
CANADA / JUDGMENT

American Creek Resources Ltd. v. Teuton Resources Corp.

2014 BCSC 636

COURT

Supreme Court of British Columbia

DECIDED

14 April 2014

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2014 BCSC 636 American Creek Resources Ltd. v. Teuton Resources Corp.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

American Creek Resources Ltd. v. Teuton Resources Corp.,

2014 BCSC 636

Date: 20140414

Docket: S107895

Registry: Vancouver

Between:

American Creek Resources Ltd.

Plaintiff

And:

Teuton Resources Corp.

Defendant

Before: The Honourable Mr. Justice Grauer

Reasons for Judgment

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Vancouver, B.C.

April 14, 2014

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INTRODUCTION

- [1] The plaintiff, American Creek Resources Ltd. ("American Creek", stock symbol AMK), seeks to enforce its rights under two agreements into which it entered in 2007 with the defendant, Teuton Resources Corp. ("Teuton", stock symbol TUO). Both parties are in the business of resource exploration.
- [2] Teuton is a mineral "prospect generator" company. Its business model is to acquire mineral claims, and then to enter into earn-in or option agreements with junior exploration companies.
- [3] American Creek is a junior exploration company that entered into such an agreement with Teuton on April 4, 2007. This agreement related to mineral claims owned by Teuton in the "Golden Triangle" region of northwestern British Columbia. These claims make up the Treaty Creek property, located near the well-known Eskay Creek mine, about 80 km north of Stewart.
- [4] In essence, the parties' agreement provided that American Creek would earn a 51% undivided interest in the Treaty Creek property upon issuing a total of 100,000 common shares to Teuton (they are not in issue), and making "exploration expenditures" on the property totalling \$5,000,000 in specified stages over the years 2007-2009. By a supplemental agreement dated September 11, 2007, the parties agreed that (among other things) upon completion of that earn-in, Teuton would convey the entire property to American Creek, which would then hold legal title to the property in trust as to Teuton's 49% interest.
- [5] American Creek says that it has exceeded those requirements and seeks an order requiring Teuton to transfer the property to it. It also seeks punitive damages.
- [6] Teuton acknowledges that American Creek issued the required number of shares, and spent a good deal of money, exceeding \$5,000,000. Teuton denies, however, that enough of those expenses qualify as "exploration expenditures" within the meaning of the agreement to earn for the plaintiff the interest it claims.

- [7] The case turns, then, principally on determining what the parties meant when they used the undefined term "exploration expenditures" in their agreement, and the extent to which American Creek's expenditures come within that meaning.
- [8] For the reasons that follow, I find that American Creek met its obligations under the agreement, and that it is entitled to the relief it seeks in relation to the property. I do not, however, award punitive damages.

BACKGROUND

1. The business models

- [9] Prospecting is a risky business. Dino Cremonese, president and CEO of Teuton, which he founded in 1982, observed that perhaps one in 5,000 to 10,000 properties that are explored will ever develop into a producing mine. Yet it remains an important part of the economy.
- [10] Mr. Cremonese built Teuton on the "prospect generator" model. He locates and stakes mineral claims in promising areas. To maintain rights to these claims beyond a relatively short period, the holder must either pay substantial fees, or carry out exploration and development on them. Otherwise, title will lapse so that others may pursue the opportunity.
- [11] Instead of undertaking the necessary exploration itself, Teuton's primary business model is to maintain the claims by arranging for exploration companies to carry it out, in return for which those companies may earn an interest in the property. The disadvantage to Teuton of this model is that it stands to lose a substantial portion of its interest in the property if the exploration company fulfils its obligations. But this is balanced by significant advantages. Exploration and development is carried out without any cost to Teuton, whose rights to the property are thereby extended. This is accomplished without having to raise capital, avoiding the dilution of Teuton's shares. At the same time, the promotion of Teuton's shares is enhanced by the mere fact of exploration. If the exploration company fails to earn its interest, Teuton maintains its 100% interest in the property, and benefits from both the geoscientific data produced, and the extension of its rights. If the exploration company spends enough over the time of the agreement to earn its interest, then both stand to profit from the result.
- [12] American Creek is a pure exploration company. Founded in 2004, it proved adept at raising cash in the equity markets to fund its exploration activities. That, of course, is its only means of financing exploration, as it produces no income. It enters into selected earn-in agreements with a view to increasing its share value through achieving encouraging results. The risk, of course, is that it may expend considerable sums that end up achieving nothing. But if promising results are obtained, then its share value is enhanced, further exploration and development becomes feasible, and it can earn an interest in the property in question.

2. The regulatory scheme

[13] By sections 28 and 29 of the Mineral Tenure Act, RSBC 1996, c 292 (the "Act"):

28 (1) Subject to this Act, the recorded holder of a claim is entitled to those minerals or placer minerals, as the case may be, that are held by the government and that are situated vertically downward from and inside the boundaries of the claim.

(2) The interest of a recorded holder of a claim is a chattel interest.

29 A recorded holder may hold a claim until the expiry date, and after that, in accordance with the regulations, may hold the claim from year to year by

- (a) doing exploration and development and registering a statement of the exploration and development, or making payments instead of exploration and development, and
- (b) registering a revised expiry date.

[14] Once exploration work is done on a claim, the work and the expenditures are detailed in an Assessment Report that must be submitted to the chief gold commissioner pursuant to section 33 of the Act. The chief gold commissioner is also executive director of the Mineral Titles Branch of the Ministry of Energy and Mines. If that office accepts the Statement of Expenditures included in the Assessment Report, and the necessary application is properly made, then "assessment credits" are generated that can be used to extend the holder's mineral claims.

[15] The Mineral Tenure Act Regulation, BC Reg 529/2004, sets out how this is accomplished. It defines terms such as "physical exploration and development" and "technical exploration and development", which together constitute "exploration and development". Section 7 specifies various parameters concerning exploration and development expenses in section 7, including:

7 (7) Shallow drill holes drilled for the purpose of blasting are considered to be physical work.

- (8) Prospecting activities in respect of a claim are acceptable for registration as exploration and development only during the first three years of the holding of the claim by a recorded holder.
- (9) The chief gold commissioner must determine the value to be credited for exploration and development work after considering
 - (a) the exploration and development work as defined by the contents of the report submitted for the purposes of section 33 of the Act, and
 - (b) the costs documented in an itemized costs statement included in the report.
- (10) On request by the chief gold commissioner, the recorded holder of a claim must provide evidence satisfactory to the chief gold commissioner that the registered exploration and development activity has been performed, including any receipts.

- [16] Where the amount of exploration and development work performed on a claim exceeds what is necessary to maintain the claim under section 29 of the Act, then the excess may be credited to a portable assessment credit account created by the chief gold commissioner in the name of the recorded holder, and may be used towards the maintenance of other claims.
3. The Treaty Creek property
- [17] The Treaty Creek property comprises, for present purposes, 44 contiguous mineral claims on approximately 179 square kilometres of harsh and forbidding terrain in a remote area of steep mountains and high valleys. It occupies the area surrounding the Atkins, Treaty and South Treaty glaciers, extending south to the Mitchell glacier. The winters are long, dark and cold. The summers are short and cool. But the prospect of gold, silver and copper attracts plenty of attention.
- [18] Weather conditions leave a short window for exploration and development work, from the middle of June to the middle of October. The winter snowfall is heavy, and the weather can reduce that window considerably.
- [19] The claims are not accessible by road. Access is by helicopter from Stewart, 80 km to the south. There is also a helicopter staging area at the Bell II Lodge, some 25 km to the north-east. Bell II is on the Stewart-Cassiar highway. The driving time from Stewart to Bell II is about three hours.
- [20] The nearest airport with commercial service is in Terrace, BC. The driving time from Terrace to Stewart is about four hours.
- [21] The Treaty Creek property was discovered and staked in 1928. Prospecting over the years failed to identify significant mineralization. Teuton acquired the claims in 1984, and its program of prospecting was rewarded with the discovery of mineralization in an area known as the Konkin zone.
- [22] Over the ensuing years, Teuton entered into a series of option agreements with exploration companies for the Treaty Creek property. The first, in 1990, was with Tantalus Resources, described by Mr. Cremonese as "Chet Idziszek's flagship company at the time--Chet was chief geologist for Murray Pezim and is credited with spotting the famous "hole 109" at Eskay Creek". This agreement allowed Tantalus to earn a 50% interest with the expenditure of \$3.2 million. Tantalus spent about \$1.8 million on the property before abandoning the project, apparently finding it difficult to raise additional working capital after Mr. Pezim ran afoul of the Securities Commission. Teuton therefore retained its 100% interest, with the advantage of the work Tantalus had undertaken.
- [23] In 1994, Teuton optioned the property to Homestake Mining. The agreement provided that Homestake could earn a 50% interest with the expenditure of \$3.6 million. According to Mr. Cremonese, its initial drilling in an area known as the Eureka zone yielded results that were of little interest in a time of low gold prices, and it, too, abandoned the project.

[24] Teuton's next Treaty Creek option agreement was with Global Exploration in 1997. After one exploration season conducted by Teuton under contract to Global, Global declined to continue, and the property remained entirely in Teuton's hands. Finally, in 2002, Teuton optioned the Treaty Creek property to Heritage Exploration, which again failed to complete its earn-in. As Mr. Cremonese later explained to American Creek, the terms of these agreements

were not as rich but it was the post Bre-X time and properties were going cheap. The Global option lasted one season--8 holes were drilled, many with good results but they declined to continue. Again, it was a tough time to raise money. Heritage had the property for 3 seasons and did very little of consequence with it. In all that time they drilled only 1 hole and that was a dud wildcat on a porphyry copper target dreamed up by their proprietary software program (Geoinformatics).

4. American Creek meets Treaty Creek

[25] By the start of 2007, times had changed. The price of gold was high. Bre-X was but a dim, if unpleasant, memory. The resource industry was booming. Silver Standard Resources and Seabridge Gold were proving substantial gold reserves on neighbouring claims with similar geology. Properties were no longer going cheap. And Teuton's rights to the Treaty Creek claims would expire in 2008, 2011 and 2012 if not extended. In Mr. Cremonese's mind, it was the perfect time to attract a new optionee.

[26] By then, American Creek was involved in the exploration of a number of properties in British Columbia, including two groups of claims in the Golden Triangle. One of these, the Electrum property, was about halfway between Stewart and Treaty Creek. American Creek had acquired this property by meeting the requirements of an earn-in agreement in 2006. The other, the Tide property, was close by. So American Creek was already active in the area.

[27] As American Creek's CEO, Allan Burton (whose evidence I do not hesitate to accept), explained, 2006 had been a very busy year in the mineral exploration field, with investment dollars pouring in. As a result, there was a heavy demand for a limited supply of geologists, field personnel, drillers, heavy equipment, helicopters and so on. That supply had dwindled as a result of years of poor markets and reduced activity, and could not now meet the burgeoning demand. Moreover, American Creek was a new player, having just been listed on the TSX Venture Exchange in September of 2006. As such, it was fairly low on the totem pole of seniority when it came to securing the necessary personnel and resources.

[28] Nevertheless, American Creek planned significant programs for the 2007 season on its Electrum and Tide properties. Having encountered difficulties securing a satisfactory driller for the 2006 season, Mr. Burton wanted to be sure to secure a good driller for 2007. He found one in Mr. Sean Pownall of Stewart, who had worked at Eskay Creek. Mr. Pownall was prepared to commit to him for the season. He signed up Mr. Pownall's newly-established company, More Core Diamond Drilling Services Ltd., in December 2006.

- [29] Another pre-emptive step taken by Mr. Burton was to purchase four diamond drills in late 2006-early 2007. This was intended to address the problem of drillers and drilling equipment being in short supply. The strategy was to have equipment available for drillers whose equipment was otherwise tied up, and ultimately to develop drilling expertise among American Creek's own employees. This strategy proved not to be viable, however, due to a number of factors including a lack of interest on the part of the employees, and the fact that American Creek's resources were stretched quite enough without getting into the drilling business. Ultimately, under circumstances that the defendant questions (but I do not), American Creek agreed to sell the drills to Mr. Pownall's company with the purchase price being credited to the cost of drilling. But at this stage, in early 2007, Teuton and Treaty Creek were not yet on the horizon.
- [30] Both American Creek and Teuton used Stewart as a base for their operations and programs in the Golden Triangle. Stewart is a small town and its occupants get to know each other quite quickly. Mr. Cremonese spent a good deal of time there. So did Brent Ambrose, American Creek's vice-president of exploration. They became good friends.
- [31] Unlike Mr. Cremonese, who had degrees in applied science and law from the University of British Columbia and was a professional engineer with a good deal of experience in prospecting, Mr. Ambrose did not have a background of significant experience and training in the resource field. He was a knowledgeable amateur with a deep interest in the area. His connection with American Creek was initially that of an investor. Ultimately, he joined American Creek as vice president of exploration, with a mandate to research properties. By the time he testified at trial, his friendship with Mr. Cremonese had evaporated and he was no longer an employee of American Creek. Things had not gone well for him.
- [32] But in early 2007, things were different.
- [33] Mr. Ambrose testified, and I accept, that he first met Dino Cremonese in 2005, before Mr. Ambrose started working for American Creek. He had gone to Stewart with furniture for American Creek's new building, which he had helped finance. He met Mr. Cremonese at the local bar, where they were introduced by American Creek employees.
- [34] By the 2006 exploration season, Mr. Ambrose had joined American Creek as its vice president of exploration, and spent the season working on the Electrum project, dividing his time between the Electrum property and Stewart. He got to know Mr. Cremonese quite well.
- [35] In late 2006, Mr. Cremonese spoke to him briefly about the possibilities of a property in his portfolio that he thought would be of interest to an aggressive company like American Creek. This conversation was renewed in February 2007, and on February 8, 2007, Mr. Cremonese emailed Mr. Ambrose:

From: Dino Cremonese

Sent: Thursday, February 08, 2007 1:18 PM

To: Brent Ambrose

Subject: Teuton Resource's Treaty Creek Property - Stewart Region

Brent:

In about two weeks, after our Powerpoint on the Treaty Creek is finished, I'm going to start actively looking for a home for this outstanding gold-silver property. It definitely is the best property now available for option in the Stewart-Eskay region.

Treaty Creek covers the northern continuation of the highly prospective Sulphurets area (which starts about 18 km north of AMK's East Gold property). If you were at the Cordilleran Round-up a week ago, you would have caught two speeches on this area. One by Silver Standard on their Snowfield Gold zone, and one by Seabridge on their Kerr, Sulphide deposits. Those two properties are now sporting a mineral endowment of close to 7 million ounces of gold and 2.7 billion lbs of copper in their various, mostly bulk tonnage type deposits. The attached map will give you the claim configurations and also details on these deposits. This is an evolving story, one that is just going to get better over the years. Because of the low-grade of this monster deposits, it really hasn't got a lot of attention, but as gold creeps up and the reserve figures increase to over the 10 million oz mark sometime next year, you will see this become BC's premier gold camp. At 10 million ounces you are entering the realm of the world's major gold districts.

AMK, with its outstanding ability to raise money, and its foot already well positioned within the Stewart "door", is a natural for this property.

