidated financial statements for the Business for the year ending December 31, 2017. With the downturn in the Alberta market, the LP adopted a financial reporting policy of placing loan loss provisions against lease accounts which were then delinquent, the effect of which was to increase the reported losses on the financial statements. Those loan loss provisions are being reversed as the lease accounts are being normalized and brought back into good standing.

31. In general, the assets of the Applicants are primarily compromised of:

    a. lease receivables;

    b. accounts receivables;

    c. cash;

    d. prepaid expenses;

    e. amounts due from related parties;

    f. repossessed assets; and

    g. capital assets.

    The total book value of all of the foregoing as at December 31, 2017, was approximately $23 million.

32. The approximate balance owing to creditors of the Applicants is $72 million, and is mainly comprised of:

    a. Promissory Notes payable to the Trust;

    b. Accrued interest payable;

    c. Accounts payable and accrued liabilities; and

    d. Amounts due to related parties.

## ONGOING TRUST LITIGATION

33. Two originating applications have been commenced by several unit holders of the Trust against the Trust, Weslease of Canada Ltd. and the Applicants. In Court of Queen's Bench Action No. 1801 00071, the applicant parties are seeking an Order directing an investigation of the business, the appointment of an inspector and related relief. In Court of Queen's Bench Action No. 1801 06978, the applicant parties are seeking to have an extraordinary resolution approved by the Court to remove me as a Trustee of the Trust.

34. As of the date of this Affidavit, both of these originating applications remain before the Court and are scheduled for special chambers applications this summer.

35. The Trust had entered into an exclusive funding agreement with Pinnacle Wealth Brokers ("**Pinnacle**") which restricted the trust from seeking other sources of funds for investment to grow the LP's business while such agreement is in place. Such investment is necessary to fund growth of the business, and the initial intention was that Pinnacle would continue to raise funds from investors to flow through to the LP, which intention was thwarted by the downturn in the economy as referenced above.

36. The LP has identified other funding alternatives to Pinnacle, and intends to pursue those opportunities during the course of the CCAA proceedings.

## CASH FLOW PROJECTIONS

37. Attached as **Exhibit "H"** to this my Affidavit is a 13 week cash flow projection for the Applicants (the "**Cash Flow Projection**") for the period commencing June 25, 2018. Based on my knowledge of the financial position of the Applicants and based on the assumptions set out in the Cash Flow Projection, I verily believe that the Cash Flow Projection is fair and reasonable.

38. The Applicants have consulted with the proposed Monitor in these proceedings, in connection with the Cash Flow Projection and the proposed Monitor has not expressed any concern over the reasonableness of the Cash Flow Projection set out in the attached Exhibit.

## INTERIM FINANCING

39. As at the date of filing, the Applicants do not require interim financing.

## PLAN OF ARRANGEMENT

40. The LP is working with its delinquent customers to find effective solutions to bring their accounts current and achieve maximum return on the lease portfolio.

41. Oil prices have been recovering and the businesses of the LP's customer base are improving as a result. I believe that the LP's proactive work with its customer base is the best approach to renewing many of the leases that were in default in 2016 and 2017.

42. The LP is already beginning to see an improvement in its outlook in the first quarter of 2018. Attached hereto and marked as **Exhibit "I"** is a copy of the first quarter 2018 update.

43. Further improvements to the oil and gas sector, including the Kinder Morgan pipeline, should see further expansion of the oil and gas sector in the near term as investor confidence returns to the Alberta oil and gas sector.

44. The Applicants intend on regaining solvency by restructuring their business. In that regard, the Applicants intend to:

   a. Reduce operating costs;

   b. Renegotiate customer loans by extending the terms of loans in appropriate cases so as to enable the customers to meet their obligations to the LP;

   c. Raise new capital to expand the Business;

   d. Resolve the disputes with the applicants of the ongoing Trust litigation with a view to normalizing relations with the Trust.

45. Based on the Cash Flow Projection and other information set out in this Affidavit, I do believe that given time, there is a reasonable prospect that the Applicants will be able to file a viable Plan of Arrangement.

## MONITOR

46. I believe that PWC is qualified and able to act as Monitor in these CCAA proceedings. Attached as **Exhibit "J"** is a copy of a Consent to Act as monitor signed by that firm.

## NOTICE OF INTENTION TO MAKE A PROPOSAL

47. On May 28, 2018, each of the Applicants filed a Notice of Intention to Make a Proposal (the "**NOI**") pursuant to Part III of the BIA. Attached hereto as **Exhibit "K"** are copies of the NOIs.

48. The Applicants have not filed proposals in the NOI proceedings.

49. In the event that the Applicants application for an Initial Order under the CCAA is not granted, the Applicants request an extension of the stay of proceedings for a further 45 days to make a viable proposal to their creditors. The Applicants believe it is likely they will be able to make a viable proposal if the extension were granted.

50. Absent a CCAA, the Applicants are and will continue to work in good faith and with due diligence with the Proposal Trustee and their stakeholders to put forward proposals.

51. No creditor will be materially prejudiced by an extension of these proposal proceedings.

## CONCLUSION

52. I make this Affidavit in support of an application for an Initial Order under the CCAA or in the alternative, an application to extend the stay of proceedings under the proposal proceedings for further time to develop and present proposals to the Applicants' creditors.

| | | |
|---|---|---|
| **SWORN BEFORE ME** at the City of Edmonton, in the Province of Alberta the 15 day of June, 2018 | ) | |
| A Commissioner for Oaths in and for the Province of Alberta | ) | **KEITH TALBOT** |

Charles P. Russell, Q.C.
Barrister and Solicitor

# TAB 2

Clerk's Stamp
JUDICIAL CENTRE OF EDMONTON
FILED
JUL 20 2017
Clerk of the Court of Queen's Bench

| | |
|---|---|
| COURT FILE NUMBER | 1703 12327 |
| COURT | COURT OF QUEEN'S BENCH OF ALBERTA |
| JUDICIAL CENTRE | EDMONTON |
| | IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED<br><br>AND IN THE MATTER OF A PLAN OF ARRANGEMENT OF CANADA NORTH GROUP INC., CANADA NORTH CAMPS INC., CAMPCORP STRUCTURES LTD., D.J. CATERING LTD., 816956 ALBERTA LTD. and 1371047 ALBERTA LTD. |
| DOCUMENT | SECOND AFFIDAVIT OF SHAYNE McCRACKEN |
| ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT | Stephanie A. Wanke<br>Spencer Norris<br>DLA Piper (Canada) LLP<br>1201 Scotia Tower 2<br>10060 Jasper Avenue<br>Edmonton AB T5J 4E5<br>T 780.429.6822<br>F 780.702.4379<br>File No.: 37060-00001 |

**SECOND AFFIDAVIT OF SHAYNE McCRACKEN**

**Sworn on July 20, 2017**

I, Shayne McCracken, Businesswoman, of the City of Edmonton, in the Province of Alberta, MAKE OATH AND SAY THAT:

1. I am a Director and the Secretary of each of the applicants, Canada North Group Inc., Canada North Camps Inc. ("**CNC**"), CampCorp Structures Inc., D.J. Catering Inc., 816956 Alberta Ltd., 1371047 Alberta Ltd. (collectively, the "**CCAA Parties**"), and 1919209 Alberta Ltd. ("**1919209**") and, as such, the matters deposed to herein are based on my personal knowledge or on my review of the books and records maintained by the CCAA Parties and 1919209 in the ordinary course of their business, entries in which books and records are made reasonably contemporaneously with the CCAA Parties and 1919209's business transactions as they occur, except where stated to be based upon other information and belief, and where so stated, I believe the same to be true.

2. I have previously sworn the following documents in these *Companies Creditors Arrangement Act*, RSC 1985, c. C-36 ("***CCAA***") proceedings:

    a. Affidavit sworn and filed on June 28, 2017 (the "**First Affidavit**");

    b. Confidential Supplemental Affidavit sworn on June 28, 2017 and sealed by Court Order on July 5, 2017 (the "**First Confidential Affidavit**"); and

c. Second Supplemental Affidavit sworn and filed on July 4, 2017 (the "**Supplemental Affidavit**").

3. I have also sworn a Confidential Supplement to this, my Second Affidavit.

4. On July 5, 2017, the Honourable Justice K.G. Nielsen granted an Initial Order under the *CCAA* which provided for a stay of proceedings up to and including August 3, 2017 (the "**Stay Period**"), or such later date as the Court might order (the "**Initial Order**").

5. Pursuant to the Initial Order, Ernst & Young Inc. was appointed as monitor of the CCAA Parties (the "**Monitor**").

6. Also pursuant to the Initial Order, R.e.l. Group Inc. was appointed as Chief Restructuring Officer of the CCAA Parties (the "**CRO**"). The CCAA Parties retained the CRO on July 6, 2017 when the engagement letter was finalized and executed.

**EXTENSION OF THE STAY PERIOD**

7. The CCAA Parties seek an extension of the Stay Period up to and including November 3, 2017.

8. It has been two weeks since the Initial Order was granted.

9. In that time, the CCAA Parties have acted in good faith and with due diligence.

10. The CCAA Parties believe that circumstances exist that make the extension of the Stay Period appropriate.

**EFFORTS SINCE THE INITIAL ORDER**

11. Since the Initial Order was granted, the CCAA Parties have worked closely with the CRO and cooperated fully with the Monitor.

12. The CCAA Parties have worked diligently to maintain and improve operations while proceeding with the steps necessary to develop a plan to present to their creditors. In particular, the CCAA Parties have:

a. addressed the day-to-day challenges, including creditor and supplier queries, arising from the filing of the Notices of Intention under the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 and these CCAA proceedings;

b. worked with the CRO and the Monitor to review, update and extend the CCAA Parties' cash flow projections;

c. assisted the CRO and the Monitor to understand the structure, business and operations of the CCAA Parties and their related companies;

d. worked with the CRO and the Monitor to improve the financial reporting and accounting processes of the CCAA Parties;

e. worked with the CRO to develop a more detailed overview of the assets and liabilities (including secured and unsecured claims) of the CCAA Parties and related entities;

f. worked with the CRO to initiate a review of the operations of the CCAA Parties to understand what debt levels might be supported by operations post-restructuring;

g. through, or in conjunction with, the CRO and/or Monitor, had introductory meetings, emails and calls with various parties who have expressed an interest in participating in a restructuring through refinancing, purchasing assets or investing in the CCAA Parties;

h. continued to negotiate condition removal in respect of an offer received for the sale of the Yard property and an offer for sale for the Office, as discussed in my First Affidavit;

i. completed arrangements for the DIP facility with Business Development Bank Canada, the DIP Lender, as authorized by the Initial Order including an initial drawdown and commenced the necessary financial reporting.

13. The CCAA Parties intend to continue to work diligently with the CRO and to fully cooperate with the Monitor with the intent to propose a workable plan to their creditors.

14. Given the unsolicited interest expressed by parties to date, the CCAA Parties anticipate that a plan may include a sale and investment solicitation process to identify options for all the stakeholders.

**OPERATIONS SINCE THE INITIAL ORDER**

15. The CCAA Parties have worked closely with the Monitor so that the Monitor could report to the Court in respect of its oversight of the financial operations of the CCAA Parties since the Initial Order.

16. Given that it has been only two weeks since the Initial Order was granted, and given the tremendous workload on the CCAA Parties arising from the Initial Order, providing all of the information required by the Monitor was a challenge and the CCAA Parties are appreciative of the effort the Monitor has exercised to review and process the information on tight timelines.

17. As a result, at the time of swearing this Affidavit, the Monitor's review of cash flow projections and actual performance to projected performance remains ongoing.

18. Generally, however, the financial operations since the Initial Order have been better than expected at the time of swearing my First Affidavit.

<u>Fire Camps</u>

19. Prior to the Initial Order, as a result of a submission under a Request For Proposal ("**RFQ**"), CNC was, along with another supplier, awarded a contract with the Provincial Government of British Columbia to be the camp services suppliers to the B.C. fire camps.

20. On July 7, 2017, two days after the Initial Order was granted, British Columbia declared a State of Emergency as a result of the tragic wildfires raging in the interior.

21. Since July 7, 2017, the fire situation has worsened.

22. As a result, the B.C. fire camps began to experience very high demand shortly after July 7.

23. CNC receives approximately half of the work for the camp services needed and is presently providing services for approximately 1000 people in fire camps at Williams Lake, Little Fort/Clearwater and Princeton.

24. CNC provides food and services (laundry, housekeeping, etc). The existing camp infrastructure is also proving insufficient to meet demand and CNC has also had orders from the provincial government for the provision of equipment to augment the present camp infrastructure.

25. This work generates a positive contribution margin.

26. The financial impact overall of this fire camp work is therefore positive for CNC.

27. It does, however, create a cash flow issue as the work is invoiced to the B.C. government approximately a week after completion and, although receipt of payment typically takes approximately four weeks from invoicing, there have been discussions to accelerate this timing.

28. As a result, the CCAA Parties are anticipated to have a cash flow shortage in August that may not be met by the present DIP facility. CNC is in discussions with the DIP Lender in respect of a bulge on the initial facility to address this unexpected liquidity issue, which is mostly required to cover the increase in accounts receivable referenced above.

29. Further information will be provided for any subsequent court application to address the additional DIP requirements.

<u>Assets / Liabilities</u>

30. The CCAA Parties are working to provide updated lists of indebtedness of each of the CCAA Parties based on their corporate records and anticipate providing such lists prior to the first extension hearing in these proceedings.

<u>Transfer of Accounts</u>

31. On July 10, 2017, Canadian Western Bank ("**CWB**") advised that it was no longer prepared to have accounts for the CCAA Parties and related entities remain open and that they would be closed at end of business on July 11, 2017.

32. Attached as Exhibit "**A**" is correspondence between counsel to the CCAA Parties and CWB with respect to the closure of the accounts.

33. After the continuation of services provision in the Initial Order was pointed out to CWB, CWB agreed to keep accounts for the CCAA Parties open, but not for the related entities, including Bigstone Tansi.

34. Accordingly, since the Initial Order, the CCAA Parties have also spent significant time setting up new bank accounts for all of the entities and arranging for the transfer of funds. Details of these efforts have been shared with the Monitor.

## GOOD FAITH

35. The CCAA Parties have, and continue to act in good faith.

36. In particular, the CCAA Parties have cooperated fully with the Monitor and been open and transparent with the CRO.

## REPLY TO CWB

37. In its materials for the initial application and at the initial application for the Initial Order, CWB raised a concern with respect to two accounts receivable invoiced to Grand Rapids Pipeline GP Ltd. ("**Grand Rapids**") ("**Grand Rapids' Receivables**").

38. In my Second Supplemental Affidavit sworn on July 4, 2017, I referred to the custom negotiated deferred revenue term of the margining requirement that was part of the Credit Agreement with CWB.

39. I understand that CWB has further questions with respect to the Grand Rapids' Receivables and, as a result, I am providing the additional background and information set out below.

40. The Grand Rapids' Receivables are related to the Grand Rapids Pipeline Project, a joint project between TransCanada and Brion Energy Corporation.

41. Grand Rapids approached Canada North Camps Inc. to request that a contract camp be constructed on Wandering River, approximately 200 km south of Fort McMurray on Highway 63 with the expectation that camp services would be required from late 2014 until at least April 30, 2018.

42. Grand Rapids required that the camp supplier purchase the lands on which the camp would be located.

43. As a result, 1371047 Alberta Ltd. (one of the CCAA Parties) and Wandering River Properties Ltd. ("**WRPL**") (a corporation owned 2/3 by 1371047 Alberta Ltd. and 1/3 by an investor, Phil Harrison) purchased a parcel in the required location (the "**Wandering River Lands**").

44. Attached hereto as Exhibit "**B**" is a copy of the corporate search for WRPL.

45. The receivable for 1371047 Alberta Ltd. effectively flows through to Canada North Camps Inc., as Canada North Camps Inc. is the party who undertakes the work.

46. TransCanada has an Aboriginal Relations Policy that seeks to create employment and business opportunities for First Nations parties impacted by TransCanada's projects.

47. As set out in my First Affidavit, the CCAA Parties also seek opportunities to create employment and business opportunities for First Nations parties.

48. CNC joined with the local Heart Lake First Nation and formed Heart Lake CNC LP, a limited partnership with CNC and Heart Lake Construction LP as limited partners and Heart Lake Canada North Group GP Ltd. ("**Heart Lake GP**") (owned jointly by CNC and Heart Lake Construction LP) as general partner.

49. Attached hereto as Exhibit "**C**" are copies of the limited partner searches for Heart Lake Construction LP and Heart Lake CNC LP and the corporate search for Heart Lake GP.

