

CANADA / JUDGMENT

## Teck Metals Ltd. v. British Columbia

2020 BCSC 2065

COURT

Supreme Court of British Columbia

DECIDED

23 December 2020

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2020 BCSC 2065 Teck Metals Ltd. v. British Columbia

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Teck Metals Ltd. v. British Columbia,

2020 BCSC 2065

Date: 20201223

Docket: S197093

Registry: Vancouver

Between:

Teck Metals Ltd.

Petitioner

And

Her Majesty the Queen in the Right of the Province of British Columbia

Respondent

Corrected Judgment: The text of the judgment was corrected at paragraph 79 on January 4, 2021.

Before: The Honourable Madam Justice Gerow

Reasons for Judgment

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Place and Date of Hearing:

Vancouver, B.C.

September 30, 2020

Place and Date of Judgment:

Vancouver, B.C.

December 23, 2020

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## Introduction

[1] The petitioner, Teck Metals Ltd., appeals a decision of the Minister of Finance made on March 25, 2019, affirming the mining tax assessments for the petitioner's Highland Valley Copper Mine (the "HV Mine") for the 2011 and 2012 fiscal years. The appeal is brought under s. 27 of the Mineral Tax Act, R.S.B.C. 1996, c. 291 [MTA].

- [2] The dispute between the parties is whether the petitioner is entitled to 50% or 100% of the exploration costs it claimed on its mineral tax return.
- [3] During the years in question, the petitioner was in a partnership with NovaGold Canada Inc. in the operation of a different mine, the Galore Creek Mine (the "GC Partnership"). An operator of more than one mine in British Columbia in a year may elect to have exploration costs incurred in that year for one of the mines treated as exploration costs of one of the other mines for the purposes of determining its liability under the MTA for each mine.
- [4] The petitioner takes the position it is entitled to claim 100% of the exploration costs incurred for the Galore Creek Mine against the HV Mine. The petitioner submits that under the terms of the GC Partnership Agreement it was obligated to fund all the exploration costs for the Galore Creek Mine, and was entitled to claim those costs in its mineral tax returns.
- [5] The respondent takes the position the petitioner is only entitled to claim 50% of the exploration costs because it was an equal partner in the GC Partnership with NovaGold. NovaGold contributed the mineral claims, and all related infrastructure as its capital contribution for its 50% interest and the petitioner was to contribute monies to the GC Partnership as its capital contribution for its 50% interest. The GC Corporation, on behalf of the GC Partnership, incurred the explorations costs. Since the petitioner was a 50% partner in the GC Partnership and there was no agreement to the contrary, the petitioner was obligated for only 50% of the exploration costs incurred for the Galore Creek Mine.
- [6] For the reasons that follow, I conclude that the petitioner is entitled to claim 100% of the exploration costs for the Galore Creek Mine, and that the matter should be referred back to the Commission of Mineral Tax for reassessment.

#### Background Facts

- [7] The facts in this appeal are not in issue. The parties filed an agreed statement of facts.
- [8] During the relevant years, the petitioner operated two mines in British Columbia:
1. the HV Mine, which was operated exclusively by the petitioner; and
  2. the Galore Creek Mine which was a resource project undertaken by the petitioner and NovaGold through the GC Partnership.
- [9] The MTA requires each operator of a mine in British Columbia to pay taxes on its "proportionate share" of the profits derived from the mine for each fiscal year. In computing profits, an operator is entitled to deduct its proportionate share of exploration costs incurred in relation to the mine during that year.
- [10] In the Galore Creek Mine's 2010 and 2011 fiscal years, the GC Partnership reported exploration costs of \$2,964,301 and \$7,055,594 respectively.

- [11] An operator of more than one mine in British Columbia in a year may elect to have exploration costs incurred in that year for one of the mines treated as exploration costs of one of the other mines for the purposes of determining its liability under the MTA for each mine.
- [12] For the years under review, the petitioner elected to allocate its proportionate share of the Galore Creek Mine exploration costs from 2010 and 2011 to the HV Mine for its 2011 and 2012 fiscal years. When computing its tax obligations under the MTA, the petitioner claimed a 100% proportionate share of the Galore Creek Mine exploration costs.
- [13] In Notices of Assessment dated December 16, 2016 and December 23, 2017, the petitioner was notified that the commissioner of mineral tax had reduced the proportionate share the petitioner could deduct as exploration costs for Galore Creek Mine to 50% for the HV Mine's 2011 and 2012 tax years.
- [14] The petitioner appealed the commissioner's decisions to the Minister of Finance. In a letter dated March 25, 2019, the Minister affirmed the 2011 and 2012 assessments.