But Treaty doesn't just have potential for mega-tonnage, low-grade Au or Au-Cu deposits. It also has outstanding potential for the smaller, high-grade variety like you see in the Brucejack area on Silver Standard's property. Check out the attached photo from the Konkin Gold pit on Treaty. The first sample from this pit ran 28 oz gold over 4 feet. Think what you could do with that on the promotion side. Along with high gold values, Treaty also has some very tasty high-grade silver results. And silver is very sexy right now. The one I like best is the GR2 area. Check out some of the trench results below:

[Chart of selected silver and gold trench results from Treaty Creek]

The last company to have Treaty under option, Heritage Explorations, planned to drill the GR2 showing based on a highly positive analysis by Peter Lewis, Ph.D. (he is an acknowledged expert on Eskay, and formerly a key figure in BC's Mineral Deposit Research Unit). But although Heritage built the pads, they never drilled. Instead, during the 3 years they held the property under option (2002-5), they drilled only 1 hole, and that was on an obscure target dreamed up by their Geoinformatics software program (the target turned out to be a dud).

Anyway, Brent I visited the GR2 last year in the company of some Sabina Silver geos, and was impressed by the amount of glacial melt back in the area. This melt back has exposed a much larger area of the argentiferous galena in a very flat section of the property, ideal for drilling. You may remember the big boulder on my porch in Stewart that was from a new exposure in this

area.

My plans for 2007 included a drill test of this zone. I figure there is a very high likelihood of replicating some of the trench results in this area because we are dealing with solid bedrock. The only other holes in the GR2 area were drilled by Tantalus in the early 1990s and they were collared on an adjacent hill-side with a lot of overburden. They did not match surface results, probably because the surface results were not true bedrock. Either that, or the geos had an imperfect understanding of the structural setting.

Brent .can you imagine what kind of reaction you would get with a whole cutting 3.8 metres of 72.2 oz/ton silver?

If I can't find a home for Treaty on our terms, we will go it alone. Why am I optioning out such a good property? Simple our best bet right now is the Fiji right next to Bravo's discovery. We have budgeted \$1 million for that, and to do more on our other properties I will have to raise more loot. That's possible, but what really concerns me is whether we have the wherewithal to get drills for all we want to do. I STILL HAVEN'T LINED UP A DRILL FOR FIJI!!!! I was even going to buy a drill but couldn't get satisfactory terms. If you have any ideas on this score I am all ears.

Get back to me if you are interested in Treaty. This is just a teaser there are boxes and boxes of information to go through if you are serious.

Treaty has also been written up extensively in the government literature. Dani Alldrick, now head BC geo, has always maintained the property has great potential for another Eskay Creek. Also Seabridge was very interested in optioning the property because of the similar geology but they insisted on having 100%. That's not our model. We would never give up more than 50% of this one.

If you want an outside opinion on the merits of Treaty, then you can contact Ken Konkin of Silver Standard. Ken found some of the best songs on Treaty and he has been up in the Stewart region for almost as long as Big Ed. Kenny, by the way, ran the \$2 million program at Silver Standard's property last year. It's going to be an even bigger program this year, and because Kenny has his plate full with an Argentinian Silver Standard project, Big Ed is going to be running things there in 2007. Should be a very, very exciting field season up there this year, mate!

All the best,

Dino

[Emphasis by upper case original; emphasis by underlining added.]

[36] Mr. Ambrose was impressed:

On 2/8/07, Brent Ambrose wrote:

Hey Dino,

Wow! That was quite a pitch!!! You had me hanging on the edge of my seat wanting more I'm going to forward this one on to Darren Blaney, our COO. Darren does all of our deals and is always willing to listen if a property has merit.

Cheers and Take Care,

Brent

[37] Mr. Ambrose did indeed forward the proposal to Mr. Blaney at American Creek's head office in Raymond, Alberta. American Creek was interested. On March 18, 2007, Mr. Cremonese emailed Mr. Ambrose, with a copy to Mr. Blaney:

Brent:

Since you've already seen the PowerPoint and have a good understanding of the regional context, I thought I would get the ball rolling by throwing out some terms. But before I do that, let me emphasize again that Treaty Creek is without doubt the best property currently available for option in the entire Eskay Creek-Stewart-Anyox region. I don't think we will have any problem finding a home for it, especially considering the recent developments next door: 20 million ounces of gold now proven up in the combined Sulphurets properties owned by Silver Standard and Seabridge. And much more to come this season.

We believe, and there is ample evidence to support, that Treaty Creek represents the north-eastern continuation of the same geology/mineralogy as Sulphurets. The property has potential to host both megaton it, low-grade gold or gold-copper deposits, and also high-grade gold-silver deposits.

[Mr. Cremonese then described the four previous option arrangements recounted above.]

OK..that was a little summary to give you a sense of the property's history and also what other companies were willing to shell out for a 50% option.

Here's what we want: terms that are similar to what Rimfire got 3 years ago (when gold was trading for much less) from Northgate for their RDN property. RDN is an Eskay Creek-type property, but work there so far has been disappointing. Call me biased, but I don't think that property is in the same class as Treaty Creek, especially considering the gold and copper endowment now established just south-west of Treaty Creek at Sulphurets.

So..here's what we are asking for:

To earn a 51% interest in the property expenditures totalling \$5 million over three years, with the first year set at \$1 million. [That's identical to the RDN deal]. I know that Darren says AMK likes to have as big as possible an interest in properties they farm into, but we can't go below 51% [sic] to a third party. That's not negotiable. Considering the potential of the property I don't think we will have a problem with that term.

Rimfire got staged cash payments totalling \$200,000 over 3 years in their deal. Again, considering what is going on just next door and Treaty Creek's large size and multiple targets as well is the much higher gold price right now, I suggest we can do better than that. Maybe some combination of shares and cash. This is entirely negotiable.

Other terms are standard AMK would be the operator and after vesting its interest, there would be a joint venture between TUO and AMK, with majority rule to prevail.

So there you have it, Brent. If this is too rich for your blood .what can I say? I'm pretty sure we can get this was a little shopping around. Maybe even more.

We'll let you guys have first shot at it. The following week we'll send it out to companies like Northgate and several well-heeled juniors. Sabina is still a possibility but being a company in transition (they are currently shopping for a CEO) no one there seems to be able to make a decision.

All the best,

Dino

[38] Asked to explain why he chose to favour American Creek with this opportunity, Mr. Cremonese gave several reasons.

[39] First, he knew Brent Ambrose and thought him a "pretty good guy". Second, he saw that American Creek was spending a lot of money on the Electrum property and concluded that it had a fair amount of cash. Third, he observed that American Creek was trading at \$2 per share, and seemed to have excellent promotional abilities. As such, he expected that it would be able to raise sufficient capital to fund another exploration program in the immediate future. It would, in short, be in a position to spend money on the property. Otherwise, he did not know that much about the company or about its senior officers, Mr. Blaney or Mr. Burton. American Creek was, after all, quite new.

THE AGREEMENT

[40] After further negotiations, the parties signed an agreement dated April 4, 2007, on the letterhead of American Creek Resources (the "earn-in agreement"):

Teuton Resources Corp.

207, 675 West Hastings Street

Vancouver, B.C.

V6B1N2

Attention: Dino Cremonese

Dear Dino:

Re: Treaty Creek Property

This confirms the agreement between Teuton Resources Corp. ("Teuton") and American Creek Resources Ltd. ("American Creek"), as follows:

1. American Creek will earn a 51% undivided interest in the mineral claims known as the Treaty Creek Property (as more particularly set out in the attached Schedule "A") (the "Property") upon American Creek issuing a total of 100,000 common shares in its capital stock to Teuton and making exploration expenditures on the Property aggregating \$5,000,000 as follows:

Shares

- a) 25,000 shares to be issued within 10 days of receiving regulatory approval from the TSX Venture Exchange;
- b) 25,000 shares to be issued on or before March 31, 2008; and
- c) 50,000 shares to be issued on or before March 31, 2009.

Exploration Expenditures

- d) \$1,000,000 on or before March 31, 2008 (the "First Year Program");
- e) \$2,500,000 in aggregate on or before March 31, 2009; and
- f) \$5,000,000 in aggregate on or before March 31, 2010.

(the "First Earn-In").

2. The requirement to make exploration expenditures on the dates set out in sub-paragraphs 1(d), (e) and (f) is contingent upon the receipt prior to July 1, 2007 of an approval of a Notice of Work ("NOW") as filed with the office of the Inspector of Mines in Smithers, B.C. If the approval of the NOW for the First Year Program is not obtained prior to July 1, 2007, then the completion dates set out in paragraph 1 shall each be extended by one year. Teuton shall be responsible to file the NOW, and Teuton hereby agrees that the details of the NOW shall conform to the exploration program as determined by American Creek, the Operator.
3. Notwithstanding anything else in this Agreement, in the event that American Creek makes expenditures of less than \$500,000 on the First Year Program within the agreed time period, American Creek shall forthwith pay to Teuton a sum equal to the difference between what was expended and \$500,000.
4. American Creek may accelerate any or all of the share issuances and exploration expenditures in its sole discretion. American Creek shall have completed the First Earn-In immediately upon the issuance of an aggregate of 100,000 common shares and expending \$5,000,000.

5. Subject to American Creek duly completing its First Earn-In, Teuton hereby irrevocably grants to American Creek the right to earn an additional 9% undivided interest in the Property (such that its aggregate interest is 60%) by performing and paying for such additional exploration work, engineering studies and reports as may be necessary in order to provide Teuton with a positive feasibility study ("Feasibility Study") (the "Second Earn-In").
6. No later than 60 days following the completion of the First Earn-In, American Creek shall notify Teuton of its election to proceed with the Second Earn-In, failing which its right to earn the additional 9% shall terminate.
7. If American Creek completes the First Earn-In, but fails to deliver the Feasibility Study within four years of its election under the preceding paragraph, or if at any time American Creek notifies Teuton of its election to abandon its rights under the Second Earn-In, then American Creek shall no longer be entitled to the Second Earn-In and American Creek and Teuton shall be deemed to have formed a joint venture with the initial interests of American Creek being equal to 51% and that of Teuton being equal to 49%. If American Creek completes the Second Earn-In, then American Creek and Teuton shall be deemed to have formed a joint venture with the initial interests of American Creek being equal to 60% and that of Teuton being equal to 40%.
8. Pursuant to the preceding paragraph, American Creek and Teuton shall enter into a Joint Venture agreement, the terms of which shall be in conformity with industry standards, including dilution clauses such that a party holding an interest of 10% or less shall be deemed to have a net proceeds interest only.
9. American Creek acknowledges that all interests in the 24 mineral claims more particularly described in Group II of the attached Schedule "A" are subject to a 2% Net Smelter Return Royalty (aNSRfl) in favour of St. Andrew Goldfields Ltd. A buy-back of one-half (1%) of the NSR for \$1,000,000 is exercisable at any time until six months has passed from the commencement of commercial production. The Property is not subject to any other third-party interest or obligation.
10. American Creek or its designate will be the Operator beginning with the 2007 exploration program.
11. During the term of this Agreement, Teuton shall be entitled to appoint a representative to monitor exploration activities on the Property. The representative shall be entitled to access all data associated with the exploration activities at the same time they are furnished to American Creek, including, without limiting the generality of the foregoing, access to diamond drill core and logs, all assay, geophysical survey, and geochemical survey results, geological mapping data, maps, etc.
12. American Creek shall be responsible for all assessments and to file all assessment credits during the term of the option.

13. This Agreement constitutes the whole of the agreement between the parties.
14. It is contemplated that the parties hereto shall enter into a formal option agreement ("Option Agreement"), the terms and conditions of which shall conform with the terms and conditions of this Agreement and shall contain such other terms and conditions as are typically contained in an industry-standard option agreement. The terms and conditions of this Agreement shall be subsumed by the terms and conditions of the Option Agreement.
15. This is a legally binding agreement, and shall enure to the benefit of and be binding upon the parties and their respective successors and assigns. This Agreement and the Option Agreement shall be assignable by American Creek or its successors and assigns, subject to Teuton's prior written consent, which shall not be unreasonably withheld.
16. This Agreement shall be governed by and construed in accordance with the laws of Alberta.
17. This Agreement is subject to the approval of the TSX Venture Exchange.

It is our understanding that we will have our legal counsel prepare an agreement to formalize the foregoing and that a draft document will be provided to you as soon as possible.

In the meantime, we ask that you kindly confirm the above by endorsing this letter below and faxing a copy back to our office.

We thank you for your attention to this matter, and look forward to working with you.

Yours truly,

[Signed]

ALLAN G. BURTON

President & CEO

Teuton Resources Corp. hereby acknowledges its agreement to the terms and conditions set out above.

Dated this 4th day of April, 2007.

TEUTON RESOURCES CORP.

Per: _[Signed]_____

DINO CREMONESE. President

[41] Notwithstanding the contents of clause 14 and the reference to legal counsel preparing an agreement "to formalize the foregoing", no more formal document was ever prepared. Neither side felt it necessary. They did, however, enter into a further letter agreement amending and supplementing the earn-in agreement, also on the letterhead of American Creek (the "supplemental agreement"):

September 11, 2007

Teuton Resources Corp.

207, 675 West Hastings Street

Vancouver, BC

V6B 1N2

Attention: Dino Cremonese

Dear Dino:

Re: Treaty Creek Property

This letter confirms that the agreement between Teuton Resources Corp. ("Teuton") and American Creek Resources Ltd. (ACR) set forth in the letter dated April 4, 2007 (the "Agreement") is amended and supplemented as follows:

1. With effect from July 29, 2007, the definition of "Property" shall include the mineral claims set forth in Schedule "A" annexed, which are in addition to the mineral claims set forth In Schedule "A" annexed to the Agreement.
2. Teuton represents and warrants to ACR that Teuton is the legal, beneficial and registered owner of a 100% interest in the Property, unencumbered by any interests or claims except pursuant to the Agreement and the NSR in favour of St. Andrew Goldfields Ltd. in respect of the mineral claims described in Group "II" of Schedule "A" annexed to the Agreement.
3. Teuton covenants and agrees to hold the Property in trust for ACR in respect of any interest ACR may have or acquire pursuant to the Agreement and shall forthwith transfer legal title in and to the Property to ACR upon completion of the First Earn-In. ACR covenants and agrees that upon such transfer, it will hold legal title to the Property in trust for the interest of Teuton.

