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COURT COURT OF KING'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY

APPLICANT CROWN CAPITAL PARTNER FUNDING LP, by its manager,  
CROWN PRIVATE CREDIT PARTNERS INC.

RESPONDENT RBEE AGGREGATE CONSULTING LTD.

DOCUMENT **BRIEF OF LAW OF THE RECEIVER**

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## PART I - INTRODUCTION & OVERVIEW

1. This Brief of Law is filed in support of an application (the "**Application**") before the Court of King's Bench of Alberta, made by FTI Consulting Canada Inc., in its capacity as the receiver (the "**Receiver**") of RBee Aggregate Consulting Ltd. ("**RBee**").
2. The Application seeks an order:
  - a) declaring that the Unpaid Invoices (defined below) are due, owing, and payable by RMC Construction Materials Inc. ("**RMC**", together with RBee, collectively, the "**Parties**");
  - b) directing RMC to pay the Receiver the amount of \$4,485,480.64 plus interest for services rendered prior to the date of the Receivership Order;
  - c) costs of the Application; and
  - d) such further and other relief as this Honourable Court may deem just.
3. Capitalized terms not otherwise defined herein having the meanings ascribed to them in the Fifth Report of the Receiver dated October 28, 2022 (the "**Receiver's Report**").

### A. Overview

4. RBee was in the business of washing and crushing gravel on various construction sites across Alberta and British Columbia. RBee's operations were seasonal, running from approximately April to October each year.<sup>1</sup> Prior to the Appointment Date, RBee was operated by Bernie Reed ("**Mr. Reed**").
5. RBee and RMC were parties to an aggregate supply agreement dated May 7, 2018 (the "**Supplier Agreement**") whereby RBee supplied RMC with washed and crushed aggregate (the "**Aggregate**" or the "**Product**") for concrete production for the GSS Work (defined below) on the Site C Project (defined below) between 2018 and 2021<sup>2</sup> (the "**Service Period**").<sup>3</sup>
6. During the Service Period, there was a regular pattern of payment of RBee's invoices. RBee issued, and RMC paid, approximately 35 invoices throughout the Service Period.<sup>4</sup>

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<sup>1</sup> First Receiver's Report at para 11.

<sup>2</sup> For clarity, throughout this brief of law, "Aggregate supplied" refers to the aggregate that was washed and crushed by RBee pursuant to the Supplier Agreement.

<sup>3</sup> A detailed ledger of the invoices issued by RBee and paid by RMC during the Service Period is attached to the Receiver's Report at Appendix "B".

<sup>4</sup> Receiver's Report at para 21 and Appendix "B".

7. The reported accounts receivable of RBee at the Appointment Date included \$4,485,480.64 plus accrued interest due from RMC (collectively, the "**Outstanding Amounts**"). The Outstanding Amounts relate to three outstanding invoices for Product supplied and services performed by RBee for RMC during September, October and December 2021 (collectively, the "**Unpaid Invoices**").<sup>5</sup>

8. On March 15, 2022 (almost five months after the last supply of Aggregate by RBee under the Supplier Agreement), RMC informed the Receiver that it had recently become aware that RBee had undersupplied over the course of the Supplier Agreement (the "**Initial Call**").<sup>6</sup> RMC refused to pay the Outstanding Amounts and informed the Receiver that RMC intended to assert a set-off claim against the Outstanding Amounts (the "**Set-Off Claim**").<sup>7</sup>

9. The Receiver has attempted to resolve the dispute in good faith. However, despite attempts between March 15, 2022 and the date the Application was filed to resolve the matter consensually, RMC failed to provide to the Receiver with sufficient information to support its Set-Off Claim. It appears to the Receiver that RMC's dispute does not relate specifically to the Unpaid Invoices (though RMC has now alleged that amounts relating to the December 2021 Unpaid Invoice are not properly owed in accordance with the Supplier Agreement). Rather, the Set-Off Claim relates to RBee's supply of Aggregate throughout the duration of the Service Period.<sup>8</sup>

10. To support the Set-Off Claim, RMC has attempted to reconstruct the historical supply of Aggregate to the Project (defined below) through information that either was not intended for such purposes, is unreliable for such purposes, or which relates to use of Aggregate after risk of loss had transferred to RMC. While the information provided serves RMC's purposes, it is not reliable and should not be favoured by this court to the detriment of creditors of RBee's estate.

## PART II - FACTS

### A. Background

11. After the Appointment Date, management of RBee informed the Receiver that it was common industry practice for customers such as RMC to delay making payments of invoices at the end of a crushing season in order to gain leverage when negotiating contract terms with RBee for the following crushing season, and that they anticipated that the Unpaid Invoices would be paid by RMC.<sup>9</sup>

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<sup>5</sup> Receiver's Report at para 5.

<sup>6</sup> Receiver's Report at para 29.

<sup>7</sup> Receiver's Report at paras 28-29.

<sup>8</sup> Receiver's Report at para 25.

<sup>9</sup> Receiver's Report at para 27.

12. After the Initial Call and RMC's indication of its concerns regarding RBee's supply of aggregate under the Supplier Agreement, in good faith, the Receiver requested documentation to support RMC's alleged Set-Off Claim. Nearly a month later, RMC provided the Receiver with a "reconciliation" RMC prepared (collectively, the "**2021 Product Reconciliation**") that relied on: (a) information relating to a survey performed by AFDE on October 31, 2021 (the "**2021 AFDE Survey**") which was completed by AFDE for other purposes, and (b) data recorded by RMC's computerized batching system (the "**Batch Records**") that RMC claims calculates the amount of Aggregate used in the production of concrete. After reviewing the Supplier Agreement and the 2021 Product Reconciliation, the Receiver was of the view that there was not sufficient evidence to support RMC's Set-Off Claim.<sup>10</sup> As a result, the Receiver remained of the view that the Outstanding Amounts were properly owing by RMC to RBee.

13. Over the course of the Receivership, the Receiver has realized on all of the assets of RBee with the exception of the RMC Claim (the subject of this Application) and certain other litigation claims, including a sale of the machinery and equipment located at the Site C Project (defined below) to A-1 Quality Belting Ltd, ("**A-1**").<sup>11</sup> Interim distributions have been made to RBee's secured creditors, and it is expected that RBee's only remaining secured creditor, Crown Capital Partner Funding LP, by its manager, Crown Private Credit Partners Inc., will incur a substantial shortfall on the remaining amounts it is owed which are in excess of \$20 million.<sup>12</sup>

## **B. The Project**

14. Work completed under the Supplier Agreement was performed in relation to a major infrastructure construction project (the "**Site C Project**") owned by British Columbia Hydro and Power Authority ("**BC Hydro**"). RBee's work was performed on a portion of the Site C Project called "Generating Stations Spillway work" ("**GSS Work**", or the "**Project**"). AFDE is the prime contractor in relation to the Project, who engaged RMC to supply concrete for the Project.<sup>13</sup>

15. Aggregate is a key component of concrete.<sup>14</sup> As such, RMC engaged RBee to supply the Aggregate to RMC on the Project pursuant to the terms of the Supplier Agreement, a copy of which

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<sup>10</sup> Receiver's Report at paras 30-40.