## Issues

1. What is the burden of proof for this statutory tax appeal?
2. Is the petitioner's proportionate share of the 2010 and 2011 Galore Creek Mine's exploration costs 50% or 100%.

### What is the Burden of Proof for this Appeal?

- [15] This is a statutory appeal pursuant to s. 27 of the MTA. Section 27 provides:
- (1) A decision of the minister under section 26 (4) may be appealed to the Supreme Court by way of a petition proceeding.
  - (6) An appeal under this section is a new hearing that is not limited to the evidence and issues that were before the minister.
  - (7) The court may
    - (a) dismiss the appeal,
    - (b) allow the appeal,
    - (c) vary the decision from which the appeal is made, or
    - (d) refer the decision back to the commissioner for reconsideration.

- [16] On a statutory appeal, questions of statutory interpretation are reviewed on a standard of correctness. An appeal under the MTA is a new hearing that is not limited to the evidence and issues that were before the Minister. Findings of fact are not reviewed on a "palpable and overriding error" standard as they would be in an appeal where the appellate court is reviewing the record of the proceedings below and new evidence is generally inadmissible.
- [17] On questions of fact in a tax appeal, the taxpayer has the onus of disproving, on a balance of probabilities, any assumptions or findings of fact made by the Minister or the commissioner in making the decisions. For the purposes of this appeal, there do not appear to be any facts in dispute. Instead the relevance of certain facts is in issue.
- [18] In *Northlands Properties Corporation v. British Columbia*, 2010 BCCA 177 at paras. 21-25, the Court discussed the approach to statutory appeals of tax assessments. The courts have recognized that there is an imbalance in knowledge about the taxpayer's affairs and that the taxpayer generally has much greater knowledge than the taxing authority. As a result, the taxing authority is entitled to make assumptions of fact as the basis for assessing a taxpayer. In an appeal of an assessment, the initial burden is on taxpayer to prove, on a balance of probabilities, that the assumptions on which the assessment is based are wrong. The Court at para. 32, set out the ways in which a taxpayer may challenge the taxing authority's assumptions:

The taxpayer has a number of ways of meeting the Minister's assumptions: *Pillsbury* at 5188. The taxpayer may

- (a) challenge the Minister's allegation that he did assume those facts,
- (b) assume the onus of showing that one or more of the assumptions was wrong, or
- (c) contend that, even if the assumptions were justified, they do not of themselves support the assessment.

[19] The Court at para. 35, summarized the approach to be taken on appeals of tax assessments:

In summary form, the proper approach on the appeal of a tax assessment may be described thus:

- i. What are the assumptions?
- ii. Have some or all of the assumptions been disproven? (i.e., has the taxpayer discharged the initial legal burden?)
- iii. If the taxpayer has successfully discharged the initial legal burden, then has the Crown shown that the assessment is valid? (i.e., has the Crown discharged the conditional legal burden?)

[20] Statements or conclusions of law are not to be pleaded as factual assumptions: *Huckleberry Mines Ltd. v. Her Majesty the Queen in the Right of the Province of British Columbia*, 2018 BCSC 1481 at para. 12.

- [21] The case law is clear that when the Minister pleads an assumption of fact, this has the effect of shifting the burden of proof to the taxpayer to disprove the assumed fact. Legal statements or conclusions are not to be included in the Minister's factual assumptions.
- [22] In this case, the factual assumptions relied on by the Minister include conclusions based on the interpretation of the GC Partnership Agreement. However, contractual interpretation involves issues of mixed fact and law. The Minister may assume the factual components of a conclusion based of mixed fact and law, but must make clear what the factual assumptions are. The parties can make arguments as to the legal test, and any questions of law will be determined by the Courts.
- [23] Insofar as the Minister relied on assumptions based on the interpretation of the GC Partnership Agreement, it is clear these assumptions are based on conclusions of mixed fact and law. Accordingly, the respondent is not entitled to any presumption as to their truth.

