

CANADA / JUDGMENT

Pacific Centre Limited v. Creative Energy Vancouver Platforms Inc.

2020 BCSC 676

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 676 Pacific Centre Limited v. Creative Energy Vancouver Platforms Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Pacific Centre Limited v. Creative Energy Vancouver Platforms Inc.,

2020 BCSC 676

Date: 20200430

Docket: S197775

Registry: Vancouver

Between:

Pacific Centre Limited

Plaintiff

And

Creative Energy Vancouver Platforms Inc., Westbank Projects Corp.,

Emanate Energy Solutions Inc. and John Doe Partnership

Defendants

Before: The Honourable Mr. Justice Skolrood

Reasons for Judgment

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Place and Date of Trial/Hearing:

Vancouver, B.C.

January 13 - 17, 2020

Written Submissions of the Plaintiff dated:

March 27, 2020

Written Submissions of the Defendants dated:

March 26 and 27, 2020

Place and Date of Judgment:

Vancouver, B.C.

April 30, 2020

Introduction

- [1] The central issue in this commercial dispute is whether a right of first purchase (the "ROFP") contained in a contract between the plaintiff, Pacific Centre Limited ("PCL"), and the predecessor to the defendant, Creative Energy Vancouver Platforms Inc. ("CEV"), has been triggered.
- [2] The parties have brought cross-applications. PCL applies for judgment in its favour enforcing the terms of the ROFP. CEV, and its related company Westbank Projects Corp. ("Westbank"), apply to dismiss PCL's claim and further apply for an order cancelling or modifying the ROFP.

Background

The Parties

- [3] PCL is owned 50% by The Cadillac Fairview Corporation Limited ("Cadillac Fairview") and it owns and operates the Pacific Centre mall and related buildings in downtown Vancouver (collectively "Pacific Centre"). PCL's other 50% owner is VanPCL LP, which in turn is indirectly owned by the Workplace Safety and Insurance Board Ontario and the Ontario Pension Board. PCL's owners and their related companies are all large and sophisticated business operators involved in numerous real estate and other commercial ventures. I will refer to PCL and Cadillac Fairview collectively as "PCL", except where it is necessary to distinguish between them.
- [4] CEV is a wholly owned subsidiary of Creative Energy Canada Platform Corp. ("CEV Parent"). As noted, CEV and CEV Parent are related companies to Westbank and part of the Westbank group of companies. Westbank is a large property development company in British Columbia. CEV was formerly known as Central Heat Distribution Limited, however I will refer to the company as CEV throughout.
- [5] CEV is a public utility which owns and operates a steam generation plant and distribution system through which it provides steam to its customers, including PCL, for the purpose of heating their premises.
- [6] CEV's current steam generation plant (the "Beatty Plant") is situated on property located at 720 Beatty Street in Vancouver (the "Beatty Lands").
- [7] The defendant John Doe Partnership is also a related Westbank entity which is intended to become the beneficial and/or legal owner of certain land and assets that are the subject of PCL's claims. I will refer to the various Westbank entities, other than CEV, as "Westbank" or the "Developer".
- [8] The defendant Emanate Energy Solutions Inc. is an unrelated company that is ultimately intended to indirectly own 50% of CEV. It did not appear on these applications.

History of the CEV/PCL Relationship

- [9] CEV was first licenced in June of 1968 by the Public Utilities Commission ("PUC"), now the British Columbia Utilities Commission ("BCUC"), to construct and operate its steam plant and related distribution system.
- [10] PCL was one of CEV's first major customers.
- [11] It is common ground between the parties that because PCL was developing a large undertaking and was relying upon a new and unproven entity for its supply of necessary heat, PCL required assurances that there would be a continuous supply of steam.

[12] This was reflected in correspondence exchanged between CEV and PCL during the course of their negotiations. For example, in a letter dated January 24, 1969, from CEV's general manager to PCL's vice-president, it was stated:

We appreciate that if the design of the Pacific Centre is not to include self-sufficient facilities for the generation of heat, then you must be assured that for all practical purposes our facilities will be available in accordance with the terms of our service contract in effect from time to time.

In the normal course of events you may rely upon the regulatory authority of the Public Utilities Commission to assure the Pacific Centre of continuity of service. However, you have expressed concern over the possibility that some time in the future our Company may decide not to continue its operations or may be incapacitated from doing so for some unforeseen reason, whether of a financial nature or otherwise.

In order to protect your undertaking against the risk involved in a change of ownership of our system we are prepared to enter into a covenant with your Company not to offer for sale or accept any offer to purchase our business and undertaking or substantially all of our assets, and not to assign the benefits of our customer contracts, at any lower price and terms of sale than we shall have first offered to you or your nominee, and have allowed forty-five (45) days for acceptance by you or your nominee and a reasonable time for completion thereafter.

The ROFP and Related Agreements

[13] Against this background, the parties entered into a set of interrelated agreements:

- a) A master agreement dated November 5, 1969 (the "Master Agreement"), setting out the general terms of the parties' commercial arrangement;
- b) A steam service contract dated June 1, 1970 (the "Steam Service Contract"), providing CEV with the exclusive right to serve PCL for the "purpose of heating and ancillary uses" at Pacific Centre;
- c) The ROFP, the key terms of which I will return to below; and
- d) An indenture dated June 1, 1970 (the "Debenture"), granting PCL a floating charge over CEV's real and personal assets in order to "secure the due observance and performance by [CEV] of all the terms and conditions of the [Steam Service Contract]".

[14] As noted at the outset, the dispute between the parties centres on the ROFP. The recitals to the ROFP provide:

WHEREAS [CEV] is a public utility carrying on the business of furnishing a steam heat service to buildings in downtown Vancouver by a system of underground pipes and ancillary equipment from its central boilers at its plant located on [the Beatty Lands]

AND WHEREAS in consideration of the agreement of [PCL] to enter into a Service Contract of even date with [CEV] for the use of [CEV's] steam heat service to heat or otherwise serve the building and in fulfilment of a condition of the execution and delivery thereof by [PCL] [CEV] has agreed to enter into these presents in order to afford to [PCL] further and better assurances of continuity of steam heat service to [PCL] and its tenants and permitted assigns.

[15] The operative language of the ROFP is as follows:

- (a) if [CEV] shall decide to sell the whole of its property, assets, business and undertaking including the plant, lands, system, Licence Agreement and customer contracts (hereinafter referred to collectively as "the undertaking"), or any part thereof required to generate and distribute steam to serve the building under the [Steam Service Contract] or any renewal or extension thereof, [PCL] shall have the first right to purchase the undertaking or any such part thereof to be offered for sale by [CEV] at a price not exceeding and on terms not less favourable than the best bona fide offer of any other prospective purchaser
- (b) in case [CEV] shall intend to offer for sale the undertaking or any such part thereof or to accept any offer for the purchase thereof, [CEV] shall first make an offer in writing to [PCL] at the same price and on the same terms of sale as [CEV] shall intend to offer or to accept, and such offer to [PCL] shall remain open for acceptance for a period of thirty (30) days from the date on which the same shall have been made . If [PCL] before the expiration of such period in writing accepts such offer, [CEV] shall sell and convey the undertaking or such part thereof as shall be the subject of the offer to [PCL] and [CEV] shall not be at liberty to sell the undertaking or any such part of parts thereof to any other person until the said period has expired and [PCL] has not accepted such offer, unless in the meantime [PCL] shall in writing unconditionally decline the offer.

[16] On or about February 13, 1970, the PUC issued an order (the "1970 PUC Order") approving CEV's entering into the Master Agreement, the Steam Service Contract, the ROFP and the Debenture. Approval of the ROFP and the Debenture was:

subject to the condition that none of the provisions of [the ROFP/Debenture] shall restrict the power of the [PUC] to act from time to time in accordance with statutory requirements and nothing contained in this Order shall be construed as approval by the [PUC] of any act or thing done by the parties to [the ROFP/Debenture] pursuant to the terms thereof

[17] At the time the various agreements were entered into and the 1970 PUC Order made, the then Pacific Centre facilities were located between West Georgia and Robson Streets on what is referred to as "Block 52". It was those facilities that were the subject of the Steam Service Contract and the focus of the security provided for in the ROFP and the Debenture.

