COURT FILE NUMBER	2001-05482
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY

Clerk's Stamp

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

AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF JMB CRUSHING SYSTEMS INC. and 2161889 ALBERTA LTD.

DOCUMENT **BRIEF OF LAW OF JMB CRUSHING SYSTEMS INC. IN RESPONSE TO APPLICATION BY 541466 ALBERTA LTD.**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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File No.: A163514

I. INTRODUCTION

1. This Bench Brief is submitted by JMB Crushing Systems Inc. ("**JMB**") in opposition to the application of 541466 Alberta Ltd., carrying on business as JLG Ball Enterprises ("**JLG**") for a declaration that the Non-Competition Agreement (as defined below) and any rights and obligations thereunder are expressly excluded from the sale of JMB's assets to Mantle Materials Group, Ltd. ("**Mantle**"). JMB also relies upon and incorporates by reference its Bench Brief dated October 1, 2020, and particularly paragraphs 45 to 56 thereof.

2. JMB respectfully submits that the Non-Competition Agreement is an asset that may be assigned by JMB with court approval pursuant to section 11.3 of the *Companies Creditors' Arrangement Act*, RSC 1985 c C-36, as amended (the "**CCAA**"), and seeks to have the Non-Competition Agreement assigned to Mantle on the same terms as set out in the Assignment Order granted by The Honourable Justice K.M. Eidsvik on October 16, 2020.

II. FACTS

3. On or about March 15, 2019, JMB and JLG entered into a purchase and sale agreement (the "**PSA**"), pursuant to which JMB purchased the shares of 2161889 Alberta Ltd. ("216") from JLG, along with various other assets, including but not limited to surface mineral rights, miscellaneous interests, inventory and goodwill, all as set out in the PSA. The PSA does not provide any remedy for non-payment of the Promissory Note (as defined below), and does not tie payment of the Promissory Note to the validity or enforceability of the Non-Competition Agreement. The PSA contains an "entire agreement" clause that requires the provisions of the PSA and all collateral agreements to be read subject to the provisions of the PSA.

Affidavit of Lisa Ball sworn September 28, 2020
(the "**Ball Affidavit**"), para 3, Exhibit A

4. Pursuant to the PSA, the purchase price of $15,500,000.00 was payable as follows:

   (a) $12,500,000.00 plus the Security Deposit Value (as defined in the PSA) by wire transfer at closing; and

(b) $3,000,000.00 by delivery of a promissory note to JLG (the "**Promissory Note**").

Ball Affidavit, para 4, Exhibits A, B

5. The Promissory Note:

(a) Evidences the unsecured debt owed by JMB to JLG;

(b) Does not contain any reference to the Options (as defined below) or the Non-Competition Agreement, and specifically, does not provide that the Non-Competition Agreement terminates for non-payment of the amounts due under the Promissory Note;

(c) Stipulates that in the event of non-payment, JLG is entitled to accelerate the debt owing;

(d) Stipulates that no security is to be granted or required to secure payment of the amounts owing under the Promissory Note; and

(e) Includes an "entire agreement" clause.

Ball Affidavit, Exhibit B

6. It was a condition precedent of the PSA that Lisa Ball and Gordon Ball (the "**Restricted Parties**"), the principals of JLG, execute a non-competition agreement in the form attached to the PSA as Schedule B. The non-competition agreement was executed on or about March 22, 2019 (the "**Non-Competition Agreement**"), and provides that, *inter alia*:

(a) The Restricted Parties shall not, and shall ensure that each of their affiliates shall not, without the prior written consent of JMB, compete with the Business (as defined in the PSA) at any time within three years of the date of the Non-Competition Agreement within Alberta;

(b) Prohibited activities include directly or indirectly selling or permitting the sale to any of the customers of the Business as of the date of the Non-Competition Agreement of any products or services of the type sold by the Business as of the date of the Non-Competition Agreement;

(c) The Restricted Parties acknowledge that a breach of the Non-Competition Agreement will cause serious harm to JMB and will result in damages to JMB that may not be adequately compensated by way of monetary award alone, and agree that in the event of a breach, JMB shall be entitled to apply for injunctive relief without the necessity of proving actual damages without objection from the Restricted Parties;

(d) The Restricted Parties acknowledge and agree that:

(i) All restrictions in the Non-Competition Agreement are necessary and fundamental to the protection of JMB and the Business and are reasonable and valid;

(ii) The Restricted Parties waive all defences to the strict enforcement of the Non-Competition Agreement against the Restricted Parties or any affiliates;

(iii) The covenants contained in the Non-Competition Agreement are intended to ensure that JMB receives the full benefit of the goodwill of the Business, including, without limitation, the Restricted Parties' relationships with customers and suppliers, and the Business' confidential information, and to preserve the fair market value of the assets of 541 being purchased by JMB;

(iv) The Restricted Parties have had sufficient time and opportunity to seek the advice of independent legal counsel, and have read and understand all of the terms and provisions of the Non-Competition Agreement;

(v) JMB is relying on the acknowledgements and agreements contained in the Non-Competition Agreement, which constitute a material inducement to JMB in proceeding with the purchase;

(e) The Restricted Parties agreed that for the purposes of the *Income Tax Act*, no part of the consideration payable to the Restricted Parties under the PSA is allocable to, and no proceeds are receivable by the Restricted Parties for granting, the Restrictive Covenants (as defined in the Non-Competition Agreement);

(f) The Non-Competition Agreement shall enure to the benefit of the Parties and their respective successors and permitted assigns; and

(g) The Non-Competition Agreement may be assigned or transferred with the prior written consent of the other Party.

Ball Affidavit, Exhibit E

7. The Non-Competition Agreement does not contain any reference to the Options or the Promissory Note, and notably, does not contain any provision that would permit the Restricted Parties to terminate the Non-Competition Agreement as a result of a breach by or default of JMB under the Promissory Note or for any reason.

8. JMB and JLG also included in the PSA terms governing the grant of a series of options for JMB to purchase from JLG certain surface material rights within a specified period of time once JLG has received notification from the applicable regulator that formal approval has been granted to JLG for those surface mineral rights (the "**Options**"). None of the Options has been exercised, as to the best of JMB's knowledge, no regulatory approval has yet been obtained by JLG for the Option Lands (as defined in the PSA).

Ball Affidavit, Exhibit F

9. The transaction contemplated by the PSA closed on or about March 22, 2019.

Ball Affidavit, Exhibit C

10. On May 1, 2020, JMB, along with 216, obtained protection from their creditors pursuant to the CCAA by order of Justice K.M. Eidsvik, which order was amended and restated on May 11, 2020 (as amended, the "**Initial Order**"). Pursuant to the Initial Order, FTI Consulting Canada Inc. was appointed as monitor of JMB and 216 (the "**Monitor**"), a sale and investment solicitation process (the "**SISP**") was approved, and Sequeira Partners was appointed as sale advisor for the SISP (the "**Sale Advisor**").

11. Notwithstanding the Initial Order, on May 8, 2020, counsel for JLG demanded payment of the first installment pursuant to the Promissory Note. On the same date, counsel for JLG advised the Monitor of its position that the Options could not be sold as part of the SISP

unless the consideration applicable to each Option was paid and all amounts due under the Promissory Note had been paid.

Ball Affidavit, para 5, Exhibits C, D

12. Mantle submitted a bid in the SISP, which bid was accepted by the Sale Advisor, resulting in the transaction set out in an amended and restated asset purchase agreement dated September 28, 2020 (as amended, the "**Mantle APA**").

Seventh Report of the Monitor dated September 30, 2020 ("**Seventh Report**"), paras 36-37

13. On October 1, 2020, Justice K.M. Eidsvik approved the Mantle APA. On October 16, 2020, Justice K.M. Eidsvik granted the following orders, among others: (a) Vesting Order for transaction contemplated by the Mantle APA (the "**Mantle Transaction**"); and (b) Assignment Order pursuant to section 11.3 of the CCAA.

Vesting Order granted October 16, 2020 **[Tab 1]**

Assignment Order granted October 16, 2020 **[Tab 2]**

14. The Assignment Order contemplates the assignment of agreements from JMB to Mantle as part of the Mantle Transaction pursuant to section 11.3 of the CCAA. The Mantle Transaction includes the assignment of the Non-Competition Agreement to Mantle by JMB, and the Non-Competition Agreement was included in the version of the Assignment Order provided to the Court. However, given the pending application of JLG to exclude the Non-Competition Agreement from the Assignment Order, the Assignment Order was granted without including the Non-Competition Agreement, but without prejudice to any arguments of JMB and JLG for or against its inclusion at the hearing of the within application.

III. LAW AND ARGUMENT

15. The Alberta Court of Appeal set out the principles governing contractual interpretation in *IFP Technologies (Canada) Inc. v EnCana Midstream and Marketing*. Those principles include the following:

(a) The Court is to determine the objective intent of the parties at the time the contract was made, which is "what a reasonable person would objectively have understood from the words of the document read as a whole and from the factual matrix";

(b) Where there are disputed contractual terms, they must be interpreted in light of the contract as a whole;

(c) While the factual matrix of an agreement is used as an objective interpretive aid to determine the meaning of the words used by the parties, it cannot be used to craft a new agreement, or to do anything more than ensure that the written words of the contract are not "divorced from the background context against which the words were chosen;"

(d) The surrounding circumstances are a question of fact arising from "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;"

(e) "Mere difficulty in interpreting a contract is not the same as ambiguity;" and

(f) "[C]ommercial contracts should be interpreted in accordance with sound commercial principles and good business sense."

IFP Technologies (Canada) Inc. v EnCana Midstream and Marketing, 2017 ABCA 157 at paras 79-88 **[Tab 3]**

16. The Court of Appeal summarized the goal of contractual interpretation as follows:

> [C]ontractual interpretation is not an exercise in second guessing what could have been included in a contract while discounting or dismissing relevant terms of a contract and uncontradicted contextual information. It is instead an exercise in determining what the parties objectively intended having regard to the entire written text, relevant contextual background and commercial context. [emphasis added]

IFP Technologies (Canada) Inc. v EnCana Midstream and Marketing, supra at para 89 **[Tab 3]**

A. JLG is seeking a remedy it does not have

17. In this case, JLG argues that JMB has breached the PSA by failing to make payments under the Promissory Note when due, thereby repudiating the PSA, with the result that the Options are no longer capable of being exercised and the Non-Competition Agreement is terminated.

18. This argument presumes that there are provisions in each of the PSA, the Promissory Note and the Non-Competition Agreement that lead to that result. There are not.

19. First, the PSA does not have any provisions dealing with non-payment of the amounts due under the Promissory Note, or stipulating that JMB would lose the benefit of the Non-Competition Agreement in the event of a default in payment. There is an "entire agreement" clause in the PSA, which operates to preclude JLG from creating additional provisions that are not included in the document itself.

20. Likewise, the Promissory Note also does not have any provisions stipulating that JMB would lose the benefit of the Non-Competition Agreement in the event of a default in payment. There is a remedy provided for; namely, the acceleration of the amount owing under the Promissory Note. A claim may be made for that amount, and apart from a situation where there is a stay of proceedings in place (as is the case here), a cause of action may be advanced in the courts to obtain judgment.

21. Notably, the Promissory Note also contains an "entire agreement" clause, and accordingly, the Promissory Note must therefore be interpreted solely on the basis of the terms contained within the document itself. It is respectfully submitted that the parties considered:

    (a) Whether there should be security given by JMB to secure the amount owed to JLG under the Promissory Note, and specifically agreed no security would be required;

    (b) What should happen upon a default in payment by JMB, and specifically agreed that the entire amount owing could be accelerated by JLG and payment of the full amount demanded; and

(c) That no further provisions were required to document their agreement, as evidenced by the "entire agreement" clause.

22. JLG seeks to have a remedy not specified or agreed to by the parties implied as part of the Promissory Note. Faced with the insolvency of JMB, JLG seeks to use non-payment under the Promissory Note to deprive JMB from the value of the Non-Competition Agreement, thereby greatly reducing the value of the Business to Mantle.

23. Moreover, the parties considered what remedies would be appropriate, and agreed upon an acceleration of the amount due under the Promissory Note. JLG specifically agreed that the debt would be unsecured. Having explicitly negotiated and agreed to these terms, JLG should not now be permitted to impose a different deal on JMB by asking this Honourable Court to imply a remedy in addition to the remedy already agreed to.

24. JLG's argument on this point amounts to an assertion that as a result of non-payment under the Promissory Note, JLG should have as a remedy the power to terminate the Non-Competition Agreement. But while the Promissory Note stipulates that JLG may accelerate the indebtedness if there is a failure to pay, it does not give JLG the power to terminate the Non-Competition Agreement. Because the Promissory Note contains an "entire agreement" clause, there is no justification for implying the existence of such power.

25. Finally, JLG asserts that the Non-Competition Agreement is not capable of being assigned to Mantle, as it is not an asset of JMB. However, the Non-Competition Agreement specifically provides that it may be assigned and that "the covenants contained herein are intended to ensure that [JMB] receives the full benefit of the goodwill of the Business … and to preserve the fair market value of the assets of [JLG] being purchased by [JMB]." JMB submits that this clearly leads to the conclusion that the Non-Competition Agreement is an asset of JMB capable of being assigned and one that is critical to maintaining the value of the purchased assets.

26. The core of JLG's argument is that it should be permitted to terminate the Non-Competition Agreement and thereby recoup some of the value of the goodwill protected by that

agreement. However, there are no provisions permitting JMB to do this. Implying such a term would amount to rewriting the Non-Competition Agreement and ignoring the surrounding circumstances as evidenced by the agreements themselves.

27. It is clearly stipulated in the Non-Competition Agreement that the agreement was necessary for JMB to receive the full benefit of the goodwill of the Business, which was specifically acknowledged and agreed by JLG. The parties agreed that the value of that goodwill required the protection of the Non-Competition Agreement so that the fair market value of the assets purchased by JMB was preserved and protected. Moreover, they did not include a term linking the preservation of that value to the payments to be made under the Promissory Note. Such a term was not bargained for and should not be implied.

B. Application of Section 11.3 of the CCAA

28. As noted above, JMB repeats and adopts its submissions contained in its Bench Brief dated October 1, 2020 with respect to this application.

29. As noted in those submissions, section 11.3 of the CCAA permits the assignment of contracts to a third party where there is an anti-assignment clause and consent is not forthcoming from the counterparty. Section 11.3(3) sets out the factors to be considered by the Court in determining whether an agreement should be assigned.

30. The first factor is whether the Monitor has approved the assignment of the Non-Competition Agreement, which is met in this case.

Seventh Report, para 65

31. The second factor, whether the proposed assignee will be able to perform the obligations, is also met. Mantle, as the proposed assignee, does not have any performance obligations under the Non-Competition Agreement. Rather, the obligations fall solely on the Restricted Parties and their affiliates. There are no obligations for Mantle to perform under the Non-Competition Agreement.

32. The third factor is whether it would be appropriate to assign the rights and obligations to the proposed assignee, which is the most significant factor to be considered. Recent commentary on this factor is instructive.

> Consideration of the appropriateness of an assignment introduces some notion of fairness, and ultimately involves the court weighing the merit of the counterparty's objections, which includes any detriment to the counterparty as a result of the assignment, against the benefit to creditors and stakeholders, or the importance of the assignment to the overall restructuring. While every case will be decided based on its facts, the jurisprudence provides some guidance for the way in which a court will consider these competing interests.
>
> In *Re Ted Leroy Trucking Ltd*., the Supreme Court of Canada stated the basis on which an order under the *CCAA* would be appropriate as follows:
>
> ... Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.
>
> While the Supreme Court of Canada was referring to appropriateness under the *CCAA* as a whole, and not section 11.3 specifically, the analysis remains the same. In *Re Veris Gold Corp*., Justice Fitzpatrick of the British Columbia Supreme Court, in a discussion of the appropriateness of an assignment order, stated that the twin goals that a court ought to be guided by are "assisting the reorganization process ... while also treating a counterparty fairly and equitably".
>
> While there is no set list of all of the factors that a court may consider in determining the appropriateness of an assignment, the following considerations appear to be significant:
>
> (a) whether the proposed assignment is crucial to the deal either individually or collectively with other contracts;
>
> (b) the nature of the contract and the degree of specialization required to perform under the contract by both parties;
>
> (c) the relative significance of the contract to the counterparty and the potential impact of the assignment on it;
>
> …

> Where a contract contains a consent right to assignment, the counterparty's consent is not a precondition for the granting of an assignment order. However, the reasonableness of withholding consent may still be a relevant factor in determining whether the assignment is appropriate. If a court finds that consent is reasonably withheld, it must acknowledge that the assignment is a clear violation of the counterparty's contractual rights. If, on the other hand, the court determines that consent is unreasonably withheld, the counterparty's objection to the assignment of the agreement is considerably weaker. In order to determine whether a counterparty's withholding of consent is reasonable, Canadian courts have applied the following test:
>
> (a) The burden is on the party seeking consent to demonstrate that the refusal to consent was unreasonable. The question is not whether a reasonable person might have given consent; it is whether a reasonable person could have withheld consent.
>
> (b) Information available to the party refusing consent at the time of the refusal is relevant to the determination of reasonableness, not any subsequent facts or reasons.
>
> (c) A refusal will be unreasonable if it was designed to achieve a collateral purpose wholly unconnected with the bargain reflected in the terms of the agreement.
>
> (d) A probability that the proposed assignee will default in its obligations may be a reasonable ground for withholding consent.
>
> (e) The financial position of the assignee may be a relevant consideration.
>
> (f) The question of reasonableness is essentially one of fact that must be determined on the circumstances of the particular case.
>
> Factor (c) above includes instances where the counterparty refuses consent because it believes it can obtain a better deal with an entity other than the proposed assignee. A court will likewise be wary of an opportunistic counterparty merely using the restructuring as an opportunity to renegotiate more favourable terms with the assignee. [emphasis added; citations omitted]
>
> J Stam and E Stitt, *Not Quite True Love: Forced Assignment of Agreements*, 2017 AnnRevInsolv 18 **[Tab 4]**

33. It is respectfully submitted that the assignment of the Non-Competition Agreement is appropriate in the circumstances. First, the nature of the Non-Competition Agreement, as acknowledged and agreed to by JLG, is the preservation and protection of the value of the assets purchased by JMB from JLG. Many of those assets are being purchased from JMB

by Mantle, and the value of those assets should continue to be preserved and protected by the Non-Competition Agreement.

34. With respect to the nature of the contract, it is one that requires the Restricted Parties to refrain from competing with JMB and from soliciting its employees, contractors, suppliers and customers. There is no degree of specialization required to perform those obligations.

35. If the proposed assignment is granted by this Court, there will be little impact on the Restricted Parties. The Restricted Parties agreed that the Non-Competition Agreement was a critical piece of JMB's deal to purchase assets from JLG, and that it was necessary to preserve the value of those assets. The Restricted Parties did not tie the performance of their obligations under the Non-Competition Agreement to being paid under the Promissory Note, and as set out above, no such term should now be implied.

36. From the perspective of the Restricted Parties, both the obligations under and the impact of the Non-Competition Agreement remain the same. The level of restraint is limited, as:

    (a) The Non-Competition Agreement expires as of March 2022;

    (b) There is no requirement for the Restricted Parties to take any steps under the Non-Competition Agreement; and

    (c) Any ability that the Restricted Parties or its affiliates, including JLG, have to engage in business is limited in any event by the issuance of licences by the regulator with respect to the Option Lands; however, there is no evidence that these parties have received any licences.

37. The final factor, found in section 11.3(4), is that the Court be satisfied that "all monetary defaults in relation to the agreement – other than those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation – will be remedied on or before the day fixed by the court."