Is the Petitioner entitled allocate 50 % or 100% of the Explorations Costs for the Galore Creek Mine to the HV Mine?

Applicable Law

### Partnership Act

- [24] Partnerships in British Columbia are governed by the Partnership Act, R.S.B.C. 1996, c. 348. Section 2 defines partnership as "the relation which subsists between persons carrying on business in common with a view of profit". By clause 2.1 of the GC Partnership Agreement, the petitioner and NovaGold explicitly formed a general partnership.
- [25] A partnership, unlike a corporation, is not a separate legal entity. Provisions of the Partnership Act set out the legal rights and obligations among the partners and between a partnership and third parties. Section 7 provides that each partner is an "agent of the firm and the other partners for the purpose of the business of the partnership". Section 11 provides that each partner is "liable jointly with the other partners for all debts and obligations of the firm while he or she is a partner".
- [26] Section 27 sets out rules for determining the rights and duties of partners in relationship to the partnership. The rules may be varied by agreement between the parties. The relevant portions of s. 27 provide:

27 Subject to any agreement express or implied between the partners, the interests of partners in the partnership property and their rights and duties in relation to the partnership must be determined by the following rules:

- (a) all the partners are entitled to share equally in the capital and profits of the business and must contribute equally towards the losses, whether of capital or otherwise, sustained by the firm;

- (b) the firm must indemnify every partner in respect of payments made and personal liabilities incurred by him or her
- (i) in the ordinary and proper conduct of the business of the firm, or
- (ii) in or about anything necessarily done for the preservation of the business or property of the firm;
- (c) a partner making, for the purpose of the partnership, any actual payment or advance beyond the amount of capital that he or she has agreed to subscribe is entitled to interest at a fair rate from the date of the payment or advance;
- (d) a partner is not entitled, before the ascertainment of profits, to interest on the capital subscribed by him or her;
- (e) every partner may take part in the management of the partnership business;

#### The MTA Framework

[27] The following defined terms are contained in s. 1(1) of the MTA:

"operator" means, for each mine, the person who, either alone or with another person, is or was the owner, lessee, licensee, tenant or other holder of a right to win minerals from the mine but does not include a person who, under an arm's length agreement, has a right to receive only royalties paid or payable in cash;

"person" does not include a partnership;

"proportionate share" means, in relation to an operator, the share of any mineral product, benefit, cost or tax-related quantity to which the operator is legally entitled from, or for which the operator is obligated as a result of, the operation of a mine, or in the case of a quarry operator, one or more mines;

[28] Under the MTA, operators of a mine are subject to two types of tax:

- a) a minimum tax on the mine's current year's gross revenues less its current operating costs ("Tier 1 Tax"); and
- b) a tax on the mine's gross revenues less current costs and losses from previous years (and less the minimum tax) ("Tier 2 Tax").

[29] Tier 1 Tax provides for a minimum level of taxation where the operation of the mine produces a positive cash flow. Tier 2 Tax provides an annual tax on any income that exceeds the cumulative investment made in respect of the mine (plus a prescribed return on that investment).

- [30] In calculating the amounts subject to tax, operators are allowed to deduct certain costs, including "exploration costs." If an operator has more than one mine, they can allocate "exploration costs" from one mine to another mine: Mineral Tax Costs and Expenditures Regulation, B.C. Reg. 405/89, ss. 2(1)(b), 4 [Regulation].
- [31] There are limits on how much of the "exploration costs" can be allocated, some of which are:
- a) "Exploration costs" must be costs incurred for the purpose of determining the existence, location, extent, or quality of a mineral deposit in the Province;
  - b) An operator can only allocate its proportionate share of the "exploration costs" from a mine.
  - c) An operator can only allocate expenses net certain assistance it received in accordance with s. 10 of the MTA and section 4(3) of the Regulation. (i.e., Financial Assistance) in respect of the mine.
- [32] The "cumulative expenditure account" of a mine operator is relevant in computing tax payable under the MTA. The cumulative expenditure account is defined in s. 9(1)(b) of the MTA as including:
- (b) the operator's proportionate share of any prescribed costs and expenses incurred in the fiscal year of the mine for the purposes of earning gross revenue from the operation of that mine.

