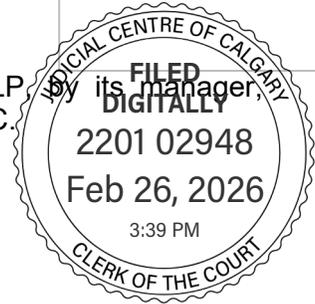


COURT FILE NUMBER 2201-02948  
COURT COURT OF KING'S BENCH OF ALBERTA  
JUDICIAL CENTRE CALGARY  
APPLICANT CROWN CAPITAL PARTNER FUNDING LP  
CROWN PRIVATE CREDIT PARTNERS INC.  
RESPONDENT RBEE AGGREGATE CONSULTING LTD.  
DOCUMENT **BRIEF OF LAW OF THE RECEIVER**  
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## TABLE OF CONTENTS

	<b>Page</b>
PART I - INTRODUCTION .....	2
PART II - BACKGROUND FACTS .....	3
A. The Parties .....	3
B. The Project .....	3
C. The Supplier Agreement .....	4
D. The Performance of the Contract .....	5
E. RBee's Insolvency and the Receiver's Appointment.....	7
F. The Outstanding Amounts and Unpaid Invoices .....	9
G. RMC's Alleged Set-Off Claim in these Receivership Proceedings.....	10
(i) The Alleged Overbilling .....	10
(ii) The Allegations Concerning the Stockpile .....	11
(iii) The AFDE Surveys .....	13
(iv) The Changing Density Factor .....	14
(v) The Unreviewed Batch Records.....	15
H. RMC's Ongoing Relationship with the Former Principal of RBee .....	16
PART III - ISSUES .....	17
PART IV - LAW AND ANALYSIS .....	17
A. The Outstanding Amounts are Due and Payable .....	19
(i) The Supplier Agreement says nothing about a final verification .....	19
(ii) RMC's right to verify the delivery of aggregate was prescribed in the Supplier Agreement, and RMC Failed to Exercise Them.....	20
(iii) Having Failed to Exercise its Verification Rights, RMC is Bound to Pay the Outstanding Amounts .....	24
(iv) The December Hauling Invoice is Payable to the Receiver .....	25
B. RMC Does Not Have a Valid Set-Off Claim.....	26
(v) RMC's Evidence is not Sufficient to Determine the Amount of Aggregate delivered to the Stockpile.....	27
C. RMC's continuing Relationship with Mr. Reed.....	29
PART V - CONCLUSION .....	29

## PART I - INTRODUCTION

1. This Brief of Law is filed in support of an application (the “**Application**”) by FTI Consulting Canada Inc. (“**FTI**”), in its capacity as the receiver (the “**Receiver**”) of RBee Aggregate Consulting Ltd. (“**RBee**”).
2. RBee and RMC Construction Materials Inc. (“**RMC**” and, together with RBee, the “**Parties**”) were Parties to an aggregate supply agreement dated May 7, 2018 (the “**Supplier Agreement**”) whereby RBee supplied RMC with washed and crushed aggregate gravel between 2018 and 2021 for concrete production on the Project (defined below).
3. The nub of the issue in the Application is the proper interpretation of certain provisions of the Supplier Agreement; in particular, whether RMC can dispute the volume of aggregate through extra-contractual means.
4. The Receiver’s position is that RMC cannot. RMC insists it can. RMC seeks to obfuscate the true issue and create ambiguity in the Supplier Agreement, where none exists. RMC’s self-serving positions are designed to muddy the waters and obscure the plain meaning of the Parties’ Supplier Agreement. This is done in an effort to excuse its own failure to comply with the terms of the Supplier Agreement and, in doing so, now avoid payment. RMC seeks to reverse a burden that, under the Supplier Agreement, falls squarely at its feet. It further seeks to raise a defence of equitable set-off, relying on an imprecise and extra-contractual method of quantifying what it claims was under-delivery of aggregate.
5. The Receiver seeks an order:
  - (a) declaring that certain unpaid invoices are due, owing, and payable by RMC for the services rendered by RBee pursuant to the Supplier Agreement and directing RMC to pay the Receiver the amount of \$4,485,480.64 plus interest;
  - (b) costs of the Application;<sup>1</sup> and
  - (c) such further and other relief as this Honourable court may deem just.

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<sup>1</sup>Which costs include the initial hearing of the within Application, the costs of its subsequent appeal, and the costs of rehearing the Application.

6. Capitalized terms not otherwise defined herein have the meanings ascribed to them in the Fifth Report of the Receiver dated October 28, 2022 (the “**Receiver’s Report**”).

## **PART II - BACKGROUND FACTS**

### **A. The Parties**

7. RBee was in the business of washing and crushing gravel on various construction sites across Alberta and British Columbia. The crushed aggregate was predominantly used in construction, primarily for the mixing of concrete. As is common in the construction industry, RBee’s operations were seasonal, running from approximately April to October each year.<sup>2</sup> Prior to the appointment of the Receiver, RBee was operated by Mr. Bernie Reed (“**Mr. Reed**”).

8. RMC is a major supplier of concrete for infrastructure, commercial, and residential projects. According to Mr. Nicholas Burak (“**Mr. Burak**”), RMC’s vice president and chief financial officer, RMC is one of Canada’s largest independent concrete producers.<sup>3</sup>

### **B. The Project**

9. RMC contracted with AECON-Flatiron-Dragados-EBC Partnership (“**AFDE**”), the prime contractor to British Columbia Hydro and Power Authority (“**BC Hydro**”), to supply AFDE with concrete needed for the construction of the generating station spillway works (the “**GSS Works**”) on the BC Hydro, Site C hydroelectric dam and generating station project (the “**Project**”).<sup>4</sup>

10. In turn, RMC entered into the Supplier Agreement with RBee for the supply of washed and crushed aggregate for concrete production needed for the GSS Works on the Project. RBee supplied RMC with aggregate<sup>5</sup> during the period 2018 to 2021 (the “**Service Period**”).<sup>6</sup>

11. The Project, including the GSS Works, experienced delays and cost overruns.<sup>7</sup> Work on the Project, including concrete production and aggregate supply, ran well beyond the originally

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<sup>2</sup>First Receiver’s Report at para 11.

<sup>3</sup>Affidavit of Nicholas Burak dated December 23, 2022 (the “**First Burak Affidavit**”) at para 3.

<sup>4</sup>Transcript of Questioning of Scott Marshall held on January 11, 2023 (the “**Marshall Questioning**”) at page 12, lines 15-24.

<sup>5</sup>For clarity, throughout this brief of law, “aggregate supplied” or similar terms refers to the aggregate that was washed and crushed by RBee pursuant to the Supplier Agreement.