4. Teuton further covenants and agrees that while ACR is earning an interest in the Property, Teuton will not transfer, sell, grant, assign, pledge, charge, encumber or otherwise commit or dispose of all or any part of the Property, nor will it cause to be created any right, interest or claim (collectively and individually, a "claim") in or against all or any part of the Property unless it has received the prior written consent of ACR and any such permitted Claim must expressly provide that it is subordinate to the interest of ACR.
5. Except for the obligation to make payments when due in accordance with the Agreement, the obligations of ACR shall be suspended to the extent and for the period that performance is prevented by any cause, whether foreseeable or unforeseeable, beyond ACR's reasonable control, including without limitation, labour disputes (however arising and whether or not employee demands are reasonable or within the power of ACR to grant); acts of God, laws, regulations, orders, proclamations, instructions or requests of any government or governmental entity; judgments or orders of any court; inability to obtain on reasonable acceptable terms any public or private license, permit or other authorization; curtail and or suspension of activities to remedy or avoid an actual or alleged, present or prospective violation of federal, provincial or a local environmental standards; acts of war or conditions arising out of or attributable to war, whether declared or undeclared; riot, civil strife, insurrection or rebellion; interference by environmentalists, aboriginals or aboriginal right groups or other activists; fire, explosion, earthquake, mudslide, storm, flood, avalanche, sinkholes, volcanic eruption, drought or other adverse weather conditions; delay or failure by suppliers or transporters of materials, parts, supplies, services or equipment or by contractors or subcontractor; shortage of, or inability to obtain, labour, transportation, materials, machinery, equipment, supplies, utilities or services; accidents; breakdown of equipment, machinery or facilities; or any other cars whether similar or dissimilar to the foregoing. ACR shall promptly give notice to Teuton of the suspension of performance, stating there in the nature of the suspension, the reasons therefor, and the expected duration thereof. The affected party shall resume performance as soon as reasonably possible.

[Strikethrough of clause 5 initialled.]

6. The Agreement, as amended and supplemented by this letter, shall constitute the entire agreement between the parties.

Please sign and return a copy of this letter to evidence your acceptance of the agreement set forth herein. Upon your execution of this letter or a counterpart hereof, this letter will constitute a legally binding and enforceable agreement between ACR and Teuton.

Yours truly,

[Signed]

ALLAN G. BURTON

President & CEO

March, 2008

The foregoing is agreed and accepted this 20 day of September, 2007.

TEUTON RESOURCES CORP.

per: __[Signed]__

Dino Cremonese, President

[42] As noted above, the principal issue arising from these agreements is the meaning of the undefined term "exploration expenditures" in the earn-in agreement. But the parties raise a further issue: do these agreements constitute a "true option" that requires American Creek to show that it has strictly complied with the conditions precedent set out in the earn-in agreement before Teuton is obliged to transfer the interest in the property, or do they constitute a bilateral contract that Teuton cannot rescind except for substantial non-performance?

DISCUSSION

1. Interpreting the agreements - what did the parties intend?

[43] The law relating to the interpretation of contracts has been stated many times, but is not always easily applied, as the opposing submissions in this case make clear. Mr. Justice Tysoe, then of this Court, provided a succinct outline of the relevant principles in *Jardine v General Hydrogen Corporation*, 2007 BCSC 119, 68 BCLR (4th) 162, at para 23:

Counsel for the parties did not have a particular disagreement over the principles of interpretation to be applied by the court. These principles include the following:

- (a) the goal of interpretation of an agreement is to ascertain the intention of the parties to the agreement at the time of its execution;
- (b) words should be given their plain and ordinary meaning, while being construed in the context of the agreement as a whole;
- (c) one should first look to the words of the agreement as a whole, with the assistance of the factual matrix of events leading up to the making of the agreement, to determine whether there is only one reasonable meaning of the words in question or whether the meaning of the words is ambiguous in the sense of being reasonably capable of two different interpretations;
- (d) the court will only look to extrinsic evidence beyond the factual matrix if the meaning of the words is ambiguous;
- (e) the court will not interpret words according to their literal construction if it would result in a commercial absurdity.

- [44] A fuller discussion of these principles can be found in *Water Street Pictures Ltd v Forefront Releasing Inc*, 2006 BCCA 459, 57 BCLR (4th) 212, per Lowry J.A.:
- [23] Recourse to extrinsic evidence to aid in the interpretation of an agreement is the court's last resort. It is only when the intentions of the parties cannot be objectively determined from the words they have chosen to employ, such that there is ambiguity, that the law permits consideration to be given to evidence of their conduct in making their agreement and in fulfilling their obligations. If it were otherwise, the certainty that is essential to documenting commercial transactions would be seriously undermined. The two-step approach to be taken has been succinctly stated by the Manitoba Court of Appeal in *Geoffrey L. Moore Realty Inc v Manitoba Motor League*, 2003 MBCA 71, [2003] 9 WWR 385, at para 26:
- [26] In brief summary then, to determine the intentions of the parties expressed in a written contract, one looks to the text of the contract as a whole. In doing so, meaning is given to all of the words in the text, if possible, and the absence of words may also be considered. If necessary, the text is considered in light of the surrounding circumstances as at the time of execution of the contract. The goal is to determine the objective intentions of the parties in the sense of a reasonable person in the context of those surrounding circumstances and not the subjective intentions of the parties. If, after that analysis, the text in question is ambiguous, extrinsic evidence may be considered.
- [24] Thus, the court looks first to the words of the agreement, read as a whole, aided, if necessary, by evidence of the circumstances or what is referred to as the factual matrix existing when the agreement was made. Such evidence is generally restricted to circumstances known to both parties that illuminate the meaning a reasonable person would give to the words employed: *Glaswegian Enterprises Inc v BC Tel Mobility Cellular Inc* (1997), 49 BCLR (3d) 317 (CA) at paras 18 to 20. See also Lord Hoffmann's discussion of the principles of interpretation in *Investors Compensation Scheme Ltd v West Bromwich Building Society*, [1998] 1 WLR 896 (HL). The wording of the agreement must not, however, be overwhelmed by a contextual analysis: *Black Swan Gold Mines Ltd v Goldbelt Resources Ltd* (1996), 25 BCLR (3d) 285 (CA) at para 19.
- [26] If, after undertaking the first step of the analysis, the text is ambiguous, extrinsic evidence becomes admissible for the purpose of resolving the ambiguity and determining what was actually agreed. But there must be a true ambiguity before recourse can be had to evidence of the way in which the parties conducted themselves. It is well recognized that the court is not to search for ambiguity. In *Melanesian Mission Trust Board v Australian Mutual Provident Society*, [1996] UKPC 53, [1996] JCI No 63 at para 9, Lord Hope of Craighead expressed the caution the court must exercise in this regard, as follows:
- [9] The approach which must be taken to the construction of a clause of the formal document of this kind is well settled. The intention of the parties is to be discovered from the words used in the document. Where ordinary words have been used they must be taken to have been used according to the ordinary meaning of these words. If their meaning is clear and

unambiguous, effect must be given to them because that is what the parties are taken to have agreed to by their contract. Various rules may be invoked to assist interpretation in the event that there is an ambiguity. But it is not the function of the court, when construing a document, to search for an ambiguity. Nor should the rules which exist to resolve ambiguities be invoked in order to create an ambiguity which, according to the ordinary meaning of the words, is not there. So the starting point is to examine the words used in order to see whether they are clear and unambiguous. It is of course legitimate to look at the document as a whole and to examine the context in which these words have been used, as the context may affect the meaning of the words. But unless the context shows that the ordinary meaning cannot be given to them or that there is an ambiguity, the ordinary meaning of the words which have been used in the document must prevail.

[26] An ambiguity can be said to exist only where, on a fair reading of the agreement as a whole, two reasonable interpretations emerge such that it cannot be objectively said what agreement the parties made: *Gilchrist v Western Star Trucks Inc* (2000), 73 BCLR (3d) 102, 2000 BCCA 70 at paras 17-18; and *Re Canadian National Railways and Canadian Pacific Ltd* (1978), 95 DLR (3d) 242 at 262, [1979] 1 WWR 358 (BCCA), *aff'd* [1979] 2 SCR 668. Where extrinsic evidence has been admitted, it has been to resolve an ambiguity in what the parties in fact agreed as opposed to overcoming an uncertainty about the legal consequences of the agreement they made.

[45] With these principles in mind, I turn to consider the two main issues of construction that arise in relation to the earn-in agreement as modified by the supplemental agreement.

2. Must the plaintiff prove strict compliance?

[46] Relying principally on *Pierce v Empey*, [1939] SCR 247, Teuton submits that in seeking to enforce its rights to an interest in the Treaty Creek property, American Creek must prove that it has strictly complied with all conditions precedent set out in the earn-in agreement. As Duff C.J.C. stated in *Pierce* at p. 252:

It is well settled that the plaintiff invoking the aid of the court for the enforcement of an option for the sale of land must show that the terms of the option as to time and otherwise have been strictly observed. The owner incurs no obligation to sell unless the conditions precedent are fulfilled or, as the result of his conduct, the holder of the option is on some equitable ground relieved from the strict fulfilment of them .

[47] This is based on the unilateral nature of an option agreement: the optionor undertakes the promise to honour the terms of the option if the optionee exercises it. But the optionee is under no corresponding obligation to exercise the option. It can, if it chooses, do nothing without being in breach of the agreement.

[48] In this case, argues Teuton, the earn-in agreement was just such an option. Teuton was bound to transfer the 51% interest in the Treaty Creek property if (but only if) American Creek completed the earn-in obligations. But American Creek had no obligation to do so.

[49] While maintaining that it has met all its obligations, American Creek argues that the earn-in agreement is not a true option, but rather is bilateral in nature. Relying on *Sail Labrador Ltd v Challenge One (The)*, [1999] 1 SCR 265, American Creek asserts that in the circumstances of this agreement, it need only show substantial performance. Thus, as Justice Bastarache stated for the majority in *Sail Labrador* at paras 40-41:

Pierce, supra, has been interpreted as establishing that all options are unilateral contracts. I disagree and would add that any previous case law which restricts the interpretation of options in this way must not be followed. That an option may be an element of a bilateral contract in which it is contained rather than an independent, unilateral contract is supported by this Court's decision in *Monk Corp v Island Fertilizers Ltd*, [1991] 1 SCR 779, where it was recognized that a single contract can contain terms which relate to different subject matters.

Whether a contract which contains an option clause establishes a single, bilateral contract or two separate contracts, one bilateral and the other unilateral, is a matter of construction. Courts must examine the text of the contract and the context surrounding it in order to determine the intention of the parties, keeping in mind that this Court has previously approved of the tendency by courts to treat offers as calling for a bilateral rather than unilateral performance whenever a contract can fairly be so construed: *Dawson v Helicopter Exploration Co*, [1955] SCR 868, at p. 874, per Rand J.

[50] The significance, as described in *Sail Labrador*, is that the courts have distinguished deficient performance in bilateral contracts from deficient performance in options, which have generally been categorized as unilateral contracts. In the former, the defect in performance must attain a certain minimum degree of seriousness to entitle the non-offending party to rescind the contract. This concept is known as substantial non-performance, or the requirement that a breach go to the "root" of the contract. With unilateral contracts, however, complete performance is required as only the offering party has undertaken a promise. See *Sail Labrador* at paras 31 and 32.

[51] In support of its position that the earn-in agreement here is a bilateral contract, American Creek points out that it lacks the unilateral nature of a true option as discussed in the *Pierce* and *Sail Labrador* cases, where the optionee has no obligation at all. Rather, the earn-in agreement did impose an obligation on American Creek as the optionee. By clause 3, if it failed to make expenditures of at least \$500,000 on the First Year Program, it was obliged forthwith to pay to Teuton a sum equal to the difference between what it did expend and \$500,000. Thus it could not simply do nothing with impunity.

[52] American Creek also points to the evidence of Mr. Cremonese on this issue. Mr. Cremonese made it clear that he insisted on clause 3, as was his practice, in order to keep the optionee honest. He did not want this to be a situation in which the optionee could simply do nothing, thereby potentially tying up the property without undertaking any exploration to advance the property's prospects or to extend the life of the claims. Thus American Creek would have to pay up to \$500,000 for the privilege of doing nothing or not enough. In these

circumstances, Mr. Burton of American Creek asked Mr. Cremonese to delete a clause in Mr. Cremonese's original draft to the effect that "[t]he Option Agreement will confer an option only", and Mr. Cremonese did so.

- [53] Notwithstanding this evidence, I find that the parties did not intend to relieve American Creek from the obligation of strict compliance with the earn-in requirements that would attach to an option agreement as discussed cases such as *Pierce and Canadian Long Island Petroleums Ltd v Irving Industries Ltd*, [1975] 2 SCR 715, and which was the norm in the industry.
- [54] The problem that arose in the *Sail Labrador* case was very different from the situation here. There, *Sail Labrador Limited* entered into a five-year agreement to charter a vessel. The charter party included an option to purchase the vessel at the end of the five years, subject to "full performance of all its obligations in this Charter Party including but not limited to payments being made promptly and in accordance with the schedule of clause 10 " (*Sail Labrador* at para 2). The accepted practice between the parties was for *Sail Labrador* to submit seven post-dated uncertified cheques at the beginning of each operating season. This worked very well for the first four years, but during the fifth year, one cheque bounced as the result of an error by a bank employee. The shipowner thereupon informed *Sail Labrador* that the option to purchase was void because of the failure to make the payment as required. The owner thus purported to rescind the option to purchase while continuing with the lease. As soon as it became aware of the problem, *Sail Labrador* promptly made the payment with interest.
- [55] In concluding that the option to purchase was still valid, and that the doctrine of substantial performance applied, Justice Bastarache found that the lease and the option formed a single, bilateral contract intimately connected to one another, and that the words used in the option clause were not precise enough to satisfy the court that the parties intended to make timely lease payments the essence of the contract.
- [56] In short, it was not a situation of two separate contracts: one being a bilateral lease agreement, and the other a unilateral option agreement. Rather, there was a single interwoven bilateral contract which did not impose an obligation of strict compliance.
- [57] But that was a matter of the construction of that particular agreement, which bears no resemblance to the earn-in agreement here.
- [58] As Bastarache J. observed at para 41, the court must examine the text of the contract and the context surrounding it in order to determine the intention of the parties. In doing so, I think it right to resist the temptation to substitute labels, such as "unilateral" and "bilateral", for analysis.
- [59] When I examine the text of the agreement here and the factual matrix from which it arose, I find that it is not one in which the earn-in option is but part of a wider agreement to which it is intimately connected as was the case in *Sail Labrador*. Rather, in this case, the earn-in

option is the essence of the agreement. It defines the relationship between the parties and what they expect to achieve. Thus the supplemental agreement, in clause 3, obliges Teuton to transfer legal title in the property to American Creek "upon completion of the First Earn-In". Nothing in either agreement suggests that something less than completion would do, particularly taking into account the context in which the parties were operating. We are not dealing with a question of rescission, but with what is required to trigger Teuton's obligation. Both parties, I am satisfied, contemplated that American Creek would have to complete the expenditure requirements in the time specified before Teuton would transfer 51% of its interest.