50. Two contracts were formed with Grand Rapids to create the Wandering River Lodge:

  a. Services Agreement No. 4600005905 between Grande Rapids and Heart Lake GP re: Wandering River Camp and Catering Services, Grand Rapids Pipeline Project dated November 4, 2014 (the "**Services Agreement**"); and

  b. Lease Agreement between 1371047 Alberta Ltd. and WRPL and Grand Rapids re: the Wandering River Lands dated October 1, 2014 (the "**Lease Agreement**")

51. The Lease Agreement contains an obligation for Grand Rapids to restore the Wandering River Lands within 30 days of expiration of the tenancy.

52. The Services Agreement requires, in part, that Grand Rapids will incur all costs associated with the dismantle and demobilization of the camp and auxiliary equipment at the end of the term.

53. Grand Rapids did not require a full camp for as long as anticipated and terminated the Lease Agreement early. A six month termination notice effective October 30, 2015 was provided. As a result, the tenancy under the Lease Agreement terminated April 30, 2016.

54. Although the Lease Agreement was terminated, Grand Rapids still requested to use the camp on an ad hoc 'man day' basis as they still required some camp services. Heart Lake GP, 1371047 Alberta Ltd. and WRPL agreed and the obligation to restore the lands was deferred until the camp was ended.

55. The day after the Lease Agreement was terminated, on May 1, 2016, the Fort McMurray wildfire began and on May 2, Fort McMurray was evacuated. The fires continued until July 5, 2016.

56. The camp was well situated to hold fire evacuees and, with the consent and support of TransCanada, the camp housed hundreds of fire evacuees. Attached as Exhibit "**D**" is an article from the Edmonton Journal dated May 9, 2016 "*Work camp transformed into evacuation centre south of Fort McMurray*".

57. As the camp was winding up, the camp also housed some third party occupants on a manday basis. This was consistent with the Services Agreement that contemplated that Heart Lake GP was required to operate the camp as an open camp in between the pipeline construction seasons from May 2015 to October 2017.

58. As a result of the requirement by Grand Rapids for use of the camp beyond April 1 and the Fort McMurray fire, the camp was not immediately demobilized and the land not immediately restored.

59. In late 2016, we began discussing the obligations of Grand Rapids to restore and reclaim the Wandering River Lands and to demobilize the camp. We advised Grand Rapids at that time that the estimated cost of removal of the camp was $2,084,231 and the estimated cost of site reclamation was $5,356,231.

60. These numbers were based on detailed cost estimates for the necessary scope of work.

61. Under the Lease Agreement and the Services Agreement, it was the view of Heart Lake GP, WRPL, and 1371047 that the costs of the removal and reclamation were amounts presently due and owing by Grand Rapids.

62. It has been our practice that, for contract camps, the significant capital costs for setting up and removing camps are borne, in advance, by the clients. It is my understanding that other companies in the camp industry also employ this practice.

63. The deferred revenue margining term negotiated with CWB also reflects the industry norm that, for these significant capital costs, billing often is done in advance.

64. It is also common in the industry that accounts are not immediately paid, including for these larger amounts. Accordingly, the deferred revenue margining allows the company to access the necessary financing to commence the work while not yet paid.

65. Given that the obligations on Grand Rapids had crystalized as present obligations, due and owing, Heart Lake GP issued an invoice for the demobilization work and 1371047 Alberta Ltd. issued an invoice for the site restoration work (collectively, the "**Invoices**").

66. Our corporate counsel reviewed the invoices and issued a letter to Grand Rapids on May 31, 2017 which, stated in part, that the invoices were to be promptly paid.

67. These invoices were inputted into our accounting system and were part of our financial reporting to CWB. We had regular conversations with our account managers at CWB and they were aware of the origin and nature of all significant receivables, including the Grand Rapid Receivables.

68. The suggestion that CWB now makes is that the Invoices were provided in bad faith to artificially inflate the amount available on the operating line.

69. This suggestion is simply not true. The Invoices were issued in good faith based on our understanding of the Services Agreement and the Lease Agreement. The Invoices were reported to CWB as part of our normal course reporting and we were open and transparent with CWB as to the origin of the Grand Rapids Receivables.

70. It was and remains my belief that the Grand Rapids Receivables were appropriately margined as deferred revenue.

71. Grand Rapids has now raised some issues with respect to payment of the Invoices arising from the continuation of the camp beyond April 30, 2016 and invited discussion toward a mutually acceptable resolution. We have scheduled a meeting in Calgary with Grand Rapids to discuss payment of the Invoices in early August.

72. Given the commercially sensitive nature of the agreements with Grand Rapids, the following documents have been provided in my Confidential Supplement to this my Second Affidavit:

a. the Services Agreement;

b. the Lease Agreement;

c. the Termination Notice; and

d. the Invoices and the supporting cost estimates; and

e. the demand letter sent from Dentons LLP dated May 31, 2017.

73. The CCAA Parties and related entities have experienced significant growth over a relatively short period of time.

74. At the same time, the vertical integration and expansion of partnerships with investors and First Nations also added a level of complexity to business operations.

75. In reviewing our accounting and bookkeeping practices with the CRO and the Monitor, it has been brought to our attention that there are certain accounting practices that we can improve and streamline.

76. We are working with the CRO and the Monitor to improve the financial reporting of the CCAA Parties.

**EXPANSION OF THE STAY OF PROCEEDINGS**

77. The Initial Order provided a Stay of Proceedings to certain companies affiliated with the Applicants in respect of the collateral enforcement of obligations of the CCAA Parties.

78. As some of the affiliated companies were not directly involved in the camp business, the stay for the affiliates did not include direct claims against the affiliates in their own right.

79. Following the granting of the Initial Order, there has been time to review certain of the direct claims against the affiliates. Some of these claims are as a result of the inter-connected operations of the camp business as a whole.

80. Accordingly, the CCAA Parties now seek to expand the stay of proceedings to specific affiliates where those affiliates are facing claims directly connected to the overall camp operations.

<u>Heart Lake GP, WRPL</u>

81. As set out above, these two entities are two of the beneficiaries of the Grand Rapids Receivables. The Wandering River Camp is not presently operating.

82. There are unpaid suppliers for Heart Lake GP and some hold-back revenue that is not presently releasable to Heart Lake GP as a result of the inability to provide a clear statutory declaration in respect of subtrades.

83. An action has been commenced by Klassen Blade Contracting Ltd. against Heart Lake GP and CNC (QB Action No. 1714 00015) for an alleged unpaid debt of $143,809.11.

84. Forthryte Services Inc. has also made a demand for payment.

85. Attached as Exhibit "**E**" is a list of the known creditors of Heart Lake GP.

86. WRPL's only known creditor is Athabasca County owed in the amount of $462,094.64.

Canada North Group LP Holdings Ltd.

87. Canada North Group LP Holdings Ltd. is a subsidiary of Canada North Group Inc. Attached as Exhibit "**F**" is a copy of the corporate search for Canada North Group LP Holdings Ltd.

88. Canada North Group LP Holdings Ltd. operates as the holding company for a variety of the Canada North Group limited partners. As a holding company, it does not carry on active business; however, it has been named as a defendant in an action by Cummins Western Canada Limited Partnership in an action that named a number of Canada North entities in respect of an alleged trade debt of $208,900.89.

Stay of Proceedings

89. The CCAA parties seek to provide a general stay of proceedings to Heart Lake GP, WRPL, Canada North Group LP Holdings Ltd. to preserve the status quo, prevent unnecessary expenditure of effort on litigation and maximize recovery for all parties.

90. Further, given the complexity of the competing security interests, a stay allows an orderly determination of priority and claims.

Shayne McCracken and Max Fuel Distributors Ltd.

91. An action has been commenced by Max Fuel Distributors Ltd. against Peace River Lodge GP Ltd. and me (QB Action No. 1603 19168) for an alleged trade debt of $88,018.14.

92. Any trade debt incurred by Peace River Lodge GP Ltd. to Max Fuel Distributors Ltd. is directly related to the operation of the camp business as a whole. Although I am named in that action, I do not believe there is any basis for the claim against me.

93. Given that the creditors of the CCAA Parties have been stayed from enforcing collateral security against me, I believe it is equitable to stay QB Action No. 1603 19168 against me in my personal capacity as well.

**1919209 ALBERTA LTD.**

94. 1919209 is a company incorporated pursuant to the law of Alberta. Attached hereto as Exhibit "**G**" is a corporate search of 1919209. Attached hereto as Exhibit "**H**" is an Alberta PPR search of 1919209.

95. I am the sole shareholder of 1919209. I control both 1919209 and 816956 Alberta Ltd., as well as 1371047 Alberta Ltd. indirectly.

96. 1919209 was incorporated specifically to lease certain equipment (the "**Equipment**") from Weslease Income Growth Fund LP ("**Weslease**"), including 3 Jack and Jill Dorms, 2 Power Distribution Centres and 1 Waste Water Treatment Plant.

97. The total claim by Weslease for the Equipment is approximately $6,000,000.

98. Copies of the lease agreements are attached hereto and marked as Exhibit "I" (the "**Leases**").

99. With Weslease's knowledge, 1919209 in turn leased the Equipment to CNC for its use in various camps. There are no written agreements between CNC and 1919209, however, CNC would pay 1919209 rent equal to the lease payments for 1919209 in turn to pay to Weslease.

100. 1919209 has no other revenue other than lease income from CNC and it is completely dependent on payments from CNC to fulfill its obligations under the Leases. As a result, 1919209 is now insolvent.

101. From a financial reporting perspective, 1919209 is included in the consolidated cash flow projections and financial statements for the CCAA Parties as the 1919209 is treated as a flow through entity.

102. The Equipment is essential to the uninterrupted operations of the CCAA Parties, CNC in particular.

103. 1919209 seeks to be added as an applicant under the *CCAA* so that it may, along with the balance of the CCAA Parties, present a viable Plan of Arrangement to the creditors.

**CONCLUSION**

104. I swear this Affidavit in support of the First Extension Application and related relief.

| | | |
|---|---|---|
| SWORN (OR AFFIRMED) BEFORE ME at Edmonton, Alberta, this 20th day of July, 2017. | ) | |
| (Commissioner for Oaths in and for the Province of Alberta) | ) | SHAYNE McCRACKEN |
| **Spencer D. Norris**<br>Barrister and Solicitor | ) | |

# TAB 3

weslease
INCOME GROWTH FUND


| Weslease Income Growth Fund LP | 11464 - 149th Street Edmonton, AB | T5M 1W7 |
|---|---|---|
| Phone: (780) 429-1900 | www.weslease.com | Fax: (780) 451-1200 |


# NOTIFICATION – APPROVAL OF LEASE

| | |
|---|---|
| **LESSEE:** | 1919209 Alberta Ltd and Paul McCracken, Acting Jointly and Severally |
| **FROM:** | **Alethea Buhr** |
| **DATE:** | **February 26, 2016** |
| **NUMBER OF PAGES:** | One |
| **LEASE NUMBER:** | **1602191A** |

**LEASE FOR THE ABOVE IS APPROVED FOR THE FOLLOWING**
(APPROVAL IS VALID FOR 30 DAYS)

**DESCRIPTION OF EQUIPMENT:** **Waste Water Treatment Plant – FilterBoxx 3,000 person capacity "portable" activated sludge waste water treatment plant constructed and delivered in 2008.**

| | |
|---|---|
| **Purchase Price Net:** | $ 1,200,000.00 |
| **Term of Lease:** | 60 months, skip lease |
| **Monthly Payment:** | $ 34,252.53 |
| **GST:** | $ 1712.63 |
| **PST:** | $ 0.00 |
| **Gross Monthly Payment:** | **$ 35,965.16** |

| | |
|---|---|
| **Lease Advance Payment** (first and last month): | $ 71,930.32 |
| **Registration Fee:** | $ 1,500.00 |
| **Total First Payment** (Due When Lease Signed): | **$ 73,430.32** |

**Lease Payment Schedule:**

Initial payment of $ 73,430.32 due upon signing the lease & automatic withdrawal of monthly payments of $ 35,965.16 each month beginning June 2016. **Please select the preferred date for your automated lease monthly payments:**

☐ **15th** ☑ **End of the Month** ***Payments will be auto-debited from your account every month on this day**

**RESIDUAL** (buy out at end of term): **$100.00 + Tax** to be automatically withdrawn with the final Lease payment.

LESSEE INITIALS: PM

**Approval Conditions:**

- Credit Application Approval
- Collateral Mortgage on available property as follows:
  $1,500,000 Collateral Mortgage on property described as : 0826492; 3; 7, 8, 11, 12 Municipal District of Bonnyville, Alberta, and
  $700,000 Collateral Mortgage on Property described as 1251 Industrial Drive, Wabasca, AB (032037;2;1)
- Simonette Dorms # 201517WB022, 201517WB024, 201517WB011, 201517WB12, 201517WB13,201517WB19, 201517WB020, 201517WB21, 201517WB25, 201517WB26
- Promissory Note
- General Security Agreement (GSA) must be signed
- Any payments that are returned NSF will be assessed a **<u>$35.00 NSF</u>** fee, the payment will be auto-debited from the clients account on the 25th of the respective month( if payments are auto-debited on the 15th )and on the 15th of the following month (if payments are auto-debited on the 25th )
- All rescheduled payments need a minimum of **<u>72 hours</u>** notice before the next scheduled payment is to be auto debited.
- Location of Equipment must be provided
- Per section 12 of the lease terms, client is required to provide proof of insurance with Weslease Income Growth Fund LP. as first loss payable

LESSEE INITIALS: MA

# LEASE AGREEMENT

Lease No. **1602191A**

WESLEASE Income Growth Fund Limited Partnership (the "Lessor")

11464–149th Street NW, Edmonton, AB, T5M 1W7, Phone: (780) 429-1900, Toll-Free: 1(877) 551-1432, Fax (780) 451-1200

GST No. of the Lessor: 809006034

| | | | | |
|---|---|---|---|---|
| Legal Name of Lessee (the "Lessee")<br>**1919209 Alberta Ltd and Paul McCracken., Acting Jointly and Severally** | | | | Contact Person<br>**Paul McCracken** |
| Address<br>**2900 – 10180 101 Street** | | | | Title of Contact<br>**Owner** |
| City & Province<br>**Edmonton, Alberta** | | | Postal Code<br>**T5J 3V5** | Cell Phone<br>**780-915-2469** |
| Bank Name and Address | | | Account No. | Home Phone |
| Sales Representative Name | No. | Terr. | Vendor/ Branch | Weslease Only | E-Mail |
| Location of Equipment if different than Lessee's address shown above | | | | Lessee's Drivers Licence No. |

| QTY | MAKE | MODEL | DESCRIPTION OF EQUIPMENT | SERIAL NUMBER |
|---|---|---|---|---|
| | | | **Waste Water Treatment Plant -Filter Boxx 3,000 Person** | |
| | | | **Capacity " Portable" activated sludge waste water treatment** | |
| | | | **Plant constructed and delivered in 2008** | |
| | | | | |
| | | | | |

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|---|---|
| Monthly Lease Payment: | $ 34,252.53 |
| GST: | $ 1,712.63 |
| Provincial Sales Tax: | $ 0.00 |
| **Total Monthly Lease Payment:** | $ 35,965.16 |

Lease Amount: $ 1,200,000.00,
Lease Commences on Date signed by Lessee U[illegible] otherwise stated.

| | |
|---|---|
| Total Number of Monthly Lease Payments: | 60 |
| Term of Lease: | 60 Months |
| **Amount Due When Lease Signed:** (tax included): | $ 71,930.32 |
| Plus registration fee: | $ 1,428.57 |
| GST: | $ 71.43 |
| PST: | $ 0.00 |
| **Total Initial Payment:** | $ 73,430.32 |

Total Lease Value: $1,055,151.80 + Taxes

**Lease Payment Schedule:**
Initial payment of $73,430.32 due at signing & automatic withdrawal of monthly payments for the term of the lease of $34,252.53+ Taxes on your selected date (15th or Month End) each month beginning, June, 2016.

***** Final payment to include end of lease equipment purchase price of $100.00 + taxes**

IN WITNESS WHEREOF the Lessor and Lessee have executed this Lease in the city of EDMONTON, in the Province of AB, this 1st of Feb, 2016.

*Lessor:*

WESLEASE INCOME GROWTH FUND LIMTED PARTNERSHIP by its GENERAL PARTNER WESLEASE INCOME GROWTH FUND GP LTD.

March 1, 2016
Date of Acceptance

By: Signature of Authorized Officer c/s
Erin Sieger

*Lessee: 1919209 Alberta Ltd and Paul McCracken., Acting Jointly and Severally*

By:
Paul McCracken
*Owner*

By:
Paul McCracken
*Authorized Signature*

**TERMS AND CONDITIONS OF LEASE**

The terms, conditions and covenants set forth on pages 1, 2 and 3 of this Weslease Form 2014-01 are incorporated herein and form a part of this Lease and are agreed to by Lessor and Lessee.