<sup>6</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>7</sup>Transcript of Questioning of Mr. Burak held on January 11, 2023 (the “**First Burak Questioning**”) at page 12, lines 11-14.

envisaged period and only concluded after RBee was placed in receivership and after this dispute arose.<sup>8</sup> In fact, the aggregate supply that was contemplated under the Supplier Agreement continued even after the Receiver's sale of RBee's assets to a third party, pursuant to new agreements entered into with that purchaser – whose principal was the same as RBee's principal, Mr. Reed. In addition to the delays and cost overruns, the amount of concrete initially required for the GSS Works increased.<sup>9</sup>

### C. The Supplier Agreement

12. The Supplier Agreement was drafted by RMC<sup>10</sup> and governed the relationship between the Parties. A copy of the Supplier Agreement is attached as Appendix "A" to the Receiver's Report.<sup>11</sup>

13. Key terms of the Supplier Agreement relevant to the dispute are as follows:

- (a) the aggregate was to be delivered to RMC at a location on the GSS Works site (the "**Stockpile**");<sup>12</sup>
- (b) once aggregate was delivered to the Stockpile, risk of loss transferred to RMC;<sup>13</sup>
- (c) each provision of aggregate was to be invoiced separately by RBee, and RMC was required to pay each invoice no later than sixty days from the date of the invoice;<sup>14</sup>
- (d) RBee was entitled to be paid for aggregate delivered to the Stockpile at the specified rate per unit tonne for each specified type of aggregate, as set out in Schedule "B" to the Supplier Agreement;<sup>15</sup>
- (e) RMC had a right to subject the volume of aggregate delivered by RBee to "third-party verification" (the "**Verification Rights**"), and if RMC exercised the Verification Rights, a certification was to originate from RMC or its designates

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<sup>8</sup>British Columbia Hydro and Power Authority, "Site C Comes into full operation," August 9, 2025 <<https://www.sitecproject.com/sitec-comes-into-full-operation>>.

<sup>9</sup>Marshall Questioning at page 14, lines 7-18.

<sup>10</sup> First Burack Questioning at page 34, lines 10-13.

<sup>11</sup>Section 26 of the Supplier Agreement, Appendix "A" of the Receiver's Report.

<sup>12</sup>Section 9 of the Supplier Agreement, Appendix "A" of the Receiver's Report.

<sup>13</sup>Section 9 of the Supplier Agreement, Appendix "A" of the Receiver's Report.

<sup>14</sup>Section 5 of the Supplier Agreement, at Appendix "A" of the Receiver's Report.

<sup>15</sup>Section 1 of the Supplier Agreement, together with Schedule "B", Appendix A to the Receiver's Report.

“within 60 days of delivery”. RBee’s entitlement to payment was based on such verification and the other terms of the Supplier Agreement;<sup>16</sup>

- (f) unpaid amounts accrued interest at the rate of 12% per annum;<sup>17</sup>
- (g) the Supplier Agreement superseded all prior agreements between the Parties and contained the full agreement between the Parties. Both Parties declared that there were “no other terms and conditions, representations or understandings regarding the subject matter” of the Supplier Agreement except those set forth in the Supplier Agreement (the “**Entire Agreement Provision**”).<sup>18</sup>
- (h) the Supplier Agreement could only be modified through written agreement between the Parties;<sup>19</sup>
- (i) RBee was required to deliver to RMC a performance bond to guarantee its performance under the Supplier Agreement;<sup>20</sup> and
- (j) the Supplier Agreement was to be interpreted in accordance with the laws of the Province of British Columbia and the laws of Canada applicable therein.<sup>21</sup>

#### **D. The Performance of the Contract**

14. The Supplier Agreement was effective as of May 7, 2018. RBee commenced delivery of aggregate on or around late spring or early summer of 2018.<sup>22</sup> RBee supplied RMC with sufficient quality and quantity of aggregate during the 2018, 2019, 2020, and 2021 crushing seasons.<sup>23</sup> During this period RBee was the sole aggregate supplier to RMC.<sup>24</sup>

15. 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>25</sup> RBee and Mr. Reed entered

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<sup>16</sup>Section 5 of the Supplier Agreement, at Appendix “A” of the Receiver’s Report.

<sup>17</sup>Section 7 of the Supplier Agreement, at Appendix “A” of the Receiver’s Report.

<sup>18</sup>Section 26 of the Supplier Agreement, at Appendix “A” of the Receiver’s Report.

<sup>19</sup>Section 27 of the Supplier Agreement, at Appendix “A” of the Receiver’s Report.

<sup>20</sup>Section 3 of the Supplier Agreement, at Appendix “A” of the Receiver’s Report.

<sup>21</sup>Section 33 of the Supplier Agreement, at Appendix “A” to of the Receiver’s Report.

<sup>22</sup> First Burak Affidavit, para 9.

<sup>23</sup> First Burak Affidavit, para 60.

<sup>24</sup> First Burak Questioning at page 17, lines 16-25

<sup>25</sup> First Burak Questioning at page 43, lines 11-14.

into an indemnity agreement with Western Surety Company, that appears to support the performance bond.<sup>26</sup> RMC has not made a claim under the performance bond.<sup>27</sup>

16. 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>28</sup> The invoices near the end of any given aggregate crushing season were frequently the largest of the season.<sup>29</sup> The change orders produced by RMC in response to undertakings given at Mr. Burak's first questioning also reference that, during the time of the final Unpaid Invoices (as defined below), there were double shifts at RBee to produce the necessary aggregate required by RMC.<sup>30</sup>

17. The Supplier Agreement clearly sets out the agreed price of the aggregate to be supplied and the methodology for submitting invoices to be payable by RMC. The Supplier Agreement did not require RBee to demonstrate, in anything but the invoice, the volume of aggregate delivered. For almost four full seasons under the Supplier Agreement, invoices were delivered by RBee in the same fashion and paid by RMC. RMC does not deny the fact that RBee conducted work on the Project in September and October 2021 in relation to the supply of aggregate or of hauling services.

18. RMC "chose not to conduct third-party verification processes" with respect to the Unpaid Invoices or at all throughout the term of the Supplier Agreement [emphasis added].<sup>31</sup> RMC's failure to protect itself with respect to the amount of product delivered in accordance with the procedure set out in the Supplier Agreement does not impose a requirement on RBee (or the Receiver) to now prove delivery other than through the issuance of invoices.

19. Contrary to the express wording of the Entire Agreement Provision, which states that the Supplier Agreement contained the whole agreement between the Parties, and that the Parties had no other "understandings," RMC alleges that it, in fact, did have another understanding. Namely, RMC claims that it "anticipated performing a final quantity verification" of aggregate delivered to the Project upon the completion of the Project.<sup>32</sup> The Supplier Agreement envisages

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<sup>26</sup>Receiver's Supplemental Report dated January 20, 2023 (the "**Receiver's Supplemental Report**") at para 5(a).