[18] In or about 1982, PCL began planning for the expansion of Pacific Centre to encompass property between West Georgia and Dunsmuir Streets, referred to as "Block 42". In conjunction with the expansion, on June 1, 1982, CEV and PCL entered into a supplemental steam service contract which provided for steam service to Block 42, a first right to purchase

modification agreement and a supplemental debenture. The intent of the ROFP modification and the supplemental debenture was to extend PCL's security to ensure continued steam service to Block 42.

- [19] The ROFP modification agreement and the supplemental debenture were registered in the Land Title Office as charges against the Beatty Lands and they remain so.
- [20] From the late 1980s through until the early 2000s, a third portion of Pacific Centre was developed between Dunsmuir and West Pender Streets on what is referred to as "Block 32".
- [21] Initially, no new contracts were entered into with respect to Block 32 and CEV supplied steam on the same terms as the Steam Service Contract and the supplemental steam service contract. In or about 2014, CEV and PCL negotiated new contracts for Block 32 which permitted PCL to install a geo-exchange heat storage system for Block 32, thus relieving it of the exclusive supply terms that apply to the other portions of Pacific Centre.
- [22] Going forward in these reasons, I will refer to the ROFP and the ROFP modification agreement together as the "ROFP", the Debenture and supplemental debenture together as the "Debenture" and the Steam Service Contract and the supplemental steam service contract together as the "Steam Service Contract".

Other Pre 2017 Events

- [23] In 1991, CEV amalgamated with a company called Saturna Holdings Ltd., which was then a shareholder of CEV. As part of the amalgamation, CEV sought and obtained PCL's consent to the transaction. Consent was apparently sought because of the existence of the ROFP. In conjunction with PCL granting its consent, the parties both acknowledged that the ROFP continued to bind the amalgamated company.
- [24] In 2013 and 2014, CEV's shares were purchased by CEV Parent which brought CEV within the Westbank group of companies. At the time, PCL raised with CEV the issue of whether the transaction triggered the ROFP. CEV disagreed and the matter was not pursued.
- [25] Also in 2013-2014, CEV applied to the BCUC for approval to dispose of a portion of the Beatty Lands that were used as a parking lot. In its application to the BCUC, CEV described these lands as being surplus to its utility requirements. The parking lot lands had previously been removed by the BCUC from CEV's rate base, meaning that the value of those lands was excluded for the purpose of setting CEV's rates.
- [26] It is also relevant to note that by 2017, CEV had grown into a major utility that supplies steam to over 200 buildings in the downtown Vancouver area. PCL is no longer CEV's largest customer and Pacific Centre now utilizes only approximately 4.3% of the total steam generated by CEV.

CEV's Current Facilities

- [27] Since its inception in 1969 through until the present time, CEV has produced steam for its customers exclusively at the Beatty Plant. CEV's assets associated with the Beatty Plant include:
- a) The Beatty Lands which comprise approximately 51,800 square feet;
 - b) Six gas-fired boilers, installed between 1967 and 1994 within the Beatty Plant. These boilers have a rated capacity of 825,000 pounds of steam per hour (lbs/hr) and a total functional capacity of 630,000 lbs/hr;
 - c) Two deaerators that remove oxygen from water used to produce steam;
 - d) Eight feed pumps which supply water to the boilers;
 - e) Other related equipment including diesel fuel tanks and a diesel generator; and
 - f) Three boiler gas flue stacks through which combustion gases generated as part of the steam production process are vented into the atmosphere.

Proposed Redevelopment

- [28] Beginning in or around 2017, CEV and Westbank began developing plans to redevelop the Beatty Lands. The intent of the redevelopment was, in part, to separate CEV's utility assets, those being the assets used to generate steam, from what it considered to be its non-utility or surplus assets.
- [29] Two different plans were proposed by Westbank and CEV. The first, referred to as "Plan A", involved transferring CEV's utility assets into a limited partnership jointly controlled by CEV and InstarAGF Asset Management. This plan was reflected in a unit and share purchase agreement created in draft form in October 2017.
- [30] CEV and Westbank were apparently concerned that Plan A would trigger the ROFP because it involved a transfer of CEV's utility assets. This concern is noted in the unit and share purchase agreement. For example, it is listed in schedule 1.01(108) which is titled "Required Approvals", along with a note to draft stating: "Subject to discussion regarding approach to be taken with Cadillac Fairview".
- [31] The approach decided upon was to request that PCL agree to discharge the ROFP and related agreements. This request was first made in a meeting between Damon Chan, a representative of Westbank, and Lillian Tummonds, the general manager of Pacific Centre, in early August 2017. Mr. Chan subsequently sent Ms. Tummonds draft discharge documents.

[32] PCL did not agree to the proposed discharge with the result that on October 2, 2017, Ian Gillespie, president of Westbank, sent an email to John Sullivan, chief executive officer of Cadillac Fairview, reiterating the request. In his email, Mr. Gillespie described the history of the ROFP and CEV's supply of steam to Pacific Centre and then he went on to say:

The [ROFP] and the Debenture still remain on title to the [CEV] assets and is causing us unnecessary complications. We've been looking at restructuring the company by transferring the assets to a limited partnership that we control but I'm being advised that would trigger the [ROFP]. This has been in the works for a while and in anticipation of it I asked one of my people, Damon Chan, to contact your local representative to ask that your company release its now unnecessary charges. I thought that would be a no-brainer, but Damon had a meeting with your reps Lillian Tummonds and Jesse Gregson about a month ago and was told that [Cadillac Fairview] would look into it. When they had another meeting last week, the answer coming back was that [Cadillac Fairview] would just like to keep things the way they are.

I really wanted to avoid getting you involved, but that answer from your team really doesn't help us even though [Cadillac Fairview] isn't being asked to give up anything of value. Moreover, when [Cadillac Fairview] asked to be released from their obligation to take steam for one of the Pacific Centre buildings, I didn't hesitate in advising [CEV] to give [Cadillac Fairview] our approval even though that did have a hit to our bottom line. So my request is could you please instruct whoever is in control of this to accommodate [CEV's] request so that we can do our restructuring, as I think they forgot the accommodation made to them. Specifically, the favour I need is for you to authorize them to discharge the Debenture and [ROFP].

[33] The "accommodation" referred to by Mr. Gillespie is when CEV agreed to release PCL from the exclusive service terms for Block 32 so it could pursue the geo-exchange heat system.

[34] The parties exchanged further correspondence about the proposed discharge, including a letter dated October 26, 2017, from PCL's then counsel to Westbank and CEV which stated:

Please be advised that we have reviewed this matter with our client, and it has decided it is not prepared to discharge the Registrations at this time. The Registrations have significant value to our client and remain an important feature of the arrangement between PCL and [CEV] in order to ensure the continuous supply of steam to the Pacific Centre complex.

[35] This prompted a further email from Mr. Gillespie to Mr. Sullivan on October 31, 2017, in which he said:

John, we just got a letter last week from a lawyer at McCarthy saying they have no interest in cooperating with us on the request I made on the email I sent you a few weeks back. I'm not sure if I should assume this was from someone from [Cadillac Fairview] before I sent you my note or if this is indeed coming from you hence my note. As discussed in the note attached, this has no impact on [Cadillac Fairview] and in our minds was part of the spirit in which we cooperated at [Cadillac Fairview's] request some time ago. So [Cadillac Fairview's] refusal makes no sense from a business perspective or fair play. The reality is if we can't gain this from [Cadillac Fairview], we

have a work-around that's just more time consuming and costly and not in the spirit in which we did [Cadillac Fairview] a favour when we released [Cadillac Fairview] from their steam contract which we were under no obligation to do

[Emphasis added.]