38. This final factor is also satisfied. Section 11.3(4) is a restriction on the assignment of an agreement where there are monetary defaults in relation to that agreement. Here, there are

none. It is anticipated that JLG will argue that the monetary defaults arising under the terms of the Promissory Note should somehow be considered for the purposes of this section. However, this provision should not be interpreted as permitting the court to consider other agreements not being assigned to the proposed assignee for the purposes of determining whether there have been monetary defaults. Such an interpretation would amount to a requirement that all monetary defaults as between the assigning party and the counterparty be remedied before one or a subset of any agreements could be assigned pursuant to section 11.3. This would not be in alignment with the policy objectives underlying the CCAA, and would stifle the value to be obtained by the estate – and hence all stakeholders – by the assignment of certain contracts to a purchaser.

39. This is particularly so where there are no provisions for payment in the subject contract – as here – and where there are no cross-provisions as between the contracts themselves. The proper interpretation of section 11.3 applies only to those agreements being assigned, and no others. Widening the scope of that inquiry in effect provides a priority payment for debts that are otherwise unsecured and would be paid out on a *pro rata* basis with other unsecured debts from the estate. An alteration of the priorities of this nature must be explicitly set out in the statute.

40. With respect to other relevant considerations:

(a) The proposed assignment is not a "clear violation" of the Restricted Parties' contractual rights, as the level of restraint is limited (as noted above) and the result of the assignment of the Non-Competition Agreement is simply to ensure that the value of the assets being purchased by Mantle is preserved. The Restricted Parties are not required to perform any obligations they were not otherwise required to perform, there are no performance obligations of Mantle under the Non-Competition Agreement, and in any event, it does not appear that the Restricted Parties have the regulatory approval they would need to be able to commence operations with respect to the Option Lands;

(b) Given the foregoing, a reasonable person would not have withheld consent;

(c) The refusal to consent is unreasonable, as it is designed to provide the Restricted Parties and JLG with a remedy they did not otherwise bargain for and that is not within the clear provisions of the Non-Competition Agreement; and

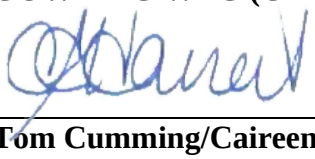
(d) In refusing to provide their consent, the Restricted Parties are attempting to convert the debt owed to JLG from an unsecured debt – as specifically agreed to under the terms of the Promissory Note – to obtaining payment in preference to other unsecured creditors by relying on agreements other than the Non-Competition Agreement.

IV. CONCLUSION

41. Accordingly, JMB respectfully submits that the declaratory relief sought by JLG to exclude the Non-Competition Agreement from the sale of assets to Mantle, or from being assigned to Mantle, should be denied with costs payable to JMB.

All of which is respectfully submitted this 20th day of October, 2020.

GOWLING WLG (CANADA) LLP



Tom Cumming/Caireen E. Hanert
Counsel for JMB Crushing Systems Inc.

V. TABLE OF AUTHORITIES

1. Vesting Order granted October 16, 2020

2. Assignment Order granted October 16, 2020

3. *IFP Technologies (Canada) Inc. v EnCana Midstream and Marketing*, 2017 ABCA 157

4. J Stam and E Stitt, *Not Quite True Love: Forced Assignment of Agreements*, 2017 AnnRevInsolv 18

TAB 1

Clerk's Stamp

COURT FILE NUMBER	2001-05482
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANTS	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF JMB CRUSHING SYSTEMS INC. AND 2161889 ALBERTA LTD.
DOCUMENT	**ORDER (Amended and Restated Mantle Sale Approval and Vesting Order)**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT:	McCarthy Tétrault LLP 4000, 421 – 7th Avenue SW Calgary, Alberta T2P 4K9 Attention: Sean Collins / Pantelis Kyriakakis Tel: 403-260-3531 / 3536 Fax: 403-260-3501 Email: scollins@mccarthy.ca / pkyriakakis@mccarthy.ca

DATE ON WHICH ORDER WAS PRONOUNCED:	**October 16, 2020**
LOCATION OF HEARING OR TRIAL:	**Calgary, Alberta**
NAME OF JUDGE WHO MADE THIS ORDER:	**Honourable Justice Eidsvik**

UPON the application (the "**Application**") of JMB Crushing Systems Inc. ("**JMB**") and 2161889 Alberta Ltd. ("**216**", JMB and 216 are collectively, the "**Applicants**") who commenced the within proceedings (the "**Proceedings**") pursuant to the initial order granted under the *Companies' Creditors Arrangement Act* (Canada) (the "**CCAA**") on May 1, 2020, as subsequently amended and restated on May 11, 2020 (collectively, the "**Initial Order**"), for an order approving the sale transaction (collectively, the "**Transaction**") contemplated by the Amended and Restated Asset Purchase Agreement, dated September 28, 2020 (the "**APA**"), between the Applicants, as vendors, and Mantle Materials Group, Ltd. (the "**Purchaser**"), as purchaser, and vesting in the Purchaser (or its nominee), all of the Applicants' right, title, and interest in and to the assets described in the APA (collectively, the "**Acquired Assets**");

AND UPON HAVING READ the Initial Order and the sale and investment solicitation process attached as Schedule "A" to the Initial Order (the "**SISP**"); **AND UPON HAVING READ**

the Second Report of FTI Consulting Canada Inc. (the "**Monitor**"), in its capacity as the court-appointed monitor of the Applicants, dated July 6, 2020 (the "**Second Monitor's Report**"), the Fifth Report of the Monitor, dated September 10, 2020, and the Seventh Report of the Monitor, dated September 30, 2020 (the "**Seventh Monitor's Report**"), all filed; **AND UPON HAVING READ** the Applicants' application for an order pursuant to Section 11.3 of the CCAA, which has been applied for concurrently with this Order, and the proposed form of order attached as Schedule "A" thereto (the "**Section 11.3 Order**"); **AND UPON HAVING READ** the Affidavit of Byron Levkulich (the "**Levkulich Affidavit**"), sworn September 30, 2020, and the Affidavit of Service of Katie Doran (the "**Service Affidavit**"), to be filed; **AND UPON HAVING READ** the Order (Mantle Sale Approval Order), granted by the Honourable Justice K.M. Eidsvik on October 1, 2020; **AND UPON HEARING** the submissions of counsel for the Applicants, the Monitor, and for any other parties who may be present;

IT IS HEREBY ORDERED AND DECLARED THAT:

SERVICE

1. The time for service of the Application and the Seventh Monitor's Report is abridged, the Application is properly returnable today, service of the Application and the Seventh Monitor's Report on the service list, in the manner described in the Service Affidavit, is good and sufficient, and no other persons, other than those listed on the service list (the "**Service List**") attached as an exhibit to the Service Affidavit, are entitled to service of the Application or the Seventh Monitor's Report.

DEFINED TERMS

2. Capitalized terms used herein but not otherwise defined shall have the same meaning as given to such terms in the APA.

APPROVAL OF THE TRANSACTION

3. The Transaction is hereby approved and execution of the APA is hereby authorized, ratified, confirmed, and approved, with such minor amendments as the Applicants (with the written consent of the Monitor) and the Purchaser may agree to. The Monitor and the Applicants are hereby authorized and directed to take such additional steps and the Applicants are hereby authorized and empowered to execute such additional documents as may be necessary or desirable for the completion of the Transaction or for the conveyance of the Acquired Assets, with the exception of any Designated Permits or Restricted Agreements (the Acquired Assets other

than the Designated Permits and Restricted Agreements are, collectively, the "**Transferred Acquired Assets**"), which Restricted Agreements shall be dealt with under the Section 11.3 Order, to the Purchaser (or its nominee), in accordance with the terms and conditions of the APA.

VESTING OF THE TRANSFERRED ACQUIRED ASSETS

4. Subject only to approval by Alberta Environment and Parks ("**AEP**") of the transfer of any Crown Dispositions (as defined below) and upon the delivery of a Monitor's certificate to the Purchaser (or its nominee), substantially in the form set out in Schedule "**A**" hereto (the "**Monitor's Certificate**"), subject only to the Permitted Encumbrances (as defined below), all of the Applicants' right, title, and interest in and to the Transferred Acquired Assets, in the manner described in the APA, shall vest absolutely, exclusively, and entirely in the name of the Purchaser (or its nominee) and, subject to the declarations under the 11.3 Order concerning the Assigned Contracts, shall be free and clear of and from any and all caveats, security interests, hypothecs, pledges, mortgages, liens, trusts or deemed trusts, reservations of ownership, options, privileges, interests, assignments, actions, judgements, executions, levies, taxes, writs of enforcement, charges, or other claims, whether contractual, statutory, financial, monetary, or otherwise, whether or not they have attached or been perfected, registered, or filed and whether secured, unsecured or otherwise (collectively, the "**Claims**") including, without limiting the generality of the foregoing:

(a) any encumbrances or charges created by the Initial Order;

(b) all charges, security interests or claims evidenced by registrations pursuant to: (i) the *Personal Property Security Act* (Alberta) or any other personal property registry system; (ii) the *Land Titles Act*, RSA 2000, c L-7 (the "**Land Titles Act**"); and, (iii) the *Public Lands Act*, RSA 2000, c. P-40 (the "**PLA**"), and the regulations thereunder;

(c) any liens or claims of lien under the *Builders' Lien Act* (Alberta); and,

(d) those Claims listed in Schedule "**B**" hereto (all of which are collectively referred to as the "**Encumbrances**", which term shall not include the permitted encumbrances, caveats, interests, easements, and restrictive covenants listed in Schedule "**C**" and "**E**" hereto (collectively, "**Permitted Encumbrances**"));

and for greater certainty, this Court orders that all Claims, including the Encumbrances but excluding the Permitted Encumbrances, affecting or relating to the Transferred Acquired Assets are hereby expunged, discharged and terminated as against the Transferred Acquired Assets.

5. Upon delivery of the Monitor's Certificate, and upon filing of a certified copy of this Order, together with any applicable registration fees, all governmental authorities including those referred to below in this paragraph (collectively, "**Governmental Authorities**") are hereby authorized, requested, and directed to accept delivery of such Monitor's Certificate and certified copy of this Order as though they were originals and to register such transfers, interest authorizations, discharges and discharge statements of conveyance as may be required to convey to the Purchaser or its nominee clear title to the Transferred Acquired Assets, subject only to Permitted Encumbrances. Without limiting the foregoing:

(a) the Registrar of Land Titles ("**Land Titles Registrar**") for the lands defined below shall and is hereby authorized, requested, and directed to forthwith:

(i) cancel existing Certificate of Title No. 992 302 625 for those lands and premises legally described as:

THE NORTH EAST QUARTER OF SECTION THIRTY FIVE (35)
TOWNSHIP FIFTY SIX (56)
RANGE SIX (6)
WEST OF THE FOURTH MERIDIAN
CONTAINING 64.7 HECTARES (160 ACRES) MORE OR LESS
EXCEPTING THEREOUT: HECTARES (ACRES) MORE OR LESS
A) PLAN 6430 KS - ROAD 0.417 1.03
B) PLAN 395 RS - ROAD 0.615 1.52
C) PLAN 9222585 - ROAD 0.407 1.01
EXCEPTING THEREOUT ALL MINES AND MINERALS

(the "**Lands**").

(ii) issue a new Certificate of Title for the Lands in the name of the Purchaser (or its nominee);

(iii) transfer to the New Certificate of Title the existing instruments listed in Schedule "**C**", to this Order, and to issue and register against the New Certificate of Title such caveats, utility rights of ways, easements or other instruments as are listed in Schedule "**C**"; and

(iv) discharge and expunge the Encumbrances listed in Schedule "**B**" to this Order and discharge and expunge any Claims including Encumbrances (but excluding Permitted Encumbrances) which may be registered after the date of the APA against the existing Certificate of Title to the Lands;

(b) upon payment of all applicable charges and fees, AEP (subject to the approval of the AEP, as set out in paragraph 4 herein) is hereby requested to transfer and assign all Crown dispositions listed in Schedule "**D**" to this Order, standing in the name of either or both of the Applicants (collectively, the "**Crown Dispositions**"), to the Purchaser (or its nominee), provided that the Purchaser (or its nominee) comply with all applicable licensing requirements, and to consent to and register the assignment of the Crown Dispositions to the Purchaser, and in doing so no further proof of due execution of the transfer and assignment of the Crown Dispositions beyond the provisions of this Order and the presentment of the Monitor's Certificate shall be required;

(c) AEP is hereby authorized and requested, upon the appropriate applications for such transfer or assignment being made by the Applicants and Purchaser, to transfer and assign (subject to the approval of AEP) all of the Applicants' right, title and interest in:

(i) any other authorizations issued under legislation administered by AEP and registered in the name of either or both of the Applicants, the transfer and assignment of which may be necessary to give effect to the transfer and assignment of the Crown Dispositions to the Purchaser; and,

(ii) to the extent assignable or transferable, all Conservation and Reclamation Business Plans that relate to the Crown Dispositions and which are registered in the name of either or both of the Applicants (the "**Crown Disposition Documents**"),

to the Purchaser, and to consent to and register the assignment of such authorizations and Crown Disposition Documents to the Purchaser, and in doing so no further proof of due execution of the transfer and assignment of such Crown Disposition Documents beyond the provisions of this Order and the presentment of the Monitor's Certificate shall be required;

(d) the Registrar of the Alberta Personal Property Registry (the "**PPR Registrar**") shall and is hereby directed to forthwith cancel and discharge any registrations at the Alberta Personal Property Registry (whether made before or after the date of this Order) claiming security interests (other than Permitted Encumbrances) in the estate or interest of the Applicants in any of the Transferred Acquired Assets which are of a kind prescribed by applicable regulations as serial-number goods, including, but not limited to, those set out in Schedule "**B**" hereto.

6. In order to effect the transfers and discharges described above, this Court directs each of the Governmental Authorities to take such steps as are necessary to give effect to the terms of this Order and the APA. Presentment of this Order and the Monitor's Certificate shall be the sole and sufficient authority for the Governmental Authorities to make and register transfers of title or interest and cancel and discharge registrations against any of the Transferred Acquired Assets of any Claims including the Encumbrances but excluding the Permitted Encumbrances.

7. The Monitor is authorized and directed to undertake and perform such activities and obligations as are contemplated to be undertaken or performed by the Monitor pursuant to this Order, the SISP, the APA, or any ancillary documents related thereto, and shall incur no liability, whatsoever, in connection therewith, save and except for any liability arising due to gross negligence or wilful misconduct on its part.

8. No authorization, approval or other action by and no notice to or filing with any Governmental Authority or regulatory body exercising jurisdiction over the Transferred Acquired Assets is required for the due execution, delivery, and performance by the Applicants of the APA, other than any required approval by AEP.

9. Upon delivery of the Monitor's Certificate together with a certified copy of this Order, this Order shall be immediately registered by the Land Titles Registrar notwithstanding the requirements of section 191(1) of the *Land Titles Act*, RSA 2000, c.L-7 and notwithstanding that the appeal period in respect of this Order has not elapsed. The Land Titles Registrar is hereby directed to accept all Affidavits of Corporate Signing Authority submitted by the Applicants.

10. For the purposes of determining the nature and priority of Claims, the net proceeds from the sale of the Acquired Assets shall stand in the place and stead of the Acquired Assets from and after delivery of the Monitor's Certificate and all Claims including the Encumbrances (but excluding the Permitted Encumbrances) shall not attach to, encumber, or otherwise form a

charge, security interest, lien, or other Claim against the Acquired Assets and may be asserted against the net proceeds from sale of the Acquired Assets with the same priority as they had with respect to the Acquired Assets immediately prior to the sale, as if the Acquired Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale.

11. Upon completion of the Transaction, the Applicants and all persons who claim by, through or under the Applicants in respect of the Transferred Acquired Assets, and all persons or entities having any Claims of any kind whatsoever in respect of the Transferred Acquired Assets, save and except for persons entitled to the benefit of the Permitted Encumbrances, shall stand absolutely and forever barred, estopped, and foreclosed from and permanently enjoined from pursuing, asserting, or claiming any and all right, title, estate, interest, royalty, rental, equity of redemption or other Claim whatsoever in respect of or to the Transferred Acquired Assets, and to the extent that any such persons or entities remain in the possession or control of any of the Transferred Acquired Assets, or any artifacts, certificates, instruments or other indicia of title representing or evidencing any right, title, estate, or interest in and to the Transferred Acquired Assets, they shall forthwith deliver possession thereof to the Purchaser (or its nominee).

12. The Purchaser (or its nominee) shall be entitled to enter into and upon, hold and enjoy the Transferred Acquired Assets for its own use and benefit without any interference of or by the Applicants, or any person claiming by, through or against the Applicants.

13. Pursuant to clause 7(3)(c) of the *Personal Information Protection and Electronic Documents Act* (Canada) and section 20(e) of the Alberta *Personal Information Protection Act*, the Applicants and the Monitor are authorized and permitted to disclose and transfer to the Purchaser (or its nominee) all human resources and payroll information in the Applicants' records pertaining to the Applicants' past and current employees. The Purchaser (or its nominee) shall maintain and protect the privacy of such information and shall be entitled to use the personal information provided to it in a manner which is in all material respects identical to the prior use (of such information) to which the Applicants were entitled.

14. Immediately upon closing of the Transaction, holders of Permitted Encumbrances shall have no claim whatsoever against the Applicants or the Monitor.

15. The Monitor is directed to file with the Court a copy of the Monitor's Certificate forthwith after delivery thereof to the Purchaser (or its nominee).

16. The Monitor may rely on written notice or correspondence from the Applicants and the Purchaser or their respective counsel regarding the fulfillment of conditions to closing under the APA and shall incur no liability, whatsoever, with respect to the delivery of the Monitor's Certificate.

MISCELLANEOUS MATTERS

17. Notwithstanding:

(a) the pendency of these proceedings and any declaration of insolvency made herein;

(b) the pendency of any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, as amended (the "**BIA**"), in respect of JMB, and any bankruptcy order issued pursuant to any such applications;

(c) any assignment in bankruptcy made in respect of the Applicants; and

(d) the provisions of any federal or provincial statute:

the vesting of the Transferred Acquired Assets in the Purchaser (or its nominee) pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of the Applicants and shall not be void or voidable by creditors of the Applicants, nor shall it constitute nor be deemed to be a transfer at undervalue, settlement, fraudulent preference, assignment, fraudulent conveyance, or other reviewable transaction under the BIA or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

18. This Honourable Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in any of its provinces or territories or in any foreign jurisdiction, to act in aid of and to be complimentary to this Court in carrying out the terms of this Order, to give effect to this Order and to assist the Applicants, the Monitor, and their agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such order and to provide such assistance to the Applicants and the Monitor, as an officer of the Court, as may be necessary

or desirable to give effect to this Order or to assist the Applicants, the Monitor, and their agents in carrying out the terms of this Order.

19. The Applicants, the Monitor, the Purchaser (or its nominee), and any other interested party, shall be at liberty to apply for further advice, assistance and direction as may be necessary in order to give full force and effect to the terms of this Order and to assist and aid the parties in closing the Transaction.

20. Service of this Order shall be deemed good and sufficient by:

(a) Serving the same on:

(i) the persons listed on the service list created in these proceedings;

(ii) any other person served with notice of the application for this Order;

(iii) any other parties attending or represented at the application for this Order;

(iv) the Purchaser or the Purchaser's solicitors;

(b) Posting a copy of this Order on the Monitor's website at: http://cfcanada.fticonsulting.com/jmb/default.htm; and,

(c) Posting a copy of the Order to CaseLines in accordance with the CaseLines Service Order granted on May 29, 2020,

and service on any other person is hereby dispensed with.

21. Service of this Order shall be deemed good and sufficient by serving the same in accordance with the procedures in the CaseLines Service Order granted on May 29, 2020.

Justice of the Court of Queen's Bench of Alberta

SCHEDULE "A" TO THE ORDER (SALE APPROVAL AND VESTING)
MONITOR'S CERTIFICATE

Clerk's Stamp

COURT FILE NUMBER	2001-05482
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICATIONS	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF JMB CRUSHING SYSTEMS INC. AND 2161889 ALBERTA LTD.
DOCUMENT	**MONITOR'S CERTIFICATE**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT:	McCarthy Tétrault LLP 4000, 421 – 7th Avenue SW Calgary, Alberta T2P 4K9 Attention: Sean Collins / Pantelis Kyriakakis Tel: 403-260-3531 / 3536 Fax: 403-260-3501 Email: scollins@mccarthy.ca / pkyriakakis@mccarthy.ca

RECITALS

A. Pursuant to an Order of the Honourable Justice K.M. Eidsvik of the Court of Queen's Bench of Alberta, Judicial District of Calgary (the "**Court**"), dated May 1, 2020, as subsequently amended and restated on May 11, 2020, FTI Consulting Canada Inc., was appointed as the monitor (the "**Monitor**") of JMB Crushing Systems Inc. and 2161889 Alberta Ltd. (collectively, the "**Applicants**").