<sup>27</sup> First Burak Questioning at page 43, lines 24-26; and the Questioning of Mr. Burak on his Second Affidavit held on November 21, 2025 (the "**Second Burak Questioning**") at page 62, lines 8-9.

<sup>28</sup>Receiver's Report at para 21 and Appendix "B".

<sup>29</sup>See generally the First Burak Affidavit at Exhibit "B".

<sup>30</sup>RMC's Undertaking response No 1 at pp 184-186 of the PDF.

<sup>31</sup>First Burak Affidavit, para 12

<sup>32</sup>First Burak Affidavit, para 13.

no such final verification. The Supplier Agreement is clear: verification of supply is required to be done within 60 days of delivery.

20. The Supplier Agreement places the burden on RMC to prove that the invoices *do not* represent the amount of aggregate. RMC's ability to verify the amounts delivered has long since expired. There is no reason to imply any right of verification, particularly not a self-serving one performed, at least in part, by RMC itself and not a third-party, outside of the terms of the Supplier Agreement.

21. At the time that the Parties entered into the Supplier Agreement, RMC and RBee had never worked on any other project together.<sup>33</sup> The only other contract between RMC and RBee was entered into in 2019, after the Parties had entered into the Supplier Agreement. That other contract was in respect of RMC's main operation in Drayton Valley and concerned an ongoing supply agreement. It was not specific to any particular construction project.<sup>34</sup> Thus, any understanding concerning other projects that the Parties subsequently worked on is not only irrelevant, but distinguishable from the Supplier Agreement. At the time of entering into the Supplier Agreement, it would not have been possible for the Parties to have the alleged understanding that RMC now asks this court to infer from post-Supplier Agreement contracts entered into for distinguishable purposes.

#### **E. RBee's Insolvency and the Receiver's Appointment**

22. The reported accounts receivable of RBee on the date the Receiver was appointed (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 aggregate supplied and services performed by RBee for RMC during September, October and December 2021 (collectively, the "**Unpaid Invoices**").<sup>35</sup>

23. After the Appointment Date, RBee's management informed the Receiver that it was common 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

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<sup>33</sup>First Burak Questioning at page 18, line 6 – page 19 line 5.

<sup>34</sup>First Burak Questioning at page 18, line 6 – page 19 line 5.

<sup>35</sup>Receiver's Report at para 5.

following crushing season. RBee's management advised that they anticipated that the Unpaid Invoices would eventually be paid by RMC.<sup>36</sup>

24. 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 allegedly undersupplied over the course of the Supplier Agreement (the "**Initial Call**").<sup>37</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>38</sup>

25. After the Initial Call and RMC's statements of its concerns regarding RBee's supply of aggregate under the Supplier Agreement, the Receiver, in good faith, requested documentation to support RMC's alleged Set-Off Claim. Nearly a month later, RMC, under the guise of a "reconciliation," attempted to reconstruct the entire historical supply of aggregate to the Project (the "**2021 Product Reconciliation**"). The 2021 Product Reconciliation relied on: (a) information relating to a survey performed by the Project's prime contractor, AFDE, on October 31, 2021 (the "**2021 AFDE Survey**"), and (b) data recorded by RMC's own computerized batching system (the "**Batch Records**"), which RMC claims calculates the amount of aggregate used in the production of concrete.

26. 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>39</sup> As a result, the Receiver remained of the view that the Outstanding Amounts were properly owing by RMC to RBee.

27. The Receiver has attempted to resolve the dispute in good faith. However, despite attempts to resolve the matter consensually between March 15, 2022 and the date in which this Application was originally filed, 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. Rather, the Set-Off Claim purports to relate to RBee's supply of aggregate throughout the entire duration of the Service Period.<sup>40</sup>

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<sup>36</sup>Receiver's Report at para 27.

<sup>37</sup>Receiver's Report at para 29.

<sup>38</sup>Receiver's Report at paras 28-29.

<sup>39</sup>Receiver's Report at paras 30-40.

<sup>40</sup>Receiver's Report at para 25.

28. While the information provided serves RMC's purposes, it is not reliable and should not be relied on by this court to the detriment of creditors of RBee's estate.

29. In addition to its appointment as Receiver, on May 18, 2022, FTI was appointed as trustee of the bankrupt estate of RBee. In its role as trustee of the RBee estate, FTI sought to recover funds paid out of the RBee estate prior to the Appointment Date and which were eligible to be set aside as preferential transactions under the *Bankruptcy and Insolvency Act*, or alternatively were susceptible to claw back pursuant to the *Fraudulent Preferences Act*, and/or the *Statute of Elizabeth*.

30. The trustee brought an application in the bankruptcy proceedings to recover these amounts. RMC has given notice of its intention to rely on select materials filed in that application, in these proceedings. While the Receiver is of the view that these materials are not relevant or material to this dispute, out of an obligation of full transparency, and as an officer of this court, the Receiver has consented to RMC including the materials in these proceedings and reserved the right to respond to them fully, once their relevance is explained by RMC in its Brief.

31. As this court is aware, statutory claims made pursuant to the three pieces of legislation noted above do not (despite the legislature's nomenclature of the acts) actually require fraud, nor did the trustee put forward a case in fraud. In its primary claim under the *BIA*, as well as its alternative claims under the *FPA* and *SOE*, the trustee's claim was squarely focused on statutory recoveries of payments to related parties that had the effect of preferring some creditors over others. Finally, while the respondents in that application opposed the relief sought by the trustee, the evidence all went untested as the parties settled the matter.

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

32. There are three Unpaid Invoices. The Unpaid Invoice dated September 2021 relates solely to aggregate supplied to the Project.<sup>41</sup> The Unpaid Invoice dated October 2021 includes aggregate supply and approximately \$445,000 in respect of hauling charges.<sup>42</sup> The Unpaid Invoice dated December 2021 is only in respect of hauling charges. Below is a chart for illustrative purposes:

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<sup>41</sup>Exhibit "C" of the Receiver's Report at page 38.

<sup>42</sup>Exhibit "C" of the Receiver's Report at page 40.

<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

33. 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 because hauling charges were not the subject matter of the Supplier Agreement.<sup>43</sup> It is unclear to the Receiver whether RMC also disputes the hauling charges that form part of the October 2021 Unpaid Invoice. RMC has not alleged that RBee did not perform the hauling work on the Project in relation to the Unpaid Invoices. RMC further does not dispute that RBee provided hauling services to RMC historically,<sup>44</sup> or that the previous hauling was also outside of the Supplier Agreement.<sup>45</sup>

34. 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>46</sup> The timing of these changes correspond, at least in part, to the Unpaid Invoices, which include hauling charges. The Receiver is of the view that these invoices to AFDE are related to RBee’s hauling invoices. It is the Receiver’s understanding that the true nature of RMC’s defence to the hauling charges rests only on its claim for equitable set-off.