## Principles of Statutory Interpretation

- [33] The modern approach to statutory interpretation, involving a textual, contextual and purposive reading, is applicable to taxing statutes: *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20 at para. 22; *Grosvenor Canada Limited v. South Coast British Columbia Transportation Authority*, 2016 BCCA 106 at paras. 25-28.
- [34] In *Placer Dome Canada Ltd.*, the Court stated:

That is, "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (p. 578): see 65302 *British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. However, because of the degree of precision and detail characteristic of many tax provisions, a greater emphasis has often been placed on textual interpretation where taxation statutes are concerned: *Canada Trustco Mortgage Co. v. Canada*, [2005] 2 S.C.R. 601, 2005 SCC 54, at para. 11. Taxpayers are entitled to rely on the clear meaning of taxation provisions in structuring their affairs. Where the words of a statute are precise and unequivocal, those words will play a dominant role in the interpretive process.

## Petitioner's Position

- [35] The petitioner submits its position in this appeal is simple. The GC Partnership Agreement required the petitioner to fund 100% of the Galore Creek Mine exploration costs, and the petitioner did so. The GC Partnership Agreement also specifically provided that the tax consequences arising from these costs under the MTA and for income tax purposes were to be for the account of the Petitioner.
- [36] It follows that the petitioner was entitled to claim a 100% proportionate share of these costs, and the respondent's decision to reduce the Petitioner's proportionate share to 50% must be reversed.

## Respondent's Position

- [37] Under the GC Partnership Agreement, the petitioner was required to fund the GC Partnership's operations up to a certain point; i.e. the initial funding commitment.
- [38] The respondent takes the position that the initial funding commitment was an obligation on the petitioner under the GC Partnership Agreement to contribute capital to the GC Partnership; an investment. It was not an obligation for costs in respect of the Galore Creek Mine on its own.
- [39] The initial funding was contributed by the petitioner to the GC Partnership, as capital, for the purpose of obtaining a bundle of rights in the GC Partnership, which included the right to distributions of net revenue. The GC Partnership, through the GC Corporation, was liable for the exploration costs for the Galore Creek Mine. Since a partnership is not a person and therefore not an operator for purposes of the MTA, the operators of the Galore Creek Mine for purposes of the MTA were the petitioner and NovaGold.
- [40] The respondent says that s. 27 of the Partnership Act operates to make all partners jointly obligated for costs, and barring an agreement between the partners, the partners must contribute equally to the losses suffered by the partnership. The respondent argues that the GC Partnership Agreement does not say that one partner is obligated for all the Galore Creek Mine exploration costs, and therefore does not displace s.27 of the Partnership Act. The respondent asserts that as a result the petitioner and NovaGold are each liable, as between themselves, for 50% of the Galore Creek Mine exploration costs, as they are each obligated for 50% of the losses and costs of the GC Partnership.
- [41] The respondent submits that in accordance with the definition "proportionate share" in section 1, the petitioner was obligated for 50% of the GC Exploration Costs incurred in respect of the GC Mine for its fiscal years ending December 31, 2010 and December 31, 2011. This is consistent with the GC Partnership Agreement, principles of partnership law, and the text, history, and context of the definition "proportionate share" in section 1 and the MTA.