B. Pursuant to an Order of the Court, dated October 1, 2020 (the "**Sale Approval Order**"), the Court approved the Amended and Restated Asset Purchase Agreement, dated September 28, 2020 (the "**APA**"), between the Applicants, as vendors, and Mantle Materials Group Ltd. (the "**Purchaser**"), as purchaser, and provided for the vesting in the Purchaser of Applicants' right, title, and interest in and to the Transferred Acquired Assets, which vesting is to be effective with respect to the Transferred Acquired Assets upon the delivery by the Monitor to the Purchaser of a certificate confirming: (i) the payment by the Purchaser of the Purchase Price for the Transferred Acquired Assets; (ii) that all

conditions to the closing of the APA have been satisfied or waived by the Applicants and the Purchaser; and, (iii) the Transaction has been completed to the satisfaction of the Monitor.

C. Unless otherwise indicated herein, all capitalized terms have the meanings set out in the Sale Approval Order.

THE MONITOR CERTIFIES the following:

1. The Purchaser (or its nominee) has paid and the Monitor has received the Purchase Price for the Acquired Assets, in accordance with and as contemplated by the terms of the APA;

2. The conditions to the closing of the APA have been satisfied or waived by the Applicants and the Purchaser (or its nominee); and,

3. The Transaction has been completed to the satisfaction of the Monitor.

This Certificate was delivered by the Monitor at **[Time]** on **[Date]**.

FTI CONSULTING CANADA INC., in its capacity as the monitor of **JMB CRUSHING SYSTEMS INC. and 2161889 ALBERTA LTD.**, and not in its personal or corporate capacity.

Per: _____
Name:
Title:

SCHEDULE "B" THE ORDER (SALE APPROVAL AND VESTING)
ENCUMBRANCES

Encumbrances Registered against Certificates of Title:

I. The "Lands" - NE ¼ of 35-56-6-W4M
LEGAL DESCRIPTION

THE NORTH EAST QUARTER OF SECTION THIRTY FIVE (35)
TOWNSHIP FIFTY SIX (56)
RANGE SIX (6)
WEST OF THE FOURTH MERIDIAN
CONTAINING 64.7 HECTARES (160) ACRES MORE OR LESS
EXCEPTING THEREOUT: HECTARES (ACRES) MORE OR LESS

A) PLAN 6430 KS - ROAD 0.417 1.03

B) PLAN 395 RS - ROAD 0.615 1.52

C) PLAN 9222585 - ROAD 0.407 1.01

EXCEPTING THEREOUT ALL MINES AND MINERALS

LINC	TITLE NUMBER	REGISTRATION NUMBER	DATE (D/M/Y)	PARTICULARS
N/A	N/A	N/A	N/A	NO ENCUMBRANCES

II. "Shankowski" - <u>SW 21-56-7-W4</u>

LEGAL DESCRIPTION

FIRST

MERIDIAN 4 RANGE 7 TOWNSHIP 56
SECTION 21
QUARTER NORTH WEST
CONTAINING 64.7 HECTARES (160) ACRES MORE OR LESS
EXCEPTING THEREOUT: HECTARES (ACRES) MORE OR LESS

A) PLAN 1722948 - ROAD 0.417 1.03

EXCEPTING THEREOUT ALL MINES AND MINERALS
AND THE RIGHT TO WORK THE SAME

SECOND

MERIDIAN 4 RANGE 7 TOWNSHIP 56
SECTION 21
QUARTER SOUTH WEST
CONTAINING 64.7 HECTARES (160) ACRES MORE OR LESS
EXCEPTING THEREOUT: HECTARES (ACRES) MORE OR LESS

A) PLAN 1722948 - ROAD 0.417 1.03

EXCEPTING THEREOUT ALL MINES AND MINERALS
AND THE RIGHT TO WORK THE SAME

LINC	TITLE NUMBER	REGISTRATION NUMBER	DATE (D/M/Y)	PARTICULARS
0037 711 538	172 269 783 +5	202 104 972	13/05/2020	BUILDER'S LIEN LIENOR – J.R. PAINE & ASSOCIATES LTD. C/O SCOTT LAW 17505 106 AVE

				EDMONTON ALBERTA T5S1E7 AGENT – JOHN SCHRODER AMOUNT: $64,207
		202 106 447	15/05/2020	BUILDER'S LIEN LIENOR – RBEE AGGREGATE CONSULTING LTD. C/O PUTNAM & LAWSON 9702-100 STREET MORINVILLE ALBERTA T8R1G3 AGENT – MAXWELL C PUTNAM AMOUNT: $1,270,791

III. "Buksa" - <u>N ¼ of 24-56-7-W4M</u>

LEGAL DESCRIPTION

FIRST

ALL OF THAT PORTION OF THE NORTH WEST QUARTER OF SECTION TWENTY FOUR (24)
TOWNSHIP FIFTY SIX (56)
RANGE SEVEN (7)
WEST OF THE FOURTH MERIDIAN
NOT COVERED BY THE WATERS OF NORTH SASKATCHEWAN RIVER, AS SHOWN ON A PLAN OF SURVEY OF THE SAID TOWNSHIP SIGNED AT OTTAWA ON THE 20TH DAY OF OCTOBER, A.D. 1922, CONTAINING 58.5 HECTARES (144.60 ACRES) MORE OR LESS.
EXCEPTING THEREOUT: .829 HECTARES (2.05 ACRES) MORE OR LESS,
AS SHOWN ON ROAD PLAN 2208 E.T.
EXCEPTING THEREOUT ALL MINES AND MINERALS

SECOND

ALL OF THAT PORTION OF THE NORTH EAST QUARTER OF SECTION TWENTY FOUR (24)
TOWNSHIP FIFTY SIX (56)
RANGE SEVEN (7)
WEST OF THE FOURTH MERIDIAN

NOT COVERED BY THE WATERS OF SASKATCHEWAN RIVER, AS SHOWN ON A
PLAN OF SURVEY OF THE SAID TOWNSHIP SIGNED AT OTTAWA ON THE 6TH DAY OF
JUNE A.D. 1906, CONTAINING 63.7 HECTARES, (157.60 ACRES)
MORE OR LESS.
EXCEPTING THEREOUT:

		HECTARES	(ACRES) MORE OR LESS
A) PLAN 2208ET -	ROAD	1.19	2.94
B) PLAN 9120726 -	ROAD	12.344	30.50

EXCEPTING THEREOUT ALL MINES AND MINERALS

LINC	TITLE NUMBER	REGISTRATION NUMBER	DATE (D/M/Y)	PARTICULARS
N/A	N/A	N/A	N/A	N/A

IV. "Andrychuk" - <u>SW 15-57-14-W4</u>

LEGAL DESCRIPTION

MERIDIAN 4 RANGE 14 TOWNSHIP 57
SECTION 15
ALL THAT PORTION OF THE SOUTH WEST QUARTER
LYING TO THE WEST OF THE RIGHT BANK OF THE NORTH SASKATCHEWAN RIVER
AS SHOWN ON A PLAN OF SURVEY OF THE SAID TOWNSHIP DATED 6 OCTOBER 1913
CONTAINING 64.462 HECTARES (159.40 ACRES) MORE OR LESS
EXCEPTING THEREOUT: 0.19 OF AN ACRE MORE OR LESS
AS SHOWN ON ROAD PLAN 2915ET
EXCEPTING THEREOUT ALL MINES AND MINERALS

LINC	TITLE NUMBER	REGISTRATION NUMBER	DATE (D/M/Y)	PARTICULARS
N/A	N/A	N/A	N/A	NO ENCUMBRANCES

V. "Havener" - NW 16-56-7-W4

LEGAL DESCRIPTION

MERIDIAN 4 RANGE 7 TOWNSHIP 56
SECTION 16
QUARTER NORTH WEST
CONTAINING 64.7 HECTARES (160) ACRES MORE OR LESS
EXCEPTING THEREOUT: HECTARES (ACRES) MORE OR LESS

A) PLAN 4286BM -ROAD 0.0004 0.001

B) ALL THAT PORTION COMMENCING AT THE SOUTH WEST CORNER OF THE SAID QUARTER SECTION; THENCE EASTERLY ALONG THE SOUTH BOUNDARY 110 METRES; THENCE NORTHERLY AND PARALLEL TO THE WEST BOUNDARY OF THE SAID QUARTER 110 METRES; THENCE WESTERLY AND PARALLEL TO THE SAID SOUTH BOUNDARY TO A POINT ON THE WEST BOUNDARY; THENCE SOUTHERLY ALONG THE SAID WEST BOUNDARY TO THE POINT OF COMMENCEMENT CONTAINING ……... 1.21 3.00

C) PLAN 1722948 - ROAD 0.360 0.89

EXCEPTING THEREOUT ALL MINES AND MINERALS

LINC	TITLE NUMBER	REGISTRATION NUMBER	DATE (D/M/Y)	PARTICULARS
0037 711 496	172 269 783 +2	002 170 374	20/06/2000	CAVEAT RE: ROYALTY AGREEMENT CAVEATOR – JMB CRUSHING SYSTEMS LTD. PO BOX 478 ELK POINT ALBERTA T0A1A0
		202 104 972	13/05/2020	BUILDER'S LIEN LIENOR – J.R. PAINE & ASSOCIATES LTD. C/O SCOTT LAW 17505 106 AVE EDMONTON

				ALBERTA T5S1E7 AGENT – JOHN SCHRODER AMOUNT: $64,207
		202 106 449	15/05/2020	BUILDER'S LIEN LIENOR – RBEE AGGREGATE CONSULTING LTD. C/O PUTNAM & LAWSON 9702-100 STREET MORINVILLE ALBERTA T8R1G3 AGENT – MAXWELL C PUTNAM AMOUNT: $1,270,791

SCHEDULE "C" TO THE ORDER (SALE APPROVAL AND VESTING)
PERMITTED ENCUMBRANCES

1. The terms and conditions of the Assigned Contracts and Aggregate Pit Agreements, including any depth limitations or similar limitations that may be set forth therein and any liens or security interests reserved therein for royalty, bonus or rental, or for compliance with the terms thereof;

2. Inchoate Liens incurred or created as security in favour of any Person with respect to a Vendor's share of costs and expenses for the extraction, processing or hauling of Aggregates which are not due or delinquent as of are adjusted to the date of Closing;

3. Defects or irregularities of title which are waived by the Purchaser;

4. Easements, rights of way, servitudes or other similar rights on, over, or in respect of any of the Transferred Acquired Assets, including rights of way for highways and other roads, railways, sewers, drains, pipelines, gas or water mains, power, telephone or cable television towers, poles and wires;

5. Applicable Laws and any rights reserved to or vested in any Government Authority to levy taxes, require periodic payment of rentals, fees or other amounts or otherwise to control or regulate any of the Transferred Acquired Assets in any manner, including (a) any rights, obligations, or duties reserved to or vested in any Governmental Authority to control or regulate any Acquired Asset in any manner including to purchase, condemn, expropriate, or recapture any Acquired Asset, and (b) any requirements to obtain the consent or approval of, or to submit notices or filings with, or other actions by, Governmental Authorities in connection with the transfer of the Permits;

6. Statutory exceptions to title and the reservations, limitations and conditions in any grants or transfers from the Crown of any of the Transferred Acquired Assets or interests therein;

7. Liens granted in the ordinary course of business to a public utility, municipality or governmental authority respecting operations pertaining to any of the Transferred Acquired Assets for which any required payments are not delinquent or are adjusted as of the Closing;

8. Undetermined or inchoate securing Taxes not yet due and payable that are adjusted as of the Closing;

9. Security Interest in favour of ATB against the Acquired Tranche B Inventory and the JMB Real Property;

10. Security Interests in favour of Fiera against the Transferred Acquired Assets;

11. Security interests in favour of Canadian Western Bank under and pursuant to the CWB Agreement (as defined in the APA); and,

12. All encumbrances, claims, Liens, registrations, interests, instruments, and Crown Dispositions, as set out below in this Schedule "**C**" and in "**E**" hereto.

Alberta Personal Property Registry Encumbrances

Year	Manufacturer	Model	Serial # / VIN	PPR Registration No.	Secured Party
2001	Travco	Travco 12'x56' 5-Unit Wel	1256110534, 1256110533, 1256110532, 1256110531, 1256110530	18062002625	FIERA PRIVATE DEBT FUND V LP
2007	Bold Developments	Bold Developments 12'x56'	T06012	18062002625	FIERA PRIVATE DEBT FUND V LP
2007	Arctic	Arctic 10' x 30' Tri-Axle	2GRTV30T975073015	18062002625	FIERA PRIVATE DEBT FUND V LP
2007	Arctic	Arctic 10' x 30' Tri-Axle	2GRTN30T075070316	18062002625	FIERA PRIVATE DEBT FUND V LP
2007	Britco	Britco 12'x62' 6-Sleeper	070663	18062002625	FIERA PRIVATE DEBT FUND V LP
2007	Britco	Britco 12'x62' 6-Sleeper	070668	18062002625	FIERA PRIVATE DEBT FUND V LP
2007	Britco	Britco 12'x62' 6-Sleeper	070669	18062002625	FIERA PRIVATE DEBT FUND V LP
2015	Stratis	Stratis 2500 gallon Water	S0SWS035	18062002625	FIERA PRIVATE DEBT FUND V LP
2014	Komatsu	HM400-3	3384	18062002625	FIERA PRIVATE DEBT FUND V LP
2014	Komatsu	HM400-3	3578	18062002625	FIERA PRIVATE DEBT FUND V LP
2014	Komatsu	HM400-3	3420	18062002625	FIERA PRIVATE DEBT FUND V LP
2006	Volvo	L180E	L180EV8273	18062002625	FIERA PRIVATE DEBT FUND V LP
2008	Caterpillar	988H	CAT0988HCBXY02382	18062002625	FIERA PRIVATE DEBT FUND V LP
2006	Volvo	L180E	L180EV8379	18062002625	FIERA PRIVATE DEBT FUND V LP
1999	Komatsu	WA450-3	53372	18062002625	FIERA PRIVATE DEBT FUND V LP
2013	Caterpillar	988H	CAT0988HABXY05172	18062002625	FIERA PRIVATE DEBT FUND V LP
2012	Caterpillar	246C	CAT0246CJJAY07005	18062002625	FIERA PRIVATE DEBT FUND V LP
2012	Caterpillar	246C	CAT0246CVJAY08691	18062002625	FIERA PRIVATE DEBT FUND V LP
2013	Volvo	L220G	VCEL220GC00012444	18062002625	FIERA PRIVATE DEBT FUND V LP
2013	Volvo	L220G	VCEL220GA00012852	18062002625	FIERA PRIVATE DEBT FUND V LP
2009	Volvo	L220F	VCEL220FP00006937	18062002625	FIERA PRIVATE DEBT FUND V LP
2004	Caterpillar	D6N LGP	ALY01814	18062002625	FIERA PRIVATE DEBT FUND V LP
2005	Daewoo	Solar 470LC-V	1357	18062002625	FIERA PRIVATE DEBT FUND V LP
1996	Hitachi	EX55UR	1BG02075	18062002625	FIERA PRIVATE DEBT FUND V LP
2012	Caterpillar	345D	CAT0345DJEEH01226	18062002625	FIERA PRIVATE DEBT FUND V LP
2009	Caterpillar	160M	CAT0160MAB9E00358	18062002625	FIERA PRIVATE DEBT FUND V LP
2001	Toyota	7FGU30	61607	18062002625	FIERA PRIVATE DEBT FUND V LP
2001	Caterpillar	535B	AAE00408	18062002625	FIERA PRIVATE DEBT FUND V LP
2014	Wacker	G100	20278208	18062002625	FIERA PRIVATE DEBT FUND V LP
2006	Terex Amida	AL5200D-4MH	G0F24939	18062002625	FIERA PRIVATE DEBT FUND V LP
2014	Wacker	LTW20	20239723	18062002625	FIERA PRIVATE DEBT FUND V LP
2014	Wacker	LTW20	20239727	18062002625	FIERA PRIVATE DEBT FUND V LP

Year	Manufacturer	Model	Serial # / VIN	PPR Registration No.	Secured Party
2014	Wacker	LTW20	20241937	18062002625	FIERA PRIVATE DEBT FUND V LP
2004	Precision		1420500044	18062002625	FIERA PRIVATE DEBT FUND V LP
2015	Precision	100-Ton Truck S	15-589	18062002625	FIERA PRIVATE DEBT FUND V LP
1980	Midland	Midland 48' Tandem-Axle V	2ATD10186AM110007	18062002625	FIERA PRIVATE DEBT FUND V LP
1979	Fruehauf	28 crusher wat	DXV180718	18062002625	FIERA PRIVATE DEBT FUND V LP
1999	Manac	Super B Tri-Axle	2M5931033X1062925	18062002625 (Block 136)	FIERA PRIVATE DEBT FUND V LP
1999	Manac	Super B	2M5931033X1062925	18062002625 (Block 229)	FIERA PRIVATE DEBT FUND V LP
1997	Great Dane	7911TJW-53	1GRAA0625VB117102	18062002625	FIERA PRIVATE DEBT FUND V LP
2004	Detroit Diesel	Series 60	6R753345	18062002625	FIERA PRIVATE DEBT FUND V LP
2013	MTU Onsite Energy	DP550D65-AH1484	366258101013	18062002625	FIERA PRIVATE DEBT FUND V LP
1998	Stamford	60-kW Portable D	E980749726	18062002625	FIERA PRIVATE DEBT FUND V LP
2004	Elrus	25YD3 SB	M3461ER04SB	18062002625	FIERA PRIVATE DEBT FUND V LP
2008	Kolberg-Pioneer	L3-36125	407136	18062002625	FIERA PRIVATE DEBT FUND V LP
2006	Powerscreen	36"x80' Porta	6002232	18062002625	FIERA PRIVATE DEBT FUND V LP
2008	Kolberg-Pioneer	36"x70' P	408560	18062002625	FIERA PRIVATE DEBT FUND V LP
2004	Elrus	36"x60' Portable Be	M3445ER04PC	18062002625	FIERA PRIVATE DEBT FUND V LP
2004	Elrus	36X60FT-PC	M3446ER04PC	18062002625	FIERA PRIVATE DEBT FUND V LP
1999	Elrus	2434	ER99PC1524	18062002625	FIERA PRIVATE DEBT FUND V LP
2014	Tyalta	42"x60' Transfer B	144260350	18062002625	FIERA PRIVATE DEBT FUND V LP
2010	CEC	30"X60' Portable Belt	30600606J	18062002625	FIERA PRIVATE DEBT FUND V LP
2011	Clemro Industries, Ltd.	7X20-3D	16824471	18062002625	
2006	Fabtec	6'x20' Portable Sc	P620332506	18062002625	FIERA PRIVATE DEBT FUND V LP
2004	Elrus	6X20-3D SC	M3490ER04SC	18062002625	
2002	Elrus	M2943 2236	M2943ER02JP	18062002625	FIERA PRIVATE DEBT FUND V LP
2011	Clemro Industries, Ltd.		16794599	18062002625	FIERA PRIVATE DEBT FUND V LP
2008	Dodge	Ram 2500HD	3D7KS29D78G155808	18062002625	FIERA PRIVATE DEBT FUND V LP
2008	Ford	F350 Super Duty XL	1FTWW31568ED84921	18062002625	FIERA PRIVATE DEBT FUND V LP
2008	Ford	F350 Super Duty XLT	1FTWW31598EE44965	18062002625	FIERA PRIVATE DEBT FUND V LP
2012	Ford	F250 Super Duty XLT	1FT7W2B69CEB71377	18062002625	FIERA PRIVATE DEBT FUND V LP
2012	Ford	F250 Super Duty XLT	1FT7W2B61CEB76184	18062002625	FIERA PRIVATE DEBT FUND V LP
2012	Ford	F150 XLT	1FTFW1EF2CFA97764	18062002625	FIERA PRIVATE DEBT FUND V LP
2012	Ford	F150 XLT	1FTFW1EF0CFA97763	18062002625	FIERA PRIVATE DEBT FUND V LP
2012	Ford	F350 Super Duty	1FT8W3B60CEA94375	18062002625	FIERA PRIVATE DEBT FUND V LP

