

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Horizon Capital Holdings Inc. v. GeoTility  
Systems Corp.*,  
2024 BCSC 1350

Date: 20240726  
Docket: S204510  
Registry: Vancouver

Between:

**Horizon Capital Holdings Inc.**

Plaintiff

And

**GeoTility Systems Corp.**

Defendant

Before: The Honourable Justice Douglas

## Reasons for Judgment

Counsel for Plaintiff:

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Place and Date of Trial:

Vancouver, B.C.  
March 11–15, 2024

Place and Date of Judgment:

Vancouver, B.C.  
July 26, 2024

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**I. OVERVIEW**

[1] The plaintiff, Horizon Capital Holdings Inc. seeks judgment against the defendant, GeoTility Systems Corp. in the amount of \$1,000,000, plus costs and interest, pursuant to the parties' share repurchase agreement.

[2] Horizon is a federally-incorporated management organization which invests in real estate and private companies. GeoTility is the parent company of a group of wholly-owned entities and is in the business of developing and installing geothermal field equipment and providing utility services in Canada and the United States.

[3] In June 2012, Horizon invested approximately \$7,000,000 in GeoTility (through a combination of equity and the repurchase of certain shareholder loans and preferred shares from GeoTility's majority shareholder), thereby acquiring a majority shareholder interest in GeoTility of approximately 56%. About six years after this investment, the parties engaged in discussions to facilitate Horizon's exit as a shareholder in GeoTility. The parties' chief financial officers negotiated and finalized the agreement on June 30, 2018.

[4] GeoTility's agreed repurchase price for Horizon's shares was \$6,686,407. GeoTility owed an initial payment of \$5,686,407, followed by a \$1,000,000 balance of sale payment. The parties intended this balance of sale payment to be triggered when GeoTility's "cash on the balance sheet" reached an agreed threshold.

[5] At issue on this summary trial is the correct interpretation of one term in the parties' agreement. The essential question before me is whether the objective meaning of "cash on the balance sheet" is GeoTility's gross cash on hand, as reflected in the cash line on its consolidated balance sheet, or its net cash position, after deducting bank indebtedness as a cash equivalent. Horizon adopts the former position; GeoTility advocates in favour of the latter. The answer to this question determines whether or not GeoTility was required to make a balance of sale payment to Horizon pursuant to the parties' agreement. Horizon says that the amount of GeoTility's "cash on the balance sheet" triggered balance of sale payments in 2018 and 2019; GeoTility disagrees.

[6] The agreement contains an express sunset clause: if no balance of sale payment was triggered by September 30, 2022, it was forfeited and not payable.

[7] Both parties assert that the disputed contractual term is clear, unambiguous, and capable of only one reasonable interpretation while simultaneously proposing divergent and irreconcilable interpretations. Each party describes the other's interpretation as effectively requiring the court to rewrite the agreement by implying or adding new contractual terms. Both parties submit that, if they had intended the disputed term to mean what the other asserts, they could easily have made such an intention clear by using different language in the agreement.

[8] Horizon argues further that, by failing to make the required balance of sale payment, GeoTility breached its core obligation under the agreement. Accordingly, Horizon relies on an acceleration clause in the agreement to recover the full \$1,000,000 it says GeoTility owes. GeoTility describes this term as a penalty clause. It argues that, if Horizon's interpretation of "cash on the balance sheet" is accepted, GeoTility ought to be relieved from this penalty and ordered to pay only the amounts found due and owing under the balance of sale provision and not the acceleration clause in the agreement. If any balance of sale payment is found to be owed, GeoTility takes issue with Horizon's calculation of those amounts.

[9] Ultimately, I accept the parties' shared view that the agreement is clear, unambiguous, and capable of only one reasonable interpretation. For the reasons that follow, I conclude that "cash on the balance sheet", considered objectively, in the context of the agreement as a whole and the relevant factual matrix, means gross cash, as reflected in the cash line on GeoTility's consolidated balance sheet, without deduction for bank indebtedness as a cash equivalent.

[10] Accordingly, I find that the amount of GeoTility's "cash on the balance sheet" triggered balance of sale payments in 2018 and 2019. I also find that GeoTility's failure to make the required balance of sale payments triggered the acceleration clause in the agreement, which I conclude was not an oppressive penalty clause. In the result, I grant judgment in favour of Horizon in the amount of \$1,000,000.

**II. LAW AND ANALYSIS**

**A. Suitability for Summary Trial**

[11] The parties agree that this action is suitable for summary trial. While an important consideration, the parties' consent is not determinative: *Manson v. Mitchell*, 2023 BCSC 723 at para. 50, aff'd 2024 BCCA 142.

[12] Rule 9-7(15)(a) of the *Supreme Court Civil Rules* permits the court to grant judgment on a summary trial application unless:

- a) The court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law; or
- b) The court is of the opinion that it would be unjust to decide the issues on the application.

[13] The presence of conflicting evidence does not preclude a summary trial: *Lafavor v. Nelson*, 2019 BCSC 1903 at para. 53. The question is whether the court has reasonable confidence when making findings of fact and whether the court is able to achieve a fair and just result: *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd* (1989), 36 B.C.L.R. (2d) 202 at 212 and 215, 1989 CanLII 229 (C.A.); *Leisure Aquatics Inc. v. Lax Kw'alaams Band*, 2012 BCSC 1202 at para. 24; *Lafavor* at para. 53.

[14] Additional factors to consider in determining whether an application is suitable for disposition under R. 9-7 include the amount involved, the complexity of the matter, the urgency, the prejudice likely to arise by reason of delay, the costs of taking the case forward in relation to the amount involved, the course of the proceedings, whether credibility is at issue, whether the application would result in litigating in slices, and any other factor appropriate in the circumstances: *Inspiration Management* at 215; *Gichuru v. Pallai*, 2013 BCCA 60 at para. 31.

[15] Horizon seeks judgment on a discrete issue which turns on the contractual interpretation of a single term in the parties' agreement. Many facts are non-contentious; credibility is not a central issue. There are no counterclaims or third-

party proceedings. A decision on the central issue in dispute will resolve this action in its entirety. As our Court of Appeal has noted, contractual interpretation issues are particularly amenable to resolution by summary trial: *Tangerine Financial Products Limited Partnership v. Tangerine FP Investments Ltd.*, 2012 BCCA 521 at para. 29.