## Analysis

- [42] As noted earlier, on questions of fact in a tax appeal, the taxpayer has the onus of disproving, on a balance of probabilities, any assumptions or findings of fact made by the Minister or the commissioner in making the decisions. In this appeal, the facts are not in dispute.
- [43] Rather, the petitioner and the respondent disagree about the correct interpretation of the GC Partnership Agreement and the term "proportionate share" in the MTA.
- [44] The petitioner takes the position that the GC Partnership Agreement makes it clear that the petitioner was obligated to pay the exploration costs for the Galore Creek Mine.
- [45] The respondent says the GC Partnership Agreement does not obligate the petitioner to pay these costs directly. Instead, the respondent argues the petitioner was obligated to make contributions to the GC Corporation, which in turn, incurred the costs on behalf of the GC Partnership. The respondent asserts that the petitioner's initial funding commitment was no different than NovaGold's contribution of the assets. In both cases, a partner made a contribution to the GC Partnership. These contributions allowed the GC Partnership to carry on business and earn a stream of revenue from the Galore Creek Mine.
- [46] As noted by the respondent, the definitions of certain terms in the GC Partnership Agreement do not correspond to how those terms are used and defined in the MTA. For example, the agreement defines the GC Corporation as the "Operator". This definition is not consistent with the meaning of "operator" used in the MTA because the GC Corporation acted as an agent, nominee and bare trustee for the partnership pursuant to article 5.12 of the agreement. Under the MTA the definition of operator does not include a partnership.
- [47] Partnership interest is defined in article 1.1 of the GC Partnership Agreement as follows:
- "Partnership Interest" means, with respect to any Partner, an interest in the Partnership based on its Participating Percentage at any particular time including: (a) that Partner's status as a Partner; (b) that Partner's share of unpaid Distributions, or the right to receive Distributions from the Partnership; (c) all other rights, benefits and privileges enjoyed by that Partner in its capacity as a Partner under the Act, this Agreement or otherwise; and (d) all obligations, duties and liabilities imposed on that Partner in its capacity as a Partner under the Act, this Agreement or otherwise, including any indebtedness to the Partnership or obligations to make Contributions.
- [48] In other words, a partner's interest in the partnership can vary dependent on a number of factors, and is not a fixed percentage, i.e. a 50/50 split, as suggested by the respondent. Likewise, the GC Partnership Agreement is clear that a partner's obligations, duties and liabilities may vary from other partners.
- [49] Article 2.3(a) defines the business of the Partnership:

- (a) Business of the Partnership. The business of the Partnership is hereby agreed to be limited to:
- (i) the further exploration, development, construction and operation of the Galore Creek Assets including, without limitation, the development and construction of the Galore Creek mine, mill and all related infrastructure, all in accordance with the Construction Plan and Budget (the "Project");
  - (ii) all matters relevant or ancillary to the Project; and
  - (iii) such other business endeavours, acts or activities as the Partners may determine by Unanimous Approval

[50] Article 4 deals with agreed upon contributions by the partners.

[51] Article 4.1 required NovaGold to contribute the mineral claims and all related infrastructure, equipment, machinery and power transmission rights purchased or constructed in existence at the time to the GC Partnership. It states:

Immediately following execution of this Agreement, NovaGold and the Partnership will enter into the Contribution Agreement pursuant to which NovaGold will transfer to the Partnership, or the Operator as nominee to the Partnership, on the terms and conditions contained therein, the Galore Creek Assets in exchange for the assumption by the Partnership of the Galore Creek Liabilities and the issuance to NovaGold of a fifty percent (50%) Partnership Interest in the Partnership.

[52] While article 4.1 refers to NovaGold receiving an initial "50% Partnership Interest", this initial interest is subject to change in accordance with other terms of the GC Partnership Agreement, according to which NovaGold's interest could increase. For example, the petitioner's interest could be relinquished if it failed to satisfy its initial funding commitment or its interest could be diluted if it failed to satisfy the ongoing contribution demands as set out in article 4.7.

[53] Article 4.2(a) required the petitioner to fund \$520 million to develop the Galore Creek Mine, referred to as the initial funding commitment.

- (a) Initial Funding Commitment. Subject to paragraph (d) below, Teck hereby unconditionally agrees to fund five hundred twenty million five hundred thousand dollars (\$520,500,000) of Project expenditures (the obligation to fund such amount being the "Initial funding Commitment"). The Initial Funding Commitment is subject to adjustment in accordance with paragraph (b) below.

[54] Article 4.2(c) provided:

- (c) Satisfaction of Commitment. Subject to Section 9.8, to satisfy the Initial Funding Commitment, Teck shall contribute seventy seven million six hundred and six thousand two hundred seventy eight dollars (\$77,606,278) as capital to the Partnership on the Effective

Date and shall thereafter contribute as capital, monthly as required, one hundred percent (100%) of cash required by the Partnership in accordance with Contribution Demands made by the Operator following the Effective Date until the Initial Funding Commitment has been satisfied.

