SUPREME COURT OF NOVA SCOTIA

Citation: *International Royalty Corporation* v. *Newmont Canada Corporation*, 2024 NSSC 160

Date: 20240527
Docket: 508374
Registry: Halifax

Between:

International Royalty Corporation

Plaintiff

v.

Newmont Canada Corporation, Newmont Corporation and Newmont Canada FN Holdings ULC

Defendants

Decision – Motion for Summary Judgment on the Evidence

Judge: The Honourable Justice Gail L. Gatchalian

Heard: February 27 and 29, 2024, in Halifax, Nova Scotia

Counsel: Gordon Capern, Ren Bucholz, Glynnis Hawe and Gavin Giles, for the Plaintiff

Julie Rosenthal, Michael Wilson and Nasha Nijhawan, for the Defendants

By the Court:

Introduction

[1] The Plaintiff, International Royalty Corporation ("IRC"), is an investor in mineral royalties. The Defendants are Newmont Canada Corporation, Newmont Corporation and Newmont Canada FN Holdings ULC (collectively, "Newmont"). Newmont is a gold mining company. IRC and Newmont are parties to a Royalty Agreement. Under the Royalty Agreement, IRC has the right to a percentage of revenue, less certain costs, from gold production at the Holt Mine in the Timmins Mining District in northeastern Ontario (the "Royalty"). The Royalty is payable by Newmont, even though Newmont no longer owns the Holt Mine and receives no revenue from it.

[2] Newmont purchased the Holt Mine from Barrick Gold Corporation in 2004. As partial consideration, Newmont granted Barrick Gold the Royalty. Barrick Gold sold the Royalty to IRC in 2008. Newmont sold the Holt Mine to St. Andrew Goldfields Ltd. in 2006. When Newmont sold the mine, it failed to properly transfer its obligation to pay the Royalty to St. Andrew: see *St. Andrew Goldfields Ltd. v. Newmont Canada Limited*, 2009 CanLII 40549 (ONSC), upheld 2011 ONCA 377.

[3] St. Andrew and its successor, Kirkland Lake, operated the Holt Mine from 2001 to 2020, and Newmont paid the Royalty to IRC during that time, totaling US $117 million.

[4] In April of 2020, the mine ceased operations temporarily due to the Covid-19 pandemic. In August of 2020, Newmont entered into an agreement with Kirkland Lake, pursuant to which Newmont paid Kirkland Lake $75 million for an option to acquire the mineral rights at the Holt Mine that are covered by the Royalty (the "Strategic Alliance Agreement"). Under the Strategic Alliance Agreement, Newmont's option may only be exercised if Kirkland Lake forms the intention to restart operations of the Holt Mine in a manner that would generate further payment obligations for Newmont under the Royalty Agreement and Kirkland Lake does not agree to assume entirely Newmont's obligations under the Royalty Agreement.

[5] The mine has not restarted operations.

[6] In this action, IRC alleges that Newmont, by entering into the Strategic Alliance Agreement:

1. engaged in oppressive conduct contrary to s.5 of the Third Schedule of the Companies Act, R.S.N.S. 1989, c.81, and

2. breached its duty of good faith contractual performance by seeking to evade its contractual duties, engaging in conduct that has the effect of defeating IRC's rights under the agreement, and by taking steps to nullify the contractual objectives and to undermine the core of the contractual bargain between the parties.

[7] Newmont has brought a motion for summary judgment on the evidence. Newmont states that there are no genuine issues of material fact, and that IRC's claims do not have a real chance of success because:

1. IRC is not a "creditor" within the meaning of the Companies Act and, even if it is a creditor, its contractual interest in future payments of the Royalty is not the "interest of a creditor" within the meaning of the Act, and therefore IRC has no standing to bring an oppression claim, because IRC does not have a present entitlement to payment from Newmont.

2. IRC has not identified an existing legal doctrine within the overarching principle of good faith contractual performance that is known to law.

The Evidence

[8] Newmont relied on the Affidavit of Blake Rhodes, former Senior Vice President of Strategic Development and a former member of the Executive Leadership Team for Newmont Corporation.

[9] IRC relied on affidavits from the following individuals:

1. Mark Isto, former Executive Vice President Operations and Chief Operating Officer of Royal Gold Corporation. IRC is a wholly owned subsidiary of Royal Gold.

2. Tony Jensen, former President, Chief Executive Officer and a former non-independent Director of Royal Gold.

3. William Heissenbuttel, the current President, Chief Executive Officer and a non-independent Director of Royal Gold.

[10] IRC also relied on an Expert Report of Richard Miner, a retired lawyer.