[16] I conclude that I am able to make the findings of fact necessary to resolve the issues before me on a summary trial and that it would not be unjust to do so.

## **B. Objections to the Admissibility of Horizon’s Evidence**

[17] GeoTility raises multiple preliminary objections to the admissibility of Horizon’s evidence. I address them at the outset.

### **1. Expert Evidence**

[18] Both parties served expert reports from accountants on this summary trial. Horizon relies on two reports from Spencer Cotton dated December 1, 2020, and December 8, 2021; GeoTility relies on the report of Darcy Haw dated September 8, 2021.

[19] Mr. Cotton obtained his designations as a Chartered Accountant in 2004 and as a Chartered Business Valuator in 2006. He is currently a partner with BDO Financial Advisory Services Group in Vancouver. Mr. Cotton was qualified without objection as an expert accountant and Chartered Business Valuator, with expertise in commercial transactions and contingent consideration.

[20] Mr. Haw has been an accountant since 1998. He is currently a partner at a Kelowna accounting firm. He oversees the firm’s assurance practice, providing assurance or opinions on financial statements and their fair presentation (which he explained covers audit engagements, review engagements, and compilation documents). His practice focuses on audits. Mr. Haw was qualified without objection as an expert in accounting assurance and accounting practices.

[21] GeoTility’s essential objection to the admissibility of Mr. Cotton’s expert reports is that he has engaged in impermissible argument in lieu of offering opinion

evidence. Neither the experts' qualifications nor the relevant legal principles for admitting expert evidence are in dispute: *R. v. Mohan*, [1994] 2 S.C.R. 9 at 20, 1994 CanLII 80; *R. v. Abbey*, 2009 ONCA 624 at para. 82, leave to appeal to SCC ref'd [2010] S.C.C.A. No. 125; *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 at para. 19.

[22] GeoTility seeks to exclude the following impugned references in Mr. Cotton's reports:

- a) Mr. Cotton uses the term "cash on the balance sheet" as though it were synonymous with the cash line in the asset section of the consolidated balance sheet, when a central issue before the court is whether it has this meaning;
- b) Mr. Cotton speculates about why GeoTility's auditors reclassified its 2018 financial statements, despite admitting he has no independent knowledge of why this occurred;
- c) Mr. Cotton provides argument in the guise of opinion evidence regarding the basis for the \$400,000 threshold amount for "cash on the balance sheet" by making comparisons between this amount and GeoTility's historical average gross cash balance;
- d) Mr. Cotton improperly references terms not included in the agreement (including earn-outs and holdbacks) to support his opinions;
- e) Mr. Cotton makes statements about GeoTility's various performance metrics, including income before taxes and profitability, which are neither referenced in the parties' definition of free cash-flow in the agreement nor logically relevant, and comprise argument;
- f) Mr. Cotton opines on the ultimate issue (i.e., whether bank indebtedness was or should be excluded from the determination of "cash" in the free

cash-flow definition), thereby offering legal conclusions, usurping the role of the court, and purportedly answering the question before the court;

- g) Mr. Cotton’s response to Mr. Haw’s report comprises argument; and
- h) Mr. Cotton provides commentary about GeoTility’s history of debt financing as an apparent substitute for lay witness evidence.

[23] GeoTility argues that once the offending statements in Mr. Cotton’s reports are excised, the remaining “patchwork” serves no useful purpose and the reports ought to be excluded in their entirety.

[24] Horizon replies that when a party objects to the admissibility of an expert report, the opinion must be considered in its entirety, the question being whether the report as a whole is capable of providing the court with the required assistance: *Keefe Laundry Ltd. v. Pellerin Milnor Corp.*, 2007 BCSC 899 at paras. 17–18. Horizon denies that expert evidence on factual matters is properly excluded simply because it suggests answers to issues at the core of the parties’ dispute: *R. v. Burns*, [1994] 1 S.C.R. 656 at 666, 1994 CanLII 127. Horizon argues that any concerns about Mr. Cotton’s opinions touching on the ultimate issue are appropriately considered in assessing weight and not admissibility.

[25] I accept that the role of an expert witness is not to testify to the facts, but rather to provide an opinion based on the facts, to assist the trier of fact to draw the appropriate inferences from the fact as found which, due to the technical nature of the facts, the judge is unable to formulate: *R. v. Parrott*, 2001 SCC 3 at paras. 54–55. Experts must not become advocates or present argument in the guise of expert evidence and must express their opinions in an objective and impartial manner: *Yewdale v. Insurance Corp. of British Columbia* (1995), 3 B.C.L.R. (3d) 240 at 243. Opinion evidence that supplants the court’s role in deciding legal issues is unnecessary and may be excluded: *Li v. British Columbia*, 2021 BCCA 256 at paras. 226–227.



[26] Ultimately, the only expert evidence that I have found relevant and necessary to my analysis are the explanations Mr. Cotton and Mr. Haw provided regarding the meaning of technical accounting terms, concepts, and principles, and the proper interpretation of financial statements including, in particular, balance sheets and statements of cash flow. While experts generally cannot testify as to the meaning of a contract, an exception arises where the contract uses technical terms that require definition: *Arbutus Software Inc. v. ACL Services Ltd.*, 2012 BCSC 1834 at para. 76. It follows that I have not relied on the impugned portions of Mr. Cotton’s reports.

## 2. Lay Evidence

[27] The parties rely on the affidavit evidence of two lay witnesses: Gaudenzio Gabrielli, Horizon’s Executive Vice-President and Chief Financial Officer, and Lorne Koebel, GeoTility’s Chief Financial Officer. GeoTility objects to substantial portions of Mr. Gabrielli’s affidavit evidence on the basis it comprises inadmissible evidence of subjective intention, negotiations, conclusions, opinions, or argument.

[28] GeoTility says the parole evidence rule, the purpose of which is to achieve finality and certainty in contractual obligation and to hamper a party’s ability to use fabricated or unreliable evidence to attack a written contract, precludes evidence of the parties’ subjective intentions: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 59. GeoTility argues that this includes evidence of the parties’ negotiations. GeoTility acknowledges that the Supreme Court in *Corner Brook (City) v. Bailey*, 2021 SCC 29 at para. 57, left open the admissibility of evidence regarding negotiations when interpreting contracts; GeoTility denies such evidence is determinative here.

