CITATION: *Lithium Royalty Corp. v. Orion Resource Partners et al.*, 2023 ONSC 4664
COURT FILE NO.: CV-21-00656830-0000
DATE: 20230815

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
LITHIUM ROYALTY CORPORATION	)	*Brendan Morrison and Katherine Costin*, for the Applicant
Applicant	)	
	)	
– and –	)	
	)	
ORION RESOURCE PARTNERS, TRIDENT ROYALTIES PLC and LITHIUM AMERICAS CORPORATION	)	*Andrew Gray, Rachel Saab and Alexandra Lawrence*, for the Respondent, Orion Resource Partners
	)	
Respondents	)	
	)	
	)	**HEARD: December 13 – 16, 2022**

VELLA J.

REASONS FOR DECISION – TRIAL OF AN ISSUE

[1] On November 22, 2022, I ordered that a trial of an issue would proceed on the key issue of whether or not a contract was made as between Lithium Royalty Corporation ("LRC"), as purchaser, and Orion Resource Partners and/or related entities (collectively referred to as "Orion") as vendor. At issue was the purchase of an existing overriding gross royalty interest in the revenues of a lithium mining project located in Nevada (the "Royalty").

Procedural Background

[2] The procedural background is important because Orion Resource Partners ("ORP") takes the position that, as a non-suable entity, it has been improperly named, the correct entities (the actual holders of the Royalty) have not attorned to this court's jurisdiction and this court lacks jurisdiction *simpliciter*. Therefore, ORP submits that the matter should be dismissed on this basis alone.

[3] This proceeding was started by way of Notice of Application by LRC. The named Respondents were originally ORP and Lithium Americas Corporation ("LAC"). By Order dated

April 7, 2021, Belobaba J. granted leave to amend the Application to add Trident Royalties plc ("Trident") as a respondent, without prejudice to Trident challenging this court's jurisdiction. Trident was the party who ultimately bought an interest in the Royalty which is at issue in this proceeding and hence was added by LRC.

[4] LAC was named as it has and owns the subject lithium mining project, described by the parties as the Thacker Pass Project. It takes no position in this proceeding.

[5] On June 4, 2021, the matter came before me for a hearing on the merits of the application. At that appearance, Trident advised that it was moving to dismiss the application as against it, on the basis that this court lacked jurisdiction *simpliciter*. LRC advised that it was seeking to further amend the Notice of Application. ORP took the position that the application should be converted to an action because the issue of contract formation between it and LRC was based, in large part, on a videoconference call that occurred between Orion's representatives and LRC's representatives which, based on the affidavit material filed at that time, evidenced diametrically opposed views of what occurred.

[6] Accordingly, I heard Trident's preliminary motion on jurisdiction, adjourned LRC's motion to amend to be heard in writing and adjourned the issue of contract formation to a trial of an issue. A case conference was convened on June 24, 2021 at which timelines and other procedural matters were dealt with on consent, including a timeline for the trial of an issue.

[7] On November 22, 2022, I released my Reasons for Decision on Trident's jurisdiction motion (the "Jurisdiction Reasons"). I found that this court lacked jurisdiction *simpliciter* over Trident and dismissed the application as against it. I also granted leave to LRC to further amend its Notice of Application. I found, *inter alia*, that there was not a good arguable case that the alleged contract was made in Ontario (at para. 68, Jurisdiction Reasons). On the other hand, I found that if the contract was valid and enforceable, it contained a provision that Ontario law was to govern, and accordingly the application was validly served out of province under r. 17.02(f)(ii). I found, however, that LRC had not raised a good arguable case under any of the four presumptive connecting factors established by *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572 and repeated in *Lapointe Rosenstein Marchand Melancon LLP v. Cassels Brock & Blackwell LLP*, 2016 SCC 30, [2016] 1 S.C.R. 851, existed as against Trident (para. 94, Jurisdiction Reasons) and dismissed the application against Trident.

[8] At para. 95 of the Jurisdiction Reasons, I noted that the named respondent, ORP, had not disputed the jurisdiction of this court to adjudicate the claims against it and had, in fact, filed affidavits in response to LRC's application on the merits of the contract claim.[1]

[1] See also, para. 97 of the Jurisdiction Reasons in which I note that Orion Resource Partners has voluntarily attorned to the jurisdiction of this court.

[9] I also directed that this matter be converted to an action. The parties filed affidavits and were permitted to lead brief (time limited) *viva voce* evidence in chief. Fulsome cross examinations, followed by re-examinations, were done at trial. A hearing protocol was filed on consent at trial.[2]

[10] By endorsement dated July 14, 2022, a timetable was established to advance this matter to what the parties have called a "hybrid application", in part recognizing that the trial of an issue would only deal with the issue of whether or not a contract to purchase the Royalty had been formed and was enforceable. I rejected LRC's suggestion that the trial of an issue be expanded to include damages, because this was premature as documentary discovery on the issue of damages had not occurred, and damages was not the subject of the affidavits being relied upon by these parties.

[11] I further determined that LRC's motion to further amend the title of proceedings to reflect the names of the correct respondents as the ostensible holders of the Royalty (the "proposed Orion respondents") would be heard at the outset of the hearing on the merits of the trial of an issue, as would be a motion by ORP disputing jurisdiction of this court over the proposed Orion respondents, but that I would reserve on these two motions and proceed with the trial of an issue on its merits.[3]

ISSUES and DISPOSITION

[12] The issues to be determined are:

(a) Should LRC be granted leave to add the proposed Orion respondents either as a misnomer or an amendment to the pleadings?

(b) Have the proposed Orion respondents voluntarily attorned to the jurisdiction of this court? If not, does this court have jurisdiction *simpliciter* over them?

(c) Was an enforceable contract formed as between LRC and Orion for the purchase by LRC of an 85% interest in the existing royalty from Orion?[4]

[13] For the reasons that follow, I find that:

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[2] Attached as Schedule 1 to these Reasons is the Hearing Protocol. By agreement, the expert affiant witnesses were not called to give *viva voce* evidence.

[3] Reiterated in my Endorsement dated August 10, 2022.

[4] For clarification, the reference in these Reasons to "Orion" includes the proposed Orion respondents. When the reference is to "Orion Resource Partners" or "ORP" this is intended to reflect the named Respondent only.

(a) LRC is granted leave to add the proposed Orion respondents as misnomers, or alternatively, under r. 26 by way of amendment;

(b) The proposed Orion respondents have voluntarily attorned to the jurisdiction of this court through the actions of its umbrella organization, ORP. However, had there been no consent-based attornment, ORP's motion on behalf of the proposed Orion respondents would have succeeded as this court lacks jurisdiction *simpliciter*;

(c) A valid and enforceable contract for the purchase by LRC of an 85% interest in the Royalty was concluded with respect to all of the essential terms with Orion, and is not subject to or, alternatively, does not violate Nevada's *Statute of Frauds*.

Overview Chronology – Undisputed Facts

[14] LRC is an Ontario corporation and was founded in 2018 as an investment fund which is dedicated to investing in revenue royalties generated by lithium mining projects.

[15] Orion is a group of mining finance businesses. Orion has various international offices and manages a number of funds for its investors. Of particular relevance, ORP is not a legal entity but, as described by its witness, Philip Clegg, a "part of the Orion group of mining finance businesses". Mr. Clegg used the term "Orion" to describe the group of mining finance businesses (or funds) in his evidence.

[16] In or around June 2019, Orion initiated a bid process to sell its Royalty interest in a lithium mine at Thacker Pass. The Royalty is a secondary revenue royalty meaning that it derives from an existing royalty. It provides the holder with a percentage of revenues generated by lithium mined at the Thacker Pass Project. LRC submitted a bid that complied with phase 1 of the process called the Indicative Proposal. The Indicative Proposal set out a number of key terms and conditions that Orion required to be submitted, in order to assess which competing bids, if any, would move on to phase 2 called the Definitive Proposal. LRC submitted an Indicative Proposal but was not invited to Phase 2. In the end, none of the bids were successful and the bid process terminated.

[17] Then, in August 2020, Orion initiated a further but substantially the same bid process to again try to sell its Royalty interest in the Thacker Pass Project. Again, LRC submitted a bid and again it was rejected at the Indicative Proposal phase. As before, none of the bids were successful and the Royalty remained unsold.

[18] In late 2020, Orion's fund which owned the Royalty was close to expiring, and Orion either had to liquidate the asset or transfer it to another Orion managed fund. As a result, Orion's Portfolio Manager at the time, Douglas Silver, advised Ernie Ortiz, LRC's President, that he was retiring, and if LRC was still interested in buying the Royalty, Mr. Ortiz should contact his successor for this particular fund, Philip Clegg.

[19] On December 21, 2020, Mr. Ortiz had a discussion with Mr. Clegg which, according to Mr. Clegg, was about potential transactions involving various battery minerals, including lithium.

Following that conversation, Mr. Ortiz sent a written general presentation about LRC and its projects to demonstrate its ability to, and interest in, buying the Royalty. Mr. Clegg suggested that Mr. Ortiz contact him in the new year to continue their discussion.

[20] On or about January 8, 2021, negotiations began between ORP and LRC with respect to the Royalty.

[21] From approximately January 8, 2021 to January 28, 2021 there was a series of communications, verbal and in writing, between LRC's team and ORP's team relating to the Royalty.

[22] LRC offered to pay USD $20 million for 100% of the Royalty.

[23] The negotiations progressed to a videoconference call on January 20, 2021, between Mr. Clegg and his associate Mr. Wrotniak on behalf of Orion ("Orion's Team"), and Mr. Levinsky, Mr. Wellings and Mr. Ortiz, on behalf of LRC ("LRC's Team"). The content of this videoconference is hotly contested. According to LRC's Team, Mr. Clegg made a counteroffer to sell 85% of Orion's interest in the Royalty for USD $18.7 million, based on Orion's revised increased valuation of USD $22 million for the entire Royalty. According to Orion's Team, Mr. Clegg made no such offer and furthermore never indicated he had authority to make a binding offer to sell the Royalty or any part of it.

[24] Following the videoconference call on the same day, Mr. Ortiz sent an email stating "[w]e accept your offer" and that a binding term sheet will follow. Mr. Clegg then sent a reply email on the same day stating, simply, "OK, sounds good".

[25] On January 22, 2021, LRC sent a proposed term sheet to Orion and invited comment. After a telephone call between the two, Orion sent a marked-up version of LRC's term sheet on January 26, 2021, back to LRC.

[26] On January 26, 2021, Orion received an indication of interest in purchasing the Royalty from another company, Trident.

[27] On January 27, 2021, Orion advised LRC that Orion will consider whether it prefers a sale of the Royalty split into two or an assignment of the Royalty. Orion also advised LRC that it had received and was considering an "unsolicited proposal" for the Royalty.

[28] On January 27, 2021, LRC sent a reply email to Orion stating that LRC considered that it had already reached an enforceable agreement with Orion for the purchase of the 85% stake in the Royalty for fixed consideration of USD $18.7 million.

[29] On January 28, 2021, LRC returned the term sheet, as revised by Orion, executed. Orion did not sign the term sheet and entered into a deal with Trident.

[30] On March 19, 2021, Trident announced the acquisition of a 60% stake in the Royalty.

Issue 1: Should LRC be granted leave to add the proposed Orion respondents?

[31] Issues 1 and 2 are interrelated. The proposed Orion respondents have raised this court's jurisdiction over them in response to LRC's motion to add them as parties.

[32] LRC moves under r. 5.04(2) for leave to correct a misnomer, *nunc pro tunc*, and add the following as respondents: Orion Mine Finance Fund I, Alnitak Holdings, LLC, Bellatrix Ltd. and Orion Mine Finance (Master) Fund LLP, collectively referred to as the proposed Orion respondents. In the alternative, LRC moves under r. 26 for leave to amend its Notice of Application to add the proposed Orion respondents.

[33] Orion resists and submits that LRC knew or ought reasonably to have known who the holders of the Royalty were and should be denied leave under both rules.

[34] The test for misnomer is set out in r. 5.04(2):

> At any stage of a proceeding the court may by order add, delete or substitute a party or correct the name of a party incorrectly named, on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

[35] LRC must establish that it meets what has been referred to in the case law as the "litigating finger" test. If LRC satisfies this first part of the test, the court must determine whether there is a good reason for the court to deny exercising its discretion to correct the misnomer.

[36] Under the litigating finger test, LRC must demonstrate that it intended to name the proposed Orion respondents, and that the proposed Orion respondents knew that they were the intended respondents in the application (*Stekel v. Toyota Canada Inc*., 2011 ONSC 6507, 107 O.R. (3d) 431, at para. 24).

[37] Under r. 5.04(2), the court can add, rather than substitute, parties. The litigating finger can point "at more than one person or entity" (*Suarez v. Minto Developments Inc*., 2009 CanLII 72100 (ONSC), at paras. 4-5).

[38] Under the second branch of this rule, the court will exercise its discretion to deny the motion if there is "real and non-compensable prejudice" to the proposed Orion respondents such as death of a key witness or the destruction of material documents by reason of the lapse of time (*Stekel* at paras. 10, 20), or where the proposed added respondents have been misled.

[39] The evidence establishes that the holders of the Royalty, at the material time, were Orion Mine Finance Fund I ("Fund I") and Alnitak Holdings, LLC. The shares of Alnitak Holdings, LLC are, in turn, wholly owned by Bellatrix Ltd., and the shares of Bellatrix Ltd. are wholly owned by Orion Mine Finance (Master) Fund LLP. All of these funds are ultimately part of the Orion businesses that operate under the business rubric of ORP.

[40] More specifically, Fund I includes a Bermuda limited partnership, Delaware and Bermuda limited partners, a Bermuda-incorporated general partner and a Bermuda-incorporated investment

manager which is advised by the entity that employs Mr. Clegg (ORP) and another advisor internal to Orion. The limited partnership's assets include the shares of Bellatrix Ltd., a Cayman Islands corporation, which in turn owns the shares of Alnitak. Fund I is in turn owned by other Orion incorporated businesses.