<sup>11</sup> Receiver's Supplemental Report dated January 20, 2023 at paras 2 and 13 (the "**Receiver's Supplemental Report**").

<sup>12</sup> Receiver's Supplemental Report at para 2.

<sup>13</sup> Transcript of Questioning of Scott Marshall held on January 11, 2023 at page 12, lines 15-24 (the "**Marshall Questioning**").

<sup>14</sup> Marshall Questioning, page 11, line 27 to page 12, line 2.

is attached as Appendix "A" to the Receiver's Report. During the Service Period, RBee was the only supplier of Aggregate in relation to the Project.<sup>15</sup>

16. The Site C Project, including the GSS Work, has experienced delays and cost overruns.<sup>16</sup> Work on the Project, including concrete production and aggregate supply, is expected to continue until the end of 2023.<sup>17</sup> Additionally, the amount of concrete initially required for the GSS Work has increased since the GSS Work began.<sup>18</sup>

### C. The Supplier Agreement

17. Certain key terms of the Supplier Agreement relating to the dispute are as follows:

- a) The Aggregate was to be delivered to RMC at a location on the GSS Work site stipulated in the Supplier Agreement (the "**Stockpile**"), at which point the risk of loss transferred to RMC;<sup>19</sup>
- b) Each provision of the Aggregate was to be invoiced separately, and RMC was required to pay each invoice no later than sixty days from the date of the invoice;<sup>20</sup>
- c) RMC had a right to verify the volume of Products delivered by RBee (the "**Verification Rights**"), and a certification was to emanate from RMC or its designates within 60 days of delivery. RBee's entitlement to payment was based on such Verification Rights and the other terms of the Supplier Agreement;<sup>21</sup>
- d) Unpaid amounts accrued interest at 12% per annum;<sup>22</sup>
- e) The Supplier Agreement superseded all prior agreements between the Parties (the "**Entire Agreement Clause**"), and the Supplier Agreement could only be modified through written agreement between the Parties;<sup>23</sup> and
- f) RBee was required to deliver to RMC a performance bond to guarantee its performance under the Supplier Agreement.

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<sup>15</sup> Transcript of Questioning of Nicholas Burak held on January 11, 2023 at page 17, lines 16 to 25 (the "**Burak Questioning**").

<sup>16</sup> Burak Questioning at page 12, lines 11-14.

<sup>17</sup> Marshall Questioning at page 13, lines 1-13.

<sup>18</sup> Marshall Questioning at page 14, lines 7-18.

<sup>19</sup> Section 9 of the Supplier Agreement, Appendix "A" of the Receiver's Report.

<sup>20</sup> Section 5 of the Supplier Agreement, at Appendix "A" of the Receiver's Report.

<sup>21</sup> Section 5 of the Supplier Agreement, at Appendix "A" of the Receiver's Report.

<sup>22</sup> Section 7 of the Supplier Agreement, at Appendix "A" of the Receiver's Report.

<sup>23</sup> Section 26 and 27 of the Supplier Agreement, at Appendix "A" of the Receiver's Report.

18. RMC did not exercise Verification Rights with respect to the Unpaid Invoices or at all throughout the term of the Supplier Agreement. RMC alleges that the Parties had always intended to complete a final verification of Products delivered to the Project upon the completion of the Project, similar to other projects the Parties had worked on.<sup>24</sup> However, in questioning, Mr. Nicholas Burak (Chief Financial Officer and Vice President of RMC) stated that RMC had not worked with RBee prior to entering into the Supplier Agreement. The only other contract between RMC and RBee was entered into in 2019 (after the Supplier Agreement), and was an ongoing supply agreement in respect of RMC's main operation in Drayton Valley, and was not specific to any particular construction project.<sup>25</sup>

19. The Supplier Agreement also required that RBee provide a performance bond.<sup>26</sup> A performance bond was issued by Western Surety Company at the outset of the Project in respect of RBee's performance under the Supplier Agreement.<sup>27</sup> RBee and Mr. Reed (RBee's principal) entered into an indemnity agreement with Western Surety Company, that appears to support the performance bond.<sup>28</sup> RMC has not made a claim under the performance bond.<sup>29</sup>

#### **D. The Outstanding Amounts and Unpaid Invoices**

20. The September 2021 Unpaid Invoice relates solely to Aggregate supplied to the Project.<sup>30</sup> The October 2021 Unpaid Invoice includes Aggregate supply and approximately \$445,000 in respect of hauling charges.<sup>31</sup> The December 2021 Unpaid Invoice is only in respect of hauling charges. Below is a chart for illustrative purposes:

<u>Invoiced Amounts pursuant to the Unpaid Invoices (before GST)</u>		
Unpaid Invoice	Supply of Aggregate	Hauling Charges
September	\$930,447.00	
October	\$2,733,049.50	\$435,287.28
December		\$173,102.52

<sup>24</sup> Affidavit of Nicholas Burak, sworn on December 23, 2022 at para 13 ( the "**Burak Affidavit**").

<sup>25</sup> Burak Questioning at page 18, line 6 – page 19 line 5.

<sup>26</sup> Section 3 of the Supplier Agreement, at Appendix "A" of the Receiver's Report.

<sup>27</sup> Burak Questioning at page 43, lines 11-14.

<sup>28</sup> Receiver's Supplemental Report at para 5(a).

<sup>29</sup> Burak Questioning at page 43, lines 24-26.

<sup>30</sup> Exhibit "C" of the Receiver's Report at page 38.

<sup>31</sup> Exhibit "C" of the Receiver's Report at page 40.



21. RMC disputes that the December 2021 Unpaid Invoice is owing on the basis that it did not receive sufficient substantiation and verification of the hauling performed in relation to the December 2021 Unpaid Invoice and hauling charges were not the subject matter of the Supplier Agreement.<sup>32</sup> It is not clear to the Receiver whether RMC also disputes the hauling charges that form part of the October 2021 Unpaid Invoice.

22. RMC has not alleged that RBee did not perform the hauling on the Project in relation to the Unpaid Invoices. RMC does not dispute that RBee provided hauling services to RMC historically,<sup>33</sup> or that the previous hauling was also outside of the Supplier Agreement.<sup>34</sup>

23. Further, certain change orders in respect of the Project illustrate that RMC invoiced AFDE for hauling of Aggregate from an area called "Area 24" to its Batch Plants (defined below) during the fall of 2021.<sup>35</sup> The timing of these changes corresponds at least in part, to the Unpaid Invoices which include hauling charges.

#### **E. RMC's Alleged Set-Off Claim in these Receivership Proceedings**

##### **(i) *The Alleged Overbilling***

24. As discussed above, the Receiver was informed during the Initial Call that RMC "had recently" become aware of RBee's overbilling and that it intended to assert the Set-Off Claim against the Outstanding Amounts, contrary to RMC's evidence that it became aware of the alleged overbilling in mid-November of 2021.