[29] Finally, GeoTility submits that Mr. Gabrielli’s affidavits contain improper conclusions, inadmissible opinions, and argument, contrary to the requirement that affidavits contain only facts: *Rayner v. The British Columbia Coast Pilots Ltd.*, 2023 BCSC 373 at paras. 63–64.

[30] I have not found it necessary to rely on the impugned evidence of Mr. Gabrielli in construing the objective meaning of the disputed term in the agreement.

While not the subject of an objection by Horizon, I note that Mr. Koebel’s affidavit also includes evidence of GeoTility’s subjective intent and the parties’ negotiations; I have not relied on any of this evidence either in reaching my conclusions.

**C. What is the meaning of “cash on the balance sheet”?**

[31] The relevant principles of contractual interpretation are well-settled and summarized in the Supreme Court’s seminal decision in *Sattva*. I have applied those principles here.

[32] The Supreme Court has adopted a practical, common sense approach to contractual interpretation. It requires the decision maker to read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract: *Sattva* at para. 47.

[33] The overriding purpose of the exercise is to determine the parties’ original objective intentions at the time the contract was formed, and whether the contract reveals the parties’ intentions as to the substance of the agreement: *Hoban Construction Ltd. v. Alexander*, 2012 BCCA 75 at para. 47; *Sattva* at paras. 47 and 55.

**1. What does the agreement say?**

[34] The exercise of contractual interpretation begins with a reading of the actual words the parties used. A legitimate interpretation will be consistent with the language they employed to express their agreement; a meaning that strays too far from the actual words fails to give effect to the way in which the parties chose to define their obligations: *Resolute FP Canada Inc. v. Ontario (Attorney General)*, 2019 SCC 60 at para. 76 [*Resolute*].

[35] On Mr. Gabrielli’s undisputed evidence, GeoTility paid the initial \$5,686,407 towards its re-purchase of Horizon’s shares on August 1, 2018. Thereafter, only the \$1,000,000 balance of sale payment remained outstanding. The parties disagree

about whether or not the amount of GeoTility's "cash on the balance sheet" ever triggered a balance of sale payment.

[36] The agreement explains how the \$1,000,000 remainder of GeoTility's purchase price for Horizon's shares was to be paid, based on the detailed formula in s. 2.02 of the agreement:

**Payment of Purchase Price**

The Purchase Price shall be Payable as follows:

- (a) At the Closing Time, the Company shall pay \$5,686,407 to Horizon, by delivering the Purchase Price to Horizon by way of certified cheque, bank draft or wire transfer to an account designated by Horizon.
- (b) The remainder of the Purchase Price, being an amount equal to \$1,000,000 (the "Balance of Sale") shall be payable at such time or times, in accordance with the following:

an amount equal to 50% of the Free Cash Flow (each, a "Free Cash Flow Payment") if any, calculated as at each fiscal year end shall be payable to Horizon within thirty (30) days of the delivery to the Company of annual financial statements for the fiscal year end in question by the auditors for the Company, by delivering such amount to Horizon by way of certified cheque, bank draft or wire transfer to an account designated by Horizon, until such time as the Balance of Sale has been paid in its entirety. Notwithstanding the foregoing, if any of the Balance of Sale remains outstanding following the fiscal year end September 30, 2022, the Free Cash Flow Payment, if any, made in respect of the fiscal year end September 30, 2022, shall be the final Free Cash Flow Payment that is payable and Horizon shall forgive any remaining Balance of Sale amount after such payment has been made;

[37] Free cash-flow is defined in s.1.01(g) of the agreement in reference to "cash on the balance sheet":

"Free Cash-Flow" means the amount of cash on the balance sheet of the Company, calculated at the time specified in Section 2.02, in excess of \$400,000 prior to the payment of any dividends and distributions, or payment or repayment of loans, to any shareholder or affiliated entity of a shareholder but after having deducted (i) a maximum of One Hundred and Fifty Thousand Dollars (\$150,000) during any fiscal year (alone or on the aggregate) on account of capital expenditures, other than deferred installations, (ii) up to a combined maximum amount of \$489,000 of total compensation to the Principals; and (iii) a combined maximum amount of \$10,000 for payments to consultants (each of the foregoing thresholds in paragraphs (i), (ii) and (iii) are hereinafter referred to as an "Expenditure Threshold"). In the event that spending in respect of capital

expenditures, compensation to principals, or payments to consultants exceeds an applicable Expenditure Threshold in a given fiscal year and there is no Free Cash Flow in such fiscal year (i.e. cash on the balance sheet is less than \$400,000 at the end of such fiscal year), then the amount of excess above such Expenditure Threshold shall be added to cash on the balance sheet for the following fiscal year for the purpose of calculating Free Cash Flow. By way of example only, if cash on the balance sheet at the end of a given fiscal year is \$300,000 and \$200,000 was spent on capital expenditures during such fiscal year, then an amount of \$50,000 shall be added.

[38] “Cash on the balance sheet” is not a defined term in the agreement. The parties negotiated the detailed free cash-flow formula, including the specific figures for add-backs and deductions for capital expenditures, compensation to principals, and payments to consultants.

[39] The language in the agreement is notable, both for what it says and for what it does not say. The definition of free cash-flow expressly references one specific financial statement: GeoTility’s balance sheet. The parties agree that this means GeoTility’s consolidated balance sheet, for all of GeoTility’s entities.

[40] The free cash-flow definition in the agreement specifically references the amount of “cash” on the balance sheet. In my view, “cash”, understood in its plain and ordinary meaning, is an asset and not a liability. I conclude that this remains true when understood in the context of cash “on the balance sheet”. Mr. Koebel admitted he appreciates the difference between assets and liabilities, and that having cash is different from owing cash. He conceded that, apart from the cash line, there is no reference to cash anywhere else on the balance sheet. I am not persuaded that the plain and ordinary meaning of cash, even in an accounting context, incorporates the concept of net cash, or the deduction of bank indebtedness as a cash equivalent.

[41] Horizon argues that, in addition to the plain meaning of the words in the agreement, the formula for calculating free cash-flow clearly indicates that the parties did not intend it to include bank indebtedness. Horizon underscores that this formula (as set out in s. 1.01(g) of the agreement) specifies which expenditures and deductions can be offset against the total free cash-flow payment and collectively

comprise the agreed expenditure threshold. Significantly, the detailed expenditure threshold specified in the agreement does not include bank indebtedness.