- [60] The addition of a term providing for a minimum payment by American Creek should it not spend at least \$500,000 in the first year does not, as I read the agreement, alter this essential nature. It gave American Creek a slightly different choice. In either event, it could not enforce the option if it failed to perform the earn-in requirements. But if it failed to expend a minimum amount in the first year, it would have to pay up to \$500,000. It could not, therefore, do nothing; but it could do nothing more.
- [61] Thus, any bilateral aspect was limited to the first year program and was distinct from the option. If American Creek incurred expenditures of less than \$1,000,000 in that timeframe, the option agreement would be at an end in accordance with its own clear terms. There would be nothing left for American Creek to do, unlike Sail Labrador Limited, which was still subject to a lease. If those expenditures were less than \$500,000, not only would the option be at an end, but American Creek would also have to pay Teuton the difference. In either event there would be no opportunity to proceed further with the real subject matter of the agreement.
- [62] But once American Creek spent \$500,000 in that first year, there was no longer any obligation of any kind upon it and, at that point, there remained no bilateral aspect to the relationship. To earn the offered interest, it had to proceed further to spend a total of at least \$1,000,000 on exploration expenditures in that first year, together with the requisite amounts in the ensuing years to produce an aggregate expenditure of \$5,000,000. But if it did not do so, there were no consequences beyond the loss of the option.
- [63] Whether one analyses the minimum payment provision as a separate side agreement relating to the first year program, an incentive provision, or a time-limited term of the agreement as a whole, it was nevertheless distinct from the option aspect and, I find, was not intended to alter the obligation on American Creek to complete the earn-in requirements in order to trigger the transfer.
- [64] American Creek argues that I should have regard to the fact that Mr. Cremonese agreed to the deletion of a clause providing that "the Option Agreement will provide an option only". In American Creek's submission, this is not the same as considering drafts or negotiations, which is impermissible, as it is clear that the parties agreed to exclude this specific language.

[65] No authority for this proposition was proffered, but if it is correct, that evidence still does not tell me that the parties thereby agreed, or intended, to convert the agreement into one in which American Creek could earn the offered 51% interest without strictly complying with the specified conditions precedent. Indeed, the fact that American Creek accepted Teuton's refusal to agree to the proposed clause 5 in the supplemental agreement, which would have relieved American Creek from the necessity of strict compliance in relation to time where delay occurred for reasons beyond its control, is strong evidence to the contrary. If I may have regard to the deletion of the one clause, I should also have regard to the deletion of the other.

[66] I conclude, on the basis of the parties' intention as discerned from the accepted text of the earn-in agreement, the supplemental agreement and the surrounding context, including the history of unsatisfied earn-in agreements relating to Treaty Creek of which both parties were well aware, that American Creek is obliged to demonstrate full compliance with the conditions precedent set out in the earn-in agreement before it can call upon Teuton to convey the promised interest.

3. What did the parties mean by "exploration expenditures"?

[67] As we have seen, the conditions precedent set out in the earn-in agreement obliged American Creek to issue a total of 100,000 common shares in its capital stock to Teuton, and to make exploration expenditures on the Treaty Creek property aggregating \$5,000,000. As I noted above, there is no issue that Teuton received the requisite number of common shares in the capital stock of American Creek, and it is not contested that American Creek spent in excess of \$5,000,000 within the specified time frame. The question is whether those expenditures qualify as "exploration expenditures" under the earn-in agreement. That term is not defined. What did the parties mean by it?

[68] On his examination for discovery, Mr. Cremonese was asked about whether he expected to have any input concerning American Creek's expenditures. He responded (Q 5470-5472):

A It's an option agreement and the optionee is entitled to spend the money on the property as they see fit. It's their money.

Q Without input from the owner?

A That's right.

Q And you didn't intend to modify that by including this clause [clause 11]. Is that correct?

A I think it's just a standard in the industry that an optionee gets to be the -- if they're the operator, they get to say what's done on the property.

[69] By the time of his testimony on the 24th day of the trial, Mr. Cremonese had modified this view somewhat:

Q Now, the next subject is the role of Teuton under these option agreements once the agreement is signed. Can you describe that for the court, please.

A Generally when we sign an option agreement, the optionee has carte blanche to carry out exploration as they see fit. It's their money and they explore on the property the targets that they want to explore and that their geologists think are prospective, and we stay out of it. The only thing that I ask is that the money is spent prudently and reasonably. That's pretty well the only way that we come into it.

[70] These two excerpts neatly set the parameters of the parties' positions. From the perspective of American Creek, the plaintiff need only establish that it spent the requisite amount of money in connection with a program of exploration at Treaty Creek. According to Teuton, that is not enough. Those expenditures must have been reasonable, prudent, and useful in terms of producing reliable geoscientific data. If such qualifications are not implicit in the use of the phrase "exploration expenditures", then as a matter of commercial necessity, Teuton argues, they must be implied.

[71] Both parties invoke commercial reality and pointed to commercially untenable results that would flow from an extreme view of the other party's proposed interpretation.

[72] Teuton argues, reasonably, that there must be some modification to the term "exploration expenditures" beyond simply money spent on exploration-type activities. For instance, paying a driller to drill repeated useless holes in an area where no mineralization has been found or is expected, simply to run up costs in order to reach the specified threshold, would surely not qualify. That would be commercially untenable. I agree, although I am satisfied that the risk of an optionee acting in that way is vanishingly small. The value of the interest to be earned depends upon exploration being carried out that identifies promising mineralization. As we have seen, where optionees have failed to do so, they have abandoned their projects rather than throw more money away on them just to achieve the buy-in.

[73] American Creek argues, equally reasonably, that no optionee would put out millions of dollars on a project under a contract that required strict compliance, but offered no certainty. This would mean that, to qualify, it would have to incur enormous expense without knowing its rights until it had undergone a retrospective forensic investigation of the sort undertaken in this case, at a cost approaching the value of the expenditures required to earn the interest under the option agreement in the first place. That would be commercially unreasonable. I agree. The question is to what 'certainties' the parties must be taken to have agreed.

[74] In proceeding to determine what the parties intended in accordance with the principles of contractual interpretation cited above, I make the following observations.

- [75] The problem here is not one of ambiguity, as that term has been explained in the authorities. An ambiguity only arises where a fair reading of the agreement as a whole, having regard to the words used and the factual matrix surrounding the agreement, does not illuminate what the parties intended and leaves one with more than one plausible interpretation. As I will explain, I do not find that to be the case here.
- [76] I begin with the question of what content, if any, is to be given to the term "exploration expenditures" beyond its plain meaning of 'expenses incurred in relation to exploration'. Exploration of what? Well, the parties are not looking for Dr. Livingstone. In the context of the agreement, they are looking for mineralization. The meaning therefore becomes, 'expenses incurred in relation to exploration of mineralization'. Whether the phrase must be given still greater content in the context of the agreement as a whole must now be considered.
- [77] What the problem really comes down to is what American Creek must prove in order to satisfy the condition precedents that allow it to exercise its option to acquire a 51% interest in the property. Must it prove no more than that it incurred an aggregate of \$5,000,000 in expenses in relation to the exploration of mineralization at Treaty Creek within the time specified? Or must it prove, as the defendant suggests, that the expenses were reasonably and prudently incurred in relation to exploration work that yielded useful and reliable geoscientific information?
- [78] Neither party thought it necessary to expand on the meaning of the term "exploration expenses" either in the agreements they signed, or in negotiating the more formal agreement that was contemplated but never consummated. In particular, as can be gleaned from their absence, Teuton did not stipulate for any qualifying terms such as 'reasonable', 'prudent', or 'geoscientifically reliable', although some other option agreements into which it had entered did use the adjective 'reasonable' in varying contexts. Sometimes, the word governed "exploration expenses"; sometimes, it governed only a particular subset; sometimes, as in this case, it was altogether absent.
- [79] Teuton submitted that I should have regard to industry standards as part of the surrounding matrix, in particular the relevant policies and guidelines of the Canadian Institute of Mining. Those guidelines are expressed to be "best practices". No statute or regulation requires companies in the position of American Creek and Teuton to follow them. Indeed, Mr. Cremonese was unable to say that he was familiar with those guidelines at the time that he signed this contract, and there was no evidence from which it could be inferred that a new junior mining exploration company such as American Creek, as opposed, for instance, to an industry giant like Teck Resources Limited, would agree, or would as a matter of practice be expected, to conduct itself in accordance with such guidelines.

- [80] No expert or other evidence was led to establish any industry understanding, based on those guidelines or otherwise, concerning the meaning of the phrase. In short, there was no evidence from which I could conclude that reasonable persons in the position of Mr. Cremonese and Mr. Burton would have a particular understanding beyond the literal meaning of the words.
- [81] Teuton sought to support its position in part on the proposition that under earn-in agreements generally, including this one, the optionee is fully in control of how it plans and executes its exploration program. It can proceed recklessly or prudently, while Teuton must sit back, powerless, to await the result. This is consistent with Mr. Cremonese's evidence excerpted above. In these circumstances, submits Teuton, the risk of performing carelessly or unreasonably should fall entirely on American Creek, as only the optionee is in a position to control that risk.
- [82] I found this to be too simplistic in the context of the realities of mineral exploration among the remote glacial valleys of north-western British Columbia. As we shall see, there were many risks of which neither company was in control but which the agreement obliged American Creek to bear alone, including the weather, the geology, the labour markets, the financial markets, and the availability of professionals, personnel and equipment. All of these could (and did) have an impact on the optionee's ability to meet its obligations despite its best efforts. As we have seen, previous optionees at Treaty Creek had failed to earn an interest in the property for precisely such reasons, including regulatory problems, low gold prices, and difficulties with the capital markets. The money they spent was wasted. Teuton lost nothing.
- [83] In this context I note, parenthetically, that some of the specific complaints raised by Teuton focus on steps taken by American Creek to manage such risks, employing all the advantages of hindsight; see, for instance, my discussion below concerning the 2008 expenditures.
- [84] Given this matrix, I conclude that the parties must have intended a degree of specificity beyond that offered by the unqualified plain meaning of the words "exploration expenditures", but with clearer guidance than that provided by after-the-fact examination in accordance with unarticulated objective standards, particularly in view of the requirement of strict compliance.
- [85] In this regard, I note that qualifying terms such as 'reasonable' and 'productive of geoscientifically useful and reliable data' import their own uncertainties. Reasonable from whose perspective? When? Useful to whom? For what? Reasonable in retrospect with the benefit of hindsight, or from the point of view of a reasonable person in the position of the party who incurred the expense given all of the circumstances at the time of the expenditure? Not only is there no evidence that such concepts were part of the parties' agreement, there is no real possibility of attempting to discern what standard of reasonableness or degree of usefulness they might have contemplated, even though their agreement sets out conditions precedent.

[86] This problem is amplified by the moving target created by the different positions Teuton has taken concerning the proper meaning of the term "exploration expenditures" as used in the earn-in agreement. It began with a lengthy definition set out in paragraph 7 of Teuton's Response to Civil Claim, called "the Reasonable Expenditure Requirement", supplemented by additional proposed meanings set out in paragraph 8, called "the Alternate Reasonable Expenditure Requirement". To these were later added by amendment, in paragraph 9, 12 subparagraphs setting out alleged implied terms to the agreement, which, together with the Reasonable Expenditure Requirement and the Alternate Reasonable Expenditure Requirement were said to constitute "the Implied Terms of Reasonableness, Competence and Value". By the end of the trial, these were pared down to paragraph 17 of the defendant's closing argument:

17. The Defendant says that to qualify as exploration expenditures, funds spent by the plaintiff must have been spent with respect to the Treaty Creek Property, have been reasonable, and have been for services conducted or goods utilized in a fashion to produce reliable geoscientific data respecting the Treaty Creek Property.

This, in turn, was supplemented by a paragraph 23 of the defendant's closing argument:

23. The thrust of these terms is that exploration expenditures must relate to physical exploration of the Treaty Creek property, carried out reasonably, and taking into account the nature and extent of the property and indications of potential mineralization done in a competent fashion to produce reliable results.

[87] When I consider the use of the term "exploration expenditures" in the context of the parties' agreement as a whole viewed in light of the factual matrix I have described above, I find it impossible to discern any intention to invest the phrase with so fluid a set of parameters. I do, however, find three significant clues as to what the parties did intend.

[88] The first is in Clause 11 of the earn-in agreement, which gave Teuton the right to monitor American Creek's exploration activities on the property, and to access all data associated with the exploration activities. Mr. Cremonese confirmed that this was not a standard clause in his option agreements, but was one he insisted upon in this case. This, then, was protection that was incorporated into the wording of the contract.

[89] The second is in the absence of qualifying adjectives and specific parameters of the sort for which Teuton now argues. Given the right of Teuton to monitor the exploration activities and to have access to all data associated therewith, the need to modify the term "exploration expenses" with adjectives for which Mr. Cremonese did not stipulate, would seem reduced. In addition, it would have been a simple matter to include requirements such as the drilling of a specific number of metres in a given season, or the employment of "best practices" as set out in the Canadian Institute of Mining Guidelines, but these, too, are conspicuously absent.

- [90] This leads pointedly to the third clue, the one parameter that was included. This is in clause 12, which provides that American Creek is responsible for all assessments, and for the filing of all assessment credits during the term of this option. This, considered in the context of the factual matrix existing when the agreement was made, makes it clear that both parties intended that the expenses incurred and the work performed by American Creek in its exploration activities would be detailed in assessment reports submitted to the chief gold commissioner pursuant to section 33 of the Act for the purpose of generating assessment credits to extend the rights to the mineral claims.
- [91] There can be no doubt, on the evidence, that this process was one clearly contemplated by both parties as an essential aspect their undertaking. It would:
- (a) achieve one of Teuton's principal objectives in entering into the option agreement by extending its rights to hold the claims, even if sufficient expenditures were not incurred in the aggregate to trigger the option;
 - (b) protect the value of the earn-in to American Creek;
 - (c) establish a level of scrutiny and protection to Teuton in addition to that for which Teuton stipulated in clause 11 of the agreement or anywhere else; and
 - (d) provide clear guidance to American Creek as to what it was expected to accomplish in order to complete the earn-in.
- [92] In these circumstances, I find that the term "exploration expenditures" in the context of this agreement was intended to mean expenses incurred by American Creek in good faith in relation to the exploration of mineralization at Treaty Creek, which expenses relate to "exploration and development work" within the meaning of the Mineral Tenure Act Regulation and are accepted by the Mineral Titles Branch as the basis for the value to be credited for such exploration and development work.
- [93] To go beyond this interpretation by implying the sort of additional qualifying terms proposed by Teuton would, in my view, produce an agreement for which neither party had bargained.
- [94] Referring back to the "carte blanche" evidence of its president, Mr. Cremonese, Teuton submits that where a contract confers a discretionary power upon a party such as American Creek, the law requires that such discretion be exercised on an objectively reasonable basis, and honestly: *Greenberg v Meffert* (1985), 50 OR (2d) 755, 18 DLR (4th) 548 (CA), and *Jack Wookey Holdings Limited v Tanizul Timber Ltd* (1988), 27 BCLR (2d) 221 (CA).
- [95] I do not see this contract, as I have interpreted it, as lending itself to that analysis. It does not purport to grant to American Creek a power to be exercised in its sole discretion, as was the case in *Greenberg*. Rather, American Creek is subject both to the definition of "exploration expenditures" I have set out above, and to Teuton's rights under clause 11. In the *Jack Wookey Holdings* case, the court considered a satisfaction clause that allowed the defendant

to terminate the contract if the plaintiff failed to satisfy it as to its performance. In essence, the party in the position of Teuton was found to have had an obligation to demonstrate objectively that the party in the position of American Creek had not satisfied its obligations under the contract. Our case is different.