[41] The evidence also establishes that ORP is not a legal entity. Rather it is a business name used by Orion.

[42] Orion notes that the conveyance document underlying the existing royalty which LRC purports to have bought was registered on title and therefore readily ascertainable through due diligence. The registered Royalty Assignment and Deed states that the Royalty was conveyed by MF2 LLC to Alnitak Holdings, LLC, a Delaware limited liability company. Furthermore, in LAC's public disclosure filings, it lists Fund I as the Royalty holder. Therefore, LRC ought to have known who the correct Royalty holders were.

[43] It is clear from the Notice of Application and the Amended Notice of Application that the litigating finger was always pointed at the holders of the Royalty. It is further clear from the affidavits filed in this matter from both parties that the subject matter of the application was the purported purchase by LRC of the Royalty from the "Seller". It was reasonable for LRC to believe that ORP was the holder of the Royalty based on the draft and partially executive term sheet and various documents.

[44] In addition, the material correspondence (letters and emails) to LRC relating to the impugned transaction were on ORP's letterhead or name, and the material dealings with Mr. Clegg were done under Mr. Clegg's representation that he represented ORP in relation to the proposed Royalty transaction as evidenced by ORP's name under his electronic signature. The bid letters for the 2019 and 2020 auction processes were sent by Mr. Silver, Mr. Clegg's predecessor, under ORP's letterhead as well.

[45] On the other hand, none of the proposed Orion respondents were expressly identified by ORP as the holders of the Royalty until this litigation was commenced, at which time ORP then disclosed this information.

[46] For all of these reasons, it was reasonable for LRC to have named ORP as the respondent in this Application, and not have discovered the true holders of the Royalty until after this litigation commenced. It must be remembered that at the outset of this litigation, LRC was seeking, *inter alia*, specific performance and to its knowledge the Royalty had not yet been sold. Accordingly, time was of the essence in commencing this proceeding.

[47] Furthermore, the proposed Orion respondents have not put forward any evidence of prejudice, much less undue prejudice. Instead, Orion came to this hearing with its affidavits prepared, cross-examinations conducted, and has fully responded to the allegations in the Amended Notice of Application on the merits. There is no suggestion that the proposed Orion respondents would have adduced different or further evidence or made different arguments and submissions had they been properly named. The proposed Orion respondents were aware of LRC's motion to add them by the time of the Jurisdiction Motion and well in advance of this trial

of an issue. It is a reasonable inference that the proposed Orion respondents were privy to ORP's response to this application on the merits. The proposed Orion respondents were well aware of the litigation, and the positions and evidence for and at the hearing, as if they were in the courtroom. While there was no evidence as to who retained counsel for ORP, it is a reasonable inference that counsel was retained by or on behalf of the proposed Orion respondents to represent ORP and, by extension, the proposed Orion respondents.

[48] It should be noted that ORP did not indicate that it would request an adjournment if leave was granted.

[49] Accordingly, leave is granted, *nunc pro tunc*, to LRC to add the proposed Orion respondents to the Amended Notice of Application under r. 5.05(2).

[50] In the alternative, leave is granted to amend the title of proceedings to add the proposed Orion respondents.

[51] The test for granting leave to amend under r. 26:

> On a motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated by costs of an adjournment.

[52] In *Mazzuca v. Silvercreek Pharmacy Ltd.*, 2001 CanLII 8620 (ONCA), 56 O.R. (3d) 768, at para. 23, the court stated that "the combined effects of Rules 26.01, 5.04(2) and 1.04(1) is to focus the analysis on the issue of non-compensable prejudice, in the wider context of the requirement that a liberal construction be placed on the rules to advance timely and cost-effective justice in civil disputes".

[53] Under r. 26.01 the burden lies on Orion to prove prejudice that will justify denying leave to amend, given the mandatory language of this rule or alternatively to show that if it is plain and obvious that the causes of action are not legally tenable as against the proposed Orion respondents.

[54] For the reasons given in relation to lack of prejudice under r. 5.04(2), an amendment to add the proposed Orion respondents is warranted in the circumstances of this case. Again, it is to be noted that Orion did not indicate that it would seek an adjournment if LRC's motion to add the proposed Orion respondents was granted.

[55] Accordingly, LRC is granted leave to add the proposed Orion respondents, *nunc pro tunc*.

<u>Issue 2: Does this Court have jurisdiction over the proposed Orion respondents?</u>

[56] As stated, the proposed Orion respondents, as the owners of the Royalty at the time of the impugned failed transaction, resisted the motion to add them on the basis that they have neither voluntarily attorned nor does this court have jurisdiction *simpliciter* under the *van Breda* test[5].

[57] The evidence before me on the issue of where the alleged contract was formed did not differ in any material way in this trial of an issue from the hearing of Trident's jurisdiction motion. The contract, if it was formed, was formed in the U.K. and not Ontario.

[58] LRC has not established that any of the presumptive connecting factors under *van Breda* exist. Furthermore, this is not an appropriate case in which to create a new presumptive connecting factor in terms of contract formation, notwithstanding the era of electronic communications, the location of servers, and COVID's arguable influence on conducting international business relations remotely rather than in person.

[59] Accordingly, like the case with Trident, this court lacks jurisdiction *simpliciter* over the proposed Orion respondents.

[60] However, despite able submissions from ORP apparently on behalf of the proposed Orion respondents, in my view the proposed Orion respondents have voluntarily attorned to the jurisdiction of this court.

[61] There is no doubt that ORP voluntarily attorned to the jurisdiction of this court. It filed fulsome responding affidavits to the merits of this matter at the outset. It made the submission that this court should order a trial of an issue given the key role of the videoconference meeting held on January 20, 2021. It did not seek to challenge the jurisdiction of this court, *qua* ORP, at any time, and concedes ORP attorned.

[62] Throughout the impugned alleged transaction, Mr. Clegg admits that he was the face of the discussions or negotiations on behalf of ORP with respect to the potential sale of the Royalty to LRC, as further evidenced by the written communications which were all under the auspices of ORP. On the partially executed term sheet, ORP does not stroke out its name as the entity managing the unnamed fund identified as the "Seller" nor does it reference anywhere in writing or otherwise the names of the actual holders and owners of the Royalty (being the proposed Orion respondents). The signature line on the partially executed term sheet reads ORP, by Philip Clegg, Portfolio Manager This is not struck by Orion when it returns the mark up version to LRC.

[63] The affidavit evidence submitted by ORP entirely applied to the position of the proposed Orion respondents. It is obvious that despite being a non-suable entity, instructions were being provided by a competent entity to fully defend this matter on the merits of whether or not a contract was validly formed and is enforceable. There is no suggestion that the proposed Orion respondents would have defended differently or provided different evidence than what was before this court. It

[5] *Club Resorts Ltd. v Van Breda*, 2021 SCC 17, [2012] 1 SCR 572.

appears that the proposed Orion respondents, as the holders of the Royalty at the time of this impugned transaction, made a tactical decision to see whether they could have this matter disposed of, in their favour, by this court.

[64] I reject the submission that only ORP attorned. It does not make sense that ORP, which it emphasized is a non-suable entity, voluntarily responded to this application on the merits and agreed to a trial of an issue; advanced the same evidence that the proposed Orion respondents would have; and then would disavow the practical implementation of the decision of this court on the merits by claiming that the proposed Orion respondents were not formally before this court.

[65] If this submission is accepted, then the practical effect is that this court's decision on the merits is of no consequence and this trial of an issue was essentially a sham process. This court will not permit its legal process to be used by the losing party in this way. No doubt had this court decided that there was no valid and/or enforceable contract for the sale of the Royalty to LRC by Orion, Orion would have relied on this court's decision. Otherwise, why bother responding? There is no suggestion that, if the proposed Orion respondents were to be added, the evidence and legal submissions made by ORP would have been different. No good explanation was provided by ORP or the proposed Orion respondents as to how the latter would be prejudiced. This is because the position of the proposed Orion respondents was fully before this court. At all times through the course of the transaction, ORP held itself out as the representative of the proposed Orion respondents with respect to the sale of the Royalty to LRC (and in the 2019 and 2020 bid processes as well).

[66] Furthermore, when counsel for ORP attended at the jurisdiction motion brought by Trident on June 4, 2021, Orion filed no material with respect to that motion despite having notice that LRC had brought a motion to amend its Notice of Application to add the proposed Orion respondents. Indeed, it expressly took no position at this motion. This would have been the time, at the latest, to have raised jurisdiction. Instead, ORP's counsel raised the need to adjourn the hearing of the merits of the application to a trial of an issue, having filed responding affidavits on the merits of LRC's application.

[67] Accordingly, I find that the proposed Orion respondents have voluntarily attorned to this court's jurisdiction.

Issue 3: Was a contract formed as between LRC and Orion and is it enforceable?

Legal Framework

[68] Under this issue there are two sub-issues. First, was a contract formed as between LRC and Orion with respect to the sale of the Royalty on January 20, 2021? Second, if a contract was formed, is it void by operation of Nevada's *Statute of Frauds*?[6]

Contract Formation

[69] It is trite law that the constituent elements of a contract are: offer, acceptance, and consideration. Contracts may be oral, written, or consist of oral and written components.

[70] In order to be enforceable, the alleged contracting parties must have formed a mutual intention to enter into a contract. They must have reached agreement on the essential elements of the contract, and those terms must be reasonably certain (*UBS Securities Canada, Inc. v. Sands Brothers Canada, Ltd.*, 2009 ONCA 328, 95 O.R. (3d) 93, at para. 49).

[71] In determining the requisite mutual intention, the court will examine the relevant circumstances from an objective viewpoint. The subjective intentions of the respective parties are not relevant to this exercise. Rather, it is whether an impartial bystander would reasonably conclude that the parties intended to and did reach an agreement on all of the essential terms. The fact that non-essential terms had not yet been agreed to will not defeat the existence of an otherwise binding contract.

[72] The court will consider the relevant surrounding circumstances when determining whether or not the parties formed a mutual intention to enter into a contract. The court will also examine the words used by the parties, the type of transaction intended to be the subject of an agreement, and the conduct of the parties (*Ruparell v. J.H. Cochrane Investments*, 2020 ONSC 7466, at para. 23).

[73] An agreement to agree on any essential terms in the future however is not a binding contract (*Bawitko Investments Ltd. v. Kernels Popcorn Ltd*. (1991), 79 D.L.R. (4th) 97 (ONCA)at para. 13; *Ruparell*, at para. 22, aff'd 2021 ONCA 880).

[74] What constitutes the essential terms of a contract is a fact driven exercise and informed by the nature of the contract. The industry or commercial customs specific to the type of contract involved is a relevant consideration. For example, in *Bawitko*, at p. 16, the industry standards applicable to franchise agreements, as specialized contracts, informed the court's determination of what the parties intended the essential terms of that franchise agreement to be. In *Bawitko*, the

[6] While ORP raised the Ontario's *Statute of Frauds* in closing submissions, it framed its submission under Nevada's *Statute of Frauds*.

plaintiff sought to enforce an agreement to purchase a franchise. It was unable to persuade the court that the fact that important standard industry terms of the impugned franchise agreement not been agreed upon, were non-essential on the basis they were not important to him. The court noted that in franchise agreements, there are particular standard terms that govern the long-term business relationship established between franchisors and franchisees that were essential terms for franchise contract formation purposes. The court accepted expert evidence on industry standards in reaching this conclusion.

[75] In *UBS*, the Court of Appeal accepted that oral agreements were customary in the securities business given the speedy nature of trades. The court also noted that where a third-party consent is required for the performance of a contract, both contracting parties must still implement the contract pending third party consent. Also, of particular relevance to this proceeding, a contracting party who has the obligation to secure that third party consent cannot rely on its own failure to attempt to secure that consent as a grounds for thwarting contract formulation (*UBS*, at para. 94). In *UBS*, the Court of Appeal upheld the trial judge's finding that an oral agreement was formulated and confirmed during the course of a telephone call at which the essential terms were determined.

[76] Of further particular relevance to this proceeding, a binding contract may be made without the formalization of the essential terms into a comprehensive written agreement if the latter was not considered an essential term by the parties, when observed from an objective perspective. However, the requirement to formalize all of the terms (essential and non-essential) can be an essential term in and of itself if that reflects the mutual intentions of the parties (*Bawitko*, at para. 12). Again, the context of the negotiations and impugned transaction are important to this fact driven exercise. The parties' respective interests are also a relevant consideration (*Ruparell*, at para. 25). As stated by the Court of Appeal in *Ruparell v. J.H. Cochrane Investments Inc*, 2021 ONCA 880 at para. 4:

> It is not unusual for contracts to be made by agreement on the essential terms, which are later incorporated into a formal written document. Whether the parties reached a binding contract depends on the circumstances of the case, and in particular the intention of the parties.

The Evidence

[77] LRC submits that there was a mutual intention to enter into a binding agreement after which a comprehensive contract would be signed, and that all of the essential terms were agreed upon and confirmed on January 20, 2021. Furthermore, LRC notes that the royalty interest it claims to have purchased was derived from an existing royalty held by another entity. In other words, the comprehensive royalty agreement was already in existence, and it was merely buying a secondary royalty interest.

[78] ORP submits that LRC misconstrued its intention that day, the essential terms were never agreed upon, and the discussions were merely ongoing at that time. Furthermore, ORP says that a comprehensive signed contract was an essential term of any royalty agreement and that this is consistent with customary industry practice for royalty purchases.

History of Prior Bid Process for the Royalty

[79] In this case, the context of the January 2021 communications is important and includes the 2019 and 2020 bid processes. Orion acknowledges that LRC submitted bids in both processes, albeit unsuccessfully. The only difference in the two bids was the price offered by LRC in the first or Indicative Proposal of the bid process. Neither price was sufficient to get LRC to the second or Definitive Phase of the bid process.