[42] In my view, if the parties had intended “cash on the balance sheet” to mean something other than its common ordinary meaning, they would have used different language in the agreement. It was open to them to define it within the agreement, with examples for additional clarity (as they did for other concepts in s. 1.01(g) of the agreement) and a specific threshold amount for bank indebtedness (as they did for capital expenditures and payments to principals and consultants). I conclude that interpreting “cash on the balance sheet” as a net concept would be contrary to the literal meaning of the words the parties chose: namely, the amount of cash that is shown on the balance sheet. The text of the contract itself is the primary interpretive source: *Sattva* at para. 57.

[43] Other words and phrases are conspicuously absent from the agreement. The term “cash on the balance sheet” makes no reference to GeoTility’s:

- a) Net cash, net cash position, or cash position;
- b) Consolidated cash;
- c) Deemed cash;
- d) Cash and cash equivalents;
- e) Bank indebtedness;
- f) Cash, net of bank indebtedness;
- g) Cash on the balance sheet, as informed by the statement of cash flow; or
- h) Cash on the balance sheet, as informed by the financial statements.

[44] Although GeoTility argues that the parties always intended reference to “cash on the balance sheet” to be cash, net of bank indebtedness, Mr. Koebel conceded that GeoTility has produced no documents from their negotiations in this litigation (in the form of emails, correspondence, or any other written communication) to support this position.

[45] I accept that the free cash-flow definition in the agreement does not reference the cash line on the balance sheet. However, as Mr. Koebel conceded in cross-examination, the only reference to cash on GeoTility’s consolidated balance sheet is the line item for cash, under the heading for assets.

[46] In my view, the plain and ordinary meaning of the words “cash on the balance sheet” supports an objective interpretation that does not incorporate the concept of net cash, or the deduction of bank indebtedness from cash as a cash equivalent.

**2. What was the purpose of the agreement?**

[47] The court should know the commercial purpose of a commercial contract; this presupposes knowledge of the genesis of the transaction, the background, the context, and the market in which the parties are operating: *Sattva* at para. 47, citing *Reardon Smith Line Ltd. v. Hansen-Tangen*, [1976] 3 All E.R. 570 at 574 (U.K.H.L.).

[48] The parties agree that an important shared goal when negotiating the free cash-flow formula and the \$400,000 threshold amount for “cash on the balance sheet” was ensuring GeoTility’s ability to make the balance of sale payment while maintaining its normal business operations in the usual course.

**3. What do the accounting terms and concepts mean?**

[49] I rely on the uncontroverted evidence of the parties and their experts regarding the meaning of relevant accounting terms and concepts. I conclude that balance sheets are distinct from statements of cash flow: they present different financial information, incorporate different accounting concepts, and are governed by different accounting standards. The evidence of both parties and their experts supports these conclusions.

[50] I accept Mr. Cotton’s evidence that there is a very particular order to the preparation of financial statements and that the balance sheet needs to be crystalized before the statement of cash flow is prepared. He testified that the numbers on the consolidated balance sheet drive those on the statement of cash flow and not the other way around. Mr. Haw did not dispute this statement but

testified that, in order to understand what comprises cash, one must consult the statement of cash flow.

[51] Mr. Koebel is familiar with accounting documents, including financial statements. He conceded that the presentation of financial statements is important, and that a statement of cash flow contains a substantial amount of information which does not directly relate to a balance sheet. Mr. Koebel understands the distinction between a balance sheet and a statement of cash flow; he conceded that cash and bank indebtedness are not offset but are instead shown as two separate line items on a balance sheet.

[52] As an accountant, Mr. Koebel is aware that there are specific rules about when assets and liabilities can, and must, be offset on a consolidated balance sheet. He admitted there are only limited circumstances when this offsetting can occur and that GeoTility's circumstances do not meet the requisite criteria.

[53] According to Mr. Haw, a balance sheet sets out a business' cash and cash equivalents at its fiscal year-end. On his evidence, cash equivalents are held for the purpose of meeting short-term cash commitments, rather than for other investment purposes. He testified that, in order for an investment to qualify as a cash equivalent, it must be readily convertible to a known amount of cash and be subject to an insignificant risk of change in value, citing the Accounting Standards for Private Enterprises ("ASPE") 1540.08. Notably, by Mr. Haw's own admission, this accounting standard expressly applies to statements of cash flow.

[54] Mr. Haw conceded in cross-examination that:

- a) A balance sheet presents the financial position of a business at a specific point in time;
- b) On its own, a balance sheet does not indicate a net change in cash over time and further investigation would be necessary in order to make this determination (i.e., reference to the statement of cash flow);
- c) The term "cash and cash equivalents" is associated with statements of cash flow;

- d) Determining whether bank indebtedness is (or is not) a cash equivalent is not possible by looking at a balance sheet and requires reference to the statement of cash flow;
- e) Cash and cash equivalents can only be grouped together on a balance sheet if the requirements of ASPE 3856 are met;
- f) ASPE 3856 applies specifically to balance sheets and dictates when an asset can be offset against a liability on the balance sheet;
- g) GeoTility did not meet the requirements of ASPE 3856; and
- h) GeoTility did not group cash and bank indebtedness together on its consolidated balance sheet.

[55] Despite being asked specifically about balance sheets, Mr. Haw makes no reference to ASPE 3856 in his report. He conceded in cross-examination that there are almost no circumstances where ASPE 3856 would permit cash and bank indebtedness to be offset on the balance sheet. Mr. Haw's report consistently responds to questions about balance sheets by incorporating the concept of cash and cash equivalents applicable to statements of cash flow (and, by extension, ASPE 1540, which applies to statements of cash flow).

[56] Mr. Cotton testified that cash (and cash equivalents) on the balance sheet refer only to items on the asset side of this document and include such things as petty cash, cash in the bank, and marketable securities which can be turned into cash almost immediately. By contrast, cash and cash equivalents on the statement of cash flow incorporate bank indebtedness and the two are treated as equivalents. I accept Mr. Cotton's unchallenged evidence that statements of cash flow show the amount of cash that goes in and out of a business. Brackets are used to refer to negative amounts (or cash outflow); the absence of brackets indicates a cash inflow. By contrast, a statement of cash flow reconciles a business' opening position in cash in a particular year with its closing position in cash and cash equivalents, and all of the inflows and outflows that have occurred in the business; it also shows the increase or decrease in cash in that year.



