

CANADA / JUDGMENT

Dusanjh v. Appleton

2017 BCSC 340

COURT

Supreme Court of British Columbia

DECIDED

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2017 BCSC 340 Dusanjh v. Appleton

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Dusanjh v. Appleton,

2017 BCSC 340

Date: 20170302

Docket: S1510728

Registry: Vancouver

Between:

Robin Lynne Dusanjh and Ronald David Wright

Petitioners

And

Mark Appleton, Sharon Halkett and Tracy Maureen Wright

as executors of the will of Robert Harold Chadwick Wright, deceased,

Mark Appleton, in his personal capacity, Sharon Halkett in

her personal capacity, Oak Bay Marina Ltd., Yun Wright

aka Yun Kloihof, and Randall Robert Wright

Respondents

- and -

Docket: S160282

Registry: Vancouver

Between:

Randy Robert Wright

Petitioner

And

Mark Appleton, Sharon Halkett and Tracy Maureen Wright
as executors of the will of Robert Harold Chadwick Wright, deceased,
Mark Appleton, in his personal capacity, Sharon Halkett in
her personal capacity, Oak Bay Marina Ltd., Yun Wright
aka Yun Kloihof, Robin Lynne Dusanjh aka Robin Lynne Wright
and Ronald David Wright

Respondents

Before: The Honourable Madam Justice Loo

Reasons for Judgment

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Place and Date of Trial/Hearing:

Vancouver, B.C.

October 17 and 18, 2016

Place and Date of Judgment:

Vancouver, B.C.

March 2, 2017

Introduction

- [1] This case concerns the proper interpretation of a provision in the articles of a company. The petitioners argue that the articles establish a trust in their favour. The respondents argue that no trust is established by the articles, or, alternatively, if a trust was established, it was a testamentary trust that failed to meet the requirements of the Wills Act, R.S.B.C. 1996, c. 489, and is therefore invalid.
- [2] Robert Harold Chadwick Wright died on April 17, 2013 ("Mr. Wright"). He was 82 years old. He is survived by his wife, the respondent Yun Wright ("Yun"). Mr. Wright is also survived by three adult children from a previous marriage: the petitioners Randall Wright ("Randy"), Robin Dusanjh ("Robin") and Ronald Wright ("Ronald"). I refer to the petitioners by their given names rather than their surnames, not out of disrespect, but to avoid confusion.
- [3] Mr. Wright was the founder, sole director and officer of Oak Bay Marina Ltd. ("OBM"), a British Columbia Corporation. The respondents Mark Appleton and Sharon Halkett ("the executors") are now the sole directors of OBM, trustees of the Robert Wright Joint Partner Trust, executors of the last Will of Mr. Wright, and the trustees of his estate. The respondent Tracy Wright renounced as trustee and executor of the Will on May 4, 2016, and is no longer a party to this proceeding.
- [4] The two petitions were heard together.
- [5] At issue is the question of the beneficial ownership of three classes of preferred shares in OBM: "the Randy Preferred shares", "the Ronald Preferred Shares", and "the Robin Preferred Shares", as they are described in the Articles of OBM (collectively, the "Preferred Shares").
- [6] The parties agree that Mr. Wright held legal title to the Randy Preferred Shares, the Ronald Preferred Shares, and the Robin Preferred Shares at the time of his death, and that the shares are now legally held by Mr. Wright's estate. They disagree over whether Mr. Wright also held beneficial title to the shares.
- [7] If a trust exists, the petitioners are entitled to the income of the shares pursuant to the trust terms. If not, the shares form part of the residue of the estate which has been left to Yun.
- [8] The Robert Wright Joint Partner Trust includes all of Mr. Wright's assets, and provides that Yun is its sole beneficiary. Mr. Wright's 2012 Will purports to give all the assets in his estate to Yun. The only assets in the estate are the Preferred Shares.
- [9] Randy also seeks an order that Larry D. Eade be appointed trustee of the Randy Preferred Shares, in the place of the executors. The validity of the 2012 Will and the Robert Wright Joint Partner Trust is also challenged by Randy in separate proceedings.

background facts

- [10] Mr. Wright was a successful businessman. He was the founder, sole director and officer of a group of companies that collectively operated as Oak Bay Marina Group ("OBMG"), which includes OBM and a number of resorts, marinas, and tourist attractions providing boat rentals, guided sports fishing, whale watching and wildlife tours in Campbell River, April Point, Oak Bay, North Saanich and Pedder Bay, British Columbia. OBMG also operates Ripley's Believe It or Not, Oregon Undersea Gardens and Waxworks in Newport, Oregon, and Cape Santa Maria Resort on Long Island in the Bahamas.
- [11] Mr. Wright began cohabiting with Yun around 2002 or 2003 and they married in 2008. They had no children together. Mr. Wright's children from a previous marriage are Randy who is 57 years old, Robin who is 58, and Ronald who is 66.
- [12] Mr. Wright dealt with the law firm Patterson Adams in Victoria, British Columbia, since approximately 1992. Jack Patterson was the law partner in charge of Mr. Wright's various personal and corporate matters, which included estate planning and corporate governance. Mr. Patterson died in 2004. Leslie B. Jamieson, a lawyer in the same firm, was involved with a number of commercial matters for OBM from 1992 to 2003. Mr. Jamieson was also the estate planning solicitor for Mr. Wright from February 2004 until Mr. Wright's death in 2013, and the corporate solicitor for OBM and its affiliates and associates.
- [13] Mr. Jamieson provided a detailed affidavit setting out his dealings and discussions with Mr. Wright over the years, including Mr. Wright's instructions to him, Mr. Wright's estate planning, and the documents that were prepared for OBM or Mr. Wright and signed by him. Mr. Jamieson drafted the amendments to OBM's Articles, as well as other estate planning documents for Mr. Wright.
- [14] Randy objects to many portions of Mr. Jamieson's affidavit, primarily on the ground that they do not form part of the factual matrix or are a statement of Mr. Wright's subjective intention. Neither the executors or Yun rely on Mr. Jamieson's affidavit, but they do rely on two September 21, 2005 letters signed by Mr. Wright, which Randy objects to as inadmissible on the basis that they amount to evidence of subjective intention. I will review these objections later.
- [15] Mr. Wright had a general estate plan in place in 2002 that was revised in 2005 and 2012.

2002 Estate Planning

- [16] When Mr. Jamieson took over as the solicitor responsible for Mr. Wright's estate planning files in 2004, Mr. Wright had the following general estate plan in place:
- (a) a Trust settled on September 20, 2002, known as the Bob Wright Alter Ego Trust Settlement (the "Alter Ego Trust"). Mr. Wright was the sole primary beneficiary and the secondary beneficiaries were named in a schedule to the Alter Ego Trust. None of Mr. Wright's children were beneficiaries of the Alter Ego Trust;

- (b) a Will dated September 20, 2002 (the "2002 Will") which, inter alia,:
- (i) left Randy an amount equal to the aggregate amount of his indebtedness at the time of his death to any company controlled directly or indirectly by Mr. Wright, on condition that the funds be used for the immediate payment of the indebtedness;
 - (ii) left Randy, if living at the time of his death, the annual sum of \$100,800 in equal monthly amounts of \$8,400, adjusted annually, and payable for Randy's lifetime;
 - (iii) left Robin, if living at the time of his death, the annual sum of \$100,800 in equal monthly amounts of \$8,400, adjusted annually, and payable for Robin's lifetime;
 - (iv) left Ronald, if living at the time of his death, the annual sum of \$100,800 in equal monthly amounts of \$8,400, adjusted annually, and payable for Ronald's lifetime; and
 - (v) the balance remaining in the estate was to be paid to the trustees of the Alter Ego Trust to be held on the trusts of such settlement.
- (c) Mr. Wright also signed a letter dated September 24, 2002 setting out his intentions with respect to the annuities he left for his children in his 2002 Will. The letter reads:

September 24, 2002

TO WHOM IT MAY CONCERN:

Re: My Last Will dated September 20, 2002

With regard to the annuities contained in my Will for my three children, Ronald, Randall and Robin, these are intended to provide financial security for my children for the remainder of their lives. I believe they are generous and are more than adequate to ensure that they will be reasonably comfortable and secure for their respective lifetimes.