LEASE OF EQUIPMENT. Lessee hereby leases from Lessor and Lessor hereby leases to Lessee the Equipment described above (hereinafter called the "Equipment") for the Term of Lease specified above (the "Term") subject to payment by the Lessee to the Lessor of the Number Of Total Monthly Lease Payments specified above, and upon the terms and conditions contained in this Lease. Lessee acknowledges that the Equipment has been acquired by Lessor at the request of and in accordance with the instructions of the Lessee.

ACCEPTANCE. Upon delivery of the Equipment to the Lessee, Lessee shall inspect, test and accept the Equipment and execute Lessor's usual form of Acceptance Certificate acknowledging that the Equipment is as ordered, is in good operating condition and repair and is fully satisfactory to the Lessee. Acceptance shall not be unreasonably withheld or delayed.

TERM. The Term of this Lease commences on the date on which the Lease is signed by the Lessee. (hereinafter referred to as the "Lease Commencement Date").

TOTAL MONTHLY LEASE PAYMENTS. Lessee agrees to pay to Lessor at the address of Lessor stated above, or such other place notified by Lessor to Lessee, the Total Monthly Lease Payment as specified above multiplied by the Number of Total Monthly Lease Payments as specified above. Unless otherwise stated, the first Total Monthly Lease Payment is due when Lessee signs this Lease; subsequent Total Monthly Lease Payments shall be made on the 15th day of each successive month thereafter throughout the Term. All payments required to be made by the Lessee under this Lease are payable without abatement, reduction, or set-off. This Lease shall not terminate or the respective obligations of Lessor and Lessee be otherwise affected by

| INITIALS | |
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| LESSOR | LESSEE |

# TERMS AND CONDITIONS OF LEASE

reason of defect in or damage to, or loss of possession of, or loss of use of, or destruction of the Equipment from whatever cause; the rental payments and all taxes and other charges payable by Lessee hereunder shall continue to be paid in all events in the manner and at the times specified unless the obligation to pay the same shall be terminated pursuant to the express provisions of this Lease.

ARRANTIES BY LESSOR. Lessee acknowledges that neither Lessor nor any of its employees, agents or representatives has made and does not now make, any representation or warranty whatsoever, expressed or implied, with respect to the Equipment or any intellectual or industrial property rights therein or its merchantability or its condition, design, durability, suitability or fitness for a particular purpose or for the use intended by Lessee or as to any other matter or thing whatsoever and all warranties are to the extent permitted by law excluded. Lessee shall unconditionally, and without abatement, reduction or set-off, pay the number of Total Monthly Payments even if the Equipment does not operate as intended by Lessee or at all or as represented by the manufacturer or the supplier, or, the Equipment operates or fails to operate in a manner that could give rise to a fundamental breach of contract, or is unacceptable for any other reason whatsoever. Lessor shall not be liable to Lessee for any loss, cost, expense, or damage of any kind or nature, or caused directly or indirectly by the Equipment or the use, ownership or maintenance thereof, and Lessor shall have no liability for any direct, indirect, punitive, exemplary, special or consequential damages or loss of profits, actual or anticipated, or for any damages based on strict or absolute tort or civil liability or the Lessor's negligence. Lessor hereby assigns to Lessee, to the extent assignable and without recourse to Lessor, all warranties of seller or manufacturer and rights to all software and other intellectual and industrial property licenses accompanying the Equipment. If the Equipment is returned to or repossessed by Lessor, all such warranties or rights shall be automatically reassigned to Lessor without further act or deed.

NON-CANCELLABLE LEASE. This Lease cannot be cancelled or terminated except as expressly provided herein and is not a conditional sales contract.

ENTIRE AGREEMENT. This Lease (Weslease Form 2014-01) constitutes the entire agreement between Lessor and Lessee respecting the Equipment. No one is authorized to waive, add to or alter any term or condition of this Lease except a duly authorized officer of the Lessor. Any alteration, amendment or addition to this Lease must be in writing and duly executed by the Lessor and Lessee.

LOCATION, USE AND RISK. The Equipment shall be at the risk of the Lessee as and from the Lease Commencement Date and shall be located and used at the place designated herein and not elsewhere without the prior written consent of the Lessor. Lessee shall only use the Equipment in connection with its business or in the carrying on of an enterprise and only for commercial, industrial or professional purposes and shall not use the Equipment for any personal, family or household purpose and shall not part with possession or control of the Equipment or permit its use by any person other than the Lessee or employees of Lessee who are qualified and competent to operate same.

TITLE, OWNERSHIP AND SECURITY INTEREST IN EQUIPMENT. Title to, ownership of, and all property in the Equipment shall at all times be and remain exclusively in Lessor. Lessee's only rights in the Equipment are to quiet enjoyment and use on the terms and conditions of this Lease while not in default. Lessee shall at Lessor's request place such insignia, plates or other identification on the Equipment showing Lessor's title thereto. Lessee hereby pledges to and in favor of Lessor in an amount equal to One Hundred Twenty Per Cent (120%) of all Total Monthly Payments to be paid hereunder, all insurance claims and proceeds therefrom to secure it's obligations under this Lease.

MAINTENANCE, USE, OPERATION.

10.1 Lessee shall at its own expense:

(a) maintain the Equipment in good operating condition, repair and appearance, ordinary wear and tear only excepted;
(b) comply with all recommendations or requirements of the manufacturer or supplier regarding the Equipment so as to preserve all warranties; and
(c) when requested by Lessor, enter into a maintenance agreement for the Equipment for the Term or balance thereof then remaining with the supplier or a competent service and maintenance person approved by Lessor.

10.2 Lessee shall not, without Lessor's prior written consent, make any alterations, additions, accessions or attachments to the Equipment. Such consent will only be granted if such changes:

(a) do not materially decrease the value of the Equipment or limit, interfere with, or frustrate its intended use;
(b) do not prejudice or adversely affect any warranties; and
(c) are free from, and do not subject the Equipment to, any lien.

10.3 All replacement parts and components, alterations, additions, accessions and attachments to the Equipment shall be deemed hereby transferred and assigned to Lessor and become the sole property of Lessor and shall be subject to this Lease.

INSPECTION. Any representative of Lessor shall have the right to inspect the Equipment and all of Lessee's books, maintenance and other records and other data maintained by Lessee with respect thereto at all reasonable times upon notice to Lessee.

INSURANCE. Lessee shall obtain and maintain for and during the Term and for so long as any sum remains payable hereunder, at its own expense, comprehensive all risks insurance against loss or damage to the Equipment, in such amounts, in such form and with such insurers as shall be satisfactory to Lessor. The amount of insurance on the Equipment shall not be less than the greater of the full replacement value of the Equipment or the aggregate amount of the Total Monthly Payments then remaining unpaid under this Lease. Each insurance policy will name Lessee and Lessor as insured, will name Lessor as first loss payee thereunder, and waive the insurer's right of subrogation against the Lessor, and shall contain a clause requiring the insurer to give to Lessor at least 30 days prior written notice of any alteration in the terms of such policy or of the cancellation thereof. At Lessor's request, Lessee shall furnish to Lessor a certificate of insurance or other evidence satisfactory to Lessor that such insurance coverage is in effect, provided, however that Lessor shall be under no duty to ascertain the existence of or to examine such insurance policy or to advise Lessee in the event such insurance coverage shall not comply with the requirements hereof. Lessee further agrees to give Lessor prompt notice of any damage to or loss of the Equipment, or any part thereof. Lessee will at its expense make all proofs of loss and take all other steps necessary to recover insurance benefits, unless advised in writing by Lessor that Lessor desires to do so, at Lessee's expense. Proceeds of insurance will be disbursed by Lessor against satisfactory invoices for repair or replacement of the Equipment, provided the Lessee is not in default hereunder or the Lessor may elect to have all proceeds of loss payable only to itself. Performance by Lessee under this paragraph will not affect or release Lessee's obligations and liabilities herein elsewhere provided.

INTEREST. The annual interest rate is 22.5%

NO SUBLEASE OR ASSIGNMENT OF LEASE BY LESSEE. The Lessee shall not transfer, deliver up possession of or sublet the Equipment and the Lease hereby granted shall not be assignable by the Lessee without the prior written consent of the Lessor, which consent may be arbitrarily withheld. Nothing contained herein shall prevent the Lessor from assigning, pledging, mortgaging, transferring or otherwise disposing either in whole or in part, of the Lessor's rights hereunder and any such consent hall not release or diminish the obligations of the Lessee under this Lease.

IANCE BY LESSEE WITH ALL LAWS, ORDINANCES. The Lessee shall comply with and conform to all laws, ordinances and regulations present or future, in any way relating to the ownership, possession, use or maintenance of the Equipment throughout the Term, or the ownership thereof by Lessor.

EQUIPMENT TO BE KEPT FREE OF LEVIES, LIENS, CHARGES. The Lessee shall keep the Equipment free of levies, liens, security interests and encumbrances and shall pay all license fees, registration fees, assessments, charges and taxes (Municipal, Provincial and Federal) which may be levied or assessed directly or indirectly against or on account of the Equipment or any interest therein or use thereof. If the Lessee shall fail to pay such license fees, registration fees, assessments, charges or taxes, the Lessor may pay such license fees, registration fees, assessments, charges and taxes as the case may be in which event the cost thereof shall constitute additional rent payable hereunder, which shall be forthwith due and payable, and the Lessor shall be entitled to all the rights and remedies provided herein in the event of default of payment of rent.

INDEMNIFICATION OF LESSOR BY LESSEE. Lessee shall indemnify and save harmless Lessor from and against all existing or future loss, costs, charges, expenses, liabilities, claims, demands, penalties, damages, suits, actions and causes of action of every nature and kind whatsoever sustained or suffered by Lessor or for which Lessor may become liable, resulting from or arising out of:

(a) the purchase of the Equipment by Lessor whether or not Lessee accepts the Equipment for the purposes of this Lease or the Equipment is delivered to Lessee;
(b) Lessor's lawful exercise or performance of its rights or obligations under this Lease;
(c) any default;
(d) any personal injury or property damage or other commercial loss arising out of the sale or delivery to, installation, ownership, use, operation, maintenance, condition, return, removal and re-delivery of the Equipment including strict liability in tort or in civil responsibility;
(e) any use or operation of the Equipment which infringes any patent or other industrial or intellectual property right, unless caused by the gross negligence or wilful misconduct of Lessor or its employees, agents or duly authorized representatives; or
(f) any impairment or pollution of or damage to the environment caused by or arising from the installation, use, operation, maintenance or lack thereof, misuse or over-use of the Equipment or due to or arising from any failure by Lessee to comply with or any act by Lessee in violation of any term, condition or restriction of any licence, permit, consent or similar document issued in respect of the Equipment or the operation thereof.

EQUIPMENT TO REMAIN PERSONAL PROPERTY. The Equipment shall at all times during the Term be and remain personal or moveable property, regardless of the manner in which it may be attached to any real estate. The Lessee shall install the Equipment in a manner which will permit its removal without material injury to the place of installation. The Lessee shall be responsible for any damage done to any real property, including improvements by the removal of the Equipment and shall indemnify and save harmless the Lessor therefrom.

DEFAULT.

18.1 The following shall be deemed to be Acts of Default by Lessee:

(a) Lessee fails to pay any Total Monthly Payment within ten (10) days of its due date;
(b) any insurance coverage required to be obtained and maintained by Lessee hereunder shall lapse, expire or be cancelled;
(c) any representation or warranty of Lessee made herein or in any instrument or document delivered to Lessor in connection herewith is false or materially incorrect or misleading;
(d) Lessee defaults in any other obligation hereunder or under any other agreement with Lessor or any affiliate of Lessor, and such , or default continues for a period of to ten (10) days after notice thereof by Lessor or such affiliate, as applicable, to Lessee (and for this purpose "affiliate" shall have the meaning attributed thereto in the Canada *Business Corporations Act*);
(e) any act of bankruptcy takes place respecting Lessee, or any proceeding, petition or notice, voluntary or involuntary, is commenced, made, given or filed, as the case may be, by Lessee or any other person, under any present or future statute or law relating to bankruptcy, insolvency, or relief from or compromise or arrangement with creditors of Lessee;
(f) Lessee ceases or threatens to cease to carry on business or makes or proposes to make any sale of its enterprise or of the whole or any substantial part of its assets in bulk or otherwise out of the normal course of business;
(g) any execution, sequestration, seizure, expropriation, restraint or similar process is brought or threatened, by way of notice or otherwise, against, or a distress or analogous process is levied upon the whole or any part of the property of Lessee or the Equipment;
(h) any trustee, receiver, interim receiver, administrator, manager or similar official is appointed with respect to all or any part of the property, assets, undertaking or enterprise of Lessee whether pursuant to any private instrument or agreement or by order of any court;
(i) if Lessee is a corporation, ownership of or control and direction over the property, assets, undertaking or enterprise of Lessee or the majority of its voting shares changes by amalgamation, merger, sale, transfer of shares or otherwise except pursuant to death of a share holder, or Lessee passes any resolution concerning any matter addressed in paragraph 18.1(e) or with respect to or any proceedings, voluntary or involuntarily, are commenced under any present or future law relating to amalgamation, liquidation, winding-up or dissolution; or
(j) any event or circumstance described in any of paragraphs 18.1(d) through (i) inclusive occurs with respect to any guarantor, or surety of Lessee respecting this Lease or any person who controls Lessee or any affiliate of Lessee (and for this purpose "control" and "affiliate" shall have the respective meanings attributed thereto in the Canada *Business Corporations Act*).

LESSOR'S REMEDIES ON DEFAULT. Upon any Act of Default, Lessor shall be entitled to do one or more of the following:

(a) declare this Lease to be in default (with or without terminating this Lease) whereupon all unpaid Total Monthly Payments specified above for the Term shall be accelerated and become immediately due and payable without any notice or demand whatsoever;
(b) terminate this Lease;
(c) take possession of the Equipment, without demand, notice or legal proceedings and enter on any premises of Lessee or any other person for such purpose;
(d) sell, lease or otherwise dispose of the Equipment by public or private transaction for such consideration payable immediately and/or deferred and on such terms and conditions as Lessor in its discretion determines;

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| LESSOR | LESSEE |

## TERMS AND CONDITIONS OF LEASE

(e) whether or not this Lease may have been terminated, demand, sue for and recover damages arising out of such default, which damages shall include, without limitation, as a genuine pre-estimate of Lessor's liquidated damages for loss of bargain and not as a penalty, the aggregate of all unpaid Total Monthly Payments for the Term, discounted to present value at the rate of 5% per annum, compounded monthly, less the aggregate of the net proceeds derived from the sale, re-leasing or other disposition of the Equipment, after deducting all costs and expenses incurred by Lessor in disposing of the Equipment; and

(f) exercise any other rights or remedies and/or take any proceedings available to Lessor at law or in equity.

In lieu of selling, re-leasing or otherwise disposing of the Equipment, Lessor may retain and cause the Equipment to be valued by a qualified appraiser selected by it and such value shall be substituted for and deducted as net proceeds under Section 19(e) above. Proceeds of sale, re-lease or other disposition shall be deducted only when received, unless Lessor elects to take the present value of payments to be received under such sale, re-lease or other disposal, discounted at the rate of 5% per annum, compounded monthly.

ASSIGNMENT BY LESSOR. Lessor may at any time assign all or any part of its interest in the Equipment and/or this Lease without notice to or the consent of Lessee. Lessee hereby accepts any such assignments and waives notification of the assignment and the delivery of a copy of any assignment document. In the event of such assignment, the assignee shall be entitled to enforce the rights, remedies and benefits of the Lessor so assigned to the assignee and to receive all benefits which would otherwise accrued to the Lessor under this Lease.

RETURN OF EQUIPMENT UPON TERMINATION. Upon the termination of this Lease for any reason, the Lessee shall at its cost return the Equipment to the Lessor at a place in Canada designated by Lessor, in as good condition, order, repair and appearance as when originally delivered to Lessee, ordinary wear and tear only excepted, and if the Lessee fails to do so within ten (10) days, the Lessor shall have the right to enter upon the premises where the Equipment may be and take possession of and remove it at the Lessee's expense, all without legal process and without liability therefor.

WAIVER BY LESSOR. No covenant or condition of this Lease can be waived except by the written consent of the Lessor, and forbearance or indulgence by the Lessor in any regard whatsoever shall not constitute a waiver of the covenant or condition to be performed by the Lessee to which the same may apply, and until complete performance by the Lessee of said covenant or condition, the Lessor shall be entitled to invoke any remedy available to the Lessor under this Lease or by law, despite said forbearance or indulgence.