Year	Manufacturer	Model	Serial # / VIN	PPR Registration No.	Secured Party
2012	Ford	F350 Super Duty	1FT8W3B60CEB56034	18062002625	FIERA PRIVATE DEBT FUND V LP
2008	Kenworth	T800	1NKDL40X68J936318	18062002625	FIERA PRIVATE DEBT FUND V LP
2008	Kenworth	T800	1NKDL40X88J936319	18062002625	FIERA PRIVATE DEBT FUND V LP
2008	Peterbilt	367	1NPTX4EX48D737575	18062002625	FIERA PRIVATE DEBT FUND V LP
2009	Peterbilt	367	1NPTL40X19D778993	18062002625	FIERA PRIVATE DEBT FUND V LP
2009	Kenworth	T800	1XKDP40X49R941482	18062002625	FIERA PRIVATE DEBT FUND V LP
2009	Peterbilt	367	1XPTP40X79D789572	18062002625	FIERA PRIVATE DEBT FUND V LP
2007	International	4200 SBA	1HTMPAFM67H406957	18062002625	FIERA PRIVATE DEBT FUND V LP
2007	Western Star	4900SA	5KKXAM0067PX64941	18062002625	FIERA PRIVATE DEBT FUND V LP
2013	Peterbilt	337	2NP2HN8X1DM205263	18062002625	FIERA PRIVATE DEBT FUND V LP
2015	Peterbilt	567	1XPCDP0X6FD284564	18062002625	FIERA PRIVATE DEBT FUND V LP
2015	Peterbilt	567	1XPCDP0X8FD284565	18062002625	FIERA PRIVATE DEBT FUND V LP
2015	Peterbilt	563 Tandem Axel	1XPCDP0XXFD284566	18062002625	FIERA PRIVATE DEBT FUND V LP
2015	Peterbilt	564 Tandem Axel	1XPCDP0X1FD284567	18062002625	FIERA PRIVATE DEBT FUND V LP
2015	Peterbilt	565 Tandem Axel	1XPCDP0X3FD284568	18062002625	FIERA PRIVATE DEBT FUND V LP
2015	Peterbilt	566 Tandem Axel	1XPCDP0X5FD284569	18062002625 (Block 185)	FIERA PRIVATE DEBT FUND V LP
2015	Peterbilt	568 Tandem Axel	1XPCDP0X5FD284569	18062002625 (Block 187)	FIERA PRIVATE DEBT FUND V LP
2015	Peterbilt	569 Tandem Axel	1XPCDP0X5FD284569	18062002625 (Block 188)	FIERA PRIVATE DEBT FUND V LP
2015	Peterbilt	570 Tandem Axel	1XPCDP0X5FD284569	18062002625 (Block 189)	FIERA PRIVATE DEBT FUND V LP
2015	Peterbilt	Arnes Tri-Axle	1XPCDP0X5FD284569	18062002625 (Block 190)	FIERA PRIVATE DEBT FUND V LP
2015	Peterbilt	567 Tandem Axel	1XPCDP0X1FD284570	18062002625	FIERA PRIVATE DEBT FUND V LP
2013	Peterbilt	367	1XPTP4TX9DD184358	18062002625	FIERA PRIVATE DEBT FUND V LP
2013	Peterbilt	367	1XPTD40X6DD197601	18062002625	FIERA PRIVATE DEBT FUND V LP
2014	Peterbilt	348	2NP3LJ0X2EM242007	18062002625	FIERA PRIVATE DEBT FUND V LP
1996	Arrow	Arrow Jeep	259CSCB2XT1073252	18062002625	FIERA PRIVATE DEBT FUND V LP
1994	Arnes	Arnes Jeep	AR804203	18062002625	FIERA PRIVATE DEBT FUND V LP
2000	Decap	Super B	2D9D54C37YL017498	18062002625	FIERA PRIVATE DEBT FUND V LP
2000	Decap	Super B	2D9DS2B31YL017499	18062002625	FIERA PRIVATE DEBT FUND V LP
2006	Arnes	Arnes Pup	2A92142466A003242	18062002625	FIERA PRIVATE DEBT FUND V LP
2006	Decap	Super B	2D9DS4C476L017782	18062002625	FIERA PRIVATE DEBT FUND V LP
2006	Decap	Super B	2D9DS2B326L017783	18062002625	FIERA PRIVATE DEBT FUND V LP
2006	Decap	Super B	2D9DS4C406L017784	18062002625	FIERA PRIVATE DEBT FUND V LP

Year	Manufacturer	Model	Serial # / VIN	PPR Registration No.	Secured Party
2006	Decap	Super B	2D9DS2B366L017785	18062002625	FIERA PRIVATE DEBT FUND V LP
2006	Decap	Super B	2D9DS4C446L017786	18062002625	FIERA PRIVATE DEBT FUND V LP
2006	Decap	Super B	2D9DS2B3X6L017787	18062002625	FIERA PRIVATE DEBT FUND V LP
2007	Arnes	Tri-Axle	2A90737307A003528	18062002625	FIERA PRIVATE DEBT FUND V LP
2008	Arnes		2A92142498A003884	18062002625	FIERA PRIVATE DEBT FUND V LP
2008	Arnes	Quad-Axle	2A92142408A003885	18062002625	FIERA PRIVATE DEBT FUND V LP
2009	Arnes	Tri-Axle End Dump T	2A90737359A003298	18062002625	FIERA PRIVATE DEBT FUND V LP
2009	Arnes	Tri-Axle End Dump T	2A90737379A003299	18062002625	FIERA PRIVATE DEBT FUND V LP
2009	Arnes	Tri-Axle End Dump T	2A907373X9A003300	18062002625	FIERA PRIVATE DEBT FUND V LP
2009	Arnes	Tri-Axle End Dump T	2A90737319A003301	18062002625	FIERA PRIVATE DEBT FUND V LP
2009	Arnes	Tri-Axle End Dump T	2A90737339A003302	18062002625	FIERA PRIVATE DEBT FUND V LP
2009	Arnes	Quad-Axle End Dump	2A92142499A003238	18062002625	FIERA PRIVATE DEBT FUND V LP
1999	Argo	8' x 21' Tandem-Axl	2AABDE821X1000122	18062002625	FIERA PRIVATE DEBT FUND V LP
2008	Doepker	Tri-Axle End Dump	2DEGEDZ3381023677	18062002625	FIERA PRIVATE DEBT FUND V LP
2006	Doepker		2DESNSZ3161018845	18062002625	FIERA PRIVATE DEBT FUND V LP
2015	Arnes	Tri-Axle	2A9073731FA003598	18062002625	FIERA PRIVATE DEBT FUND V LP
2015	Arnes	Tri-Axle	2A9074131FA003583	18062002625	FIERA PRIVATE DEBT FUND V LP
2015	Arnes	Tri-Axle	2A9073732FA003576	18062002625	FIERA PRIVATE DEBT FUND V LP
2015	Arnes	Tri-Axle	2A9073738FA003596	18062002625	FIERA PRIVATE DEBT FUND V LP
2015	Arnes	Tri-Axle	2A907373XFA003597	18062002625	FIERA PRIVATE DEBT FUND V LP
2015	Arnes	Tri-Axle	2A9073733FA003599	18062002625	FIERA PRIVATE DEBT FUND V LP
2013	Arnes	40-Ton Tri-Axle	2A9125335DA003461	18062002625	FIERA PRIVATE DEBT FUND V LP
2013	Lode King	SDS53-3	2LDSD5331DS055478	18062002625	FIERA PRIVATE DEBT FUND V LP
2015	Arnes	50-Ton Tri-Axle	2A9105630FA003016	18062002625	FIERA PRIVATE DEBT FUND V LP
1980	Willock	Single-Axle Float	2ATA06238AM107038	18062002625	FIERA PRIVATE DEBT FUND V LP
1999	Manac	Tandem-Axle	2M5920884X1062932	18062002625	FIERA PRIVATE DEBT FUND V LP
2007	Dodge	Ram 3500HD	3D7MX48A27G781634	18062002625	FIERA PRIVATE DEBT FUND V LP
2008	Ford	F350 Super Duty XLT	1FTWW31518EE16691	18062002625	FIERA PRIVATE DEBT FUND V LP
2008	Ford	F350 Super Duty XLT	1FTWW31598ED98117	18062002625	FIERA PRIVATE DEBT FUND V LP
2008	Ford	F350 Super Duty XLT	1FTWW31538EE44962	18062002625	FIERA PRIVATE DEBT FUND V LP
2012	Dodge	Ram 2500 SLT	3C6TD5JT2CG113379	18062002625	FIERA PRIVATE DEBT FUND V LP

Permitted Encumbrances Registered with Alberta Parks and Environment:

All Conditional Surrenders of Leases registered in respect of the Crown Dispositions described in Schedule "**D**" hereto, pursuant to the Memorandum of Agreement, dated January 13, 2020, between Her Majesty the Queen in right of the Province of Alberta, as represented by the Department of Environment and Sustainable Resource Development, and, Fiera Private Debt Fund V LP, by its general partner Fiera Private Debt Fund GP Inc., in its own capacity and as collateral agent for Fiera Private Debt Fund VI LP, by its general partner Fiera Private Debt Fund GP Inc.

Without limiting the generality of the foregoing, the following Conditional Surrenders of Leases are Permitted Encumbrances:

Conditional Surrender of Lease between Her Majesty the Queen in right of the Province of Alberta, as represented by the Department of Environment and Sustainable Resource Development, as lessor, 2161889 Alberta Ltd., as lessee, and, Fiera Private Debt Fund V LP, by its general partner Fiera Private Debt Fund GP Inc., in its own capacity and as collateral agent for Fiera Private Debt Fund VI LP, by its general partner Fiera Private Debt Fund GP Inc., as mortgagee, dated December 18, 2019 ("**CSL 200014**"), in respect of SML 080085 (as defined in Schedule "**D**");

Conditional Surrender of Lease between Her Majesty the Queen in right of the Province of Alberta, as represented by the Department of Environment and Sustainable Resource Development, as lessor, 2161889 Alberta Ltd., as lessee, and, Fiera Private Debt Fund V LP, by its general partner Fiera Private Debt Fund GP Inc., in its own capacity and as collateral agent for Fiera Private Debt Fund VI LP, by its general partner Fiera Private Debt Fund GP Inc., as mortgagee, dated December 18, 2019 ("**CSL 200015**"), in respect of SML 100085 (as defined in Schedule "**D**");

Conditional Surrender of Lease between Her Majesty the Queen in right of the Province of Alberta, as represented by the Department of Environment and Sustainable Resource Development, as lessor, 2161889 Alberta Ltd., as lessee, and, Fiera Private Debt Fund V LP, by its general partner Fiera Private Debt Fund GP Inc., in its own capacity and as collateral agent for Fiera Private Debt Fund VI LP, by its general partner Fiera Private Debt Fund GP Inc., as mortgagee, dated December 18, 2019 ("**CSL 200016**"), in respect of SML 110025 (as defined in Schedule "**D**");

Conditional Surrender of Lease between Her Majesty the Queen in right of the Province of Alberta, as represented by the Department of Environment and Sustainable Resource Development, as lessor, 2161889 Alberta Ltd., as lessee, and, Fiera Private Debt Fund V LP, by its general partner Fiera Private Debt Fund GP Inc., in its own capacity and as collateral agent for Fiera Private Debt Fund VI LP, by its general partner Fiera Private Debt Fund GP Inc., as mortgagee, dated December 18, 2019 ("**CSL 200017**"), in respect of SML 110026 (as defined in Schedule "**D**");

Conditional Surrender of Lease between Her Majesty the Queen in right of the Province of Alberta, as represented by the Department of Environment and Sustainable Resource Development, as lessor, 2161889 Alberta Ltd., as lessee, and, Fiera Private Debt Fund V LP, by its general partner Fiera Private Debt Fund GP Inc., in its own capacity and as collateral agent for

Fiera Private Debt Fund VI LP, by its general partner Fiera Private Debt Fund GP Inc., as mortgagee, dated December 18, 2019 ("**CSL 200018**"), in respect of SML 110045 (as defined in Schedule "**D**");

Conditional Surrender of Lease between Her Majesty the Queen in right of the Province of Alberta, as represented by the Department of Environment and Sustainable Resource Development, as lessor, 2161889 Alberta Ltd., as lessee, and, Fiera Private Debt Fund V LP, by its general partner Fiera Private Debt Fund GP Inc., in its own capacity and as collateral agent for Fiera Private Debt Fund VI LP, by its general partner Fiera Private Debt Fund GP Inc., as mortgagee, dated December 18, 2019 ("**CSL 200019**"), in respect of SML 110046 (as defined in Schedule "**D**");

Conditional Surrender of Lease between Her Majesty the Queen in right of the Province of Alberta, as represented by the Department of Environment and Sustainable Resource Development, as lessor, 2161889 Alberta Ltd., as lessee, and, Fiera Private Debt Fund V LP, by its general partner Fiera Private Debt Fund GP Inc., in its own capacity and as collateral agent for Fiera Private Debt Fund VI LP, by its general partner Fiera Private Debt Fund GP Inc., as mortgagee, dated December 18, 2019 ("**CSL 200020**"), in respect of SML 110047 (as defined in Schedule "**D**");

Conditional Surrender of Lease between Her Majesty the Queen in right of the Province of Alberta, as represented by the Department of Environment and Sustainable Resource Development, as lessor, 2161889 Alberta Ltd., as lessee, and, Fiera Private Debt Fund V LP, by its general partner Fiera Private Debt Fund GP Inc., in its own capacity and as collateral agent for Fiera Private Debt Fund VI LP, by its general partner Fiera Private Debt Fund GP Inc., as mortgagee, dated December 18, 2019 ("**CSL 200021**"), in respect of SML 120005 (as defined in Schedule "**D**");

Conditional Surrender of Lease between Her Majesty the Queen in right of the Province of Alberta, as represented by the Department of Environment and Sustainable Resource Development, as lessor, 2161889 Alberta Ltd., as lessee, and, Fiera Private Debt Fund V LP, by its general partner Fiera Private Debt Fund GP Inc., in its own capacity and as collateral agent for Fiera Private Debt Fund VI LP, by its general partner Fiera Private Debt Fund GP Inc., as mortgagee, dated December 18, 2019 ("**CSL 200022**"), in respect of SML 120006 (as defined in Schedule "**D**"); and,

Conditional Surrender of Lease between Her Majesty the Queen in right of the Province of Alberta, as represented by the Department of Environment and Sustainable Resource Development, as lessor, 2161889 Alberta Ltd., as lessee, and, Fiera Private Debt Fund V LP, by its general partner Fiera Private Debt Fund GP Inc., in its own capacity and as collateral agent for Fiera Private Debt Fund VI LP, by its general partner Fiera Private Debt Fund GP Inc., as mortgagee, dated December 18, 2019 ("**CSL 200023**"), in respect of SML 120100 (as defined in Schedule "**D**").

Permitted Encumbrances Registered against Certificates of Title:

I. The "Lands" - NE ¼ of 35-56-6-W4M
LEGAL DESCRIPTION

THE NORTH EAST QUARTER OF SECTION THIRTY FIVE (35)
TOWNSHIP FIFTY SIX (56)
RANGE SIX (6)
WEST OF THE FOURTH MERIDIAN
CONTAINING 64.7 HECTARES (160) ACRES MORE OR LESS
EXCEPTING THEREOUT: HECTARES (ACRES) MORE OR LESS

A) PLAN 6430 KS - ROAD 0.417 1.03

B) PLAN 395 RS - ROAD 0.615 1.52

C) PLAN 9222585 - ROAD 0.407 1.01

EXCEPTING THEREOUT ALL MINES AND MINERALS

LINC	TITLE NUMBER	REGISTRATION NUMBER	DATE (D/M/Y)	PARTICULARS
0023 485 379	922 302 625	7814UH	21/02/1974	CAVEAT CAVEATOR – K+S WINDSOR SALT LTD. / K+S SEL WINDSOR LTEE. 755 BOUL ST-JEAN, SUITE 700 POINTE-CLAIRE QUEBEC H9R5M9 (DATA UPDATED BY: CHANGE OF NAME 142209827)
		792 233 325	25/09/1979	CAVEAT RE: EASEMENT CAVEATOR – ALBERTA POWER LIMITED.
		832 213 053	02/09/1983	CAVEAT RE: EASEMENT CAVEATOR – CENTRA GAS ALBERTA INC. 5509 – 45 ST., LEDUC ALBERTA T9E6T6

				(DATA UPDATED BY: TRANSFER OF CAVEAT 982397886)
		122 244 840	30/07/2012	CAVEAT RE: LEASE INTEREST UNDER 20 ACRES CAVEATOR – CANADIAN NATURAL RESOURCES LIMITED. BOX 6926, STATION “D” CALGARY ALBERTA T2P2G1 AGENT – D.R. HURL & ASSOCIATES LTD.
		202 177 243	20/08/2020	CAVEAT RE: AGREEMENT CHARGING LAND CAVEATOR – ATB FINANCIAL. C/O DENTONS CANADA LLP ATTN TOM GUSA 2500 STANTEC TOWER 10220 103 AVENUE NW EDMONTON ALBERTA T5J0K4 AGENT – JAMES B EDGAR

II. “Shankowski” - <u>SW 21-56-7-W4</u>

LEGAL DESCRIPTION

FIRST

MERIDIAN 4 RANGE 7 TOWNSHIP 56
SECTION 21
QUARTER NORTH WEST
CONTAINING 64.7 HECTARES (160) ACRES MORE OR LESS
EXCEPTING THEREOUT: HECTARES (ACRES) MORE OR LESS

A) PLAN 1722948 - ROAD 0.417 1.03

EXCEPTING THEREOUT ALL MINES AND MINERALS
AND THE RIGHT TO WORK THE SAME

SECOND

MERIDIAN 4 RANGE 7 TOWNSHIP 56
SECTION 21
QUARTER SOUTH WEST
CONTAINING 64.7 HECTARES (160) ACRES MORE OR LESS
EXCEPTING THEREOUT: HECTARES (ACRES) MORE OR LESS

A) PLAN 1722948 - ROAD 0.417 1.03

EXCEPTING THEREOUT ALL MINES AND MINERALS
AND THE RIGHT TO WORK THE SAME

LINC	TITLE NUMBER	REGISTRATION NUMBER	DATE (D/M/Y)	PARTICULARS
0037 711 538	172 269 783 +5	862 021 825	30/01/1986	UTILITY RIGHT OF WAY GRANTEE – ALBERTA POWER LIMITED AS TO PORTION OR PLAN: 4286BM
		972 235 435	08/08/1997	CAVEAT RE: RIGHT OF WAY AGREEMENT CAVEATOR – CANADIAN NATURAL RESOURCES LIMITED. BOX 6926, STATION “D” CALGARY ALBERTA T2P2G1 AGENT – DONNA FELLOWS AFFECTED LAND: 4;7;56;21;SW (DATA UPDATED BY: CHANGE OF NAME 042462560)