[55] Article 4.3 provides that the participating percentage of each partner is subject to adjustment:

The Participating Percentage of each Partner as of the Effective Date is set forth on Schedule "B". Thereafter, the Participating Percentage of a Partner shall be adjusted from time to time in accordance with this Agreement and the Operator shall revise Schedule "B" accordingly and sign and attach a dated copy of such Schedule to this Agreement, which revised Schedule "B" shall supersede and replace all earlier versions of Schedule "B" and become the governing Schedule "B".

[56] Schedule "B" specifies that the Participating Percentage as of August 1, 2007, of the petitioner and NovaGold is 50.0% each.

[57] Article 4.4 provides:

Following the expenditure by Teck of the Initial Funding Commitment in accordance with Section 4.2, all future Contribution Demands of the Partnership shall be funded by NovaGold and Teck pro rata in accordance with their respective Participating Percentages from time to time, subject to Section 4.7. All Contribution Demands shall be funded within ten Business Days of receipt. All such Contributions shall be made in accordance with Section 4.5.

[58] Article 4.5(a) addresses the issuance of Contribution Demands:

(a) Contribution Demands. The Operator shall issue or cause to be issued a written notice to each Partner (a "Contribution Demand") for payment of Contributions to be made in accordance with Sections 4.2(c) and 4.4, in such amounts as shall be required to finance the Business of the Partnership including exploration, development, construction, bonding by the Partnership and payments required under the Tahltan Agreement in accordance with the Construction Plan and Budget, the Approved Annual Budget most recently approved by the Management Committee, AFE duly approved by the Management Committee or as required to meet emergency expenditures incurred in accordance with Section 5.4(e). Contribution Demands shall be made in advance in amounts such that at all times the Partnership has a maximum of 60 days and a minimum of 30 days working capital.

[59] The concept of "Contribution Demands" created a mechanism to facilitate the partner's timely and ongoing performance of their obligations to provide the funds required for project costs.

[60] Article 4.5(d), provides that contributions are credited to the respective partners' capital accounts:

- (d) Capital Account. All amounts received by the Partnership pursuant to Sections 4.1, 4.2 and this Section 4.5, whether received prior to, on or after the date specified in Section 4.5(a), shall be credited to the respective Partner's Capital Account in accordance with Section 4.9. All amounts received by the Partnership from a Partner after the date specified in Section 4.5(c) shall be accompanied by interest on such overdue amounts, which interest shall be payable to the Partnership and shall accrue from and after such specified date at a rate per annum equal to five (5%) percentage points over the Prime Rate.
- [61] Article 4.7(a) sets out what would happen if the petitioner failed to fulfill its funding commitment:
- (a) Initial funding Commitment. If Teck does not fund a Contribution Demand during the period of its Initial funding Commitment and such default remains unremedied for five Business Days following receipt of a written notice of default, Teck will, first, forgive any amounts owed to Teck under CEE Loans and, immediately thereafter, forfeit any amounts previously paid and relinquish its Partnership Interest and all rights related thereto. In such circumstances, Teck will, if requested by NovaGold, transfer its Partnership Interest and all rights related thereto including any CEE Loans to a party designated by NovaGold for consideration of one dollar (\$1.00).
- [62] In other words, the petitioner's ongoing interest in the GC Partnership was contingent on it fulfilling its initial funding commitment.
- [63] Article 4.9 provides for the keeping of capital accounts for each partner to keep track of the contributions made by each partner.
- [64] The GC Partnership Agreement provides that once the Galore Creek Mine became profitable, distributions to the partners are generally to be made in proportion to their participating percentage. However, article 8.1(c) provides that NovaGold is to receive a bonus allocation in certain circumstances.
- [65] Article 9.7 sets out the partners' shares of the taxable income, Canadian exploration expense (CEE), taxable losses, Canadian development expenses (CDE), and other amounts from the GC Partnership for income tax purposes:
- (a) Taxable Income. The Partners' shares of the Taxable Income for a Fiscal Year from all sources of income of the Partnership for the purposes of the Tax Act shall be as follows:
- (i) first, to the extent of income from property allocable to a particular Partner as an Insolvent Partner under Section 8.1(a), 100% to the particular Partner;
- (ii) second, to the extent of income from all other sources, 100% to NovaGold, but only to the extent of cash distributable to NovaGold pursuant to Section 8.1(c) in the fiscal Year or any previous fiscal Year, and only to the extent of the excess of such cash over amounts previously allocated to NovaGold pursuant to this Section 9.7(a)(ii) in any previous fiscal Years; and

(iii) third, to the extent of income from all other sources in excess of the foregoing, to each Partner in proportion to its Participating Percentage at the end of the Fiscal Year.