[36] As will be seen, PCL puts considerable emphasis on the reference to a "work-around".

[37] Mr. Gillespie and Mr. Sullivan exchanged further emails on the issue in which Mr. Gillespie noted again that if the parties could not agree, CEV/Westbank had a "fix".

[38] CEV's "fix" or "work-around" was in the form of the second proposed plan, referred to as "Plan B".

[39] The essential elements of Plan B were outlined in a memorandum circulated by CEV's counsel on November 9, 2017. The covering email described it as a potential structure "which does not require [Cadillac Fairview] participation". Generally speaking, Plan B involved CEV transferring non-utility or surplus assets, including portions of the Beatty Lands, to the Developer for the purposes of development. In this regard, the memorandum outlining Plan B included the following statement:

Upon being declared, by the BCUC, as assets which are surplus to the operation of the utility, the beneficial interest in the real property will be transferred to the Development Entity. (Once the BCUC considers the real property assets to be surplus, then [Cadillac Fairview] should have difficulty in arguing that its ROFR applies to those assets).

[40] Plan B was described in greater detail in a term sheet for trust agreement dated January 29, 2018 (the "Term Sheet"), and a trust and development agreement dated June 29, 2018, later revised to the amended and restated trust and development agreement dated April 26, 2019 (together the "Trust and Development Agreement").

[41] The Term Sheet describes the central objective of Plan B, under the heading "Declaration of Surplus Property":

[CEV] is currently the legal and beneficial owner of the Lands [defined as both the Beatty Lands and an adjacent property at 701 Expo Boulevard]. It is anticipated that [CEV] will make an application to the BCUC to approve the disposition of an undivided beneficial interest in the lands in respect of the portion of the lands and ancillary rights that are surplus to the requirements of the [utility business], including all development rights associated with that portion of the Lands (the "Surplus Assets"). All rights associated with the lands, other than the Surplus Assets, are referred to herein as the "Utility Assets".

[42] The Term Sheet then describes the "Utility Assets" as follows:

- a) The premises housing the existing steam generation plant on the Lands, presently consisting of approximately 45,600 square feet of double-height space, as such premises may be amended during the course of the Redevelopment to such square footage as is approved by the BCUC (the "Plant Premises");
- b) The existing office premises utilized by [CEV] within the building situate on the Lands, consisting of approximately 2,880 square feet of office space, subject to the relocation thereof and reduction in size in accordance with the provisions below (the "Office Premises");
- c) Flue stacks, the fuel tanks and any distribution piping located on the Lands (the "Ancillary Equipment"); and
- d) Rights of way as are required to connect the Plant Premises to the Ancillary Equipment.

[43] As can be seen, the intent of the proposed transaction was to separate CEV's "surplus assets" from its "utility assets", with CEV maintaining ownership of the utility assets but spinning off the surplus assets for the purposes of development.

[44] More specifically, the key elements of the Plan B transaction relevant to this proceeding, as set out in the Term Sheet and the Trust and Development Agreement, are, in general terms:

- a) A new steam plant (referred to in the various agreements as the "BC Place Plant" or the "Expo Plant", I will refer to it as the "Expo Plant") will be constructed on lands under BC Place stadium owned by BC Pavilion Corporation ("PavCo") comprising two new boilers with a rated capacity of 400,000 lbs/hr. CEV will retain ownership of the boilers and related utility equipment in the Expo Plant. CEV will have access to the Expo Plant by way of a statutory right of way granted by PavCo;
- b) Once the Expo Plant is operational, the Beatty Plant will be demolished, including abatement and demolition of three of the existing boilers. A new steam plant will then be constructed on the Beatty Lands (the "New Beatty Plant") that will utilize one or more of the existing boilers. The New Beatty Plant will occupy a smaller footprint on the Beatty Lands. During the demolition of the Beatty Plant and construction of the New Beatty Plant, the Developer will be permitted to temporarily shut down and remove CEV's utility equipment located on the Beatty lands;
- c) The Beatty Lands will be subdivided such that two new air space parcels will be created, referred to as the "Plant ASP" and the "Office ASP". The New Beatty Plant will be constructed within the Plant ASP and new office space for CEV will be constructed within the Office ASP. Legal title to the remainder of the existing Beatty Lands, referred to as the "Remainder Parcel", will ultimately be transferred to the Developer with the intent that the Developer will construct a new office tower; and

- d) The Developer will grant CEV a statutory right of way over those portions of the Remainder Parcel that contain the Ancillary Equipment (see above at para. 42 (c)). For example, the flue stacks of the New Beatty Plant will extend out the top of the new building by way of the statutory right of way.

(Collectively the "Project").

- [45] Following completion of the Project, the Expo Plant will operate as the "baseload plant" meaning that it will be the principal source of steam for CEV's customers, including Pacific Centre. For the most part, the total demand for steam from all of CEV's customers is less than the 400,000 lbs/hr maximum capacity of the Expo Plant, however in certain months, depending upon the weather, peak demand for steam may exceed 400,000 lbs/hr in which case the New Beatty Plant will be used to meet that excess demand. According to Max Walenciak, an expert retained by PCL, only about 2-3% of the steam produced annually by CEV will come from the New Beatty Plant.
- [46] The total cost of the Project is expected to be approximately \$53.1 million, of which the Developer will pay \$38.5 million with CEV paying the balance. In exchange for its contribution, the Developer will receive the Remainder Parcel as described in subpara. 44(c) above.

Rezoning and BCUC Applications

- [47] In May 2018, the Developer submitted a rezoning application to the City of Vancouver and in December 2018, it submitted a revised rezoning application in connection with the Project. That application remains outstanding.
- [48] On June 29, 2018, CEV filed an application with the BCUC seeking a Certificate of Public Convenience and Necessity ("CPCN"), which is required under the Utilities Commission Act, R.S.B.C. 1996, c. 473 [UCA], for the construction or operation of a public utility, and for approval of the Project.
- [49] The BCUC issued an initial decision on February 19, 2019 ("BCUC Decision #1). In its decision, the BCUC rejected CEV's application for a CPCN, although it invited CEV to submit a revised application to address various concerns raised. The BCUC also declined to consider CEV's application for approval of its corporate reorganization on the ground that it was linked to the other approvals sought that were denied.
- [50] Despite the fact that the BCUC rejected its application, albeit not in final terms, CEV relies on a number of findings made by the BCUC, for example, where the BCUC said at p. 55:

The two new boilers for the Expo Plant will replace boiler units that are at or near the end of expected life and, in all likelihood, will need to be replaced in the near future. This will result in an increase in capacity as both of the new units have a 200,000 lb/hr functional capacity as compare to the functional capacity of 290,000 lb/hr for the boiler units being replaced. In addition, the building housing the Beatty Plant will be replaced and upgraded to modern seismic

and fire resistance standards and with it many of the hazardous materials that were part of the original construction will be removed. Further new administrative office space will be provided to replace the existing space which has limitations. As a result of these changes and enhancements, [CEV] will realize improvements in safety, efficiency, and emissions control while ensuring reliable service is maintained.

[51] PCL did not initially participate in the BCUC proceeding. During the course of the hearing on the present applications, a considerable amount of evidence and argument addressed the issue of whether PCL had proper notice of that proceeding.

[52] In my view, little turns on this issue, however I will briefly outline the parties' evidence.

[53] As described above in paras. 30-37, there was communication at the highest level between Westbank and Cadillac Fairview in 2017 about CEV/Westbank's intentions, albeit the specifics of the proposed project were not disclosed in detail. Despite this communication, CEV did not provide PCL or Cadillac Fairview with direct notice of its BCUC application.