III. “Buksa” - <u>N ¼ of 24-56-7-W4M</u>

LEGAL DESCRIPTION

FIRST

ALL OF THAT PORTION OF THE NORTH WEST QUARTER OF SECTION TWENTY FOUR (24)
TOWNSHIP FIFTY SIX (56)
RANGE SEVEN (7)
WEST OF THE FOURTH MERIDIAN
NOT COVERED BY THE WATERS OF NORTH SASKATCHEWAN RIVER, AS SHOWN ON A PLAN OF SURVEY OF THE SAID TOWNSHIP SIGNED AT OTTAWA ON THE 20TH DAY OF OCTOBER, A.D. 1922, CONTAINING 58.5 HECTARES (144.60 ACRES) MORE OR LESS.
EXCEPTING THEREOUT: .829 HECTARES (2.05 ACRES) MORE OR LESS,
AS SHOWN ON ROAD PLAN 2208 E.T.
EXCEPTING THEREOUT ALL MINES AND MINERALS

SECOND

ALL OF THAT PORTION OF THE NORTH EAST QUARTER OF SECTION TWENTY FOUR (24)
TOWNSHIP FIFTY SIX (56)
RANGE SEVEN (7)
WEST OF THE FOURTH MERIDIAN
NOT COVERED BY THE WATERS OF SASKATCHEWAN RIVER, AS SHOWN ON A PLAN OF SURVEY OF THE SAID TOWNSHIP SIGNED AT OTTAWA ON THE 6TH DAY OF JUNE A.D. 1906, CONTAINING 63.7 HECTARES, (157.60 ACRES) MORE OR LESS.
EXCEPTING THEREOUT:

		HECTARES	(ACRES) MORE OR LESS
A) PLAN 2208ET -	ROAD	1.19	2.94
B) PLAN 9120726 -	ROAD	12.344	30.50

EXCEPTING THEREOUT ALL MINES AND MINERALS

LINC	TITLE NUMBER	REGISTRATION NUMBER	DATE (D/M/Y)	PARTICULARS
0014 312 011 0017 352 246	912 059 126 +2	6667HE	25/01/1949	CAVEAT CAVEATOR – CANADIAN UTILITIES LIMITED. AFFECTED LAND: 4;7;56;24; NE

		832 064 361	18/03/1983	CAVEAT RE: RIGHT OF WAY AGREEMENT CAVEATOR – HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA AS REPRESENTED BY THE MINISTER OF TRANSPORTATION 50TH STREET ATRIA, 4949 – 94B AVENUE, EDMONTON ALBERTA T6B2T5 AFFECTED LAND: 4;7;56;24;NW 4;7;56;24;NE
		912 059 125	12/03/1991	DISCHARGE OF CAVEAT 832064361 AFFECTED LAND: 4;7;56;24;NE
		132 414 533	19/12/2013	CAVEAT ROYALTY AGREEMENT CAVEATOR – JMB CRUSHING SYSTEMS ULC C/O EUGENE BUCK PO BOX 6977 BONNYVILLE ALBERTA T9N2H4 AGENT – ALLAN W FRASER AFFECTED LAND: 4;7;56;24;NE

IV. "Andrychuk" - <u>SW 15-57-14-W4</u>

LEGAL DESCRIPTION

MERIDIAN 4 RANGE 14 TOWNSHIP 57
SECTION 15
ALL THAT PORTION OF THE SOUTH WEST QUARTER
LYING TO THE WEST OF THE RIGHT BANK OF THE NORTH SASKATCHEWAN RIVER
AS SHOWN ON A PLAN OF SURVEY OF THE SAID TOWNSHIP DATED 6 OCTOBER 1913
CONTAINING 64.462 HECTARES (159.40 ACRES) MORE OR LESS
EXCEPTING THEREOUT: 0.19 OF AN ACRE MORE OR LESS
AS SHOWN ON ROAD PLAN 2915ET
EXCEPTING THEREOUT ALL MINES AND MINERALS

LINC	TITLE NUMBER	REGISTRATION NUMBER	DATE (D/M/Y)	PARTICULARS
0023 553 580	202 076 980 +1	762 127 955	19/07/1976	UTILITY RIGHT OF WAY GRANTEE – THE COUNTY OF TWO HILLS NO. 21.

V. "Havener" - <u>NW 16-56-7-W4</u>

LEGAL DESCRIPTION

MERIDIAN 4 RANGE 7 TOWNSHIP 56
SECTION 16
QUARTER NORTH WEST
CONTAINING 64.7 HECTARES (160) ACRES MORE OR LESS
EXCEPTING THEREOUT: HECTARES (ACRES) MORE OR LESS

A) PLAN 4286BM -ROAD 0.0004 0.001

B) ALL THAT PORTION COMMENCING AT THE SOUTH WEST CORNER OF THE SAID QUARTER SECTION; THENCE EASTERLY ALONG THE SOUTH BOUNDARY 110 METRES; THENCE NORTHERLY AND PARALLEL TO THE WEST BOUNDARY OF THE SAID QUARTER 110 METRES; THENCE WESTERLY AND PARALLEL TO THE SAID SOUTH BOUNDARY TO A POINT ON THE WEST BOUNDARY; THENCE SOUTHERLY ALONG THE SAID WEST BOUNDARY TO THE POINT OF COMMENCEMENT
CONTAINING …….. 1.21 3.00

C) PLAN 1722948 - ROAD 0.360 0.89

EXCEPTING THEREOUT ALL MINES AND MINERALS

LINC	TITLE NUMBER	REGISTRATION NUMBER	DATE (D/M/Y)	PARTICULARS
0037 711 496	172 269 783 +2	882 162 859	19/07/1988	CAVEAT RE: EASEMENT CAVEATOR – JIMMY DAVID YARMUCH BOX 645

				ELK POINT ALBERTA T0A1A0 (DATA UPDATED BY: TRANSFER OF CAVEAT 012383325)
		972 003 876	06/01/1997	CAVEAT RE: SURFACE LEASE CAVEATOR: CANADIAN NATURAL RESOURCES LIMITED. BOX 6926, STATION “D” CALGARY ALBERTA T2P2G1 AGENT – DONNA FELLOWS (DATA UPDATED BY: CHANGE OF NAME 042462572)
		972 229 534	05/08/1997	UTILITY RIGHT OF WAY GRANTEE – CANADIAN NATURAL RESOURCES LIMITED. BOX 6926, STATION “D” CALGARY ALBERTA T2P2G1 (DATA UPDATED BY: CHANGE OF NAME 042463878)

SCHEDULE "D"
CROWN DISPOSITIONS

Crown Dispositions

Surface Material Lease No. 080085 dated April 26, 2012 in respect of Aggregate Pit JLG 3 ("**SML 080085**") located within NW 12-63-19-W4M and SW 13-63-19-W4M.

Surface Material Lease No. 100085 dated June 24, 2016 in respect of Aggregate Pit JLG 4 ("**SML 100085**") located within NW 12-63-19-W4M and NE 12-63-19-W4M.

Surface Material Lease No. 110025 dated February 11, 2014 in respect of Aggregate Pit JLG 5 ("**SML 110025**") located within NE 11-61-18-W4M.

Surface Material Lease No. 110026 dated April 11, 2012 in respect of Aggregate Pit JLG 6 ("**SML 110026**") located within SE 11-61-18-W4M.

Surface Material Lease No. 110045 dated March 18, 2015 in respect of Aggregate Pit JLG 7 ("**SML 110045**") located within E ½ of 15-61-18-W4M.

Surface Material Lease No. 110046 dated March 18, 2015 in respect of Aggregate Pit JLG 8 ("**SML 110046**") located within N ½ of 15-61-18-W4M.

Surface Material Lease No. 120006 dated October 5, 2017 in respect of Aggregate Pit JLG 11 ("**SML 120006**") located within NW14-61-18-W4.

Surface Material Lease No. 120100 dated October 5, 2017 in respect of Aggregate Pit JLG 12 ("**SML 120100**") located within SE-21-61-18-W4M.

Surface Material Lease No. 110047 dated March 18, 2015 ("**SML 110047**") located within SE 15-61-18-W4M, SW 15-61-18-W4M, and NW-15-61-18-W4M.

Surface Material Lease No. 120005 dated October 5, 2017 ("**SML 120005**") located within SW 14-61-18 W4M and NW 14-61-18 W4M.

Land Keys	Document ID	Client ID	Participant
W4-18-061-11-SE	TFA 201290	1021767-001	2161889 ALBERTA LTD.
W4-18-061-14-NW W4-18-061-14-SW	TFA 202260	1021767-001	2161889 ALBERTA LTD.
W4-18-065-13-SE W4-18-065-13-SW	DLO 170011	1021767-001	2161889 ALBERTA LTD.

W4-18-065-13-SE W4-18-065-13-SW	TFA 201094	1021767-001	2161889 ALBERTA LTD.
W4-18-065-13-SW	DLO 170011	1021767-001	2161889 ALBERTA LTD.
W4-18-065-13-SW	TFA 201094	1021767-001	2161889 ALBERTA LTD.
W4-19-063-12-NE W4-19-063-12-NW	DLO 200059	1021767-001	2161889 ALBERTA LTD.

Crown Disposition Documents:

Land Keys	Document ID	Client ID	Participant
W4-08-063-30-SW	CRB 120047	1022044-001	JMB CRUSHING SYSTEMS INC.
W4-12-063-21-SW	CRB 000104	1022044-001	JMB CRUSHING SYSTEMS INC.
W4-18-061-11-NE	CRB 120004	1021767-001	2161889 ALBERTA LTD.
W4-18-061-11-SE	CRB 120005	1021767-001	2161889 ALBERTA LTD.
W4-18-061-14-NW W4-18-061-14-SW	CRB 140022	1021767-001	2161889 ALBERTA LTD.
W4-18-061-15-NE W4-18-061-15-NW	CRB 120037	1021767-001	2161889 ALBERTA LTD.
W4-18-061-15-NE W4-18-061-15-NW	CRB 120039	1021767-001	2161889 ALBERTA LTD.
W4-18-061-15-NE W4-18-061-15-SE	CRB 120037	1021767-001	2161889 ALBERTA LTD.
W4-18-061-15-NE	CRB 120039	1021767-001	2161889 ALBERTA LTD.

Land Keys	Document ID	Client ID	Participant
W4-18-061-15-SE			
W4-18-061-15-NW	CRB 120039	1021767-001	2161889 ALBERTA LTD.
W4-18-061-15-SE W4-18-061-15-SW	CRB 120037	1021767-001	2161889 ALBERTA LTD.
W4-18-061-15-SE W4-18-061-15-SW	CRB 120039	1021767-001	2161889 ALBERTA LTD.
W4-18-061-21-SE	CRB 150020	1021767-001	2161889 ALBERTA LTD.
W4-18-065-13-SE W4-18-065-13-SW	CRB 100024	1021767-001	2161889 ALBERTA LTD.
W4-18-065-13-SW	CRB 100024	1021767-001	2161889 ALBERTA LTD.
W4-19-063-12-NE W4-19-063-12-NW	CRB 100032	1021767-001	2161889 ALBERTA LTD.
W4-19-063-12-NE W4-19-063-12-NW	CRB 140069	1021767-001	2161889 ALBERTA LTD.
W4-19-063-13-SW	CRB 100032	1021767-001	2161889 ALBERTA LTD.

Water Act Authorizations re SMLs

SML	Necessary Permits
SML 110045	Water Act License 00384205 Water Act Approval 00395017
SML 110026	Water Act License 00368596 Water Act Approval 00383852
SML 110025	Water Act License 00368589 Water Act Approval 00383854

TAB 2

Order
Rule 9.1

Clerk's Stamp

COURT FILE NO.	2001-05482
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 1985, c C-36, as amended AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF JMB CRUSHING SYSTEMS INC. and 2161889 ALBERTA LTD. AND IN THE MATTER OF A PLAN OF ARRANGEMENT OF JMB CRUSHING SYSTEMS INC. and MANTLE MATERIALS GROUP, LTD. UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 1985, c C-36, as amended, and the *BUSINESS CORPORATIONS ACT*, SBC 2002, c 57, as amended
APPLICANTS	JMB CRUSHING SYSTEMS INC. and 2161889 ALBERTA LTD.
DOCUMENT	**ASSIGNMENT ORDER** **(pursuant to section 11.3 of the CCAA)**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**Gowling WLG (Canada) LLP** 1600, 421 – 7th Avenue SW Calgary, AB T2P 4K9 Attn: **Tom Cumming/Caireen E. Hanert/Alex Matthews** Phone: 403.298.1938/403.298.1992/403.298.1018 Fax: 403.263.9193 File No.: A163514

DATE ON WHICH ORDER WAS PRONOUNCED: October 1, 2020

LOCATION AT WHICH ORDER WAS MADE: Calgary Court House

NAME OF JUSTICE WHO MADE THIS ORDER: The Honourable Justice K.M. Eidsvik

UPON THE APPLICATION of JMB Crushing Systems Inc. and 2161889 Alberta Ltd. (collectively, the "**Applicants**") under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") and pursuant to the Amended and Restated Asset Purchase Agreement dated September 28, 2020 (the "**APA**") between the Applicants and Mantle Materials

Group, Ltd. ("**Mantle**") for an order (this "**Order**"), *inter alia*, assigning to Mantle the rights and obligations of the Applicants under and to the Restricted Agreements (as defined below) and any Additional Restricted Agreements (as defined below); **AND UPON** hearing read the Application, the Affidavit of Byron Levkulich sworn September 29, 2020, and the Seventh Report of FTI Consulting Canada Inc., the Court-appointed Monitor of the Applicants (in such capacity, the "**Monitor**"), all to be filed, and the pleadings and proceedings in this Action, including the Initial Order granted in the within proceedings on May 1, 2020 (the "**Filing Date**"), which was amended and restated on May 11, 2020, filed; **AND HAVING HEARD** the application by the Monitor for an order approving the sale transaction contemplated by the APA (the "**SAVO**"); **AND UPON** hearing the submissions of counsel for the Applicants, counsel for the Monitor and counsel for those parties present;

IT IS HEREBY ORDERED THAT:

Service

1. Service of this Application and supporting materials is hereby deemed to be good and sufficient, the time for notice is hereby abridged to the time provided, this application is properly returnable today, and no other person other than those listed on the service list attached as an exhibit to the Service Affidavit are entitled to service of is required to have been served with notice of the Application.

Defined Terms

2. Capitalized terms used but not otherwise defined in this Order shall have the meaning given to such terms in the APA.

Assignment of Restricted Agreements

3. Upon the delivery by the Monitor to the Applicants and Mantle of the Monitor's Certificate (as defined in the SAVO), all of the rights and obligations of the Applicants under and to the Restricted Agreements, which are listed in **Schedule "A"** to this Order, shall be assigned, conveyed and transferred to, and assumed by, Mantle pursuant to section 11.3 of the CCAA.

4. The assignment of the Restricted Agreements is hereby declared valid and binding upon all of the counterparties to the Restricted Agreements notwithstanding any restriction, condition or prohibition contained in any such Restricted Agreements relating to the assignment thereof, including any provision requiring the consent of any party to the assignment.

5. The assignment and transfer of the Restricted Agreements shall be subject to the provisions herein directing that the Applicants' rights, title and interests in the Acquired Assets shall vest absolutely in Mantle free and clear of all Encumbrances other than the Permitted Encumbrances in accordance with the provisions of this Order.

6. No counterparty under any Restricted Agreement, nor any other person, upon the assignment and transfer to, and assumption by, Mantle of any Restricted Agreement hereunder shall make or pursue any demand, claim, action or suit or exercise any right or remedy under such Restricted Agreement against Mantle relating to:

   (a) the Applicants having sought or obtained relief under the CCAA;

   (b) the insolvency of the Applicants; or

   (c) any failure by the Applicants to perform a non-monetary obligation under any Restricted Agreement;

   and all such counterparties and persons shall be forever barred and estopped from taking such action. For greater certainty:

      (i) nothing herein shall limit or exempt Mantle in respect of obligations accruing, arising or continuing after the Closing under the Restricted Agreements other than in respect of items (a) to (b), above; and

      (ii) any Permitted Encumbrances shall continue to have the priority and entitlement attaching thereto notwithstanding this Order.

7. All monetary defaults in relation to the Restricted Agreements existing prior to the Closing, if any, other than those arising by reason only of the insolvency of the Applicants, the

commencement of these CCAA proceedings or the failure to perform a non-monetary obligation under any Restricted Agreement, shall be paid to the Monitor on Closing as part of the Purchase Price and in accordance with the APA. Provided the Cure Costs are paid to the Monitor, then the Monitor shall make payment of Cure Costs to the Counterparties to the Restricted Agreements within 20 days of Closing.

8. Immediately following the assignment and transfer of the Restricted Agreements no counterparty under any Restricted Agreement shall have any claim, whatsoever against the Applicants or the Monitor.

Additional Restricted Agreements

9. Following the date of this Order, including, for greater certainty, following the Closing, the Applicants are authorized to provide to the Counterparty or Counterparties to any additional Restricted Agreements not listed on **Schedule "A"** to this Order that are to be assigned to Mantle pursuant to the APA and in respect of which Counterparty consent is required thereunder but not obtained (each an "**Additional Restricted Agreement**") a notice of the assignment to and assumption by Mantle of such Additional Restricted Agreement (each an "**Additional Assignment Notice**").

10. Any counterparty to an Additional Restricted Agreement who receives an Additional Assignment Notice shall have seven (7) Business Days from the date of such Additional Assignment Notice (the "**Objection Deadline**") to provide notice to the Monitor and the Applicants of any objection it has to such assignment to and assumption by Mantle of the applicable Additional Restricted Agreement.

11. If the Monitor and the Applicants do not receive any notice of objection to the assignment to and assumption by Mantle of an Additional Restricted Agreement by the Objection Deadline, the Applicants shall be authorized to assign such Additional Restricted Agreement to Mantle subject to paragraphs 3 to 7, inclusive, of this Order, which shall apply *mutatis mutandis* to the assignment and assumption of any Additional Restricted Agreements without any further Court order.

12. The applicable date of assignment and assumption of any Additional Restricted Agreements shall be the later of the date of service of the Additional Assignment Notice or delivery of the Monitor's Certificate.

13. If notice of an objection to the assignment to and assumption by Mantle of an Additional Assigned Contract is received by the Monitor and Applicants from the Counterparty to such Additional Assigned Contract by the Objection Deadline, the Applicants are authorized to schedule an application with this Court for the resolution of such objection.

Unrestricted Agreements

14. For certainty, it is hereby declared that the transfer and vesting of the Unrestricted Agreements, which are listed in **Schedule "B"** to this Order, in Mantle is free and clear of any liabilities or monetary claims owing to or accruing in favour of the counterparties to such Unrestricted Agreements which arose prior to May 1, 2020, the Filing Date.

Pendency of Bankruptcy Proceedings

15. For greater certainty, notwithstanding:

    (a) the pendency of these proceedings and any declaration of insolvency made herein;

    (b) the pendency of any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended (the "**BIA**"), in respect of the Applicants, and any bankruptcy order issued pursuant to any such applications;

    (c) any assignment in bankruptcy made in respect of the Applicants; and

    (d) the provisions of any federal or provincial statute:

    the assignment of the Restricted Agreements, and any Additional Restricted Agreements, to Mantle in accordance with this Order and the APA shall be binding on any trustee in bankruptcy that may be appointed in respect of the Applicants and shall not be void or voidable by creditors of the Applicants, nor shall it constitute nor be deemed to be a transfer

at undervalue, settlement, fraudulent preference, assignment, fraudulent conveyance, or other reviewable transaction under the BIA or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

16. Notwithstanding any other provisions of this Order, the Applicants shall continue to be entitled to exercise all of their rights to set-off (or any other contractual rights) and apply any and all post-filing amounts that the Applicants owes or may come to owe to any party, as the case may be, as against any amounts that are owed by such party to the Applicants.

Advice and Directions

17. The Applicants and the Monitor shall be at liberty to apply for further advice, assistance and direction as may be necessary or desirable in order to give full force and effect to the terms of this Order, including without limitation, as necessary, to effect the transfer of the Restricted Agreements and any Additional Restricted Agreements (including any transfer of title registrations in respect of such Restricted Agreements and any Additional Restricted Agreements), the interpretation of this Order or the implementation thereof, and for any further order that may be required, on notice to any party likely to be affected by the order sought or on such notice as this Court requires.