25. RMC claims that it was alerted to the alleged overbilling when it discovered that RBee invoiced RMC for more Aggregate than was anticipated under the Supplier Agreement.<sup>36</sup> According to RMC, RBee and RMC agreed that approximately 1,383,000 tonnes of Aggregate (the minimum supply indicated in the Supplier Agreement) would be sufficient to satisfy the concrete production requirements on the Project, but 1,761,480 tonnes of Aggregate were actually invoiced by RBee.<sup>37</sup>

26. There have been delays, design changes, and cost overruns in relation to the Project.<sup>38</sup> Additionally, the Supplier Agreement only contemplated supply of Aggregate through 2020, but RBee supplied Aggregate through to the end of the 2021 season, and concrete production (with

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<sup>32</sup> Burak Affidavit at para 16 and Burak Questioning at page 40 lines 16-23.

<sup>33</sup> Burak Affidavit at para 57.

<sup>34</sup> Burak Questioning at page 40, line 13 – page 41, line 8.

<sup>35</sup> Undertaking 1 at pages 134, 137 and 182-183.

<sup>36</sup> Burak Affidavit at paras 17-18.

<sup>37</sup> Burak Affidavit at paras 17-18.

<sup>38</sup> Burak Questioning at page 12, lines 11-13 and page 74, lines 12-21.

corresponding aggregate supply) is ongoing and expected to continue, at least, until the end of 2023.<sup>39</sup>

27. The minimum volumes set out in the Supplier Agreement did not contemplate changes to the Project and were just that, minimum volumes. The key expectation underlying the Supplier Agreement was "that RBee would supply enough Aggregate to enable RMC to meet its concrete production obligations on the Project".<sup>40</sup>

**(ii) The Stockpile**

28. As discussed above, the Products were required to be delivered by RBee to the Stockpile on the Project, at which point any risk of loss passed to RMC.<sup>41</sup> Within the Stockpile, Aggregate was placed into sub-piles that were based on the size class of the Aggregate.

29. The purpose of the Stockpile was to ensure that there was enough Aggregate available for RMC to produce the concrete it was required to produce for AFDE.<sup>42</sup> Mr. Burak stated in questioning that the Stockpile is "a critical component of the future success of the project".<sup>43</sup>

30. Despite the Stockpile being a critical component of the future success of the Project, RMC did not perform any surveys of the Stockpile. RMC did not undertake any formal steps to monitor the amounts of Aggregate in the Stockpile, other than visual inspection,<sup>44</sup> which as noted by the Receiver, would not be a reliable method for ensuring sufficient supply for concrete production.<sup>45</sup>

31. While the Receiver does not dispute RMC's assertion that the Site C Project is a fully secured location, it is clear from the evidence that the Stockpile itself was not subject to any security and other parties on the Site C Project could physically access the Stockpile.<sup>46</sup> Mr. Burak confirmed that RMC was not present when AFDE accessed the Stockpile for the purposes of the 2021 AFDE Survey<sup>47</sup> and Mr. Marshall, the Project Director for the Site C Project, confirmed that AFDE conducted multiple surveys of the Project and had regular access to the Stockpile.<sup>48</sup>

32. RMC has not produced a pre-survey with respect to the location of the Stockpile prior to RBee commencing work under the Supplier Agreement and neither RMC nor AFDE can speak

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<sup>39</sup> Burak Questioning, page 74 at lines 10-21 and Marshall Questioning at page 13 line 5-13.

<sup>40</sup> Burak Affidavit at para 8.

<sup>41</sup> An aerial view of the Stockpile location is included at Exhibit "C" to Burak's Affidavit.

<sup>42</sup> Burak Questioning at page 23, lines 16-23.

<sup>43</sup> Burak Questioning at page 23, lines 16-23.

<sup>44</sup> Burak Questioning at page 23, line 26 to page 24, line 15.

<sup>45</sup> Receiver's Supplemental Report at para 24(c).

<sup>46</sup> Burak Questioning at page 26, lines 6-23.

<sup>47</sup> Burak Questioning at page 28, lines 20-21.

<sup>48</sup> Marshall Questioning at page 29, lines 15-27.

directly to whether such a pre-survey was obtained. RMC alleges that the ground was "flat" based on a visual inspection.<sup>49</sup> However, as noted by the Receiver, a visual assessment would be insufficient to determine whether there were any dips or slopes on the Stockpile lands, which would be necessary for a survey of the Stockpile to disclose the amount of Aggregate with any level of certainty.<sup>50</sup>

33. Mr. Marshall of AFDE indicated that in his experience, aggregate may be used for other purposes on a project site. For example, aggregate could be required for backfill or sand could be removed and used for sanding purposes.<sup>51</sup>

34. Given the nature and size of the Project, consideration of wasted or lost product over the Service Period should also be considered.<sup>52</sup>

### **(iii) AFDE Surveys**

35. Throughout the Service Period, the Receiver understands that AFDE completed a number of surveys of the Stockpile for quality control purposes.<sup>53</sup> The evidence shows that the AFDE surveys were not performed for billing purposes.<sup>54</sup> The 2021 AFDE Survey was performed for the primary purpose of confirming that there was sufficient Aggregate in the Stockpile to produce the required concrete for the upcoming scheduled construction.<sup>55</sup> In other words, the survey was forward-looking, rather than retrospective.

36. AFDE also used the AFDE surveys to submit advance billings to BC Hydro for anticipated units of concrete to be placed on the Project based on the amount of Aggregate in the Stockpiles, which would later be reconciled with the final units of concrete that were actually placed.<sup>56</sup> For the purposes of the advanced billing, AFDE converted the measurement of the Aggregate in the Stockpile from meters cubed to metric tonnes using a pre-determined density factor (agreed between AFDE and BC Hydro).<sup>57</sup> AFDE was not concerned with the accuracy of the density factors utilized for the advanced billings because the advanced billings would later be reconciled with the final units of concrete that were placed.<sup>58</sup>

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<sup>49</sup> Burak Questioning at page 25, lines 13-18.

<sup>50</sup> Burak Questioning at page 24, line 19 – page 25, line 25.

<sup>51</sup> Marshall Questioning at page 20, lines 13-22.

<sup>52</sup> Receiver's Supplemental Report at para 24(d).

<sup>53</sup> Receiver's Report at Appendix "H", page 63.

<sup>54</sup> Appendix H of the Receiver's Report, at page 63.

<sup>55</sup> Marshall Affidavit at para 7(a).

<sup>56</sup> Marshall Affidavit at para 7(b).

<sup>57</sup> Marshall Questioning at page 35, line 25 – page 36 line 13.

<sup>58</sup> Marshall Questioning at page 36, lines 1-13.

37. AFDE advised that it completed formal surveys of the Stockpile at the end of every crushing season, at a minimum, because it was critical for AFDE to know there was sufficient Aggregate onsite to allow concrete production to continue through the winter until crushing could begin again in the spring.<sup>59</sup>

38. Notably, RMC did not receive copies of any of the surveys performed by AFDE<sup>60</sup> and it is not clear how RMC came to be in possession of the 2021 AFDE Survey.<sup>61</sup> Mr. Marshall indicated that AFDE completed surveys for its own internal purposes.<sup>62</sup>

39. RMC relies on the 2021 AFDE Survey to determine the amount of Aggregate that RMC believes was delivered to the Stockpile by RBee, which purports to measure the amount of Aggregate in each Stockpile in cubic meters.<sup>63</sup> As discussed above, as no pre-survey was completed, the topography of the Stockpile site was never confirmed. As such, the AFDE surveys would not account for any slopes or other dips in Stockpile site. Therefore, in addition to not being completed for the purpose that RMC relies on the 2021 AFDE Survey, the accuracy of the survey information is in question.