COLLECTION CHARGES. Should the Lessee fail to pay when due any sum required to be paid by the Lessee to the Lessor under this Lease, the Lessee agrees to pay to the Lessor interest on the amount in default from the due date thereof until paid at the rate of twenty-four per cent (24%) per annum.

PREAUTHORIZED PAYMENT. Lessee agrees that it will authorize Lessor to draw the Total Monthly Payments from the Lessee's bank account under the Lessor's pre-authorized payment plan. Payment by other means must receive the Lessor's prior approval and will nevertheless be subject to a service fee at Lessor's sole discretion.

TIME OF THE ESSENCE. Time is of the essence of this Lease and each and all of its provisions.

RENEWAL OF LEASE OR OPTION TO PURCHASE.

26.1 If, at the expiry of the Term the Lessee fails to return the Equipment to the Lessor or has not exercised the option to purchase the Equipment upon expiry of the Term as herein provided, then this Lease shall continue on a month to month basis at a monthly rent equal to the Total Monthly Lease Payment. All other terms and conditions contained herein shall continue to apply to the month to month tenancy hereby created.

26.2 The Lessee shall have the option to purchase the Equipment at the end of the Term for the sum of $100.00, unless stated otherwise on page one (1) of this agreement, providing all of the Total Monthly Lease Payments required under this Lease, have been punctually paid. Lessee must notify Lessor in writing not more than 30 days or less than 10 days prior to expiry of the Term, if Lessee desires to purchase the Equipment. Upon payment of the purchase price for the Equipment, the Lessor will deliver title to the Equipment to the Lessee at the end of the Term on a "as is, where is" basis without any condition, representation or warranty by the Lessor of any kind whatsoever, express or implied, including without limiting the generality of the foregoing, the merchantability, condition, design, durability, suitability or fitness for a particular purpose or for the use intended by Lessee or as to any other matter or thing whatsoever, and all warranties are to the extent permitted by law excluded. The option to purchase cannot be assigned by Lessee and any assignment or purported assignment thereof shall be null and void and shall be deemed an Act of Default, as defined in this Lease.

BINDING UPON HEIRS, EXECUTORS, SUCCESSORS AND ASSIGNS. This Lease shall enure to the benefit of and be binding upon the Lessor and it's successors and assigns and the Lessee and it's permitted assigns and the heirs, executors and administrators of the Lessee if an individual, provided that nothing in this Clause contained shall impair or negate any of the provisions herein before set forth prohibiting transfer or subletting of the Equipment by the Lessee, or assignment of this Lease by the Lessee without the written consent of the Lessor.

HEADINGS. The insertion of headings in this Lease is for convenience of reference only and shall not affect the interpretation thereof.

INTERPRETATION. It is hereby agreed by and between the parties hereto that whenever the context of this Lease so requires, the singular number shall include the plural and vice versa, and that words importing the masculine gender shall include the feminine and neuter genders, and if more than one person or corporation executes this Lease as Lessee, their obligations hereunder shall be joint and several and, where the context so admits, each reference in this Lease to Lessee shall include reference to any one or more or all of such persons and corporations and the acts or omissions of any such persons or corporations shall bind all of them.

LEGAL EXPENSES. If this Lease is placed in the hands of a solicitor for enforcement, the Lessee agrees to pay all costs, charges and expenses incurred by the Lessor in connection with enforcing this Lease, including without limitation, legal fees on a solicitor and his own client basis.

GOVERNING LAW. This Lease shall be interpreted and enforced in accordance with the laws of the Province wherein the Equipment is to be located according to the terms hereof.

INVESTIGATION. Lessee hereby consents and authorizes Lessor and it's agents and representatives at any time:

(a) to collect, verify, use, communicate with and disclose to third parties (including credit reporting agencies, financial institutions, creditors, vendors and other persons) any credit, financial and other information, including personal information (as applicable) and information related to the credit rating, financial capacity and payment history, with respect to the Lessee ("Information"), as Lessor deems necessary to process, service and enforce this Lease and any other existing or potential transactions, or as required or otherwise permitted by law; and
(b) to respond to inquiries from, and exchange any information with third parties concerning Lessee's credit rating, financial capacity and payment history, and
(c) to provide information to persons to whom Lessor considers assigning or otherwise disposing of rights or obligations under this Lease; and
(d) to provide to any person copies of this Lease. This consent is in addition to and does not replace any consent previously given.

STATEMENTS. Annually and within ninety (90) days of the end of each financial year of the Lessee, Lessee shall deliver to Lessor at Lessor's request a copy of the Lessee's financial statement as at the end of each financial year of Lessee prepared using Generally Accepted Accounting Principles.

NOTICES. Any notices, consents, approvals, statements, authorizations, documents, or other communications (collectively "notices") required or permitted to be given hereunder shall be in writing, and shall be delivered personally or mailed by registered mail, postage prepaid, or faxed by electronic facsimile to the parties at their respective addresses or facsimile numbers set forth herein or at any such other address or facsimile number as may be given by one party to the other in writing from time to time. Such notices, if mailed, shall be deemed to have been given on the second business day (except Saturdays and Sundays) following such mailing, or, if delivered personally or faxed, shall be deemed to have been given on the day of delivery or transmission, if a business day, or if not a business day, on the business day next following the day of delivery or transmission; provided that if such notice shall have been mailed and if regular mail service shall be interrupted by strike or other irregularity before the deemed receipt of such notice as aforesaid, then such notice shall not be effective unless delivered or transmitted by fax.

CLERICAL ERRORS. Lessor is authorized by Lessee to correct clerical or inadvertent errors appearing in this Lease.

STATUTORY WAIVER AND ACKNOWLEDGEMENT. Lessee acknowledges receipt of a true copy of this Lease and waives its rights to receive any copy of any financing statement or financing change statement registered by Lessor and of any related verification statement. Lessee waives to the full extent allowed by law, the provisions of the *Limitation of Civil Rights Act* (Saskatchewan), the *Distress Act* (Manitoba), Sections 19 through 24 of the *Sale of Goods on Condition Act* (British Columbia), Sections 47, 49 and 50 of the *Law of Property Act* (Alberta), and the sale of goods legislation of any applicable jurisdiction all as amended or replaced from time to time.

CURRENCY. Unless otherwise stated in this Lease, all sums of money payable hereunder shall be paid in Canadian Dollars.

SEVERABILITY. Any term, condition or provision of this Lease which is deemed to be void, prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be severed herefrom and ineffective to the extent of such invalidity, prohibition or unenforceability, without in any way invalidating the balance hereof.

SECURITY INTEREST. The security interest granted by the Lessee to the Lessor by this Lease includes the Equipment together with all accessories installed in or affixed to or attached or appertaining to the Equipment and all personal property in any form or fixtures derived directly or indirectly from any dealing therewith and includes payment representing indemnity or compensation for loss or damage thereof or proceeds therefrom.

FINANCING STATEMENTS.

41.1 Lessor is hereby authorized to file one or more financing statements in respect of this Lease. Lessee hereby irrevocably appoints Lessor as the true and lawful attorney-in-fact of Lessee, coupled with an interest, with full power in Lessee's name, place and stead to execute financing statements on Lessee's behalf and to do any and all other acts on Lessee's behalf necessary or helpful to perfect Lessor's security interest in the Equipment pursuant to any applicable personal property security legislation and pursuant to any other applicable provincial or federal law.

41.2 Any security interest granted herein shall attach to any proceeds and Lessee and Lessor agree that they have not agreed to postpone the time for attachment of the security interests granted hereby with respect to the Equipment and that such security interests shall attach to any Equipment leased by Lessee from Lessor after the date hereof. Lessor may at any time, with or without exercising any of the rights or remedies available to it and without prior notice or demand to Lessee, appropriate and apply toward payment of any of Lessee's obligations to Lessor any and all balances, sums, property, credits, deposits, accounts, reserves, collections, monies, drafts, notes or cheques coming into Lessor's possession and belonging or owing to Lessee and for such purposes, endorse Lessee's name on any such instrument made payable to Lessor for deposit, negotiation, discount or collection.

GENERAL SECURITY INTEREST. To further secure performance of the obligations of the Lessee under this Lease, Lessee grants to Lessor a general security interest, as defined in the Personal Property Security Act (Alberta) in all present and after acquired personal property of the Lessee.

ACCEPTANCE. Lessee understands and accepts the terms and conditions of this Lease and all of the obligations of the Lessee herein.

LANGUAGE. The parties hereto have expressly required that this Lease and all documents, agreements and notices relating thereto be drafted in the English language.

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| LESSOR | LESSEE |

# GENERAL SECURITY AGREEMENT

**To:**

WESLEASE INCOME GROWTH FUND LIMITED PARTNERSHIP
BY ITS GENERAL PARTNER WESLEASE INCOME GROWTH FUND GP LTD.
(hereinafter referred to as the "Secured Party")

**From:**

1919209 ALBERTA LTD AND PAUL MCCRACKEN, ACTING JOINTLY AND SEVERALLY
(hereinafter referred to as the "Debtor")

**1. Definitions**

All capitalized terms used in this Agreement and in any schedules attached hereto shall, except where defined herein, be interpreted pursuant to their respective meanings when used in the Personal Property Security Act of the Province of Alberta, as in force at the date of this Agreement, which Act including amendments thereto and any Act substituted therefore and amendments thereto is herein defined as the "PPSA".

**2. Security Interest**

As continuing security for the payment and performance of all debts, liabilities and obligations of the Debtor to the Secured Party howsoever arising (present and future, absolute and contingent) (the "Indebtedness") the Debtor grants, assigns, mortgages, pledges and charges, as and by way of a specific mortgage, pledge and charge, and grants a Security Interest to and in favor of the Secured Party in the undertaking of the Debtor and in all personal property referred to in schedule "A" and in all Proceeds and renewals thereof, accessions thereto and substitutions therefor (the "Collateral"). The Debtor warrants and acknowledges to and in favor of the Secured Party that:

a) the parties intend the Security Interest hereby constituted in its existing property to attach upon execution and delivery hereof;

b) the parties intend the Security Interest created in after-acquired property of the Debtor to attach at the same time as it acquired rights in the said after-acquired property; and

c) value has been given

**3. Continuous Interest**

The mortgage, pledge, charge and Security Interest hereby created shall be a continuous charge notwithstanding the Indebtedness may be fluctuating and even may from time to time, and at any time, be reduced to a nil balance and notwithstanding monies advanced may be repaid and further advanced made to or to the order of the Debtor or in respect of which the Debtor is liable.

**4. Authorized Dealing With Collateral**

Until Default, or until the Secured Party provides written notice to the contrary to the Debtor, the Debtor may deal with the collateral in the ordinary course of the Debtor's business in any manner not inconsistent with the provisions of this Agreement, provided that the Debtor may not, and agrees that it will not, without prior written consent of the Secured Party:

a) sell or dispose of any of the Collateral otherwise than for fair market value in the ordinary course of the Debtor's business as it is presently conducted and for the purpose of carrying on that business, or

b) create or incur any Security Interest, lien, assessment, or encumbrance upon any of the Collateral which ranks or purports to rank, or is capable of being enforced in priority to or equally with the Security Interest granted under this Agreement, except Purchase Money Security Interests and Leases uncured in the ordinary course of the Debtor's business.

5. **Representations and Warranties of the Debtor**

The Debtor hereby represents and warrants with the Secured Party that:

a) the collateral is owned by the Debtor free of all Security Interests, mortgages, liens, claims, charges or other encumbrances (hereinafter collectively called "Encumbrances");

b) this Agreement when duly executed and delivered by the Debtor will constitute a legal, valid and binding obligation of the Debtor, subject only that such enforcement may be limited by bankruptcy, insolvency and any other laws of general application affecting creditor's rights and by rules of equity governing enforceability by specific performance;

c) there is no provision in any agreement to which the Debtor is a party, nor to the knowledge of the Debtor is there ant statute, rule or regulation, or ant judgment, decree or order of any court, binding on the Debtor which would be contravened by the execution and delivery of this Agreement;

d) there is no litigation, proceeding or dispute pending, or to the knowledge of the Debtor threatened, against or affecting the Debtor or the Collateral, the adverse determination of which might materially and adversely affect the Debtor's financial condition or operations or impair the Debtor's ability to perform hereunder.

6. **Covenants of the Debtor**

The Debtor hereby covenants with the Secured Party that:

a) the Debtor owns and will maintain the Collateral free of Encumbrances, or those hereafter approved in writing by the Secured Party prior to their creation or assumption, and will defend title to the Collateral fir the benefit of the Secured Party against the claims and demands of all persons;

b) the Debtor will maintain the Collateral in good condition and repair and will not allow the value of the Collateral to be impaired, and will permit the Secured Party or such persons as the Secured Party may from time to time appoint to enter into any premises where the Collateral may be kept to view its condition;

c) to pay the Secured Party the Indebtedness including, without limitation, all costs, charges and expenses reasonably incurred by the Secured Party or any Receiver appointed by it, whether directly or for services rendered (including reasonable solicitor's and auditor's costs and other legal expenses and Receiver remuneration), in operating the Debtor's Accounts, in preparing or enforcing the General Security Agreement, taking custody of, preserving, repairing, processing, preparing for disposition and disposing of Collateral and in enforcing and collecting the Indebtedness and all such costs, charges and expenses, together with any monies owing as a result of any borrowing by the Secured Party or any Receiver appointed by it, as permitted hereby, shall be a first charge on the proceeds of realization, collection or disposition of Collateral and shall be secured hereby;

d) that if by reason of location of the Collateral or otherwise the creation, validity or perfection of the Security Interest provided for herein is governed by law of a jurisdiction other than Alberta, then the Debtor shall take such steps and execute and deliver such papers as the Secured Party may from time to time request to comply with the Personal Property Security Act and other laws of another province or provinces, or the laws of Canada.

7. **Default**

The happening of any of the following shall constitute Default under this Agreement:

a) The Debtor fails to pay, when due, the Indebtedness or any part thereof or to perform when due any other obligation to the Secured Party;

b) The Debtor fails when due to perform any obligation to any other person, and such failure is not cured within 30 days of the date the Debtor first knew or should have known of such failure;

c) Any representation or warranty made in this Agreement or any other document or report furnished to the Secured Party in respect of the Debtor or the Collateral proves to have been or to have become false or materially misleading;

d) The Debtor ceases or demonstrates an intention to cease to carry on business or disposes or purports to dispose of all or a substantial part of its assets;

e) An order is made or a resolution is passed for winding up the Debtor or a petition is filed for the winding up, dissolution, liquidation or amalgamation of the Debtor;

f) The Debtor becomes insolvent or makes an assignment or proposal for the benefit of its creditors, or a Bankruptcy Petition or Receiving Order is filed or made against the Debtor, or a Receiver of the Debtor, or any part of its property is appointed, or the Debtor commits or demonstrates an intention to commit any act of bankruptcy, or the Debtor otherwise becomes subject to the provisions of the Bankruptcy Act or any other Act for the benefits of its creditors;

g) Any execution, sequestration, extent or distress or any other like process is levied or enforced against any property of the Debtor, or a outside Secured Party takes possession of any of the Debtor's property;

h) Any material adverse change occurs in the financial position of the Debtor;

i) The Secured Party considers that it is insecure, or that the prospect of payment or performance by the Debtor of the Indebtedness is or is about to be impaired, or that the Collateral is or is about to be placed in jeopardy.