[80] However, the steps that LRC had to take in order to prepare and complete its Indicative Proposal are important to an understanding of the relative brevity that the January 2021 process took.

[81] First, Mr. Silver, of ORP, invited LRC to bid for the Royalty on June 12, 2019. The specifications for the bid were set out by ORP on its letterhead (and were applicable to all bids) as follows:

a) Description of the proposed acquiring entity;

b) Purchase price in U.S. dollars;

c) Form of Consideration;

d) LRC's material conditions, qualifications and assumptions that could have an impact on the purchase price proposed;

e) The sources of financing that LRC's required in order to close the proposed transaction;

f) LRC's due diligence requirements required from Orion;

g) Any external and internal approvals required by LRC in order to complete the proposed transaction;

h) LRC's contact information for purposes of the Indicative Proposal, including a lead contact, and any technical, financial and legal advisers engaged in this proposal;

i) Any other key issues, assumptions, terms or conditions on which LRC was basing its Indicative Proposal.

[82] LRC replied with a written non-binding proposal under the bid process on July 31, 2019. It responded to each of the specifications, after having reviewed the Royalty and other documents provided by ORP on June 18, 2019. As stated, the process was repeated in 2020. However, Orion did not sell the Royalty at either of these auctions.

Steps Leading to Videoconference Meeting of January 20, 2021

[83] Mark Wellings testified on behalf of LRC. He described himself as the "mining guy". He is a geological engineer and his role is to conduct the due diligence and review the contracts for purchases of mining royalty interests.

[84] Mr. Wellings testified that in December 2020, Mr. Silver told him that the fund holding the Royalty was winding down, and therefore Orion had some time constraints with respect to selling the Royalty. If LRC was interested in acquiring the Royalty, then it should contact his successor, Mr. Clegg. Accordingly, Mr. Wellings suggested that Mr. Ortiz call Mr. Clegg with regard to the Royalty.

[85] The parties agree that on December 21, 2020, Mr. Clegg of ORP and Mr. Ortiz of LRC had a telephone conversation that related to LRC's interest in purchasing a royalty interest in the Thacker Pass Project.

[86] At the time, Mr. Ortiz was the President and the Managing Director of LRC. Mr. Ortiz testified that he spoke with Mr. Clegg on December 21, 2020. He testified that during the telephone call, Mr. Clegg advised that the 2020 auction had concluded with no sale of the Royalty. Mr. Ortiz deposed that Mr. Clegg told him that Orion was motivated to sell because the fund which held the Royalty was maturing and would therefore welcome an offer from LRC.

[87] Mr. Levinsky was the co-chair of the Board of Directors of LRC at the time of these events.

[88] Mr. Levinsky explained that a revenue royalty is a contractual right to receive a percentage of revenues generated by mining products. The mining product that LRC is interested in is lithium, consistent with the company's name. LRC is an Ontario corporation and is based in Toronto. He explained that LRC has a business relationship with Lithium Americas Corporation. LAC is the owner of the subject lithium mining project at the Thacker Pass in Nevada.

[89] He further explained that based on LRC's due diligence, it knew that Orion was entitled to the gross revenue royalty from LAC relating to the Thacker Pass Project pursuant to two Gross Royalty Agreements, both dated February 6, 2013, and both amended September 20, 2013. Lithium is a vital element in automotive batteries, especially for electrical vehicles, and LRC was interested in investing in this growth electrical automotive industry.

[90] Mr. Levinsky described the steps leading to January 20, 2021. He testified that LRC was still keen on purchasing 100% of the Royalty so that when Mr. Wellings indicated to Mr. Ortiz that Mr. Silver advised they should contact Mr. Clegg, they did so. LRC was building upon its failed bids from the 2019 and 2020 auction processes for this same Royalty.

[91] A telephone call was held on January 13, 2021, with Mr. Levinsky, Mr. Ortiz, Mr. Wellings and Mr. Clegg. Mr. Levinsky testified that Mr. Clegg advised that Orion valued the Royalty at USD $20 million and would not take a reduced price. He also advised that the Orion fund holding the Royalty would be maturing soon, and hence time was of the essence. While Orion could transfer the Royalty to another Orion fund, it would be cleaner if it did not have to. However, Mr.

Clegg indicated that Orion would be happy to discuss a potential sale with LRC. Mr. Clegg was told that LRC would be able to close in a week as it had no conditions, having completed the bid processes earlier. Mr. Clegg also asked whether LRC was going to partner with LAC, since LAC was apparently keen to buy back this Royalty.

[92] Mr. Levinsky testified that he raised the possibility of LRC paying $15 million up front and $5 million later to which Mr. Clegg replied suggesting a share swap for the $5 million tranche. Mr. Levinsky recalled that Mr. Ortiz said in this call that LRC was prepared to make an unconditional binding offer and could close in a week.

[93] Mr. Levinsky's impression at the end of this telephone call was that Orion would sell the Royalty to LRC for USD $20 million; that LRC would consider this valuation and whether it would be prepared to pay it and if so, how it would structure the payment; and that Orion was interested in selling the Royalty before its fund matured. LRC contacted LAC to see if it would like to partner with it to acquire the Royalty.

[94] Mr. Wellings and Mr. Ortiz agreed with Mr. Levinsky's detailed account of this telephone call.

[95] Mr. Ortiz added that Mr. Clegg said the fund holding the Royalty was expiring at year's end, so it would be good to come to terms before year end if LRC was serious in purchasing the Royalty. He testified that Mr. Clegg did not indicate that LRC would have to address any of the terms from the 2019 and 2020 bid processes and acknowledged these were key terms for Orion.

[96] LRC understood that making an offer that was unconditional would be attractive to any seller and was simpler. The fact that LRC understood that time was a factor for Orion further elevated the importance to it of making an offer unconditional. LRC could make an unconditional offer because it had already undertaken its due diligence in the earlier bid processes, and it had the funding in place.

[97] Mr. Levinsky testified that LRC decided it was willing to make an unconditional offer to buy the entire Royalty for USD $20 million. It had been advised by LAC in the meantime that while LAC was interested in partnering, getting the requisite approvals in a timely manner would be a challenge. Accordingly, LRC made the decision to go it alone with an offer.

[98] Mr. Clegg was and is a Portfolio Manager at ORP and was responsible for identifying and assessing potential investments, particularly in the area of energy transition. He makes recommendations to the various funds managed by Orion for investment and divestment of assets. He explained that mining is the only field that the funds invest in.

[99] Mr. Clegg agreed that he was Orion's "face" for the discussions with LRC and that it was his responsibility to communicate on behalf of Orion with LRC.

[100] Mr. Clegg deposed that the Royalty relates to mining claims held by LAC in respect of the Thacker Pass project. To use his words, the "Royalty entitles the holder, Alnitak, to a gross revenue royalty on the Thacker Pass project in the amount of 8% of gross revenue until aggregate

royalty payments equal USD $22 million have been paid, at which time the Royalty will be reduced to 4.0% of the gross revenue on all minerals mined, produced or otherwise recovered".

[101] In his affidavit, Mr. Clegg denied generally that he said that Orion was a "motivated seller". However, he offers little detail about what specifically transpired during the December 21, 2020, telephone call. He did acknowledge that the fund holding the Royalty was expiring, but that Orion had the option to transfer it in any event to another fund.

[102] Mr. Clegg agreed that Mr. Ortiz initiated the January 13, 2021 call. He deposed that the participants at the telephone call generally discussed the value of the Royalty, potential deal pricing and ideas about the form the consideration might take "in any transaction that might be negotiated". He deposed that finding a common price point was the starting point of any potential transaction and not the end point. He did not offer much detail concerning this call, such as who said what to whom. He indicated that following this telephone call he reported to Mr. Oskar Lewnowski, who is the founder and Chief Investment Officer of Orion, as well as a member of the Investment Committee. As Mr. Clegg readily admitted, everything of significance must be run by Mr. Lewnowski and have his blessing before being proceeded with.

[103] On January 14, 2021, Mr. Ortiz sent an email to Mr. Clegg setting out a sale price and form of payment by LRC to purchase the Royalty as follows:

(a) USD $15 million in cash on closing;

(b) USD $2.5 million in cash on full financing of the Thacker Pass Project's capital expenditure; and

(c) USD $2.5 million in cash on commissioning to the Project.

Mr. Ortiz also advised that LRC could turn these terms into a binding unconditional offer as soon as Mr. Clegg responded. Mr. Ortiz repeated and confirmed that the offer would not be subject to any due diligence or any financing. The currency was in USD consistent with the currency specified by Orion during its two failed auction processes.

[104] In response, on January 14, 2021, LRC received an email from Mr. Clegg asking whether it would consider making a joint offer with LAC and if so, whether LRC would consider replacing the deferred consideration for common shares in LAC. As a result, LRC approached LAC with this possibility however LAC was not certain it could turn around a quick response.

[105] Mr. Oritz then sent an email to Mr. Clegg on the same day advising of LAC's response. In light of what LRC understood to be an urgent time frame within which to do a deal, LRC communicated an offer to purchase the Royalty for the sum of USD $17 million payable in cash on closing if Orion did not wish to await LAC's response. These emails were followed up by others on January 15 and 16, 2021, during which Mr. Clegg advised that he would get back to LRC regarding its proposal "shortly".

[106] Mr. Clegg acknowledged that he received Mr. Ortiz's January 14th email indicating that LRC would submit an unconditional offer, including waiving due diligence and financing as conditions but stated that he did not believe that LRC would submit any binding offer that was unconditional. He believed that LRC would require both financing and due diligence conditions notwithstanding the email. He qualified his answer under cross-examination, after acknowledging that LRC would have completed due diligence for the 2019 and 2020 bid processes, to meaning "legal" due diligence as opposed to "technical" due diligence. He maintained his position that he never believed LRC's representations that any offer from it would be unconditional. However, he did not point to any written communication in which he expressed that sentiment to anyone – external or internal – between January 14 and January 20, 2021.

[107] Mr. Clegg confirmed that LRC and Orion exchanged various emails between January 14 and 15, 2021, relating to these ongoing discussions about the potential sale and purchase of the Royalty relating to price, form and structure of payment and whether LAC would participate by way of a share swap. He confirmed that he reported to Mr. Lewnowski about these communications throughout.

[108] Mr. Clegg admitted in cross-examination that the terms reflected in the Indicative Proposal in the 2019 and 2020 ORP letters were mandatory and key terms from Orion's perspective for the sale of the Royalty, though not necessarily for the bidders. He reiterated that they were key terms for purposes of the Indicative Proposal in those prior processes, unwilling to concede that they were also key terms for the impugned 2021 transaction.

[109] Mr. Wrotniak did not add any detail about the January 13th telephone call, nor was he copied on the emails that followed.

[110] On January 19, 2021, there was an exchange of emails starting with Mr. Ortiz asking Mr. Clegg whether Orion had any feedback on LRC's proposal. Mr. Clegg inquired about whether LRC had any response from LAC regarding a potential share swap and Mr. Ortiz responded that LAC was interested and was willing to use shares for the deferred component of the offer.

The January 20, 2021, Videoconference Call and Term Sheet

[111] On January 20, 2021, Mr. Ortiz, Mr. Wellings, Mr. Levinsky and Mr. Clegg had a telephone call. At that telephone call, the parties agree that Orion advised that it valued the Royalty at USD $20 million. The parties agreed to consult with others at their respective organizations, and then would reconvene as soon as possible.

[112] Mr. Clegg confirmed that he reported back to Mr. Lewnowski and others at Orion concerning this communication, while all three witnesses for LRC confirmed that they contacted LAC to see if it would be interested in participating in the purchase of the Royalty by way of a share swap with LRC. LAC advised it was interested but because it was in the process of issuing a prospectus, it would be "complicated".

[113] With these consultations completed, LRC and Orion convened a videoconference later on January 20, 2021. The same persons participated, and Mr. Wrotniak joined as well.

[114] The videoconference was not recorded, and none of the participants prepared contemporaneous notes. All relied on their respective memories of the videoconference call.

[115] According to LRC's evidence, the purpose of this videoconference was to reach an agreement on the purchase of the Royalty. According to Orion's evidence, the purpose of this call was simply to continue discussions regarding a potential transaction. LRC placed significance in the fact that the parties agreed this "meeting" should be by way of videoconference elevating the significance of it. Orion's witnesses disagreed but offered no particular explanation for choosing this venue. Mr. Clegg agreed that he sent out the invitation on Microsoft Teams for this videoconference.

[116] The parties agree that the following topics were discussed at this videoconference:

(a) LRC's advice that LAC had indicated that it would take time to go through its own approval process with respect to any participation in the purchase of the Royalty;

(b) LRC was prepared to pay USD $20 million for the entire Royalty, without the participation of LAC;

(c) Orion's advice that in light of recent good news at the Thacker Pass project, it now valued the Royalty at USD $23.5 million, up from USD $20 million;

(d) LRC's dismay at what it considered was Orion's sudden increase after LRC committed to the USD $20 million price;

(e) Orion's reply that in fact it had paid USD $22 million for the Royalty and did not want to sell the Royalty at a discount, and also that it now wanted to retain a 15% interest in the Royalty;

(f) Orion's increased valuation of USD $18.7 million for an 85% interest in the Royalty, based on Orion's USD $22 million valuation for the entire Royalty, was then discussed;

(g) The conference call ended.