**(iv) Density Factor**

40. RMC's calculation of the Aggregate in the Stockpile relies on a "density factor" for each size class of Aggregate in order to convert the amounts set out in the 2021 AFDE Survey from meters cubed to tonnes.<sup>64</sup>

41. In the 2021 Product Reconciliation provided to the Receiver on April 12, 2022, RMC used density factors for each class of Aggregate that they advise were provided by AFDE to calculate the volume of Products measured in the 2021 AFDE Survey.<sup>65</sup> RMC now uses different density factors to calculate the volume of Products measured in the 2021 AFDE Survey. Doing so has resulted in the amount of RMC's alleged Set-Off Claim increasing.<sup>66</sup>

42. Mr. Burak states in his affidavit that RMC commissioned laboratory testing of the densities of the four relevant classes of Aggregate.<sup>67</sup> However, Mr. Burak noted that the laboratory testing was

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<sup>59</sup> Marshall Questioning at page 15, lines 13 to page 16, line 3.

<sup>60</sup> Burak Questioning at page 39, lines 6-8.

<sup>61</sup> Marshall Questioning at page 30, lines 1-15.

<sup>62</sup> Marshall Questioning at page 30, lines 1-15.

<sup>63</sup> Marshall Affidavit at para 7(b).

<sup>64</sup> Burak Affidavit at para 33.

<sup>65</sup> Burak Affidavit at para 34.

<sup>66</sup> Burak Affidavit at para 54-55.

<sup>67</sup> Burak Affidavit at para 34 and Exhibit "F" of Burak Affidavit.

not commissioned for the purposes of this dispute, and that the density testing is intended to be "an estimate".<sup>68</sup>

43. RMC's evidence relating to density factors is from two sets of density testing: the January 2022 testing of the 20-14mm, 14-5mm and concrete sand aggregates from another operation of RMC that was located near Drayton Valley, Alberta (the "**Vogel Pit**"); and the December 2022 testing of the 40-20mm Aggregate from the Stockpile.<sup>69</sup> Therefore, the majority of the aggregate tested was not the Aggregate located on the Project.

44. RMC alleges that the Stockpile and the Vogel Pit will have very similar densities because they are both sourced from river deposit gravel.<sup>70</sup> This contradicts the information provided by Construction Solutions professionals within the Forensic & Litigation Consulting segment of the Receiver's office that the density of aggregate is dependent on where it is located.<sup>71</sup>

**(v) Batch Records**

45. As stated above, RMC was responsible for the Product once it reached the Stockpile, including any risk of loss. RMC asserts that the Batch Records accurately reflect the amount of each class of Aggregate product which it removed from the Stockpile and consumed in its production facilities (the "**Batch Plants**").<sup>72</sup> However, what the Batch Records show is Product consumed in the production of concrete. The Batch Records do not account for the movement of Aggregate from the Stockpile to the Batch Plants, wastage, or any other potential uses of Aggregate on the Project site.

46. RMC's production team was responsible for the movement of Aggregate from the Stockpile.<sup>73</sup> Aggregate was taken from the Stockpile to bins outside the Batch Plant using loaders or rock trucks. From there, the Aggregate was moved by loader to bins inside the Batch Plant before it was ultimately used in production.<sup>74</sup> The Aggregate was not weighed when it was removed from the Stockpile, or as it was moved between bins and into the Batch Plant,<sup>75</sup> and the movement of Aggregate was not documented.<sup>76</sup>

47. RMC's Batch Record data is initially produced in a program called "Marcotte" and, in order to provide the information to the Receiver and its counsel, Mr. Burak converted the data to Microsoft

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<sup>68</sup> Burak Questioning at page 66, line 13 to page 67, line 9.

<sup>69</sup> Burak Affidavit at Exhibit "F" and pages 243-246.

<sup>70</sup> Burak Affidavit at para 36.

<sup>71</sup> Receiver's Supplemental Report at para 24(b).

<sup>72</sup> Burak Affidavit at para 25.

<sup>73</sup> Burak Questioning at page 30, lines 15-17.

<sup>74</sup> Burak Questioning at page 30, line 22 to page 31 line 8.

<sup>75</sup> Burak Questioning at page 31, lines 9-11.

<sup>76</sup> Burak Questioning at page 31, line 25 – page 32, line 6.

Excel format. The Excel spreadsheet provided to counsel to the Receiver RMC contains over 58,000 rows of data and over 1.4 million individual data points. RMC asserts that the data is exactly the same regardless of format. When questioned on this point, Mr. Burak indicated that RMC had verified a sample of the data, but said he did not know the size of the sample verified.<sup>77</sup>

#### **F. RMC's Ongoing Relationship with the Former Principal of RBee**

48. RMC provides contradictory evidence in these proceedings on RMC and RBee's past working relationship, and also RMC's continuing relationship with Mr. Reed, RBee's former principal.

49. In support of its conclusion that RMC and RBee understood that a final verification would be completed under the Supplier Agreement, RMC stated in its affidavit evidence that "...as on prior projects for which RBee supplied RMC with Aggregate, RBee understood that RMC would perform one reconciliation at the end of this Project".<sup>78</sup> However, in questioning, Mr. Burak stated that the Supplier Agreement was the first contract between the Parties and there was no relationship between RMC and RBee prior to 2018.<sup>79</sup>

50. Mr. Burak stated in his affidavit evidence that when RMC learned that a new entity involving Mr. Reed, A-1, had purchased the equipment previously owned by RBee on the Project site, RMC made the decision to engage A-1 to provide the remaining aggregate that was required to meet its obligations to AFDE.<sup>80</sup> By contrast, in questioning, Mr. Burak stated that RMC does not contract with A-1, and that the remaining aggregate was supplied by a company called "Paragon". Mr. Burak later confirmed that RMC does in fact have a contract with A-1 in respect of the Project when he was presented with his affidavit evidence.<sup>81</sup>

51. Subsequently, RMC informed the Receiver that "Paragon" is 2128222 Alberta Ltd., operating as Paragon Custom Crushing ("**212 Alberta**").<sup>82</sup>

52. Mr. Reed is the owner and sole director of both 212 Alberta and A-1.<sup>83</sup> Mr. Burak also confirmed that the pricing of aggregate under RMC's contract with A-1 is the same as under the Supplier Agreement.<sup>84</sup> As such, Mr. Reed continues to operate the same equipment on the Project

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<sup>77</sup> Burak Questioning at page 51, lines 11-26.

<sup>78</sup> Burak Affidavit at para 13.

<sup>79</sup> Burak Questioning at page 18, lines 3-8.

<sup>80</sup> Burak Affidavit at para 63.

<sup>81</sup> Burak Questioning at page 73, lines 5-13.

<sup>82</sup> Undertaking 11.

<sup>83</sup> Receiver's Supplemental Report at paras 14 and 16.