My children and I have not been close. I do not bear any malice or vindictiveness towards them. I believe the provision I have made in my Will for my children more than adequately discharges my moral obligations and duties to my children in light of our long term estrangement.

I have given careful consideration to my obligations and duties and have decided that my employees and the community as a whole deserve much consideration for the support they have given me over my more than 40 years in business.

I am satisfied that I have made fair and adequate provision for my children in my Will.

Yours truly

[Sgd.] Robert H. Wright

2005 Estate Planning

- [17] In 2005, Mr. Wright met with Mr. Jamieson on a number of occasions to discuss his estate plan. This led to Mr. Wright restructuring his estate plan in September 2005. He wanted to have his assets held primarily in a trust for the benefit of named secondary beneficiaries, but wanted Yun to be the main beneficiary. He decided to wind up the Alter Ego Trust and settle a joint partner trust in which Yun was the primary beneficiary.
- [18] The following steps were taken:
- (a) the Alter Ego Trust was wound up in favour of a new Joint Partner Trust with Yun as a beneficiary;
 - (b) the Articles of OBM were amended to authorize a share structure that included the Randy, Ronald, and Robin Preferred Shares at issue;
 - (c) the Preferred Shares were issued from OBM's treasury to Mr. Wright; and
 - (d) Mr. Wright executed a Will on September 21, 2005 replacing the 2002 Will. The 2005 Will leaves the Preferred Shares outright to each adult child, provided he or she is living at the time of Mr. Wright's death.
- [19] On September 21, 2005, Mr. Wright settled the Robert Wright Joint Partner Trust by way of a formal document that formally establishes a trust, names Mr. Wright as the settlor and initial trustee, with Mr. Wright and Yun as the primary beneficiaries. There are secondary beneficiaries, but the petitioners are neither primary nor secondary beneficiaries of this trust.
- [20] On September 21, 2005, the Articles of OBM were amended to alter the authorized share structure and to set out the rights and restrictions of the Preferred Shares. As sole director of OBM, Mr. Wright was responsible for the amendment.
- [21] The following shares were issued: 108,000 each of "Randy Preferred Shares", "Robin Preferred Shares", and "Ronald Preferred Shares", and 200,000 "Yun Preferred Shares". The Randy, Robin, and Ronald Preferred Shares were issued to Mr. Wright in his personal capacity. The Yun Preferred Shares were issued to Mr. Wright in his capacity as the trustee of the Robert Wright Joint Partner Trust.
- [22] The special rights and restrictions set out in Article 27 are what the petitioners say gives rise to the trust in their favour. The rights and restrictions include dealing with voting rights, dividends, redemption and retraction of the Preferred Shares. As the Articles of OBM are lengthy, Appendix A to these reasons is the table of contents to the Articles of OBM, and Appendix B is the full text of Article 27.
- [23] Mr. Wright also signed two letters on the same date, that is September 21, 2005, which Randy contends are inadmissible, and the respondents rely upon to demonstrate that no trust is established by Article 27. I will review the documents at this point without addressing their admissibility.

The two letters dated September 21, 2005

[24] One letter of September 21, 2005 signed by Mr. Wright, accompanies his 2005 Will and expresses his intent with respect to his bequests towards his children (the petitioners) as follows:

With respect to the bequests contained in my Will for my three children, Ronald, Randall and Robin, the income to be paid on the securities referred to is intended to provide financial security for my children for the remainder of their lives. I believe they are generous and are more than adequate to ensure that they will be reasonably comfortable and secure for their respective lifetimes.

My children and I have not been close. I do not bear any malice or vindictiveness towards them. I believe the provision I have made in my Will for my children more than adequately discharges my moral obligations and duties to my children in light of our long term estrangement.

I have given careful consideration to my obligations and duties and have decided that my wife, Yun, my employees and the community as a whole, deserve much consideration for the support they have given me over my more than 40 years in business.

I am satisfied that I have made fair and adequate provision for my children in my Will.

[25] The second letter dated September 21, 2005 from Mr. Wright is addressed to his trustees (the executors), and states in part:

The primary objective of the business of Oak Bay Marina Ltd. and its associated and affiliated companies must be to satisfy the financial needs of Yun Klohofer and my three children. Oak Bay Marina Ltd. has an obligation to pay certain income annually to each of Yun and my Children while they are living in accordance with the Articles.

[26] In 2007, OBM entered into an amalgamation agreement with another company owned by Mr. Wright, Pacific Undersea Gardens Inc. The amalgamated company continued under the name OBM. Mr. Wright remained sole director and officer of OBM and the shares were effectively exchanged for Preferred Shares with the same class names in the new OBM. The Preferred Shares were again allotted to Mr. Wright in his personal capacity, while the Yun Preferred Shares were allotted to him as trustee of the Joint Partner Trust. Nothing really appears to turn on the amalgamation.

2008 Estate Planning

[27] Mr. Wright executed a new Will on December 8, 2008 but altered none of the bequests regarding the shares and provided nothing further for his children.

2012 Estate Planning

[28] Mr. Wright engaged in further estate planning in 2012. There is again disagreement amongst some of the parties as to the admissibility of this evidence when interpreting the Articles.

- [29] Mr. Wright executed his final Will on December 13, 2012. The 2012 Will no longer gave the gifts of the shares to his children. After payment of debts, testamentary and other expenses, the 2012 Will left the capital and income of his estate to Yun for "her own use absolutely".
- [30] The petitioners contend that the Preferred Shares remain in trust for them. The respondents contend that the Preferred Shares become part of the residue of the estate.
- [31] Mr. Jamieson deposes that at the time Mr. Wright signed his 2012 Will, he was on his way to the Bahamas for the Christmas season, and was going to deal with a number of remaining issues relating to his estate planning on his return. Mr. Wright had an appointment to see Mr. Jamieson on April 16, 2013, but he was hospitalized that day or the next day, and died on April 17, 2013.

Issues and analysis

- [32] The main issues for determination are these:

1. Does Article 27 establish a trust in favour of the petitioners?
2. If Article 27 establishes a trust, is it a testamentary trust?
3. If Article 27 establishes an inter vivos trust, should the application for removal of the executors as trustees be granted?

- [33] If the first issue is decided in the affirmative, it is not necessary to decide the remaining issues.

1. Does Article 27 establish a trust in favour of the petitioners?

- [34] The parties appear to be in general agreement on the applicable legal principles but disagree on the application of those principles to the facts. Randy, in oral argument, appeared to focus primarily on construing the Articles themselves in determining whether a trust exists. The respondents contend that the factual matrix must be taken into account when construing the Articles. The petitioners take a narrow view of what is included in the factual matrix; the respondents take a more expansive view.