[54] Rather, CEV relies on notices provided to a company called Energy Advantage Inc. ("Energy Advantage"), which is a designated billing agent for PCL. In November of 2013, CEV received a notice from Cadillac Fairview advising of Energy Advantage's appointment. The notice included the following:

[Cadillac Fairview] hereby appoints [Energy Advantage]. to act as its Agent regarding all billing matters associated with the service at the list of locations detailed herein. Please accept this letter as authorization to release all billing and consumption data to Energy Advantage and their personnel upon request.

You are also authorized to interface with them directly regarding matters of supply and billing etc.

[55] In October 2017, a communication firm engaged by CEV circulated a flyer notifying recipients of an open house related to the Project. Energy Advantage was included on the list of addressees, however there is no evidence of the flyer being forwarded to PCL.

[56] In February 2018, a press release was issued by CEV to its customers announcing a "new energy platform". This again went to Energy Advantage.

[57] When the BCUC proceeding commenced, a public notice was issued, which also went to Energy Advantage but not to PCL. The notice referred to CEV's application to "construct and operate new and renovated steam plant works and related facilities at [CEV's] existing site at [the Beatty Lands] and at an adjacent site within BC Place Stadium".

- [58] I note that CEV takes issue with PCL's evidence that it did not receive the public notice from Energy Advantage. While I agree that the evidence on this point is weak, for example there is no direct evidence from anyone at Energy Advantage about what it did or did not do with the notice, there is no basis on which to make a finding the PCL did in fact receive the public notice.
- [59] According to PCL, it only learned about the BCUC proceeding when Ms. Tummonds found BCUC Decision #1 on the BCUC website in April 2019. Tom Knoepfel, a vice president of PCL, in his affidavit #1, said that he did see CEV's rezoning application in December 2018, however he said that it did not address how CEV would be impacted by the proposed development or how PCL's charges would be affected. However, on cross-examination, he acknowledged that from reading the rezoning application, he knew that there was some sort of proceeding before the BCUC, that the proposed redevelopment involved spinning off surplus lands and that most of the steam generation equipment was to be relocated across the street on PavCo lands.
- [60] Notwithstanding this knowledge, when PCL did learn of the BCUC proceeding in April 2019 and of BCUC Decision #1, it did not apply to intervene in that proceeding or for a reconsideration of BCUC Decision #1.
- [61] On October 15, 2019, PCL did submit a request to the BCUC for permission to submit an application for reconsideration of BCUC Decision #1 and to suspend any further consideration of CEV's application in favour of this court proceeding. It did so after CEV had delivered a proposed counterclaim and further amended response to civil claim in which it alleged that the BCUC had made binding findings of fact in BCUC Decision #1 and sought modification of the ROFP.
- [62] On December 18, 2019, the BCUC issued an order and decision dismissing PCL's request ("BCUC Decision #2").
- [63] As part of its request, PCL submitted that it did not have adequate notice of the BCUC proceeding. In BCUC Decision #2, the BCUC made no determination on that point because the "evidence on the record is unclear". However, the BCUC made the following observations:

regardless of whether PCL was cognizant of the proceedings leading up to [BCUC Decision #1], they were fully aware of the proceedings currently underway and could have intervened had they wished to do so. This is supported by the affidavit of Ms. Tummonds who confirmed that she was aware of the BCUC proceedings in April 2019. PCL chose not to intervene explaining that [BCUC Decision #1] had already been made and the BCUC had specified the scope based on outstanding issues raised in that decision. Given the professed importance of the outcome of this proceeding to PCL, it is surprising PCL did not at least attempt to intervene and raise its issues. In addition, the Panel notes that PCL had the opportunity to ask for a reconsideration of [BCUC Decision #1] when they first learned of it. It chose not to do so. Moreover, while we acknowledge that the Panel provided a specified scope for the second part of this proceeding, it did not mean that a request

to broaden the scope to include issues raised by a direct customer of [CEV] could not have been considered by the Panel. Given these factors, the Panel finds that PCL had the opportunity intervene but chose not to do so.

[64] The BCUC cited this finding, that PCL had the opportunity to intervene but chose not to, in support of its denial of both the application for permission to bring a reconsideration application and for a suspension of the BCUC proceeding. With respect to the suspension application, the BCUC also held:

The BCUC and the courts have different jurisdictions with respect to the different issues that have arisen. Sections 52 and 53 of the UCA [outline] the BCUC's jurisdiction with respect to the disposition of property as well as the consolidation, amalgamation and merger of a public utility. It is not appropriate for the BCUC to deal with the ROFP because, as stated by PCL, the jurisdiction to interpret and apply the ROFP lies with the BC Supreme Court. Thus, given the separate jurisdictions, the Panel finds it inappropriate for the BCUC to suspend proceedings awaiting a final decision in the Court Proceedings.

[65] To round out the facts concerning the BCUC proceedings, CEV submitted a revised application on April 26, 2019, to address the BCUC's concerns set out in BCUC Decision #1. The BCUC issued its decision on the revised application on March 5, 2020 ("BCUC Decision #3"), after the hearing of these applications.

[66] Briefly, the BCUC approved a CPCN for the proposed New Beatty Plant and the Expo Plant, subject to certain conditions, including the requirement for further BCUC approval of any changes to the number, capacity or location of the boilers described in the Trust and Development Agreement.

[67] As part of its application, CEV also sought approval of its proposed corporate reorganization to be undertaken in conjunction with the Project. In BCUC Decision #3, the BCUC approved the various steps involved in the reorganization, subject only to approval of the Lieutenant Governor in Council to the amalgamation of CEV and a new entity pursuant to s. 53 of the UCA.

The Parties Positions

[68] PCL advances the following main arguments:

- a) The ROFP was triggered when PCL entered into the Trust and Development Agreement in which it agreed to sell the bulk of the Beatty Lands on which the Beatty Plant is currently located and without which no steam could, until some time in the future after the Project is embarked upon, be generated or distributed;
- b) The ROFP is also triggered by virtue of the fact that, even after construction of the smaller New Beatty Plant, some elements critical to CEV's operations, notably the Ancillary Equipment, will be located on lands that CEV no longer owns, in that they will be transferred to the Developer;

- c) CEV breached the ROFP by not taking the steps required by the ROFP, including putting an offer to PCL on the same terms as are being offered to the Developer;
- d) CEV has derogated from the grant made in the ROFP, and diminished the security provided to PCL thereunder, by transferring the majority of its steam generation capacity to a facility (the Expo Plant) located on lands that CEV does not own and that are is not subject to the ROFP and the related charges and by similarly locating other key components on land owned by the Developer (see subpara. (b) above);
- e) CEV's shift from Plan A to Plan B, which PCL submits was done to defeat its interests under the ROFP, is a breach of CEV's duty of good faith; and
- f) The Project violates s. 73 of the Land Title Act, R.S.B.C. 1996, c. 250 [LTA], in that it involves a division of the beneficial ownership of portions of the Beatty Lands without first obtaining approval of a subdivision.

[69] CEV submits:

- a) The ROFP has not been triggered as there has been no sale nor is there intended to be a sale, of assets required to generate and distribute steam. In fact, the Project will enhance CEV's ability to serve its customers, including Pacific Centre. On this point, CEV submits that components of the Beatty Plant are reaching the end of their useful life giving rise to serious system vulnerability;
- b) The findings of the BCUC in BCUC Decision #1 are binding on the Court and lead to the conclusion that there has been no decision to sell assets required to generate and distribute steam to serve Pacific Centre. CEV submits as well that the BCUC findings are binding on PCL, given the BCUC's finding, in BCUC Decision #2, that PCL had the opportunity to intervene but chose not to do so;
- c) The decision to proceed with a reorganization plan that would not trigger the ROFP over one that might trigger it, i.e. the switch from Plan A to Plan B, is not a breach of the contractual obligation of good faith;
- d) The location of Ancillary Equipment on land not owned by CEV does not trigger the ROFP because there is no disposition of any equipment owned by CEV that is necessary for the generation and distribution of steam. Further, if the Court holds that because the flue stacks pass through airspace not owned by CEV but subject to a statutory right of way triggered the ROFP, that aspect of the Project could be reconfigured to avoid that result; and
- e) In the event that the Project is found to have triggered the ROFP, CEV seeks relief from forfeiture. Further, by way of its counterclaim, CEV seeks an order cancelling or modifying the ROFP.