<sup>84</sup> Undertaking 9.

site, under a new contract with the same economic terms as the Supplier Agreement, through his wholly owned company.

53. Mr. Reed did not respond to the Receiver's request to comment on RMC's evidence filed in respect of this Application.<sup>85</sup>

### **PART III - ISSUES**

54. The issues before this court are as follows:

- a) Are the Outstanding Amounts due and payable?
- b) Does RMC have a valid Set-Off Claim that may be set off against the Outstanding Amounts?
  - (i) If so, is RMC's Set-Off Claim barred in whole or in part by the *Limitations Act*?

### **PART IV - LAW AND ANALYSIS**

55. Based on the Receiver's review of the books and records of RBee and also the course of conduct of the Parties prior to the Appointment Date, the Unpaid Invoices were properly issued and the Outstanding Amounts are due and payable. The September 2021 and October 2021 Unpaid Invoices clearly relate to work performed by RBee pursuant to the Supplier Agreement.

56. Additionally, while the December 2021 Unpaid Invoice appears to be in relation to hauling charges, which are not provided for in the Supplier Agreement, there is evidence before this court that RBee had performed hauling services for RMC in respect of the Project previously, and those amounts were paid by RMC.

57. RMC and RBee worked together in relation to the Supplier Agreement for four aggregate crushing seasons. Throughout the Service Period, RMC demonstrated a pattern of payment of approximately 35 invoices without further verification. RMC did not rely on the Verification Rights that were afforded to it through the Supplier Agreement and is thus barred from challenging the Unpaid Invoices.

58. It was only once the Receiver was appointed that RMC alleged any overbilling in relation to the Supplier Agreement. This court should not permit RMC to unwind the express language contemplated in the Supplier Agreement to validate its tenuous claim that RBee overbilled RMC.

59. To successfully assert the Set-Off Claim, RMC must prove to this court that RBee supplied

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<sup>85</sup> Receiver's Supplemental Report at para 25.

less Product than the amount for which it invoiced RMC over the course of the Supplier Agreement resulting in the overpayment alleged by RMC. RMC's evidence is both deficient and unreliable, and does not support this conclusion.

**A. The Outstanding Amounts are Due and Payable**

60. The Supplier Agreement governed the relationship between the Parties in relation to RBee's supply of Aggregate. It was the only written agreement between the Parties.<sup>86</sup> Pursuant to the Entire Agreement Clause, the Supplier Agreement governed the terms of the contractual relationship between RMC and RBee in relation to RBee's supply of Aggregate.

61. Contractual interpretation requires the court to read the contract as a whole, giving the words used their ordinary and grammatical meaning.<sup>87</sup> The goal of contractual interpretation is to determine the objective intent of the Parties at the time the contract was made while considering the factual matrix.<sup>88</sup>

62. The Receiver is not aware of any relevant evidence that contributes to the factual matrix surrounding the circumstances in which RMC and RBee entered into the Supplier Agreement. The allegations by RMC as to the expectations of the Parties at the time of entering into the Supplier Agreement should not be considered by the court, as the reliability of the evidence is in question. For example, despite RMC's affidavit evidence to the contrary, the Supplier Agreement was the first contract between the Parties.<sup>89</sup>

**(i) RMC Failed to utilize the Verification Rights Provided in the Supplier Agreement.**

63. As discussed above, the Site C Project is a major infrastructure project in British Columbia and the GSS Work began in 2018 and continues into 2023. RMC was responsible for the Aggregate once it was delivered to the Stockpile, including any risk of loss.<sup>90</sup>

64. The Verification Rights set out a mechanism by which RMC could, in a timely manner, verify the amount of Aggregate that was actually delivered to the Stockpile. The verification clause of the Supplier Agreement stated that verification of Products delivered would emanate from RMC or its designates within sixty days of delivery, and that RMC's payment of the invoices would be subject to this verification.

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<sup>86</sup> Burak Questioning at page 14, lines 15-17.

<sup>87</sup> *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 ("**Sattva**") at paras 47-48.

<sup>88</sup> *IFP Technologies (Canada) Inc v EnCana Midstream and Marketing*, 2017 ABCA 157 ("**IFP**") at paras 79-81.

<sup>89</sup> Burak Questioning at page 18, lines 3-13.

<sup>90</sup> Section 9 of the Supplier Agreement, at Appendix "A" of the Receiver's Report.



65. Despite being a crucial component of RMC's work on the Project, and an express term of the Supplier Agreement, RMC chose not to rely upon its Verification Rights with respect to RBee's invoices, and over the course of four crushing seasons, paid those invoices in the normal course.<sup>91</sup> In addition to not being a term of the Supplier Agreement, RMC's assertion that RMC and RBee always intended to complete a final verification is not compelling for two further reasons: (a) the Supplier Agreement was the first contract between RMC and RBee,<sup>92</sup> and (b) none of the other projects that RMC and RBee had worked on together were of the size and scope of the Site C Project.<sup>93</sup>

66. Section 18 of the Supplier Agreement provides that in the event of any termination of the Supplier Agreement, RBee would be limited to payment for Product actually delivered and verified up to the date of termination. However, in this case, the Supplier Agreement was never terminated by either Party. Therefore, section 18 is not applicable, and no verification has occurred under the Supplier Agreement.

67. Even if the Supplier Agreement could be read to include the implied term that there would be a final reconciliation at the completion of the Project, as RMC alleges and which the Receiver refutes, RBee became insolvent prior to the end of the Project, and work continues and is expected to continue until the end of 2023. Therefore, it is not possible to complete a precise final reconciliation that determines the amount of Aggregate that was delivered by RBee to the Project.

**(ii) Case Law on Verification Clauses supports the Receiver's Position**

68. RMC failed to exercise its Verification Rights in accordance with the Supplier Agreement. As a result, it is now estopped from exercising or attempting to exercise other, similar rights. RMC should not be rewarded by this court for failing to exercise the Verification Rights which it expressly negotiated with RBee as sophisticated parties in the commercial construction context. As a result, the September 2021 and October 2021 Unpaid Invoices are properly due and payable. This position is consistent with case law.

69. For example, In *Paradigm Holdings Ltd v Ngan & Siu Investments Co ("Paradigm")*, the parties had a contract for the purchase and sale of two units owned by the seller to the buyer.<sup>94</sup> According to the sales contract, the purchase price was calculated based on a combined square footage of 3,200, which was to be verified by the buyer.<sup>95</sup> If there was a discrepancy, the purchase

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<sup>91</sup> Burak Affidavit at para 12.

<sup>92</sup> Burak Questioning at page 18, lines 3-8.

<sup>93</sup> Burak Questioning at page 70, lines 12-15.

<sup>94</sup> *Paradigm Holdings Ltd v Ngan & Siu Investments Co*, 2008 BCCA 172 at para 1 ("**Paradigm**").