## **G. RMC’s Alleged Set-Off Claim in these Receivership Proceedings**

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

35. As discussed above, the Receiver was informed during the Initial Call in March 2022 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. RMC offers only hearsay evidence that in November

<sup>43</sup>First Burak Affidavit at para 16 and Burak Questioning at page 40 lines 16-23.

<sup>44</sup>First Burak Affidavit at para 57.

<sup>45</sup>First Burak Questioning at page 40, line 13 – page 41, line 8.

<sup>46</sup>Undertaking 1 at pages 134, 137 and 182-183.

2021 it conveyed its intention to verify delivery to RBee, albeit not in accordance with the Supplier Agreement.<sup>47</sup>

36. 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>48</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>49</sup> It is not disputed that there have been delays, design changes, and cost overruns in relation to the Project.<sup>50</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 corresponding aggregate supply) continued well past when RBee was placed into receivership.<sup>51</sup>

37. 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>52</sup>

**(ii) The Allegations Concerning the Stockpile**

38. As discussed above, RBee was required to deliver the aggregate to the Stockpile at the Project site, at which point any risk of loss passed to RMC.<sup>53</sup> Within the Stockpile, aggregate was placed into sub-piles according to the size class of the aggregate.

39. 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>54</sup> Mr. Burak stated in questioning that the Stockpile is “a critical component of the future success of the project.”<sup>55</sup>

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<sup>47</sup>First Burak Affidavit at para 21.

<sup>48</sup>First Burak Affidavit at paras 17-18.

<sup>49</sup>First Burak Affidavit at paras 17-18.

<sup>50</sup>First Burak Questioning at page 12, lines 11-13 and page 74, lines 12-21.

<sup>51</sup>First Burak Questioning, page 74 at lines 10-21 and Marshall Questioning at page 13 line 5-13.

<sup>52</sup>First Burak Affidavit at para 8.

<sup>53</sup>An aerial view of the Stockpile location is included at Exhibit “C” to First Burak Affidavit.

<sup>54</sup>First Burak Questioning at page 23, lines 16-23.

<sup>55</sup>First Burak Questioning at page 23, lines 16-23.

40. 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>56</sup> which as noted by the Receiver, would not be a reliable method for ensuring sufficient supply for concrete production.<sup>57</sup>

41. It is clear from the evidence that the Stockpile was not subject to any particular security and other parties on the Site C Project could physically access the Stockpile.<sup>58</sup> Mr. Burak confirmed that RMC was not present when AFDE accessed the Stockpile for the purposes of the 2021 AFDE Survey<sup>59</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>60</sup>

42. RMC has not produced a pre-survey analysis with respect to the location of the Stockpile prior to RBee commencing work under the Supplier Agreement. Neither RMC nor AFDE can speak directly to whether such a pre-survey analysis was obtained. RMC alleges that the ground was “flat” based on a visual inspection.<sup>61</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>62</sup>

43. 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>63</sup> Indeed, RMC has acknowledged that it used thousands of tonnes of aggregate for winter abrasive material to sand the roadways.<sup>64</sup> RMC provides no evidence as to how the volumes of the aggregate used for this purpose was measured.

44. Despite RMC’s assurances that it had a “strong incentive” to avoid loss or waste of the aggregate,<sup>65</sup> given the nature and size of the Project, the length of the Service Period, and Mr.

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<sup>56</sup>First Burak Questioning at page 23, line 26 to page 24, line 15.

<sup>57</sup>Receiver’s Supplemental Report at para 24(c).

<sup>58</sup>First Burak Questioning at page 26, lines 6-23.

<sup>59</sup>First Burak Questioning at page 28, lines 20-21.

<sup>60</sup>Marshall Questioning at page 29, lines 15-27.

<sup>61</sup>First Burak Questioning at page 25, lines 13-18.

<sup>62</sup>First Burak Questioning at page 24, line 19 – page 25, line 25.

<sup>63</sup>Marshall Questioning at page 20, lines 13-22.

<sup>64</sup>First Burak Questioning at page 28, lines 22-27 and page 29, lines 1-14 and Second Burak Affidavit at para 17.

<sup>65</sup>Second Burak Affidavit at para 16.

Burak's conflicting evidence,<sup>66</sup> consideration of wasted or lost product should also be considered.<sup>67</sup> While RMC's evidence is that normal operating practice was for the rock trucks to be loaded "well below overflowing" and "not driven in such a fashion that there would be spillage" this evidence is based only on Mr. Burak's 20 visits to the Project site over the course of the Service Period.<sup>68</sup> Based on the length of the Service Period, Mr. Burak was a first-hand witness of his operators' behaviour for only about 1% of the Service Period. RMC has no way of evidencing that the general driving behaviour of its operators the other 99% of the time accords with Mr. Burak's recollections.<sup>69</sup> Indeed, his earlier evidence was that they were often "lazy, and they use a loader because they don't need to load things twice."<sup>70</sup>

**(iii) The AFDE Surveys**

45. The Receiver understands that AFDE completed a number of surveys of the Stockpile for quality control purposes throughout the Service Period.<sup>71</sup> The evidence shows that the AFDE surveys were not performed for billing purposes.<sup>72</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>73</sup>

46. 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>74</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>75</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>76</sup>

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<sup>66</sup>Second Burak Affidavit at para 16 and Second Burack Questioning page 33, lines 12-16

<sup>67</sup>Receiver's Supplemental Report at para 24(d).

<sup>68</sup>Second Burack Questioning at page 57, lines 2-8

<sup>69</sup>Undertaking 1 from Second Burak Questioning.

<sup>70</sup>Second Burak Questioning, page 33, line 14-15.

<sup>71</sup>Receiver's Report at Appendix "H", page 63.

<sup>72</sup>Appendix H of the Receiver's Report, at page 63.

<sup>73</sup>Marshall Affidavit at para 7(a).

<sup>74</sup>Marshall Affidavit at para 7(b).

<sup>75</sup>Marshall Questioning at page 35, line 25 – page 36 line 13.

<sup>76</sup>Marshall Questioning at page 36, lines 1-13.

47. 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 if there was sufficient aggregate onsite to allow concrete production to continue through winter until crushing could begin again in the spring.<sup>77</sup>

48. Notably, RMC did not receive copies of any of the surveys performed by AFDE<sup>78</sup> and it is not clear how RMC came to be in possession of the 2021 AFDE Survey.<sup>79</sup> Mr. Marshall indicated that AFDE completed surveys for its own internal purposes.<sup>80</sup>

49. 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>81</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 accuracy of the information in the 2021 AFDE Survey is in question.

**(iv) The Changing Density Factor**

50. 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>82</sup>

51. 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 aggregate measured in the 2021 AFDE Survey.<sup>83</sup> RMC now uses different density factors to calculate the volume of aggregate measured in the 2021 AFDE Survey. Doing so has resulted in the amount of RMC's alleged Set-Off Claim increasing.<sup>84</sup>

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<sup>77</sup>Marshall Questioning at page 15, lines 13 to page 16, line 3.