Legal Framework

- [70] The central issue in this litigation is whether the ROFP has been triggered. Determination of that issue turns in large part on the interpretation to be given the language used in that contract.
- [71] In *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, the Supreme Court of Canada settled the modern approach to contract interpretation:
- [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 (see *Moore Realty Inc. v. Manitoba Motor League*, 2003 MBCA 71, 173 Man. R. (2d) 300, at para. 15, per Hamilton J.A.; see also *Hall*, at p. 22; and *McCamus*, at pp. 749-50). As stated by Lord Hoffmann in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98 (H.L.):

The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. [p. 115]

- [72] The Court went on to discuss the role of surrounding circumstances in contractual interpretation:
- [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).

- [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.
- [73] A useful discussion of the role of "factual matrix" evidence in the interpretation of contracts can also be found in *Coutinho & Ferrostaal GmbH v. Tracomex (Canada) Ltd.*, 2015 BCSC 787 at paras. 200-204.
- [74] While the approach to interpreting contracts has evolved to include consideration of the surrounding circumstances, the fundamental objective of the exercise is still to ascertain the intentions of the parties.

Analysis

Preliminary Point - Relevance of the BCUC Proceedings and Findings

- [75] CEV again relies on findings of the BCUC in BCUC Decision #1 which CEV submits are binding on the Court. CEV cites s. 79 of the UCA, which states:

The determination of the commission on a question of fact in its jurisdiction, or whether a person is or is not a party interested within the meaning of this Act, is binding and conclusive on all persons and all courts.

- [76] For its part, PCL submits that any findings of fact made by the BCUC are not binding in this proceeding because BCUC Decision #1 was not a final decision and, as discussed above, it did not receive proper notice of the BCUC proceeding.

- [77] The BCUC itself noted that its jurisdiction to deal with issues under the UCA differs from the Court's jurisdiction to interpret and apply the ROFP (BCUC Decision #2 quoted at para. 64 above). I agree with the BCUC and for that reason, the BCUC process and decisions have minimal relevance to the issues now before the Court.
- [78] Given the different jurisdictions, and the different nature of the exercise in which the BCUC and the Court are engaged, it is not necessary to determine whether any specific findings of the BCUC are binding on the Court.
- [79] That said, one finding that I accept, albeit on the basis of evidence filed in this proceeding, is that the Project is intended to and will enhance CEV's long term ability to deliver steam to its customers, including Pacific Centre.

Was the ROFP triggered when CEV entered into the Trust and Development Agreement or by virtue of the fact that, after construction of the smaller New Beatty Plant, some elements of CEV's operations will be located on lands that CEV no longer owns?

- [80] This is the central issue in dispute. While both parties advance numerous arguments in support of their respective positions, determination of the issue turns on the interpretation of the operative words of the ROFP.
- [81] In order to engage in the interpretive exercise, it is useful to break that language down into three key components. Specifically, the ROFP is triggered if CEV:
- (i) shall decide to sell;
 - (ii) the whole of its property, assets, business and undertaking or any part thereof;
 - (iii) required to generate and distribute steam to serve the building under the Steam Service Contract.
- [82] With respect to the first two components, PCL again submits that CEV made a decision to sell a part of its assets and undertaking as evidenced by the Trust and Development Agreement.
- [83] CEV submits that a right of first refusal or purchase is only triggered when a binding contract is about to be entered into by the grantor to dispose of the property, which requires certainty of essential terms, not when there is merely a wish to dispose of such property (citing *Tiffany Investments Ltd and Another v. Bircham & Co Nominees (No 2) Limited and Others*, [2003] EWCA Civ 1759).
- [84] CEV submits that such certainty is lacking here in that there is as yet no legal description of the Remainder Parcel to be conveyed to the Developer and, further, CEV and the Developer will ensure that CEV retains title to the air space surrounding the boiler flues if to do otherwise would trigger the ROFP. Fundamentally, CEV submits that there is no intention to transfer any assets that are subject to the ROFP. Rather, the proposed transaction is again intended to transfer only non-utility, surplus assets.

- [85] Whether a particular right of first refusal or purchase is triggered, will depend upon the specific language used in the provision. Here, I am satisfied that the first two components of the operative language have been established.
- [86] The term "undertaking" is broadly defined in the ROFP to include CEV's "property, assets, business and undertaking including the plant, lands, system, Licence Agreement and customer contracts". The terms "plant" and "lands" are described in the recitals to the ROFP with specific reference to the Beatty Plant and the Beatty Lands, respectively.
- [87] As set out in the summary of the Plan B transaction at para. 44 above, the footprint of the Beatty Plant will be reduced with the balance of the existing Beatty Lands (the Remainder Parcel) transferred to the Developer for development purposes. Portions of the air space above the Beatty Plant, through which the existing boiler flues vent gas, will also be transferred to the Developer. The recitals to the Trust and Development Agreement clearly state the intent of the agreement:
- A. [CEV] and the Developer wish to enter into this agreement and certain agreements ancillary hereto in order to provide for new and refurbished energy generation facilities for the use and benefit of [CEV] and the transfer to the Developer, for improvement by the Developer, of that portion of the real property owned by [CEV] that will, as a result of the new and refurbished facilities, become surplus to the needs of [CEV] in its operations as a utility;
- D. Following the receipt of the approvals from the BCUC in respect of the foregoing, the Developer will acquire a beneficial interest in the portions of the lands which are surplus to the needs of [CEV] in its operation as a utility
- [Emphasis added.]
- [88] This constitutes a decision to sell at least a part of CEV's existing assets or undertaking within the meaning of the ROFP. The fact that BCUC approval is ultimately required for the Project to proceed, or that there is as yet no legal description of the Remainder Parcel, does not undermine the fact that a decision to sell was made.
- [89] I pause here to note that PCL makes much in its submissions of the fact that the Project will "result in a massive windfall to the Developer" because it will acquire the Remainder Parcel, which is valued at approximately \$180 million, in exchange for its approximately \$38.5 million contribution towards the cost of constructing the New Beatty Plant.
- [90] Whether or not that is the case has no bearing on the legal issue before the Court. The financial terms of the Project are driven in large measure by the fact that CEV and the Developer are related entities. Further, as noted, the ROFP is triggered by the decision to sell and not by particular financial terms. Those terms only become relevant once the decision is made and the ROFP triggered, at which point CEV is obligated to make an offer to PCL on "terms not less favourable than the best bona fide offer of any other prospective purchaser" (ROFP, cl. 1(a), see para. 15 above). It is also worth noting that if that were to occur, it is PCL that presumably would reap the "massive windfall".