- [35] The respondents contend that the two letters dated September 21, 2005 are part of the factual matrix. The petitioners, Randy in particular, argue that the letters amount to subjective intention and are inadmissible. Randy also contends that the Articles of OBM are not ambiguous. The respondents say they are.

- [36] If the Articles are determined to be ambiguous, then evidence of subsequent conduct and subjective intention may be considered; however the Court must be mindful of the context of the creation of the evidence and assign it weight accordingly: 0746727 B.C. Ltd. v. Cushman & Wakefield LePage Inc., 2008 BCSC 415 (aff'd 2008 BCCA 486) at para. 20:

- [20] If this examination reveals an unambiguous meaning, it is not necessary to go further. However, if it produces two reasonable interpretations, thereby creating ambiguity, or if the plain language leads to an absurdity, the court may look beyond the words of the contract to extrinsic evidence to assist in determining the parties' intent. Such evidence will include facts leading up to the agreement, circumstances existing at the time of it, and evidence of subsequent conduct.
- [37] The applicable legal principles include the following:
- (a) the existence of a trust depends upon the existence of three certainties (intention, objects, and subject matter): *Mordo v. Nitting et al*, 2006 BCSC 1761 at para. 292;
 - (b) the Articles constitute a contract in law and the principles of contractual interpretation are applicable when interpreting the Articles: *Bhandal v. Khalsa Diwan Society of Victoria*, 2014 BCCA 291 at paras. 26-27; *Retreat Cove Farms Ltd. v. Wolfe*, [1995] B.C.J. No. 1235 (S.C.) at paras. 24, 34; and *Theatre Amusement Co. v. Stone* (1914), 50 S.C.R. 32;
 - (c) it is acceptable to apply contractual interpretation principles in interpreting a trust or determining the existence of a trust: *The Canada Trust Company v. Russell Browne et al.*, 2011 ONSC 731 at para. 27, *aff'd* 2012 ONCA 862;
 - (d) no specific wording is necessary to create a trust: *Rowland v. Vancouver College Ltd.*, 2000 BCSC 1221 at paras. 81-82 (*aff'd* 2001 BCCA 527);
 - (e) equity preserves a trust which might fail by the strict application of technical requirements. This is because (i) equity looks to the intent, or substance, of a transaction rather than its form and (ii) equity does not strive officiously to defeat a gift: *Singer v. Singer (Estate)*, 2002 ABCA 294 at paras. 29-30; *T Choithram International SA v. Pagarani*, [2001] 2 All ER 492 (on appeal from the British Virgin Islands) at p. 12.
- [38] The most current law in British Columbia on the principles of contractual interpretation is *British Columbia (Minister of Technology Innovation and Citizens' Services) v. Columbus Real Estate Inc.*, 2016 BCCA 283 at paras. 41-47 citing *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 [*Sattva*]:
- [41] The goal of interpreting an agreement is to discover the objective intent of the parties at the time the contract was made. In *Sattva*, the Supreme Court of Canada affirmed the "modern approach" to contractual interpretation. It held that the interpretive process involves reading the agreement in question "as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract" Paras. 47, 50 [emphasis added in *British Columbia (Minister of Technology Innovation and Citizens' Services)*].

- [42] Sattva confirmed that the surrounding circumstances are relevant to contractual interpretation regardless of whether there is ambiguity in the contract. In this regard, Whitmore J.A.'s observations in *Directcash Management Inc. v. Seven Oaks Inn Partnership*, 2014 SKCA 106 at para. 13 are apposite:

Prior to the Supreme Court's decision in *Sattva*, it was not clear that the surrounding circumstances or the "factual matrix" of the contract had to be taken into account when interpreting a contract. The Supreme Court had earlier suggested in *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 SCR 129 at para 55-56 that the surrounding circumstances only had to be considered when the contract was ambiguous. *Sattva* has made it clear that the surrounding circumstances are relevant, whether or not there is an ambiguity in the contract.

- [43] The principle that surrounding circumstances must be considered represents the longstanding law in British Columbia: see 0930032 B.C. Ltd. v. 3 Oaks Dairy Farms Ltd., 2015 BCCA 332 at paras. 3-5 [Oaks Dairy]. In *Oaks Dairy*, Newbury J.A., writing for the court, commented that, "[i]t may be that the Supreme Court in *Sattva* was only encouraging courts to be even more receptive to considering evidence of "factual matrix" to elucidate the interpretation of contracts" (Emphasis in original; para. 6). See also the decision of Lambert J.A. in *Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc.* (1997), 49 B.C.L.R. (3d) 317 (C.A.) at paras. 19-20.
- [44] I would add that in *Sattva*, the Court discussed the difficulty of discerning objective intentions by reading the bare words of a contract in absence of a consideration of the surrounding circumstances, and that consideration of them is part of the interpretive process at paras. 47-48:
- [47] the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at para. 27, per LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 64-65, per Cromwell J.). To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:

No contracts are made in a vacuum: there is always a setting in which they have to be placed. . . . In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

(*Reardon Smith Line*, at p. 574, per Lord Wilberforce)

[48] The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement .

[45] The Court then discussed the role and nature of the "surrounding circumstances" in contractual interpretation at para. 57:

While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement (Hayes Forest Services, at para. 14; and Hall, at p. 30). The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract (Hall, at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement (Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc. (1997), 101 B.C.A.C. 62).

[46] The Court discussed what kind of evidence may be considered under the "rubric" of surrounding circumstances at para. 58:

The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract (King, at paras. 66 and 70), that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. Subject to these requirements and the parol evidence rule discussed below, this includes, in the words of Lord Hoffmann, "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man" (Investors Compensation Scheme, at p. 114). Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.

[39] Any determination of whether the Articles are ambiguous cannot be determined unless the factual matrix is first considered. It is therefore necessary to determine whether the two letters of September 21, 2005 are included in the factual matrix, or, as Randy argues, are inadmissible.

[40] In Sattva at paras. 59 to 61, Rothstein J. stated:

[59] It is necessary to say a word about consideration of the surrounding circumstances and the parol evidence rule. The parol evidence rule precludes admission of evidence outside the words of the written contract that would add to, subtract from, vary, or contradict a contract that has been wholly reduced to writing (King, at para. 35; and Hall, at p. 53). To this end, the rule precludes, among other things, evidence of the subjective intentions of the parties (Hall, at pp. 64-65; and Eli Lilly & Co. v. Novopharm Ltd., [1998] 2 S.C.R. 129, at paras. 54-59, per Iacobucci J. [Eli Lilly]). The purpose of the parol evidence rule is primarily to achieve finality and certainty in contractual obligations, and secondarily to hamper a party's ability

to use fabricated or unreliable evidence to attack a written contract (United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd., [1993] 2 S.C.R. 316, at pp. 341-42, per Sopinka J.).