[57] Notably, the free cash-flow definition in the agreement references GeoTility’s balance sheet, and not the statement of cash flow. In the absence of any reason to find otherwise, I conclude that this was an intentional choice. By Mr. Haw’s own admission, the concepts of cash and cash equivalents, and the netting of cash and bank indebtedness, apply to statements of cash flow.

[58] The parties defined the free cash-flow formula in the agreement with precision. They identified specific limits for “add-backs” and capital expenditures. They did not include bank indebtedness as a deduction in the definition of free cash-flow for the purpose of triggering the balance of sale payment.

**4. What forms part of the relevant factual matrix?**

[59] The factual matrix must be considered when interpreting a contract, whether or not there is linguistic ambiguity in the text of the document: Geoff R. Hall, *Canadian Contractual Interpretation Law*, 2nd ed. (Markham, Ont.: LexisNexis, 2012) at 30; *Ahluwalia v. Richmond Cabs Ltd.* (1995), 13 B.C.L.R. (3d) 93 at para. 14, 1995 CanLII 1440 (C.A.). An interpretation that ignores the context in which the contract was formed will not accurately discern what the parties intended to achieve, even if the interpretation is literally correct: *Resolute* at para. 77. Consideration of surrounding circumstances or context does not allow a court to change the meaning of the words used so as to modify the rights and obligations that the contract provides: *Resolute* at para. 78.

[60] Deriving the meaning of the words in a contract should include consideration of surrounding contextual factors, such as the purpose of the agreement and the nature of the relationship created by the agreement: *Sattva* at paras. 47–48. However, the surrounding circumstances must never be allowed to overwhelm the words of the agreement: *Sattva* at para. 57.

[61] The interpretation of a contract must be grounded in the text and read in light of the entire contract: *Sattva* at para. 57. Surrounding circumstances must only be used to deepen an understanding of the parties’ mutual and objective intentions, as expressed in the agreement: *Sattva* at para. 57.

[62] I am mindful of the Court's caution in *Sattva* that the consideration of surrounding circumstances is not without limits; it should comprise only objective evidence of the background facts at the time the contract was executed and information that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting: *Sattva* at para. 58. The parties' intention is to be considered objectively and to reflect what a reasonable person would have understood the words of the document, read as a whole and from the relevant factual matrix, to mean: *Golden Capital Securities Ltd. v. Investment Industry Regulatory Organization of Canada*, 2010 BCCA 359 at para. 44.

[63] I have considered the parties' longstanding business relationship and their shared purpose in finalizing the agreement. The parties agree that their common goal in negotiating the free cash-flow threshold was to trigger a balance of sale payment once GeoTility had sufficient cash resources to make this payment, while ensuring that GeoTility remained able to continue its normal business operations in the usual course.

[64] I accept the parties' uncontroverted evidence that they had access to GeoTility's audited financial statements for previous years before they finalised the agreement, including, in particular, those for GeoTility's 2016 and 2017 fiscal years. I conclude that these documents form part of the relevant factual matrix. I have also considered the minutes of GeoTility's board meetings, together with the periodic written financial updates GeoTility management received before the agreement was finalized, as part of the factual matrix.

[65] Evidence of the parties' subjective intentions is inadmissible to add to, subtract from, vary, or contradict a written contract: *Sattva* at para. 59. The subjective intention of one party negotiating a contract cannot be considered part of the evidence of surrounding circumstances: *Cultivate Capital Corp. v. 1011173 B.C. Ltd.*, 2021 BCSC 1258 at para. 57. Throughout prolonged negotiations, parties' positions change and their interests are divergent until final agreements are achieved; the final document records the parties' consensus and previous offers or

discussions are not helpful in construing the words in a contract: *Cultivate Capital* at para. 57.

[66] I have not relied on evidence of the parties' subjective intentions, their negotiations, or the draft agreements they exchanged but did not finalize. In my view, this evidence does not assist in interpreting the agreement they actually reached.

**a) GeoTility's Financial Statements**

[67] Mr. Gabrielli served as a director on GeoTility's board of directors from March 24, 2014 to July 31, 2018. In this capacity, he attended numerous GeoTility board meetings. There is no dispute that GeoTility's management periodically provided Horizon with financial updates at these board meetings, in addition to monthly financial "flash card" reports.

[68] The parties agree that GeoTility has always managed its financial affairs on a consolidated basis, with cash being comingled and transferred among the bank accounts of its various entities regularly, depending on operational needs.

[69] The parties agree that a company's management is responsible for the preparation of its financial statements. The parties and their experts accept that a company's auditors are responsible for expressing an opinion about whether the company's financial statements comply with generally accepted accounting principles.

[70] On Mr. Cotton's uncontroverted evidence, most private Canadian companies during the material timeframe would have used ASPE as their disclosed basis of accounting. The agreement expressly required GeoTility to provide Horizon with its annual financial statements, all prepared in accordance with ASPE:

**7.09 Annual Financial Statements and Information**

Within one-hundred and twenty (120) days after the end of each of its fiscal year, it shall furnish to Horizon its audited unconsolidated and consolidated balance sheet as at the end of such fiscal year and the related financial statements of income, shareholders' equity and changes in financial position

for such fiscal year, setting forth in each case in comparative form the figures as at the end of and for the previous fiscal year all prepared in accordance with ASPE and as certified by its auditor and accompanied by such auditor's report which must not contain any expression of any material concern as to whether or not such financial statements do present fairly its financial position as at the end of such fiscal year or any material reserve as to its solvency.

[71] I accept the uncontroverted evidence of Mr. Gabrielli and Mr. Koebel that both parties had access to GeoTility's audited financial statements for previous years before finalizing the agreement.

[72] As Mr. Cotton noted, all of GeoTility's reclassified balance sheets for the years 2015–2019 treat cash separately from bank indebtedness. While he agreed that GeoTility's statements of cash flow (and not its balance sheets) utilize a net definition of cash, he stated that, in doing so, they rely on the cash balance, expressed as a gross sum on the balance sheet. In other words, while cash on GeoTility's statements of cash flow might be net amounts, cash on its balance sheets is consistently presented as a gross amount, not subject to any reduction based on bank indebtedness. As cash and bank indebtedness are not grouped together on GeoTility's balance sheets, GeoTility's historical cash balances are consistently positive (and not negative, as would be the case if these amounts were net of bank indebtedness).