**8. <u>Remedies</u>**

**On Default:**

a) The Secured Party may seize or otherwise take possession of the Collateral or any part thereof and sell the same by public or private sale at such price and upon such terms as the Secured Party in its sole discretion may determine and proceeds of such sale less all costs and expenses of the Secured Party (including costs as between a solicitor and its own client on a full indemnity basis) shall be applied on the Indebtedness and the surplus, if any, shall be disposed of according to law;

b) The Secured party has the right to enforce this Agreement by any method provided for in this Agreement and as permitted by law, and dispose of the Collateral by any method permitted by law, including disposal by lease or deferred payment;

c) Subject to the Act, all monies collected or received by the Secured Party pursuant to or in exercise of any right it possesses with respect to the Collateral shall be applied on the account of the Indebtedness in such manner as the Secured Party deems appropriate or at the option of the Secured Party, may he held unappropriated in a collateral account or released to the Debtor, all without prejudice to the liability of the Debtor or the rights of the Secured Party hereunder and any surplus shall be accounted for as required by law;

d) The Debtor acknowledges and agrees that the enforcement of the Security Interest hereby created and any realization upon the security of the Collateral shall not in any way restrict, hinder or estop the Secured Party from suing for and obtaining judgment against the Debtor for any amount which may remain due in respect of this Agreement after the application of the proceeds of any sale, disposal or leasing of the Collateral, including all legal fees and disbursements as between a solicitor and his own client and any and all other reasonable professional fees including, without limitation, Receiver and accounting fees and disbursements;

e) The Secured Party shall not be liable or accountable for any failure to seize, collect, realize, sell or obtain possession or payment of the Collateral or any part thereof and shall not be bound to institute proceeding for the purpose of seizing, collecting, realizing or obtaining possession or payment of the same or for the purpose of preserving any rights of the Secured Party, the Debtor or any other person, firm or corporation in respect to the same;

f) The Secured Party may grant extensions of time and other indulgences, take and give up securities, accept compositions, grant releases and discharges, release any part of the Collateral to third parties and otherwise deal with the debtors of the Debtor, sureties and others and with the Collateral and other securities as the Secured Party may see fit without prejudice to the liability of the Debtor or the Secured Party's right to hold and realize the Collateral;

g) The Secured Party may appoint any person or persons to be a Receiver of any Collateral. And may remove any person so appointed and appoint another in his stead. The term "Receiver" as used in this Agreement includes a Receiver-Manager;

h) Any Receiver will have the power:

i) to take possession of any Collateral and for that purpose to take any proceedings, in the name of the Debtor or otherwise;

ii) to carry on or concur in carrying on the business of the Debtor;

iii) to sell and dispose of any or all of the Collateral at public auction, by public or private tender or by private sale at such time and on such terms and conditions as to credit or otherwise and as to upset or reserve bid or price, and as to method of payment whether by way of deferred payment or otherwise, as the Receiver shall in its sole discretion determine and to deliver to the purchaser or purchasers of the Collateral good and sufficient deeds or title documents for the same, the Receiver being hereby constituted the irrevocable attorney of the Debtor for the purpose of making such sale shall be absolute and conclusive as against the Debtor or any person claiming by, from, through or under the Debtor and the Debtor's assigns;

iv) to make any arrangement or compromise which he may think expedient in the interest of the Secured Party

v) to pay all liabilities and expenses connected with the Collateral, including the cost of insurance and payment of taxes or other charges incurred in obtaining, maintaining possession of and preserving the Collateral, and the same shall be added to the Indebtedness and secured by the Collateral;

vi) to hold as additional security any increase or profits resulting from the Collateral;

vii) to exercise all rights that the Secured Party have under this Agreement or otherwise at law.

i) The Debtor hereby appoints each Receiver appointed by the Secured Party to be its attorney to effect sale or lease of any Collateral and any deed, lease, agreement or other document signed by the Receiver under his seal pursuant hereto will have the same effect as if it were under the seal of the debtor;

j) Any Receiver will be deemed to be the agent of the Debtor, and the Debtor will solely be responsible for his acts or defaults and for his remuneration and expenses, and the Secured Party will not be in any way responsible for any misconduct or negligence on the part of any receiver;

k) Neither the Secured Party nor the Sheriff is required to keep Collateral identifiable;

l) The Secured Party may use the Collateral in any manner as it in its sole discretion deems advisable.

**9. Securities**

If the Collateral at any time includes Securities, the Debtor irrevocably authorizes and appoints the Secured Party as its attorney and agent to transfer the same or any part thereof into its own name or that of its nominee(s) so that the Secured Party or its nominee(s) may appear on record as the sole owner thereof; provided that, until Default, the Secured Party shall deliver promptly to the Debtor all notices or other communications received by it or its nominee(s) as such registered owner and, upon demand and receipt to such Securities. After Default, the Debtor waives all rights to receive any notices or communications received by the Secured Party or its nominee(s) as such registered owner and agrees that no proxy issued by the Secured Party to the Debtor or its order as aforesaid shall thereafter be effective.

**10. Acceleration**

In the event of Default, the Secured Party, in its sole discretion, may without demand or notice of any kind, declare all or any of the Indebtedness due and payable by the Debtor which is not by its terms payable on demand, to be immediately due and payable, and the Secured Party shall be entitled to proceed in accordance with the terms of paragraph 8 hereof.

**11. Notice**

Any notice or demand required or permitted to be made or given by the Secured Party to the Debtor may be validly served by leaving the same or by mailing the same by prepaid registered mail addressed to the Debtor at the last known address of the Debtor or of any officer or director thereof, as shown on the records of the Secured Party, and in the case of mailing such notice or demand shall be deemed to have been received by the Debtor in the third business day following the date of mailing.

**12. Costs and Expenses**

The Debtor agrees to pay all costs, charges and expenses reasonably incurred by the Secured Party or any Receiver appointed by it (including, but without restricting the generality if the forgoing, legal fees as between a solicitor and client on a full indemnity basis), in enforcing this Agreement and taking custody of the Collateral and all such costs, charges and expenses shall be a first charge on the proceeds of realization, collection, or disposition of Collateral and shall be secured hereby.

**13. Miscellaneous**

a) This Agreement is in addition to and not in substitution for any other security or securities now or hereafter held by the Secured Party and all such other securities shall remain in full force and effect.

b) The Debtor further agrees to execute and deliver to the Secured Party such further assurances and conveyances and supplemental deeds as may be necessary to properly carry out the intention of this Agreement, as determined by the Secured Party, or as may be required by the Secured Party from time to time.

c) After Default, the Secured Party may from time to time apply and re-apply, notwithstanding any previous application, in any such manner as it, in its sole discretion, sees fit, any monies received by it from the Debtor or as a result of any enforcement or recovery proceedings, in or toward payment of any portion of the Indebtedness.

d) If the Security Interest in the Collateral is not sufficient, in the event of default, to satisfy the Indebtedness, the Debtor acknowledges and agrees that the Debtor shall continue to be liable for any deficiency remaining outstanding and the Secured Party shall be entitled to pursue full payment thereof.

**14. Copy of Agreement**

The Debtor hereby acknowledges receipt of a copy of this Agreement, and waives any right it may have to receive a Financing Statement or Financing Change Statement relating to it.

IN WITNESS WHEREOF the Debtor has executed this Agreement this 1st day of ~~February~~ March, 2016.

Witness

By: Paul McCracken
*Authorized Signature*

By: Paul McCracken
*Owner*

Lease No. 1602191A

**SCHEDULE "A"**

**Description of Collateral**

All of the Debtor's present and after acquired personal property being Goods, Documents of Title, Securities, Chattel Paper, Instruments, Money and Intangibles, including, without limitation, the following:

a) All present and after-acquired Equipment, and any Proceeds therefor, including, without limiting the generality of the foregoing, all fixtures, plant machinery, tools and furniture nor hereafter owned or acquired,

b) All present and after-acquired Inventory and any Proceeds therefor, including, without limiting the generality of the foregoing, all raw materials, Goods in process, finished Goods, and packaging materials and Goods acquired or held for sale or furnished or to be furnished under contracts of rental or service; and

c) All present and after-acquired Intangibles and Proceeds therefor, including, without limiting the generality of the foregoing, all debts, accounts, chooses in action, claims, demands and monies now due or owing or accruing due or which may hereafter become due or owing to the Debtor, including (without limiting the foregoing) claims against the Crown in the Right of Canada or of any province, monies which may become payable under any policy or insurance in respect of any loss by fire or other cause which has been or may be incurred by the Debtor (collectively called "Book Debts"), together with all contracts, securities, bills, notes, lien notes, judgments, chattel mortgages, mortgages and all other rights, benefits and documents now or hereafter taken, vested in or held by the Debtor in respect of or as security for the Book Debts hereby assigned or intended so to be or any part thereof and the full benefit and advantage thereof.

d) Description of Equipment includes:

Waste Water Treatment Plant – FilterBoxx 3,000-person capacity "portable" activated sludge waste water treatment plant constructed and delivered in 2008.

I/We hereby acknowledge that the leased equipment referred to herein is not for resale.

LESSEE INITIALS ______

**PROMISSORY NOTE**

**Borrower:** 1919209 Alberta Ltd and Paul McCracken, Acting Jointly and Severally ("1919209 Alberta Ltd")
2900 – 10180 101 Street, Edmonton, AB T5J 3V5

**Lender:** Weslease Income Growth Fund LP ("Weslease")
11464 149th Street, Edmonton, AB T5M 1W7

**Principal Amount:** CDN $1,200,000.00

**Date:** March ________, 2016

FOR VALUE RECEIVED, 1919209 Alberta Ltd promises to pay to Weslease at such address as may be provided in writing to 1919209 Alberta Ltd the principal sum of **One Million Two Hundred Thousand dollars, (1,200,000.00 ) CDN** as per lease agreements 1602191A

This Note is repayable within 30 days or in full ten days after Weslease providing 1919209 Alberta Ltd, of, with written notice of demand.

This Note will be construed in accordance with and governed by the laws of the Province of Alberta.

All costs, expenses and expenditures including, and without limitation, the complete legal costs incurred by Weslease in enforcing this Note as a result of any default by 1919209 Alberta Ltd will be added to the principal then outstanding and will immediately be paid by 1919209 Alberta Ltd.

This note will inure to the benefit of and be binding upon the respective heirs, executors, administrators, successors and assigns of 1919209 Alberta Ltd, and 1919209 Alberta Ltd waives presentment for payment, notice of non-payment, protest and notice of protest.

IN WITNESS WHEREOF Paul McCracken has duly affixed there signature on this 15th day of March , 2016.

Per:
BORROWER: Paul McCracken,

[signature]

Signature

PAUL McCRACKEN

(Name – please print)

PRESIDENT

(Title – please print)

Per:
LENDER: Weslease Income Growth Fund LP

[signature]

Erin Sieger
VP Business Development

# TAB 4

AN INTRODUCTION TO THE LAW OF

# CONTRACT

By
J. E. CÔTÉ
B.A. (McGill), LL.B. (Alta.), B.C.L. (Oxon.)
of the Alberta Bar, and Sometime Instructor in
Contracts in the Faculty of Law,
University of Alberta

EDMONTON
JURILIBER LIMITED
1974

This book was published by the colleagues of the author, members of the 1964 graduating class of the Faculty of Law of the University of Alberta to commemorate the tenth anniversary of their graduation. Particular acknowledgment is due to the following members who contributed financially to make this publication possible.

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Fred Laux
Edward P. MacCallum
Walter K. Mis
Robert Pottinger
I. Michael Robison
John G. Saxton
P. Sutherland
L. Yuzda

# Chapter V. Consideration[1]

## A. General

Contracts under seal, called deeds or specialties, are subject to special rules which are discussed in Chapter VI. They are not subject to the rules of consideration given in this Chapter.[2]

Where there is no seal, by our law[3] no valid contract can result from purely gratuitous promises with nothing given in return for them.[4] An agreement to mow the lawn in return for five dollars is enforceable, but a onesided promise to mow the lawn with nothing in return is not; it is said to lack consideration.[5] This rule is a general one extending to all contracts not under seal. No exception is made for one-sided promises which are very worthwhile, such as promises founded on moral obligation[6] or upon natural love and affection,[7] or even pledges to worthwhile charities.[8] A man who as an orphan had been raised by a charity might owe that charity a great moral debt, but even so his promise to give money to the charity would not be enforceable unless the charity agreed at the same time to give him something further in return. Thus an enforceable contract requires benefits[9] or detriments[10] on both sides.[11] This rule is described as the rule that a contract requires consideration.[12]

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1 See generally, Ames (1899) 12 Harv L Rev 515 and 13 Harv L Rev 29; Pollock (1901) 17 LQR 415, 1 Can L Rev 135; Langdell (1901) 14 Harv L Rev 496; Beale (1903) 17 Harv L Rev 71; Ballantine (1913) 11 Mich L Rev 423, 33 Can LT 412; Ashley (1913) 26 Harv L Rev 429, 134 LT 602, 628; Williston (1914) 27 Harv L Rev 503; Ashley (1915) 3 Va L Rev 201; Willis (1924) 72 U Pa L Rev 245 and 376; Gardner (1932) 46 Harv L Rev 1, 9-12, 22-28; Shatwell (1954) 1 Syd L Rev 289; Patterson (1958) 58 Col L Rev 929; cf. Salmond on Jurisprudence 347-48 (12th ed. 1966), and Atiyah, Consideration in Contracts: A Fundamental Restatement (1971). This last lecture is very unorthodox, but space is lacking for a discussion here of most of its arguments. As a foil to Shatwell's article, one may first glance through Wright (1936) 49 Harv L Rev 1225, (1937), 1 Mod L Rev 97, 100-07, and (1937) 15 Can Bar Rev 585. For a historical view, see Holdsworth (1922) 2 Boston U L Rev 87, 174, Willis (1932) 8 Ind LJ 93, and Simpson (1965) 16 UTLJ 1. On equity, see Ryan (1964) 2 Adel L Rev 189, and Pound (1919) 13 Ill L Rev 667.

2 Infra, Chapter VI, section H.

3 On Continental and Civil legal systems, see Lorenzen (1919) 28 Yale LJ 621, and Chloros (1968) 17 Int & Comp LQ 137.

4 Rann v. Hughes (HL 1778) 7 TR 340, 101 ER 1014; Thomas v. Thomas (1842) 2 QB 851, 114 ER 330; Carton v. Wilson (1908) 13 OLR 412; McPherson v. L'Hirondelle [1927] SCR 429; Stewart v. Rennie (1836) 5 UC-QB(OS) 151; Donaldson v. Wherry (1898) 29 OR 552 (discharge); Tobias v. Dick (Man) [1937] 4 DLR 546; and see generally, Broom's Legal Maxims 509-28 (10th ed. 1939); but there may be liability for doing negligently the thing promised, if it is done: Donaldson v. Haldane (HL 1840) 7 Cl & F 762, 7 ER 1258; Baxter & Co. v. Jones (Ont CA 1903) 6 OLR 360.

5 It is customary at this point to quote the definition of consideration in Currie v. Misa (1875) LR 10 Ex 153, 162 (in turn quoted from Comyn's Digest) (and see Gibson v. McVeigh (#1) (Alta) [1922] 1 WWR 151); but see Shatwell, loc. cit. *supra* n. 1, at pp. 305-06.

6 Eastwood v. Kenyon (1840) 11 Ad & El 438, 113 ER 482.

7 Holliday v. Atkinson (1826) 5 B & C 501, 108 ER 187; Tweddle v. Atkinson (1861) 1 B & S 393, 121 ER 762.

8 Dalhousie v. Boutilier [1934] SCR 642; cf. Peters v. Agricultural Socy (1905) 3 NB Eq 127. See Billig (1927) 12 Cornell LQ 467; Carver (1928) 13 Cornell LQ 270; Gold (1922) 8 Cornell LQ 57; Note (1928) 27 Mich L Rev 88; Crouse (1935) 13 Can Bar Rev 751.

9 See n. 64, infra.

10 See n. 66, infra.

11 Each party must give consideration, and it is not sufficient for some third person to give it: cf. Gallagher v. Murphy [1929] SCR 288; Dunlop v. Selfridge (HL(E)) [1915] AC 847; Hutchison v. Paxton (Ont CA) [1928] 4 DLR 704. See further on this point, Chapter XII, infra.

12 A gratuitous contract lacks consideration. Failure of consideration, a failure by one party to perform a valid contract, is very different. See Chapter XV, part B, and Corbin on Contracts § 133 (1951).

deductions,[75] some contracts for the carriage of passengers[76] or goods,[77] and possibly sales of horses.[78] Some contracts for the sale of goods where property and possession of the goods do not pass simultaneously must also be in writing and be registered with the government in order to be enforceable against third parties.[79] Some contracts passing rights only on death might constitute wills and require signature at the end and two witnesses.[80]

9. *Contracts Lacking Consideration*

These are void unless in writing and under seal.[81]

10. *Important Contracts by Companies*

At common law, these had to be similarly in writing and under the company's seal, though this is a rule which is increasingly cut down in scope by the courts.[82] What is more, most jurisdictions have passed legislation like that in England allowing a company to make a parol contract whenever private individuals could do so.[83]

## B. What Writing is Needed[84]

A few of the specific contracts listed under head 8 above must, by the terms of the applicable legislation, be entirely in writing to be valid. The general rule, however, is to the contrary. For the other matters described in sections 1 to 6 above, (but not some under head number 7[85]), it is not necessary that the whole contract be in writing. It is sufficient that the contract either be in writing, or that there be or have been[86] a memorandum[87] in writing evidencing it. The memorandum must be signed[88] somehow[89] by the Defendant (the person being sued[90]) or by his agent.[91] The agent

75 (Imp.) 1 & 2 Wm. 4 c. 37 s. 23.