<sup>95</sup> *Paradigm* at para 7.

price was to be adjusted according to the actual size of the combined units registered as per strata plans.<sup>96</sup> After the execution of the sale contract, it became apparent that the units were actually smaller than 3,200 square feet.<sup>97</sup> On the closing date, the buyer attempted to complete the sale with a purchase price adjustment reflecting a combined square footage based on the information in the strata plan, and the seller demanded the full purchase price to close. The buyer commenced an action for specific performance.<sup>98</sup>

70. The trial judge held that the buyer was entitled to specific performance of the contract at the reduced purchase price.<sup>99</sup> However, on appeal, the British Columbia Court of Appeal held that since the buyer did not attempt to verify the area prior to the completion date, the adjustment clause was not triggered and the buyer was not entitled to take the position that the purchase price had been reduced.<sup>100</sup>

71. In the banking context, the Supreme Court of Canada held that a customer's failure to verify their statements of account with their bank within the prescribed time period in a verification clause was a complete defence to any claims against the bank.<sup>101</sup> In *Arrow Transfer Co v Royal Bank*, a customer had received the statements and relevant vouchers necessary for verification, but failed to do so, and later discovered certain forged cheques which had been cashed against their account.<sup>102</sup> The account agreement between the customer and their bank provided that, at the end of the stipulated period, the statements as kept by the bank were conclusive evidence as to the correctness of the account. The court held that the customer had no recourse as against the bank with respect to the forged cheques that were cashed against their account.

72. The Verification Rights set out in the Supplier Agreement provided a 60-day period within which RMC had the right to verify the Products delivered, and provided RMC with the ability to withhold payment until it performed verification. RMC failed to exercise the Verification Rights at any time during RBee's performance under the Supplier Agreement. Similar to the buyer in *Paradigm* and the customer in *Arrow*, RMC elected not to exercise its contractual rights. As a result, RMC should be bound by the provisions of the Supplier Agreement and the Unpaid Invoices and be required to make payment to the Receiver.

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<sup>96</sup> *Paradigm* at para 7.

<sup>97</sup> *Paradigm* at paras 8-10.

<sup>98</sup> *Paradigm* at paras 12-13.

<sup>99</sup> *Paradigm* at para 1.

<sup>100</sup> *Paradigm* at para 20.

<sup>101</sup> *Arrow Transfer Co v Royal Bank*, [1972] SCR 845 (BC), 1972 CarswellBC 103 at paras 2, 7, 13 ("**Arrow**").

<sup>102</sup> *Arrow* at para 13.

73. If the court finds that RMC is precluded from challenging the September 2021 and October 2021 Unpaid Invoices in respect of Aggregate supply, the analysis ends here, as RMC would not be entitled to assert any amounts are owing in order to it to support its alleged Set-Off Claim.

**(iii) December Hauling Invoice**

74. RMC admits that RBee had previously performed hauling in respect of the Project, and that RMC paid for those services.<sup>103</sup> Further, RMC has not disputed that the hauling in the October 2021 and December 2021 Unpaid Invoices was performed. In fact, change orders produced by RMC in response to undertakings to given at Mr. Burak's questioning show that RMC invoiced AFDE with respect to hauling aggregate from an area known as Area 24 to its Batch Plants during the fall of 2021.<sup>104</sup> Additionally, an e-mail exchange among RMC, RBee, and AFDE, in the fall of 2021 supports the fact that hauling was completed by RBee at that time.<sup>105</sup>

**B. RMC does not have a Valid Set-Off Claim that may be set off against the Outstanding Amounts**

75. If the court is persuaded that RMC retains certain rights of verification outside of the specific terms of the Supplier Agreement, RMC has the positive burden to persuade this court that RBee did not deliver the Aggregate under the Supplier Agreement to the extent of its invoices. The Receiver's position is that RMC has not met that burden and cannot prove to this court on a balance of probabilities that it was overbilled by RBee to the extent of its alleged Set-Off Claim, or at all.

76. RMC states that it was alerted to the alleged overbilling when it realized that RBee had invoiced RMC for amounts in excess of the amounts anticipated under entire the Supplier Agreement.<sup>106</sup> However, this does not logically support the conclusion that RBee overbilled for two reasons.

- a) First, it is not in dispute that RBee supplied at least 1,250,044 tonnes of Aggregate through the 2018 through 2021 seasons,<sup>107</sup> which amounts to approximately 90% of the total minimum Aggregate supply as set out in Schedule "B" of the Supplier Agreement. Further, RMC has stated that approximately 480,000 tonnes of aggregate was supplied in the 2022 season.<sup>108</sup> RMC does not dispute that at least 1,730,044 tonnes of Aggregate have been supplied in relation to the Project, which

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<sup>103</sup> Burak Questioning at page 40, line 19 to page 41, line 8.

<sup>104</sup> Undertaking 1 at page 182.

<sup>105</sup> Receiver's Supplemental Report at para 22 and Appendix "F".

<sup>106</sup> Burak Affidavit at para 17.

<sup>107</sup> Burak Affidavit at Exhibit "E".

<sup>108</sup> Undertaking 10 response.

amounts to approximately 125% of RMC's initial estimate of aggregate production. The supply of aggregate will also continue into 2023.

- b) Second, the Supplier Agreement set out the minimum Aggregate production, and that those figures were not an actual or valid estimate of Aggregate needed for the Project. The fact that Aggregate is expected to continue to be supplied until the end of 2023 further supports the view that the amounts set out in Schedule "B" to the Supplier Agreement were intended to be minimums, not an estimation of total Aggregate required for the Project.

77. In its evidence before this court, RMC purports to calculate the amount of Aggregate RBee supplied under the Supplier Agreement based on two sources: the Batch Records and the 2021 AFDE Survey.<sup>109</sup> As set out below, and separate from the question of reliability of the raw data, these two sources do not provide the court with the entire context and detail necessary to support RMC's claim.

**(i) RMC's Evidence is not Sufficient to Determine the Amount of Aggregate delivered to the Stockpile**

***Batch Records***

78. As discussed above, RMC's Batch Records reflect the amount of Aggregate that is used in RMC's production of concrete. It effectively measures the amount of Aggregate that goes over the scales in the production of concrete for the Project. It does not account for the movement of Aggregate from the Stockpile, to the Batch Plants or otherwise.

79. Risk of loss transfers to RMC once Aggregate is delivered to the Stockpile, not at the time Aggregate is used in production. As such, without sufficient documentation relating to the movement of Aggregate from the Stockpile, RMC's Batch Records do not conclusively determine the amount of Aggregate that was removed from the Stockpile for any purpose.

***2021 AFDE Survey***

80. The 2021 AFDE Survey was intended for forward-looking purposes and was not prepared for or intended for use by RMC for any purpose. AFDE relied on the 2021 AFDE Survey to ensure there was sufficient Aggregate in the Stockpile for future needs, and utilized a theoretical density factor to estimate the amount of Aggregate that would be available for concrete production on the Project. The 2021 AFDE Survey was not intended to provide retrospective evidence of the amount

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<sup>109</sup> Burak Affidavit at para 47.

of Aggregate that had been delivered to the Stockpile throughout the Service Period. Therefore, it cannot be relied upon to adequately or appropriately quantify the Aggregate delivered over the four-year period in which RBee supplied Aggregate to the Project. Even if the 2021 AFDE Survey could be relied upon for the purposes set forth by RMC, there is no evidence relating to a pre-survey to determine the topography of the site where the Stockpile is located prior to Aggregate being delivered to the Stockpile, which is crucial to ensuring the accuracy of the 2021 AFDE Survey. Visual inspection that the Stockpile site was "flat" is insufficient for this purpose.<sup>110</sup>

### ***Density Factors***

81. Even setting aside the quality and value of the 2021 AFDE Survey for the purposes RMC attempts to rely upon it, in order to take the information from that survey and compare it against RBee's invoiced supply of Aggregate, an accurate density factor must be applied to convert the 2021 AFDE Survey information from meters cubed into metric tonnes. There is no conclusive evidence before the court (and, in fact the evidence before the court is both inconclusive and contradictory) that confirms the appropriate or accurate density factor relating to the Aggregate on the Stockpile.