Aid and Recognition

18. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in any of its provinces or territories or in any foreign jurisdiction, to act in aid of and to be complimentary to this Court in carrying out the terms of this Order, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

Service

19. Service of this Order shall be deemed good and sufficient by:

(a) serving this Order upon those interested parties attending or represented at the within Application;

(b) posting a copy of this Order on the Monitor's website at http://cfcanada.fticonsulting.com/jmb/; and

(c) posting a copy of the Order to CaseLines in accordance with the CaseLines Order granted on May 29, 2020,

and service of this Order on any other person is hereby dispensed with.

_____

J.C.C.Q.B.A.

SCHEDULE "A"
RESTRICTED AGREEMENTS

Counterparties	Agreement
Canadian Western Bank	Commitment Letter dated January 8, 2018
	Letter of credit issued in connection with SML 080085
	Letter of credit issued in connection with SML 100085
	Letter of credit issued in connection with SML 110025
	Letter of credit issued in connection with SML 110026
	Letter of credit issued in connection with SML 110045
	Letter of credit issued in connection with SML 110046
	Letter of credit issued in connection with SML 120006
	Letter of credit issued in connection with SML 120100
	Letter of credit issued in connection with SML 110047
	Letter of credit issued in connection with SML 120005
Enterprise Fleet Management	Master Equity Lease Agreement
Lafarge Canada Inc.	Moose River Royalty Agreement
Lafarge Canada Inc.	Oberg Royalty Agreement
Municipal District of Bonnyville No. 87	Supply Agreement, as amended by the first, second, and third amendment, and the amendment to agreement
Northbridge General Insurance Corporation	Bond issued in connection with the Buksa Royalty Agreement
	Bond issued in connection with the Havener Royalty Agreement
	Bond issued in connection with the Shankowski Royalty Agreement

SCHEDULE "B"
UNRESTRICTED AGREEMENTS

Counterparties	Agreement
302016 Alberta Ltd. c/o Rose Short	Buksa Royalty Agreement
Darren Andrychuk & Daphne Andrychuk	Andrychuk Royalty Agreement
Gail Havener & Helen Havener	Havener Royalty Agreement
Jerry Shankowski (945441 Alberta Ltd.)	Shankowski Royalty Agreement

TAB 3

2017 ABCA 157
Alberta Court of Appeal

IFP Technologies (Canada) Inc. v. EnCana Midstream and Marketing

2017 CarswellAlta 1133, 2017 ABCA 157, [2017] 12 W.W.R. 261, [2017] A.W.L.D. 3423, [2017] A.W.L.D. 3424, [2017] A.W.L.D. 3448, [2017] A.W.L.D. 3756, [2017] A.W.L.D. 3757, [2017] A.J. No. 666, 280 A.C.W.S. (3d) 752, 53 Alta. L.R. (6th) 96, 70 B.L.R. (5th) 173

IFP Technologies (Canada) Inc. (Appellant) and EnCana Midstream and Marketing, PanCanadian Resources, EnCana Corporation, EnCana Oil & Gas Developments Ltd., Canadian Forest Oil Ltd. and The Wiser Oil Company (Respondents)

Catherine Fraser C.J.A., Jack Watson, Patricia Rowbotham JJ.A.

Heard: October 16, 2015; November 10, 2015
Judgment: May 26, 2017
Docket: Calgary Appeal 1401-0235-AC

Proceedings: reversing *IFP Technologies (Canada) Inc. v. Encana Midstream and Marketing* (2014), 2014 CarswellAlta 1423, 591 A.R. 202, 2014 ABQB 470, Neil Wittmann C.J.Q.B. (Alta. Q.B.)

Counsel: P. Edwards, R. de Waal, for Appellant
G.N. Stapon, Q.C., L.M. Gill, for Respondents

Subject: Contracts; Evidence; Natural Resources

Related Abridgment Classifications

Contracts
VII Construction and interpretation
VII.4 Resolving ambiguities
VII.4.e Miscellaneous

Natural resources
III Oil and gas
III.6 Exploration and operating agreements
III.6.h Damages for breach

Natural resources
III Oil and gas
III.6 Exploration and operating agreements
III.6.k Miscellaneous

Headnote

Contracts --- Construction and interpretation — Resolving ambiguities — Miscellaneous
Plaintiff I Inc., research and development company, entered into deal with defendant PCR, Canadian oil and gas over plans to jointly work on enhanced recovery technology at site — I Inc. was granted 20 per cent working interest in asset exchange agreement ("AEA") — Joint operating agreement ("JOA"), attached as schedule, specified that working interest was limited

to enhanced recovery — Economics of gas development changed, and PCR had to establish economically producing wells on site to prevent expiry of leases — PCR entered into agreement with defendant W Co., for it to act as operator on site, dealing with existing wells and taking over working interest — I Inc. waived its right of first refusal but refused to consent to transaction — I Inc. brought action against defendants for breach of agreement — Action dismissed — Trial judge held that joint operating agreement did not supersede asset exchange agreement — Trial judge ruled that working interest was not defined in asset exchange agreement — Trail judge found that provision in JOA, stating that working interest was limited to thermal and other enhanced recovery, was not conflict but rather provided definition — Trial judge held that under agreements, I Inc.'s working interest was always limited to thermal and other enhanced recovery methods — I Inc. appealed — Appeal allowed — Trial judge erred in law in failing to recognize that "working interest" was legal term of art with specific meaning in oil and gas industry — Trial judge disregarded in their entirety clear, compelling substantive provisions in AEA relating to 20 per cent of PCR's working interest that PCR conveyed to I Inc. — Trial judge wrongly relied on preamble provision in AEA to trump its substantive textual provisions — This led the trial judge into further errors and, in end, it led him to interpretation of the contract that would have given I Inc. not only interest incompatible with parties' objective intentions but one incompatible with law on working interests in oil and gas industry — Trial judge erred in finding that I Inc. acted unreasonably in withholding its consent to farmout to W Co. I Inc.'s withholding of consent was reasonable in circumstances of this case — Accordingly, PCR breached contract by proceeding as it did.

Natural resources --- Oil and gas — Exploration and operating agreements — Miscellaneous
Plaintiff I Inc., research and development company, entered into deal with defendant PCR, Canadian oil and gas over plans to jointly work on enhanced recovery technology at site — I Inc. was granted 20 per cent working interest in asset exchange agreement ("AEA") — Joint operating agreement ("JOA"), attached as schedule, specified that working interest was limited to enhanced recovery — Economics of gas development changed, and PCR had to establish economically producing wells on site to prevent expiry of leases — PCR entered into agreement with defendant W Co., for it to act as operator on site, dealing with existing wells and taking over working interest — I Inc. waived its right of first refusal but refused to consent to transaction — I Inc. brought action against defendants for breach of agreement — Action dismissed — Trial judge held that agreements did not prohibit and actually contemplated primary production, and did not require PCR to undertake enhanced recovery operations — Trial judge found that I Inc. was unreasonable in withholding its consent to agreement between defendants — Trial judge ruled that I Inc. retained its 20 per cent working interest in thermal and other enhanced recovery at property and did not establish that its working interest was destroyed by primary operations — I Inc. appealed — Appeal allowed — Law is clear that "working interest" in relation to mineral substances in situ is particular kind of property right or interest in land — When owner of minerals in situ leases right to extract these minerals, right to extract is known as "working interest" — "Working interest" constitutes percentage of ownership that owner has to explore, drill and produce minerals from lands in question — Trial judge erred in concluding that because primary production was not expressly prohibited, it followed that reactivating primary production, including through new wells, was permitted without limitation — I Inc.'s working interest remained undivided interest tenant in common equal to 20 per cent of PCR's working interest in site's petroleum and natural gas rights and in PCR miscellaneous interests in site, as both terms were defined in AEA — I Inc.'s withholding of consent was reasonable in circumstances of this case — Accordingly, PCR breached contract by proceeding as it did.

Natural resources --- Oil and gas — Exploration and operating agreements — Damages for breach
Plaintiff I Inc., research and development company, entered into deal with defendant PCR, Canadian oil and gas over plans to jointly work on enhanced recovery technology at site — I Inc. was granted 20 per cent working interest in asset exchange agreement ("AEA") — Joint operating agreement ("JOA"), attached as schedule, specified that working interest was limited to enhanced recovery — Economics of gas development changed, and PCR had to establish economically producing wells on site to prevent expiry of leases — PCR entered into agreement with defendant W Co., for it to act as operator on site, dealing with existing wells and taking over working interest — I Inc. waived its right of first refusal but refused to consent to transaction — I Inc. brought action against defendants for breach of agreement — Action dismissed — Trail judge held that I Inc. was unreasonable in withholding its consent to agreement between defendants — Trial judge ruled that I Inc. retained its 20 per cent working interest in thermal and other enhanced recovery at property and did not establish that its working interest was destroyed by primary operations — Trial judge held that accumulation of errors by I Inc.'s experts was such that valuation based on their evidence could not accepted and that any figure selected for damages would be guess unsupported by method, principle or evidence — Trial judge held that I Inc. was never in position to realize upon its working interest, and there was no chance of thermal development at site within reasonable time of alleged breach of contract — I Inc. appealed — Appeal allowed on other grounds — Despite breach of contract when PCR transferred its interest to W Co., I Inc. merely lost opportunity to convince PCR that thermal project should be "go" — Realistically, having regard to all relevant considerations

and factors, trial judge's conclusion that there was no chance thermal project would be implemented was correct — Therefore, trial judge made no reviewable error in concluding that any award of damages should be discounted by 100 per cent to reflect chance of non-occurrence of thermal project.

The plaintiff I Inc., a research and development company, entered into a deal with the defendant PCR, a Canadian oil and gas partnership, over plans to jointly work on enhanced recovery technology at a property in Alberta ("site"). The deal made between PCR and I Inc. involved a number of agreements. There was a Memorandum of Understanding ("MOU") and a formal Asset Exchange Agreement ("AEA)". Attached to the AEA as schedules were a number of agreements, including a Joint Operating Agreement ("JOA").

I Inc. was granted a 20 per cent working interest in the AEA.The JOA specified that a working interest was limited to enhanced recovery. PCR had to establish economically producing wells on site to prevent the expiry of leases. PCR entered into an agreement with the defendant W Co. for it to act as operator on site, dealing with existing wells and taking over the working interest. I Inc. waived its right of first refusal but refused to consent to the transaction. I Inc. brought an action against the defendants for breach of agreement. The action was dismissed.

The trial judge ruled that "working interest" was not defined in the AEA and that the provision in the JOA stating that working interest was limited to thermal and other enhanced recovery, was not in conflict but rather provided the definition. The trial judge held that under the agreements, I Inc.'s working interest was always limited to thermal and other enhanced recovery methods. I Inc. appealed.

Held: The appeal was allowed.

Per Fraser C.J.A. (Rowbotham J.A. concurring) The term "working interest" has an accepted meaning and usage in the oil and gas industry sector Its interpretation has precedential value, therefore it must be interpreted consistently. While a legal term of art may be modified by the parties to an agreement, that does not permit a trial judge to ignore the meaning attributable to it in the absence of such modification. To do so is tantamount to failing to take into account a key term of a contract or relevant factor or ignoring applicable principles and governing authorities. That is a question of law reviewable for correctness.

In a recent contractual interpretation case, the Supreme Court of Canada clarified that courts ought to "have regard for the surrounding circumstances of the contract — often referred to as the factual matrix — when interpreting a written contract." While the factual matrix cannot be used to craft a new agreement, a trial judge must consider it to ensure the written words of the contract are not looked at in isolation or divorced from the background context against which the words were chosen. An antecedent agreement like the MOU, which was agreed to in writing by both PCR and I Inc., fell within the category of objective evidence of background facts. Netiations preceding the conclusion of the MOU were also relevant to the extent that they shed light on the factual matrix.

The AEA referred to PCR's conveying to I Inc. 20 per cent of PCR's "working interest" in the site. "Working interest", as that term was used in the AEA, had a specific legal meaning. Unfortunately, the trial judge failed to recognize this, then compounded this error by wrongly using the fact that the parties had not expressly defined the meaning of "working interest" in the AEA to disregard, in their entirety, the textually explicit conveyance articles in the AEA.

The fact that the AEA did not expressly define the term "working interest" was irrelevant, since it is a legal term of art. The law is clear that a "working interest" in relation to mineral substances *in situ* is a particular kind of property right or interest in land. When the owner of minerals *in situ* leases the right to extract these minerals, the right to extract is known as a "working interest." Simply stated, "working interest" constitutes the percentage of ownership that an owner has to explore, drill and produce minerals from the lands in question.

The trial judge found that the JOA was determinative of the nature and extent of I Inc.'s working interest in the site. In so finding, however, the trial judge failed to consider surrounding circumstances on the basis the contract was not ambiguous. This interpretive approach constituted a reviewable error of law. Had the surrounding circumstances been taken into account, it would have been apparent that the JOA was not intended to, and did not, limit I Inc.'s working interest in the site.

The incontrovertible facts, as revealed in the supporting documentary evidence, confirmed that PCR and I Inc. agreed, following negotiations between the parties, that I Inc. would receive 20 per cent of PCR's working interest in all development

in the site. That agreement, documented in the MOU, did not limit I Inc.'s interest in the site to thermal or enhanced production only. In ignoring this factual matrix, the trial judge also relied on Article 7.3 of the AEA, which provided that the AEA "supercedes all other agreements, documents, writings, and verbal understandings among the Parties relating to the subject matter hereof and expresses the entire understanding of the Parties with respect to the subject matter hereof." On this basis, the trial judge effectively dismissed the MOU and other surrounding circumstances as irrelevant to the interpretive exercise. In so doing, he erred.

The mere existence of an "entire agreement" provision does not mean that the words chosen beyond that entire agreement provision admit of one interpretation only. The purpose of considering the surrounding circumstances is not to add to, contradict or vary the terms of the agreement but rather use them as an interpretive aid to determine the meaning of the words in dispute. Where parties have concluded an agreement and a court is left to sort out the parties' objective intentions, it cannot be prevented from considering the surrounding circumstances by a provision that is itself based on the assumption that the agreement is clear when it is not.

The trial judge failed to recognize that the AEA and the JOA served fundamentally different objectives. The AEA dealt with ownership of the assets. The JOA outlined the terms under which the parties would operate to exploit those assets.

The record was replete with evidence that both PCR and I Inc. considered primary production to be finished at the site. The JOA did not address the terms and conditions under which primary production could be restarted or initiated without I Inc.'s agreement. Consequently, the trial judge erred in concluding that because primary production was not expressly prohibited, it followed that reactivating primary production, including through new wells, was permitted without limitation and in further concluding that W Co. did no more than PCR was entitled to do when it reactivated primary production at the site.

I Inc.'s working interest remained an undivided interest as a tenant in common equal to 20 per cent of PCR's working interest in the site's petroleum and natural gas rights and in the PCR miscellaneous interests in the site, as both terms were defined in the AEA.

The trial judge erred in finding that I Inc. acted unreasonably in withholding its consent to the farmout to W Co. I Inc.'s withholding of consent was reasonable in the circumstances of this case. Accordingly, PCR breached the contract by proceeding as it did.

The JOA did not obligate PCR to implement a thermal project. Corporate priorities, financial circumstances and the economy can all change, but that does not end the analysis. The trial judge failed to consider whether there was nevertheless, at a minimum, a reasonable expectation that PCR would not engage in primary production in a manner that substantially nullified the contractual objectives or caused significant harm. Having regard to the entirety of the contract and the factual matrix, such an expectation was a reasonable one.

Despite the breach of contract when PCR transferred its interest to W Co., I Inc. merely lost an opportunity to convince PCR that a thermal project should be a "go" and an opportunity to agree with PCR on other methods to exploit the minerals at the site. Realistically, having regard to all relevant considerations and factors, the trial judge's conclusion that there was no chance a thermal project would be implemented was correct. Therefore, the trial judge made no reviewable error in concluding that any award of damages should be discounted by 100 per cent to reflect the chance of non-occurrence of a thermal project.

Per Watson J.A. (dissenting): The trial judge's reasons properly accepted that the onus was on PCR to prove consent was unreasonably withheld. It was not a palpable error to find that I Inc.'s rationale for refusing consent was unreasonable because it had the effect of overriding legitimate rights of another party to the same deal. There was no reasonable refusal under the terms of the deal. As a matter of law, I Inc. was in no worse position after the farm-out to W Co. than it was before. PCR was under no obligation to develop the thermal and enhanced recovery potential of the site. I Inc. did not contract for that obligation.

If a reasonable reading of the deal did not support the sort of veto that I Inc. asserted could be based on its reasonable expectations, a veto could not be grounded in reasonable expectations in law. Reasonable expectations of persons involved in a specific industry (industry expectations) may also have a role in assessing whether an ambiguous clause or term of a contract should be given a specific meaning. Such expectations are not subjective. In a sense, reasonable expectations grounded in the practice of the relevant industry may be circumstantial evidence of what would be the likely objective

meaning of the clause or term and therefore its case-specific meaning.

The trial judge's finding of that there was no breach of the deal was reasonable.

The appeal should be dismissed.

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MEDIchair LP v. DME Medequip Inc. (2016), 2016 ONCA 168, 2016 CarswellOnt 2700, 129 O.R. (3d) 161, 397 D.L.R. (4th) 224, 347 O.A.C. 31 (Ont. C.A.) — refered to in a minority or dissenting opinion

Moreira v. Ontario Lottery and Gaming Corp. (2013), 2013 ONCA 121, 2013 CarswellOnt 1995, 302 O.A.C. 244, 296 C.C.C. (3d) 245 (Ont. C.A.) — refered to in a minority or dissenting opinion

Moreira v. Ontario Lottery and Gaming Corp. (2013), 2013 CarswellOnt 11363, 2013 CarswellOnt 11364, 464 N.R. 400 (note), 327 O.A.C. 399 (note) (S.C.C.) — refered to in a minority or dissenting opinion

Ontario Electricity Financial Corp. v. Iroquois Falls Power Corp. (2017), 2017 CarswellOnt 699, 2017 CarswellOnt 700 (S.C.C.) — refered to in a minority or dissenting opinion

Pacific National Investments Ltd. v. Victoria (City) (2004), 2004 SCC 75, 2004 CarswellBC 2673, 2004 CarswellBC 2674, 245 D.L.R. (4th) 211, 34 B.C.L.R. (4th) 1, 3 M.P.L.R. (4th) 1, [2005] 3 W.W.R. 1, [2004] 3 S.C.R. 575, 327 N.R. 100, 206 B.C.A.C. 99, 338 W.A.C. 99, 42 C.L.R. (3d) 76, 2004 CSC 75 (S.C.C.) — considered in a minority or dissenting opinion

Pivotal Capital Advisory Group Ltd. v. NorAmera BioEnergy Corp. (2010), 2010 ABCA 199, 2010 CarswellAlta 1127, 70 B.L.R. (4th) 37, 26 Alta. L.R. (5th) 13, 487 A.R. 313, 495 W.A.C. 313 (Alta. C.A.) — refered to in a minority or dissenting opinion

Potter v. New Brunswick (Legal Aid Services Commission) (2015), 2015 SCC 10, 2015 CSC 10, 2015 CarswellNB 87, 2015 CarswellNB 88, 381 D.L.R. (4th) 1, 21 C.C.E.L. (4th) 1, 33 B.L.R. (5th) 1, 468 N.R. 227, 18 C.C.P.B. (2nd) 1, 2015 C.L.L.C. 210-017, 2015 C.E.B. & P.G.R. 8120 (headnote only), [2015] 1 S.C.R. 500, 1128 A.P.R. 1, 432 N.B.R.