**b) GeoTility's Board Meetings and Financial Updates**

[73] GeoTility says that the parties always discussed cash as a net concept during the course of their business relationship, including at board meetings and in the context of periodic financial updates provided to the board. While I accept that this might have been true in an operational context, when the parties were in business together and before they entered into the agreement, I do not agree that this history informs an analysis of what the parties objectively intended by referencing "cash on the balance sheet" in the agreement.

[74] On the parties' own evidence, the financial information referenced in GeoTility board meetings and in its periodic financial updates to the board had a variety of sources which were not confined to GeoTility's consolidated balance sheet. Mr.

Gabrielli described the source documents for this information as a “hodgepodge”. Mr. Koebel conceded that this information was not confined to figures from the balance sheet but was instead extrapolated from a variety of financial documents. He conceded that the financial “flash cards” (which periodically provided the parties with a “snapshot” of GeoTility’s financial picture) similarly presented information differently than on the consolidated balance sheet.

**5. Is either party’s interpretation commercially unreasonable?**

[75] Commercial reasonableness and efficacy are central considerations in the interpretation of commercial contracts: *Blackmore Management Inc. v. Carmanah Management Corporation*, 2022 BCCA 117 at para. 42; *Resolute* at para. 79. Courts will seek a commercially sensible interpretation as that is more likely than not to give effect to the parties’ intentions: *Resolute* at paras. 142–144.

[76] Given the choice between an interpretation that allows the contract to function in furtherance of its commercial purpose and one that does not, the former should generally prevail: *Resolute* at para. 144. While a party cannot avoid its contractual obligations simply because the bargain they entered into was undesirable or unusual, commercially absurd interpretations should be avoided; if a given construction of the contract would lead to an absurd result, the assumption is that this result could not have been intended by rational commercial actors in making their bargain, absent some explanation to the contrary: *Resolute* at para. 144.

[77] The more unreasonable the result, the more unlikely it is that the parties can have intended it, and if they do intend it, the more necessary it is that they shall make that intention abundantly clear: *Peacock, Inc. v. Reliance Foundry Company Limited*, 2001 BCSC 232 at para. 97.

[78] When contractual terms are unambiguous, the words of the contract are presumed to reflect the parties’ intent, and the court will reject an interpretation that renders one or more of the contract’s provisions ineffective: *Athwal v. Black Top Cabs Ltd.*, 2012 BCCA 107 at para. 42. Courts should not give a contract a meaning that is different from the one expressed by its clear terms, unless the contract is

unreasonable or has an effect that is contrary to the parties' intentions: *Scott v. Wawanesa Mutual Insurance Co.*, [1989] 1 S.C.R. 1445 at 1467, 1989 CanLII 105.

[79] Both parties assert that the other's interpretation of the disputed contractual term is commercially unreasonable. Horizon argues that if "cash on the balance sheet" is construed to mean cash net of bank indebtedness, GeoTility could readily manipulate this figure by assuming new debt, thereby effectively avoiding the balance of sale payment indefinitely. Horizon denies an interpretation that permits one party to defeat the purpose of the contractual term can be considered objectively reasonable.

[80] Horizon describes the amount of bank indebtedness on GeoTility's balance sheet as a matter that falls within GeoTility's complete unilateral control and not one that is dependent on its financial success, as contemplated by the balance of sale payment provision in the agreement. It argues that bank indebtedness is both too flexible a concept to be reasonably construed as part of the free cash-flow formula, and one that would yield an arbitrary result, contrary to the express language in the agreement. Horizon submits that GeoTility's interpretation would permit it to avoid the balance of sale payment, sell the shares it acquired from Horizon, and retain a profit of one million dollars. Horizon denies this outcome can reasonably be construed as the one the parties intended by the agreement.

[81] GeoTility asserts that Horizon's interpretation of the disputed contractual term leads to a commercial absurdity. GeoTility denies it is commercially reasonable to require it to make a balance of sale payment when in a negative cash position. GeoTility argues that Horizon's interpretation of the disputed term would permit GeoTility (if it were so inclined) to artificially reduce the cash line item on its consolidated balance sheet by simply transferring cash from other GeoTility accounts to pay down the overdraft loan it uses to finance its Canadian operations. GeoTility also denies it is reasonable to interpret "cash on the balance sheet" in a manner that would leave it vulnerable to how its auditors present information on its

financial statements. Notably, the agreement expressly requires GeoTility to provide Horizon with its audited financial statements, prepared in accordance with ASPE.

[82] GeoTility submits that Horizon's interpretation of the free cash-flow formula is both unreasonable and commercially absurd because it allows Horizon to adopt inconsistent positions. Horizon says that compensation to principals and capital expenditures (funded by GeoTility's overdraft account) ought to be included in the calculation of add-backs in the free cash-flow formula, while simultaneously denying that the same overdraft account is properly included as a cash equivalent (i.e., bank indebtedness) when applying the free cash-flow formula.

[83] Both parties were aware before finalizing the agreement that one of GeoTility's Canadian entities had access to a credit facility in the form of a bank loan which permitted the balance to go into an overdraft position. They agree that GeoTility was consistently in a negative (overdraft) position on this bank loan at its fiscal year-end. Mr. Haw confirmed that businesses often finance capital expenditures through debt and that GeoTility had a history of debt financing.

[84] Mr. Koebel admitted GeoTility had a credit facility in the form of a bank loan in an amount up to \$1.75 million. The amount on this overdraft loan was calculated monthly based on GeoTility's accounts receivable and inventory. Horizon submits that GeoTility's cash resources (as reflected on the asset side of its balance sheet) were therefore unencumbered. Mr. Koebel admitted the bank could seize GeoTility's accounts receivable and inventory if GeoTility did not repay this loan pursuant to a general security agreement.

[85] The parties agree that GeoTility relied on this overdraft loan as part of its ordinary course of business and that it typically owed money at year-end. Mr. Koebel admitted GeoTility's financial statements consistently showed an amount owing for bank indebtedness and that GeoTility was consistently in an overdraft position and had bank indebtedness on its consolidated balance sheet.