82. RMC's evidence relating to density factors is not reliable. The majority of the density testing was not completed on the Aggregate in question, it was completed on aggregate sampled from RMC's main operations in Alberta. Despite Mr. Burak's testimony to the contrary, the density of aggregate can vary drastically depending on where it is sourced.<sup>111</sup>

83. In order to verify the density factor relating to the various Aggregate sizes on the Stockpile, RMC would have had to conduct contemporaneous density testing of the Aggregate actually delivered to the Stockpile. There is no reason why RMC could not have done this. In fact, Mr. Burak stated in questioning that RMC completes density testing regularly.<sup>112</sup>

84. RMC's reliance on the 2021 AFDE Survey and the application of a density factor is nothing more than an estimate, and should not be relied upon by this court in these circumstances, particularly since RMC had Verification Rights under the Supplier Agreement, which would have confirmed quantities of Aggregate supplied, that it failed to rely upon.

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<sup>110</sup> Receiver's Supplemental Report at para 24(a).

<sup>111</sup> Receiver's Supplemental Report at para 24(b).

<sup>112</sup> Burak Questioning at page 66, line 27 to page 67, line 3.

**C. Even if RMC is able to assert its Set-Off Claim, such a claim is at least partially barred by the Limitations Act**

85. Claims in respect of certain invoices issued by RBee are statute-barred by a limitation defence. Although section 33 of the Supplier Agreement states that the contract is governed by British Columbia law, section 12(1) of the *Limitations Act*, RSA 2000, c L-12 (the "**Act**") displaces the words of the contract.

86. Section 12 of the *Act* states:

- (1) the limitations law of Alberta applies to any proceeding commenced or sought to be commenced in Alberta in which a claimant seeks a remedial order;
- (2) notwithstanding subsection (1), where a proceeding referred to in subsection (1) would be determined in accordance with the law of another jurisdiction if it were to proceed, and the limitations law of that jurisdiction provides a shorter limitation period than the limitation period provided by the law of Alberta, the shorter limitation period applies [Emphasis added].<sup>113</sup>

87. These proceedings were commenced by Crown Capital Partner Funding LP in the Court of Queen's Bench of Alberta (as it then was) at Calgary on March 7, 2022. Section 8 of British Columbia's *Limitation Act*, SBC 2012, c 13, prescribes a 3-year limitation period which is longer than the 2-year limitation period in section 3(1)(a) of the *Act*.<sup>114</sup> Therefore, the adjudication of disputes arising from RBee's receivership are subject to the *Act*.

88. Section 3(1)(a) of the *Act* states that "...a claimant must seek a remedial order within 2 years after the date on which the claimant first knew, or in the circumstances ought to have known:

- (i) that the injury for which the claimant seeks a remedial order had occurred;
- (ii) that the injury was attributable to conduct of the defendant; and
- (iii) that the injury, assessing liability on the part of the defendant, warrants bringing a proceeding."<sup>115</sup>

89. In *Grant Thornton LLP v New Brunswick*, the Supreme Court of Canada held that a claim is discovered when a plaintiff has actual or constructive knowledge of the material facts upon which a

<sup>113</sup> *Limitations Act*, RSA 2000, c L-12 at s 12(1) (the "**Act**").

<sup>114</sup> *Limitation Act*, SBC 2012, c 13 at s 8.

<sup>115</sup> *Act* at s 3(1)(a). See also *Sun Gro Horticulture Canada Ltd v Abe's Door Service Ltd*, 2006 ABCA 243 at para 11, which distinguishes between an injury and a cause of action.

plausible inference of liability on the defendant's part can be drawn.<sup>116</sup> In that case, the limitations provision at-issue was analogous to section 3(1)(a) of the Act.<sup>117</sup>

90. The injuries allegedly suffered by RMC are in the form of economic loss.<sup>118</sup> There are two time periods within which RMC should have reasonably discovered the alleged economic loss, either (a) within 60 days of the issuance of each invoice, based on the exercise of its Verification Rights, or (b) at the end of each crushing season.

**(i) The Limitations Period Began 60 days after the issuance of each Invoice**

91. If RMC had exercised its Verification Rights, it would have discovered any overbilling that occurred within 60 days of the issuance of the invoice which contained such overbilling. The purpose of the Verification Rights was to allow RMC to determine whether it was being accurately billed for Aggregate delivered to the Stockpile. Had RMC exercised its Verification Rights and discovered overbilling, it would have been obvious that RBee was the cause of RMC's economic loss, as no other entity was delivering Aggregate to the Stockpile or invoicing RMC for Aggregate delivered to the Stockpile.<sup>119</sup> Therefore, RMC ought to have known that any economic loss was attributed to RBee, and sought to commence a proceeding to recover any losses (or simply withheld payment to avoid suffering any damages).

92. The present situation is distinguishable from *Prescott Finishing Inc v Prescott (Town)*. In that case, the plaintiff's claim arising from overpayments was not statute-barred because discoverability required advanced technical knowledge which the plaintiff could not be reasonably expected to have in the context.<sup>120</sup> In contrast, RMC required no such advanced technical knowledge to exercise its Verification Rights. RMC is a sophisticated business party in a commercial construction context who ought to be presumed to have any knowledge required to exercise its Verification Rights under the Supplier Agreement.

93. Any alleged overbilling under any particular invoice was clearly discoverable no later than 60 days after the invoice was issued to RMC, such that section 3(1)(a) of the Act was engaged and the limitation period began.

94. RBee issued invoices throughout the period beginning in July 2018 to December 2021. Ministerial Order 27/2020 suspended the calculation of limitation periods in Alberta for any limitation

<sup>116</sup> *Grant Thornton LLP v New Brunswick*, 2021 SCC 31 at para 42 ("**Grant Thornton**").

<sup>117</sup> *Lafferty v Co-operators General Insurance Co*, 2021 ABCA 359 at para 25; *Grant Thornton* at para 35.

<sup>118</sup> Act at s 1(e).

<sup>119</sup> Marshall Questioning at page 16, lines 15-18.

<sup>120</sup> *Prescott Finishing Inc v Prescott (Town)*, 2010 ONSC 212 at paras 175-176.

period running between March 17, 2020 and June 1, 2020 (the "**COVID Limitation Period Suspension**").<sup>121</sup> As such, limitation periods applicable to the invoices that were issued by RBee between July 2018 and May 2020 are subject to Ministerial Order 27/2020.