76 Railway Act, RSC 1970 c. R-2 s. 294.

77 (Imp.) 17 & 18 Vict. c. 31 s. 7.

78 See (Imp.) 31 Eliz. c. 12.

79 Bills of Sale Acts, RSA 1970 c. 29; BC 1961 c. 6; RSM 1970 c. B-40; RSNB 1952 c. 18; RSNfld 1952 c. 22; RSO 1970 cc. 44, 45; RSPEI 1951 c. 18; RSS 1965 c. 392; RONWT 1956 c. 7; ROYT 1971 c. B-1. See generally Wilkinson, op. cit. *supra* n. 56, at pp. 160-62

80 Cf. Mortimer's Probate Division Practice 142-49 (1911); cf. Re Slinn (1890) 15 PD 156.

81 Infra, nn. 216 ff.

82 Cf. S. of Ire. Colliery Co. v. Waddle (1868) LR 3 CP 462, affd. 4 *id* 617.

83 Companies Act, RSA 1970 c. 60 s. 134; on which see 6 Hals. Laws 427-29 (3d ed. 1954), and Pyramid Construction (Calgary) v. Feil (Alta 1957) 22 WWR 497.

84 See generally, Rowlatt, op. cit. *supra* n. 29, at pp. 51-57, and Smith, op. cit. *supra* n. 8, at pp. 344-52.

85 As provided in those individual statutes.

86 Heichmann v. National Trust Co. (1920) 60 SCR 428; Allen v. Graves (CA 1908) 43 NSR 249.

87 Made for any purpose: McKenzie v. Hiscock (Sask CA 1966) 55 DLR(2d) 155.

88 So that a telegram will suffice: Godwin v. Francis (1870) LR 5 CP 295. A rubber stamp: cf. Bennett v. Brumfitt (1867) LR 3 CP 28 (election case); Re Jenkins (1863) 3 Sw & Tr 93, 164 ER 1208 (will); Goodman v. Eban (CA) [1954] 2 WLR 581 (bill of costs). Even letterhead with the sender's name at the top! Tourret v. Cripps (1879) 48 LJCh 567; cf. Caton v. Caton (HL(E) 1867) 36 LJCh 886. The Defendant's name in the body of the note in his writing: Swim v. Amos (CA 1895) 33 NBR 49. For further examples, see 8 Hals. Laws 104-05 (3d ed. 1954), and diCastri on Vendor and Purchaser, para. 150 (1968), Benjamin, op. cit. *supra* n. 55, at 262-68, and cf. the general discussion of signatures in Cowen on the Law of Negotiable Instruments in South Africa, Chap. X (4th ed. 1966). See a general statement in Walker v. Copp Clark Pub. Co. (Ont 1962) 33 DLR(3d) 338, 344.

89 Initials will do: Chichester v. Cobb (QB 1866) 14 LT 433; Hill v. Hill (CA) [1947] 1 All ER 54; Standard Realty Co. v. Nicholson (1911) 24 OLR 46. Or a firm name: McMeekin v. Furry (1907) 39 SCR 378. On adopting something existing as a signature, see Behnke v. Bede Shipping Co. [1927] 1 KB 649, 660, and Schneider v. Morris (1814) 2 M & S 286, 105 ER 388 (printed heading).

90 The other need not sign: Fowle v. Freeman (1804) 9 Ves 351, 32 ER 638; Laythoarp v. Bryant (1836) 2 Bing NC 735, 132 ER 283; Seton v. Spade (1802) 7 Ves 265, 32 ER 108; Mills v. Marriott (SCC 1912) 3 WWR 841; Zipursky v. Bursten (Man) [1946] 1 DLR 746; Bank of B.N.A. v. Simpson (CA 1874) 24 UCCP 354. See generally, Lotterhos (1930) 3 Miss LJ 126.

# TAB 5

**Most Negative Treatment:** Check subsequent history and related treatments.

2014 SCC 53, 2014 CSC 53
Supreme Court of Canada

Creston Moly Corp. v. Sattva Capital Corp.

2014 CarswellBC 2267, 2014 CarswellBC 2268, 2014 SCC 53, 2014 CSC 53, [2014] 2 S.C.R. 633, [2014] 9 W.W.R. 427, [2014] B.C.W.L.D. 5218, [2014] B.C.W.L.D. 5219, [2014] B.C.W.L.D. 5230, [2014] B.C.W.L.D. 5255, [2014] S.C.J. No. 53, 242 A.C.W.S. (3d) 266, 25 B.L.R. (5th) 1, 358 B.C.A.C. 1, 373 D.L.R. (4th) 393, 461 N.R. 335, 59 B.C.L.R. (5th) 1, 614 W.A.C. 1

# Sattva Capital Corporation (formerly Sattva Capital Inc.), Appellant and Creston Moly Corporation (formerly Georgia Ventures Inc.), Respondent and Attorney General of British Columbia and BCICAC Foundation, Interveners

McLachlin C.J.C., LeBel, Abella, Rothstein, Moldaver, Karakatsanis, Wagner JJ.

Heard: December 12, 2013
Judgment: August 1, 2014
Docket: 35026

Proceedings: reversing *Creston Moly Corp. v. Sattva Capital Corp.* (2012), 554 W.A.C. 114, 326 B.C.A.C. 114, 2 B.L.R. (5th) 1, 36 B.C.L.R. (5th) 71, 2012 BCCA 329, 2012 CarswellBC 2327, Bennett J.A., Kirkpatrick J.A., Neilson J.A. (B.C. C.A.); reversing *Creston Moly Corp. v. Sattva Capital Corp.* (2011), 2011 CarswellBC 1124, 2011 BCSC 597, 84 B.L.R. (4th) 102, Armstrong J. (B.C. S.C.); and reversing *Creston Moly Corp. v. Sattva Capital Corp.* (2010), 319 D.L.R. (4th) 219, 2010 BCCA 239, 2010 CarswellBC 1210, 7 B.C.L.R. (5th) 227, Levine J.A., Low J.A., Newbury J.A. (B.C. C.A.); reversing *Creston Moly Corp. v. Sattva Capital Corp.* (2009), 2009 BCSC 1079, 2009 CarswellBC 2096, Greyell J. (B.C. S.C.)

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Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Public

**Related Abridgment Classifications**

Alternative dispute resolution
IX Appeal from arbitration awards
IX.2 Question of law

Alternative dispute resolution
IX Appeal from arbitration awards
IX.5 Leave to appeal
IX.5.b Miscellaneous

Business associations
IV Powers, rights and liabilities
IV.9 Contracts by corporations
IV.9.e Miscellaneous

Contracts

VII Construction and interpretation
VII.4 Resolving ambiguities
VII.4.c Reasonableness

**Headnote**

Alternative dispute resolution --- Appeal from arbitration awards — Question of law
Dispute arose between CM and SC regarding SC's finder's fee under fee agreement, with SC taking position that it was entitled to be paid in shares of CM valued at $0.15 per share — Arbitrator concluded that stock exchange would have probably valued finder's fee at $0.15 per share under terms of agreement and that SC lost opportunity to sell shares at that value — CM brought application for leave to appeal arbitration award and chambers judge dismissed application as it was not brought on basis of question of law but question of fact or mixed fact and law — CM's appeal from decision to dismiss application for leave to appeal arbitrator's award of damages was allowed — CA Leave Court decided that the construction of s. 3.1 of agreement, and in particular "maximum amount" proviso, was question of law — SC's appeal to Supreme Court of Canada allowed — Historical approach regarding determination of legal rights and obligations of parties under written contract as question of law should be abandoned — Even if it had been question of law, Court of Appeal Leave Court should have deferred to decision of Supreme Court Leave Court.

Alternative dispute resolution --- Appeal from arbitration awards — Leave to appeal — Miscellaneous
Dispute arose between CM and SC regarding SC's finder's fee under fee agreement, with SC taking position that it was entitled to be paid in shares of CM valued at $0.15 per share — CM brought application for leave to appeal arbitration award and chambers judge dismissed application as it was not brought on basis of question of law but on question of fact or mixed fact and law — CM's appeal from decision to dismiss application for leave to appeal arbitrator's award of damages was allowed — CA Leave Court decided that the construction of s. 3.1 of Agreement, and in particular "maximum amount" proviso, was question of law — SC's appeal to Supreme Court of Canada allowed — Unless Court places restrictions in order granting leave, order granting leave is "at large" — Appellants may raise issues on appeal that were not set out in leave application — Historical approach regarding determination of legal rights and obligations of parties under written contract as question of law should be abandoned — Even if it had been question of law, Court of Appeal Leave Court should have deferred to decision of Supreme Court Leave Court.

Business associations --- Powers, rights and liabilities — Contracts by corporations — Miscellaneous
Dispute arose between CM and SC regarding SC's finder's fee under fee agreement, with SC taking position that it was entitled to be paid in shares of CM valued at $0.15 per share — Arbitrator found that under agreement SC was entitled to fee equal to maximum amount payable pursuant to rules and policies of TSX Venture Exchange, and quantum of fee was US$1.5 million — Arbitrator found that under agreement, fee was payable in shares based on market price, as defined in agreement, unless SC elected to take it in cash or combination of cash and shares — Arbitrator found market price, as defined in agreement, was $0.15 per share — CM appealed arbitration award without success — Further appeal was allowed, Court of Appeal holding that to give effect only to "market price" definition resulted in absurdity that could not reasonably be within contemplation of parties or in accordance with good business sense — SC's appeal to Supreme Court of Canada allowed — Arbitrator's decision that shares should be priced according to Market Price definition gave effect to both Market Price definition and "maximum amount" proviso — Arbitrator's interpretation of agreement achieved goal by reconciling market price definition and "maximum amount" proviso in reasonable manner.

Contracts --- Construction and interpretation — Resolving ambiguities — Reasonableness
Dispute arose between CM and SC regarding SC's finder's fee under fee agreement, with SC taking position that it was entitled to be paid in shares of CM valued at $0.15 per share — Arbitrator found that under agreement SC was entitled to fee equal to maximum amount payable pursuant to rules and policies of TSX Venture Exchange, and quantum of fee was US$1.5 million — Arbitrator found that under agreement, fee was payable in shares based on market price, as defined in agreement, unless SC elected to take it in cash or combination of cash and shares — Arbitrator found market price, as defined in agreement, was $0.15 per share — CM appealed arbitration award without success — Further appeal was allowed, Court of Appeal holding that to give effect only to "market price" definition resulted in absurdity that could not reasonably be within contemplation of parties or in accordance with good business sense — SC's appeal to Supreme Court of Canada allowed — Arbitrator's decision that shares should be priced according to Market Price definition gave effect to both Market Price definition and "maximum amount" proviso — Arbitrator's interpretation of agreement achieved goal by reconciling market

que SC ne choisisse d'être payée en argent comptant ou à la fois en argent comptant et sous forme d'actions — Arbitre a conclu que le cours, selon la définition qu'en donnait l'entente, s'établissait à 15 cents l'unité — CM a interjeté appel à l'encontre de la sentence arbitrale, sans succès — Cour d'appel a accueilli l'appel après que la Cour ait estimé que de donner effet qu'à la définition du « cours » donnait lieu à une absurdité que les parties n'avaient raisonnablement pas voulu créer ou qui ne correspondait pas au bon sens des affaires — Pourvoi formé par SC devant la Cour suprême du Canada accueilli — Décision de l'arbitre selon laquelle les actions devraient être évaluées en fonction de la définition du cours donnait effet non seulement à la définition du cours, mais également à la stipulation relative au « plafond » — Interprétation par l'arbitre de l'entente atteignait cet objectif en conciliant la définition du cours et la stipulation relative au « plafond » d'une manière qui ne pouvait être considérée comme déraisonnable.

The dispute concerned which date should be used to determine the price of shares and thus the number of shares to which SC was entitled. The arbitrator ruled in favour of SC, and CM sought leave to appeal from the Supreme Court Leave Court, which dismissed the application on the grounds that it did not involve a question of law, but rather mixed fact and law. The Court of Appeal granted CM leave to appeal, holding that it was a question of law. The Supreme Court dismissed the appeal, but the Court of Appeal reversed this decision and found in favour of CM. SC appealed both this decision and the decision of the Court of Appeal Leave Court to the Supreme Court of Canada.

**Held:** The appeals were allowed.

Per Rothstein J. (McLachlin C.J.C., LeBel, Abella, Moldaver, Karakatsanis and Wagner JJ. concurring): The issue of whether the Court of Appeal Leave Court erred in finding a question of law for the purposes of granting leave to appeal was properly before the Court. While the subject of the appeal was important to the parties, the question was not a question of law within the meaning of s. 31 of the Arbitration Act. Historically, determining the legal rights and obligations of the parties under a written contract was considered a question of law. Canadian courts, however, have moved away from this historical approach. 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". Questions of law "questions about what the correct legal test is". Yet in contractual interpretation, the goal of the exercise is to ascertain the objective intent of the parties. One central purpose of drawing a distinction between questions of law and those of mixed fact and law is to limit the intervention of appellate courts to cases where the results can be expected to have an impact beyond the parties to the particular dispute. The legal obligations arising from a contract are, in most cases, limited to the interest of the particular parties. The fact that the legal system leaves broad scope to tribunals of first instance to resolve issues of limited application supports treating contractual interpretation as a question of mixed fact and law.

The issue whether the proposed appeal was on a question of law was expressly argued before the Leave Courts of both the Supreme Court and Court of Appeal. There was no reason why SC should be precluded from raising this issue on appeal despite the fact it was not mentioned in its application for leave to appeal to the Supreme Court of Canada. Appellate review of an arbitrator's award will only occur where the requirements of s. 31(2) of the Arbitration Act are met and where the leave court does not exercise its residual discretion to nonetheless deny leave. Even if the Court of Appeal Leave Court had identified a question of law and the miscarriage of justice test had been met, it should have upheld the Supreme Court Leave Court's denial of leave to appeal in deference to that court's exercise of judicial discretion. The Court of Appeal Court erred in holding that the Leave Court's comments on the merits of the appeal were binding on it and on the Supreme Court Appeal Court. A court considering whether leave should be granted is not adjudicating the merits of the case. A leave court decides only whether the matter warrants granting leave, not whether the appeal will be successful. This is true even where the determination of whether to grant leave involves a preliminary consideration of the question of law at issue. A grant of leave cannot bind or limit the powers of the court hearing the actual appeal. The fact that the Court of Appeal provided its own reasoning as to why it came to the same conclusion as the Leave Court did not vitiate the error.

The arbitrator's decision that the shares should be priced according to the market price definition gave effect to both the market price definition and the "maximum amount" proviso. The arbitrator's interpretation of the agreement, as reconciled the market price definition and the "maximum amount" proviso in a manner that cannot be said to be unreasonable.

Le litige portait sur la date devant servir à déterminer le prix des actions et, ainsi, le nombre d'actions auxquelles SC avait droit. L'arbitre a tranché en faveur de SC, et CM a déposé une demande d'autorisation d'appel auprès de la Cour suprême, laquelle a rejeté la demande au motif qu'elle ne soulevait pas une question de droit, mais une question mixte de fait et de

  

*Code civil du Québec*, L.Q. 1991, c. 64
en général — referred to

**Authorities considered:**

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Dyzenhaus, David, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (Oxford: Hart, 1997)

Hall, Geoff R., *Canadian Contractual Interpretation Law*, 2nd ed. (Markham, Ont.: LexisNexis, 2012)

Lewison, Kim, *The Interpretation of Contracts*, 5th ed. (London: Sweet & Maxwell, 2011 & Supp. 2013)

McCamus, John D., *The Law of Contracts*, 2nd ed. (Toronto: Irwin Law, 2012)

**Words and phrases considered:**

**Contractual interpretation**

Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix.

**fee paid in shares**

There is an inherent risk in accepting a fee paid in shares that is not present when accepting a fee paid in cash. A fee paid in cash has a specific predetermined value. By contrast, when a fee is paid in shares, the price of the shares (or mechanism to determine the price of the shares) is set in advance. However, the price of those shares on the market will change over time. The recipient of a fee paid in shares hopes the share price will rise resulting in shares with a market value greater than the value of the shares at the predetermined price. However, if the share price falls, the recipient will receive shares worth less than the value of the shares at the predetermined price. This risk is well known to those operating in the business sphere and both [the respondent and the appellant] would have been aware of this as sophisticated business parties.

**surrounding circumstances**

While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement . . . . The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract . . . . While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement.

The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract . . . , that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. Subject to these requirements and the parol evidence rule discussed below, this includes, in the words of Lord Hoffmann, "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man" . . . . Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.