- [60] The parol evidence rule does not apply to preclude evidence of the surrounding circumstances. Such evidence is consistent with the objectives of finality and certainty because it is used as an interpretive aid for determining the meaning of the written words chosen by the parties, not to change or overrule the meaning of those words. The surrounding circumstances are facts known or facts that reasonably ought to have been known to both parties at or before the date of contracting; therefore, the concern of unreliability does not arise.
- [61] Some authorities and commentators suggest that the parol evidence rule is an anachronism, or, at the very least, of limited application in view of the myriad of exceptions to it (see for example *Gutierrez v. Tropic International Ltd.* (2002), 63 O.R. (3d) 63 (C.A.), at paras. 19-20; and *Hall*, at pp. 53-64). For the purposes of this appeal, it is sufficient to say that the parol evidence rule does not apply to preclude evidence of surrounding circumstances when interpreting the words of a written contract.
- [41] The executors argue that on September 21, 2005 Mr. Wright did three things: (i) he executed a Will which deals with the shares, (ii) he signed a letter setting out his intentions, and (iii) he signed another letter to his trustees setting out what he says are to happen with the shares: "That is as objective as it comes." The only knowledge at issue is the knowledge of Mr. Wright. He was the testator, the sole operating mind of OBM, and the only person who settled the Joint Partner Trust. What was in his mind is objective.
- [42] Yun contends that the Articles are not a "traditional contract" created between two separate directing minds of a company. While the Articles of a company are an agreement between the company and its shareholders, OBM and its only shareholder, Mr. Wright, are effectively one and the same, so there is only one natural party to the contract. Many of the traditional concerns that occur with a bilateral contract (such as the concern with subjective intention) do not arise because there is only one natural party, and therefore subjective intention should be admissible and is essential. Yun provided no case authority for her proposition.
- [43] However, on the basis of *Sattva*, it is not improper for the court to know the commercial purpose of the contract, the genesis of the contract, or amendments to it, the background, or context in which the contract was made (para. 47). The factual matrix or surrounding circumstances that can be relied on will necessarily vary from case to case (para. 58), and in this case, should include Mr. Wright's knowledge at the time Article 27 was created.
- [44] While *Sattva* relies on the Supreme Court of Canada decision in *Eli Lilly* for the proposition that the evidence of subjective intention is inadmissible, the evidence in *Eli Lilly* is distinguishable. There, an agreement between Novopharm and Apotex was drafted without legal advice by Dr. Sherman for Apotex, and Mr. Dan for Novopharm. The issue was whether the agreement was a supply agreement or a sublicense. Mr. Dan filed an affidavit concerning

his intentions as to the nature of the agreement, and on cross-examination testified that the parties to the agreement intended to create a supply agreement. Despite objections, the trial judge admitted Mr. Dan's direct evidence that he intended to enter into a supply agreement with Apotex. Justice Iacobucci, for the Supreme Court of Canada, found that there was no ambiguity to the contract, and that the trial judge erred in considering Mr. Dan's evidence as to his intention at the time the contract was made.

- [45] In basic terms, subjective intention means that a party cannot testify as to what he or she thought the contract meant by the words he or she used at the time of the making of the contract. Mr. Wright is not testifying about what he intended or meant by the words in the Articles. I conclude that the September 21, 2005 letters do not amount to subjective intention and are parts of the factual matrix.

The Factual Matrix

- [46] Randy set out what he considers to be part of the factual matrix. Robin and Ronald Wright do not explicitly set out what they allege should form part of the factual matrix but refer to portions of Mr. Jamieson's affidavit, including paras. 14 and 16, in their written argument.
- [47] In paras. 14 and 16, Mr. Jamieson deposes the following:
14. I also spoke with Bob regarding the income to the Children and how that bequest would be funded. Bob was aware that the trust being considered in 2005 included virtually all his assets and that he had insufficient assets outside the trust to pay the proposed income to the Children. There was discussion about the manner in which the funds would be made available to the Children over the course of their lifetimes. It was decided by Bob at that time to create preferred shares in OBM for each of the Children so that income would be payable on those shares directly from OBM.
 16. Bob and I discussed whether the new preferred shares would be placed in a separate trust to be held for the Children (in which case the trustees would be the holders of the Shares and pay the income to the Children pursuant to the provisions of the trust) or would be left to them through Bob's will (in which case the Children themselves would become the holders of the Shares and could pay themselves the income). While this discussion was ongoing, I drafted the amendments to the Notice of Articles and Articles to create the new preferred shares, and establish the rights and restrictions applicable thereto. The special rights, reflected my understanding at the time which was that the new preferred shares were probably going to be held through a new trust to be settled by Bob.
- [48] Randy also objects to paras. 15-18 of the Jamieson affidavit on the basis that they include legal opinion or argument, including an opinion on the ultimate issue the court is to decide. Neither the executors or Yun rely on those paragraphs and I do not find it necessary to consider the evidence in those paragraphs in deciding the issue.
- [49] I consider that the factual matrix includes the following:

- Mr. Wright had a long history of complex estate planning which included formal trust agreements.
- Mr. Wright's 2002 Will provided for his children to receive \$100,800 per year for their lifetime.
- The OBM Articles and other estate planning documents for Mr. Wright created in September 2005 were drafted by Mr. Jamieson.
- On September 21, 2005, Mr. Wright placed most of his assets into a complex formal Joint Partner Trust which did not name his children as beneficiaries, and he:
 - o transferred the Yun Preferred Shares to himself as a trustee for the Joint Partner Trust, so that the Yun Preferred Shares would be expressly held in trust for the primary beneficiaries of the Joint Partner Trust;
 - o did not formally settle a trust over the Preferred Shares in favour of his children; and
 - o transferred the Randy Preferred Shares, Ronald Preferred Shares, and Robin Preferred Shares to himself personally.
- The shares are dealt with and considered in four separate documents. These are:
 - o a Will dated September 21, 2005, in which the executors are directed to deliver to each of his children "if living at my death" the shares held by him in the capital of OBM;
 - o a letter dated September 21, 2005 by Mr. Wright (the same day as his Will and Articles were signed), respecting his involvement with his children and his view that he had made fair and adequate provision for his children in his 2005 Will;
 - o a letter dated September 21, 2005 to his trustees;
 - o an amendment to Article 27 of the Articles of OBM that was made on September 21, 2005.

Is there an ambiguity?

- [50] An ambiguity exists if there are two reasonable interpretations of the same document (looking at the text of the agreement in light of the factual matrix) or the plain language of the text reveals an absurdity: 0746727 B.C. Ltd. at para. 20.
- [51] The parties put forward different interpretations of Article 27 that relate primarily to the rights and restrictions given to the shares.
- [52] Randy contends that Article 27 should be interpreted as settling a trust which names the petitioners as the beneficiaries with certain rights of redemption and retraction allocated to OBM and Mr. Wright.
- [53] Robin and Ronald contend that the Articles should be interpreted similarly. In written argument they argue that Mr. Wright effectively gave the beneficial interests in the shares to the petitioners regardless of who or what held legal title to the share at the time of Mr. Wright's death. The purpose of Article 27.2.2 (which states that the dividends are payable to

the holders of the preferred shares) is to provide the amount and the mechanics of the payment of the dividends. In oral argument, they argued that the "holders" of the Preferred Shares on Mr. Wright's death hold legal title only.

