

2003 01 T No. 3807

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION

BETWEEN:

CLIFFS MINING COMPANY in its capacity as
Managing Agent of WABUSH MINES

PLAINTIFF

AND:

ROYAL BANK OF CANADA

DEFENDANT

AND BETWEEN

ROYAL BANK OF CANADA

PLAINTIFF BY
COUNTERCLAIM

AND:

CLIFFS MINING COMPANY in its capacity
as Managing Agent of WABUSH MINES

DEFENDANT BY
COUNTERCLAIM

AMENDED STATEMENT OF DEFENCE AND COUNTERCLAIM

1. The Defendant, Royal Bank of Canada, admits paragraph 2 of the Statement of Claim.
2. The Defendant denies each and every other allegation in the Statement of Claim as if same were set forth herein and traversed seriatim.
3. With respect to paragraph 3 of the Statement of Claim, the Defendant admits entering into a Lease Agreement with the Plaintiff on or about December 17, 1996 (the "Master Lease Agreement"). With respect to the Master Lease Agreement, the Defendant states that same needs to be read in its entirety together with the respective Schedules being Schedule "A", Lease No. 08-73566 and Schedule "A", Lease No. 08-74187 (the "Schedules").

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4. As to paragraph 4 of the Statement of Claim, the Defendant states that section 11 of the Master Lease Agreement deals with maintenance and use and states as follows:

"11. Maintenance and Use

11.1 Lessee will, as its own expense:

(a) maintain the System in good operating condition and repair (ordinary wear and tear excepted);

(b) comply in all respects with all recommendations, or requirements of the Supplier regarding the System or any part or component thereof or accessory thereto, as may be necessary to preserve all Warranties by such Supplier;

(c) repair and replace any damage to the System caused by the operation or use thereof by Lessee, its officers, employees and servants or by others; and

(d) replace any components, including power plants, as may become necessary or, in the reasonable opinion of Lessee, desirable for the proper use and operation of the System.

11.2 All replacement parts which may, in the course of maintaining the Equipment in good operating condition and repair, at any time and from time to time, during the term of each Lease, be made to, or placed in or upon, the Equipment thereby leased, shall be free and clear of all Adverse Claims.

11.3 All replacement parts, of whatever kind or nature, made to, or placed in or upon the Equipment, shall belong to, and become the property of Lessor and shall be subject to all the terms and conditions of this lease as if they formed part of the Equipment."

5. The words System and Equipment are defined terms in the Master Lease Agreement and are defined as follows in the definitions section:

"(g) "Equipment" means the equipment which Lessor purchases and leases to Lessee pursuant to the terms and conditions of any Lease and when or where required in the context or circumstances, individual items thereof.

(v) "System" means the Equipment and the Licensed Software."

6. The Defendant states that the Plaintiff failed to maintain the equipment in accordance with the provisions of section 11 of the Master Lease Agreement which resulted in a deterioration of the Equipment and a reduction in the value of the Equipment for purposes of the appraisal.

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7. As to paragraph 5 of the Statement of Claim, the Defendant states that the entirety of paragraph 25 of the Master Lease Agreement needs to be reviewed and same is set forth herein for ease of reference dealing with the option to purchase, return conditions, as follows:

"25. Option to Purchase/Return Conditions

- 25.1 Provided Lessee shall not be in default under any Obligation, Lessor hereby grants to Lessee an option to purchase whatever title Lessor may have to the Equipment for the Purchase Price and at the time or times set forth in Item 4 of the relevant Leasing Schedule.*
- Provided Lessee shall not be in default under any Obligation and to the extent Lessor has the right to grant such an assignment, Lessor hereby grants to Lessee the right to take an assignment of Lessor's rights under any license of Licensed Software for the option price and at the time or times set forth in the relevant item of the relevant Leasing Schedule.*
- 25.2 Such option to purchase may be exercised by Lessee by giving to Lessor notice of Lessee's intention to exercise such option, at least thirty (30) days prior to the date of intended purchase, describing the Equipment with respect to which such option is being exercised.*
- The right to take an assignment of Lessor's rights under any license of Licensed Software may be exercised by Lessee by giving to Lessor notice of Lessee's intention to exercise such right, at least thirty (30) days prior to the date of intended assignment, describing the Licensed Software with respect to which such right is being exercised.*
- 25.3 The intended purchase and sale and/or assignment of license rights shall be concluded on a date specified in the said notice falling in or after, but not before, the option date stated in the relevant item of the relevant Leasing Schedule, but in any event not later than the termination date of term pertaining to the Equipment and/or Licensed Software being purchased.*
- 25.4 Upon the exercise of such option, there shall be a binding agreement for the sale and purchase of the Equipment and/or assignment of license rights in the Licensed Software described in the said notice on the terms and conditions provided herein. The Purchase Price shall be paid to Lessor at the time of the conclusion of such sale.*
- 25.5 Upon any such purchase and/or assignment of license rights and/or license rights so assigned, Lessor shall transfer the*