- [91] The real dispute between the parties turns on the meaning to be given the third component, specifically the phrase "required to generate and distribute steam to serve the building under the [Steam Service Contract]".
- [92] PCL submits that the assets being sold are currently required to generate and distribute steam, thus the ROFP is triggered. It submits that the question of whether particular assets or elements of CEV's undertaking are "required" to generate and distribute steam must be assessed at the time of the decision to sell, not the time after the sale has completed and the changes proposed under the Project completed.
- [93] CEV counters by arguing that the ROFP was intended to secure the ongoing, long term supply of steam and does not require that the steam be generated from the specific facilities in existence at the time the ROFP was executed. It submits that the interpretation advanced by PCL would result in a commercial absurdity in that it would tie the hands of CEV in perpetuity, or for at least the 100-year term of the Steam Services Contract, to a single source.
- [94] I agree with CEV about the intent of the ROFP. That intent is apparent on the face of the agreement, including in the recitals reproduced at para. 14 above. It is also reflected in the correspondence exchanged in advance of the agreements (see para. 12 above) where CEV's general manager noted PCL's concern that "some time in the future our Company may decide not to continue its operations or may be incapacitated from doing so" and its interest in ensuring that "our facilities will be available in accordance with the terms of our service contract." The assurances offered by way of the ROFP were intended to "protect [PCL's] undertaking against the risk involved in a change of ownership of [CEV's] system."
- [95] This is also reflected in the Master Agreement, which sets out the overall framework for the arrangement between the parties. Clause 1 of the Master Agreement sets out the key objective of providing PCL with security for "continuity of steam heat service". It then describes the ROFP as granting PCL a "first right to purchase the business and undertaking" of CEV.
- [96] It is clear that the key concern addressed by the ROFP and the related agreements was the ongoing availability and capacity of CEV's facilities and system to deliver steam to Pacific Centre. The intent was to permit PCL, in the event of a potential change of ownership of the facilities or system, to assess the associated risk and to determine whether it was in its interest to assume ownership and operation of that system in order to safeguard continued supply.

- [97] That said, an imminent threat to the continuity of steam supply is not necessary to trigger the ROFP. That provision does not state that PCL has a right of first purchase in the event that CEV intends to cease operations or that the supply of steam is otherwise put in jeopardy. Rather, the triggering event is again a "decision to sell". Presumably that language was used so that PCL could, at the earliest opportunity, assess its risks and determine whether it was necessary or appropriate to avail itself of its rights under the ROFP.
- [98] Thus, neither the absence of an imminent threat to PCL's steam supply or the fact that CEV's capacity to produce and deliver steam will be enhanced, is determinative of PCL's claims.
- [99] The intent of the ROFP however is relevant to the interpretation to be given the operative language of the ROFP. As noted at para. 74 above, the objective of the interpretive exercise is to ascertain the intent of the parties.
- [100] Here, it is apparent that PCL's attempt to invoke the ROFP is inconsistent with the parties' intentions as reflected in the ROFP. Specifically, PCL is not seeking an opportunity to determine whether it can or should assume ownership and operation of the utility in order to safeguard the supply of steam to Pacific Centre. Rather, it is attempting to appropriate for itself the development opportunity associated with the Remainder Parcel and the related "massive windfall", which has no bearing on CEV's ability to continue to deliver steam to Pacific Centre.
- [101] In this regard, the evidence of Mr. Knoepfel, a senior officer of PCL and Cadillac Fairview, is telling. Mr. Knoepfel swore three affidavits relied on by PCL. In none of them does he state that PCL seeks to invoke the ROFP in order to properly assess any potential risk to the continuous supply of steam to Pacific Centre arising as a result of the Project. Rather, he describes in detail the real estate development experience of PCL, Cadillac Fairview and their owners, and he states that there is no reason in principle that "PCL would be unable to fulfill the obligation of the [Developer]" and that PCL and its owners have "the experience and other resources to complete the proposed transaction".
- [102] Again, seeking to invoke the ROFP in order to appropriate the real estate development opportunity does not accord with the intent of that agreement and lacks any sense of commercial reality.
- [103] Further, the language of the ROFP does not support PCL's position. The ROFP is not triggered simply by CEV's decision to sell a portion of its undertaking, nor by a decision to sell a portion of its undertaking currently used to generate steam. Had the intent been for one or both of those events to trigger the ROFP, clear language to that effect could have been used.

- [104] Instead, the ROFP is only triggered if CEV decides to sell all or portion of its undertaking that is required to generate and distribute steam under the Steam Service Contract. The Steam Service Contract is concerned with the delivery of steam to Pacific Centre, not where the steam is generated. Again, had the parties intended that the ROFP would be triggered upon CEV selling any of its then existing assets, they could have done so with appropriate language.
- [105] Support for this interpretation can be found in the language of the Debenture, which is one of the constellation of agreements entered into between the parties. Pursuant to the Debenture, in order to secure the "due observance and performance" by CEV of the terms of the Steam Service Contract, CEV granted PCL a floating charge over all of its "real and personal property, assets and undertaking for the time being, both present and future". The Debenture also provided that the security granted would not prevent CEV from "mortgaging, pledging, selling, alienating, assigning or otherwise charging, disposing of or dealing with" its assets. Further, the security granted only becomes enforceable in the event, amongst other things, that CEV defaults under the Steam Service Contract.
- [106] The terms of the Debenture make it clear that CEV is permitted to deal with its assets and undertaking as it sees fit, including selling or disposing of assets or otherwise reconfiguring its utility operations, provided that it continues to meet its obligations under the Steam Service Contract. That same objective is reflected in the ROFP.
- [107] It is apparent that none of the assets being sold as part of the Project are required to produce and deliver steam under the Steam Service Contract within the meaning of the ROFP. While it is true that once the Project is completed, the majority of steam provided to Pacific Centre will be generated at the Expo Plant, the reconfiguration of CEV's utility assets and operations, as distinct from a disposition of its undertaking, is not sufficient to trigger the ROFP.
- [108] I also do not accept that the ROFP has been triggered by virtue of the fact that CEV is selling lands on which it is intended that certain ancillary equipment, such as flue stacks and fuel tanks, will be located, with CEV retaining access to those lands through statutory rights of way.
- [109] Location of some equipment on land not owned by CEV is consistent with how CEV has operated since its inception. For example, many of the pipes required to deliver steam to its customers run under lands not owned by CEV and that are subject to rights of way. Further, PCL's argument on this point again has little to do with protecting the supply of steam to Pacific Centre but rather is another attempt to obtain for itself the development opportunity associated with the Remainder Parcel. For the reasons set out above, that objective is inconsistent with the intent of the ROFP.

[110] I find that CEV's decision to proceed with the Project therefore has not triggered the ROFP. Given this finding, it is unnecessary to address PCL's argument that CEV breached the ROFP by failing to make an offer to PCL on the same terms as are being offered to the Developer.

Did CEV derogate from the grant made under the ROFP and diminish PCL's security by transferring the majority of its steam generation capacity to a facility (the Expo Plant) located on lands the CEV does not own and which is not subject to the ROFP?

[111] PCL submits that CEV has fundamentally altered its contractual rights and diminished its security under the ROFP by entering into a transaction that will see the majority of CEV's steam generation occur at the Expo Plant, which is located on lands not owned by CEV and that are not subject to the ROFP.

[112] The lands upon which the Expo Plant will be located are subject to a statutory right of way granted by PavCo, with a term of 40 years. PCL notes that under the statutory right of way, there are provisions for early termination as well as terms that, in certain circumstances, would permit PavCo to assume ownership of the steam generation equipment or to destroy or dispose of that equipment, which would prejudice PCL's interests.

[113] CEV submits that there is no evidence to suggest that this structure in any way compromises PCL's right to further and better assurances of continuity of steam service under the Steam Service Contract and, as such, it does not impact the ROFP.

[114] I agree with CEV. PCL's argument on this point is based entirely upon speculation about what might occur in 40 years' time and it adds little to its position that the ROFP has been triggered, which I have rejected, or its argument that CEV is acting in bad faith (see below). Further, it fails to account for the fact that the New Beatty Plant will have sufficient capacity to meet PCL's needs, even if the Expo Plant goes off line, and that the New Beatty Plant will be located on lands owned by CEV and both the plant and the lands will be subject to the ROFP.

[115] In addition, while the Expo Plant will be located on lands not owned by CEV and not subject to the ROFP, CEV will retain ownership of the assets and equipment comprising the Expo Plant. While the ROFP will not be registered against those assets, they nonetheless fall within the definition of "undertaking" in the ROFP. Thus, any decision by CEV to sell or dispose of those assets, if they are required to generate and distribute steam to Pacific Centre, would trigger the ROFP. Those assets are also subject to the Debenture which provides security over CEV's current and future assets. Again, however, this is entirely speculative and is not a basis on which to find that the ROFP has been triggered or to otherwise enjoin the Project from proceeding.