**Termes et locutions cités:**

**circonstances**

Bien que les circonstances soient prises en considération dans l'interprétation des termes d'un contrat, elles ne doivent jamais les supplanter (...). Le décideur examine cette preuve dans le but de mieux saisir les intentions réciproques et objectives des parties exprimées dans les mots du contrat. Une disposition contractuelle doit toujours être interprétée sur le fondement de son libellé et de l'ensemble du contrat (...). Les circonstances sous-tendent l'interprétation du contrat, mais le tribunal ne saurait fonder sur elles une lecture du texte qui s'écarte de ce dernier au point de créer dans les faits une nouvelle entente (...).

La nature de la preuve susceptible d'appartenir aux « circonstances » variera nécessairement d'une affaire à l'autre. Il y a toutefois certaines limites. Il doit s'agir d'une preuve objective du contexte factuel au moment de la signature du contrat (...), c'est-à-dire, les renseignements qui appartenaient ou auraient raisonnablement dû appartenir aux connaissances des deux parties à la date de signature ou avant celle-ci. Compte tenu de ces exigences et de la règle d'exclusion de la preuve extrinsèque que nous verrons, on entend par « circonstances, pour reprendre les propos du lord Hoffmann [TRADUCTION] « tout ce qui aurait eu une incidence sur la manière dont une personne raisonnable aurait compris les termes du document » (...). La question de savoir si quelque chose appartenait ou aurait dû raisonnablement appartenir aux connaissances communes des parties au moment de la signature du contrat est une question de fait.

**honoraires sous forme d'actions**

Le versement des honoraires sous forme d'actions présente un risque inhérent, qui ne se pose pas dans le cas du versement en argent. Les honoraires payés en argent ont une valeur prédéterminée. Par contre, quand les honoraires sont versés en actions, le cours de l'action (ou le mécanisme permettant de le déterminer) est fixé à l'avance. Cependant, le cours de l'action fluctue avec le temps. La personne qui reçoit des honoraires payés en actions espère une augmentation du cours, de sorte que ses actions auront une valeur marchande supérieure à celle qui est établie selon le cours prédéterminé. En revanche, si le cours chute, cette personne reçoit des actions dont la valeur est inférieure à celle des actions selon le cours prédéterminé. Ce risque est bien connu de ceux qui évoluent dans ce milieu, et [l'intimée et l'appelante], des parties avisées, en auraient eu connaissance.

**interprétation contractuelle**

L'interprétation contractuelle soulève des questions mixtes de fait et de droit, car il s'agit d'en appliquer les principes aux termes figurant dans le contrat écrit, à la lumière du fondement factuel.

APPEAL from judgment reported at *Creston Moly Corp. v. Sattva Capital Corp.* (2012), 2012 BCCA 329, 2012 CarswellBC 2327, 36 B.C.L.R. (5th) 71, 2 B.L.R. (5th) 1, 326 B.C.A.C. 114, 554 W.A.C. 114 (B.C. C.A.), reversing dismissal of appeal from arbitrator's decision; APPEAL from judgment reported at *Creston Moly Corp. v. Sattva Capital Corp.* (2010), 2010 BCCA 239, 2010 CarswellBC 1210, 319 D.L.R. (4th) 219, 7 B.C.L.R. (5th) 227 (B.C. C.A.), reversing decision to dismiss application for leave to appeal arbitrator's award of damages.

POURVOI formé à l'encontre d'un jugement publié à *Creston Moly Corp. v. Sattva Capital Corp.* (2012), 2012 BCCA 329, 2012 CarswellBC 2327, 36 B.C.L.R. (5th) 71, 2 B.L.R. (5th) 1, 326 B.C.A.C. 114, 554 W.A.C. 114 (B.C. C.A.), ayant infirmé le rejet d'un appel interjeté à l'encontre d'une sentence arbitrale; POURVOI formé à l'encontre d'un jugement publié à *Creston Moly Corp. v. Sattva Capital Corp.* (2010), 2010 BCCA 239, 2010 CarswellBC 1210, 319 D.L.R. (4th) 219, 7 B.C.L.R. (5th) 227 (B.C. C.A.), ayant infirmé la décision de rejeter la demande d'autorisation d'appeler à l'encontre de la sentence arbitrale portant sur les dommages-intérêts.

***Rothstein J.*** **(McLachlin C.J.C. and LeBel, Abella, Moldaver, Karakatsanis and Wagner JJ. concurring):**

1 When is contractual interpretation to be treated as a question of mixed fact and law and when should it be treated as a question of law? How is the balance between reviewability and finality of commercial arbitration awards under the *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55 (now the *Arbitration Act*, hereinafter the "*AA*"), to be determined? Can findings made by a court granting leave to appeal with respect to the merits of an appeal bind the court that ultimately decides the appeal? These are three of the issues that arise in this appeal.

**I. Facts**

 

2 The issues in this case arise out of the obligation of Creston Moly Corporation (formerly Georgia Ventures Inc.) to pay a finder's fee to Sattva Capital Corporation (formerly Sattva Capital Inc.). The parties agree that Sattva is entitled to a finder's fee of US$1.5 million and is entitled to be paid this fee in shares of Creston, cash or a combination thereof. They disagree on which date should be used to price the Creston shares and therefore the number of shares to which Sattva is entitled.

3 Mr. Hai Van Le, a principal of Sattva, introduced Creston to the opportunity to acquire a molybdenum mining property in Mexico. On January 12, 2007, the parties entered into an agreement (the "Agreement") that required Creston to pay Sattva a finder's fee in relation to the acquisition of this property. The relevant provisions of the Agreement are set out in Appendix I.

4 On January 30, 2007, Creston entered into an agreement to purchase the property for US$30 million. On January 31, 2007, at the request of Creston, trading of Creston's shares on the TSX Venture Exchange ("TSXV") was halted to prevent speculation while Creston completed due diligence in relation to the purchase. On March 26, 2007, Creston announced it intended to complete the purchase and trading resumed the following day.

5 The Agreement provides that Sattva was to be paid a finder's fee equal to the maximum amount that could be paid pursuant to s. 3.3 of Policy 5.1 in the TSXV Policy Manual. Section 3.3 of Policy 5.1 is incorporated by reference into the Agreement at s. 3.1 and is set out in Appendix II of these reasons. The maximum amount pursuant to s. 3.3 of Policy 5.1 in this case is US$1.5 million.

6 According to the Agreement, by default, the fee would be paid in Creston shares. The fee would only be paid in cash or a combination of shares and cash if Sattva made such an election. Sattva made no such election and was therefore entitled to be paid the fee in shares. The finder's fee was to be paid no later than five working days after the closing of the transaction purchasing the molybdenum mining property.

7 The dispute between the parties concerns which date should be used to determine the price of Creston shares and thus the number of shares to which Sattva is entitled. Sattva argues that the share price is dictated by the Market Price definition at s. 2 of the Agreement, i.e. the price of the shares "as calculated on close of business day before the issuance of the press release announcing the Acquisition". The press release announcing the acquisition was released on March 26, 2007. Prior to the halt in trading on January 31, 2007, the last closing price of Creston shares was $0.15. On this interpretation, Sattva would receive approximately 11,460,000 shares (based on the finder's fee of US$1.5 million).

8 Creston claims that the Agreement's "maximum amount" proviso means that Sattva cannot receive cash or shares valued at more than US$1.5 million on the date the fee is payable. The shares were payable no later than five days after May 17, 2007, the closing date of the transaction. At that time, the shares were priced at $0.70 per share. This valuation is based on the price an investment banking firm valued Creston at as part of underwriting a private placement of shares on April 17, 2007. On this interpretation, Sattva would receive approximately 2,454,000 shares, some 9 million fewer shares than if the shares were priced at $0.15 per share.

9 The parties entered into arbitration pursuant to the *AA*. The arbitrator found in favour of Sattva. Creston sought leave to appeal the arbitrator's decision pursuant to s. 31(2) of the *AA*. Leave was denied by the British Columbia Supreme Court (2009 BCSC 1079 (B.C. S.C.) (CanLII) ("SC Leave Court")). Creston successfully appealed this decision and was granted leave to appeal the arbitrator's decision by the British Columbia Court of Appeal (2010 BCCA 239, 7 B.C.L.R. (5th) 227 (B.C. C.A.) ("CA Leave Court")).

10 The British Columbia Supreme Court judge who heard the merits of the appeal (2011 BCSC 597, 84 B.L.R. (4th) 102 (B.C. S.C.) ("SC Appeal Court")) upheld the arbitrator's award. Creston appealed that decision to the British Columbia Court of Appeal (2012 BCCA 329, 36 B.C.L.R. (5th) 71 (B.C. C.A.) ("CA Appeal Court")). That court overturned the SC Appeal Court and found in favour of Creston. Sattva appeals the decisions of the CA Leave Court and CA Appeal Court to this Court.

## II. Arbitral Award

 

particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future. [para. 37]

52 Similarly, this Court in *Housen* found that deference to fact-finders promoted the goals of limiting the number, length, and cost of appeals, and of promoting the autonomy and integrity of trial proceedings (paras. 16-17). These principles also weigh in favour of deference to first instance decision-makers on points of contractual interpretation. The legal obligations arising from a contract are, in most cases, limited to the interest of the particular parties. Given that our legal system leaves broad scope to tribunals of first instance to resolve issues of limited application, this supports treating contractual interpretation as a question of mixed fact and law.

53 Nonetheless, it may be possible to identify an extricable question of law from within what was initially characterized as a question of mixed fact and law (*Housen*, at paras. 31 and 34-35). Legal errors made in the course of contractual interpretation include "the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor" (*King*, at para. 21). Moreover, there is no question that many other issues in contract law do engage substantive rules of law: the requirements for the formation of the contract, the capacity of the parties, the requirement that certain contracts be evidenced in writing, and so on.

54 However, courts should be cautious in identifying extricable questions of law in disputes over contractual interpretation. Given the statutory requirement to identify a question of law in a leave application pursuant to s. 31(2) of the *AA*, the applicant for leave and its counsel will seek to frame any alleged errors as questions of law. The legislature has sought to restrict such appeals, however, and courts must be careful to ensure that the proposed ground of appeal has been properly characterized. The warning expressed in *Housen* to exercise caution in attempting to extricate a question of law is relevant here:

> Appellate courts must be cautious, however, in finding that a trial judge erred in law in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual. It is for this reason that these matters are referred to as questions of "mixed law and fact". Where the legal principle is not readily extricable, then the matter is one of "mixed law and fact" .... [para. 36]

55 Although that caution was expressed in the context of a negligence case, it applies, in my opinion, to contractual interpretation as well. As mentioned above, the goal of contractual interpretation, to ascertain the objective intentions of the parties, is inherently fact specific. The close relationship between the selection and application of principles of contractual interpretation and the construction ultimately given to the instrument means that the circumstances in which a question of law can be extricated from the interpretation process will be rare. In the absence of a legal error of the type described above, no appeal lies under the *AA* from an arbitrator's interpretation of a contract.

**(b) The Role and Nature of the "Surrounding Circumstances"**

56 I now turn to the role of the surrounding circumstances in contractual interpretation and the nature of the evidence that can be considered. The discussion here is limited to the common law approach to contractual interpretation; it does not seek to apply to or alter the law of contractual interpretation governed by the *Civil Code of Québec*.

57 While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement (*Hayes Forest Services*, at para. 14; and Hall, at p. 30). The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract (Hall, at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement (*Glaswegian Enterprises Inc. v. BC Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62 (B.C. C.A.)).

58 The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract (*King*, at paras. 66 and 70), that is, knowledge that was or reasonably ought to

 

have been within the knowledge of both parties at or before the date of contracting. Subject to these requirements and the parol evidence rule discussed below, this includes, in the words of Lord Hoffmann, "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man" (*Investors Compensation Scheme*, at p. 114). Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.

**(c) Considering the Surrounding Circumstances Does Not Offend the Parol Evidence Rule**

59 It is necessary to say a word about consideration of the surrounding circumstances and the parol evidence rule. The parol evidence rule precludes admission of evidence outside the words of the written contract that would add to, subtract from, vary, or contradict a contract that has been wholly reduced to writing (*King*, at para. 35; and Hall, at p. 53). To this end, the rule precludes, among other things, evidence of the subjective intentions of the parties (Hall, at pp. 64-65; and *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129 (S.C.C.), at paras. 54-59, *per* Iacobucci J.). The purpose of the parol evidence rule is primarily to achieve finality and certainty in contractual obligations, and secondarily to hamper a party's ability to use fabricated or unreliable evidence to attack a written contract (*C.J.A., Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316 (S.C.C.), at pp. 341-42, *per* Sopinka J.).

60 The parol evidence rule does not apply to preclude evidence of the surrounding circumstances. Such evidence is consistent with the objectives of finality and certainty because it is used as an interpretive aid for determining the meaning of the written words chosen by the parties, not to change or overrule the meaning of those words. The surrounding circumstances are facts known or facts that reasonably ought to have been known to both parties at or before the date of contracting; therefore, the concern of unreliability does not arise.

61 Some authorities and commentators suggest that the parol evidence rule is an anachronism, or, at the very least, of limited application in view of the myriad of exceptions to it (see for example *Gutierrez v. Tropic International Ltd.* (2002), 63 O.R. (3d) 63 (Ont. C.A.), at paras. 19-20; and Hall, at pp. 53-64). For the purposes of this appeal, it is sufficient to say that the parol evidence rule does not apply to preclude evidence of surrounding circumstances when interpreting the words of a written contract.

**(d) Application to the Present Case**

62 In this case, the CA Leave Court granted leave on the following issue: "Whether the Arbitrator erred in law in failing to construe the whole of the Finder's Fee Agreement ..." (A.R., vol. 1, at p. 62).

63 As will be explained below, while the requirement to construe a contract as a whole is a question of law that could — if extricable — satisfy the threshold requirement under s. 31 of the *AA*, I do not think this question was properly extricated in this case.

64 I accept that a fundamental principle of contractual interpretation is that a contract must be construed as a whole (McCamus, at pp. 761-62; and Hall, at p. 15). If the arbitrator did not take the "maximum amount" proviso into account, as alleged by Creston, then he did not construe the Agreement as a whole because he ignored a specific and relevant provision of the Agreement. This is a question of law that would be extricable from a finding of mixed fact and law.

65 However, it appears that the arbitrator did consider the "maximum amount" proviso. Indeed, the CA Leave Court acknowledges that the arbitrator had considered that proviso, since it notes that he turned his mind to the US$1.5 million maximum amount, an amount that can only be calculated by referring to the TSXV policy referenced in the "maximum amount" proviso in s. 3.1 of the Agreement. As I read its reasons, rather than being concerned with whether the arbitrator ignored the maximum amount proviso, which is what Creston alleges in this Court, the CA Leave Court decision focused on how the arbitrator construed s. 3.1 of the Agreement, which included the maximum amount proviso (paras. 25-26). For example, the CA Leave Court expressed concern that the arbitrator did not address the "incongruity" in the fact that the value of the fee would vary "hugely" depending on whether it was taken in cash or shares (para. 25).

66 With respect, the CA Leave Court erred in finding that the construction of s. 3.1 of the Agreement constituted a

 

# TAB 6

**Most Negative Treatment:** Application/Notice of Appeal
**Most Recent Application/Notice of Appeal:** Knelsen Sand and Gravel Ltd. v. Houle | 2016 CarswellAlta 2192 | (S.C.C., Oct 25, 2016)

2016 ABCA 247
Alberta Court of Appeal

Houle v. Knelsen Sand and Gravel Ltd.

2016 CarswellAlta 1582, 2016 ABCA 247, [2016] A.W.L.D. 3830, [2016] A.W.L.D. 3849, [2017] 1 W.W.R. 652, 269 A.C.W.S. (3d) 472, 403 D.L.R. (4th) 684, 43 Alta. L.R. (6th) 13

# Charles Houle and Ernie Houle (Appellants / Plaintiffs) and Knelsen Sand and Gravel Ltd. (Respondent / Defendant)

Ronald Berger, Frans Slatter, Barbara Lea Veldhuis JJ.A.

Heard: June 9, 2016
Judgment: August 26, 2016
Docket: Edmonton Appeal 1503-0273-AC

Proceedings: reversing *Houle v. Knelsen Sand and Gravel Ltd.* (2015), 2015 ABQB 659, Ross J. (Alta. Q.B.)