- [54] Article 27 contains "rights of redemption" that allow the shares to be redeemed on notice to the holders. OBM can choose whether to redeem by redemption cheque or annuity contract. The redemption cheque would go to the holder, while the annuity would be delivered to the beneficiaries. The petitioners consider the "holder" to be the beneficiaries, as it would be absurd if OBM could choose where the money went.
- [55] The executors interpret Article 27 as not granting a trust in favour of the petitioners. With respect to the redemption rights, the executors interpret the holder to mean the holder of the shares, who was Mr. Wright at all material times. The executors also interpret Article 27 as saying that Mr. Wright retained an absolute right to unwind the issuance of the shares (pursuant to the s. 27.2.6 Retraction Rights), whereby OMB could require the retraction of the contested shares for the issue price. As holder is never defined as holding income for the petitioners, although it would have been simple to include this, this suggests that there was no intention to create a trust.
- [56] Yun submits that an ambiguity exists with respect to s. 27.2.2 dividends rights, whereby the right to income is granted to the holders of the shares. If the holder is not the petitioners, then it is inconsistent with the definitions of the Preferred Shares as there are no shares that then have income payable to them, which is an internal inconsistency.
- [57] In my view, the Articles are ambiguous on their face. It is possible to interpret the passages regarding "holder" as the holder being either Mr. Wright or the beneficiaries. Further, the Articles appear to have internal inconsistencies, including providing that each named Preferred Shares are shares the income of which is payable to each child, when the children are not given an entitlement to the income of any shares, at least while Mr. Wright is alive. The executors pose an interpretation which would have the redemption rights either resulting in an annuity to the beneficiaries (the petitioners, or Yun), or redemption price paid to the holder of the shares (likely Mr. Wright or his estate, but uncertain). The petitioners appear to consider that both the redemption price cheque or annuity go to the petitioners if the shares were redeemed, but the respondents interpret this as the annuity only going to the petitioners if redeemed. It is not clear on its face which is the correct interpretations. There appear to be enough uncertainties and enough warring interpretations that I consider the Articles to be ambiguous.

What is the proper interpretation of the Articles?

- [58] Randy argues that the proper interpretation is as follows:

- Randy, Robin, Ronald and Yun are the beneficiaries of the Preferred Shares (Article 27.1(b));

- as beneficiaries of the Preferred Shares, Randy, Robin, Ronald and Yun are entitled to receive the benefit of the Preferred Shares (including the Preferred Share Income) (Article 27.1(h)(j)(k) and (m));
- OBM is required to issue the Preferred Share Dividend (i.e., an annual dividend on the Preferred Shares after Mr. Wright's death in the amount of \$1.00 per share (as increased by the Inflation Formula) (Articles 27.2.2 and 27.1(e));
- in the event of a dissolution, liquidation or winding up of the OBM, the holders of the Preferred Shares shall receive the "Redemption Price" in priority to any payments to the common shareholders (Article 27.2.3);
- the Redemption Price is the total of the following:
 - o the issue price;
 - o the Preferred Share dividends which have not yet been paid on the death of the beneficiary;
 - o an amount equal to the present value of the dividends for the remainder of the lifetime of the beneficiaries or, at the option of OBM, an Annuity wherein the beneficiary will be entitled for his or her lifetime to be paid an amount equal to the dividends that would have otherwise been payable (Article 27.1(i));
- OBM was entitled to redeem the Preferred Shares at any time (either before or after Mr. Wright's death) by paying the Redemption Price (Article 27.2.5);
- Mr. Wright was entitled during his lifetime to retract the Preferred Shares by submitting them to OBM. OBM was required to pay the retraction price (Article 27.2.6); and
- no dividends can be paid by OBM to the common shareholders if to do so would lead to OBM not having sufficient assets to pay either (i) the Preferred Share dividends, or (ii) the Redemption Price (Article 27.3.3).

[59] Robin and Ronald argue that the proper interpretation is as follows:

- Mr. Wright separated the legal title from enjoyment (beneficial ownership) of each class of Preferred Shares by the creation of special rights and restrictions in Article 27. The definition of "Beneficiaries" and "Preferred Shares" create beneficial interests separate from legal title;
- the Articles contemplate that the beneficiaries will be entitled to all of the rights of enjoyment of the shares regardless of who or what holds legal title after Mr. Wright's death;
- the purpose of Article 27.2.2 (dividends payable to the holders) is to provide the amount and mechanics of the payment of the dividend. The holders of the Preferred Shares on the death of Mr. Wright are the personal representatives of his estate;

- the rights of redemption under Articles 27.2.3 to 27.2.5 will result in the petitioners receiving the redemption amount (even though it states the redemption amount should go to the holder) whether it is by way of cheque (to the holder) or annuity (described as going to the beneficiaries);
- a payout to the beneficiaries extinguishes the rights of enjoyment in the shares of the beneficiaries; and
- Articles 27.2.6 to 27.2.8 provide an explicit mechanism for revocation of the trust reserved by Mr. Wright as settlor to himself. The trust may only be revoked by Mr. Wright and that did not occur.

[60] The executors generally argue that under the Articles, the Preferred Shareholder is entitled to the Preferred Share Income, and the petitioners have no interest (legal or equitable) in the Preferred Shares (or the Preferred Share Income). The executors in particular argue that the proper interpretation is as follows:

- the shares, for each petitioner, are defined as the "Preferred shares the income from which is payable to" that petitioner, for her or his lifetime (Article 27.1(h)(j)(k));
- there is no reference to capital being payable to the petitioners, the definition deals solely with income (Article 27.1(d));
- Mr. Wright is the "Founder", an undefined term which is separate from the "holder" of the shares, although Mr. Wright was also the holder at all material times (Article 27.1(d));
- there are no provisions in the Articles for the payment of share income to the petitioners, despite the definition noted above. All dividend payments are to be made by OBM to the holder of the shares, and there is no direction to the holder to pay that income to the petitioners (Article 27.2.2);
- no dividend payments can be made until the death of the founder. Consequently, no income stream exists until after Mr. Wright's death (Article 27.2.2);
- no dividends are payable on the shares at any time after the death of the beneficiary of the shares. As no dividends are payable until after Mr. Wright's death, this accords with the provisions of the Will - the petitioners must survive Mr. Wright to receive any benefit from the shares (Article 27.2.2);
- Mr. Wright, as founder, retained the absolute right to unwind the issuance of the shares, and thereby the payment of any income to the petitioners; he could require OBM to retract the shares for the issue price (Article 27.2.6);
- OBM could, at any time during the lifetime of Mr. Wright, redeem the shares (although there is ambiguity as to how this could be accomplished given the formula for calculating the Redemption Price) (Article 27.1(i)); and

· the Redemption Price for the shares is to be paid, in most cases, to the holder of the shares. As the Redemption Price for any share is not a payment of income, but of capital, this is in accordance with the definition of the shares that only income is to go to the petitioners. However, OBM may choose to pay for the shares with an annuity, in which case the annuity would go to the petitioners (Article 27.1(i)).

[61] Yun submits that the proper interpretation is as follows:

- Mr. Wright intended to set up the share structure to include the contested Preferred Shares and to attach certain rights and restrictions to them, including the right of the holders to receive dividend income during the lives of the petitioners following Mr. Wright's death;
- Mr. Wright intended to be the initial holder of the legal and beneficial interests in the shares;
- Mr. Wright intended to gift the shares to the petitioners absolutely upon his death; and
- the references to "holder" of the shares refers to Mr. Wright.