Was CEV's shift from Plan A to Plan B in order to avoid triggering the ROFP a breach of CEV's duty of good faith?

- [116] PCL submits that CEV structured the Plan B transaction in order to avoid triggering the ROFP and therefore to deprive PCL of its contractual rights thereunder. It says this is the "work-around" referred to by Mr. Gillespie in his email to Mr. Sullivan on October 31, 2017 (see para. 35 above). PCL submits that this constitutes a breach of CEV's contractual duty of good faith.
- [117] CEV submits that there has been no such breach given that one of the central objectives of the Project is to enhance its capacity to deliver steam to its customers, including PCL, which is the focus of the ROFP.
- [118] The duty of good faith in contract was discussed by the Supreme Court of Canada in *Bhasin v. Hrynew*, 2014 SCC 71, where Justice Cromwell said:
- [65] The organizing principle of good faith exemplifies the notion that, in carrying out his or her own performance of the contract, a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner. While "appropriate regard" for the other party's interests will vary depending on the context of the contractual relationship, it does not require acting to serve those interests in all cases. It merely requires that a party not seek to undermine those interests in bad faith. This general principle has strong conceptual differences from the much higher obligations of a fiduciary. Unlike fiduciary duties, good faith performance does not engage duties of loyalty to the other contracting party or a duty to put the interests of the other contracting party first.
- [66] This organizing principle of good faith manifests itself through the existing doctrines about the types of situations and relationships in which the law requires, in certain respects, honest, candid, forthright or reasonable contractual performance. Generally, claims of good faith will not succeed if they do not fall within these existing doctrines. But we should also recognize that this list is not closed. The application of the organizing principle of good faith to particular situations should be developed where the existing law is found to be wanting and where the development may occur incrementally in a way that is consistent with the structure of the common law of contract and gives due weight to the importance of private ordering and certainty in commercial affairs.
- [70] The principle of good faith must be applied in a manner that is consistent with the fundamental commitments of the common law of contract which generally places great weight on the freedom of contracting parties to pursue their individual self-interest. In commerce, a party may sometimes cause loss to another - even intentionally - in the legitimate pursuit of economic self interest: *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177, at para. 31. Doing so is not necessarily contrary to good faith and in some cases has actually been encouraged by the courts on the basis of economic efficiency: *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43, [2002] 2 S.C.R. 601, at para. 31. The development of the principle of good faith must be clear not to veer into a form of ad hoc judicial moralism or palm tree justice. In particular, the organizing principle of good faith should not be used as a pretext for scrutinizing the motives of contracting

parties.

[119] PCL cites *GATX Corp. v. Hawker Siddeley Canada Inc.* (1996), 27 B.L.R. (2d) 251 (Ont. C.J. (Gen. Div.)), a case that pre-dates *Bhasin*, in support of its position. There, the applicant GATX Corp. owned 45% of the shares in "CGTX Inc." and the respondent Hawker Siddeley Canada Inc. owned the other 55%. Pursuant to a shareholders' agreement, each party granted the other a right of first refusal in the event that either wished to sell its interest. GATX offered to purchase Hawker Siddeley's shares, but that offer was refused. Hawker Siddeley then created a structure under which it transferred its shares to a wholly-owned subsidiary, which under the shareholders' agreement did not trigger the right of first refusal, and then agreed to sell the shares of the subsidiary to a third party competitor.

[120] The court found that the transaction was "very carefully structured" (at para. 45) in a way to avoid the operation of an existing right of first refusal.

[121] Justice Blair said at para. 71:

It is well established that the grantor of a right of first refusal must act reasonably and in good faith in relation to that right, and must not act in a fashion designed to eviscerate the very right which has been given. This is an illustration of the application of the good faith doctrine of contractual performance,

[122] In the same paragraph, Justice Blair cited *Landymore v. Hardy* (1991), 21 R.P.R. (2d) 174 at 193-194 (N.S.S.C.), where the court said:

The grantor of a right of first refusal is not entitled to frustrate it by conveying the property in such a way as to avoid having to give the right in the first place: *Gardner v. Coutts & Co.*, [1968] 1 W.L.R. 173, [1967] 3 All E.R. 1064 (Ch. Div.).

Relations between the giver and the holder of a right of first refusal must be characterized by good faith and reasonableness.

Consider as well the observations of V. Di Castri, *The Law of Vendor and Purchaser*, 3d ed. (looseleaf) (Toronto: Carswell, 1988), vol. 1, at p. 6-8:

"As to the giver of the right, the law implies a duty of reasonableness and good faith on his part in entering into a cash and property exchange transaction. The duty is not discharged if the essential purpose of the sale to the third party is to frustrate the right of first refusal."

[Emphasis added by Blair J.]

[123] GATX is distinguishable from the present case. There, GATX Corp. and Hawker Siddeley were effectively partners or co-owners of CGTX Inc. It is common in such circumstances for there to be a right of first refusal or a shotgun mechanism to ensure that one party cannot unilaterally alter the fundamental nature of the joint enterprise by selling its interest to a third party. That was part of the expectation of both parties that was defeated by Hawker Siddeley's actions.

[124] Here, the intent of the ROFP is to provide security for the ongoing supply of steam, an objective that is enhanced, not diminished or eviscerated, by the Project.

[125] Further, the Project is in the nature of an internal reorganization in that the intent is for CEV to "spin off" assets to a related company, the Developer, that are considered surplus to its utility operations. The Project is in pursuit of legitimate business interests of both CEV and the Developer and, unlike in GATX, was not done to undermine PCL's interests in bad faith (Bhasin at para. 65).

[126] Accordingly, I find that CEV has not breached its duty of good faith.

Does the Project violate s. 73 of the LTA in that it involves a division of the beneficial ownership of portions of the Beatty Lands without first obtaining approval of a subdivision?

[127] PCL submits that elements of the Project, particularly terms of the Trust and Development Agreement, violate s. 73 of the LTA and are therefore illegal and unenforceable. Section 73 and related sections in Part 7 of the LTA deal with the subdivision of land. Section 73(1) states:

Except on compliance with this Part, a person must not subdivide land into smaller parcels than those of which the person is the owner for the purpose of

- (a) transferring it, or
- (b) leasing it, or agreeing to lease it, for life or for a term exceeding 3 years.

[128] In *Yi Teng Investments Inc. v. Keltic (Brighthouse) Development Ltd.*, 2019 BCCA 357 at para. 40, the Court of Appeal described s. 73 in these terms:

This Court's decision in *International Paper Industries Ltd. v. Top Line Industries Inc.* (1996), 20 B.C.L.R. (3d) 41 at para. 1 (C.A.) [Top Line], unequivocally said s. 73 of the Land Title Act prohibits the subdivision of land except in compliance with Part 7 thereof. The legal implications of the s. 73 prohibition include an inability to grant any interest in land that has the effect of subdividing the land without the necessary approval under the Land Title Act: Top Line. Therefore, a smaller portion of a larger parcel can only be unconditionally sold after being subdivided in accordance with the Land Title Act.

[129] PCL submits that pursuant to the transfer agreement appended to the Trust and Development Agreement, prior to the date on which the existing Beatty Lands are formally subdivided to create the parcel on which the New Beatty Plant will be located and the Remainder Parcel, CEV has agreed to transfer to the Developer its beneficial interest in the Remainder Parcel, while still retaining registered legal ownership. PCL submits that this is a form of subdivision that is contrary to s. 73. So too is the separation and transfer of the airspace in which the utility assets are housed from the balance of the lands.