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Equipment so purchased free and clear of all interests of Lessor under this Lease Agreement and any Leasing Schedule and thereupon this Lease shall terminate with respect to the Equipment and/or Licensed Software so purchased.

25.6 Lessee shall bear the cost of any Provincial or Federal taxes, licence or registration fees or other assessments or charges imposed on, or connected with, the transfer of title to and ownership of the Equipment.

25.7 Should Lessee not exercise such option, Lessee shall then return the Equipment subject to the following:

Lessee agrees that each piece of Equipment must be, as of the termination date, in strict conformance with all the following minimum physical return conditions:

1) *The Equipment shall have been operated and maintained in accordance with the Manufacturer's standard operating and maintenance procedure and evidenced by all maintenance records and logs as required under the Manufacturer's available guarantee.*

2) *At the time of return,*

a) *all Equipment shall be returned in the condition in which it is required to be maintained. The Equipment shall be free of any rust or corrosion, except surface rust and corrosion, that would adversely effect the structural integrity or mechanical operations of the Equipment. All advertisements, logos or identifying marks of the Lessee shall be removed;*

b) *Lessee agrees that 30 days prior to the expiration of the Leasing Schedule, Lessor may cause an authorized manufacturer's representative to inspect all items of Equipment, at Lessee's expense, to enable Lessor to determine the condition of the Equipment including, without limitation, a component reconciliation. Said component reconciliation shall determine, using information provided by the inspection and a review of applicable maintenance records, the number of operational hours in excess of 50% of useful life or of 50% of time between manufacturer recommended replacement, overhaul or rebuild for any component parts. Expected intervals between component replacement, overhaul or rebuild supplied by the manufacturer shall be used as the basis of such reconciliation. If the operational hours of any such components exceed either 50% of its remaining useful life or 50% of time recommended between replacement, overhaul or rebuild, then Lessee shall compensate Lessor by the following formula:*

Amount due to Lessor = $z(y-0.5x)/x$

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x = Total number of allowable hours between replacement, overhaul or rebuild on component.

y = Total number of hours since new, or last overhaul, rebuild or replacement.

z = The then current cost to Lessor for replacement, overhaul or rebuild of the component from the manufacturer.

The component reconciliation shall be completed not later than 10 days prior to the last day of the Lease Term of the Lease and Lessee shall be obligated to pay Lessor for such excess component usage on the last day of the Lease Term:

c) the Equipment shall be operational and able to perform its assigned task(s), normal wear and tear accepted;

d) if required by Lessor, Lessee shall provide free storage in operating condition for the Equipment on Lessee's premises in order to sell the Equipment FOB mine site if possible;

e) upon being sold the Equipment shall be deinstalled, disassembled and properly packed by Lessee at Lessee's expense;

f) the Equipment shall be loaded on an equipment trailer suitable for shipping of such equipment by Lessee at Lessee's expense; and

g) the Lessee agrees to pay at the date of return to the Lessor two per cent (2%) of Net System Cost as remarketing fee.

In the case where any of these conditions are not met, Lessee shall be deemed to have exercised its option to purchase the Equipment at the cap of Fair Market Value as stipulated in Leasing Schedule."

8. Of particular significance is the definition of the word Obligation set out in the Definition section of the Master Lease Agreement, which reads as follows:

"(1) "Obligation" means any obligation to comply with any provision of any Lease or any other agreement between Lessor and Lessee."

9. The Defendant states that the Plaintiff failed in its Obligation under the Lease in that the Plaintiff failed to maintain the System in good operating condition and repair and that the

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Plaintiff has sought to benefit from its failure to comply with its obligations under the Master Lease Agreement.