[117] The fundamental disagreement relates to whether or not Mr. Clegg made a counteroffer to LRC during the conference call to sell 85% of the Royalty for USD $18.7 million, whether he stated that he had the "authority" to make this binding counteroffer to LRC, and whether the price, form of consideration and percentage of the Royalty were the final essential terms to conclude an agreement if accepted by LRC. The three witnesses for LRC were uniform in their testimony that Mr. Clegg made this counteroffer and that he explicitly confirmed he had "authority" when asked by Mr. Levinsky. Mr. Clegg was equally adamant that he never made a formal counteroffer, never used the word "authority" and that in any event there were many essential terms yet to be negotiated as reflected by the subsequent draft term sheet sent by LRC.

[118] Significantly, following the videoconference, on the same day, Mr. Ortiz, as President and Managing Director of LRC, sent an email to Mr. Clegg (with a copy to Mr. Levinsky and Mr. Wellings), that stated simply:

> Hi Philip,
>
> We accept your offer of USD$18.7m in cash for 85% of the Thacker Pass royalty held by Orion. On closing, the 85% and 15% portion of the royalties shall be divided into two separate royalties with any repayment split accordingly.
>
> Binding term sheet to follow.
>
> Thanks,
>
> Ernie

[119] Shortly thereafter, still on January 20, 2021, Mr. Clegg sent the following email to Mr. Ortiz in response:

> Ernie,
>
> Ok, sounds good.
>
> Best,
>
> Philip

[120] The majority of the *viva voce* evidence led centered around the videoconference and the aftermath. Since there was no contemporaneous record of this videoconference, the evidence of the individual witnesses is critical.

LRC's Witnesses

Blair Levinsky

[121] Mr. Levinsky testified about the two oral communications that took place on January 20, 2021. The first oral communication was a telephone call. Mr. Levinsky advised Mr. Clegg of LAC's response but that he would confirm with LAC. Mr. Levinsky testified that Mr. Clegg responded that he would speak with his people, and that they should reconvene at 12:30 p.m. (EST) by way of a videoconference call which was set up by Mr. Clegg.

[122] From Mr. Levinsky's perspective, the fact that Mr. Clegg set up a videoconference call elevated the importance of this meeting. It meant to him that LRC and Orion were gearing towards a transaction for the sale and purchase of the Royalty. He testified in chief that it was not common practice in his industry to go from a telephone call in the morning to a meeting in the afternoon to conclude a transaction.

[123] In preparation for the videoconference LRC confirmed with LAC that while the latter was interested in partnering with LRC, it could not secure the requisite approvals on an expedited basis. Therefore, LRC decided it would proceed on its own.

[124] At the videoconference, Mr. Levinsky, Mr. Ortiz and Mr. Wellings attended on behalf of LRC, while Mr. Clegg and Mr. Wrotniak attended on behalf of Orion. However, Mr. Clegg did most of the talking.

[125] Mr. Levinsky offered to purchase the Royalty for USD $20 million without LAC, as per their earlier discussion. However, Mr. Clegg responded that in fact Orion would only be prepared to sell 85% of the Royalty for USD $20 million. Mr. Levinsky testified that he was unhappy with this response and told Mr. Clegg that this was re-trading, meaning that once LRC had committed to the price originally suggested by Mr. Clegg, Orion decided to increase the price. Mr. Levinsky was frustrated and told Mr. Clegg so. He asked how it was that Orion increased the price for the Royalty to USD $23.5 million. Mr. Clegg responded that in fact Orion had paid USD $22 million for the Royalty in the first place, and that in light of recent positive news from LAC regarding the Thacker Pass Project, Orion could justify this new valuation. In any event, he was not prepared to accept a lesser price than what Orion paid. Mr. Clegg confirmed, however, that the figure of USD $22 million would be for the entire Royalty, but that Orion wanted to retain a 15% interest.

[126] Mr. Levinsky also asked Mr. Clegg how LRC could now be certain that if it agreed to this increased price, Orion would not turn around and increase the price again. Mr. Levinsky testified that Mr. Clegg responded that he had authority to do a deal at this price.

[127] Mr. Levinsky then asked Mr. Clegg if LRC emailed acceptance of the all-cash offer of $18.7 million for 85% of the Royalty (being 85% of $22 million), would Orion and LRC have "a deal at this price"? He testified that Mr. Clegg's response was "yes" and "I have authority to do a deal".

[128] The videoconference concluded with LRC agreeing to consider this "offer" by Orion and advising it would get back to Mr. Clegg via email with a response.

[129] After the videoconference ended, Mr. Levinsky, Mr. Ortiz and Mr. Wellings discussed the increased price and agreed that LRC should accept the offer, even though they thought they could have bargained further given what Mr. Levinsky characterized as Mr. Clegg's quick response to confirming they would have a deal at $18.7 million. He then instructed Mr. Ortiz to send a simple email to Mr. Clegg stating that LRC accepted the offer of $18.7 million for 85% of the Royalty. He was copied on Mr. Ortiz' email which was sent that afternoon.

[130] Mr. Levinsky testified that he has a specific recollection that Mr. Clegg said he had "authority" to do the deal. Mr. Levinsky testified that Mr. Clegg never retracted that he had authority to do this deal at any time following the January 20, 2021 email from Mr. Ortiz accepting Orion's offer to sell 85% of the Royalty for US$18.7 million with the binding term sheet to follow.

[131] Mr. Levinsky was copied by Mr. Clegg on his response to Mr. Ortiz' email stating simply "Ok, sounds good". He testified that at no time prior to this litigation did he receive any indication

from Mr. Clegg that he had been confused by Mr. Ortiz' email accepting Orion's offer or denying that he, Mr. Clegg, had in fact made that offer.

[132] Mr. Levinsky confirmed that the terms set out in the 2019 and 2020 Indicative Proposal by LRC on the earlier auction processes meant that there was nothing left to negotiate at the videoconference other than price (USD $18.7 million), form of consideration (all cash) and percentage of the Royalty (85%)[7], and this was implicit in Mr. Ortiz' email reference to "closing" the deal. He further stated that since the acceptance was unconditional, there was nothing left to negotiate regarding items 4-6 of the Indicative Proposal as they had been fulfilled and did not change.

[133] Mr. Levinsky testified that LRC's belief that a deal was done was reinforced by the telephone call of January 22, 2021, in which Mr. Clegg asked if LRC had provided a notice to call on its investors' money to fund the purchase, and Mr. Levinsky responded it made a 7 days' notice call of capital.

[134] A series of emails were sent on January 22, 2021. Mr. Ortiz sent a term sheet prepared by its legal counsel for Orion's review and execution, LRC's advice that the term sheet was the "same as our unconditional email acceptance of your verbal offer for 85% sale for 18.7mm." and adding "what we discussed which is your preference to have the royalties legal split if possible". The term sheet contained 13 provisions and was entitled "Purchase of Royalty Interests by Lithium Royalty Corporation" from "a fund managed by Orion Resource Partners".

[135] Mr. Clegg did not communicate any indication that he had not made a binding offer at the videoconference or that he did not have authority to make that offer in response to this email. Rather, Mr. Clegg requested a telephone call with Mr. Ortiz.

[136] Mr. Levinsky participated in the telephone call with Mr. Ortiz, Mr. Wellings and Mr. Clegg. According to Mr. Levinsky, Mr. Clegg asked why it was that everyone was on the telephone call, and that all he wanted to say was that the Orion fund holding the Royalty was maturing so he needed internal approval to transfer the Royalty to another Orion fund. However, Mr. Clegg said this was a formality, and just an "FYI". This is when Mr. Clegg asked and was advised that it would only take 7 days for LRC to call in its capital having provided the requisite notice to its investors. He pointed out that a fund only makes a call on capital when it is actually about to close a transaction. He also understood that the internal approval would be from Orion's LPAC and was relative to transferring the 15% portion of the Royalty only. It would not weigh in on the sale of the balance of the Royalty to LRC.

[137] On January 25, 2021, Mr. Clegg asked why the term sheet contained a condition from LRC that due diligence be completed when "[w]e thought that diligence was 100% complete" to which Mr. Ortiz responded the same day, that LRC was "fully complete" on due diligence, that this was

[7] These components reflected the requirements of items 1 and 2 of the Indicative Proposal.

lawyer language and should be struck out. By this time, Mr. Dov Lader, who was Orion's internal deputy legal counsel, was being copied on email correspondence.

[138] On January 26, 2021, Mr. Clegg wrote an email to LRC advising that "[j]ust a couple of bits that have come out of our legal review" of the term sheet being that an assignment of the royalty can be done to accomplish the split and this would be a "cleaner way of doing this so long as the $22 million buydown applies equally". The assignment would not require any consents on Orion's part. He also asked if LRC was considering syndicating the deal because of its inclusion in the term sheet, querying why this is necessary to do prior to closing and asking who the parties would be. Mr. Ortiz again responded same day stating that LRC was flexible on how the Royalty was split so long as its interest is properly assigned. He also wrote that LRC had no intention to syndicate and that this was "standard language" in LRC's term sheets that can be edited to give Orion "more comfort".

[139] In response, still on January 26, 2021, Mr. Clegg sent a "mark up" of the term sheet for LRC's consideration. Mr. Levinsky replied by same day email that "all looks good to go" but for one revision (section 2) regarding the proposed assignment. It was LRC's preference to create two separate royalty agreements, so that it would hold the 85% Royalty directly rather than receiving an assignment of the right to receive payments. Mr. Levinsky suggested that LRC's original language for section 2 be reinstated (providing for both scenarios) with a view to discussing the legal structure of dividing the Royalty after closing. Mr. Levinsky also states that LRC expects to receive LAC's consent with respect to dividing the royalties.

[140] Then on January 27, 2021, LRC received an email from Mr. Clegg stating that he apologizes to have to advise that Orion has received, and is considering, another offer for the Royalty. Mr. Levinsky responded that LRC intends to close the deal. He put quotation marks around "re-trading" because he had used that term in the videoconference and was reminding Mr. Clegg that he was given an assurance there would be no such re-trading. He testified that that had been the pivotal moment in the negotiations. Furthermore, he put into his email quotation marks around "we never had an issue with this" referencing the LPAC approval, because Mr. Clegg had told them this. Mr. Levinsky also put the words "had the authority to accept" into quotation marks as Mr. Clegg had used those words at the videoconference call as well.

[141] On January 28, 2021, LRC sent back the term sheet after accepting all of the tracked changes made by Orion (including s. 2 as revised by Orion) and executed by Mr. Levinsky and Mr. Wellings on behalf of LRC.

[142] In the end, Mr. Levinsky characterized the transaction as a take it or leave it proposition, and that LRC had had similar transactions to this one in the past. The only issue that was left to negotiate at the videoconference had been the price and the percentage of the Royalty given that this was to be an unconditional, all-cash, deal. It was a "simple" deal because LRC had already conducted its due diligence throughout the bid process and did not need to repeat it.

[143] The focus of the cross-examination was the term sheet sent by LRC to Orion. The cross-examination demonstrated that some of the terms in the unrevised sheet were contrary to LRC's

testimony that its acceptance was unconditional, and that a formal written agreement setting out all of the terms was necessary before a binding agreement could be reached

[144] Under cover of email dated January 22, 2021, Mr. Ortiz sent a term sheet to Mr. Clegg 'as prepared by counsel" and asking him to "review and execute". The term sheet contained provisions that were incongruent to the "unconditional" all-cash deal LRC claimed had been "done".

[145] Under cross-examination of the original term sheet, Mr. Levinsky admitted:

a) Section 3 set out a right of first refusal for LRC to purchase Orion's 15% interest in the Royalty which was a restriction on Orion's right to sell. Mr. Levinsky stated he thought that this issue had come up in the videoconference but was not an essential term in any event. He conceded that this was not mentioned in his affidavit and later in his cross-examination stated that term only came up after Mr. Ortiz sent the original draft term sheet. It was not needed and hence LRC agreed to having it struck. He then backtracked on his answer that this was a standard term given the appearance it had been customized to reflect this transaction and stated he did not know if this was a standard term or not.

b) Section 4 set out a number of condition precedents including notably 4(b) that provided the transaction was conditional on the execution of definitive documentation including a mutually agreeable purchase agreement that would include representations and warranties "as are customary for transaction similar in nature to, or appropriate for the Transaction". Mr. Levinsky responded that s. 5 contained the representations and warranties and, in any event, this was an unconditional deal so section 4 was not relevant.

Mr. Levinsky stated that he did not review the draft term sheet sent by Mr. Ortiz because of the expedited closing being sought by Orion. He stated that LRC's lawyers simply inserted the material terms agreed to on the January 20th videoconference, but otherwise sent over a standard unmodified term sheet containing standard terms and conditions not needed for this unconditional deal. He further responded that Mr. Clegg called to discuss the terms that were inadvertently included by LRC's lawyers and agreed they would be struck from the term sheet, as reflected by the mark-up Mr. Clegg sent. Therefore, when Mr. Clegg sent over the marked-up version with track changes, LRC simply agreed to all of the changes and signed it back in final form.

[146] Moving on to the marked-up version of the term sheet sent by Mr. Clegg, Mr. Levinsky agreed that while Mr. Clegg struck out the right of first refusal which was clause 3, and in 4(b) (which became 3(b) in the revised version), Mr. Clegg left in the requirement for signed documentation and LRC accepted that.

[147] Mr. Levinsky testified that his understanding of Mr. Clegg's advice that he required internal approval from Orion's conflict of interest committee (the "LPAC"), this was only to ensure that Orion could transfer the 15% interest in the Royalty to another Orion fund. He maintained that the deal with LRC was not contingent on this approval but only what would become of the

remaining 15% which did not involve LRC. However, when confronted with his own wording, in his January 27, 2021 email, acknowledging that the deal was subject to LPAC's approval, Mr. Levinsky attempted to explain that he did not mean "subject to" but meant "when LPAC approves" and acknowledged his email reflected "awkward wording". This email was attached to his supplementary affidavit and located when he "dug deeper" and found additional relevant emails.

[148] When confronted with his original affidavit and the omission of any reference to the January 22, 2021 telephone call, Mr. Levinsky explained that he had remembered the telephone call but did not initially find the email until after he had sworn his initial affidavit.