(2d) 1 (S.C.C.) — refered to in a minority or dissenting opinion

Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada (2010), 2010 SCC 33, 2010 CarswellBC 2501, 2010 CarswellBC 2502, 92 C.L.R. (3d) 1, [2010] 10 W.W.R. 573, 9 B.C.L.R. (5th) 1, 89 C.C.L.I. (4th) 161, 73 B.L.R. (4th) 163, 323 D.L.R. (4th) 513, (sub nom. *Progressive Homes Ltd. v. Lombard General Insurance Co.)* [2010] I.L.R. I-5051, [2010] 2 S.C.R. 245, 406 N.R. 182, 293 B.C.A.C. 1, 496 W.A.C. 1 (S.C.C.) — refered to in a minority or dissenting opinion

Reid Crowther & Partners Ltd. v. Simcoe & Erie General Insurance Co. (1993), [1993] 2 W.W.R. 433, (sub nom. *Simcoe & Erie General Insurance Co. v. Reid Crowther & Partners Ltd.)* [1993] I.L.R. 1-2914, 13 C.C.L.I. (2d) 161, 83 Man. R. (2d) 81, 36 W.A.C. 81, 6 C.L.R. (2d) 161, [1993] 1 S.C.R. 252, 147 N.R. 44, 99 D.L.R. (4th) 741, 1993 CarswellMan 96, 1993 CarswellMan 343, [1993] 1 S.C.R. 10 (S.C.C.) — refered to in a minority or dissenting opinion

Ron Ghitter Property Consultants Ltd. v. Beaver Lumber Co. (2003), 2003 ABCA 221, 2003 CarswellAlta 1049, 10 R.P.R. (4th) 28, 35 B.L.R. (3d) 30, 17 Alta. L.R. (4th) 243, 330 A.R. 353, 299 W.A.C. 353, [2004] 1 W.W.R. 628 (Alta. C.A.) — considered in a minority or dissenting opinion

Shelanu Inc. v. Print Three Franchising Corp. (2003), 2003 CarswellOnt 2038, 172 O.A.C. 78, 226 D.L.R. (4th) 577, 64 O.R. (3d) 533, 38 B.L.R. (3d) 42 (Ont. C.A.) — refered to in a minority or dissenting opinion

Sundance Investment Corp. v. Richfield Properties Ltd. (1983), [1983] 2 W.W.R. 493, 24 Alta. L.R. (2d) 1, 27 R.P.R. 93, 41 A.R. 231, 1983 CarswellAlta 4 (Alta. C.A.) — refered to in a minority or dissenting opinion

Swan Group Inc. v. Bishop (2013), 2013 ABCA 29, 2013 CarswellAlta 84, 29 R.P.R. (5th) 36, [2013] 7 W.W.R. 130, 542 A.R. 134, 566 W.A.C. 134, 78 Alta. L.R. (5th) 217, 10 B.L.R. (5th) 175 (Alta. C.A.) — refered to in a minority or dissenting opinion

Topsail Shipping Co. v. Marine Atlantic Inc. (2014), 2014 NLCA 41, 2014 CarswellNfld 345, 379 D.L.R. (4th) 442, 1109 A.P.R. 240, 357 Nfld. & P.E.I.R. 240 (N.L. C.A.) — refered to in a minority or dissenting opinion

Wood v. Capita Insurance Services Ltd. (2017), [2017] UKSC 24 (U.K. S.C.) — refered to in a minority or dissenting opinion

Statutes considered by *Catherine Fraser C.J.A.*:

Energy Resources Conservation Act, R.S.A. 2000, c. E-10
s. 21 — considered

Rules considered by *Catherine Fraser C.J.A.*:

Alberta Rules of Court, Alta. Reg. 124/2010
R. 13.1 — considered

Rules considered by *Jack Watson J.A.* (dissenting):

Alberta Rules of Court, Alta. Reg. 124/2010
Generally — referred to

R. 13.1 — considered

Regulations considered by *Catherine Fraser C.J.A.*:

Mines and Minerals Act, R.S.A. 2000, c. M-17
Petroleum and Natural Gas Tenure Regulation, Alta. Reg. 263/97

s. 14-17 — referred to

Words and phrases considered:

1990 Operating Procedure

The 1990 Operating Procedure is a standard form agreement that is a product of the Canadian Association of Petroleum Landmen.

ambiguity

Mere difficulty in interpreting a contract is not the same as ambiguity: [*Paddon Hughes Development v Pancontinental Oil*, 1998 ABCA 333] at para 29. A contract is ambiguous when the words are "reasonably susceptible of more than one meaning": [*Hi-Tech Group Inc. v Sears Canada Inc.*, 2001 CanLII 24049 at para 23, 52 OR (3d) 97 (CA)] at para 18.

public expectations

First, reasonable expectations by members of society generally (public expectations) may have a role in implying terms into specialized types of contracts. These expectations are of a public or general nature, invoking public policy, and are not influenced by what a particular party's perspective may be.

standards of review

In many respects, standards of review are an effective "case-management device" that appellate courts use to regulate workloads and ensure the efficacy of the courts.

working interest

A fundamental point is whether the term "working interest" with respect to oil and gas leases has any meaning in Canadian oil and gas law. In my view, it most assuredly does. This phrase is a legal term of art with a specific meaning in the oil and gas industry, a meaning which this Court should uphold in keeping with what were undoubtedly the parties' mutual intentions when the subject contract was concluded.

. . .

It is true that the [] does not expressly define the term "working interest". But that is unnecessary, indeed irrelevant, in the circumstances here since "working interest" is a legal term of art. On this point, the law is clear that a "working interest" in relation to mineral substances *in situ* is a particular kind of property right or interest in land. When the owner of minerals *in situ* (the Crown in this case) leases the right to extract these minerals (here to PCR), the right to extract is known as a "working interest": see *Bank of Montreal v Dynex Petroleum Ltd.*, [2002] 1 SCR 146, 2002 SCC 7 at para 2 [*Dynex*]. This particular kind of interest in land is also commonly called a "*profit à prendre*", which allows a party to enter land and take a resource for profit: *Dynex*, *supra* at para 9; *Alberta Energy Company Ltd. v Goodwell Petroleum Corporation Ltd.*, 2003 ABCA 277 at para 63, 339 AR 201; John Ballem, *The Oil and Gas Lease in Canada*, 4th ed (Toronto: University of Toronto Press, 2008) at 15; see also *Orphan Well Association v Grant Thornton Limited*, 2017 ABCA 124 at paras 32, 131. Therefore, simply stated, "working interest" constitutes the *percentage of ownership* that an owner has to explore, drill and produce minerals from the lands in question.

This meaning also happens to be consistent with the American definition of "working interest" as "the exclusive right to exploit the minerals on the land": see Howard Williams & Charles Meyers, *Manual of Oil and Gas Terms*, 8th ed (New York: Matthew Bender & Company, 1991) at 1377.

APPEAL from judgment reported at *IFP Technologies (Canada) Inc. v. Encana Midstream and Marketing* (2014), 2014 ABQB 470, 2014 CarswellAlta 1423, 591 A.R. 202 (Alta. Q.B.), dismissing action for breach of agreement.

***Catherine Fraser C.J.A.*:**

V. Principles of Contractual Interpretation

A. Goal of Contractual Interpretation

79 I now turn to a brief overview of the applicable principles of contractual interpretation. The goal of contractual interpretation is to determine the objective intent of the parties at the time the contract was made through the application of legal principles of interpretation: *Sattva*, *supra* at para 49. To this end, "the exercise is not to determine what the parties subjectively intended but what a reasonable person would objectively have understood from the words of the document read as a whole and from the factual matrix": Geoff R. Hall, *Canadian Contractual Interpretation Law*, 2nd ed (Markham: LexisNexis, 2012) at 33 [Hall]. Accordingly, disputed contractual terms must be interpreted, not in isolation, but in light of the contract as a whole: *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)*, 2010 SCC 4 (S.C.C.) at para 64, [2010] 1 S.C.R. 69 (S.C.C.).

1. Requirement to Consider Factual Matrix

80 One aspect of the current law on contractual interpretation engaged by this appeal relates to the relevance of the factual matrix. In *Sattva*, the Supreme Court finally clarified that courts ought to "have regard for the surrounding circumstances of the contract — often referred to as the factual matrix — when interpreting a written contract" (para 46). Why? As the Supreme Court noted, "ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning" (para 47).

81 Considering the surrounding circumstances of a contract does not offend the parol evidence rule. That rule precludes admission of evidence outside the words of the written contract that would add to, subtract from, vary, or contradict a contract. However, evidence of surrounding circumstances is not used for this purpose but rather as an *objective* interpretive aid to determine the meaning of the words the parties used: *Sattva*, *supra* at paras 59-61. Therefore, while the factual matrix cannot be used to craft a new agreement, a trial judge must consider it to ensure the written words of the contract are not looked at in isolation or divorced from the background context against which the words were chosen. The goal is to deepen the trial judge's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. This approach is in keeping with Lord Steyn's famous admonition in *R. (on the application of Daly) v. Secretary of State for the Home Department*, [2001] UKHL 26 (Eng. H.L.) at para 28 that "[i]n law context is everything".

82 Thus, in interpreting a contract, a trial judge must consider the relevant surrounding circumstances even in the absence of ambiguity: Hall, *supra* at 24-25; John D. McCamus, *The Law of Contracts*, 2nd ed (Toronto: Irwin Law, 2012) at 751 [McCamus]; *Bighorn*, *supra* at para 10; *Seven Oaks Inn Partnership v. Directcash Management Inc.*, 2014 SKCA 106 (Sask. C.A.) at para 13, (2014), 446 Sask. R. 89 (Sask. C.A.); *Nexxtep Resources Ltd. v. Talisman Energy Inc.*, 2013 ABCA 40 (Alta. C.A.) at para 31, (2013), 542 A.R. 212 (Alta. C.A.) [*Nexxtep*], citing *Dumbrell v. Regional Group of Cos.*, 2007 ONCA 59 (Ont. C.A.) at para 54, (2007), 85 O.R. (3d) 616 (Ont. C.A.); *Hi-Tech Group Inc. v. Sears Canada Inc.*, 2001 CanLII 24049 at para 23, (2001), 52 O.R. (3d) 97 (Ont. C.A.) [*Hi-Tech*]; *Eco-Zone Engineering Ltd. v. Grand Falls-Windsor (Town)*, 2000 NFCA 21 (Nfld. C.A.) at para 10, (2000), 5 C.L.R. (3d) 55 (Nfld. C.A.).

83 Determining what constitute properly surrounding circumstances is a question of fact. As to what is meant by surrounding circumstances, this consists 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": *Sattva*, *supra* at para 58. Examples of relevant background facts include: (1) the genesis, aim or purpose of the contract; (2) the nature of the relationship created by the contract; and (3) the nature or custom of the market or industry in which the contract was executed: *Sattva*, *supra* at paras 47-48; *Geoffrey L. Moore Realty Inc. v. Manitoba Motor League*, 2003 MBCA 71 (Man. C.A.) at para 15, (2003), 173 Man. R. (2d) 300 (Man. C.A.); *King v. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80 (Man. C.A.) at para 72, (2011), 270 Man. R. (2d) 63 (Man. C.A.); *Ledcor*, *supra* at paras 30, 106. Ultimately, the surrounding circumstances can include "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man": *Sattva*, *supra* at para 58, citing Lord Hoffman in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society* (1997), [1998] 1 W.L.R. 896 (U.K. H.L.) at 913.

84 All this being so, it will be obvious why the factual matrix, that is surrounding circumstances, of a contract can be critical to understanding the objective intentions of the parties. That is certainly so in interpreting the Contract between PCR and IFP. Of particular relevance on this appeal are the genesis and purpose of the Contract and the relevant background, including the MOU. An antecedent agreement like the MOU, which has been agreed to in writing by both PCR and IFP, falls within the category of objective evidence of background facts.

85 Negotiations preceding the conclusion of the MOU are also relevant to the extent that they shed light on the factual matrix. It is true that evidence of negotiations is not itself admissible as part of the factual matrix: Hall, *supra* at 29; *Keephills Aggregate Co. v. Riverview Properties Inc.*, 2011 ABCA 101 (Alta. C.A.) at para 13, (2011), 44 Alta. L.R. (5th) 264 (Alta. C.A.) [*Keephills*]. Nor generally are prior drafts of an agreement: *Wesbell Networks Inc. (Receiver of) v. Bell Canada*, 2015 ONCA 33 (Ont. C.A.) at para 13, (2015), 248 A.C.W.S. (3d) 820 (Ont. C.A.). However, evidence of negotiations is relevant insofar as that evidence *shows* the factual matrix, for example by helping to explain the genesis and aim of the contract: Hall, *supra* at 30, 80; *Nexxtep*, *supra* at para 32. Moreover, written evidence of those negotiations is far more objective evidence of the parties' intentions than after-the-fact evidence from opposing parties about oral statements made during negotiations.

2. Admissibility of Parol Evidence to Resolve Ambiguity

86 Further, where a contract itself is ambiguous, extrinsic evidence, that is parol evidence, may be admitted to resolve the ambiguity: Hall, *supra* at 59; McCamus, *supra* at 205; *Paddon-Hughes Development Co. v. Pancontinental Oil Ltd.*, 1998 ABCA 333 (Alta. C.A.) at para 28, (1998), 223 A.R. 180 (Alta. C.A.) [*Paddon Hughes*]; *Guaranty Properties Ltd. v. Edmonton (City)*, 2000 ABCA 215 (Alta. C.A.) at para 23, 261 AR 376; *Nexxtep*, *supra* at para 20. In the face of ambiguity, the interpretation promoting business efficacy is to be preferred so long as it is supported by the text: *Keephills*, *supra* at para 12; Hall, *supra* at 38-47.

87 Mere difficulty in interpreting a contract is not the same as ambiguity: *Paddon Hughes*, *supra* at para 29. A contract is ambiguous when the words are "reasonably susceptible of more than one meaning": *Hi-Tech*, *supra* at para 18. An ambiguity in the contract also allows courts to consider evidence of the parties' subsequent conduct post-contract: *Shewchuk v. Blackmont Capital Inc.*, 2016 ONCA 912 (Ont. C.A.) at paras 46, 56, (2016), 404 D.L.R. (4th) 512 (Ont. C.A.); Hall, *supra* at 83-85. But it must be understood that even under this ambiguity exception to the parol evidence rule, there are limitations as to what parol evidence is admissible. In this regard, evidence as to the parties' subjective intentions is generally inadmissible.

3. Interpreting Commercial Contracts

88 Also of particular importance on this appeal, commercial contracts should be interpreted in accordance with sound commercial principles and good business sense: McCamus, *supra* at 763-766. In the absence of evidence of a bad bargain, courts should not interpret a contract in a way that yields an unrealistic or absurd result.

B. Conclusion

89 In the end, contractual interpretation is not an exercise in second guessing what could have been included in a contract while discounting or dismissing relevant terms of a contract and uncontradicted contextual information. It is instead an exercise in determining what the parties objectively intended having regard to the entire written text, relevant contextual background and commercial context.

VI. Analysis

A. Overview of IFP's Interest in Eyehill Creek

90 Following a careful and comprehensive review of the QB Reasons and all relevant documentation, I have concluded

TAB 4

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Editor: Janis P. Sarra

18 — Not Quite True Love: Forced Assignment of Agreements

Not Quite True Love: Forced Assignment of Agreements

Jennifer Stam and Evan Stitt[*]

I. — INTRODUCTION

In the legal profession, commercial contracts are pieces of paper — they are drafted, negotiated, interpreted, and litigated. In the business world, a commercial contract is often more than that — it is the tangible embodiment of a relationship between two parties. Although the contract exists, the relationship often has little to do with the piece of paper and more to do with the people, the business, the products, the service, and a multitude of other elements. Obviously, some commercial relationships are more significant than others. They often depend on the availability of alternatives, the complexity or uniqueness of the product or service, the unique job skills required by the people who are servicing the contract, the quantity and scope of the product or service, whether products are generic or tailored specifically for a party, whether the industry is regulated, whether licenses or regulatory approvals are required, geographical scope and other factors. It is also equally obvious that, much like in personal relationships, in a commercial relationship, the importance of that relationship to one of the parties may be substantially more significant than it is to the other party.

One of the main purposes and touted benefits of the "liquidating *CCAA*"[1] is the continuation of a business where the most likely alternative is a piecemeal liquidation and break up of assets. The benefit of a liquidating *CCAA* is that often a new buyer can get a "fresh start" — a business free and clear of most liens and historical debt — while jobs, supply, service, and customer relationships are all preserved. From a counterparty's perspective, however, the proposed new business partner may not always be a match made in heaven. The question is, what options does that counterparty have?

When a sale occurs, there are two basic decisions that must be made with respect to executory contracts: (a) what contracts does the buyer want to assume and which ones should be repudiated; and (b) is the contract counterparty content to continue doing business with the new business owner, and if not, does such counterparty have a valid basis on which to object to the assignment? Contract counterparties fortunate enough to not experience having had one of their customers, clients, commercial partners, etc, enter into insolvency proceedings may turn to the terms of their contract and point to the assignment clause that, in many cases, will say that a contract cannot be assigned without their consent, sometimes the language specifies acting reasonably, sometimes in a party's sole discretion. They are then sorely disappointed when they are told about section 11.3 of the *Companies' Creditors Arrangement Act (CCAA)*,[2] which allows the court to overrule an objection to assignment and force the assignment of a contract. Even more disappointing to these parties is the unwelcome news that the sheer momentum of a *CCAA* sale, which often has the support of many, if not all, key constituents in the *CCAA* proceeding, means any objection to an assignment is almost always an uphill and expensive battle. This dynamic does not mean that in the right circumstance, the battle is not worth fighting or impossible to win. Where there are truly meritorious arguments, it would appear that the court will not easily override the contractual rights of the contract counterparty.

II. — A BRIEF HISTORY

In 2005, the federal government proposed a series of important changes to Canada's insolvency legislation with the tabling of Bill C-55, which included the introduction of sections 11.3 of the *CCAA* and 84.1 of the *BIA* on the assignment of agreements.[3] Prior to the introduction of these sections, it was typically assumed that where a contract counterparty had the right to consent to an assignment of its contract, that right had to be respected except in very limited circumstances where specific legislation allowed for that right to be overridden. The most common example of this exception arises in relation to real property leases that, in Ontario, could be assigned by a licenced insolvency trustee under section 38(2) of the *Commercial Tenancies Act*.[4] Absent such exception, there were very few cases where courts ever forced the assignment of contracts over the objection of a counterparty, although the court maintained that it had the jurisdiction to do so under the broad powers granted to it under the *CCAA*. Two notable instances where this forced assignment occurred were *Re Playdium Entertainment Corp*[5] and *Re Nexient Learning*.[6] These pre-amendment cases continue to inform courts' analyses even in post-amendment cases.

In *Playdium*, the Playdium group's initial attempts at restructuring under the *CCAA* were unsuccessful, but a proposed transfer of all of the Playdium assets to a newly formed corporation had the backing of most stakeholders, including the two primary secured creditors. Pursuant to the transfer, the new corporation would assume all the material contracts of the Playdium group. However, Famous Players, a counterparty to one of these agreements, objected to the assignment. Famous Players argued that the Playdium group was not in compliance with certain provisions of their agreement, and disputed that steps proposed by the new entity would have the effect of achieving compliance with the agreement. Justice Spence of the Ontario Superior Court of Justice agreed with the first argument and noted the possibility of the second, but nevertheless, ordered the assignment of the agreement. Famous Players' right to sue for breach of the agreement was preserved as against the new corporation, and because of the existence of pre-filing defaults, in theory, Famous Players would be able to issue notices of default against the new entity as soon as the *CCAA* stay was lifted. Ultimately, Justice Spence found that the entire deal hinged on the assignment of the contracts, and as such, the risk was an acceptable one.

The case of *Re Nexient Learning* occurred just prior to the enactment of the amendments to the *CCAA*. In that case, Justice Wilton-Siegel of the Ontario Superior Court of Justice considered whether the debtor had demonstrated that the court's discretion in ordering an assignment was "important to the reorganization process".[7] Justice Wilton-Siegel was careful to note that an assignment order must not affect a counterparty's rights beyond what is absolutely necessary to further the reorganization.[8] In this case, the proposed assignee was looking for an order permanently staying the counterparty's contractual right to terminate the agreement for material breach. Having first agreed to purchase the debtor's assets without the agreement, the assignee had returned to the court seeking an order assigning the agreement after the sale had been completed. Ultimately, Justice Wilton-Siegel found that the proposed assignee could not demonstrate that the assignment would further the *CCAA* proceedings — an obvious finding given the retroactive nature of the relief sought — and that the assignee's desire to permanently stay the counterparty's contractual right to terminate the agreement was similarly unjustifiable.