[11] Newmont did not file any rebuttal evidence.

[12] The parties conducted cross-examination on the affidavits out of court, and filed a transcript of the evidence.

[13] While Newmont did not move to strike any portion of IRC's affidavits or expert report, Newmont objected to the admissibility of certain aspects of IRC's evidence. If I rely on any evidence that is challenged by Newmont, I will address its arguments about admissibility.

[14] At the hearing, I allowed IRC to file an Affidavit of Graham Headley, articled clerk, sworn on February 26, 2024, attaching Newmont's press release announcing the Strategic Alliance Agreement.

Issues

[15] In order to determine Newmont's motion for summary judgment, I will consider the following:

1. The test for summary judgment on the evidence.

2. With respect to IRC's claim that it is a "creditor" and that the interest it seeks to protect is that of a "creditor" within the meaning of the Companies Act:

    a. Is there a genuine issue of material fact?
    b. If not, is there a question of law?
    c. If so, does IRC's claim have a real chance of success?

3. With respect to IRC's claim that Newmont breached its duty of good faith contractual performance by engaging in conduct that had the effect of defeating IRC's rights under the Royalty Agreement:

    a. Is there a genuine issue of material fact?
    b. If not, is there a question of law?
    c. If so, does IRC's claim have a real chance of success?

4. If one or both of IRC's claims have a real chance of success, should I exercise my discretion to finally determine the question of law?

Test for Summary Judgment on the Evidence

[16] In a motion for summary judgment on the evidence:

1. The first question to ask is whether there is a genuine issue of material fact, either pure or mixed with a question of law. If the answer is "yes," the motion fails.

    A "material fact" is one that would affect the result. A dispute about an incidental fact, i.e. one that would not affect the outcome, will not derail a summary judgment motion.

Newmont has the onus to show by evidence that there is no genuine issue of material fact. But my assessment is based on all the evidence from any source.

2. If the answer is "no," the second question is whether there is a question of law, either pure or mixed with a question of fact, that requires determination.

3. If the answer to questions 1 and 2 are both "no," summary judgment must issue.

4. If there is no genuine issue of material fact, but there is a question of law, the third question is whether the claim has a real chance of success. IRC must show a real chance of success. If it fails to show a real chance of success, summary judgment issues to dismiss the claim. A real chance of success is "a chance, a possibility that is reasonable in the sense that it is an arguable and realistic position that finds support in the record". A claim with a "real chance of success" is the kind of prospect that if the judge were to ask themselves the question: "Is there a reasonable prospect for success on the undisputed facts?" the answer would be "yes": see Arguson Projects Inc. v. Gil-Son Construction Ltd., 2023 NSCA 72 at para.41, citing Coady v. Burton Canada Co., 2013 NSCA 95 at paras.42-44.

5. If the answer to this third question is yes, leaving only an issue of law with a real chance of success, the fourth question is whether I should exercise the discretion to finally determine the issue of law.

6. In a motion for summary judgment on the evidence, the pleadings serve only to indicate the issues, and the subjects of a genuine issue of material fact and a question of law depend on the evidence presented: Civil Procedure Rule 13.04(4). A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence: Civil Procedure Rule 13.04(5).

7. Each party is expected to put their "best foot forward" with evidence and legal submissions on all these questions, including the "genuine

> issue of material fact", issue of law, and "real chance of success" questions: Rules 13.04(4) and (5).
>
> See Civil Procedure Rule 13.04 and Shannex Inc. v Dora Construction Ltd., 2016 NSCA 89 at paras.34 and 36.

IRC's Standing as a "Creditor"

Genuine Issue of Material Fact?

[17] Newmont says that IRC does not meet the definition of "creditor" and that the interest it seeks to protect does not arise from its status as a "creditor" because there are no Royalty payments due and owing by Newmont, given that the Holt Mine has not operated since April of 2020. Newmont says that there are only four facts material to its position that IRC is not a "creditor," and that none of these facts are in dispute. The four facts are:

1. IRC's entitlement to payment of the Royalty by Newmont is set out entirely in the Royalty Agreement.

2. Newmont has paid in full all amounts invoiced by IRC to Newmont under the Royalty Agreement, with the last invoice being paid on August 28, 2020, three days before coming due.

3. IRC has no concerns about Newmont's financial capacity.

4. IRC is not a director, officer or security holder of Newmont.

[18] Newmont also relies on Clause D.5(d) of the Royalty Agreement, which states that "Newmont has no obligation hereunder to conduct any exploration,

development, mining operations or any other activities whatsoever on or relating to the Property."