[149] Mr. Levinsky denied that section 2 of the Term sheet which referenced how the legal division of the Royalty between LRC and Orion would work was a point of contention. He stated that he told Mr. Clegg that LRC preferred to divide the Royalty into two separate royalties so that LRC would receive the revenue directly from LAC. However, he told Mr. Clegg that LRC would take either that option or an assignment of the revenues from the Royalty from Orion as opposed to dividing the Royalty into two separate royalties and left it to Orion to choose. When Mr. Clegg returned the mark up, Mr. Clegg struck out the division of the Royalty into two, because under the existing Royalty agreement, Orion could assign in whole or in part and without consent of LAC.

[150] Mr. Levinsky testified that the partially signed term sheet reflected the deal LRC struck, and the final transactional documentation, including the form of the division of the Royalty, were to be left to closing as non-essential terms.

Ernie Ortiz and Mark Wellings

[151] Mr. Ortiz and Mr. Wellings' evidence was substantially similar to Mr. Levinsky's albeit less detailed on the whole. There were no material inconsistencies as amongst the three witnesses.

[152] Mr. Ortiz and Mr. Wellings testified that the videoconference ended with Mr. Levinsky advising Mr. Clegg and Mr. Wrotniak that LRC would take away Orion's offer of $18.7 million for 85% of the Royalty and get back to him with their answer.

[153] Mr. Ortiz confirmed that, on instructions from Mr. Levinsky, he sent the email advising of LRC's acceptance of Orion's offer, with a binding term sheet to follow.

[154] Of significance, Mr. Ortiz testified that he, like Mr. Levinsky, did not take the time to review the term sheet prepared by LRC's lawyers before it was sent to Orion. Hence, his position was also that what had been sent was a standard precedent term sheet and prepared by the lawyers with only the key terms from the January 20, 2021, videoconference call having been provided to them for insertion. The other terms were standard boilerplate terms according to Mr. Ortiz.

[155] Thereafter, Mr. Ortiz returned the clean copy of the Term Sheet with all of Orion's changes accepted by letter dated January 28, 2021, duly signed by Mr. Wellings and Mr. Levinsky. Mr. Levinsky told him to accept all of the changes, because the material terms had not been changed. He also testified under cross-examination that he had not reviewed the original draft term sheet

before it was sent out, because he understood that Mr. Clegg wanted this deal expedited. He instructed their lawyers to prepare it, but only gave the lawyers the essential terms.

[156] He acknowledged under cross-examination that in the preamble to the draft term sheet, the deal was phrased as LRC's offer to purchase the Royalty interests, but again stated he was not focused on the non-essential terms. He reiterated that as long as the essential terms were not changed, he did not care about changes to the non-essential terms, in part, because LRC was buying an existing royalty. Similarly, he was not concerned about whether, in the end, the allocation of the Royalty was by way of a division of the Royalty into two separate royalties or by way of assignment by Orion of 85% of the revenue generated by the Royalty. This was not an essential term and Orion had the final say, as reflected by the partially executed Term Sheet he returned to Orion for signature.

[157] Referring to the partially executed term sheet dated January 28, 2021, under cross-examination, Mr. Ortiz could not explain why LRC left in the reference to only a best efforts attempt for LRC to hold the royalty directly and the lack of detail as to how this process of best efforts would go since the sentences that followed were all struck out. Mr. Ortiz maintained this was a non-essential term which was to be handled as Orion saw fit from the two options.

[158] He also acknowledged that under item 3 "Conditions Precedent" there were various conditions including, in particular, the "execution of definitive documentation…including a mutually acceptable purchase agreement …that includes such representations and warranties, covenants, indemnities and conditions of closing as are customary for transactions similar in nature to, or appropriate for, the Transaction", but that these were non-essential terms.

[159] He also acknowledged that under the partially signed Term Sheet, s. 3(a), LRC was to undertake a search to ensure there were no encumbrances, but responded this was not essential. Similarly, pursuant to the condition under 3(d), the transaction was subject to LPAC approval. Again, Mr. Ortiz, like Mr. Levinsky, testified that he did not understand this to be a real issue based on Mr. Clegg's representation that such approval was a formality.

[160] Mr. Ortiz was asked about the Representations and Warranties portion of the partially signed Term Sheet and, in particular, s. 4(b):

> The Seller [Orion] confirms that this Agreement, effective upon the Seller's delivery to LRC of a copy hereof executed by the Seller, has been duly authorized, executed and delivered by the Seller and constitutes a legal, valid and binding obligation of the Seller, enforceable against it in accordance with its terms; and the execution and delivery of this agreement by the Seller and the performance by the Seller of its obligations hereunder, does not, and will not, result in a breach by the Seller of any agreement to which it is a party or of any law to which it is subject."

[161] When it was suggested to Mr. Ortiz that this provision means that there is no binding transaction until a formal agreement was signed in the form of the Term Sheet by Orion, Mr. Ortiz stated that it was not an essential term, and that it was a standard term inserted by their lawyers which he did not, unfortunately, review. In his view, the Term Sheet merely memorialized the

essential and non-essential terms of the deal struck between Orion and LRC on January 20, 2021, and the agreement was not contingent on a formal agreement of purchase and sale being signed.

[162] Similarly, Mr. Ortiz agreed that s. 6, the Exclusivity Clause, which recognizes that there will be a fixed time period during which Orion will not initiate or entertain competing offers in recognition that LRC will require time to be expended in connection with the Transaction, was not necessary if LRC had already completed its conditions. Mr. Ortiz repeated that this was simply a standard term that had been erroneously inserted by their lawyers and could, in any event, be needed for non-essential terms not yet completed.

[163] Linked to the Exclusivity section was the Termination section (s. 9) which permits either party to terminate on written notice if the closing did not occur prior to the expiry of the Exclusivity Period (February 24, 2021). However, that provision goes on to state that termination is without prejudice to "either party's right to pursue all legal remedies… arising in connection with any breach of the agreement by the other party or any other cause of action arising prior to the date of such termination". Again, Mr. Ortiz acknowledged it was in the Term Sheet but called this a non-essential term.

[164] In the end, Mr. Ortiz maintained that the only terms that could not be changed by either party were the essential terms, all of which had been negotiated at the videoconference and consummated by LRC's email accepting Orion's offer that same day. He stated that the partially executed Term Sheet reflected the essential terms, with no changes, and the non-essential terms with the changes made by Orion and acceptable to LRC as evidenced by the signatures of Mr. Levinsky and Mr. Wellings.

[165] Mr. Wellings made similar concessions and stated that the Term Sheet where it contained conditions in favour of LRC, such as section 3(a) and 3(b) were conditions that could be waived by LRC and effectively it had already waived 3(a) by its representation that it needed to do no further due diligence. With respect to s. 4(b) and Orion's representation that the agreement would not be valid until there was a fully executed Term Sheet, Mr. Wellings agreed it was there. Furthermore, he agreed that there was no need for the Exclusivity clause (s. 6) if the deal was done, as LRC claimed. He also agreed that under the Termination clause, either side could terminate in writing before the expiry of the exclusivity period, and that the aggregate purchase price would not survive termination. He agreed that if Orion had signed this Term Sheet, Orion could have terminated the deal in writing subject to the survival of four provisions (exclusivity, confidentiality, termination and expenses).

[166] While all three witnesses testified that they have done these types of royalty purchase deals based on oral and written communications, none produced any tangible example of these deals.

Orion's Evidence

Philip Clegg

[167] Mr. Clegg's affidavit focused more on what he did not say and do over the course of the discussions with LRC rather than what he did say and do. He provided little further detail of what was said and done in the course of his *viva voce* evidence in chief.

[168] In his brief examination in chief, Mr. Clegg focused on the events of January 20, 2021, the term sheet, and the immediate aftermath. He emphasized that royalty interests in mining assets are very unique and are complex transactions done by sophisticated parties. He characterized royalty interests as real property interests.

[169] He testified that if he had felt Orion had a binding agreement with LRC, Orion would not have entered into an agreement with Trident.

[170] Mr. Clegg agreed on cross-examination that he was Orion's "face" for the discussions with LRC and that it was his responsibility to communicate on behalf of Orion with LRC.

[171] Mr. Clegg placed a great emphasis on having told LRC during the videoconference call that he only had the "ability" to negotiate on behalf of Orion as opposed to having the "authority" to negotiate. He explained that "authority" had a more formal meaning than "ability" and that the latter word was not intended to convey the impression that when he suggested that Orion was be prepared to accept USD $18.7 million for 85% of the Royalty it was actually a counteroffer. He maintained that he made no offer whatsoever during the videoconference call with respect to the price and/or division of the Royalty.

[172] On the other hand, when he was asked to explain what he meant by his email response of "Ok, sounds good" to LRC's advice that it would "accept" Orion's "offer" to sell the 85% Royalty for USD $18.7 million with a term sheet to follow, he testified that he was "confused" by Mr. Ortiz' use of the terms "offer" and "accept" but only responded to the latter advice that a term sheet would follow. He explained that it was obvious that there had been no offer and acceptance and hence no reply was needed. He agreed that he did not qualify his response, challenge the use of the terms offer and accept, or express any confusion about the use of those terms, anywhere in writing or otherwise until this application was commenced. Given his prior focus on recollecting that he had used the term "ability" and would never use the term "authority" because of the distinction, in his view, between the two in terms of business transactions, his explanation that he did not think there was any need to respond to LRC's use of the terms "offer" and "acceptance" given their fundamental meanings in business contracts, is not credible.

[173] There were important omissions in his affidavit and examination-in-chief that were revealed in cross-examination and lend more credibility to LRC's version of events than his own version.

[174] For example, Mr. Clegg revealed in cross-examination that:

a) Even though he was aware of the critical importance of the details of the videoconference meeting of January 20, 2021, and intended to be comprehensive in his affidavit, he did not mention the figure of USD $18.7 million even though he agreed that figure was indeed discussed;

b) He did not mention in his affidavit or examination-in-chief who raised this figure or what was said about it;

c) He did not mention in his affidavit that he told LRC that Orion had acquired the Royalty for USD $22 million, even though he admitted it in cross-examination;

d) His affidavit does not express how the USD $18.7 million figure was arrived at or his understanding of its rationale;

e) He did not reference or produce any internal communications relative to the ongoing discussions with LRC that he acknowledged he had with Mr. Lewnowski regarding the proposed price of USD $18.7 million dollars for 85% of the Royalty. He admitted however that Mr. Lewnowski gave his blessing to Mr. Clegg to discuss this price and royalty division;

f) He maintained that by Mr. Lewnowski giving his "blessing" to discuss the price to LRC prior to the videoconference call, Mr. Clegg was only provided with the "ability" to discuss that price with LRC, but not the "authority" to make an offer. When pressed, he was not able to provide a plausible explanation for the difference between "ability" and "authority" except that the latter word sounded more formal, and while authority means he could close a deal, ability meant he could do something short of a deal. He confirmed that the discussion with Mr. Lewnowski occurred in between the telephone call and videoconference call on January 20, 2021.

g) He admitted he advised LRC that Orion had paid USD $22 million for the Royalty, but denied that he proposed that Orion would sell the Royalty for that figure – this evidence was also not contained in his affidavit;

h) He could not recall if both calls on January 20, 2021, were videoconference calls or not, but that the second call was for certain a videoconference call, and that he initiated both calls via Microsoft Teams;

i) He acknowledged that in between the two calls, he spoke with Dov Lader, who was Orion's deputy legal counsel at the time, but did not mention that in his affidavit;

j) He admitted that during the videoconference, after discussions about a potential division of the Royalty with Mr. Lewnowski and Mr. Lader, he raised the issue of Orion keeping 15% of the Royalty and this was the first time it was raised,

k) He acknowledged that they discussed this specific cost and specific division during the videoconference call, that the value discussed was an increase by Orion from what had been discussed earlier that day, and that LRC was unhappy. He did not recall Mr. Levinsky specifically saying LRC felt it was being "re-traded" per se, however. He conceded it was possible but unlikely as he would have remembered that word if it had been used.

l) He denied that the videoconference ended with LRC saying they would think about the increased price of USD $18.7 million and get back to him about it. Rather his recollection is that the videoconference ended with both parties indicating they would digest the information. When pressed, he denied that LRC told him that they would consider the new price and get back to him. He agreed that if the court heard evidence that LRC in fact said this to him, that evidence should not be believed. He was then taken to an excerpt of the cross-examination transcript of Mr. Wrotiniak, who testified that it was discussed that LRC would take away that valuation and price and come back to Orion. Mr. Clegg stood by his recollection of the videoconference and disagreed with Mr. Wrotniak's testimony.

m) Mr. Clegg maintained that in fact Orion was not prepared to accept USD $18.7 million for 85% of the Royalty, and that this position is also not mentioned in his affidavit.

n) He did not tell LRC before January 20, 2021, that any potential transaction with LRC would require internal approval from Orion, nor during the videoconference call, nor did he address this requirement in his affidavit.

o) He did not reveal in his affidavit that he had spoken with both Orion's Chief advisement officer, Oskar Lewnowski, or Orion's Deputy Legal Counsel, Dov Lader, about a potential deal with LRC and a possible split of 85%/15% of the Royalty.

p) With respect to the email from Mr. Levinsky dated January 22, 2021, he took specific note of the use of the terms "accept" and "offer" but disregarded those terms and chose to focus on the draft term sheet instead. Even though he was "confused" by the suggestion that LRC was purportedly accepting an offer from Orion that was never made, he did not query Mr. Levinsky or otherwise disabuse him of any notice that an offer capable of acceptance had been made by Orion, nor did he produce any internal communication in which he expressed this alleged confusion about a supposed fictional offer.

q) He did not mention in his affidavit that he did not believe that the initial offer, and then purported acceptance, by LRC was unconditional and that LRC still required, in his view, "legal" due diligence. He admitted, in cross-examination, that he was aware that LRC was fully financed and hence did not require that condition.