10. The particular benefit being that by failing to maintain the Equipment, the Plaintiff knew that the appraised value of the Equipment would be less than if the Equipment was properly maintained and that the Plaintiff would therefore benefit from its own wrongdoing.
11. The Defendant states that the Master Lease Agreement contemplates this situation and deals with same in section 25 of the Master Lease Agreement by stipulating in subsection 25.1 that the purchase option is only exercisable when the *"Lessee shall not be in default under any Obligation"* and that failing this requirement, the Lessee is required to return the Equipment in accordance with the remainder of the provisions of section 25 and where it fails to return the Equipment in accordance with section 25, the *"Lessee shall be deemed to have exercised its option to purchase the equipment at the cap of Fair Market Value as stipulated in the Leasing Schedule."*
12. The Defendant states that the Fair Market Value cap was correctly set out in paragraph 7 of the Plaintiff's Statement of Claim, same being One Million Six Thousand Six Hundred Twenty-One Dollars and Sixty Cents (\$1,006,621.60) for each Shovel (as defined in the Plaintiff's Statement of Claim) for a total value of \$2,013, 324.20.

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13. The Defendant states that it has received payments to date in the amount of \$347,120.00 which should be deducted from the Fair Market Value cap and that the Defendant is therefore entitled to the difference between the Fair Market Value cap and the amount received to date, which the Defendant calculates as follows:

Fair Market Value	\$2,013,324.20
Less Payments Received	<u>-\$347,120.00</u>
	<u>\$1,666,204.20</u>

14. The Defendant states that the Plaintiff:

- (a) failed to comply with section 11 of the Master Lease Agreement;
- (b) purported to exercise the option to purchase set out in section 25 of the Master Lease Agreement notwithstanding the fact that the Plaintiff was in default under its Obligation(s) under the Master Lease Agreement;
- (c) attempted to allow the System and Equipment to fall into state of disrepair and to benefit from its own wrongdoing by attempting to have the System and/or Equipment appraised at a value that was not in accordance with the appraisal provisions set forth in the Master Lease Agreement;
- (d) the Plaintiff had the System and/or Equipment appraised by appraisers who placed an unreasonably low value on the System and/or Equipment in the circumstances; and
- (e) the Plaintiff purported to exercise its option contrary to the spirit and intent of the terms of the Master Lease Agreement.

15. The Defendant therefore claims that it is entitled to:

- (a) the Fair Market Value cap less payments made to date, which the Defendant calculates as follows:

Fair Market Value	\$2,013,324.20
Less Payments Received	<u>-\$347,120.00</u>
	<u>\$1,666,204.20</u>

- (b) costs; and
- (c) such further and other relief as this Honourable Court may deem just.

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~~DATED at St. John's, in the Province of Newfoundland and Labrador, this 15th day of July, A.D. 2004.~~

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~~TO: Registry of the Supreme Court of Newfoundland and Labrador
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COUNTERCLAIM

- The Plaintiff, Cliffs Mining Company ("Cliffs Mining"), is the Managing Agent on behalf of Wabush Mines, which operates a mine in Wabush, Newfoundland and Labrador. The Plaintiff operates a head office in Cleveland, Ohio and has a local office at 235 Water Street, St. John's, NL.
- The Defendant, Royal Bank of Canada ("RBC"), is a chartered bank duly incorporated pursuant to the laws of the Parliament of Canada, having its head office in Toronto, Ontario and a local office at 224-226 Water Street, NL.

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3. On December 17, 1996 Cliffs Mining leased two Bucryus Erie Electric Shovels (the "Equipment") from RBC pursuant to a Master Lease Agreement (the "Lease"). The term of the Lease was for 60 months commencing July 1, 1998 terminating on June 30, 2003.
4. Section 25 of the Lease has the heading "Option to Purchase/Return Conditions". It provided that Cliffs Mining had the option to purchase the Equipment. Such option could be exercised as long as there was no default in any "Obligation".
5. "Obligation" is defined in section 1.1(l) of the Lease as meaning any obligation to comply with any provision of the Lease, or any other agreement between the parties.
6. Section 11 of the Lease states, in part:
 - 11.1 Lessee will, at its own expense:
 - (a) maintain the System in good operating condition and repair (ordinary wear and tear expected);
 - (b) comply in all respects with all recommendations or requirements of the Supplier regarding the System or any part or component thereof or accessory thereto, as may be necessary to preserve all Warranties by such supplier;
 - (c) repair and replace any damage to the System caused by the operation or use thereof by the Lessee, its officers, employees and servants or by others; and
 - (d) Replace any components, including power plants, as may become necessary or, in the reasonable opinion of Lessee, desirable for the proper use and operation of the System.
7. The "System" is defined in the Lease as meaning the Equipment and the licensed software.
8. Cliffs Mining provided notice on or about May 27, 2003 of its intention to exercise its option to purchase the Equipment pursuant to section 25 of the Lease.