<sup>78</sup>First Burak Questioning at page 39, lines 6-8.

<sup>79</sup>Marshall Questioning at page 30, lines 1-15.

<sup>80</sup>Marshall Questioning at page 30, lines 1-15.

<sup>81</sup>Marshall Affidavit at para 7(b).

<sup>82</sup>First Burak Affidavit at para 33.

<sup>83</sup>First Burak Affidavit at para 34.

<sup>84</sup>First Burak Affidavit at para 54-55.

52. Mr. Burak states in his First Affidavit that RMC commissioned laboratory testing of the densities of the four relevant classes of aggregate.<sup>85</sup> However, Mr. Burak noted that the laboratory testing was not commissioned for the purposes of this dispute, and that the density testing is intended to be “an estimate”.<sup>86</sup> Further, in his response to Undertakings from the Questioning of Mr. Burak on his Second Affidavit, it is apparent that even on other projects where RBee and RMC did use density factors, there were often disputes regarding the appropriate density factors to use.<sup>87</sup> Given those disagreements, together with the significant impact that the density factor has on calculating the quantum payable for the aggregate delivered, commercially sophisticated parties would have been expected to agree to these factors (or at least a method for calculating a mutually agreeable form of these factors) in advance.

53. RMC’s evidence relating to density factors originates 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>88</sup> Therefore, the majority of the aggregate tested was not the aggregate located on the Project.

54. RMC alleges that the Stockpile and the Vogel Pit will have very similar densities because they are both sourced from river deposit gravel.<sup>89</sup> This contradicts the information provided by Construction Solutions professionals within the Forensic & Litigation Consulting segment of the Receiver’s office, which is that the density of aggregate is dependent on where it is located.<sup>90</sup>

(v) ***The Unreviewed Batch Records***

55. As stated above, RMC was responsible for the aggregate 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 that it removed from the Stockpile and consumed in its production facilities (the “**Batch Plants**”).<sup>91</sup> However, what the Batch Records show is aggregate consumed in the production of concrete. The Batch Records do not account for the movement of aggregate

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<sup>85</sup>First Burak Affidavit at para 34 and Exhibit “F” of First Burak Affidavit.

<sup>86</sup>First Burak Questioning at page 66, line 13 to page 67, line 9.

<sup>87</sup>Undertaking 4 from Second Burak Questioning.

<sup>88</sup>First Burak Affidavit at Exhibit “F” and pages 243-246.

<sup>89</sup>First Burak Affidavit at para 36.

<sup>90</sup>Receiver’s Supplemental Report at para 24(b).

<sup>91</sup>First Burak Affidavit at para 25.

from the Stockpile to the Batch Plants, wastage, or any other potential uses of aggregate on the Project site.

56. This is the very reason why risk passes to RMC on delivery of aggregate. RBee has no sight, or control, of the use of the aggregate once it is delivered. RMC's production team was responsible for the movement of aggregate from the Stockpile.<sup>92</sup> Aggregate was taken from the Stockpile to bins outside the Batch Plants using loaders or rock trucks. From there, the aggregate was moved by loader to bins inside the Batch Plants before it was ultimately used in production.<sup>93</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>94</sup> and the movement of aggregate was not documented.<sup>95</sup>

57. RMC's batch record data is initially produced in a program called "Marcotte." In order to provide information to the Receiver and its counsel, Mr. Burak converted the data to Microsoft Excel format. The Excel spreadsheet provided to counsel to the Receiver by 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>96</sup>

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

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

59. 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>97</sup> However, in questioning, Mr. Burak stated that the Supplier Agreement was the first contract between the Parties and that there was no relationship between RMC and RBee prior to 2018.<sup>98</sup>

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<sup>92</sup>First Burak Questioning at page 30, lines 15-17.

<sup>93</sup>First Burak Questioning at page 30, line 22 to page 31 line 8.

<sup>94</sup>First Burak Questioning at page 31, lines 9-11.

<sup>95</sup>First Burak Questioning at page 31, line 25 – page 32, line 6.

<sup>96</sup>First Burak Questioning at page 51, lines 11-26.

<sup>97</sup>First Burak Affidavit at para 13.

<sup>98</sup>First Burak Questioning at page 18, lines 3-8.

60. Mr. Burak stated in his affidavit evidence that when RMC learned that a new entity involving Mr. Reed ("**A-1**") had purchased the equipment on the Project site previously owned by RBee, RMC made the decision to engage A-1 to provide the remaining aggregate that RMC required to meet its obligations to AFDE.<sup>99</sup> In 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.<sup>100</sup> Subsequently, RMC informed the Receiver that "Paragon" is 2128222 Alberta Ltd., operating as Paragon Custom Crushing ("**212 Alberta**").<sup>101</sup>

61. Mr. Reed is the owner and sole director of both 212 Alberta and A-1.<sup>102</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>103</sup> As such, at the date of the first hearing of the Application Mr. Reed was continuing to operate the same equipment on the Project site, under a new contract with the same economic terms as the Supplier Agreement, through his wholly owned company.

62. Mr. Reed did not respond to the Receiver's request to comment on RMC's evidence filed in respect of this Application.<sup>104</sup> Mr. Reed is also available to RMC, as equally as he was to the Receiver. As ongoing business associates, it is more likely that RMC would have the ability to persuade Mr. Reed to provide information or cooperate than the Receiver, yet it has not done so.

### **PART III - ISSUES**

63. 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?

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

64. Where there is a written contract, the court must first interpret the words of the contract according to their ordinary and natural sense in the context of the contract as a whole in light of

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<sup>99</sup>First Burak Affidavit at para 63.

<sup>100</sup>First Burak Questioning at page 73, lines 5-13.

<sup>101</sup>Undertaking 11.

<sup>102</sup>Receiver's Supplemental Report at paras 14 and 16.

<sup>103</sup>Undertaking 9.

<sup>104</sup>Receiver's Supplemental Report at para 25.

the factual matrix existing at the time the contract was entered into. If the meaning of the words is unambiguous, the agreement of the parties is determined solely from the interpretation of the contract.

65. It is only if the words of the contract bear more than one reasonable interpretation that the court will consider extrinsic evidence to assist it in determining the intentions of the parties.<sup>105</sup> Subsequent conduct or evidence of the behavior of parties after the execution of the contract is otherwise not part of the factual matrix.<sup>106</sup>

66. The Receiver submits that Supplier Agreement is clear and unambiguous. Based on the Receiver's review of the books and records of RBee and the Parties' course of conduct 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.