[175] When confronted with the above and other omissions in his affidavit, Mr. Clegg would only concede that they *could* be important facts and/or he had no explanation for these omissions.

[176] Mr. Clegg confirmed that he did not raise the topic of requiring approval from Orion's LPAC during the course of the videoconference call, and that its only involvement would be to deal with any potential conflicts of interests between the transferor Orion fund to the transferee Orion fund regarding the 15% interest in the Royalty. He confirmed that in the completed transaction of the sale of the Royalty to Trident, Orion maintained 40% of the Royalty. This admission leads to the inference that Orion's LPAC cleared that transaction of any conflict of interest in the transfer of the 40% interest in the Royalty to another Orion fund.

[177] When Mr. Clegg was cross-examined with respect to the 9 terms that Orion set out in the 2019 and 2020 bid processes, and LRC's Indicative Proposal response, he admitted that they were mandatory terms set out by Orion for the potential sale of the Royalty to a bidder, including Orion. Using the following items from the Indicative Proposal, as applied to Orion's alleged oral offer and written acceptance by LRC on January 20, 2021, he agreed that:

a) Item 1 (Description of the Acquiring Entity): LRC was an appropriate entity to purchase the Royalty;

b) Item 2 (Purchase Price): the purchase price discussed at the videoconference meeting was in US dollars, and the price of $18.7 million for 85% of the Royalty was the last amount discussed – it was never changed up to and including January 27, 2021, when the term sheet was revised and returned by Orion;

c) Item 3 (Form of Consideration): the form of consideration was proposed by LRC to be all cash;

d) Item 4 (Key Conditions, Qualifications and Assumptions): LRC advised that there would be no conditions attached to this transaction – Mr. Clegg disputed that LRC advised that its offer and/or acceptance was unconditional until he was pointed to an email dated January 14, 2021 from Mr. Ortiz confirming that LRC's offer was unconditional and furthermore expressly not conditional on LRC undertaking due diligence or obtaining financing. When pressed, Mr. Clegg claimed he simply did not believe LRC's written representation and could not recall if LRC ever raised any conditions between January 14 and January 20, 2021. He then qualified his answer by saying that he meant that he believed LRC would have to complete "legal due diligence" as opposed to "technical due diligence" which he conceded had likely been done as a result of the earlier bid processes. He then relied on the subsequent term sheet sent by LRC on January 25, 2021 which did reflect the usual condition by LRC that it would have to complete due diligence. However, he then acknowledged that when he pointed this out, Mr. Ortiz and then Mr. Levinsky both confirmed the prior advice that LRC had fully completed its due diligence, it was a standard term inserted by the lawyers, and that it should be struck out (which it was by Orion when Mr. Clegg returned the marked-up version of the term sheet). In

terms of LRC's ability to finance the deal, Mr. Clegg admitted that although he knew by January 20, 2021, that LRC put forward an all-cash deal, he testified that he did not know where the cash was coming from and he had doubts that LRC would be able to close an all-cash deal.[8]

e) Item 7 (Conditions and Approvals): He acknowledged that there were no external approvals needed by LRC, and Orion knew this, but recalls that Mr. Levinsky wrote at some pint that he would need to consult with his own Board of Directors.

f) Item 8 (Contact Information): He had the requisite contact information for LRC but then added that from Orion's perspective there was an issue as to who the legal advisors would be and LRC might put forward a law firm Orion did not want to work with – but conceded he never raised this with LRC or in his affidavit. He then acknowledged that on January 27, 2021, Mr. Levinsky sent him an email confirming that LRC had all internal approvals in place.[9]

[178] While the prior 2019 and 2020 bid processes were terminated and not incorporated as terms in the January 2021 alleged contract, they are informative in determining what the mutual intentions of the parties were in 2021 as to whether a contract was formed on the essential terms. This is also a relevant contextual factor in understanding the relatively quick and document-light nature of the events of January 2021. The cross-examination demonstrated that Orion and LRC had already comprehensively engaged in at least some of the key terms, as defined by Orion, relating to this same Royalty interest albeit under prior processes.

[179] Furthermore, with respect to the partially executed term sheet which Mr. Clegg acknowledged receiving on January 28, 2021, he speculated that the reason why LRC sent it accepting all of Orion's changes was because he had just told them the day before of Trident's offer. In other words, the signed-back Term Sheet was artificially expedited by LRC. Mr. Clegg stated, notwithstanding that the term sheet was returned with all of his changes accepted, nonetheless, it did not reflect an agreement with LRC in part because there were items on it that had not been the subject of prior discussion in 2021. Mr. Clegg insisted that the Term Sheet showed that there was no agreement because some of the terms were contrary to what had been discussed; e.g., the conditions for due diligence and financing. However, he acknowledged that he was aware that those conditions were confirmed to have been withdrawn based in part on prior discussions and were to LRC's benefit; in other words, LRC could and did waive reliance on those items.

[180] Mr. Clegg confirmed that Mr. Lader reviewed LRC's term sheet and returned the Orion mark-up to LRC. Furthermore, he copied Mr. Lader on the January 22, 2021 thread of emails

[8] Item 5 was the prospective purchases sources of funding for the potential royalty transaction and Item 6 was the prospective purchaser's due diligence requirements.
[9] The last item, Item 9, was other key issues, assumptions terms or conditions that the bidder wanted Orion to consider.

exchanged. However, Mr. Clegg added, under cross-examination, for the first time in the litigation, that Orion's legal review of the term sheet had not yet been completed when he returned their marked-up version to LRC. He had no documentary evidence to support his assertion, including in his email to LRC on January 26, 2021, when he returned the marked-up version, four days after his receipt of the term sheet, and wrote that it reflected a "couple of bits" from legal. Instead, he justified this position by saying it was not necessary to tell LRC at that stage that the legal review had not been completed. He maintained that even if LRC signed back Orion's revised version of the term sheet, there was no deal until and unless Orion signed back the term sheet – and it did not because the term sheet had not been finalized from Orion's perspective.

[181] Mr. Clegg then explained that in his January 27, 2021 response to Mr. Levinsky saying that the mark-up term sheet was "all good" except for item 2 (the manner of dividing the Royalty interest into two parts by sale or by assignment of revenues) as the final point, which he would need to discuss this with Mr. Lader, he meant that it was Mr. Levinsky's final point, not Orion's.

[182] He testified that the fund that held the Royalty was maturing in March 2021. He testified that the unexpected development that he referenced in his email was the need for his side to obtain approval from Orion's LPAC which decided potential conflict of interest matters. As the potential transaction contemplated Orion retaining 15% of the Royalty and transferring it to another fund, this approval had to be obtained. However, he admitted that he did not present the potential transaction to LPAC and in any event, he had been reporting to Mr. Lewnowski, who was the Chairperson of Orion's Investment Committee and involved in the LPAC, all along. Indeed, he described Mr. Lewnowski as the gatekeeper of the Investment Committee (as well as the Chief Investment Officer and founder of Orion, and stated that you could not even take any potential investments to the Investment Committee without his blessing. Yet, no evidence was led from Mr. Lewnowski, nor were any internal written communications produced relating to Mr. Lewnowski's involvement with the potential transaction with LRC.

[183] Furthermore, Mr. Clegg admitted in cross-examination that the eventual transaction with Trident also involved Orion retaining an even larger interest in the Royalty (40%), and that LPAC approved that deal. In other words, the "unexpected development" was not a real barrier. This makes Mr. Clegg's denial that he told LRC that getting LPAC approval would not be an issue suspect, given that it clearly was not an obstacle nor was it flagged as such by Mr. Lewnowski. He testified he told LRC only that he expected to obtain it on a balance of probabilities but never said it was a foregone conclusion. His use of the phrase "balance of probabilities" was not reflected in his affidavit or used by any of the other witnesses.

[184] Mr. Clegg deposed that in all of his 11 years of experience in this field, he has not ever been privy to a "transaction of significance" with respect to mining royalties having been completed by way of an oral offer and email acceptance, as alleged by LRC. Oral agreements for this type of transaction are not consistent with commercial practice, in his experience.

[185] Mr. Clegg acknowledged that in the Trident deal, Orion received 11 million shares in Trident as part consideration but that this was not a factor in Orion's decision to accept the Trident bid.

Michael Wrotniak

[186] Mr. Wrotniak swore a very brief affidavit, adopting Mr. Clegg's affidavit in its entirety. His main focus in chief was his recollection that Mr. Clegg never advised that he had the "authority" to make any offers during the videoconference call on behalf of Orion.

[187] However, Mr. Wrotniak provided little detail about what transpired during the videoconference call or the surrounding communications and events relating to the impugned failed transaction with LRC. The impression left with the court was that he was being confined to a narrow scope of evidence with care not to contradict Mr. Clegg's anticipated evidence or affidavit evidence. What his cross-examination did reveal, however, was a different version of how the videoconference ended from that testified to by Mr. Clegg. Mr. Wrotniak testified that the meeting ended with LRC telling them that it would take the USD $18.7 million dollar purchase price for 85% of the Royalty under consideration and would get back to Orion with their response. This is consistent with LRC's evidence, and inconsistent with Mr. Clegg's evidence.

[188] He also testified that if anyone else testified that the videoconference ended differently, that their evidence should not be believed. Of course, he did not know at the time of this question that Mr. Clegg had testified to a different version of how the videoconference call ended.[10]

The Expert Evidence – Customary Practice for Royalty Purchase Agreements

[189] John Marvel was Orion's expert. He is a senior lawyer who practices in Nevada in, *inter alia*, mining law including gross royalty interests, and was qualified as a legal expert on Nevada law.

[190] Colleen Dolan was LRC's expert. She is also a senior lawyer who practices in Nevada in, *inter alia*, mining law including gross royalty interests and was also qualified as legal expert on Nevada law. She was retained to respond to Mr. Marvel's report.

[191] By agreement, neither of the experts were called to provide *viva voce* evidence. Rather, the parties relied on the respective expert reports, filed as exhibits on consent, and the transcripts of cross-examinations conducted in advance of the trial of an issue.[11]

[192] On the issue of customary practice regarding the sale of royalty interests, Mr. Marvel wrote that:

> It is commonplace in mineral and royalty transactions in Nevada for parties to have a broad outline and understanding of the general terms of a transaction, but it is done with the expectation that the parties will ultimately execute a formal, written agreement which will

[10] On consent, I issued an order excluding witnesses at the outset of trial.
[11] Pursuant to the terms of the Hearing Protocol, as accepted by this court.

> serve as the "entire agreement" and the only contract or agreement to which the parties will be bound in consummating a sophisticated and monetarily sizable royalty transaction."

[193] It is Mr. Marvel's opinion that the alleged contract, as pleaded in the Notice of Application by LRC, was nothing more than an agreement to agree relying, particularly, on s. 3(b) of the partially executed Term Sheet providing for the execution of a formal agreement of purchase and sale and other transaction related documents.

[194] On the issue of customary practice, Ms. Dolan's opinion is that, as the alleged contract did not itself effect a conveyance of the Royalty, the contract reflects the material terms of this type of transaction under Nevada law. Specifically, she wrote,

> Rather, the Agreement consists [of] the material terms of a transaction to purchase and sell the Royalty upon payment of the agreed price. That structure comports with the typical way a royalty interest is sold under Nevada law – the parties first agreeing to the asset to be sold and a price, with an instrument of conveyance to be delivered at a future date upon payment of the purchase price and satisfaction of any other agreement terms.

[195] In my view, the expert evidence that was led on this issue was of little assistance to the court. The experts each provided a very brief general statement. Mr. Marvel's opinion addressed what was "commonplace" and then was informed by his view that the alleged contract was an agreement to agree. He relied on the insertion of s. 3(b) into the partially executed Term Sheet to support his view. Ms. Dolan's opinion was that the alleged contract was typical of how royalty sales are structured under Nevada law while noting that in this case, the parties had chosen Ontario law to govern this transaction. Her opinion was that the alleged contract was an enforceable one under Nevada law as all the essential terms had been agreed upon.

Analysis

Credibility

[196] This matter comes down to a finding of facts that depends in large part upon a credibility assessment of the respective witnesses, who were the key actors in the negotiations between LRC and Orion[12]. While the court heard from all of the participants to the communications, including the January 20, 2021 videoconference, it did not hear from Mr. Lewnowski despite his obvious key role in directing Mr. Clegg throughout the various discussions between LRC and Orion.

[197] It is trite law that the court can accept all, none or some of a witness' evidence.

[198] In assessing the credibility of witnesses in commercial transactions in particular, the court will look at the surrounding circumstances, including the relevant contemporaneous written

[12] Reliability of witnesses' memory was not a major concern in this matter.

documents, the internal consistency of telling of the respective versions of events together with the consistency or lack thereof with respect to other witnesses' version of the same events, the commercial/industry customs relative to the type of commercial transaction in question, potential motivational factors informing a witness' perception and/or recollection of the events, and what makes common sense at the end of the day from an objective perspective. While a witness' demeanour on the stand is not a significant factor in assessing credibility, the manner in which witnesses responded to questions under cross-examination and under examination-in-chief (such as whether their narrative flowed unprompted or had to be managed through the use of documents, whether they were defensive or evasive or had moments of selective memory), are appropriate factors in an overall assessment.

[199] As summarized succinctly in the oft-cited case of *Faryna v. Chorny*, [1952] 2 DLR 354, at p. 357:

> the real test of the truth of the story of a witness in such a case (interested witnesses) must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[200] Applying the framework set out in *Faryna* to a commercial case, the court's focus is on whether an interested witness' evidence is "consistent with the preponderance of probabilities that a practical businessperson would feel reasonable"[13], and is also consistent "with the documentary evidence and commercially reasonable principles" applicable.