[19] IRC does not dispute these facts, apart from asserting that its entitlement to payment of the Royalty arises not only from the Royalty Agreement but also from the decision in *St. Andrew Goldfields*.

[20] IRC says that it meets the definition of "creditor" and that the interest it seeks to protect is that of a "creditor" because, at the time of the alleged oppressive conduct, IRC was a potential or contingent creditor, and at the very least, would have remained a creditor but for the oppressive conduct of Newmont. IRC says that the following facts are material to this claim:

- IRC and Newmont had a decade-long creditor-debtor relationship.
- Newmont acknowledged its substantial future liability to IRC in its public statements.
    - For example, in its 2019 Annual Report, the last filed before the Strategic Alliance Agreement was entered into, Newmont stated that:
        - the fair value of the Royalty obligation was $257 million; and
        - the Royalty obligation was a $243 million liability.

Heissenbuttel Affidavit, Exhibit CC, pp.137 and 160.

- The Holt Mine was economically viable and was likely to continue operating for years into the future.

    - See, for example, Isto Affidavit at paras. 36-38, 51 and 54.

- Newmont wanted to reduce or eliminate its Royalty liability to IRC.

    - In an internal email dated April 9, 2020, Mr. Rhodes of Newmont wrote that "[w]ith Holt suspended and therefore the royalty not paying, it's a good time [to] consider options."

Heissenbuttel Affidavit, Exhibit X, document N0000038, page N0000038_001

    - In an internal document dated April of 2020 and entitled "Holt Royalty Liability, Optionality and Next Steps," Newmont set out options for reducing its liability under the Royalty Agreement. Option 1 on page 5 of the document reads "Purchase from Kirkland the mining claims burdened by the Newmont royalty to keep mine out of production and eliminate the royalty payments to [IRC]." The document states that one potential benefit of Option 1 is that it would eliminate the Holt liability.

Heissenbuttel Affidavit, Exhibit X, document N0000111, page N0000111_005

    - In an internal document dated April, 2020 and entitled "Holt Royalty Liability, ELT Overview and Recommended Next Steps," Newmont characterized the fact that the mine was not then operating as a "unique opportunity to reduce Newmont's Holt liability exposure" and stated that "[c]urrent gold price increases likelihood for the mine restarting, providing short-term window in which to act."

Heissenbuttel Affidavit, Exhibit X, document N0000111, page N0000243_005)

- In August of 2020, Newmont entered into the Strategic Alliance Agreement.

- Newmont paid the mine owner $75 million pursuant to the Strategic Alliance Agreement, which eliminated its future liability to IRC.

    - In its press release announcing the Strategic Alliance Agreement, Newmont stated that "[t]he effect of the Option structure is that Newmont will have no additional liability exposure in relation to the Holt Royalty" and that the Agreement allowed it to remove the approximately USD $350 million liability for future payment obligations under the Royalty Agreement from its financial statements and instead record a gain of approximately USD $275 million.

Headley Affidavit, Exhibit "A", p.1.

    - In its 2020 Annual Report, Newmont:

        - booked $137 million in net income as a result of the elimination of the Royalty; and

        - stated that, as part of the Strategic Alliance Agreement, "the Company purchased an option ("the Holt option") from Kirkland for the mining and mineral rights subject to the Holt royalty obligation for $75 [million], effectively reducing the Holt royalty obligation to $-" and that "[i]f exercised, the Holt option will allow the Company to prevent Kirkland from mining minerals subject to the Holt royalty obligation."

Heissenbuttel Affidavit, Exhibit DD, pp. 139

    - In its 2022 Annual Report, Newmont repeated the statement that, as part of the Strategic Alliance Agreement, "the Company purchased an option ("the Holt option") from Kirkland for the mining and mineral rights subject to the Holt royalty obligation for $75 [million], effectively reducing the

> Holt royalty obligation to $-" and that "[i]f exercised, the Holt option will allow the Company to prevent Kirkland from mining minerals subject to the Holt royalty obligation."

Heissenbuttel Affidavit, Exhibit W, pp. 124

- Kirkland Lake has not restarted gold mining operations at the Holt Mine since the suspension of operations in April of 2020.
- But for the Strategic Alliance Agreement, the Holt Mine would likely have continued to operate, generating revenue and royalty payments from Newmont to IRC.
    - See, for example, Isto Affidavit at paras.36-38, 51 and 54.
    - During the hearing of the motion, counsel for Newmont conceded that Newmont's recognition in its 2019 Annual Report of a significant liability to IRC was a recognition that that amount would likely be payable in the future.