[86] The parties clearly contemplated that GeoTility would continue its normal business operations in the usual course after they signed the agreement. This included GeoTility treating cash and bank indebtedness separately on its consolidated balance sheet. GeoTility used its overdraft loan to finance its normal business operations and it consistently had debt at its fiscal year-end. There is no evidence that GeoTility's normal business operations included transferring money from other GeoTility entities, either to reduce or retire bank indebtedness at its fiscal year-end, or to decrease the cash line item on its consolidated balance sheet. Ultimately, I am not persuaded that interpreting "cash on the balance sheet" in its plain and ordinary meaning as cash on hand (i.e., the amount of cash on the cash line, under the heading for assets, on GeoTility's consolidated balance sheet), leads to a commercial absurdity.

[87] I am also not persuaded that allowing certain transactions funded by the overdraft loan to be considered in the free cash-flow formula, while not considering overall bank indebtedness leads to a commercial absurdity. The parties defined the free cash-flow with particularity. It included specific limits for add-backs and capital expenditures but did not include bank indebtedness as a deduction.

[88] I accept that either party might theoretically have attempted to exploit the agreement in bad faith to their own advantage. There is no evidence that either party negotiated the agreement in bad faith. Given their longstanding business relationship, and their common purpose in reaching the agreement, I am not persuaded that this hypothetical possibility results in a commercial absurdity.

## **6. Conclusion**

[89] I find that there is only one reasonable interpretation of "cash on the balance sheet". Viewed objectively, in light of the relevant factual matrix, I conclude that this term is not ambiguous and (unlike cash on the statement of cash flow) does not incorporate the concept of net cash. In my view, GeoTility's interpretation strays too far from the words the parties used in the agreement.



[90] Two sophisticated parties negotiated the agreement. They agreed on a specific threshold of \$400,000 in the formula for free cash-flow. I conclude that both parties ultimately decided that this amount was adequate to meet their common goal: namely, ensuring that GeoTility could make the balance of sale payment once it had a cash reserve in excess of this amount, while allowing it to retain sufficient operating capital to maintain its normal business operations in the usual course. The parties gave conflicting evidence about how they arrived at this threshold figure. I have not considered the disputed evidence regarding their subjective intentions, including whether they intended this figure to match GeoTility's historical cash on the balance sheet (as Mr. Gabrielli suggested) or its historical monthly cash outflow (as Mr. Koebel suggested).

[91] In my view, it is significant that the parties agreed on specific deductions to the free cash-flow formula (for capital expenditures, compensation to principals, and consultants' fees) but identified no comparable deduction for bank indebtedness. I find that, if they had intended to incorporate the concept of net cash and bank indebtedness as a cash equivalent, they would have used different language in the agreement. I conclude that incorporating those concepts absent clear language to reflect such an intention would overwhelm the text of the agreement and effectively create a new one: *Resolute; Sattva*.

**D. Was a balance of sale payment triggered in 2018 or 2019?**

[92] Horizon says that its interpretation of "cash on the balance sheet" triggers balance of sale payments in 2018 and 2019.

[93] On March 20, 2019, Horizon received copies of GeoTility's audited financial statements for its 2018 fiscal year. They indicated, in part, as follows:

- a) Under the assets heading on the consolidated balance sheet, the 2018 cash line item was \$169,693; and
- b) Under the liabilities heading on the consolidated balance sheet, the 2018 bank indebtedness line item was \$857,841.

[94] On or about January 22, 2020, Horizon received copies of GeoTility's audited financial statements for the 2019 fiscal year. They indicated, in part, as follows:

- a) Under the assets heading on the consolidated balance sheet, the line item for cash was \$949,782 for 2019, and \$565,893 for 2018;
- b) Under the liabilities heading on the consolidated balance sheet, the line item for bank indebtedness was \$1,242,027 for 2019, and \$1,254,041 for 2018;
- c) The consolidated statement of cash flow included a section on financing activities and referenced GeoTility's repayment of a \$900,000 bank loan secured in 2018 (apparently separate from bank indebtedness); and
- d) A note to the 2019 consolidated financial statements indicated that GeoTility had further credit and financing capabilities under an existing arrangement with the Bank of Montreal (not to exceed the total amount of \$2,986,000 at any point during the year).

[95] In GeoTility's 2019 audited financial statements, its auditors reclassified the historical balance sheet for the 2018 fiscal year. Specifically, they reclassified \$396,200 from bank indebtedness to the cash line on GeoTility's consolidated balance sheet for 2018. Horizon says this reclassification triggered a free cash-flow payment for GeoTility's 2018 fiscal year, in addition to the one it says was triggered in 2019.

[96] On Mr. Cotton's evidence, minor errors contained in financial statements may be audited but not corrected if they are determined to be not material. He defined a material change as one that exceeds 1–2% of the asset balance on the balance sheet. In Mr. Cotton's opinion, the auditors' change to GeoTility's 2018 financial statements in 2019 was material, it being in excess of 1–2% of assets on the balance sheet. In the circumstances, he would have expected GeoTility's auditors to prepare a restatement (and not just a reclassification) of those financial statements.

[97] Mr. Haw testified that materiality is considered in the context of the financial statements' intended users. Mr. Cotton accepts that the primary users of GeoTility's

financial statements would have been the bank and GeoTility (both of whom would have been aware of this change). However, because the share repurchase was then in progress, Mr. Cotton would have considered this change to be material to both GeoTility management and to Horizon.

[98] GeoTility's auditors provided no evidence about why they reclassified GeoTility's 2018 financial statements in 2019. As Mr. Cotton noted, the auditors provided limited commentary about why this reclassification occurred.

[99] Ultimately, I accept Mr. Koebel's view of what occurred. He testified that GeoTility's auditors reclassified a cash line item (in the amount of \$396,200) that had previously been included in bank indebtedness and adjusted GeoTility's 2018 financial statements accordingly. Mr. Koebel agreed that this amount (\$396,200) was close to the threshold figure of \$400,000 in the free cash-flow formula in the agreement. He conceded (based on the assessment of GeoTility's auditors) that this change was deemed to be material to GeoTility, and that the reclassification occurred because the misclassification was material in 2018. Mr. Haw admitted the 2019 reclassification resulted in an identical increase (of \$396,200) to the cash and bank indebtedness lines on GeoTility's 2018 balance sheet.