Credibility Assessment and Findings of Fact

[201] Mr. Levinsky was a careful witness. His recollection of the contents of the videoconference call, together with the preceding steps and the immediate aftermath, was detailed and did not require much prompting through reference to documents. However, at times, under cross-examination, his answers bordered on the defensive. His defensiveness was revealed particularly with respect to the cross-examination on the draft and revised term sheet.

[202] Mr. Ortiz and Mr. Wellings were both very straightforward and not defensive under cross-examination. While they provided fewer details regarding the overall discussions and steps (from the 2019 bid process) through to the end of the relationship with ORP, their respective versions of the key events in January 2021 were detailed, spontaneous, and consistent with Mr. Levinsky's. They both presented their testimony in the form of longer narratives than Mr. Levinsky and required less prompting via the use of documents than Mr. Levinsky. They withstood cross-examination on their testimony as to how the ultimate purchase price of USD $18.7 million arose, the forms of consideration, the percentage of the Royalty that would be purchased, that Mr. Clegg

[13] *Enterprise Rent-A-Car Canada Company v. The Minister of Finance*, 2020 ONSC 5339 at para. 55; *Vantage Equipment Company Ltd. v. Finning International Inc.*, 2022 BCSC 692 at para. 83.

specifically confirmed that he had the "authority" to make a binding counter proposal, and how that videoconference ended.

[203] Mr. Clegg on the other hand did not present as a credible witness. He admitted that his affidavit spoke more about what ostensibly did not occur at the January 20th videoconference than what did occur and that certain matters were not disclosed in his affidavit.

[204] Mr. Clegg was defensive, and aspects of his testimony were implausible and inconsistent with his own documentation. His focus on the word "ability" versus "authority" aimed at disavowing any communication of a binding counteroffer was not plausible. He could not adequately explain why he was so certain he did not use the word "authority" and instead used the word "ability". The difference between ability and authority is essentially a difference without a distinction in a business context. It also casts doubt on his testimony that he did not make a counteroffer. There was no suggestion in his evidence that LRC offered to buy 85% of the Royalty for USD $18.7 million other than pointing to the phrasing in the partially executed term sheet, after the fact. Given his admission that he volunteered during the videoconference that Orion had paid USD $22 million for the Royalty, and that it was Orion that wanted to retain 15%, along with his admission that LRC initially offered to pay USD $20 million for the entire Royalty, it is not plausible that LRC effectively bet against itself.

[205] Mr. Clegg's testimony also revealed that he did not have a clear recollection of the events surrounding the videoconference call. For example, he could not recall if he forwarded Mr. Ortiz' key email of January 20, 2021 following the videoconference call and communicating LRC's acceptance of Mr. Clegg's purported offer to sell the Royalty to Mr. Lewnowski – even though he confirmed that any potential transaction had to be vetted with Mr. Lewnowski and he confirmed he was in regular communication about the LRC negotiations during this time with Mr. Lewnowski. Similarly, he could not recall if he forwarded a copy of this email to his Deputy Legal Counsel, Mr. Lader, notwithstanding the offer and acceptance language and the fact that Mr. Lader was engaged in this potential transaction by this time. This lack of recollection also raises a question about why he would not have examined his file to see if he forwarded a copy of the email to these two key actors at Orion. No satisfactory explanation was provided by Mr. Clegg. There were various occasions in which Mr. Clegg denied certain matters and then was directed to documentation in which he reversed his answer.

[206] I reject Mr. Clegg's explanation that the email of Mr. Ortiz later that same afternoon advising that LRC accepted Orion's offer and stating the essential terms with a binding term sheet to follow was "confusing" to him. It is not plausible that he simply ignored the first part of Mr. Ortiz' email constituting the acceptance of an offer and focused only on the second part stating that a binding term sheet would follow when he replied simply "Ok, sounds good". His explanation is implausible given his experience in these types of royalty mining transactions that he would not have turned his mind to the significance of Mr. Ortiz's use of the offer and acceptance language. The implausibility is highlighted by his steadfast position that he would not have used the word "authority" in the context of making a counteroffer during the videoconference and only used the word "ability". Mr. Clegg understood the significance of these terms in the business context.

[219] The lack of plausibility is further heightened by the fact that between January 20 and January 27, 2021, there is no written communication from Orion disabusing LRC of any notion it had made an offer to sell the Royalty, notwithstanding the fact that its deputy legal counsel, Mr. Lader, was being copied on all key communications between the two entities. Indeed, in his email of January 28, 2021, responding to LRC's contention that there is a binding agreement, Mr. Clegg writes that "Orion does not agree with the legal conclusion reached by your counsel. But in any event, I think it may be helpful for us to talk about this…". He does not state he never had authority to make a binding offer, or that no offer had been made in the first place.

[207] Similarly, Mr. Clegg's explanation that he never believed LRC's representations that this was an unconditional, all-cash, offer, made orally and in writing, is not plausible. The fact these representations were made was not disputed. The representations were made with the recognition that LRC had already completed its due diligence with respect to the Royalty in the prior 2019 and 2020 bid processes and Orion knew this. Furthermore, Mr. Clegg never mentioned in writing or to anyone that he did not believe the representations to be true.

[208] Overall, Mr. Clegg tended to exaggerate and would not concede any point. For example, he tried to find disagreement on points on the 2019/2020 Indicative Proposal. For example, he insisted that the parties had not agreed on anything at all at the end of the day.

[209] The fact that Mr. Clegg and Mr. Wrotniak's evidence was internally inconsistent with respect to the manner in which the videoconference ended is a factor that casts further doubt on the credibility, if not reliability, of Mr. Clegg's testimony. Also, Mr. Wrotniak did not otherwise offer his own version of what transpired at the videoconference other than to adopt Mr. Clegg's affidavit evidence. Accordingly, the probative value of Mr. Wrotniak's evidence is weak, other than his recollection of how the videoconference ended, which was consistent with that of LRC's witnesses.

[210] Having considered all of the relevant factors, I found the collective evidence of LRC's lay fact witnesses more credible and reliable than Orion's collective evidence. Where their respective evidence materially differs, I favour LRC's evidence over Orion's.

[211] In the circumstances of this case, where time was of the essence in light of the Royalty's holding fund's pending maturity, and the 2021 negotiations were informed by the prior bid processes for the same Royalty as between the same parties, I find that the essential terms were concluded with Mr. Ortiz' email of January 20, 2021 accepting Orion's offer and evidenced by Mr. Clegg's email confirming LRC's acceptance of Orion's offer. The binding term sheet was revised by Orion and accepted by LRC, without change or condition, as evidenced by Mr. Levinsky's and Mr. Wellings' respective signatures on January 28, 2021 as further evidence that there was a meeting of the minds not only on the essential terms but the standard non-essential terms a well.

[212] The fact that Orion declined to sign it was an attempt to avoid a binding agreement already made, in light of the fact that it received an unsolicited better offer after the acceptance of Orion's offer was communicated in writing by LRC. The Term Sheet contained all of the essential and

non-essential terms, and all that was left was to embody those terms into a comprehensive written agreement and related transactional documents. The latter transactional documents would have included a decision on how to structure the division of the Royalty to be done at a future date after consideration was paid. The comprehensive written agreement was not an essential term in and of itself in the sense of it being required before a valid contract was made.

[213] Orion's recognition that the Term Sheet contained some inadvertent errors that did not reflect what Orion and LRC had agreed upon, and LRC's quick agreement, only reinforces the fact that these parties intended to, and did in fact, reach an agreement of the essential terms of this deal before the draft term sheet was sent.

[214] I find that the videoconference of January 20, 2021 was the culmination of negotiations that were built upon the prior bid processes to Orion's knowledge. At that videoconference, Mr. Clegg made a counteroffer to LRC to purchase 85% of the Royalty for USD $18.7 million. Mr. Clegg did so and represented that he had authority to do so on behalf of Orion. Mr. Clegg had been discussing the possibility of a transaction with his superior, Mr. Lewnowski, who had to give his blessing for any such transactions. Mr. Clegg had actual authority to make this offer, as successor to Mr. Silver. In the alternative, Mr. Clegg had ostensible authority to make this counteroffer *(Courtot Investments Ltd. v. Royal Trust Co*., [1980] OJ No. 1264 (Ont. SC), at para. 35). I find that the videoconference was concluded with the mutual understanding and intention that if LRC accepted the counteroffer, on an unconditional, all-cash, basis, then the deal was done.

[215] The rapidity and lack of formalized written terms of this transaction are understandable from a commercial efficacy perspective when the prior bid processes are considered, against the background of Mr. Silver's advice to Mr. Wellings in December 2020 that the fund holding the Royalty was to expire at year end (March 2021) and if LRC was still interested in buying it, they should contact his successor Mr. Clegg. Mr. Clegg also told LRC that the fund was expiring and so it would be a positive factor if a deal could be concluded before that time.

[216] While much was made of the fact that the initial Term Sheet contained conditions and other provisions that were counter to the deal that LRC alleges to have been made, I accept the explanation that, other than the essential terms which were correctly inserted, the balance of the terms were essentially boilerplate terms. This makes sense when viewed in the context of the relative speed at which this transaction progressed, and the fact that when Mr. Clegg pointed out that one of the terms was inconsistent, LRC readily agreed that it should not have been inserted by its lawyers.

[217] The nature of the alleged contract is also important in this case. The asset being purchased was a portion of an existing royalty. The underlying royalty was already created. I have considered the evidence of the experts as to the customary practices with respect to this type of transaction, and the evidence of the other witnesses as to their business practices.

[218] The price, the asset in question (the Royalty), the percentage of the Royalty being acquired, the form of consideration, the lack of requirement for due diligence, and the waiver of all conditions by LRC were the essential terms for this potential transaction and had been agreed upon

with sufficient certainty with delivery of Mr. Ortiz' acceptance email on January 20, 2021. Some of these terms were confirmed by subsequent emails from LRC. These terms were not the subject of further negotiation and were sufficiently certain.

[219] Orion also submits that approval from its LPAC was a precondition to the agreement. However, Orion did not raise LPAC approval until January 22, 2019. Furthermore, and in any event, it is apparent that LPAC approved the subsequent deal with Trident which included Orion retaining a percentage of the Royalty giving credence to LRC's evidence that Mr. Clegg represented that getting this internal approval would not be a problem. In the alternative, even if this was a condition precedent, as stated in *UBS* at para. 94, "each party is obliged to perform the contract pending the necessary third-party consent". There is no evidence that Orion attempted to gain LPAC approval, and it cannot now rely on this ground to avoid its binding obligations.

[220] I further find that a fully executed Term Sheet and/or a mutually acceptable comprehensive agreement of purchase (referenced in the partially executed Term Sheet) were not preconditions to a binding agreement between LRC and Orion or essential terms of the deal.

[221] Section 4(b) of the partially executed Term Sheet in particular states, in material part, that "effective upon the Seller's delivery to LRC of a copy hereof executed by the Seller…constitutes a legal, valid and binding obligation of the Seller, enforceable against it in accordance with its terms…". Orion submits that as it did not execute the Term Sheet, therefore, there was no binding agreement, and this Term Sheet reflects the mutual intentions of the parties in that regard.

[222] However, the purchase price, form of consideration, and the asset being acquired were correctly reflected in the initial draft and the partially executed draft Term Sheet as evidenced by the fact they were not revised or questioned by Mr. Clegg when he sent Orion's marked up version back to LRC for LRC's consideration.

[223] Furthermore, with respect to s. 3(b) of the partially signed Term Sheet, the purpose of the anticipated agreement of purchase and sale together with other related transaction documents was to give effect to an existing binding, legally valid agreement between LRC and Orion. This view is supported, in part, by the lack of a reference to the requirement for a "mutually acceptable" comprehensive purchase agreement by Orion at any time prior to its decision to sell the Royalty to Trident. This conclusion is also supported by the wording of the partially executed term sheet itself which provides that it will include terms that are "customary for transactions similar in nature to, or appropriate for, the Transaction." These parties are sophisticated parties knowledgeable and experienced in this particular type of mining royalty sale and purchase.

[224] The other terms in the partially executed Term Sheet, were non-essential terms. It is clear that there was a miscommunication between LRC and its lawyers with respect to some of these non-essential terms, and they were acknowledged as such when raised and struck by Mr. Clegg.

[225] Even with respect to the Exclusivity clause, it is non-essential if the deal was done without the need for a fully executed Term Sheet.

[226] Similarly, Orion's reliance on the Termination clause does not assist it. The Termination clause, while redundant to a degree if there was already an agreement on all of the essential terms with the requisite degree of certainty on those terms, still preserved the rights of the aggrieved party to pursue its rights and remedies for any breach including a wrongful termination of the agreement, such as by Orion selling the Royalty to a third party.

[227] The Termination clause is not an essential term of this agreement much like an entire agreement clause was found, in *UBS* at para. 89, not to be an essential term in the securities context.

[228] The fact that Orion did not sign back the partially signed Term Sheet when all of its changes were accepted with no further modifications, does not excuse it from its binding obligations (*Erie Sand & Gravel Ltd. v. Seres' Farms Ltd.*, 2009 ONCA 709, at para. 42; *Al-Omani v. Bird*, 2016 ONSC 5779, at para. 45). It cannot rely on its own failure to sign the Term Sheet it ultimately proposed as an excuse to terminate the agreement. Orion did not indicate anywhere prior to this pending litigation that it would have further revised the Term Sheet it returned to LRC with its "few bits" arising from its legal review nor did it take the position that a fully signed comprehensive contract was a condition of any deal to sell the Royalty interest to LRC prior to the engagement of lawyers in pending litigation. Instead, a better deal came along and Orion simply disengaged.

Viewing the matter from the perspective of an objective reasonable bystander, I conclude that the parties reached a binding agreement on January 20, 2021 on the essential terms with the requisite degree of certainty (*UBS*, at para. 47).