[62] In my view, the term "holder" must be considered as referring to Mr. Wright rather than to the petitioners/beneficiaries. It would have been open to the drafters of the Articles to clearly state either (a) that the holder was holding the contested shares on trust for the petitioners/beneficiaries, in which case it would be clear a trust had been established; and/or (b) that the term "holder" referred to the beneficiaries/petitioners. As the term "Beneficiaries" was already defined in the Articles, it would not make sense to use the term "holder" to refer specifically to the beneficiaries. It can only be that the holder is separate from the beneficiaries. There is no indication in the Articles that the holder is holding the property on behalf of the beneficiaries or that the beneficiaries have been given a beneficial interest in the property. This is particularly evidenced by the fact that Mr. Wright issued the shares to himself in his personal capacity and gave the contested shares outright to the petitioners in his 2005 Will.

The Law and Analysis on the Establishment of a Trust

(a) Certainty of Intention

[63] With respect to the first certainty, what must be shown is "an intention on the part of the settlor to impose enforceable trust obligations on the trustee. The language used by the settlor is critical and must show a clear intention that the recipient of the trust property holds that property on trust": Mordo at para. 293.

[64] While it may be useful for the settlor to use such words as "trust" or "trustee", no such wording is required to create a trust: Donovan W.M. Waters, Mark R. Gillen and Lionel D. Smith, *Waters' Law of Trusts in Canada*, 4th ed. (Toronto: Carswell, 2012) at 204; *Re Kayford*, [1975] 1 All E.R. 604 at 607. Even conduct may suffice. The question is one of fact: *McInerney v. Laass*, 2015 BCSC 1708 at para. 40:

In the absence of formal documentation creating a trust, the court may infer an intention to create a trust from the surrounding circumstances. Evidence of what the parties intended, what they actually agreed upon and how they conducted themselves will be considered (Elliott at paras. 26 and 28).

[65] The petitioners rely on a series of cases, primarily involving laypeople and more informal circumstances, whereby the courts held trusts to exist without formal documentation or wording: *Union Bank of Chicago v. Wormser*, 256 Ill. App. 291; *Re Kayford*, supra. In *Paul v. Constance*, [1977] 1 All E.R. 195 (Eng. C.A.), the alleged settlor was described as a man of unsophisticated character and the trust was created by him telling his girlfriend that the money in a particular account was as much his as it was hers.

[66] The executors do not disagree that courts are capable of inferring a trust in a document without express language. However, they contend that a court should be less willing to do so when documents prepared by a lawyer do not contain specific and clear declarations of trust: *Daley, Kero, Morgan and Wong v. OHR Whistler Management Ltd.*, 2007 BCSC 383 at para. 14:

[14] I find no trust is created by the terms of the Hotel Management and Rental Pool Agreement. This is a sophisticated legal document prepared by lawyers to create a very specific and defined bundle of legal rights. If it was intended that a trust be created, I would expect a trust would have been expressly stipulated.

[67] Further, the following principles may weigh against an inference of the establishment of the certainty of intention:

- the parties to the agreement may alter the terms of the agreement without reference to the alleged beneficiaries: *Mohr v. C.J.A.*, [1989] B.C.J. No. 2083 (S.C.), aff'd [1991] B.C.J. No. 209 (C.A.);
- the parties to the agreement may cancel the agreement without reference to the alleged beneficiaries: *Mohr*;
- the agreement is not in the form of a declaration of trust; there is no settlor, no disposition of trust property from a settlor to a trustee and no express declaration of trust by a trustee: *Khavari v. Mizrahi*, 2016 ONSC 101 at para. 48;
- the parties to an agreement do not treat the agreement as a trust in their dealings with third parties: *Khavari*, supra at para. 55; and
- it is possible for certainty of intention to be found even where the settlor retains legal title to the item, provided the beneficial ownership is transferred: *Elliott (Litigation Guardian of) v. Elliott Estate*, 2008 CarswellOnt 7448 (S.C.J.) at para. 37.

[68] I do not find that the Articles established a trust in favour of the petitioners. While a court may infer a trust in a document that does not contain express language to that effect, I am not satisfied that it is appropriate to do so here. I base this conclusion on the following:

- Mr. Wright was familiar with the legal requirements of a trust and had previously set up the Alter Ego Trust and was in the process of setting up the Joint Partner Trust;
- the fact that Mr. Wright chose to create the trusts through formal trust documents prepared by his lawyer suggests that, if he wished to set up a trust for the petitioners, he would have done so in a similar manner, or, if he chose to do so through the Articles, he would have made it expressly clear that he was setting up a trust;
- Mr. Wright was a highly sophisticated businessman and the Articles were drafted by a lawyer based on instructions from him. It is doubtful that a sophisticated businessman working with a lawyer for many years would not have inserted express language to set up a trust if that had been the intention. The majority of cases put forward by the petitioners considered laypeople who set up trust situations without knowing it or using express words. Mr. Jamieson and Mr. Wright were fully aware of how to effect a trust and the lack of express language, while not fatal to the existence of a trust, points away from a trust existing;
- the fact that Mr. Wright chose to give the shares to his children in his Will and clearly considered he had provided for them by his Will, supports the conclusion that there is no trust. If Mr. Wright had set up a trust, there would have been no need to distribute the shares through his Will;
- if subsequent conduct may be considered pursuant to a finding of ambiguity, the fact that Mr. Wright issued the contested Preferred Shares to himself personally and issued the Yun Preferred Shares to himself as trustee for the Joint Partner Trust is helpful in demonstrating his intention. If Mr. Wright had considered himself a trustee, it is likely that he would have issued the shares to himself in that capacity, as he did with the Yun Preferred Shares; and
- the Articles could have been amended at any time without the knowledge or consent of the petitioners, which is inconsistent with a trust. The shares could also have been revoked at any time.

[69] I conclude that the requisite certainty of intention does not exist.

(b) Certainty of Subject Matter

[70] Subject matter refers to the subject matter (i.e. property) of the trust. There are two requirements, as set out in *Mordo*, *supra*:

[309] There are two elements to certainty of subject matter: First, the property which is subject to the trust must be clear. Second, the nature of the interest due to each beneficiary must be clear.

[310] To satisfy the first of the two elements, the subject matter must be described with "sufficient exactness to permit that such matter be ascertained at the time the trust was created": *Re Beardmore Trusts*, [1952] 1 D.L.R. 41 at 46 (Ont. H.C.) [Beardmore]. Clearly the subject matter must also be certain on future dates when the trustees are required to deal with the trust property. However, the trust property need not be fixed in quantity or nature;

property can be added later, and the nature of existing property may be changed by the trustees exercising their power of investment. If the initial trust property is certain, and the property which may be added is certain, then the subject matter is certain because at any point the current trust property can be determined by tracing the original property to its current form: Waters at 155 - 156.

- [71] Yun argues that the Articles do not set out with sufficient certainty the subject matter of the trust: it could be the contested shares themselves, the income generated by the contested shares (or other rights of the "holder"), or some right to a share in the assets of OBM. The contested shares were issued after the amendment of the Articles, and this suggests that the subject matter was not in existence at the time of creation of the trust, and therefore there is no sufficient certainty of subject matter.
- [72] There is some inconsistency in the Articles and confusion about what exactly the "beneficiaries" or petitioners are entitled to, and I conclude that there may be uncertainty as to subject matter, although the failure of certainty of intention is stronger.

(c) Certainty of Objects

- [73] With respect to a trust for persons, not purposes, all that is required for certainty of objects is that the group of persons intended to benefit from the trust (i.e., the objects) be clearly identifiable: Mordo at para. 306. In this case, it is not contested by the executors (although Yun disagrees) that the potential beneficiaries are identified and consist of the petitioners (Mr. Wright's adult children, Randy, Robin and Robert).
- [74] Overall, I do not find that a trust in favour of the petitioners was created by the Articles on Article 27. It is therefore not necessary to consider the remaining issues.