(b) CEE. The Partners' share of CEE incurred in a Fiscal Year by the Partnership shall be as follows:

(i) first, 100% to Teck to the extent of the amount by which (x) the Initial Funding Commitment exceeds (y) the aggregate amount of CEE, CDE and Taxable Loss allocated to Teck for all preceding Fiscal Years; and

(ii) second, to the extent of amounts in excess of the foregoing, to each Partner in proportion to its Participating Percentage at the end of the fiscal Year.

(c) Taxable Losses. The Partners' shares of the Taxable Loss for a Fiscal Year from all sources for the purposes of the Tax Act shall be as follows:

(i) first, if Teck is a Partner at the end of the Fiscal Year, 100% to Teck to the extent of the amount by which (x) the amount of the Initial Funding Commitment exceeds (y) the aggregate amount of CEE allocated to Teck for the Fiscal Year and all preceding fiscal Years and of CDE and Taxable Loss allocated to Teck for all preceding Fiscal Years; and

(ii) second, to the extent of amounts in excess of the foregoing, to each Partner in proportion to its Participating Percentage at the end of the Fiscal Year.

(d) CDE. The Partners' shares of CDE incurred in a Fiscal Year by the Partnership shall be as follows:

(i) first, 100% to Teck to the extent of the amount by which (x) the amount of the Initial Funding Commitment exceeds (y) the aggregate amount of CEE and Taxable Loss allocated to Teck for the Fiscal Year and all preceding Fiscal Years and of CDE allocated to Teck for all preceding Fiscal Years; and

(ii) second, to the extent of amounts in excess of the foregoing, to each Partner in proportion to its Participating Percentage at the end of the Fiscal Year.

(e) Other Amounts. All other amounts required to be allocated to the Partners for a fiscal Year for purposes of the Tax Act shall be shared by the Partners in proportion to their Participating Percentages at the end of the fiscal Year.

(f) Capital Cost Allowance. Unless otherwise agreed by Unanimous Approval, the Partnership will claim the maximum allowable capital cost allowance and other discretionary amounts in computing its Taxable Income and Taxable Loss in each Fiscal Year and will make the long-term project election under subsection 13(29) of the Tax Act where permitted by the Tax Act.

[66] Generally, under article 9.7(a), taxable income is allocated in accordance with the allocation to the partners of cash distributions.

- [67] Generally, under articles 9.7(b), (c), and (d), CEE, taxable losses and CDE are allocated first to the petitioner to the extent of the initial funding commitment, and thereafter in accordance with Participating Percentages. In other words, the allocation of these costs or losses for tax purposes tracks the funding of the expenditures by each partner.
- [68] Article 9.10(b) addresses the partners' responsibilities for payment of mineral taxes. As with the income tax allocations in article 9.7, the allocation of the entitlement to claim expenses for purposes of the MTA tracks the funding of the expenditures by each partner:
- (b) Mineral Taxes. Each Partner shall file its own mineral tax returns and, to the extent permitted under the applicable rules, the tax recognition for costs and expenses related to the Project shall be credited to the Partners in accordance with their respective funding of Partnership expenditures. Where (i) Teck has relinquished its Partnership Interest pursuant to Section 4.7(a) or (ii), the Partnership Interest of a Partner (the "Selling Partner") has been reduced pursuant to Section 4.7(b)(i) then at the request of, in the case of (i), NovaGold and, in the case of (ii), another Partner (the "Acquiring Partner") whose Partnership Interest has increased pursuant to Section 4.6(b)(i) concurrently with a reduction described in (ii), a joint election in the form and within the time prescribed shall be filed where permitted by (iii) Teck and NovaGold or (iv) the Selling Partner and the Acquiring Partner, as the case may be, under the Mineral Tax Disposition of a Mine Regulation to the Mineral Tax Act.
- [69] It is clear from the GC Partnership Agreement that the petitioner was obligated to pay 100% of the Galore Creek Mine exploration costs. The fact the petitioner was required to pay those expenses is further acknowledged in article 9.10(b) of the GC Partnership Agreement which sets out the parties' agreement that the petitioner was entitled to claim 100% of these costs for purposes of the MTA.
- [70] It is apparent from reviewing the GC Partnership Agreement that each partner had respective rights and obligations, including:
- the petitioner had the obligation to fund certain expenditures pursuant to the initial funding commitment; and
  - NovaGold was entitled to a Bonus Allocation of more than 50% if the mill efficiency or ore price resulted in gross revenue in excess of the defined threshold.
- [71] As set out the respondent asserts that the GC Partnership Agreement only obligates the petitioner to pay 50% of the Galore Creek Mine exploration costs. However, I agree with the petitioner that the treatment of the petitioner's expenditures pursuant to the initial funding commitment as capital contributions for accounting purposes does not change the nature of expenditures the petitioner was obligated to pay. Nor does the fact that the partners were required to fund expenditures on a 50/50 basis after the initial funding commitment have any bearing on the treatment of expenditures made pursuant to this commitment.