[21] None of these facts relied on by IRC were disputed by Newmont.

[22] IRC says that Newmont's true purpose in entering into the Strategic Alliance Agreement is also material to IRC's claim that it qualifies as a creditor. IRC asserts that Newmont's true purpose in entering into the agreement was to eliminate Newmont's future obligations to pay IRC under the Royalty Agreement. IRC bases this assertion on the evidence that I have already referred to: Newmont's internal communications, the wording of the Strategic Alliance Agreement itself, the wording of the press release announcing the Strategic Alliance Agreement, and the wording of Newmont's annual reports.

[23] Newmont did not file rebuttal affidavit evidence to dispute IRC's assertion that the true purpose of the Strategic Alliance Agreement was to eliminate its future obligations to pay the Royalty.

[24] I have considered paragraph 24 of Mr. Rhodes' Affidavit, where he states that "Newmont decided to pursue a transaction with Kirkland Lake that would align the ownership of the Holt mine with the royalty payable to IRC." I have also considered Mr. Isto's evidence in cross-examination, when he agreed with counsel for Newmont that "the effect of the strategic alliance agreement [was] to reunite the burden of the royalty with the benefit of the mine…" Neither of these statements challenges the factual assertion made by IRC that the true purpose of the Strategic Alliance Agreement was to eliminate Newmont's future obligations to pay IRC under the Royalty Agreement.

[25] There are no genuine issues of material fact.

Question of Law?

[26] The parties disagree as to whether IRC meets the definition of "creditor" and whether the interest it seeks to protect is that of a "creditor." This is a question of law mixed with a question of fact.

Real Chance of Success?

The Relevant Statutory Provisions

[27] Under section 5 of the *Act*, a "complainant" may apply to a court for an action in oppression:

> 5 (1) A ***complainant*** may apply to the court for an order under this Section.
>
> (2) If, upon an application under subsection (1) of this Section, the court is satisfied that in respect of a company or any of its affiliates
>
> > (a) any act or omission of the company or any of its affiliates effects a result;
> > (b) the business or affairs of the company or any of its affiliates are or have been carried on or conducted in a manner; or
> > (c) the powers of the directors of the company or any of its affil-iates are or have been exercised in a manner,
>
> that it is ***oppressive or unfairly prejudicial to or that unfairly disregards the interests of any*** security holder, ***creditor***, director or officer, the court may make an order to rectify the matters complained of.
>
> [emphasis added]

[28] A "complainant" for the purpose of s.5 of the *Act* is defined in s.7(5)(b) as including a creditor of a company or any of its affiliates:

> "complainant" means
>
> > (i) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a company or any of its affiliates,
> > (ii) a director or an officer or a former director or officer of a company or of any of its affiliates,
> > (iia) ***a creditor of a company or any of its affiliates***,
> > (iii) the Registrar, or

(iv) any other person who, in the discretion of the court, is a proper person to make an application under this Section.

[Emphasis added]

[29] Newmont Canada Corporation ("Newmont Nova Scotia") is a corporation continued under the *Companies Act*, and is an indirect, wholly-owned subsidiary of Newmont Corporation. Newmont Canada FN Holdings ULC ("Newmont British Columbia") is a British Columbia corporation and is also an indirect, wholly-owned subsidiary of Newmont Corporation. Newmont Nova Scotia is the signatory to the Royalty Agreement. Newmont British Columbia is the signatory to the Strategic Alliance Agreement. Newmont British Columbia is an affiliate of Newmont Nova Scotia.

[30] IRC may therefore bring an oppression claim against Newmont under s.5 of the Third Schedule of the *Act* if IRC is a "creditor" of Newmont within the meaning of s.7(5)(b) of the *Act* and if the interest it seeks to protect is that of a "creditor."

[31] This Court has not yet interpreted the meaning of "creditor" under the *Act*.

Position of IRC

[32] IRC relies in part on the following propositions and cases to support a broad interpretation of "creditor":

- The oppression remedy has been described as “the broadest, most comprehensive and most open-ended shareholder remedy in the common law world”: People’s Department Stores Ltd. (1992) Inc., Re 2004 SCC 68 at para.48.

- The introduction of a statutory remedy against oppression is a deliberate departure from the policy of judicial non-intervention in corporate affairs: First Edmonton Place Ltd. v. 315888 Alta. Ltd., 1988 CanLII 168 (ABKB) at para.28.