Conclusion

- [75] I conclude that the claims of the petitioners must be dismissed, with costs to the respondents.

"Loo J."

The Honourable Madam Justice Loo

APPENDIX A

OAK BAY MARINA LTD.

(the "Company")

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APPENDIX B

ARTICLE 27 - SPECIAL RIGHTS AND RESTRICTIONS

27.1 Definitions

In these conditions, the following words and phrases shall have the following meanings:

- a) "Act" means the Business Corporations Act (British Columbia).
- b) "Beneficiary" means:
 - (i) in the case of the Randy Preferred Shares, Randolph [sic] Wright;
 - (ii) in the case of the Ronald Preferred Shares, Robert Wright;
 - (iii) in the case of the Robin Preferred Shares, Robin Wright; and
 - (iv) in the case of the Yun Preferred Shares, Yun Kloihofe.
- c) "CPI" means the all Canada Consumer Price Index maintained by Statistics Canada and in the event that such index shall not [sic] longer be maintained then such comparable index as the Directors may determine.
- d) "Founder" means Robert Harold Chadwick Wright.
- e) "Inflation Formula" means for each year after the Year of Date the lesser of 3% per annum and the annual rate increase in the CPI each year after the Year of Death.
- f) "Issue Price" means the amount paid to the Company on the issue of each Preferred Share.
- g) "Preferred Shares" means the Yun Preferred Shares, the Ronald Preferred Shares, the Randy Preferred Shares and the Robin Preferred Shares, but does not include the Legacy Preferred Shares.
- h) "Randy Preferred Shares" means the Preferred shares the income from which is payable to Randolph [sic] Wright, son of the Founder.
- i) "Redemption Price" of each Preferred Share means the Issue Price in respect thereof plus an amount equal to all dividends which have at the relevant time accrued to the death of Beneficiary of such Preferred Shares but which have not then been paid (if any); and if the Beneficiary has not then died, an amount equal to the then present value of the dividends for the remainder of their lifetimes, as determined by the Company's Auditors based on the advice of a competent actuary, or, at the option of the Company, an annuity from a reputable insurance company or financial institution wherein the Beneficiary will be entitled for his or her lifetime to be paid an annuity in an amount equal to the dividends that would otherwise have been payable for such lifetime.
- j) "Ronald Preferred Shares" means the Preferred shares the income from which is payable to Ronald Wright, son of the Founder, for his lifetime.
- k) "Robin Preferred Shares" means the Preferred shares the income from which is payable to Robin Wright, daughter of the Founder, for her lifetime.
- l) "Year of Death" means the year comprising the 12-month period commencing on the last day of the month following the month after the Founder dies.

- m) "Yun Preferred Shares" means the Preferred shares the income from which is payable to the Robert Wright Joint Spousal Trust, the income of which is payable for her lifetime to Yun Kloihofe, spouse of the Founder, provided she is up to the time of the Founder's Death continuing to co-habit with the Founder.

27.2 Preferred Shares

The rights, privileges, restrictions and conditions attaching to the Preferred Shares are as follows:

27.2.1 Voting Rights

The holders of the Preferred Shares shall not as such be entitled (except as hereinafter specifically provided and except as otherwise provided by the Act) to receive notice of or to attend shareholder meetings and shall not be entitled to vote at any such meeting; the holders of the Preferred Shares shall, however, be entitled to notice of meetings of shareholders called for the purpose of authorizing any alteration to the rights and restrictions attaching to that class of Preferred Shares and any other matters on which they are entitled to vote in accordance with the provisions of the Act.

27.2.2 Dividends

Subject to the Act, the holders of the Preferred Shares shall be entitled to receive fixed annual cumulative dividends in the amount of \$1.00 for each Preferred Share for the Year of Death and for each year thereafter while the Beneficiary is alive the sum of \$1.00 for each Preferred Share plus the amount determined by the Inflation Formula. Such dividends are to be paid out of the assets of the Company. The dividends, in any year, may be paid by the Company monthly in equal amounts or in such other amounts and at such other times as the board of directors may from time to time determine. All dividends on Preferred Shares shall rank equally. No dividends shall be payable on any class of Preferred Shares for any time after the death of the Beneficiary of such shares. In the year that a Beneficiary dies, the dividends payable for that year shall be calculated to the date of death of the Beneficiary, so that the dividend payable for such year shall be a fraction of the dividend otherwise payable for such year, such fraction shall have as its numerator the number of days for such year that the Beneficiary was living and shall have as its denominator the number 365 or 366 as applicable for such year. For greater certainty, no dividends on such shares shall accrue or be payable until the death of the Founder.

27.2.3 Dissolution

In the event of the dissolution, liquidation or winding up of the Company, whether voluntary or involuntary, or any other distribution of assets of the Company among its shareholders for the purpose of winding-up its affairs, the holders of the Preferred Shares of each class (pari passu with each other) shall be entitled to receive the Redemption Price relating to such Preferred Shares, in preference and priority to the rights of the holders of the Common Shares. After payment to the holders of the Preferred Shares of the Redemption Price, so payable to them as above provided they shall not be entitled to share in any further distribution of the property or assets of the Company.

27.2.4 Redemption on Death of Beneficiary

Subject to the Act, the Company shall redeem all the then issued Preferred Shares of any Class on the death of the Beneficiary of such class of Preferred Shares on payment for each Preferred Share to be redeemed of the Issue Price for such shares together with all unpaid dividends accumulated to the date of death of the Beneficiary calculated in accordance with Article 27.2.

27.2.5 General Right of Redemption

The Company may redeem any or all of the Preferred Shares of any Class as the Directors may determine and in such case the Company shall give not less than thirty (30) days notice in writing of such redemption, specifying the date and place of redemption notify the holders of the class or classes of Preferred Shares to be redeemed. If such notice is given or waived, and the Redemption Price for such Preferred Shares is paid to such holders, or is deposited with any chartered bank or trust company in Canada, as specified in the notice, on or before the date fixed for redemption, dividends on the shares to be redeemed, or if the Company exercises the option to provide an annuity in lieu of payment, the annuity contract is delivered to the Beneficiary, the dividend shall cease after the date fixed for redemption and the holders thereof shall thereafter have no rights against the Company in respect thereof except to receive payment of the redemption price. No such redemption will be made where the effect thereof would be to prevent the Company from paying the dividends payable under the other Preferred Shares then issued and outstanding or would result in the Company having insufficient assets to pay the Redemption Price for the remaining Preferred Shares and Legacy Preferred Shares then outstanding. The Directors may in this regard rely on the opinion of the Company's Auditors as to whether such effect will occur.

27.2.6 Retraction Rights

Subject to the Business Corporations Act, while he is the holder of Preferred Shares, the Founder may, at any time and from time to time, require the Company to retract any such shares from such holder on payment of an amount for each share to be retracted equal to the Issue Price for that share. No Beneficiary shall hold such right if he or she becomes the holder of Preferred Shares.

27.2.7 Exercise of Retraction Right

The right given to the Founder to require the Company to retract some or all of the Preferred Shares held by him may be exercised by written notice given to the Company accompanied by the certificates for the shares that the Founder wants the Company to retract. The notice shall be signed by the person shown in the securities register of the Company as the registered holder of such shares or by his or her authorized attorney. The notice shall specify the number of shares that the Founder wants the Company to retract and the address to which the Issue Price is to be sent.