- [72] The respondent asserts that the definition of "proportionate share" in the MTA is clear and that multiple operators of one mine cannot agree to allocate costs amongst themselves for tax purposes regardless of whether they were obligated for such costs.
- [73] As set out earlier, proportionate share is defined in s. 1(1) of the MTA as the "the share of any mineral product, benefit, cost or tax-related quantity to which the operator is legally entitled from, or for which the operator is obligated as a result of, the operation of a mine, or in the case of a quarry operator, one or more mines. I agree that the definition limits the costs operators can claim only to those costs to which they are legally bound.
- [74] The respondent's "Mineral Tax Handbook" contains guidelines for completing a Mineral Tax Return. It confirms that the meaning of the operator's "proportionate share" of costs is to be determined in accordance with the agreement with the other operators of the mine:

Proportionate Share of the Mine Reported on this Return - This is the share of revenue to which a mine operator is entitled and the costs the operator is obliged to pay under the terms of an agreement with other operators of the mine.

- [75] "Obligated" is not defined in the MTA or the Regulation. The respondent relies on the following Merriam-Webster online dictionary defines obligated as:

obligated; obligating (transitive verb)

1: to bind legally or morally: Constrain

2: to commit (something, such as funds) to meet an obligation

- [76] The respondent's argument is limited to the first portion of the definition and based on its interpretation of the GC Partnership Agreement.
- [77] However, as set out earlier, it is clear from the GC Partnership Agreement that the petitioner was required to fund 100% of the Galore Creek Mine exploration costs.
- [78] The respondent has not provided any authority for the proposition that partners are not permitted to allocate expenses or revenues by agreement. There is nothing in the MTA or the authorities that suggests a taxpayer is not entitled to deduct exploration costs it actually funded. In this case, the GC Partnership Agreement allowed the petitioner to claim the amounts it had funded. The evidence is that NovaGold has not claimed any of the costs funded by the petitioner.
- [79] I agree with the petitioner, that in the context of a partnership, allocating the tax consequences to the partner who actually funded those expenditures is a rational approach, consistent with the MTA. This is also consistent with the GC Partnership Agreement which provides that the petitioner, as the partner who incurred the exploration costs, is able to claim 100% of those costs for tax purposes.

## Conclusion

[80] Having considered the submissions, the chambers record, and the case law, I conclude that the petitioner was obligated to pay 100% of the Galore Creek Mine exploration costs within the meaning of the MTA.

[81] Accordingly, the petitioner's appeal of the Minister's decision of March 25, 2019 is allowed.

[82] I refer the matter back to the commissioner of mineral tax in accordance with section 27(7) (d) of the MTA for reassessment the basis that:

1. the petitioner is entitled to allocate the 2010 and 2011 Galore Creek Mine exploration costs to the HV Mine's 2011 and 2012 fiscal years on the basis that the petitioner's "proportionate share" of such costs is 100%; and
2. the 2010 and 2011 exploration costs allocated to the HV Mine's 2011 and 2012 fiscal years are to be reduced by the amount of the financial assistance the petitioner received.

[83] The petitioner is entitled to its costs of the appeal.

"Gerow J."

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