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

68. RMC and RBee worked together in relation to the Supplier Agreement over 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. It was only once the Receiver was appointed that RMC alleged any overbilling in relation to the Supplier Agreement. RMC is thus barred from challenging the Unpaid Invoices based on a purported verification process that does not comply with the Verification Rights, and that occurred long after the window to exercise those Verification Rights had closed. This court should not permit RMC to unwind the express language of the Supplier Agreement to validate its tenuous claim that RBee overbilled RMC.

69. Even if it were permitted to read in additional terms into the Supplier Agreement, to successfully assert the Set-Off Claim, RMC would have to prove to this court that RBee supplied less Product than the amount for which it invoiced RMC over the course of the Supplier Agreement

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<sup>105</sup>*Paradigm Holdings Ltd v Ngan & Siu Investments Co*, [2008 BCCA 172](#) ("**Paradigm**") at [para 17](#).

<sup>106</sup>*Shewchuk v Blackmont Capital Inc.*, [2016 ONCA 912](#) ("**Shewchuk**") at [paras 41-42](#).

resulting in the overpayment alleged by RMC. RMC's evidence in this regard is both deficient and unreliable, and does not support this conclusion.

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

70. Like it had done at least 35 times before, RBee delivered aggregate and invoiced RMC for that aggregate. That was all it was required to do in order to be paid under the Supplier Agreement.

**(i) The Supplier Agreement says nothing about a final verification**

71. The Supplier Agreement was drafted by RMC and governed the relationship between the Parties in relation to RBee's supply of aggregate. At the time it was entered into, it was the only written agreement between the Parties.<sup>107</sup> The Supplier Agreement contains not a single suggestion that a final verification would take place.

72. Pursuant to the Entire Agreement Provision, all other understandings (if they did exist, which is refuted) were expressly excluded and the Supplier Agreement – and only the Supplier Agreement – governed the terms of the contractual relationship between RMC and RBee in relation to RBee's supply of aggregate.

73. The "cardinal presumption" is that the Parties intended what they have said,<sup>108</sup> and the obligation of this court in undertaking contractual interpretation, requires the court to read the contract as a whole, giving the words used their ordinary and grammatical meaning.<sup>109</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>110</sup>

74. The conduct of the Parties *subsequent* to the formation of the Supplier Agreement must be distinguished from the concept of the factual matrix. The Ontario Court of Appeal ("ONCA") set out the law in relation to subsequent conduct in *Shewchuk v Blackmont Capital Inc.* as follows: "subsequent conduct, or evidence of the behaviour of the parties after the execution of the contract, is not part of the factual matrix".<sup>111</sup> The ONCA also explained that subsequent conduct

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<sup>107</sup>First Burak Questioning at page 14, lines 15-17.

<sup>108</sup>*Project Freeway Inc. v ABC technologies Inc.*, [2025 ONCA 855](#) ("*Project Freeway*") at [para 8](#).

<sup>109</sup>*Sattva Capital Corp v Creston Moly Corp*, [2014 SCC 53](#) ("*Sattva*") at [paras 47-48](#); and *Project Freeway* at [para 8](#).

<sup>110</sup>*IFP Technologies (Canada) Inc v EnCana Midstream and Marketing*, [2017 ABCA 157](#) ("*IFP*") at [paras 79-81](#).

<sup>111</sup>*Shewchuk* at [paras 41-42](#), cited with approval in *Wade v Duck*, 2018 BCCA 176, and in *IFP*.

lends itself to several dangers, including the parties' changing behaviour over time, its ambiguity, and the potential to reward self-serving conduct in a way that would lend support to a party's preferred interpretation of the contract.<sup>112</sup> The ONCA held that the court should only utilize subsequent conduct to resolve ambiguities, giving it appropriate weight by having regard to the inherent dangers.<sup>113</sup>

75. 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 primarily involve conduct *post* entry into the Supplier Agreement and should not be considered by the court, as the reliability of the evidence is in question.

**(ii) RMC's right to verify the delivery of aggregate was prescribed in the Supplier Agreement, and RMC Failed to Exercise Them**

76. The Project is a major infrastructure project in British Columbia. The GSS Works began in 2018 and continued into 2023. RMC was responsible for the aggregate once it was delivered to the Stockpile, including any risk of loss.<sup>114</sup>

77. The Verification Rights at Section 5 of the Supplier Agreement set out the mechanism by which RMC was compelled, in a timely manner, to verify the amount of aggregate that was actually delivered to the Stockpile. The Verification Rights stated that any verification of aggregate delivered to the site "*would*" emanate from RMC or its designates within sixty days of delivery, and that RMC's payment of the invoices "*will*" be subject to this verification.

78. This process was not merely one verification option available to RMC. It was *the* contractually agreed method to verify delivery of aggregate to RMC. The word "*will*" in Section 5 creates the obligation for RMC, if it chose to dispute the volume of aggregate delivered, to verify the amount of aggregate delivered pursuant to the Supplier Agreement. If the Parties' objective intention was to provide RMC with an option to verify the aggregate, the Supplier Agreement would have clearly specified this using permissive language such as "*may*".

79. The Supplier Agreement specifically placed the burden on RMC to verify the volume of delivered aggregate, RMC's failure to do so at the appropriate time does not now enable it to

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<sup>112</sup>Shewchuk at [paras 43-47](#).

<sup>113</sup>Shewchuk at [para 46](#).

<sup>114</sup>Section 9 of the Supplier Agreement, at Appendix "A" of the Receiver's Report.

retrospectively dispute delivery. The case law is clear: a buyer's failure to verify a material provision of a contract that was its responsibility to verify does not entitle it to vary the purchase price stipulated by contract.<sup>115</sup> The Verification Rights in the Supplier Agreement is a term that is analogous to those contained in banking agreements. In that context, the Supreme Court of Canada ("**SCC**") has consistently held that a customer's failure to verify its statements of account with a bank within the prescribed period of a contractual verification provision is a complete defence to any claims against the bank.<sup>116</sup>

80. Any suggestion that RMC would be entitled, despite the express provision of the Verification Rights, to challenge the delivery of product by a different means is in fundamental opposition to the accepted interpretive legal maxim "*expressio unius est exclusio alterius*"; that is, "to express one thing, is to exclude another," as one of the canons of construction.<sup>117</sup> Even if this court were to find that the Verification Rights were an option, the express inclusion of that option operates to exclude other possible forms of verification.