- [96] In my view, given the subject matter at issue here, these cases do no more than to emphasize, as I have already found, that in carrying out its program of exploration, American Creek must act honestly and in good faith.
- [97] Teuton then asserts that interpreting the term "exploration expenditures" to accord with the Mineral Titles Branch approval process has already been rejected by this court in *Terasen Gas Inc v Anglo Swiss Resources Inc*, 2010 BCSC 1732. Teuton relies in particular upon the following passages from Madam Justice Holmes' reasons for judgment:
- [52] There is no question that work was done on the property. Through Mr. John (Ziggy) Ziegler, Mr. Burton submitted a series of photographs taken during the course of the work. The difficulty with Mr. Burton's claim is that the evidence does not establish the value of the work done and for which Mr. Burton remains uncompensated.
- [53] Mr. Burton provided very little detail about the \$700,000 in expenditures for which he claims compensation; he relies almost entirely on the reporting of development expenditures in the two assessment reports for the property filed with the Ministry for 2005 and 2006.
- [54] However, the evidence indicated that the reported development expenditures in those reports were based on amounts which the Ministry is known to consider reasonable, and not on expenditures actually made. Also, cross-examination exposed some vast discrepancies in the reported expenditures, including the reporting of costs (such as for an excavator) that were not actually incurred at all.
- [65] Mr. Burton submits that the expenditures effectively underwent an audit, because the Ministry scrutinized and accepted them as part of the 2005 and 2006 assessment reports for the property. This submission cannot succeed, because the Ministry's role and concerns in accepting the assessment reports are entirely different from those of the owner of the property, 70% of whose interest may become "earned out" by the optionees.
- [98] Teuton argues that here, as in that case, the process of approval by the Mineral Titles Branch is relatively superficial, and does not involve any kind of true forensic audit or investigation of the reasonableness of any of the expenses, or otherwise accord with the concerns of the owner of the property.
- [99] I am unable to agree with Teuton's submissions in this regard. The context of the *Terasen Gas* case was completely different. So was the evidence. So was the contract at issue.
- [100] In the first passage quoted above, paragraphs 52-54, Holmes J. was not purporting to interpret a contract, but was rather considering (and dismissing) a claim for unjust enrichment by Mr. Burton (no relation to the president of American Creek), who was the

"exploration manager" on the property in question, not an optionee, and who sought recovery of expenses he claimed to have incurred in exploring on the property. In dismissing his claim, Holmes J. noted that the development expenditures he reported were in essence false, based not on actual expenses incurred, but on expenditures which were thought likely to be accepted. In our case, the reported development expenditures were based on expenses actually made.

- [101] In the second passage, paragraph 65, Holmes J. was considering a claim of wrongful interference with contractual relations. Mr. Burton claimed that the optionor had wrongfully excluded the optionees, leaving the optionees unable to pay him for the work he had performed. This claim was based in part on the proposition that the optionor had acted unreasonably and in breach of the agreement when it asked for audit support for the expenditures claimed to have been made. Once again, this context is entirely different. The agreement in question apparently entitled the optionor to audit the expenses, but in any event Her Ladyship had no difficulty in concluding that just because the expenditures had already been scrutinized by the Ministry did not make it unreasonable for the optionor to ask for audit support for the expenditures, given the differences in the processes.
- [102] That is not the issue we are discussing here. American Creek does not suggest that acceptance by the Mineral Titles Branch ought to end all investigation, as was argued in the Terasen case, and that is not how I have interpreted the agreement. My conclusion merely clarifies what American Creek must prove before it can call on Teuton either to convey the appropriate interest in Treaty Creek or to demonstrate why it should not. In the absence of such proof, Teuton would have no case to meet. But if such proof is made, it still remains open to Teuton to challenge American Creek's right to compel the transfer of the specified interest on the basis that expenditures it claims as "exploration expenditures" were not incurred in good faith, were wrongly calculated or attributed, were not incurred at all, or were in fact incurred in relation to matters other than "exploration and development work" within the meaning of the Mineral Tenure Act Regulation notwithstanding their acceptance by the Mineral Titles Branch. But the onus in that regard falls upon Teuton.
- [103] Moreover, while the Mineral Titles Branch assessment process does not involve a forensic audit or investigation of reasonableness, the office of the gold commissioner did review the reports and the work reportedly performed from the perspective of its vast experience with such programs, and questioned a number of the expenses. Under the regulation, it was entitled to demand "evidence satisfactory to the gold commissioner", including any receipts, in assessing the value to be credited for exploration and development work. In addition, adding to the geoscientific database is very much part of what the process is designed to achieve.

[104] I am satisfied that, subject to proof to the contrary, the Mineral Titles Branch assessment process guaranteed a baseline of appropriateness, usefulness, reliability and efficacy that the parties agreed to accept. If Teuton desired greater protection or higher standards it should have bargained for them in the agreement. It did not.

4. Did American Creek establish a prima facie case?

[105] The question here is whether American Creek established a case that, if not answered by Teuton, entitled it to succeed under the earn-in agreement. It did.

[106] American Creek tendered in evidence copies of the three assessment reports on the Treaty Creek property it filed with the Mineral Titles Branch for the years 2007, 2008 and 2009. These are extensive documents consisting of descriptions of the property, climate and geology, mineralization analyses, drilling survey data, drill highlights, drill hole geochemistry, drill logs, assay samples, geology analysis, maps, figures, recommendations for future exploration and drilling, and much more information. The 2007 report consists of 305 pages, the 2008 report of 105 pages, and the 2009 report of 751 pages.

[107] These copies were certified as true copies by the deputy chief gold commissioner. By section 40 of the Evidence Act, RSBC 1996, c 124:

40. For the purpose of a record kept by or a document filed with the chief gold commissioner or a gold commissioner under the Mineral Tenure Act, copies of or extracts from the record or document, certified as true copies or extracts by the chief gold commissioner or gold commissioner, must be received in a court in British Columbia as evidence of the matters contained in them.

[108] Each of these reports included a "Statement of Expenditures" accepted as expenditures incurred in relation to exploration and development work within the meaning of the Mineral Tenure Act and its regulation. As such, they qualify as "exploration expenditures" within the meaning of the earn-in agreement as I have construed it. Those expenditures were as follows:

2007:

\$3,762,961.02

2008:

\$451,127.09

2009:

\$2,197,258.91

- [109] Putting these expenditures into the context of the earn-in agreement, it will be seen that the 2007 expenditures were well in excess of the \$1,000,000 required by March 31, 2008, for the First Year Program. The 2007 and 2008 aggregate of \$4,214,088.11 comfortably exceeded the required aggregate of \$2,500,000 by March 31, 2009, and the overall aggregate of \$6,411,347.02 more than met the agreement's requirement of \$5,000,000 by March 31, 2010.
- [110] On this basis alone, the plaintiff has established prima facie entitlement to the transfer it seeks.
- [111] In addition, American Creek adduced the evidence of its general ledger and other business records relating to the Treaty Creek program, including 13 binders of invoices, payment vouchers, receipts, bank statements, helicopter tickets, payroll files and other supporting documentation. These were all proven to my satisfaction to be "business records" admissible pursuant to s. 42(2) of the Evidence Act.
- [112] American Creek's own internal review of all of this documentation yielded a spreadsheet of exploration expenditures based on the Statements of Expenditures from the assessment reports, corrected for accounting errors and misattributions, and expanded to include the expenses incurred after October 6, 2009, when the 2009 assessment report Statement of Expenditures was finalized, and before March 31, 2010, the end date of the earn-in agreement. Additional amounts were also added for amortization and management compensation referable specifically to Treaty Creek. These last two items had not formed part of the assessment reports, but were included on the basis of generally accepted accounting principles. This yielded a total aggregate amount of \$6,537,559.98.
- [113] This evidence was supported by the testimony of a number of witnesses, being Mr. Ambrose, Mr. Pownall, American Creek's president, Mr. Burton, its COO, Mr. Blaney, its CFO, Mr. Edwards, its bookkeeper, Ms. Trotman, and an expert in investigative forensic accounting, Mr. McEwen.
- [114] I turn next to consider the evidence adduced by Teuton and whether Teuton met the onus on it of demonstrating that, when properly considered, these expenditures did not meet the requirements of the earn-in agreement.

5. Did Teuton answer American Creek's case?

(a) Overview

- [115] As will be seen, Teuton's attack is aimed primarily at the expenditures of some \$3,763,000 that American Creek claims to have incurred in 2007, and focuses largely on the contention that American Creek included in this sum unreasonably large expenditures that produced unreliable results.
- [116] Although on what I have found to be the proper interpretation of the contract the issue of "reasonableness" does not arise given the parameters of the meaning of "exploration expenditures", the evidence adduced over the course of this nine week trial did not indicate

to me, on a balance of probabilities, that the exploration expenditures claimed by American Creek were not reasonably incurred, at least from the perspective of a reasonable junior exploration company in the position of American Creek, taking into account the exigencies of the situation.

[117] That being said, the proper scope of enquiry given my interpretation of the contract is whether the expenses:

- (a) were actually incurred;
- (b) in good faith;
- (c) in connection with Treaty Creek;
- (d) in relation to "exploration and development work" within the meaning of the Mineral Tenure Act Regulation; and
- (e) were accepted as such by the Mineral Titles Branch and credited accordingly.

[118] In these circumstances, I do not propose to delve into all the minutiae of the evidence that relates to Teuton's objections. I will deal, instead, with the principal concerns raised by Teuton, noting the flaws I have found in Teuton's position that, in my view, illustrate why Teuton's defence must fail.

(b) 2009

[119] By the end of the trial, Teuton had abandoned any challenge to the expenditures of approximately \$2.2 million claimed by American Creek for the 2009 program. There was nothing in the evidence to support any such challenge.

(c) 2008

[120] With respect to the expenditures of approximately \$450,000 claimed in relation to the 2008 program, Teuton objected principally to expenses claimed for helicopter costs of \$131,977.48, and for drilling of \$37,000. In fact, no drilling took place that year and helicopter usage was limited. These expenses consisted largely of penalties charged to American Creek under the terms of the contracts it had entered into with Prism Helicopters and More Core Drilling.

[121] What happened, I find, was this.

[122] As we have seen, 2007 was a boom year. American Creek was able to raise considerable sums to fund exploration, and indeed that was the main reason why Mr. Cremonese went to American Creek to propose the Treaty Creek earn-in agreement. Drillers, geologists, field personnel, heavy equipment and helicopters were in short supply. This was the experience of both American Creek and Teuton. And in this context, the Treaty Creek opportunity came up very late in the day for the 2007 season.

- [123] American Creek had to scramble, but was nevertheless able to proceed in large part because it had already planned a program at Electrum for that season, and was able to parlay its arrangements for a driller, personnel, helicopters, etc., for that program into a program for Treaty Creek. But the problem of supply not meeting demand was significant, and was one that American Creek wished to avoid for the following season.
- [124] In these circumstances, American Creek took steps at the end of the 2007 season to tie up its drilling contractor and helicopter contractor in order to ensure that it had in place what it would need for 2008, for which it had planned a significant drilling program,. What American Creek could not foresee when it did so, was that 2008 would be a financial and economic disaster, and that investment money would dry up. In the result, it had to curtail its program significantly, and abandon its planned drilling program altogether.
- [125] This was a risk borne entirely by American Creek. If, because of unanticipated market collapse, it could not proceed with its program, it could lose its rights under the earn-in agreement, and the value of all the work it had previously performed would be for naught. Equally, if because of a booming market it could not obtain the logistical support it required, once again it could lose its rights and the value of the work it had previously performed.
- [126] Teuton does not suggest that this change in the program was unreasonable or imprudent, but it does submit that the monies American Creek had to pay to its drilling contractor and helicopter contractor for cancellation fees and expenses incurred in preparing for the season ought not to be claimable as exploration expenditures.
- [127] The Mineral Titles Branch, aware of the nature of these expenses, still considered them to be claimable in relation to exploration and development work, and I accept them as exploration expenditures within the meaning of the agreement. Viewed, as I think they must be, in the context of the exploration program as a whole over the course of three years as contemplated by the agreement, they were expenses actually incurred, in good faith, that related to exploration and development work within the meaning of the Mineral Tenure Act Regulation, and were accepted as part of the value to be credited for that year, to Teuton's benefit. Some of the cancellation fees, indeed, were subsequently credited by the contractors to services performed in the 2009 season. Taken together, they were part of what American Creek had to spend to keep its exploration program going.
- [128] Other expenses claimed by American Creek in 2008 were either incurred for the purpose of carrying out the scaled-back exploration program it actually conducted, or incurred in anticipation of the program it had originally planned for material that, due to the scaling back, was not in fact used until the 2009 program. Teuton has failed to demonstrate that any of these fail to qualify as "exploration expenditures" within the meaning of the agreement.

[129] It is noteworthy in this context that in its own programs, Teuton did not hesitate to claim as expenses incurred in relation to exploration and development work for the assessment process, expenditures that were in effect thrown away but were part of the overall exploration process. Thus on September 6, 2007, Mr. Cremonese emailed Mr. Ambrose:

Brent:

Thx much for the update. Sounds really good. I hate to do it but I have to ask you another favor could you ask [Mr. Pownall] if he has any BTW bits here in town that he can spare for a few days? .our guys at the Orion have again gone through their stock and Mitch did not send up a enough for them. Preferably "9's" and up. The hard ones.

I am paying these guys standby right now and it is costing a pretty penny although technically it's their fault they didn't order enough bits last time. They just sprung the news on me. We have given them at least 15 bits from Mike's stock so there's nothing else much we can do.

Weather has been atrocious. I blew about \$9,000 in helicopter time today trying to service the Fiji project.

Dino

[130] Such are the vicissitudes of exploring for minerals in the Golden Triangle.

(d) 2007

(i) Overview: 2007 vs. 2009

[131] What took place in 2007 is at the heart of Teuton's complaint.

[132] The starting point is the fact that the 2007 exploration program, when compared to the 2009 exploration program, cost almost three times as much per metre drilled. Teuton says that if the 2007 program had been carried out at the same rate as the 2009 program, the aggregate expenditures would be reduced to approximately \$4,238,000, comfortably below the \$5,000,000 threshold the agreement required.

[133] According to Teuton, this discrepancy was due to a number of factors that disentitle American Creek from claiming the full amount as 2007 "exploration expenditures" under the agreement. Further, submits Teuton, this discrepancy of itself provides evidence of "significant imperfection in the Plaintiff's performance under the Option Agreement".

[134] The first alleged deficiency is that the 2007 program was incompetently designed and carried out due to the lack of experience and competence on the part of the field manager, Brent Ambrose, and the head geologist, Mac Millard. Teuton contrasts this to the 2009 program, which was designed and supervised by a person it acknowledges to be a competent geologist, Raul Sanabria, who replaced Mr. Millard after the 2007 season.

- [135] The second is that American Creek's contractual relationship with Sean Pownall and his company, More Core Drilling, was "impenetrable" and, as I understand the submission, wanting in good faith.
- [136] The third is that the 2007 drilling program was designed and carried out for promotional purposes rather than exploration purposes based on scientific considerations; that is, to produce results that would look good in press releases, rather than results that would advance exploration for gold and silver.
- [137] The fourth is that the evidence produced by American Creek yields numerous examples of reckless overspending or inappropriate allocation indicating demonstrably imperfect performance by the plaintiff under the agreement.
- [138] I emphasize that the onus of establishing these allegations was on Teuton.