Counsel: Charles Houle, Appellant, for himself
S.C. Chau, J. Wheat, for Appellant, Ernie Houle
R. Noce, Q.C., C.T. Aitken, for Respondent

Subject: Contracts; Corporate and Commercial; Natural Resources; Property; Torts

**Related Abridgment Classifications**

Natural resources
II Mines and minerals
II.3 Ownership and acquisition of mineral rights
II.3.f Miscellaneous

Torts
VII Fraud and misrepresentation
VII.2 Innocent misrepresentation
VII.2.c Miscellaneous

**Headnote**

Torts --- Fraud and misrepresentation — Innocent misrepresentation — Miscellaneous
Plaintiffs contacted defendant about gravel deposit — Plaintiffs provided defendant with certain data, and based on that data defendant's manager concluded lands would yield 457,000 tonnes of gravel — Price of $800,000 was agreed upon for gravel rights, and formal contract was prepared by counsel — It became apparent that there was much less gravel in lands than expected, and defendant failed to make final payment of $400,000 — Plaintiffs' claim for amount still owing under contract was dismissed, and defendant's counterclaim for rescission of contract and partial repayment of funds already paid to plaintiffs was allowed — Trial reasons concluded that defendant was entitled to rescind contract based on innocent misrepresentation — Plaintiffs appealed — Appeal allowed — Finding that defendant was entitled to rescind contract

  

reflected errors of law, and relied on palpable and overriding errors of mixed fact and law — Reasons found there was no implied covenant in contract that lands contained at least 500,000 tonnes of gravel, but then awarded remedy that would reflect just such covenant — Finding of innocent misrepresentation was premised on assumption that estimate in certain report was representation of "fact", not just opinion, and this was finding not reasonably available on record — If applied, whole agreement clause, which disclaimed any representation, warranty, collateral agreement or condition affecting property or offer, would have answered whole claim.

Natural resources --- Mines and minerals — Ownership and acquisition of mineral rights — Miscellaneous
Gravel rights.

**Table of Authorities**

**Cases considered:**

*Canadian Pacific Hotels Ltd. v. Bank of Montreal* (1987), 77 N.R. 161, [1987] 1 S.C.R. 711, 21 O.A.C. 321, 41 C.C.L.T. 1, 40 D.L.R. (4th) 385, 1987 CarswellOnt 760, 1987 CarswellOnt 962 (S.C.C.) — considered

*Creston Moly Corp. v. Sattva Capital Corp.* (2014), 2014 SCC 53, 2014 CSC 53, 2014 CarswellBC 2267, 2014 CarswellBC 2268, 373 D.L.R. (4th) 393, 59 B.C.L.R. (5th) 1, [2014] 9 W.W.R. 427, 461 N.R. 335, 25 B.L.R. (5th) 1, 358 B.C.A.C. 1, 614 W.A.C. 1, (sub nom. *Sattva Capital Corp. v. Creston Moly Corp.)* [2014] 2 S.C.R. 633 (S.C.C.) — referred to

*D'Amato v. Badger* (1996), [1996] 8 W.W.R. 390, 22 B.C.L.R. (3d) 218, 31 C.C.L.T. (2d) 1, 137 D.L.R. (4th) 129, 199 N.R. 341, 79 B.C.A.C. 110, 129 W.A.C. 110, [1996] 2 S.C.R. 1071, 1996 CarswellBC 2303, 1996 CarswellBC 2304 (S.C.C.) — referred to

*Gainers Inc. v. Pocklington Holdings Inc.* (2000), 2000 CarswellAlta 508, 255 A.R. 373, 220 W.A.C. 373, 81 Alta. L.R. (3d) 17, 2000 ABCA 151 (Alta. C.A.) — referred to

*Housen v. Nikolaisen* (2002), 2002 SCC 33, 2002 CarswellSask 178, 2002 CarswellSask 179, 286 N.R. 1, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, [2002] 7 W.W.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, 30 M.P.L.R. (3d) 1, [2002] 2 S.C.R. 235, 2002 CSC 33 (S.C.C.) — followed

*Kingu v. Walmar Ventures Ltd.* (1986), 38 C.C.L.T. 51, 10 B.C.L.R. (2d) 15, 1986 CarswellBC 2 (B.C. C.A.) — followed

*L. (H.) v. Canada (Attorney General)* (2005), 2005 SCC 25, 2005 CarswellSask 268, 2005 CarswellSask 273, 24 Admin. L.R. (4th) 1, 8 C.P.C. (6th) 199, 251 D.L.R. (4th) 604, 333 N.R. 1, [2005] 8 W.W.R. 1, 262 Sask. R. 1, 347 W.A.C. 1, [2005] 1 S.C.R. 401, 29 C.C.L.T. (3d) 1, 2005 CSC 25 (S.C.C.) — referred to

*Martel Building Ltd. v. R.* (2000), 2000 SCC 60, 2000 CarswellNat 2678, 2000 CarswellNat 2679, 36 R.P.R. (3d) 175, (sub nom. *Martel Building Ltd. v. Canada)* 193 D.L.R. (4th) 1, (sub nom. *Martel Building Ltd. v. Canada)* 262 N.R. 285, 3 C.C.L.T. (3d) 1, 5 C.L.R. (3d) 161, 186 F.T.R. 231 (note), (sub nom. *Martel Building Ltd. v. Canada)* [2000] 2 S.C.R. 860, 2000 CSC 60 (S.C.C.) — followed

*Queen v. Cognos Inc.* (1993), 45 C.C.E.L. 153, 93 C.L.L.C. 14,019, 99 D.L.R. (4th) 626, 60 O.A.C. 1, 14 C.C.L.T. (2d) 113, [1993] 1 S.C.R. 87, 147 N.R. 169, 1993 CarswellOnt 801, 1993 CarswellOnt 972, D.T.E. 93T-198 (S.C.C.) — considered

*Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)* (2010), 2010 SCC 4, 2010 CarswellBC 296, 2010 CarswellBC 297, 100 B.C.L.R. (4th) 201, [2010] 3 W.W.R. 387, 86 C.L.R. (3d) 163, 65 B.L.R. (4th) 1, 397 N.R. 331, 315 D.L.R. (4th) 385, 281 B.C.A.C. 245, 475 W.A.C. 245, [2010] 1 S.C.R. 69 (S.C.C.) — considered

*1250810 Alberta Ltd. v. 1284768 Alberta Ltd.* (2010), 2010 ABQB 125, 2010 CarswellAlta 308, 25 Alta. L.R. (5th) 199, 489 A.R. 201 (Alta. Q.B.) — referred to

**Statutes considered:**

*Judgment Interest Act*, R.S.A. 2000, c. J-1
Generally — referred to

APPEAL by plaintiffs from judgment reported at *Houle v. Knelsen Sand and Gravel Ltd.* (2015), 2015 ABQB 659 (Alta. Q.B.), dismissing plaintiff's claim and allowing defendant's counterclaim.

***Per curiam*:**

1 This is an appeal from a judgment dismissing the appellants' claim for the amount still owing under a contract: *Houle v. Knelsen Sand and Gravel Ltd.*, 2015 ABQB 659 (Alta. Q.B.). The judgment allowed the respondent's counterclaim for rescission of the contract and partial repayment of funds already paid to the appellants.

**Facts**

2 The appellants identified a parcel of land that they believed contained valuable deposits of gravel, which they estimated were between 800,000 and 900,000 tonnes. They pursued development of the gravel deposits with Wapiti Gravel Suppliers which obtained an exploration permit for the property. Wapiti engaged Silvatech Resource Solutions to assess the deposit, and the latter estimated there might be 444,850 tons of gravel in the land. The appellants and Wapiti could not agree on a price for the gravel, and Wapiti agreed to transfer the surface material lease it had obtained to the appellants on payment of the funds that Wapiti had invested in the project.

3 The appellants then contacted the respondent about the gravel deposit. The appellants provided the respondent with the Silvatech data, and based on that data the respondent's manager concluded the lands would yield 457,000 tonnes of gravel. After a series of negotiations, a price of $800,000 was agreed upon for the gravel rights, calculated at $1.60 per tonne for 500,000 tonnes, plus $1 per tonne for tonnage over 500,000.

4 A formal contract was prepared by counsel for $800,000 payable by a deposit of $75,497.36, followed by an initial payment of $324,502.64, and a final payment in one year of $400,000. At the appellants' request, the lawyer who drafted the contract for the parties included the following clause:

> 2. The Purchaser acknowledges that he has inspected the property and that he is purchasing the property as is and that there is no representation, warranty, collateral agreement or condition affecting the property or this offer other than as expressed herein in writing.

This "whole agreement" clause is the foundation for resolving the present dispute.

5 It very quickly became apparent that there was much less gravel in the lands than expected. The respondent was able to extract only 74,000 tonnes of gravel, and estimated there might be another 25,000 to 30,000 tonnes on site, but that extraction of this amount would not be economical. The respondent failed to make the final payment of $400,000, and the appellants sued.

6 The respondent counterclaimed, alleging breach of contract, negligent misrepresentation respecting the amount of gravel available, and innocent misrepresentation.

**The Trial Decision**

7 At trial the contract was admitted, and it was agreed the final $400,000 payment was not made. The trial reasons focus

  

104,000 tonnes = $166,400.

15 Secondly, the reasons reject the claim for negligent misrepresentation, but then award relief for the same misrepresentation on the assumption that it was innocent. As noted in *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711 (S.C.C.) at p. 778:

> ... the principle of concurrent or alternate liability in contract and in tort affirmed in [*Central Trust Co. v Rafuse*, [1986] 2 SCR 147] cannot extend to the recognition of a duty of care in tort when that same duty of care has been rejected or excluded by the courts as an implied term of a particular class of contract.

This concept was affirmed in *Martel Building Ltd. v. R.*, 2000 SCC 60 (S.C.C.) at paras. 68, 70, [2000] 2 S.C.R. 860 (S.C.C.). The same principle must apply here: relief cannot be provided for an innocent misrepresentation which is inconsistent with the express covenants in the contract.

16 The finding of innocent misrepresentation was premised on the assumption that the estimate in the Silvatech report was a representation of "fact", not just an opinion. This is a finding not reasonably available on this record.

17 As the trial reasons recognized, no one knew, or purported to know, how much gravel was actually in the land (see *infra*, para. 19). Neither the appellants, the respondent, Wapiti or Silvatech ever claimed or represented that there were in fact at least 500,000 tonnes of gravel, and it would have been reckless for any of them to do so. The cases relied on by the respondent are distinguishable. It is one thing to represent that an orchard for sale has 600 trees (trial reasons at para. 40), and quite another thing to represent the quantity of a mineral buried underground. The Silvatech report can only reasonably be read as stating that, in the opinion of Silvatech and based on its professional analysis, it was more likely than not that there would be about 444,850 tons of gravel in the land. This was clearly an opinion, not a "fact". Neither Silvatech (nor the appellants, vicariously) ever represented as a fact that there was any particular quantity of gravel present.

18 The linchpin of the analysis is the rejection in the trial reasons of the whole agreement clause:

> [33] The Houles later included a "no representation" clause in the contract. However, at the time that they provided the Silvatech report to Knelsen their only qualification was that they expected that there was substantially more gravel present. There was "no contemporaneity" between the disclaimer of responsibility and the misrepresentation, and the disclaimer therefore does not bar liability for the earlier misrepresentation: *Cognos* at para 89.

If applied, the whole agreement clause (which disclaims any "representation, warranty, collateral agreement or condition affecting the property or this offer") would have answered the whole claim.

19 As the trial judge noted at para. 21, there is nothing objectionable about the whole agreement clause. It was a legitimate provision (found in most commercial contracts) confirming the scope of the agreement, and allocating the risks between the parties: *D'Amato v. Badger*, [1996] 2 S.C.R. 1071 (S.C.C.) at para. 51. The risk surrounding the actual quantity of gravel was well known to the parties:

> ... There was inconsistent information available regarding the expected volume of gravel, and the Defendants' witnesses acknowledged that some variability from forecasted volumes can be expected, up to a range of plus or minus 25% in Frith's view. There could also be potential disputes about the quality of the gravel ... (trial reasons, para. 21).

At para. 36 it was observed that the exact quantity of gravel was unknown and unknowable, and "only truly discoverable if and when the gravel is excavated". The respondent agreed to buy the appellants' interest in the land "as is". The appellants insisted on the whole agreement clause, at least in part to confirm that the risk arising from these unknown factors fell on the respondent purchaser.

20 The whole agreement clause disclaims any "representation ... affecting the property". In context, this must be a reference to pre-contractual representations; post-contractual representations cannot affect the formation or terms of the contract. The trial reasons appear to assume that the whole agreement clause excludes negligent misrepresentations, but not innocent misrepresentations. There is no basis in law for that interpretation. It deprives the parties of the certainty the whole agreement clause was intended to deliver.

 

21 The reasons sidestep the whole agreement clause by stating that there was "no contemporaneity" between it and the misrepresentation, relying on *Queen v. Cognos Inc.* In *Cognos* it had been represented that a particular employment opportunity was approved and funded. The plaintiff left his secure employment based on this representation, and sued for negligent misrepresentation when the employment turned out to be short-term only. The partial defence was that clauses in the contract permitted reassignment or termination without notice; there was no actual whole agreement clause disclaiming any pre-contractual representations. The Court said of these clauses at p. 138: "They have nothing to do with representations made during pre- or post-contractual negotiations, let alone disclaimers for said representations". *Cognos* confirms that there can be contemporaneous liability in contract and tort, but that the scope of tort liability must yield to the terms of the contract. The reference to "no contemporaneity" is a reference to substantive overlap between the alleged misrepresentation and the terms of the contract, not the timing of the representation: *Gainers Inc. v. Pocklington Holdings Inc.*, 2000 ABCA 151 (Alta. C.A.) at para. 16, (2000), 81 Alta. L.R. (3d) 17, 255 A.R. 373 (Alta. C.A.). The timing of any misrepresentation is at best relevant to whether it actually induced one party to enter into the contract. The Court concluded in *Cognos* at p. 139 that the negligent misrepresentation was unaffected by the terms of the contract because it related to the very "nature and existence of the employment opportunity"; nothing in the contract spoke to those issues.

22 The present appeal is distinguishable from *Cognos*, if only because of the presence of the express whole agreement clause. The respondent knew it was buying whatever gravel existed in a particular piece of land, and that is what it got. As the trial judge held, there was no contractual covenant that there was any particular quantity of gravel to be found. In *Cognos* the approved and funded long-term employment opportunity never existed; in the present appeal the land, the gravel, and the opportunity to extract it did exist. In *Cognos* there was an actual representation about the quality of the subject matter of the contract (i.e. the employment opportunity). In this case it was never represented that there was or was not any particular quantity of gravel in the land; at most there were expressions of opinion based on the available data. Furthermore, in this case the whole agreement clause was inserted after an express request by the appellants, and in direct response to the negotiations about the sale of the rights to extract the gravel. *Cognos* does not import a general requirement of temporal "contemporaneity" into the interpretation of whole agreement clauses; there was no whole agreement clause in that case.

23 The respondent argues that the whole agreement clause is not wide enough to catch the representation about the quantity of gravel present in the lands, citing *1250810 Alberta Ltd. v. 1284768 Alberta Ltd.*, 2010 ABQB 125 (Alta. Q.B.) at paras. 49-50, (2010), 25 Alta. L.R. (5th) 199, 489 A.R. 201 (Alta. Q.B.). A whole agreement clause, like any other clause in the contract, must be interpreted in accordance with the intentions of the parties as reflected in the words used in their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract: *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53 (S.C.C.) at para. 47, [2014] 2 S.C.R. 633 (S.C.C.). There would be no point in excluding liability for non-actionable representations, and no reason to distinguish between innocent and negligent actionable representations, or between relief in contract or equity. The point of the whole agreement clause is that the obligations of the parties will be determined in accordance with the written terms of the contract, not extraneous negotiations and discussions that have not been reduced to writing, and thus formally acknowledged by the contracting parties.

24 Alternatively, the respondent alleges a "substantial failure" of consideration. This is not a case of a complete absence of consideration, because there was gravel and a right to extract it. Arguments based on "substantial failure" of consideration, or "*error in substantialibus*", are echoes of the now abandoned concept of "fundamental breach of contract": *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)* [2010 CarswellBC 296 (S.C.C.)] at paras. 62, 82. These concepts do not provide any general exception to the ordinary rules of interpreting contracts, nor do they allow a contracting party to automatically bypass express terms of the contract, like whole agreement clauses.

25 The respondent relies on the decision in *Kingu*, which sets out some criteria for rescission of a contract for misrepresentation. Despite its helpful *dicta*, it should be noted that the claim for rescission in *Kingu* was rejected. The Court therefore did not have to deal with the effect of the whole agreement clause, stating only at p. 29:

> The appellants also contended that the fact that the parties in the case at bar signed a contract excluding all representations other than those set out in the contract negated any liability which might otherwise arise in tort. On the view I take of the case, it is unnecessary to consider this submission. I note only that it has considerable force in circumstances such as these where the parties expressly agreed by their contract on those pre-contractual representations which they considered material and excluded all others.