81. The British Columbia Supreme Court ("**BCSC**") has considered an analogous contractual provision to the case at bar. In *BCR Properties Ltd. v. J.A. Brink Investments Ltd.*, a dispute arose over an option in a property purchase transaction that specified how environmental assessments were to be considered.<sup>118</sup> BCR Properties argued that the wording of the option did not expressly limit what the appraiser could consider, and that if that was intended, the word "only" would have been stated in the agreement. The BCSC disagreed and held that:

While it is true that the words used do not expressly limit the appraiser to considering reports supplied by the parties, by specifying the material that is to be regarded I consider that other material is impliedly excluded. This form of contractual interpretation is captured by the Latin maxim, *expressio unius est exclusio alterius*, which means "to express one thing is to exclude another". I find that maxim applicable here.<sup>119</sup>

82. The BCSC's comments precisely reflect the case at bar. While there may be many means to verify the volume of aggregate delivered to the site, the Parties intentionally, unambiguously, and expressly agreed to the Verification Rights. They did so to the exclusion of other possible options. Despite judicial caution regarding the exercise of the maxim, the maxim readily applies

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<sup>115</sup>*Paradigm* at [para 20](#).

<sup>116</sup>*Arrow Transfer Co v Royal Bank*, [1972 SCR 845](#) ("**Arrow**").

<sup>117</sup>*Gill v Navigate Capital Corp.*, [2014 BCCA 462](#) at [para 14](#).

<sup>118</sup>*BCR Properties Ltd. v J.A. Brink Investments Ltd.*, [2010 BCSC 1898](#) ("**BCR Properties**") at [para 2](#).

<sup>119</sup> *BCR Properties* at [para 33](#).

to the present circumstances.<sup>120</sup> The Receiver emphasizes that RMC's right to verify the quantum of aggregate delivered is not being excluded by the Supplier Agreement. The Parties have simply solidified how, and when, that verification must occur. This is entirely reasonable, and makes commercial sense, particularly when one considers the very important factor of the transfer of risk of loss as set out in Section 9 of the Supplier Agreement.

83. 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>121</sup> In RMC's words, it "did not see any reason to engage periodic third party verifications."<sup>122</sup>

84. 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. Even if it did apply, Section 18 contemplates a verification that takes place prior to, or at least contemporaneously with, termination of the Supplier Agreement and in accordance with the Verification Rights contained in Section 5 of the Supplier Agreement.

85. Even if the Supplier Agreement could be read to include an implied term that there would be a final reconciliation at the completion of the Project, as RMC alleges, RBee became insolvent prior to the end of the Project. Nevertheless, the work under the Supplier Agreement continued. Therefore, it is impossible to complete a precise final reconciliation that determines the amount of aggregate that was delivered by RBee to the Project.

86. In addition to not being a term of the Supplier Agreement, RMC's assertion that the Parties always intended to complete a final verification is not compelling for three further reasons: (a) the Supplier Agreement was the first contract between RMC and RBee,<sup>123</sup> (b) none of the other projects that RMC and RBee had worked on together were of the size and scope of the Project,<sup>124</sup>

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<sup>120</sup>*Turgeon v Dominion Bank*, [1930 SCR 67](#) at [paras 70-71](#).

<sup>121</sup>First Burak Affidavit at para 12.

<sup>122</sup>First Burak Affidavit at para 15.

<sup>123</sup>First Burak Questioning at page 18, lines 3-8.

<sup>124</sup>First Burak Questioning at page 70, lines 12-15.

and (c) adopting the reading-in of terms into the Supplier Agreement as RMC asks this court to do will create, rather than avoid, conflicting terms in the Supplier Agreement.

87. Adopting RMC's understanding that a final verification was to be performed is also commercially unreasonable when read together with the transfer of risk of loss provisions contained at Section 9 of the Supplier Agreement. Delaying verification to the end of the Project would expose RBee to risk that it would not be paid for aggregate that was lost over the course of the Project period. As noted above, the risk of loss transferred to RMC *on delivery*, a final verification of the delivery of aggregate at the end of the contract would render the risk of loss provision entirely meaningless.

88. Accepting RMC's position would create, rather than avoid, a conflict in the terms of the Supplier Agreement. It is a "fundamental rule of contractual interpretation" that provisions should be read in a way that gives effect to all provisions, avoiding interpretations that would render any other provision ineffective or redundant.<sup>125</sup>

89. The SCC has held that it is a "cardinal rule" of the construction of contracts that the "various parts of the contract are to be interpreted in the context of the intentions of the parties as evident from the contract as a whole," and that "where there are apparent inconsistencies between different terms of a contract, the court should attempt to find an interpretation which can reasonably give meaning to each of the terms in question."<sup>126</sup> Unless one adopts RMC's understanding, and reads words into the Supplier Agreement, there are no inconsistencies. RMC's position creates inconsistencies.

90. It is a "fundamental rule of contractual interpretation" that provisions should be read in a way that gives effect to all provisions, avoiding interpretations that would render any other provision ineffective or redundant.<sup>127</sup>

91. RMC's position fails to withstand the scrutiny of this cardinal rule.

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<sup>125</sup> *Samson Cree Nation v O'Reilly & Associés*, [2014 ABCA 268](#) at [paras 81-82](#); *Humphries v Lufkin Industries Canada Ltd.*, [2011 ABCA 366](#) at [para 12-13](#).

<sup>126</sup> *BG Checo International Ltd. v British Columbia Hydro and Power Authority*, [1993 1 SCR 12](#) at [para 23-24](#).

<sup>127</sup> *Samson Cree Nation v O'Reilly & Associés*, [2014 ABCA 268](#) at [paras 81-82](#); *Humphries v Lufkin Industries Canada Ltd.*, [2011 ABCA 366](#) at [para 12-13](#).

**(iii) Having Failed to Exercise its Verification Rights, RMC is Bound to Pay the Outstanding Amounts**

92. RMC failed to exercise its Verification Rights in accordance with the Supplier Agreement. As a result, it is now precluded 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. Accordingly, the September 2021 and October 2021 Unpaid Invoices are properly due and payable.

93. This position is consistent with case law. For example, in *Paradigm Holdings Ltd v Ngan & Siu Investments Co* (“*Paradigm*”), the parties entered into a contract for the purchase and sale of two residential property units.<sup>128</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>129</sup> If there was a discrepancy, the purchase price was to be adjusted according to the actual size of the combined units registered as per strata plans.<sup>130</sup> After the execution of the sale contract, it became apparent that the units were actually smaller than 3,200 square feet.<sup>131</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>132</sup>

94. The trial judge held that the buyer was entitled to specific performance of the contract at the reduced purchase price.<sup>133</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>134</sup>

95. In the banking context, the SCC has uniformly held that a customer’s failure to verify their statements of account with their bank within the prescribed time period in a verification provision was a complete defence to any claims against the bank.<sup>135</sup> In *Arrow Transfer Co v Royal Bank*, a

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<sup>128</sup>*Paradigm* at [para 1](#).

<sup>129</sup>*Paradigm* at [para 7](#).

<sup>130</sup>*Paradigm* at [para 7](#).

<sup>131</sup>*Paradigm* at [paras 8-10](#).

<sup>132</sup>*Paradigm* at [paras 12-13](#).

<sup>133</sup>*Paradigm* at [para 1](#).