(ii) The absence of industry standards

- [139] Very little expert evidence was tendered by Teuton in support of its allegations.
- [140] For instance, no expert opined on what cost per metre for drilling is appropriate in any given circumstance, or what drilling rates were standard in the industry. In fact, I was told that there were no set drilling rates that were standard in the industry.
- [141] Teuton sought to tender an expert report from Kristian Whitehead, B.Sc., P.Geo., entitled "Report on Diamond Drilling and Mining Exploration in the Stewart Area during the Years 2007 and 2009". Mr. Whitehead's qualifications were not in doubt, but American Creek objected to the admissibility of his report on other grounds. I found substantial portions of it to be inadmissible: *American Creek Resources Ltd v Teuton Resources Corporation*, 2013 BCSC 2202.
- [142] One part of this report that I ruled admissible concerned "techniques commonly used to contain costs of conducting a mining exploration program". I found it difficult to discern the extent to which Mr. Whitehead's written opinion on this topic was based upon industry standards, and thus admissible, as opposed to ideal practices or just his way of doing things. I assumed for the purpose of my ruling that he was purporting to set out accepted industry standards and ruled his comments admissible, subject to weight given the shortcomings I had identified.
- [143] When Mr. Whitehead testified in chief, Teuton's counsel quite properly brought to my attention the fact that, as it turned out, many of the views Mr. Whitehead had expressed on this subject did indeed relate to what he considered to be ideal practices, or just his way of doing things, rather than accepted industry standards. In fact, Mr. Whitehead testified, there was no single standard as "every project is different".
- [144] This encapsulates what was, I find, a significant flaw in the defendant's approach. American Creek was a relatively inexperienced company (as Mr. Cremonese well knew) taking on a challenging project in challenging times. It made mistakes, and there were undoubted

inefficiencies. But it surmounted these problems and by the end of 2009, completed a significant and successful exploration program. Teuton would focus on the early difficulties and hold American Creek to a standard of ideal practices. That was never what the parties contemplated. As to the standards reasonably to be expected of a junior exploration company in American Creek's position given the circumstances it faced, there was no evidence. In fact, the evidence suggested that no such standards existed.

- [145] Harking back to the discussion concerning the meaning of "exploration expenditures", this absence of expert evidence only emphasizes the danger of importing qualifiers such as 'reasonable, 'competent' and 'geoscientifically useful and reliable'. If accepted industry standards do not exist, how then could American Creek possibly have governed itself sensibly in attempting to comply with an obligation modified by such terms?
- [146] Returning to Mr. Whitehead's report, he had also been asked to comment in his report on "the differences in experience and skill you would expect to be possessed by an experienced 'hard rock' geologist and an experienced 'oil & gas' geologist". This related to the alleged incompetence of Mr. Millard, whose main experience was in the field of oil & gas drilling, rather than hard rock geology which was Mr. Sanabria's area of expertise.
- [147] I ruled Mr. Whitehead's comments on this subject inadmissible for two reasons. First, he provided what he described as his "perspective" on the differences in experience and skill between the two. I considered that his perspective was irrelevant. Ultimately what would count was the adequacy of the drill program, not the background of the geologist. Secondly, and crucially, his answer was in any event nothing but speculation because, as he acknowledged, he did not in fact know what an oil & gas geologist's skill set would be.
- [148] As to the (in)adequacy of the drill program Mr. Millard designed, there was no expert evidence at all.
- [149] Finally, Mr. Whitehead was asked to respond to Requests for Proposals for 2007 and 2009 that had been drafted by counsel for Teuton with the intention of reflecting the work actually done at Treaty Creek in those years. Mr. Whitehead's responses, in the form of diamond drilling contract proposals, formed part of his report and were tendered as expert opinion evidence. Counsel for Teuton submitted that the object was to provide me with drilling contract proposals for the work actually performed that would give me a basis for comparison with what American Creek negotiated with More Core Drilling, and the costs American Creek incurred. Counsel conceded that there was no such thing as an industry set rate, so that Mr. Whitehead's responses were proffered to give some indication of what American Creek could reasonably have expected if it had tendered its drilling contracts in the two years in question.

- [150] I ruled the proposals inadmissible given that they showed only what Mr. Whitehead then said he would, hypothetically, have submitted in 2007 and 2009, and gave no indication of applicable and accepted industry standards (of which, it appeared, there were none). The report was, of course, principally aimed at the issue of "reasonableness", which, on the findings I have made, does not arise.
- [151] Consequently my findings concerning the 2007 drilling program, which is the foundation of Teuton's complaint, fall to be assessed almost wholly on the basis of factual evidence, rather than expert opinion evidence. I start with this: there was no admissible expert opinion evidence to support the proposition that the discrepancy in drilling costs per metre between the 2007 and 2009 programs was, without more, indicative of "significant imperfection in the Plaintiff's performance under the Option Agreement".

(iii) The cause of the discrepancy

- [152] Mr. Whitehead observed, and I accept, that "every project is different". Teuton acknowledged that comparing one project with another can be problematic given the variations in time, place, geology, markets, personnel and so on. Such variations need not, in Teuton's submission, trouble us when we compare American Creek's exploration programs in 2007 and 2009, because we have an almost exact comparison: same place, same geology, same driller, same optionee. The difference, asserts Teuton, was in execution: new geologist, proper planning and supervision, and appropriate efficiencies.
- [153] The evidence does not, however, support such an analysis. There were other significant differences between the two years that in my view account for nearly all of the discrepancy in costs.
- [154] In coming to this conclusion, I rely particularly upon the evidence of two witnesses whom I found to be candid, reliable and credible: Mr. Pownall of More Core Drilling, and Mr. Blaney of American Creek. Each provided testimony that I found compelling and which was untouched in cross-examination. As well, I was much impressed by the evidence of Mr. Ambrose. He was straight forward and made no attempt to skirt around uncomfortable issues. His evidence was consistent with documents produced at the time of the events in question, and I prefer it to the evidence of the witnesses called by Teuton where there is a conflict.

• The Market conditions

- [155] One of the key differences between 2007 and 2009 was market conditions. As Mr. Blaney testified, April was very late in the year to commit to a new exploration program, and in 2007, the timing was particularly problematic as it was the peak of market frenzy, and demand was at its highest. As a result, there was a dearth of experienced geologists, pad builders, helicopter pilots and other trained personnel. As Mr. Pownall put it:

there was a real lapse of people being trained in the previous years, and in 2007 there's a boom.

So all of a sudden everybody wants to drill at once. There's no people around. There's no equipment. There's no helicopters. So even to get pickup rental trucks out of Terrace, Smithers you couldn't get them. Everything was booked. You couldn't get hotels. You couldn't get nothing. So the rates and everything go up, and that's just the way it is. If you didn't order rods and order gears six months ahead in 2007, you weren't going to have them.

2009, the industry had picked up. You had a lot more experienced people in the industry. 2008, it slowed down, and all of a sudden there was an abundance of people again.

The whole industry was better in 2009 than it was in 2007. 2007 was a chaos across the industry.

[156] As I discuss in the next section, American Creek's program was expanded significantly in the latter part of August 2007, at the urging of Mr. Cremonese. This required extra drills, drill pads, blasting and trucking, and produced a good deal more core to be cut than had been expected. In addition, when it came time in late September to shut things down and 'demobilize' the camp, an enormous amount of work was required. American Creek was thinly stretched and did not have all of the people in place in these circumstances to take care of all that needed to be done. Fortunately, Mr. Pownall had the crew available to fill in and provide the necessary support.

· Drilling programs

[157] Another key difference was the nature of the drilling program in 2007 as compared to 2009. American Creek's initial drilling program was designed by the geologist they hired for that season, Mac Millard, M.Sc., P.Eng., P.Geo. It started from scratch. A substantial camp had to be built with a view to supporting not just one summer's drilling, but the full three year program. Heavy equipment including generators, a Caterpillar tractor and containers had to be flown in by Sikorski helicopter. None of this was required in 2009.

[158] According to Mr. Blaney, American Creek had hoped to use its geologist from the Electrum property, but she and American Creek parted ways. In looking for a replacement, Mr. Millard was the best geologist they could find given how late it was in the 2007 season when the Treaty Creek opportunity arose. Of importance, Mr. Millard was qualified to fulfil the role of a Qualified Person ("QP") for regulatory purposes.

[159] Mr. Millard did not have extensive credentials in hard rock geology, his background being mainly in oil & gas drilling. In that sense, he was less than ideal for the position, and the subsequent change to Mr. Canabria was an upgrade. But it would be unfair to characterize him as incompetent. In fact, he designed a drill program that elicited this response from Mr. Cremonese (who was aware of his background) on May 18, 2007:

Mac:

I just read your drill proposal and concur with you on all points. As an optionor, I can't tell you how much it pleases me when the optionee takes an aggressive AND intelligent approach to the property.

[160] That proposal focused on drilling the Eureka zone, which had previously been the focus of exploration by Homestake Mining. While it showed some promise, the Eureka zone was a real challenge for hard rock drilling due to fracturing, faulting and overburden. The result was lost drill bits, stuck drill rods and blown transmissions; in short, high cost per metre drilling. Nevertheless, Mr. Pownall and his crew produced more core than anyone else had ever drilled from that zone. The 2009 program involved very little drilling of this degree of difficulty, so that a lower cost per metre would be expected.

[161] Then, at the urging of Mr. Cremonese, the program took an abrupt turn in August 2007, and was expanded although there was relatively little time left in the drilling season. This explains why the expenditures in 2007 so greatly exceeded the minimum amount that the agreement required.

[162] Mr. Cremonese had visited Treaty Creek in early August 2007, and had walked over various zones both with Mr. Ambrose, and in the company of two geology students hired by American Creek. Mr. Cremonese was particularly excited about what he had observed in an area of a zone called "Copper Belle" that had recently been exposed by the retreat of the glacier that had covered it for the last few millennia. He could hardly contain himself. He emailed Brent Ambrose on August 14, 2007:

Brent:

I want to talk with you candidly about a few items. As you know, we had a great day earlier this week at Treaty. When you arrive here and see the zones, especially the last one we look at near the foot of the Goat Trail nunatak (the "Copper Bell" [sic] zone), you will see for yourself. [These zones comprised not only the Copper Bell, but also the "GR2" zone and the "ND" zone.]

What I want to stress as emphatically as I can, is what this discovery means to me .I look at it as Lady Luck smiling at us from behind the dark clouds, and believe me, if we don't take advantage of it to the fullest--we will be the biggest dummies around.

Let's step back a bit. Both these two discoveries were made because of my involvement in the Treaty program, however minor it may be in terms of time spent on the property. The first, a few hundred metres north-west of the Eureka, is just 20 feet uphill from that clay-rich zone I spotted as we were walking along the moraine. I told Des [geology student] that day to hand trench that zone and prospect all around. You were there. He and Natalie [geology student] did a great follow-up job. The other one across the ice, the Copper Bell, sent Des an email on that day previous to us going out there, suggesting it would be a great drill target. I'm not mentioning any of this to blow my own horn, or because I want a zone named after me, etc you know me better than that. I'm telling you to emphasize that my intuition is working well on this property and for the reason it doesn't make sense to shut me out of the planning process for a follow-up. Everyone has got to put their egos aside here and get in the boat and roll.

I like Darren [Blaney] a lot, but one thing disturbs me a bit. He keeps talking about "next year" as if this one is already a write-off. Brent, one thing I have learned in this business: YOU CANNOT COUNT ON NEXT YEAR!

We MUST grab the bull by the horns and every day is precious now. If I were running this show, the pad builders would have been on it the next day and a drill as soon as possible thereafter. And screw sending samples to Eco-Tech for six-week turnaround.

Which brings me to my next point and I'm going to be blunt: I'm really worried whether you fellows have the experience to take what fortune has given us here and run with it hard and fast.

In 1995, late in the season we came up with the high-grade Clone trenches. Our stocks Teuton and Minvita jumped from \$0.20 to \$0.60 but stalled there because everyone figured we would have to shut down for the winter. But Big Ed and I cooked up a plan and we marched a drill in there in early November and caught all the shorts off guard. Teuton traded every day that November in the millions and was the top performer on the VSE. Peter Brown had been after us to finance at \$0.80. I know for a fact that he personally had to cover a 500,000 share short position at twice the price, hehe. We had planes circling the Clone to see whether we really had a drill on there or whether we were bluffing. Three weeks later I had Teuton financed at \$2.40 and Minvita at \$3.79. Not bad for two stocks that started in the \$0.20s that summer.

This is a great opportunity to do something similar. But it has to be choreographed perfectly.

I'd like you fellows to consider putting me in charge of the [Copper Belle] program in all particulars. Spotting holes, oversight, etc. I'm even willing to finance the first \$150,000 of this work, to be refunded only if the drilling hits certain milestones. We can negotiate that, but let's say a hole that has gold equivalent value of at least 20 feet of 0.5 oz/ton (or equivalent lengthxgrade value, e.g. 10 ft of 1.0 oz, or 40 ft. of 0.25oz/ton, and Au, Ag, Cu, Pb, Zn all to count in the equivalent grade).

To do this I propose to use the drill crew that I have slated to go into the Orion early next week. Elite Drilling led by Martin Zikmund, a good crew. They would stay at Treaty of course, and that part of the cost you would cover. Maybe Sean [Pownall] wouldn't like that but I'm sure if you explained it to him right he would see the wisdom of it. He's a sensible guy and he knows these are extraordinary circumstances. After the first phase of drilling proves this to be the barnburner I think it is, then the Elite crew can either go back to the Orion or stay on with additional drills from Sean, at your discretion. I say this because I don't know what your deal is with Sean and because he's been so good for you we have to consider that aspect.

I'm sure Sean would appreciate the extra time to come up with good crews for all these unplanned projects, in any event. My chief concern is that he we attack this thing tooth and nail, immediately.

I also want to have meetings as to how best to handle this from the promotion side. My advice.. .absolute secrecy and no "whisper campaign". Secrecy drives everyone crazy. The stock will move in that scenario much better than with the whispering. And when it does the shorts will get involved. There is no better promotion then when you have four aces in your hand and most of the table thinks you are bluffing.

Anyway, get back to me on this. As you can tell I'm excited...

[Emphasis added.]

[163] As this email suggests, Mr. Cremonese was quite familiar with what was going on at Treaty Creek. He became very excited about the prospects and wanted them pursued immediately. Mr. Ambrose was all for it, as was Darren Blaney. Resources were reallocated from Electrum to Treaty Creek, additional drills were moved on site, and the camp was expanded as the focus of the program changed and its intensity increased. This increased expenses considerably.

[164] American Creek did not agree to use the Elite Drilling crew that Mr. Cremonese suggested, or to involve Mr. Cremonese directly by putting him in charge of the new drilling program. It was, after all, American Creek's program, and their past experience with Elite Drilling had been unsatisfactory. In the meantime, Mr. Pownall and his company were equal to the task.