III. — ASSIGNMENT OF CONTRACTS POST-AMENDMENTS

Section 11.3 states:

> Assignment of Agreements
>
> 11.3 (1) On application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment.

> Exceptions
>
> (2) Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature or that arise under
>
> (a) an agreement entered into on or after the day on which proceedings commence under this Act;
>
> (b) an eligible financial contract; or
>
> (c) a collective agreement.
>
> Factors to be considered
>
> (3) In deciding whether to make the order, the court is to consider, among other things,
>
> (a) whether the monitor approved the proposed assignment;
>
> (b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and
>
> (c) whether it would be appropriate to assign the rights and obligations to that person.
>
> Restriction
>
> (4) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

Although there was some speculation that the enactment of section 11.3 would drastically change the practice of assignment of contracts in Canada and potentially create a system much closer to the assumption and assignment process seen in § 365 of the United States ("US") *Bankruptcy Code*,[9] the practice to date has remained relatively unchanged and "forced assignment motions" on a contested basis have remained uncommon.

In many ways, the case law that has developed since 2009 merely expands on the principles articulated in *Playdium* and *Nexient*. In particular, balancing the parties' competing interests and not unduly infringing upon the rights of the counterparty remain foremost considerations. Nevertheless, section 11.3 leaves many open questions that have not yet been conclusively resolved in the case law, including:

1. When will agreements not be assignable by "reason of their nature"?

2. What level of evidence is required to establish that the proposed assignee is able to perform the obligations under the contract?

3. When will a court find that it is "appropriate" to assign an agreement over the objection of the counterparty?

4. To what extent can non-monetary defaults be permanently stayed or otherwise eliminated as grounds for termination?

1. — Agreements not Assignable by Reason of their Nature

Section 11.3(2) of the *CCAA* expressly excludes from assignment several categories of agreements: those agreements that are entered into after the date of the bankruptcy or initial order, eligible financial contracts, and agreements that arise under a collective agreement. It also excludes agreements that are not assignable by reason of their nature. Both the case law and commentary have suggested that section 11.3(2) refers principally to personal service agreements.[10] The trickier issue, of course, is the question of what types of agreements constitute personal service agreements. While defined variously in the case law, perhaps the most compelling definition is that a personal service agreement is an agreement that is "based on confidences or considerations applicable to special personal characteristics, and cannot be usefully performed to or by another".[11] A common example of a personal service agreement is an independent contractor agreement, although the rationale for not assigning such an agreement — that the contractual relationship between the parties is predicated on characteristics specific to the parties, which cannot be meaningfully replicated — is arguably only applicable when the debtor is the independent contractor. In other words, it is not inconceivable to envision a court approving the assignment of an independent contractor agreement where the proposed assignee's business is substantially similar to that of the debtor such that the independent contractor counterparty could continue to perform the same work. In any event, Canadian courts have not considered this specific issue.

In *Ford Credit Canada Ltd v Welcome Ford Sales Ltd*,[12] the trustee in the bankruptcy of Welcome Ford sought an order assigning the rights and obligations of Welcome Ford under a dealership agreement to the prospective purchaser of Welcome Ford's assets. Ford, counterparty to the dealership agreement, argued that the agreement ought to be considered a personal service contract. In support of its argument, Ford pointed to the extensive due diligence process carried out by Ford in selecting Welcome Ford, as well as provisions of the agreements allowing Ford to reserve its rights to determine the necessary characteristics of dealers.[13] However, both the chambers judge and the Alberta Court of Appeal disagreed with this argument, with the former describing the agreement as "a rather standard commercial franchise which could be performed by virtually any business person and entity with some capital and experience in automotive retailing".[14] Clearly this finding was warranted, given that the dealership agreement was a franchise agreement — precisely the sort of agreement that could be performed by a number of parties, being standardized for that purpose. Looking beyond the *Ford Credit* decisions, however, the takeaway remains that in a commercial context, it will be difficult for a counterparty to establish that its agreement with the debtor is a personal service contract, because such a classification almost invariably suggests that the agreement cannot be performed by any other party — an unlikely scenario in most industries.

Moreover, parties cannot simply characterize an agreement as a personal service agreement in the wording of the contract and expect to be shielded from an assignment order. In *Ford Credit* the Alberta Court of Appeal noted that parties to an agreement cannot simply include "a clause describing [the agreement] as creating 'personal' obligations where the contract is, in fact, a commercial one which could be performed by many others than the contracting parties".[15] Similarly, including a term in the agreement to the effect that the agreement cannot be assigned by reason of its nature will not likely be persuasive to a court.[16] As in most instances, substance will prevail over form.

There is at least one other category of agreement that cannot be assigned by reason of its nature: non-executory contracts. Since section 11.3 of the *CCAA* contemplates the assignment of rights and obligations, an agreement that has been fully performed and no longer has ongoing rights or obligations cannot be assigned. However, any underlying interest or asset created by a non-executory contract may still be assigned.

2. — What Level of Evidence is Required to Establish that the Proposed Assignee is Able to Perform the Obligations under the Contract?

Pursuant to section 11.3(b), the proposed assignee's ability to perform the obligations under an agreement is a factor for the court to consider. The ability to perform — or lack thereof — may also be relevant to the appropriateness analysis discussed below. The issue of what information is required to satisfy this requirement is not fully resolved. In some instances, where obligations are strictly financial, it may be enough to provide financial statements. In other circumstances, depending on the significance, management meetings, business plans, industry or regulatory expertise and other materials could potentially be required. Ultimately this question is a factual inquiry as the question of performance might require far more than simply financial stability and could foreseeably depend on capabilities, expertise or otherwise. As such, whether the assignee has met the burden will presumably depend largely on the nature, monetary value and terms of the contract or contracts at issue.

3. — When Will a Court Find that it is "Appropriate" to Assign an Agreement?

Pursuant to section 11.3(c), the court must consider whether the assignment would be appropriate, which is probably the most all-encompassing and therefore important factor that a court will consider. Consideration of the appropriateness of an assignment introduces some notion of fairness, and ultimately involves the court weighing the merit of the counterparty's objections, which includes any detriment to the counterparty as a result of the assignment, against the benefit to creditors and stakeholders, or the importance of the assignment to the overall restructuring. While every case will be decided based on its facts, the jurisprudence provides some guidance for the way in which a court will consider these competing interests.

In *Re Ted Leroy Trucking Ltd*,[17] the Supreme Court of Canada stated the basis on which an order under the *CCAA* would be appropriate as follows:

> ... Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.[18]

While the Supreme Court of Canada was referring to appropriateness under the *CCAA* as a whole, and not section 11.3 specifically, the analysis remains the same. In *Re Veris Gold Corp*,[19] Justice Fitzpatrick of the British Columbia Supreme Court, in a discussion of the appropriateness of an assignment order, stated that the twin goals that a court ought to be guided by are "assisting the reorganization process ... while also treating a counterparty fairly and equitably".[20]

While there is no set list of all of the factors that a court may consider in determining the appropriateness of an assignment, the following considerations appear to be significant:

(a) whether the proposed assignment is crucial to the deal either individually or collectively with other contracts;

(b) the nature of the contract and the degree of specialization required to perform under the contract by both parties;

(c) the relative significance of the contract to the counterparty and the potential impact of the assignment on it;

(d) where intellectual property is involved, the scope of the license granted, the significance of the intellectual property involved to each party, whether the assignee has development obligations under the contract and, if so, the assignee's ability to perform those obligations.

Where a contract contains a consent right to assignment, the counterparty's consent is not a precondition for the granting of an assignment order. However, the reasonableness of withholding consent may still be a relevant factor in determining whether the assignment is appropriate. If a court finds that consent is reasonably withheld, it must acknowledge that the assignment is a clear violation of the counterparty's contractual rights. If, on the other hand, the court determines that consent is unreasonably withheld, the counterparty's objection to the assignment of the agreement is considerably weaker. In order to determine whether a counterparty's withholding of consent is reasonable, Canadian courts have applied the following test:

> (a) The burden is on the party seeking consent to demonstrate that the refusal to consent was unreasonable. The question is not whether a reasonable person might have given consent; it is whether a reasonable person could have withheld consent.
>
> (b) Information available to the party refusing consent at the time of the refusal is relevant to the determination of reasonableness, not any subsequent facts or reasons.
>
> (c) A refusal will be unreasonable if it was designed to achieve a collateral purpose wholly unconnected with the bargain reflected in the terms of the agreement.
>
> (d) A probability that the proposed assignee will default in its obligations may be a reasonable ground for withholding consent.
>
> (e) The financial position of the assignee may be a relevant consideration.
> (f) The question of reasonableness is essentially one of fact that must be determined on the circumstances of the particular case.[21]

Factor (c) above includes instances where the counterparty refuses consent because it believes it can obtain a better deal with an entity other than the proposed assignee.[22] A court will likewise be wary of an opportunistic counterparty merely using the restructuring as an opportunity to renegotiate more favourable terms with the assignee.

Courts have also determined that the commercial realities of the marketplace, the economic impact of the assignment on the counterparty, and the financial position of the proposed assignee are all important factors.[23] In *Exxonmobil Canada Energy v Novagas Canada Ltd*,[24] the Alberta Court of Queen's Bench found consent to be reasonably withheld and stressed the counterparty's "real and reasonable issues" that it had to consider in its assessment of the assignee as a future partner. The Court stated that the counterparty's concerns about the capabilities of the proposed assignee were simply "the same considerations that [the counterparty] considered in its decision to enter the Agreement with the financially solvent [debtor]", and that the very reason for the consent requirement in the agreement was to allow the counterparty to assess the suitability of any future contractual partners.[25] Consent will not be found to have been unreasonably withheld if the counterparty has not been given enough time or disclosure to conduct proper due diligence on the proposed assignee.

4. — To What Extent can the Debtor be in Default under the Agreement?

Section 11.3(4) of the *CCAA* reads:

> The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.[26]

The concept of "cure costs" is much more prevalent in US Chapter 11 proceedings than it is in Canada, but the essence of the idea is that if there are monetary amounts owing, the counterparty must be paid those costs to bring the contract into good standing before it can be assigned. There are at least two elements of this so-called cure costs provision that deserve discussion. The first is that it is not difficult to envision circumstances where it would be challenging to determine whether monetary defaults in relation to the agreement arose by reason only of the company's insolvency. The classic example is in the context of a commercial lease, where the debtor has been in rental arrears for some time before filing for protection under the *CCAA*. Since the failure to pay rent is typical of an insolvent enterprise, the argument could be made that the full amount of the arrears could be considered monetary defaults arising by reason of the company's insolvency. Section 11.3(4) specifically exempts those types of costs from the calculation of cure for the purposes of assignment.

The second issue formed the basis of some discussion in *Playdium*. Since the debtor is only expressly required to cure monetary defaults, technically speaking, the assignee may be in default under the contract as a result of non-monetary defaults under the agreement continuing post-assignment.[27] In an attempt to circumvent this scenario, debtors and assignees have sought to include broad terms in the vesting order in an attempt to restrict the instances in which a counterparty may

terminate as a result of pre-existing non-monetary defaults. However, courts have not always accepted this type of language, particularly where there have been counterparties present to object to the language being proposed in the order.[28] Further, it would often appear that the language is included as "belts and suspenders", as often no known non-monetary defaults for the target contracts exist. As such, it remains to be seen what resolution would be granted in a true "Playdium" type situation post-amendments. As stated in *Nexient*, the court must be "satisfied that the requested relief does not adversely affect the third party's contractual rights beyond what is absolutely required to further the reorganization process and that such interference does not entail an inappropriate imposition upon the third party or an inappropriate loss of claims of the third party".[29] It is therefore unlikely that when a counterparty objects strenuously but unsuccessfully to the assignment of its agreements, a court will also deny the counterparty its contractual remedies for breaches that continue post-assignment.

Additional, practical considerations limit the potential trouble that an assignee will find itself in on a lifting of the stay. First, since one of the factors that a court must consider is whether the assignee can perform the obligations under the agreement, it is unlikely that an assignee would not have the resources to swiftly rectify any defaults after the stay is lifted if faced with potential litigation for breach of contract. Second, both the assignee and the counterparty will typically be incentivized to find ways to make the new business work. The assignee will be motivated to cooperate with the counterparty because it just invested a significant amount of money and time obtaining the debtor's assets, and the counterparty will be motivated because it has just had a front row seat to what was likely a lengthy and expensive court process and may not be anxious to embark on one of its own.

A subsidiary consideration, related to the second item outlined above, is the extent to which a court will be willing to overlook the existence of non-monetary defaults. Despite the wording of section 11.3(4) providing that only monetary obligations must be cured, a court may be wary of assigning an agreement where a debtor has materially failed to perform non-monetary obligations, lest the assignee find itself assuming a grenade of an agreement that is ready to blow up as soon as the stay is lifted. There may also be non-monetary defaults in existence at the time of filing that are simply incurable, and it is not immediately clear how a Canadian court would treat such a situation.

IV. — CROSS-BORDER CONSIDERATIONS

A debtor's contracts may be similarly assigned by court order under the US *Bankruptcy Code*.[30] However, the US legislation deviates from its Canadian counterpart by providing that a debtor must also cure monetary defaults. Although the wording of § 365(b)(1)(A) of the US *Bankruptcy Code* is somewhat ambiguous in this respect, judicial authority exists for the proposition that a contract will not be assignable unless the debtor has cured material non-monetary defaults, other than those arising in relation to a real property lease.[31] In determining whether the existence of an incurable non-monetary default precludes assumption of an executory contract, the test is whether the default is "materially and economically significant" such that it will cause substantial economic detriment.[32] In addition to curing material non-monetary defaults, a debtor in the US must provide "adequate assurance" of future performance of the agreement with respect to the proposed assignee.[33] This requirement arguably places a greater burden on debtors and assignees in the US than in Canada, where the court must merely consider whether or not the assignee can fulfill its obligations under the agreement.

In cross-border files, the issues of which legal regime will apply to the analysis on the assignment of the contract may easily arise. Some of the complexities may hinge on factors such as: (a) the filing matrix of the debtors, *ie*, whether the debtors are cross-filed and if so, whether in plenary proceedings or a main/ancillary proceeding; (b) which debtor is a party to the contract; (c) whether the counter party is in another jurisdiction; (d) the governing law of the contract involved; and (e) whether there are property interests in the contract. All of these factors may complicate which court and what law applies to the determination of whether a contract should be assigned through a court process.

V. — CONCLUSION

As was stated at the outset, despite the fact that section 11.3 has been in force for a number of years, there are good reasons for the fact that there is little case law on the issue. Where the issues at hand are matters of business relationships, the right

solution is often a commercial one and not a legal one. Further, commercial judges are often prone to reminding parties of this fact and are not shy about encouraging a consensual resolution or prompting the monitor to try and broker one. However, there will hopefully be circumstances where the boundaries of this section do get tested, so that the section does not evolve to unnecessarily usurp the contractual rights of a counterparty. In particular, circumstances likely to test the boundaries of the section include instances where the contract at issue is of crucial importance to the counterparty but not the proposed assignee, where the proposed assignee has not provided sufficient evidence of its ability to perform and/or where performance under the contract requires more than just financial resources. That said, where such motions do proceed on a contested basis, the unstoppable force of the debtor's approval and vesting motion will often prevail over an objecting counterparty posing as an immovable object, particularly where it would seem that there is little commercial harm to that counterparty and its contract is crucial to the deal.

Footnotes

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[1] Broadly speaking, a "liquidating *CCAA*" involves a sale of the assets of the debtor in the absence of a plan. See, for example, *Re Nortel Networks Corporation*, 2009 CarswellOnt 4467 (Ont SCJ [Commercial List]).

[2] *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended [*CCAA*]. Equivalent provisions can be found in s 84.1 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended [*BIA*].

[3] While introduced in 2005, these sections did not come into force until 2009.

[4] *Commercial Tenancies Act*, RSO 1990, c L.7.

[5] *Re Playdium Entertainment Corp*, 2001 CarswellOnt 3893, [2001] OJ No 4252 (Ont SCJ [Commercial List]) [*Playdium 1*], additional reasons 2001 CarswellOnt 4109, [2001] OJ No 4459 (Ont SCJ [Commercial List]).

[6] *Re Nexient Learning*, 2009 CarswellOnt 8071, 2009 OJ No 5507 (Ont SCJ) [*Nexient*].

[7] *Nexient*, *ibid* at para 56.

[8] *Ibid* at para 59.

[9] US *Bankruptcy Code*, 11 USC § 365.

[10] Legislative Summary of Bill C-12, "*An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act* and chapter 47 of the *Statutes of Canada*, 2005" (14 December 2012), online: <https://lop.parl.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?ls=c12&Parl=39&Ses=2&source=library_prb&Language=E#assignment>; Government of Canada, "Summary of Key Legislative Changes in Chapter 47 of the *Statutes of Canada, 2005*, and Chapter 36 of the *Statutes of Canada*, 2007. Available at: <https://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br01782.html>.

[11] *Black Hawk Mining Inc v Manitoba (Provincial Assessor)*, 2002 MBCA 51 at para 82, citing with approval from *Maloney v Campbell*, 1897 CarswellOnt 18, 28 SCR 228 (SCC) at para 11.

[12] *Ford Credit Canada Ltd v Welcome Ford Sales Ltd*, 2010 ABQB 798 [*Ford Credit 1*], affirmed 2011 ABCA 158 [*Ford Credit 2*].

[13] *Ford Credit 1*, *ibid* at paras 57-58.

[14] *Ibid* at para 73.

[15] *Ford Credit 2*, *ibid* at para 50.

[16] *Ibid* at para 54.

[17] *Re Ted Leroy Trucking Ltd*, 2010 SCC 60.

[18] *Ibid* at para 70.

[19] *Re Veris Gold Corp*, 2015 BCSC 1204.

[20] *Ibid* at para 58.

[21] *1455202 Ontario Inc v Welbow Holdings Ltd*, 2003 CarswellOnt 1761 (Ont SCJ) at para 9; *1550988 Ontario Ltd v Burnford Realty Ltd*, 2017 ONSC 2582 (Ont SCJ), additional reasons 2017 ONSC 4407, 2017 CarswellOnt 11107 (Ont SCJ); *Suncor Energy Products Inc v 2054889 Ontario Ltd*, 2010 ONSC 6159 (Ont SCJ [Commercial List]), additional reasons 2010 ONSC 7112, 2010 CarswellOnt 9957 (Ont SCJ [Commercial List]).

[22] *Playdium 1*, *supra* note 5 at para 31.

[23] *Re Hayes Forest Services Ltd*, [2009] BCJ No 1725 (BCSC); *Ford Credit 1*, *supra* note 11.

[24] *Exxonmobil Canada Energy v Novagas Canada Ltd*, 2002 ABQB 455.

[25] *Ibid* at para 54.

[26] *CCAA*, *supra* note 2, s 11.3(4). An almost identical provision is contained at s 84.1(5) of the *BIA*, *supra* note 2.

[27] *Playdium 1*, *supra* note 5 at para 29.

[28] *Re Golftown Canada Holdings Inc* (27 October 2016), Doc CV-16-11527-00CL (Ont SCJ [Commercial List]) Assignment Order; *Re TBS Acquireco Inc*, 2013 ONSC 4663 (Ont SCJ [Commercial List]) at para 24.

[29] *Nexient*, *supra* note 6 at para 59.

[30] US *Bankruptcy Code*, 11 USC.

[31] *In re Empire Equities Capital Corp*, 405 BR 687, 690-91 (Bankr SDNY, 2009).

[32] *In re Joshua Slocum*, 922 F2d 1081, 1092 (3d Cir, 1990).

[33] US *Bankruptcy Code*, 11 USC § 365(f)(1).