<sup>134</sup>*Paradigm* at [para 20](#).

<sup>135</sup>*Arrow* at [paras 2, 7, and 13](#).

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>136</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.

96. 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 gave RMC the right to withhold payment until it performed that verification. RMC failed to exercise the Verification Rights at any time during RBee's performance under the Supplier Agreement. As was the case with the buyer in *Paradigm* and the customer in *Arrow*, RMC elected not to exercise its contractual right of verification. As a result, RMC is bound by the terms of the Supplier Agreement to pay to the Receiver the amount claimed in the Unpaid Invoices.

97. 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 that any amounts are owing to it in order to support its alleged Set-Off Claim.

**(iv) The December Hauling Invoice is Payable to the Receiver**

98. RMC admits that RBee had previously performed hauling in respect of the Project, and that RMC paid for those services.<sup>137</sup> Furthermore, RMC does not dispute that the hauling described in the October 2021 and December 2021 Unpaid Invoices was performed. In fact, change orders produced by RMC in response to Undertakings given at Mr. Burak's Questioning show that RMC invoiced AFDE for hauling aggregate from an area known as Area 24 to its Batch Plants during the fall of 2021.<sup>138</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>139</sup> Accordingly, and as per the Parties' previous conduct, the hauling charges in the October 2021 and December 2021 Unpaid Invoices are due and payable.

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<sup>136</sup>*Arrow* at [para 13](#).

<sup>137</sup>First Burak Questioning at page 40, line 19 to page 41, line 8.

<sup>138</sup>Undertaking 1 at page 182.

<sup>139</sup>Receiver's Supplemental Report at para 22 and Appendix "F".

## **B. RMC Does Not Have a Valid Set-Off Claim**

99. If this Court finds that RMC retained a right of verification outside of the specific terms of the Supplier Agreement, RMC bears the burden of proving that RBee did not deliver the aggregate under the Supplier Agreement that it invoiced RMC for. Based on the evidence before this court, RMC has not met that burden and cannot prove, on a balance of probabilities, that it was overbilled by RBee to the extent of its alleged Set-Off Claim, or at all.

100. 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 the entire Supplier Agreement.<sup>140</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>141</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>142</sup> RMC does not dispute that at least 1,730,044 tonnes of aggregate have been supplied in relation to the Project, which amounts to approximately 125% of RMC’s initial estimate of aggregate production. The supply of aggregate also continued at least well into 2023; and
- (b) second, the Supplier Agreement set out the minimum aggregate production. It also stated that those figures were not an actual or valid estimate of aggregate needed for the Project. The fact that aggregate continued to be supplied until at least the end of the 2023 crushing season further demonstrates that the amounts set out in Schedule “B” to the Supplier Agreement were intended to be minimums, not an estimate of total aggregate required for the Project.

101. 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>143</sup> As set out below, and separate from the question of reliability of the raw data,

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<sup>140</sup>First Burak Affidavit at para 17.

<sup>141</sup>First Burak Affidavit at Exhibit “E”.

<sup>142</sup>Undertaking 10 response.

<sup>143</sup>First Burak Affidavit at para 47.

these two sources do not provide the court with the entire context and detail necessary to support RMC's claim.

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

***Batch Records***

102. As discussed above, RMC's own Batch Records are stated to reflect the amount of aggregate 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 loss of aggregate, the use of aggregate for anything other than concrete production, the movement of aggregate from the Stockpile to the Batch Plants, or otherwise.

103. 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***

104. The October 2021 AFDE survey is unreliable for several reasons.

105. First, it 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 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.

106. Second, 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>144</sup> The burden rests on RMC to prove that the Stockpile site

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<sup>144</sup>Receiver's Supplemental Report at para 24(a).

was flat, not on RBee to prove that it was not. Despite Mr. Burak's assurance that the visual inspection satisfied him that the site was flat, he acknowledges that even minor slopes can generate large discrepancies in volume measurements.<sup>145</sup> Bearing this in mind, if RMC's suggestion that surveys were to be used as a means to verify the volume of aggregate, one would anticipate a baseline survey of the vacant site would have been performed from which accurate comparisons could then have been drawn.

107. Third, the AFDE Survey ignores the risk of loss provisions in the Supplier Agreement and, even if accurate, measures only what is in the Stockpile at the time of the survey.

108. Lastly, for the AFDE Survey to result in accurate measurements to convert the survey results from meters cubed to tonnes, it requires agreed density factors to be applied. For the reasons that follow, the density factors used are critical to the accurate conversion of the survey data to volumes.

### ***Density Factors***

109. 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 factors relating to the aggregate on the Stockpile.

110. RMC's evidence relating to density factors is not reliable. Most 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>146</sup>

111. 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

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<sup>145</sup>Second Burack Affidavit at para 5.

<sup>146</sup>Receiver's Supplemental Report at para 24(b).

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>147</sup>

112. 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.

### **C. RMC's continuing Relationship with Mr. Reed**

113. As set out above, despite RMC's allegations of RBee's overbilling in the amount of over \$7 million dollars, Mr. Reed continued 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 knowledge that Mr. Reed is the principal of A-1 and was the principal of RBee.<sup>148</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**

114. The Outstanding Amounts are properly due and payable by RMC. RMC and RBee worked together pursuant 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 in accordance with the terms of the Supplier Agreement and without further verification. It was only after the Appointment Date that RMC alleged any over-billing with respect to the Supplier Agreement.

115. RMC failed to exercise the Verification Rights afforded to it under the Supplier Agreement in a timely manner, or at all. It is now 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 in a manner that is at odds with the evidence.

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<sup>147</sup>First Burak Questioning at page 66, line 27 to page 67, line 3.

<sup>148</sup>First Burak Questioning at page 75, lines 23 to page 76, line 4.

116. Even if it were permitted to assert its Set-Off Claim, RMC has failed to meet its burden of proof. RMC's inadequate and unreliable analysis relies on questionable evidence that 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 is merely a point-in-time measurement of the Stockpile that was conducted for purposes that were completely unrelated to verification of aggregate delivery. RMC seeks to impose density factors on the Stockpile that, in the majority, relate to aggregate from a completely different geographic location and are simply not applicable, or comparable, to the Stockpile. In summary, RMC's evidence is severely deficient, and it has not met the necessary burden to establish its Set-Off Claim.

117. 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 into 2023, it is impossible to reliably complete such a final reconciliation, which was never a term of the Supplier Agreement in any event.

118. Accordingly, the Receiver seeks an order of this court declaring 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 26<sup>th</sup> day of February, 2026.

**BLAKE, CASSELS & GRAYDON LLP**

By: \_\_\_\_\_



Kelly J. Bourassa/Clinton Slogrove  
Counsel for the Applicant

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4. *Sattva Capital Corp. v Creston Moly Corp.*, [2014 SCC 53](#)
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