27.2.8 Payment of Redemption Amount

On or before the date (the "Retraction Date") that is 30 days after receipt of the notice of retraction and the required certificates, the Company shall pay the Issue Price to the holder of the shares specified in the notice. Such payment shall be made by cheque payable at par at any branch in Canada of the Company's bankers and shall be forwarded by first class mail to the holder at the address specified in the notice. If less than all of the shares represented by any certificate are to be purchased by the Company, the holder shall receive a new certificate for the shares represented by the original certificate that are not being purchased.

27.3 Common Shares

The rights, privileges, restrictions and conditions attaching to the Common shares shall be as follows:

27.3.1 Voting Rights

Except for meetings at which only holders of another specified class or series of shares of the Company are entitled to vote separately as a class or series, the holders of Common shares shall be entitled to receive notice of and to attend all meetings of the shareholders of the Company and shall have one vote for each Common share held at all meetings of the shareholders of the Company.

27.3.2 Dividends

The holders of the Common shares shall be entitled to receive dividends and the Company shall pay dividends thereon, as and when declared by the board of directors of the Company out of moneys properly applicable to the payment of dividends, subject to the prior rights of the holders of any shares ranking senior to the Common shares in the payment of dividends, in such amount and in such form as the board of directors may from time to time determine and all dividends which the directors may declare on the Common shares shall be declared and paid in equal amounts per share on all Common shares at the time outstanding. For the purposes of this Article the Board may rely on an opinion from [sic] the Company's auditors, or if the Company has no auditors, the Company's Auditors, and the opinion of such auditors shall be final and binding upon the Company and the Shareholders of the Company and the Board of Directors in deciding to declare any dividends may rely on such opinion.

27.3.3 Preferred Share Protection

Notwithstanding any other provision contained in these Articles, if there are reasonable grounds to believe that after the payment of a dividend on the Common shares of the Company the realizable value of the Company's assets would be less than the aggregate of its liabilities and the amount that would be required, on a redemption or liquidation, to pay the holders of the Preferred Shares either the dividends payable hereunder or the Redemption Amount for the Preferred Shares, then the Company may not pay such dividend on the Common shares. For the purposes of this Article the Board may rely on an opinion from the Company's Auditors and the opinion of such auditors and chartered accountants shall be final and binding upon the Company and the Shareholders of the Company, and the Board of Directors in declaring such a dividend on

the Common shares may rely on such opinion.

27.3.4 Dissolution

In the event of the dissolution, liquidation or winding up of the Company, whether voluntary or involuntary, or any other distribution of assets of the Company among its shareholders for the purpose winding up its affairs, subject to the prior rights of the holders of the Preferred Shares and any other shares ranking senior to the Common shares with respect to priority in the distribution of assets upon dissolution, liquidation or winding up, the holders of the Common shares shall be entitled to receive the remaining property and assets of the Company.

27.4 Legacy Preferred Shares

The rights, privileges, restrictions and conditions attaching to the Legacy Preferred Shares shall be as follows:

27.4.1 Definitions

In these conditions, the following words and phrases shall have the following meanings:

- a) "Act" means the Business Corporations Act (British Columbia);
- b) "Beneficiary" means any beneficiary of the Robert Wright Legacy Trust;
- c) "Founder" means Robert Harold Chadwick Wright;
- d) "Issue Price" means the amount paid to the Company for the issue of each Legacy Preferred Share;
- e) "Preferred Shares" means the Randy Preferred Shares, the Ronald Preferred Shares, the Robin Preferred shares and the Yun Preferred Shares;
- f) "Legacy Preferred Redemption Price" of each Legacy Preferred Share means the Issue Price plus the amount, if any, required in excess of the Issue Price to fund the Robert Wright Legacy Trust after the shareholder loan balance owing by the Company or any Affiliate of the Company to the Founder (or such part of the same as necessary) has been paid to the Robert Wright Legacy Trust to enable the trustees to fully pay all cash legacies to the Beneficiaries within the time and in accordance with the terms of the Robert Wright Legacy Trust divided by the number of Legacy Preferred Shares then issued and outstanding and in no case shall such price be less than the Issue Price.

27.4.2 Voting Rights

The holders of the Legacy Preferred Shares shall not be entitled (except as hereinafter specifically provided and except as otherwise provided by the Act) to receive notice of or to attend shareholder meetings and shall not be entitled to vote at any such meetings; the holders of the Legacy Preferred Shares shall, however, be entitled to notice of meetings of shareholders called for the purpose of authorizing any alteration to the rights and restrictions attaching to the Legacy Preferred Shares and any other matters on which they are entitled to vote in accordance with the

provisions of the Act.

27.4.3 Dividends

The holders of the Legacy Preferred Shares shall not be entitled to receive any dividends other than such dividend as may be required to be declared by the Company to pay the Legacy Preferred Redemption Amount for each Legacy Preferred Share and such dividend is to be paid only after all other dividends payable have been paid.

27.4.4 Dissolution

In the event of the dissolution, liquidation or winding up of the Company, whether voluntary or involuntary, or any other distribution of assets of the Company among its shareholders for the purpose of winding-up its affairs, the holders of the Legacy Preferred Shares shall be entitled to receive the Legacy Preferred Redemption Price relating to such Legacy Preferred Shares, in preference and priority to the rights of the holders of the Common Shares but after payment to the holders of the other classes of Preferred Shares and thereafter shall not be entitled to participate in any other distribution of the property or assets of the Company.

27.4.5 General Right of Redemption

The Company may redeem any or all of the Legacy Preferred Shares as the Directors may determine and in such case the Company shall give not less than thirty (30) days notice in writing of such redemption, specifying the date and place of redemption and notifying the holders of the Legacy Preferred Shares to be redeemed. If such notice is given or waived, and the Legacy Preferred Redemption Price for such Legacy Preferred Shares is paid to such holders, or is deposited with any chartered bank or trust company in Canada, as specified in the notice, on or before the date fixed for redemption, dividends on the shares to be redeemed shall cease after the date fixed for redemption and the holders thereof shall thereafter have no rights against the Company in respect thereof except to receive payment of the Legacy Preferred Redemption Price.

27.4.6 Retraction Right

Subject to the Business Corporations Act, while he is the holder of Legacy Preferred Shares, the Founder may, at any time and from time to time, require the Company to retract any such shares from such holder on payment of an amount for each share to be retracted equal to the Issue Price for that share.

27.4.7 Preferred Share Dividend Rights

The holder of any Legacy Preferred Shares shall not be entitled to receive dividends.

27.4.8 Limitation of Redemption

The Company shall not redeem any Legacy Preferred Shares pursuant to the provisions hereof if the redemption thereof would (a) prevent the Company from paying fixed cumulative dividends payable on the Preferred Shares; or (b) be contrary to any applicable law. If the Company Is

unable, for these reasons, to redeem the Legacy Preferred Shares determined by the Board, it shall redeem all such Legacy Preferred Shares as it may lawfully redeem on a pro rata basis from the holders presenting and surrendering same, disregarding fractions. In such an event, the Company, as soon as it is no longer affected by the foregoing restrictions, shall, by resolution of the Board, immediately redeem such Legacy Preferred Shares as it is able at law to so redeem.

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