- [130] I have some doubt as to whether s. 73 has any application in this case in that the transfers of CEV's beneficial interest identified by PCL are simply interim steps in the Project that are not, in my view, intended to effect a subdivision outside of the provisions of the LTA.
- [131] In this regard, the circumstances are somewhat analogous to those in *Gadhri v. 0760815 B.C. Ltd.*, 2016 BCSC 521, rev'd in part on other grounds 2017 BCCA 31, where options to purchase certain lots were granted in advance of a properly registered subdivision. The court there rejected the argument that this violated s. 73 of the LTA (*Gadhri BCSC at para. 200*, citing *Bank of British Columbia v. Tri Holdings Ltd.* (1992), 71 B.C.L.R. 58 at para. 29 (C.A.)).
- [132] Regardless, this is not an issue that PCL has standing to raise. Given my findings that the ROFP has not been triggered and that CEV has not breached its contractual duty of good faith, PCL has no private rights affected by the Project nor has it suffered special damages that might otherwise support private standing to enforce a public or statutory right: *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607 at 618-19.
- [133] PCL relies on s. 284 of the LTA in support of its position that it has standing, which states in part:
- (1) In this section, "order" includes injunction.
 - (2) The Supreme Court may,
 - (a) on the application of a person interested in land, or
 - (b) on application made on behalf of the owner of a future or contingent interest,make an order prohibiting dealing with that land.
- [134] While I accept that PCL is a "person interested in land" given its registered charges against the Beatty Lands, I read s. 284 as granting such a party standing to seek an order prohibiting dealing with land where that party's interest in the subject land is directly affected by the proposed dealing. Here, I have found that PCL's contractual rights underlying its registered charges have not been impacted and, as such, there is no basis to grant PCL a remedy under s. 284.
- [135] I would add that PCL's argument under s. 73 of the LTA is unrelated to its principal argument that the ROFP has been triggered. In other words, PCL does not rely on s. 73 to further its claim that CEV is required to offer the development opportunity to it on the same terms as made available to the Developer. Rather, it seeks to invoke s. 73 solely for the purpose of blocking the Project. For the reasons set out above, I decline to give effect to this argument.

CEV's Counterclaim for Discharge or Modification of the ROFP and Related Agreements

[136] In light of my finding that the ROFP has not been triggered, it is unnecessary to consider CEV's request for relief from forfeiture. However, I will address its counterclaim for discharge or modification of the ROFP as this claim is not dependent upon a finding that the ROFP has been triggered.

[137] CEV relies upon s. 35 of the Property Law Act, R.S.B.C. 1996, c. 377, the relevant provisions of which state:

- (1) A person interested in land may apply to the Supreme Court for an order to modify or cancel any of the following charges or interests against the land, whether registered before or after this section comes into force:
 - (e) a restrictive or other covenant burdening the land or the owner;
- (2) The court may make an order under subsection (1) on being satisfied that the application is not premature in the circumstances, and that
 - (a) because of changes in the character of the land, the neighbourhood or other circumstances the court considers material, the registered charge or interest is obsolete,
 - (b) the reasonable use of the land will be impeded, without practical benefit to others, if the registered charge or interest is not modified or cancelled,
 - (d) modification or cancellation will not injure the person entitled to the benefit of the registered charge or interest,

[138] CEV submits:

- a) There has been a material change in circumstances in the over 50 years since the date the ROFP was executed. While PCL may have required the additional security represented by the ROFP and related agreements, that is no longer the case given CEV's current status as a major utility with a proven track record. Further, CEV is strictly regulated by the BCUC in a manner that ensures continuity of service. As such, the ROFP is obsolete and no longer required;
- b) PCL is attempting to use the ROFP to impede CEV's reasonable use of its lands with no practical benefit to PCL, other than its ability to reap the "massive windfall" if the ROFP has in fact been triggered; and
- c) Modification or cancellation of the ROFP will not injure PCL. Given that the intent of the ROFP was to better ensure continuity of steam service, PCL's interests are protected by virtue of the fact that the Project will enhance CEV's ability to produce and deliver steam.

- [139] CEV submits that the ROFP should therefore be cancelled or discharged. Alternatively, it submits that it should be modified to exclude its application to any transaction that is subject to BCUC approval.
- [140] PCL submits that none of the factors identified in s. 35 have been established and that, in any event, the Court should exercise its discretion to deny CEV's application.
- [141] I agree with PCL that CEV has not established circumstances that would warrant a cancellation or modification of the ROFP pursuant to s. 35.
- [142] The ROFP was one part of a package of agreements entered into between CEV and PCL pursuant to which PCL agreed to become a customer of CEV and CEV agreed to provide steam to PCL. As reflected on the face of the ROFP, that agreement was intended to provide PCL security in the form of "further and better assurances of continuity of steam heat service" (see para. 15 above). Those further and better assurances were over and above the protections available to PCL by virtue of the fact that CEV was regulated by the BCUC (then the PUC).
- [143] CEV points to the fact that the Project has been subject to rigorous regulatory review by the BCUC, whose mandate is to ensure that CEV provide "safe, adequate, efficient and secure service" to its customers (*British Columbia Old Age Pensioners' Organization v. British Columbia Utilities Commission*, 2017 BCCA 400 at para. 6).
- [144] However, it is not sufficient to consider the ongoing validity or utility of a charge or covenant solely in the context of a specific transaction. Rather, the court must consider the broader effects of the covenant and "all of the consequences of cancelling the covenant, not just those that arise in one particular situation" (*Paterson v. Burgess*, 2017 BCCA 298 at para. 29). Further, in determining whether a charge or covenant is obsolete, within the meaning of s. 35(2)(a), the question is whether the original purpose of the charge can still be served (*TDL Group Ltd. v. Harvey*, 2002 BCCA 258 at para. 53, citing *Re Truman, Hanbury, Buxton & Co., Ltd.'s Application*, [1955] 3 All E.R. 559 at 563-64 (C.A.)).
- [145] TDL Group provides a useful contrast to the present case. There, an easement existed across one lot of land to permit access to a garage located on an adjacent lot. As Justice Hall for the majority noted (at para. 54), the "original and only" use of the easement was to permit such access. However, when the lot on which the garage was located was sold and the garage demolished to make way for an apartment building, the easement was found to be "completely outdated and of no practical use" and therefore obsolete (at para. 55).
- [146] Here, Pacific Centre, the complex that benefits from the security provided through the ROFP, continues to exist and, indeed, arguably requires the assurance of continuity of steam supply even more now given the increase in the size and complexity of its facilities since the date the ROFP was first entered into.

- [147] The fact that I have found that the current Project does not trigger the ROFP does not mean that the ROFP lacks ongoing utility. The ROFP will continue to apply to assets of CEV that are required to produce steam and in the event of any proposed change in the ownership of those assets, PCL will be entitled to assess the risk associated with that change to determine whether it wishes to exercise its rights under the ROFP. That was and continues to be the fundamental objective of the ROFP.
- [148] With respect to ss. 35(2)(b) and (d), for the reasons set out above, the ongoing existence of the ROFP provides a practical benefit to PCL and its cancellation would injure or prejudice PCL's interests. Specifically, cancellation of the ROFP would deprive PCL of a central element of the consideration bargained for at the time it entered into the commercial arrangement with CEV, namely "further and better assurances".
- [149] Further, in light of my finding that the ROFP is not triggered by the Project, it cannot be said that the ROFP impedes the reasonable use of CEV's lands.
- [150] CEV's application to cancel or modify the ROFP is therefore dismissed.

Conclusion

- [151] In summary, I make the following findings:
- a) The ROFP has not been triggered;
 - b) CEV has not derogated from the grant made under the ROFP or diminished PCL's security;
 - c) CEV has not breached its duty of good faith;
 - d) PCL is not entitled to relief under s. 73 or s. 284 of the LTA; and
 - e) CEV is not entitled to cancellation or modification of the ROFP.
- [152] It follows that PCL's application is dismissed. CEV's application for judgment in its favour dismissing PCL's claims is granted, however its application for judgment on its counterclaim to cancel or vary the ROFP is dismissed.
- [153] If the parties cannot agree on costs, they may make arrangements to speak to the issue.
- "Skolrood J."

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