95. The first invoice was issued by RBee under the Supplier Agreement on July 31, 2018. As such, any overbilling under that invoice would have been discoverable on or before September 29, 2018 (60 days after issuance). After accounting for the COVID Limitation Period Suspension, the limitation period in respect of the July 31, 2018 invoice expired on December 30, 2020.

96. RMC paid all invoices prior to the September 2021 Unpaid Invoice and did not assert any claim until the April 12 Letter (at the earliest). If RMC ought to have reasonably discovered the alleged overbilling within 60 days after each invoice was issued, after accounting for the COVID Limitation Period Suspension, each invoice issued by RBee up to and including the October 31, 2019 invoice is statute barred.<sup>122</sup>

**(ii) In the alternative, the Limitations Period Began at the End of each Crushing Season**

97. Further and in the alternative, at a minimum, RMC ought reasonably to have discovered the alleged overbilling at the end of each crushing season. RMC adduced evidence that monitoring the Stockpile was critical to ensure there was enough Aggregate to continue concrete production through the winter while RBee's crushing operations were paused.<sup>123</sup> This is why AFDE completed surveys at the end of each crushing season to estimate the amount of Aggregate in the Stockpile.<sup>124</sup> A reasonable party would have discovered any alleged overbilling at the end of each respective crushing season. The final invoices in 2018 and 2019 were issued in October 2018 and November 2019, respectively. After accounting for the COVID Limitation Period Suspension, the limitation period in respect of those invoices would have expired in January 2021 and February 2022, respectively. Therefore, RMC is statute barred from claims respecting invoices relating to the 2018 and 2019 seasons.

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<sup>121</sup> Ministerial Order 27/2020, made under the authority of Order in Council 080/2020, which declared a state of public health emergency in Alberta under section 52.1(1) of the *Public Health Act*, RSA 2000, c P-37.

<sup>122</sup> The October 31, 2019 invoice would have been discoverable on or before December 30, 2019. After accounting for the COVID Limitation Period Suspension, the limitation period in respect of the October 31, 2019 invoice expired on March 15, 2022.

<sup>123</sup> Burak Questioning at page 23, line 26 to page 24 line 15; Marshall Questioning at page 14, lines 23-27.

<sup>124</sup> Marshall Affidavit at para 7(a).



**(iii) *The Limitations Period Undermines the Applicability of RMC's Evidence***

98. Regardless of the date at which RMC is statute barred from claims in relation to the invoices, claims relating to a portion of the invoices are barred. RMC purports to calculate the amounts of Aggregate delivered by RBee between the beginning of work under the Supplier Agreement in 2018 and the end of the 2021 season. RMC's evidence does not calculate the amount of Aggregate delivered pursuant to any specific invoice or time period within the Service Period. As such, if any portion of RMC's Set-Off Claim is statute barred, RMC's evidence provides little assistance in determining the amount of Aggregate delivered during the period in respect of which it may assert its Set-Off Claim.

**D. RMC's continuing Relationship with Mr. Reed**

99. As set out above, despite RMC's allegations of RBee's overbilling in the amount of over \$7 million dollars, Mr. Reed continues to work with RMC through his other companies A-1 and 212 Alberta, including in respect of the same work that RBee performed under the Supplier Agreement. Mr. Burak confirmed in questioning that RMC did not seek any compensation or relief from A-1 in relation to RBee's alleged overbilling on the Project, despite RMC's belief that Mr. Reed is the principal of A-1 and was the principal of RBee.<sup>125</sup> RMC ignores the alleged overbilling by RBee in respect of its relationship with Mr. Reed's companies, but seeks to short-change the Receivership estate to the detriment of RBee's creditors for the same alleged amounts.

**PART V - CONCLUSION**

100. The Receiver submits that the Outstanding Amounts are properly due and payable by RMC. RMC and RBee worked together in relation to the Supplier Agreement for four aggregate crushing seasons. Throughout the Service Period, RMC and RBee demonstrated a pattern of payment of approximately 35 invoices without further verification. It was only after the Appointment Date that RMC alleged any overbilling with respect to the Supplier Agreement.

101. RMC failed to rely on the Verification Rights that were afforded to it under the Supplier Agreement, and should be barred from challenging any invoices issued by RBee during the Service Period. Through the Set-Off Claim, RMC seeks to override express contractual terms between the Parties and to reconstruct the Parties' performance under the Supplier Agreement over a four-year period.

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<sup>125</sup> Burak Questioning at page 75, lines 23 to page 76, line 4.

102. RMC has not met its burden to prove its Set-Off Claim. It has provided this court with an inadequate and unreliable analysis, as the evidence provided by RMC does not prove the amount of Aggregate actually delivered to the Stockpile. It is an oversimplification of the realities on the Project. RMC was invoiced for amounts delivered to the Stockpile. There was no documentation of the movement of aggregate from the Stockpile to the Batch Plants or anywhere else on the Project. The 2021 AFDE Survey does not show the volume of aggregate delivered to the Stockpile, it only demonstrates a point in time measurement of the stockpiles, and based on the evidence of Mr. Marshall of AFDE, it was conducted for other purposes. RMC seeks to impose density factors on the Stockpile that, in the majority, relate to aggregate from a completely different geographic location. In summary, RMC's evidence is severely deficient, and it has not met the necessary burden to establish its Set-Off Claim.

103. Even if RMC and RBee had intended to complete a final reconciliation at the end of the Project, RBee's insolvency intervened. Given that supply of aggregate continued through 2022 and is expected to continue until the end of 2023, it is impossible to reliably complete such a final reconciliation.

104. Alternatively, even if RBee overbilled RMC during a portion of the Supplier Agreement, RMC is statute barred from claims relating to at least a portion of the invoices. Based on the evidence before the court, it is impossible to determine under which invoices, if any, the overbilling occurred.

105. The Receiver seeks an order of this court declaring that the Unpaid Invoices are valid and that the Outstanding Amounts are due and payable to the Receiver for the benefit of RBee's creditors.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20<sup>th</sup> day of January, 2023.

**BLAKE, CASSELS & GRAYDON LLP**



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Kelly J. Bourassa / Jessica MacKinnon  
Counsel for the Applicant

### Table of Authorities

1. *Sattva Capital Corp v Creston Moly Corp*, [2014 SCC 53](#)
2. *IFP Technologies (Canada) Inc v EnCana Midstream and Marketing*, [2017 ABCA 157](#)
3. *Paradigm Holdings Ltd v Ngan & Siu Investments Co*, [2008 BCCA 172](#)
4. *Arrow Transfer Co v Royal Bank*, [\[1972\] SCR 845 \(SCC\)](#), 1972 CarswellBC 103
5. *Limitations Act*, [RSA 2000, c L-12](#)
6. *Sun Gro Horticulture Canada Ltd v Abe's Door Service Ltd*, [2006 ABCA 243](#)
7. *Grant Thornton LLP v New Brunswick*, [2021 SCC 31](#)
8. *Lafferty v Co-operators General Insurance Co*, [2021 ABCA 359](#)
9. *Prescott Finishing Inc v Prescott (Town)*, [2010 ONSC 212](#)
10. Ministerial Order [27/2020](#), made under the authority of Order in Council 080/2020, which declared a state of public health emergency in Alberta under section 52.1(1) of the *Public Health Act*, RSA 2000, c P-37