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9. Cliffs Mining and RBC could not agree on the Fair Market Value for the purpose of determining the purchase price pursuant to the exercise of the option.
10. The Lease defines the Fair Market Value Cap (the "Cap") for the Equipment at \$2,013,324.20.
11. The Lease provided in section 1(ac) that in the event of disagreement, the Fair Market Value would be determined by two independent appraisers.
12. RBC engaged High Tower Construction Services which provided an appraisal of \$770,000.00 for the Equipment on or about August 18, 2003. Cliffs Mining engaged Hunyady Appraisal Services which provided an appraisal of \$140,280.00 for the Equipment on or about August 29, 2003.
13. Given the appraisals represented a significant departure from the Cap, RBC asked High Tower Construction Services to complete a maintenance review of the Equipment (the "Review").
14. The Review concluded that the Equipment had not been maintained and/or repaired to the degree required by the Lease, specifically section 11 which required Cliffs Mining to maintain the Equipment in good working condition, including repairing and replacing any damage.
15. Cliffs Mining was in default of its Obligations under the Lease. Specifically, Cliffs Mining failed to maintain the Equipment in good operating condition and repair the equipment in accordance with the provisions of section 11 of the Lease. This resulted in a deterioration of the Equipment and a subsequent reduction in value.

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16. Following the results of the appraisals, RBC provided Cliffs Mining with a notice that Cliffs Mining could not properly exercise the option to purchase as it was in default of complying with maintenance Obligations under the Lease. Further, Cliffs Mining was deemed to have purchased the Equipment at the Cap.
17. Section 25 of the Lease states that the purchase option is only exercisable when the "Lessee shall not be in default under any Obligation" and that failing this requirement, the Lessee is to return the Equipment. Where the Lessee fails to return the Equipment, it is "deemed to have exercised its option to purchase the Equipment at the cap of the Fair Market Value as stipulated in the Leasing Schedule".
18. Cliffs Mining has sought to benefit from its failure to comply with its Obligations under the Lease. By failing to maintain the Equipment, Cliffs Mining knew, or ought to have known, that the value of the Equipment would be reduced. Therefore Cliffs Mining would benefit from an artificially low value when exercising the option to purchase.
19. RBC states that Cliffs Mining is liable to RBC for breach of the Lease; specifically:
 - a. Failing to comply with section 11 of the Lease;
 - b. Purporting to exercise the option to purchase notwithstanding the fact that it was in default under its Obligation(s) under the Lease;
 - c. Attempting to allow the System and Equipment to fall into a state of disrepair and to benefit from its own wrongdoing by attempting to have the System and/or Equipment appraised at a value that was not in accordance with the appraisal provisions set forth in the Lease;


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- d. Having the System and/or Equipment appraised by appraisers who placed unreasonably low value on the System and/or Equipment in the circumstances;
 - e. Purporting to exercise its option contrary to the spirit and intent of the terms of the Lease; and
 - f. Such other breaches as may appear.
20. Cliffs Mining continues to hold the Equipment in its possession. RBC also pleads and relies on the equitable remedies of restitution and unjust enrichment.
21. Further and in the alternative, Cliffs Mining was required to obtain the approval of its partners prior to exercising the option to purchase the Equipment. Cliffs Mining failed to obtain the approval thereby it did not validly exercise the option.
22. RBC by Counterclaim repeats the foregoing and states that it is entitled to the remainder of the monies owing under the Cap, being the difference between payments received to date from Cliffs Mining and the Cap. Cliffs Mining has already made payments in the amount of \$347,120.00, inclusive of \$24,377.82 interest, leaving \$322,742.18 to be applied against the Cap (resulting in the principal amount of \$1,690,582.02 owing to RBC).
23. RBC by Counterclaim claims against Cliffs Mining for the following:
- a. The Fair Market Value Cap less payments made to date for a total of \$1,690,582.02;
 - b. Compound Interest in accordance with Section 30 of the Lease;
 - c. Costs in accordance with column 5 of Rule 55 of the Rules of the Supreme Court, 1986; and

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d. Such other relief as this Honourable Court deems just and appropriate.

DATED at St. John's, in the Province of Newfoundland and Labrador, this 13th day of February, 2014.


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