[165] It is worth noting that Mr. Cremonese's proposal to use the drill crew he had slated for another project was based not on dissatisfaction with More Core ("Sean [has] been so good for you"), but on the desire to ramp up quickly. The result would have been to leave Mr. Pownall chewing through his equipment in the difficult ground of the Eureka zone, while Elite took on what was much easier drilling in the Copper Belle and GR2 zones. This would hardly have been conducive to the flexible ongoing relationship with More Core that American Creek hoped would take it through the full three year program and beyond.

[166] In fact, I find, the 2007 drilling program did produce useful information, which was accepted by the Mineral Titles Branch, was acknowledged by Mr. Cremonese and Teuton in press releases, and provided the ground work that formed the basis on which Mr. Sanabria designed the 2009 drilling program. Properly, it should be viewed not in comparison with 2009, but together with it as part of the whole.

• Weather

[167] Another cause of the discrepancy between the 2007 and 2009 exploration programs was the weather. The evidence of Mr. Pownall, Mr. Blaney and Mr. Ambrose satisfies me that the weather towards the end of the season was significantly worse in 2007 than in 2009, adding to that season's expense particularly in view of the intensified drilling program that had begun in late August. The result was cancelled and delayed helicopter flights, delayed shipments and delayed services, all of which chewed up money.

[168] Mr. Cremonese's experience seems to have been similar. As we have seen, he complained of blowing \$9,000 in helicopter time due to the atrocious weather in September 2007. In a further email to Mr. Ambrose later that month, he reported:

Brent:

Sorry to hear about your helicopter troubles. I know what that's like and you really can't do anything about it when a pilot plays the safety card [due to bad weather]. But it costs you huge and production takes a big hit.

Mother nature is not helping at all this year. Every time I think we are getting a break, back comes the fog. Also, our drill at Fiji is down again.

[169] Similarly, in an email to a geologist dated September 6, 2007, Mr. Cremonese complained that it had been a "real crazy year", with the weather continuing to be ugly, and 10 straight days of "fog and clag [low-lying cloud]" that interfered with helicopter flying.

(iv) Some particular objections

· The driller

[170] American Creek entered into its first contract with Mr. Pownall's new company, More Core Drilling, in December 2006, for the 2007 drilling season at Electrum. It provided, in essence, for rates based on metres drilled, and man and machinery hours.

[171] The evidence that I accept (from Mr. Blaney and Mr. Pownall) establishes that the terms were amended orally after American Creek's 2007 drilling program was expanded to include Treaty Creek, and amended further during that season to change from hourly and per metre rates to an all-inclusive daily rate of \$8,000 per day.

[172] At the end of the 2007 drilling season, as noted above, American Creek was anxious to secure the services of More Core for the ensuing seasons. A second contract was signed in October 2007 covering the drilling seasons for the years 2008, 2009 and 2010. It specified a minimum of 20,000 metres to be drilled in each of the three years, and per diem rates of \$10,000 for 2008, \$11,000 for 2009 and \$12,000 for 2010.

[173] As we have seen, however, American Creek had to abandon its drilling plans for 2008. More Core charged nothing other than \$37,000 from the deposit of \$100,000 for the cost of its bringing its drills back to Stewart in preparation for the season.

[174] American Creek entered into a third contract with More Core in April 2009, in preparation for the 2009 drilling season. The daily rate contemplated for 2009 in the October 2007 contract of \$11,000 was replaced by a daily rate of \$8,000. As Mr. Pownall pointed out, by April 2009 the market had softened considerably compared to late 2007.

- [175] Teuton finds these arrangements highly suspicious: "That More Core would enter into such an agreement to its detriment, and seek no compensation for the Plaintiff's failure to meet the terms of the [October 2007] contract beyond its 2008 costs, defies explanation". In Teuton's submission, "the only conclusion that can be drawn is that the Plaintiff has not disclosed the true relationship between itself and More Core Drilling".
- [176] I reject that submission. I thought Mr. Pownall explained things rather well. The proposition that some suspicious sort of relationship existed beyond what the contracts and the testimony revealed was not put to Mr. Pownall, and is supported by no evidence of any kind. I accept the explanation given by Mr. Pownall and Mr. Blaney. I find that these two new companies were feeling their way through challenging times and difficult conditions. In doing so, they employed a mutually accommodating and flexible approach that, in the end, worked well for both of them and got the job done.
- [177] It is true that, on both sides, there were lapses in appropriate documentation in 2007. These were, however, due to the lack of sophisticated organization on the part of More Core during its first year of operation, and of inadequate record-keeping on the part of American Creek. But I am satisfied, on the evidence as a whole, that these shortcomings reveal nothing sinister and that these two parties were acting in good faith throughout.
- [178] In the wake of my ruling that the drilling proposals proffered by Mr. Whitehead were inadmissible as expert opinion evidence, Teuton established much the same evidence on a purely factual basis. It noted that the drilling costs from More Core at Treaty Creek for 2007 were a little over \$1,300,000. Teuton then produced calculations indicating that if More Core's work had been carried out at the rates originally stipulated in the first contract (signed December 2006), the cost would have been approximately \$687,000. If the work had been carried out at the rates charged by Elite Drilling on Teuton's Orion project, the cost would have been just over \$843,000. On this basis, Teuton submits, the drilling costs for 2007 at Treaty Creek were unreasonable.
- [179] In my view, the comparison to rates from the original More Core contract is unhelpful in the absence of admissible opinion evidence comparing the work contemplated by that contract with what was actually done at Treaty Creek. On the facts, the contract contemplated an entirely different project (the Electrum property) which, as Mr. Blaney pointed out, was a "totally different scenario". The conditions at Treaty Creek, I find, were markedly more challenging than those at Electrum. As Mr. Whitehead put it, "every project is different".
- [180] The comparison to Elite's contract suffers from the same problem in addition to a number of shortcomings in calculation that understate coring costs and mobilization/demobilization costs, and an inaccurate equation of services.
- [181] These problems are compounded by the fact that none of this was put to Mr. Pownall in cross-examination.

[182] In these circumstances, I am unable to give any weight to this evidence as a basis for attacking the costs of More Core's 2007 drilling at Treaty Creek. I am satisfied that these drilling costs were actually incurred, in good faith, in relation to "exploration and development work" at Treaty Creek within the meaning of the Mineral Tenure Act Regulation. They were clearly accepted as such by the Mineral Titles Branch and credited accordingly. They constitute "exploration expenditures" within the meaning of the agreement.

· Consumables

[183] Teuton raises the high cost of "consumables" in 2007 compared to 2009. This refers to the cost of drilling equipment and parts consumed during the course of the drilling program, and charged by More Core to American Creek. Teuton complains that the plaintiff has failed to show that these consumables were properly exploration expenses under the earn-in agreement, and that the records are inadequate given that More Core's daily drilling reports were not signed off, and the charges for consumables were not supported by accompanying invoices.

[184] Mr. Pownall acknowledged under cross-examination that an unscrupulous drilling contractor could take advantage of its client in such circumstances. I am satisfied that Mr. Pownall was a man of the highest scruples and find no basis in the evidence for doubting the legitimacy of the cost of the consumables he charged.

· Helicopters

[185] Teuton also points to the high cost of helicopter expenses in 2007 as compared to 2009. Teuton acknowledges that this would be explained in part by the fact that a camp had to be built in 2007, but submits that, on the evidence, the main reasons for the difference were the ineffective use of helicopters in 2007, and the use of helicopters for purposes other than exploration.

[186] I do not find the allegation of ineffective use to be supported by the evidence, at least to the extent that would disqualify a meaningful amount of the helicopter costs from being considered "exploration expenditures". The evidence of Mr. Blaney and Mr. Ambrose satisfies me that did their best to balance appropriately the competing goals of time, cost and efficacy taking into account the exigencies of aircraft availability, weight requirements, cargo size, lift capacity, and weather. In doing so, the result may not always have been ideal when examined in hindsight, but there is nothing about those expenses which would suggest that they were not incurred in good faith, that they were not incurred at all, that they did not relate to exploration and development work, or that they were not accepted as such by the Mineral Titles Branch.

[187] Teuton points to the evidence of Michelle White-Wilsdon, a geology student hired by American Creek in the summer of 2007. Ms. White-Wilsdon testified that Mr. Ambrose, on several occasions, "would send a helicopter to Stewart to go pick up big supplies of booze

for camp staff and bring it back into camp", arguing that the cost of such trips could hardly be considered to related to exploration and development work. Mr. Thomsen, a helicopter pilot formerly employed by Vancouver Island Helicopters, American Creek's helicopter contractor for 2007, testified that he loaded liquor on to helicopters leaving Stewart for Treaty Creek.

[188] None of this was put to Mr. Ambrose in cross-examination, and I am unable to give it much weight. I accept that liquor was flown by helicopter from Stewart to Treaty Creek, but the evidence, including that of Mr. Thomsen and the flight tickets produced by Vancouver Island helicopters, does not satisfy me that liquor was the only cargo on those flights.

· Promotion

[189] The evidence establishes beyond any shadow of a doubt that promotion was, from the perspective of both parties, a vitally important aspect of what they were trying to accomplish through their agreement, and inextricably connected to the whole process of exploring for mineralization. Mr. Cremonese's email of August 14, 2007, quoted above, makes this perfectly clear. After all, increasing the value of the companies is rather the point of the exercise. The world already has enough gold. Moreover, Mr. Cremonese's perception of American Creek's proficiency at promotion was a principal reason for his decision to offer the property to that company. Without promotion, there is no financing; without financing, there is no exploration; without exploration, there is little to promote.

[190] I accept, conceptually, Teuton's position that drilling aimed solely at producing results for promotional purposes that were known to be geoscientifically misleading, such as deliberately producing false positives, would fail to qualify as "exploration expenditures" within the meaning of the agreement. This would indicate a lack of good faith, being more deception than promotion. But to drill in good faith with an eye to promoting investor interest was something Mr. Cremonese expected and encouraged, and there was no expert evidence to suggest that such an approach was not widely accepted in the industry. On the evidence, particularly that of Mr. Ambrose, I find that it is the latter, not the former, that happened here. In this regard, the absence of expert evidence is significant.

[191] Teuton takes particular exception to the pattern of drilling that took place in the Copper Belle and GR2 zones towards the end of the season, as the bad weather was closing in. One pattern was described as the "star fish", while the second was described as the "squid". These names are descriptive of the patterns formed by drilling multiple holes from a single pad. Teuton asserts that these constitute clear evidence of unsound drilling practices governed solely by promotional considerations. This was based on the evidence of Mr. Cremonese that, in his experience, proper drilling is normally undertaken from a series of pads spaced along baselines, creating a conceptual 'window' into the ground. This, Teuton points out, is the sort of pattern originally described by Mr. Millard in his drilling proposal for Eureka, but is not what was used when the focus changed to Copper Belle and GR2. By drilling multiple holes from one pad, the result was the star fish and squid patterns, rather than a

window, and this was geoscientifically of little use.

- [192] Apart from Mr. Cremonese's evidence, the only other evidence offered in support of this contention was from Ms. White-Wilsdon. It was quite clear that Ms. White-Wilsdon did not get on with Mr. Ambrose that summer, and I prefer Mr. Ambrose's evidence to hers. Ms. White-Wilsdon's recollection was unusually selective, and frequently at odds with independent documentation produced contemporaneously with the events in question.
- [193] But more importantly, there was no expert evidence to support the proposition that the holes as drilled did not, or were not likely to, produce useful information, or were designed contrary to standard and accepted geological practice. Such evidence was missing not only in respect to the so-called star fish and squid holes, but also in respect to the drilling program in general. The details of all of that drilling, including specific diagrams of the star fish and the squid drilling patterns, were included in the 2007 assessment report and caused no concern in the office of the gold commissioner.
- [194] Teuton points to Mr. Ambrose's evidence that, "[w]e have to drill as much as possible and get as much core as possible before the snow flies", then asserts that the only possible explanation for this approach is "promotion". Yet it seems precisely the approach urged upon American Creek by Mr. Cremonese: "YOU CANNOT COUNT ON NEXT YEAR! We MUST grab the bull by the horns and every day is precious now".
- [195] I conclude that any promotional aspects of the program were not such as to convert the expenses into something other than "exploration expenditures".

· Incompetence

- [196] As I have already noted, the geologist hired for the 2007 year, Mr. Millard, had a background in oil & gas drilling, rather than hard rock drilling, while Mr. Ambrose had been learning on the job. I have also noted, and reiterate, that it was nevertheless unfair to characterize Mr. Millard as incompetent, and no expert evidence was led to suggest that the drill program he designed was inadequate.
- [197] Mr. Ambrose was presumably not a complete loss as Mr. Cremonese expressed this view in an email to Mr. Blaney dated August 2, 2007:

I've been coming up here yearly since 1980 and have met every kind of mining guy there is. Brent is in a class by himself definitely one of the most decent and honorable fellows I've ever had the chance to come across.

- [198] It is true that the drilling program for 2007 did not have the advantage of the overall direction of the highly qualified Mr. Sanabria, who took over at the end of that year. But it did have direction and input from Mr. Millard, Mr. Ambrose, competent geology students, field personnel including a very experienced driller, and the executives of American Creek. There were frequent team telephone conferences reviewing progress and planning further steps. There was no evidence in terms of expert opinion, regulatory requirements, industry

standards or otherwise, that would allow me to conclude that this approach disqualifies the 2007 expenses from constituting "exploration expenditures" within the meaning of the agreement.

· Core sampling and assay results

- [199] Closely connected to Teuton's objections concerning both the drilling program and the overall lack of competence is concern raised in connection with a particular assay result and the core sampling upon which it was based. This aspect is also the principal foundation of Teuton's assertion that the 2007 program did not produce geoscientifically reliable results.
- [200] The assay result in question was from the last 8.5 m interval from hole TC0704 (hole #4 in the 2007 Treaty Creek program), drilled in the Eureka zone. It indicated very high silver content: 2,094 g/t over the 8.5 m.
- [201] This result caused considerable excitement and was the subject of press releases from both companies, as it indicated bonanza-grade silver. But the result was anomalous and Mr. Cremonese questioned it, as it turns out correctly. He therefore went up to Treaty Creek to look at the remaining sample from the same core interval, and brought it back for petrographic testing in 2012.
- [202] The assay result was confirmed, so there was nothing wrong with the testing process that had produced the original assay. Was there, then, something wrong with the sample? Was American Creek guilty of salting it with silver, à la Bre-X? Had American Creek engaged in selective sampling (deliberately selecting higher-grade portions of the interval for submission to the geochemical laboratory)? Mr. Cremonese asked his expert petrographer, Fabrizio Colombo, Ph.D., P.Geo., these questions, and Dr. Colombo could not rule either one out at that point. Teuton sought to amend its claim to allege fraud on American Creek's part, but the application was dismissed.
- [203] The problem, it turned out, was one no one had anticipated, including the petrographer. Dr. Colombo recognized that the sample was obtained under difficult drilling operations resulting from "a highly fractured portion of rock", and noted that the drill hole had to be abandoned at the depth where the interval ended, of 108.51 metres.
- [204] What had happened was this: the core from this interval had become contaminated by drill bit fragments as a result of the difficult drilling. This happens. What no one connected to Treaty Creek realized at the time was that the solder used in drill bits has a relatively high silver content. It was fine grains of this solder introduced via the drill bit fragments that produced the anomalous high-grade silver assay result.