Nevada's Statute of Frauds and Enforceability of the Contract Under Nevada Law

The Expert Evidence

[229] Mr. Marvel provided an opinion on the following issues:

a) Is the Royalty a real property interest under Nevada law?

b) Would the conveyance or assignment of the Royalty from Alnitak Holdings LLC to LRC be subject to Nevada's *Statute of Frauds*?

c) If yes, what are the legal requirements for the conveyance or assignment of the Royalty under Nevada Law?

d) Is the Agreement as defined in LRC's Notice of Application sufficient to satisfy the conveyance or assignment of the Royalty?

[230] Mr. Marvel opined that the Royalty is a real property interest under Nevada law, and therefore Nevada's *Statute of Frauds* applies. He relies on the definition of a "royalty" in Nevada Revised Statutes 362.105(1) which he defines as "a portion of the proceeds from extraction of a mineral which is paid for the privilege of extracting the mineral. Therefore, he reasons that a "production royalty" is an interest in real property that runs with the land. He cites a number of

articles for this proposition. He concludes that the Royalty as defined in the existing royalty agreement held by Alnitak Holdings would be considered a real property interest under Nevada law.

[231] In Mr. Marvel's opinion, the alleged agreement does not meet the requirement under Nevada's *Statute of Frauds* that it be signed and in writing reflecting the essential terms of the deal. This is because the partially signed Term Sheet was not accepted in writing by Alnitak Holdings and further because the Term Sheet was made expressly subject to the "execution of definitive documentation…including a mutually acceptable purchase agreement". He does not, however, reference the email exchanges between LRC and Orion of January 20, 2021. Rather he states that under Nevada law the holder of the existing Royalty, in this case Alnitak, or its authorized agent must accept the proposed assignment or purchase by LRC.

[232] He notes that to be enforceable, the conveyance of the Royalty must be registered on title in order to operate as notice to any subsequent purchasers.

[233] Finally, in his view, the verbal offer by Mr. Clegg followed by an email communication from Mr. Ortiz is not enough to constitute an enforceable contract under the laws of Nevada, nor did the Term Sheet that contemplates that a further agreement to purchase will be executed. In his view, the alleged agreement and the Term Sheet at most each constitute an agreement to agree which is not enforceable under Nevada law. He relies on customary practice in mineral and royalty transaction in Nevada for the parties to have a "broad understanding" of the general terms of the transaction as a starting point for further negotiations only. This is how he characterized the dealings between Orion and LRC. With respect to contract formation, Mr. Marvel wrote:

> [p]reliminary negotiations do not constitute a binding contract unless the parties have agreed to all material terms.

[234] Ms. Dolan provided a responding opinion on the following issues:

a) does Nevada law apply to the interpretation of the alleged agreement between LRC and Orion?

b) is the Royalty properly characterized as personal property under Nevada law?

c) If yes, then have the requirements under Nevada's *Statute of Frauds* been met?

d) Is the alleged agreement an enforceable contract under Nevada law?

[235] Regarding the first issue, Ms. Dolan opined that under Nevada law, parties are entitled to choose the domestic law to apply to the interpretation of contracts, provided there is a substantial connection with that jurisdiction. In this case, the partially signed Term Sheet provided that Ontario law would govern, and this term was never challenged by Orion. Therefore, she concluded, the parties intended for Ontario law to govern the agreement and that a Nevada court would uphold that contractual provision. Furthermore, Ontario has a substantial connection to the agreement given, *inter alia*, that LRC is an Ontario company and its principal and lawyers were

present in Ontario when the agreement was being negotiated. On the other hand, Orion is located in various locations around the world, excluding Nevada, so there in no basis to conclude that Nevada law would apply. The fact that the Royalty itself related to mines located in Nevada is not sufficient, and in her experience, these types of agreements are often governed by laws other than Nevada law.

[236] Ms. Dolan also deposed that in Nevada, no court has yet ruled on the issue of whether a mining royalty is personal property or an interest in real property. To the contrary, the state of Nevada treats mining royalty interests as personal property in terms of, for example, tax treatment. However, she stated that as this issue has not yet been settled by a court, her firm's practice is to register these types of royalty agreements on title as a precautionary measure. Nonetheless, her opinion is that the present state of the law in Nevada is that mining royalty interests, such as the Royalty, are treated as personal property and hence Nevada's Statute of Frauds is not applicable. Ms. Dolan notes that Mr. Marvel does not rely on any caselaw in his opinion, but rather on academic articles to support his opinion on this key issue. She further points out that there is an active debate on this topic with articles advocating each side.

[237] In the alternative, Ms. Dolan's opinion is that if the *Statute of Frauds* applies, then its requirement for the agreement to be signed in writing is met in the current circumstances. This is because Nevada's courts and statutes recognize the validity of electronic signatures on emails to satisfy this requirement. This requirement is satisfied, in her view, by Mr. Ortiz's email dated January 20, 2021, accepting the terms of the oral offer, and Mr. Clegg's reply email of the same day stating "Ok, sounds good".

[238] Finally, Ms. Dolan deposed that under Nevada law, the alleged contract is enforceable because there was an offer, acceptance, meeting of the minds, consideration, and the material terms were certain and definite. She noted that the lack of a registered instrument conveying real property, if the Royalty was considered real property, would also not affect the enforceability of the alleged contract against Orion under Nevada law. Rather, the contract would not be enforceable against a bona fide purchaser without notice.

[239] On cross-examination, Ms. Dolan, upon being shown a 54-page agreement involving the sale of a royalty, containing a number of schedules identifying the mine claims at issue, stated that this was "typical" in terms of length and detail of mining royalty transactions. However, the fact that this type of detail is typical of a comprehensive agreement does not mean that it is either an essential term for the formation of a valid contract, or more importantly, whether it was an essential term for Orion and LRC.

[240] Ms. Dolan also conceded in cross-examination that the characterization of mining royalty interests as personal versus real property is unsettled. However, she did not retract her opinion that under the current state of the law, Nevada treats royalties on balance as personal property.

Is the Impugned Contract Unenforceable under Nevada's Statute of Frauds

[241] The court did not have the benefit of observing the respective expert witnesses. Therefore, I assessed credibility of their respective opinions based on their reports, filed as exhibits, and the transcripts of cross-examination of these experts.

[242] I accept Ms. Dolan's evidence over that of Mr. Marvel's. Her opinion was much more thorough and relied not only on Nevada statutes but also substantial case law. Mr. Marvel did not file a reply report.

[243] Mr. Marvel's opinion, with respect to the primary issue of whether the Royalty was a real property interest for purposes of Nevada law and Nevada's *Statute of Frauds,* did not cite any case law in support.

[244] Furthermore, Mr. Marvel's opinion with respect to the validity and enforceability, or lack thereof, of the impugned contract is inconsistent with my findings of fact. As I noted, Nevada's law with respect to validity and enforceability of contracts is substantially similar to Ontario's. It is the application of the law to the facts of this case that distinguishes, in large part, Ms. Dolan's opinion from Mr. Marvel's opinion.

[245] Orion points out that in Ontario, royalties in mining interests whereby the revenue in question is derived from mining products, can be characterized as real property interests, thus engaging Ontario's *Statute of Frauds* (*Third Eye Capital Corporation v. Resources Dianor Inc*., 2018 ONCA 253, at paras. 24, 59, 111-112). However, Orion's submission was that the impugned agreement relating to the disposition of the Royalty would be void under Nevada's *Statute of Frauds*. Therefore, the analogy to Ontario law is not helpful.

[246] I find that under Nevada law, the Royalty would likely be currently treated as a personal property interest and therefore would not be subject to Nevada's *Statute of Frauds*.

[247] In the alternative, assuming that Nevada's *Statute of Frauds* applies, the exchange of emails between Mr. Ortiz and Mr. Clegg on January 20, 2021, satisfies the requirements of that statute under the current status of Nevada law.

DISPOSITION and NEXT STEPS

[248] This court grants leave to add the proposed Orion respondents *nunc pro tunc.*

[249] This court has jurisdiction over the proposed Orion respondents.

[250] A binding and enforceable contract was made for the purchase of the Royalty between LRC and Orion.

[251] The next steps in this proceeding, including damages, will be the subject of a case conference. The parties may contact my judicial assistant to schedule the case conference.

[252] At the case conference, I will also hear submissions as to whether costs should be fixed at this stage or deferred to the damages phase.

Justice S. Vella

Date: August 15, 2023

SCHEDULE 1

Court File No. CV-21-00656830 -0000

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

LITHIUM ROYALTY CORPORATION

Applicant

- and -

ORION RESOURCE PARTNERS and LITHIUM AMERICAS CORPORATION

Respondents

APPLICATION UNDER Rule 14.05(3)(b), (d) and (h) and Rule 38 of the *Rules of Civil Procedure*

HEARING PROTOCOL

Procedural Background

A. This matter was commenced by Application on February 11, 2021. Attached as Schedule "A" is a brief of orders and endorsements that have been issued in this proceeding.

B. As reflected in the case conference endorsement of Vella J. dated July 28, 2022, the June 4, 2021 hearing of the Application was adjourned to be heard by way of *viva voce* evidence because "the parties appropriately agreed that the central issue of contract formation will fundamentally involve an assessment of credibility of the participants in a key telephone call in January 2021 at which the alleged contract was allegedly formed".

C. It was ordered and agreed at a case conference before Vella J. heard August 10, 2022 that: (i) the parties would proceed with the "liability phase" of the Application, (ii) the liability phase hearing (the "Hearing") would take 3-4 days, and (iii) the Applicant' s motion to amend the

Notice of Application to add additional parties and Orion's jurisdiction motion would be argued at the return of the Heming.

D. The Hearing is scheduled to take place December 13-16, 2022.

Hearing Procedure

1. The following issues are to be decided at the Hearing:

(a) the Applicant's motion to amend the Notice of Application (dated November 4, 2022, appending an Amended Amended Notice of Application dated February 8, 2022) to add additional Respondents and Orion's cross-motion on jurisdiction (dated December 2, 2022), including relating to those proposed Respondents;

(b) the issue of whether the Agreement was formed as alleged by LRC in relation to the Royalty.

2. Any issues relating to the appropriate remedy, if any, arising from the Application will not be dealt with at the Hearing.

3. In addition to *viva voce* evidence, the following documents will be entered into evidence in respect of the hybrid application:

(i) LRC's Amended Application Record (dated April 8, 2021), containing the Amended Notice of Application issued March 24, 2021, the Affidavit of Blair Levinsky sworn February 11, 2021 and attached Exhibits, the Affidavit of Mark Wellings sworn February 11, 2021, the Affidavit of Ernie Ortiz sworn February 11, 2021, the Supplementary Affidavit of Blair Levinsky sworn March 24, 2021 and attached Exhibits.

(ii) LRC's Reply Application Record (dated April 24, 2021), containing the Affidavit of Colleen Dolan sworn April 24, 2021 and attached Exhibits.

(iii) LRC's Transc1ipt Brief (dated May 27, 2021), containing transcripts of the cross-examination s of fact and expert affidavits.

(iv) LRC's Supplemental Brief (dated May 31, 2021), containing Exhibits from the cross-examination of Philip Clegg on May 6, 2021, Exhibits from the cross-examination of Coleen Dolan on May 19, 2021, and Orion's Responses to Undertakings delivered May 17, 2021.

(v) LRC's Supplementary Application Record (dated December 9, 2022) and attached Exhibits.

(vi) Orion's Responding Application Record (dated March 26, 2021), containing the Affidavit of Philip Clegg affirmed March 26, 2021 and attached Exhibits, the Affidavit of Michael Wrotniak affirmed March 26, 2021, and the Affidavit of John Marvel sworn March 24, 2021 and attached Exhibits.

(vii) Orion's Supplementary Responding Application Record (dated June 1, 2021), containing the Affidavit of John Marvel sworn May 7, 2021 and attached Exhibits.

(b) Any additional documents that are tendered and admitted as evidence at the Hearing.

4. The Hearing will follow the following format:

(a) LRC and Orion will each present opening submissions, which shall be no longer than thirty minutes for each party.

(b) An order excluding witnesses shall be made.

(c) The expert affiant witnesses will not be called to give *viva voce* evidence.

(d) The Applicant has agreed to produce its fact affiant witnesses without the need for subpoenas. The Applicant will conduct a brief examination-in-chief of the Applicant's fact witnesses (Mr. Levinsky, Mr. Wellings, and Mr. Ortiz). The examination-in-chief will be approximately twenty-five minutes per witness. Orion will conduct cross-examinations, followed by re-examination, if any.

(e) Orion has agreed to produce its fact affiant witnesses without the need for subpoenas. Orion will conduct a brief examination-in-chief of the Respondent 's fact witnesses (Mr. Clegg

and Mr. Wrotniak). The examination-in-chief will be approximately twenty-five minutes per witness. The Applicant will cross-examine the Respondent's fact witnesses, followed by any re-examination by the Respondent.

(f) The Applicant and the Respondent will each present closing submissions, which submissions will include any oral argument on the Applicant's motion to amend the Notice of Application to add Respondents and Orion's corresponding motion on jurisdiction, including in respect of the proposed Respondents .

5. The Hearing will proceed on the basis that the allotted time for the Hearing shall be divided in half, and each party shall have equal time to make submissions and conduct affiant witness examinations (i.e., the "chess clock" approach).

CITATION: *Lithium Royalty Corp. v. Orion Resource Partners et al.*, 2023 ONSC 4664
COURT FILE NO.: CV-21-00656830-0000
DATE: 20230815

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

LITHIUM ROYALTY CORPORATION

Applicant

– and –

ORION RESOURCE PARTNERS, TRIDENT ROYALTIES PLC and LITHIUM AMERICAS CORPORATION

Respondents

REASONS FOR DECISION (Trial of an Issue)

Vella J.

Released: August 15, 2023