[100] By email dated January 27, 2020, Horizon provided GeoTility with its calculation of free cash-flow for the fiscal years 2018 and 2019. Based on Mr. Gabrielli's calculations, GeoTility owed Horizon \$166,075, due April 10, 2019, and payable no later than April 20, 2019 (based on the 2019 reclassification), and \$496,959, due January 19, 2020, and payable no later than January 29, 2020.

[101] Mr. Gabrielli requested the total of \$663,034 towards the balance of sale payment he said GeoTility owed for Horizon's shares, on or before February 6, 2020. He stated that a failure to pay this amount would constitute an event of default, as contemplated by s. 8.01 of the agreement, thereby accelerating GeoTility's obligation to pay the entire balance of sale in the amount of \$1,000,000.

[102] By letter from its legal counsel dated February 28, 2020, GeoTility denied owing any free cash-flow payments for the years 2018 or 2019, stating that, on a proper reading and application, reference to “cash on the balance sheet” meant the total of the cash line item (within current assets) and the bank indebtedness line item (within current liabilities) on the balance sheet. In other words, it was GeoTility’s position that the balance of sale payment was not triggered unless and until GeoTility had cash on hand, above the agreed threshold, net of bank indebtedness.

[103] GeoTility’s lawyer calculated “cash on the balance sheet” for GeoTility’s fiscal year 2018 to be negative \$688,148 (i.e., bank indebtedness of \$1,254,041 less \$565,893, representing the cash line item within current assets). Accordingly, it was (and remains) GeoTility’s position that no free cash-flow payment was triggered in 2018. GeoTility’s lawyer stated that a proper reading of GeoTility’s 2019 balance sheet yielded “cash on the balance sheet” of negative \$292,245, and not \$949,782 as Horizon suggested (i.e., bank indebtedness of \$1,242,027 less \$949,762, representing the cash line item within current assets). GeoTility therefore concluded that no free cash-flow payment was triggered in 2019 (since this figure was below the \$400,000 threshold in the agreement).

[104] GeoTility’s interpretation of the agreement does not accord with my own. I find that GeoTility breached the agreement by not making balance of sale payments in 2018 and 2019.

**E. Is the acceleration provision in the agreement a penalty clause?**

[105] Horizon relies on s. 8.01 of the agreement in support its claim for payment of the entire \$1,000,000 balance of sale payment:

**ARTICLE 8 – EVENTS OF DEFAULT AND ACCELERATION**

**8.01** Notwithstanding anything to the contrary herein contained, if any of the following events occurs, (each an “Event of Default”), and amounts under Section 2.02 are due, Horizon may declare all amounts owing under the Balance of Sale to be immediately due and payable, the whole without presentment, demand, protest or notice of any kind (all of which are hereby expressly waived by the Company), such events being as follows:

- (a) if the Company shall fail to pay the Balance of Sale or any part thereof when due and such default is not remedied within ten (10) days following the date on which such payment was due;

[106] GeoTility describes this contractual term as a penalty clause: namely, a sum stipulated in a contract that is not a genuine pre-estimate of damages and is payable upon a breach, whether or not there is any actual loss. Horizon denies that GeoTility has adequately pleaded this position. GeoTility's further amended response to civil claim filed March 12, 2021, pleads as follows in para. 14:

In further response to paragraph 14 of Part 1 of the Amended Notice of Civil Claim, if GeoTility is in default under the SRA for failing to pay Free Cash Flow Payments for fiscal years 2018 or 2019, which is not admitted but is expressly denied, then payment of the remaining amount of the Balance of Sale pursuant to section 8.02 [*sic*] of the SRA is in the nature of a penalty rather than a genuine pre-estimate of liquidated damages, and given the amount involved for such a breach, the penalty is oppressive or unconscionable, or both, and for that reason the court should invoke its discretion under Section 24 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, to relieve GeoTility against the penalty.

[107] In my view, this pleading is adequate to put Horizon on notice of GeoTility's position that s. 8.01 of the agreement comprised a penalty clause.

[108] Horizon denies there is anything unconscionable about ordering GeoTility to make the balance of sale payment, as contemplated by the agreement. Horizon submits that this amount formed part of the agreed value for the repurchased shares, that GeoTility has received these shares (and therefore the benefit of the agreement), and that GeoTility agreed to make the balance of sale payment.

[109] By contrast, GeoTility describes s. 8.01 of the agreement as an oppressive penalty clause. GeoTility denies penalty clauses should be enforced when they are unconscionable, extravagant, grossly excessive, or punitive: *Tropic Holdings Ltd. v Roots & Wings Enterprises Ltd.*, 2018 BCSC 439 at para. 47.

[110] GeoTility says the plaintiff bears the onus of proof of establishing that the impugned clause is a genuine pre-estimate of damages and not a penalty clause: *Tropic Holdings* at para. 54. It argues that, if any balance of sale payments were

triggered in 2018 or 2019, GeoTility owed substantially lower amounts than those Horizon calculates. GeoTility calculates any such amounts to be \$87,318 (in 2018) and \$298,979 (in 2019).

[111] Contracts that provide for payment by instalments often include an acceleration clause: on default in paying one instalment, all future instalments immediately become payable as one sum. Although the operation of these clauses produces results which may seem punitive, courts have enforced them on the basis that they do not increase the contract-breaker’s overall obligation: Hugh G. Beale, ed., *Chitty on Contracts*, 35th ed. (London UK: Sweet & Maxwell, 2023) vol. 1, at 30-248; Harvin D. Pitch & Ronald M. Snyder, *Damages for Breach of Contract*, 2nd ed. (Toronto: Carswell, 1989) at § 8:4; *Emerald Christmas Tree Company v. Boel & Sons Enterprises Ltd.* (1979), 13 B.C.L.R. 122 at 129–130, 1979 CanLII 607 (C.A.).

[112] I find that s. 8.01 of the agreement is a valid acceleration clause. GeoTility’s objections to Horizon’s calculations of add-backs and capital expenditures for the 2018 and 2019 fiscal years are therefore academic.

**III. DISPOSITION**

[113] I grant judgment in favour of Horizon in the amount of \$1,000,000, plus interest in accordance with the *Court Order Interest Act*, and costs on the ordinary scale.

“Douglas J.”