- [205] The silver content of the solder used in drill bits was something that was news to Mr. Cremonese, as well as to his very experienced business associate Ed Kruchkowski, B.Sc., P.Geo. Mr. Cremonese discovered it in late 2012 in an article that had been published in the Northern Miner in 2009, and quite properly brought it to Dr. Colombo's attention. Dr. Colombo had been unaware of it even though he had worked in exploration and had supervised drilling.
- [206] In the result, it was clear that there had been no salting. Moreover, Dr. Colombo confirmed in cross-examination that from his own sampling, he could be relatively sure that American Creek had not engaged in selective sampling.
- [207] The result from hole TC0704 was thus proven to be unreliable, and indeed both companies issued press releases warning the public not to rely on it. But the evidence did not establish any basis for concluding that the 2007 drilling program failed to produce geoscientifically reliable information, beyond this one unforeseeable problem. The evidence of Ms. White-Wilsdon was particularly unpersuasive in this regard in light of the evidence of Dr. Colombo.

(v) Conclusion

- [208] Teuton has failed to demonstrate that the expenses claimed by American Creek as "exploration expenditures" in relation to Treaty Creek do not comprise the amount of "exploration expenditures" necessary to satisfy the terms of the earn-in agreement. American Creek has accordingly satisfied the conditions precedent set out in that agreement, and Teuton must now comply with its obligations. It was not argued in these circumstances that specific performance is not the appropriate remedy.
- [209] It follows that American Creek is entitled to an order that Teuton forthwith transfer to American Creek legal title to all of Teuton's mineral claims as set out in Schedules "A" to the earn-in agreement and the supplemental agreement. American Creek shall thenceforth hold an undivided 49% interest in those mineral claims in trust for Teuton.
6. Should punitive damages be awarded?
- (a) The nature of punitive damages
- [210] As the Supreme Court of Canada noted in *Whiten v Pilot Insurance Co*, 2002 SCC 18, [2002] 1 SCR 595 at paras 36, 68 and 94, punitive damages are intended to punish the defendant, not to compensate the plaintiff, and in that sense constitute a windfall for the plaintiff. As a result they can be awarded only under certain rare and exceptional circumstances as a matter of discretion. These circumstances are limited to instances where there has been conduct on the part of the defendant that is so outrageous as to deserve condemnation beyond the defendant's liability for compensatory damages in order to achieve the objectives of retribution, deterrence and denunciation, normally the preserve of the criminal law.

- [211] Such conduct should be a marked departure from the ordinary standards of decent behaviour, in that it is of a harsh, vindictive, reprehensible or malicious nature: *Whiten; Vorvis v Insurance Corp of British Columbia*, [1989] 1 SCR 1085 at pp 1107-1108.
- [212] In addition, in a breach of contract case like this one, the conduct must constitute an independent actionable wrong, separate from the ground upon which the plaintiff is suing: see *Vorvis* at 1106.
- [213] Often, an issue arises as to whether there is an overlap between punitive damages and special costs. Both are claimed in this case. Both are punitive in nature, are available in cases of reprehensible conduct, and are intended to achieve general and specific deterrence and denunciation. One significant difference is that special costs are simultaneously compensatory and punitive, whereas punitive damages are wholly punitive: *Bradshaw v Stenner*, 2012 BCSC 237 at para 9. Where the situation is one where special costs have been awarded or are likely to be awarded, punitive damages should rarely be ordered: *Performance Industries Ltd v Sylvan Lake Golf & Tennis Club Ltd*, 2002 SCC 19; *Insurance Corporation of British Columbia v Eurosport Auto Co. Ltd*, 2007 BCCA 279 at paras 55 and 58. See also *Bradshaw* at para 32.
- [214] Another difference is that, typically (though perhaps not necessarily), special costs are awarded in relation to misconduct in the course of the litigation and leading up to it, whereas punitive damages relate to pre-litigation conduct, connected with the cause of action rather than conduct of the litigation; see, for instance, *Marchen v Dams Ford Lincoln Sales Ltd*, 2010 BCCA 29.
- [215] In this case, by request of the parties, the question of costs remains to be argued in light of this judgment.
- (b) The pleadings
- [216] In its Notice of Civil Claim, American Creek includes as part of the Relief Sought, "Aggravated and punitive damages" and "Special costs". The claim for punitive damages is supported by the following paragraphs:
19. Further, or alternatively, Teuton has conducted itself, including, inter-alia, in refusing to transfer legal title in and to the Property to American Creek, and further, or alternatively, in announcing that it has no intention to so register the legal title, in a malicious, high-handed, arbitrary, and further or alternatively, oppressive manner and further, or in the further alternative, in a deliberate, callous, egregious and contumelious disregard of American Creek's rights.
 20. Further, or alternatively, Teuton's conduct has been, and continues to be, reprehensible and warrants rebuke.

[217] After the conclusion of the evidence portion of this trial, the plaintiff applied for leave to amend its Notice of Civil Claim to add the following material facts in support of its claim for punitive damages:

28. Further, American Creek claims punitive damages as a result of independent actionable wrongs committed by Teuton.
29. Teuton committed an independent actionable wrong by engaging in defamatory statements as detailed in the Alberta Court of Queen's Bench Action #1201-07918 in order to gain a tactical advantage against American Creek (the "Defamatory Statements").
30. Teuton has engaged in an abuse of the court's process by publicly disclosing confidential evidence arising out of the examination for discovery of American Creek's representative while these proceedings were ongoing, as well as mischaracterizing the evidence arising from this discovery.
31. Mr. Cremonese, on behalf of Teuton, has also engaged in an abuse of the court's process by refusing to acknowledge at trial that evidence given by him at his examination for discovery was untrue.
32. As a result of Teuton's Defamatory Statements and abuse of process, American Creek has suffered loss and damages.
33. Teuton's Defamatory Statements and abuse of process constitute high-handed malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour.

[218] American Creek submitted that all of the facts raised in these paragraphs had been canvassed both on discovery and at trial, so that there was no surprise or prejudice to Teuton.

[219] Teuton argued that the amendments are not to be allowed. It pointed out that in Whiten, the Supreme Court of Canada had made it clear that the facts said to justify punitive damages should be pleaded with some particularity. This is because it is a:

basic proposition in our justice system that before someone is punished, they ought to have advance notice of the charge sufficient to allow them to consider the scope of their jeopardy as well as the opportunity to respond to it. This can only be ensured if the claim for punitive damages, as opposed to compensatory damages, is not buried in a general reference to general damages. (Para 86; emphasis original.)

[220] The comments in Whiten must be taken in context. From my perspective, the real issue is whether, in this case, Teuton is taken by surprise, or faces unfairness if the amendments are allowed. Given that all of the evidence upon which American Creek relies was indeed canvassed both on discovery and at trial, and through discovery of documents, I do not think that surprise or unfairness arises. Although full particulars were not pleaded in advance, American Creek's pursuit of this claim was transparent.

[221] Accordingly, I grant leave to American Creek to amend its Notice of Civil Claim in the manner requested. For the reasons that follow, however, I have concluded that this is not a case in which an award of punitive damages should be made.

(c) Analysis

[222] American Creek bases its claim for punitive damages, as I understand it, on three different factual bases.

[223] The first relates to Mr. Cremonese's actions in refusing to transfer the properties in the period between September 11, 2009, when American Creek gave notice that it had completed the First Earn-In, and December 2010 when this litigation was commenced. This is covered by paragraph 19 of the Notice of Civil Claim.

[224] The second relates to Internet postings by Mr. Cremonese and others, as covered by the new paragraph 29 of the Notice of Civil Claim. The third relates to alleged "abuse of process" as covered by new paragraphs 30 and 31 of the Notice of Civil Claim.

[225] Common to these are instances of what I can only describe as perplexing inconsistencies in Mr. Cremonese's behaviour. Two examples will suffice.

[226] It will be recalled that one of the reasons given by Mr. Cremonese for choosing American Creek as optionee for the Treaty Creek property was his belief that American Creek was well-positioned to raise sufficient capital to fund an appropriate exploration program, based on the amount was already spending on Electrum, its share price of \$2, and its promotional abilities. I had no difficulty in accepting this evidence.

[227] Given this context, it is difficult to understand why, shortly after he commenced his overtures to American Creek, Mr. Cremonese would begin an anonymous assault on American Creek's share price on stockhouse.com.

[228] Stockhouse.com is a website that caters to the small capital stock investor community. It includes bulletin boards, called "bullboards", on which community members may post comments concerning companies of interest. Mr. Cremonese posted his first comment of this nature on the American Creek Resources bullboard on February 19, 2007:

This puppy is so overvalued

Come on. 50,000,000 shares out fully diluted and trading at \$2.20??? You're going to tell me this baby is worth \$110 million? I thought Kenrich was totally overvalued, but AMK makes it look like a piker. You guys jumping up and down about the Electrum property, it's too much. What have they got there? A few narrow high-grade veins that no one has been able to follow. No continuity, no tonnage. And these guys picking up all the property around it like it was Hemlo at Eskay Creek? And the prices they are paying? The stock's been trading for less than a year and already there's 50 million out. What's it going to be at the end of next year, 100 million? I'm surprised the shorters like Au Contraire aren't all over this stock.

[229] Similar postings followed over the ensuing weeks, all under the same pseudonym. On April 19, 2007, Mr. Cremonese posted a particularly puzzling comment on the Teuton Resources Corp. bullboard :

Exploring since 1983 you say???

And haven't found nothing yet. Teuton, the perennial also-ran. They've been looking for El Dorado even longer than Kenrich. Now they've fobbed off their Treaty property on hapless American Creek.

[230] In his evidence at trial, Mr. Cremonese explained that he posted these comments because he thought that American Creek's stock price was way overvalued and that he sought "to bring their share price into proper dimension". He also conceded that he knew that in doing so, it would make it more difficult for American Creek to raise financing. Why he would do this, having just entered into an agreement with American Creek that depended for its success on the company's ability to raise money, he could not explain.

[231] There is, however, no evidence that these postings in fact interfered with American Creek's ability to finance its exploration, and it is not clear that they constitute an independent actionable wrong however one might think it reasonable to suppose that an optionor ought not to attempt to undermine its optionee. I can only assume that Mr. Cremonese was not thinking things through very clearly at this point, indulging his internet chat room/investor persona without much thought to his position as the president and CEO of Teuton Resources Corp. In this context, I am not convinced that this activity, even if actionable, sinks to a level that would justify punishment.

[232] The second example arises out of his dealings with American Creek after American Creek gave notice that it had completed the First Earn-In, and sought transfer of the Treaty Creek property. I do not propose to go through all of the details of the dealings between the two throughout this period, but I found it noteworthy that Mr. Cremonese seemed to take incompatible positions at the same time.

[233] Thus, on November 4, 2009, Mr. Cremonese raised some concerns he had about American Creek's expenses. By letter of that same date, Mr. Burton responded to those concerns, but noted that American Creek has spent more than \$1,000,000 over what the agreement required, and indicated that if title were not transferred by November 10th, American Creek would have to commence legal action. Mr. Cremonese emailed Mr. Burton on November 10th to reiterate his concerns, stating:

I am afraid you will have to go ahead and sue us as you have threatened numerous times. We will raise these many questions in our defence.

[234] The parties then met on November 18, 2009, and agreed to exchange further information. Teuton continued to resist transferring the property.

[235] Notwithstanding this position, Teuton nevertheless agreed to the issue of a joint press release on November 30, 2009 that included the following statement:

American Creek holds a 51% interest in the Treaty Creek Project with Teuton Resources Corp holding the remaining 49%. Under the terms of the Option Agreement with Teuton, American Creek has elected to earn an additional 9% interest (for an aggregate total of 60%) by making all expenditures necessary to bring the project to feasibility. American Creek is the operator of the project.

[236] Teuton issued a press release to similar effect on January 12, 2010. It must be remembered that these were public announcements upon which the public is expected to be able to rely. Why Mr. Cremonese agreed to these public statements when it would appear he never intended to convey the interest to American Creek was never satisfactorily explained.

[237] Nevertheless, whatever complaints American Creek may have arising out of how Teuton responded to its demand for the transfer of the interest in Treaty Creek appear to me to relate not to an independent actionable wrong, but rather to the nature of Teuton's breach. In essence, American Creek asserts that Teuton acted irrationally in refusing to transfer the property and requiring American Creek to sue. But that goes to the merits of the claim, and cannot properly, in my view, support a claim for punitive damages in a breach of contract case. Teuton should not be punished for taking a position that proved unsuccessful. The remedy for Teuton's breach is specific performance and costs.

[238] The third major area of complaint consists of yet more bulletin board postings by Mr. Cremonese and also by Amanda Mullin, formerly an employee of American Creek but currently an executive with Teuton. The evidence establishes that, after the commencement of the litigation, and using various aliases, Mr. Cremonese and Ms. Mullin posted a number of scurrilous, distasteful and gratuitously insulting comments aimed at American Creek's executives and their families. Mr. Cremonese gave incorrect evidence when asked about them on discovery.

- [239] These postings are the subject of an action for defamation brought in the province of Alberta. In the context of that action, an order was made seizing computers from Teuton, Mr. Cremonese and Ms. Mullin. After that order was enforced, counsel for Teuton gave notice to counsel for American Creek in this action about corrections Mr. Cremonese wished to make to his discovery evidence.
- [240] American Creek submits that these comments are clearly defamatory, so that the actions of Mr. Cremonese and Ms. Mullin in publishing them constitute an independent actionable wrong. Teuton argues, however, that they cannot form the basis of a claim for punitive damages because they are already the subject of the action in Alberta, and whether they constitute actionable defamation remains to be judicially determined.
- [241] I do not find it necessary to decide that point, or to determine whether posting the comments constitutes conduct that is harsh, vindictive, reprehensible or malicious to an extent that would justify an award of punitive damages. It seems to me that Teuton's conduct in relation to the postings, as well as in relation to the "abuse of process" allegations, is conduct leading to and in the course of litigation. As such, it should more properly be examined in the context of a claim for special costs, which has been pleaded and seems likely to be pursued. As the Court of Appeal stated in *Marchen* at para 69:

Punitive damages are a remedy for breach of contract that reflects the conduct of a party at the time of the breach. Costs reflect the results and conduct of parties leading to and in the course of litigation. They are not a remedy for breach of contract.

- [242] In these circumstances, I decline to award punitive damages.

CONCLUSION

- [243] As noted above, American Creek is entitled to an order that Teuton forthwith transfer to American Creek legal title to all of Teuton's mineral claims as set out in Schedules "A" to the earn-in agreement and the supplemental agreement. American Creek shall thenceforth hold an undivided 49% interest in those mineral claims in trust for Teuton.
- [244] The parties are at liberty to apply with respect to any corollary matters arising out of that order.
- [245] American Creek's claim for punitive damages is dismissed.
- [246] As they requested, the parties are at liberty to speak to costs.

"GRAUER, J."

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