- The oppression remedy focuses on harm to the legal and equitable interests of a wide range of stakeholders, including creditors, affected by oppressive acts of a corporation or its directors: BCE at para.45.

- The oppression remedy is an equitable one, designed to ensure fairness: BCE at para.58.

- Oppression is not restricted to illegal conduct. Rather, the remedy will respond “where the impugned conduct is wrongful, even if it is not actually unlawful”: BCE at para.71.

- As remedial legislation, the oppression provisions should be given a liberal interpretation in favour of the complainant: see First Edmonton at para.28.

- The cornerstone of the oppression remedy is the reasonable expectations of affected stakeholders: BCE at para.61.

- Courts considering claims for oppression must “engage in fact-specific, contextual inquiries looking at ‘business realities, not merely narrow legalities’”: Wilson v. Alharayeri, 2017 SCC 39 at para.23, and see BCE at para.70.

- In determining whether it would be “just and equitable” to grant an oppression remedy, a court must consider “whether the expectation is reasonable having regard to the facts of the specific case, the

relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations": BCE at para.62.

- The oppression remedy is designed to address, where oppression is found, the imbalance of power on the part of those in control with the vulnerability on the part of those having a genuine stake in the affairs of the corporation but no control over its conduct: 1413910 Ontario Inc. (Bulls Eye Steakhouse & Grill) v. McLennan, 2009 CanLII 22544 (ONSC Div Crt) at para.34.

- Unlike the Nova Scotia Companies Act, under the Canadian Business Corporations Act, and in all other Canadian jurisdictions except for New Brunswick, creditors must satisfy a two-step test to be granted standing as complainants: (1) they must demonstrate that they are a "creditor," and (2) they must demonstrate that they are a "proper person." Under the Nova Scotia Act, a creditor has automatic standing to seek an oppression remedy: Bledin v. Landsburg, 2013 NSSC 418 at para.30.

- The term "creditor," in the context of an oppression application, should be given a "latitudinous" meaning: Gignac, Sutts v. Harris, 1997 CanLII 12437 (OCJ, Gen Div) at para.68 and Bulls Eye at para.27.

- The kinds of interests recognized and protected by the oppression remedy are (a) varied, (b) not necessarily pecuniary and (c) if pecuniary, not necessarily grounded in a present and crystallized loss: Bulls Eye at paras.33-34.

- The term "creditor" is not limited to "judgment creditor." Rather, the threshold is that the claimant be an actual or "potential" creditor at the time of the oppressive actions being complained of: Apotex Inc. v. Laboratoires Fournier S.A., 2006 CanLII38354 (ONSC) at paras.37-39.

- The parties' "particular relationship of proximity," where the manner of conduct of the defendant company's affairs could have

significant consequences on the plaintiff, is a factor supporting a finding that a claimant is a creditor: Bulls Eye at para.30.

- A defendant company's recognition of its liability to a claimant may be evidence of the claimant's status as a creditor: see SCI Systems Inc. v. Gornitzki Thompson & Little Co., 1997 CanLII 12436 at para.28; and PricewaterhouseCoopers Inv. v. Perpetual Energy Inc., 2021 ABCA 16 ("PwC"), leave to appeal to SCC refused, [2021] SCCA No.79 at para.87.

- Creditors include contingent creditors, whose claims are contingent in the sense that they are liabilities that may not crystallize for some time and their quantum is uncertain: PwC at paras.86-87 and 129.

- A claimant's status as a creditor has been recognized where the defendant corporation has been re-organized in such a way that it has been rendered unable to pay its debts: PwC at para.126.

[33] IRC also relies on *Brookfield Financial Real Estate Group Limited v. Azorim Canada (Adelaide Street) Inc.*, 2012 ONSC 3818, a decision of Brown J., as he then was, sitting as a judge of the Ontario Superior Court of Justice Commercial List. In *Brookfield*, a commercial real estate agent alleged that the defendant landowner had attempted to do an "end run" on a real estate commission agreement by restructuring a sale agreement into a share purchase agreement: at para.20. The pre-condition to the commission – the sale – was therefore not met. The real estate agent commenced an oppression action against the landowner. The landowner brought a motion to strike the claim under the Ontario rules.

[34] Brown J. dismissed the motion to strike, given "the very fact-specific nature of oppression claims, the lack of any definitive legal principle barring an oppression claim in circumstances where a contract existed between the parties, and the allegations made by Brookfield that Azorim … deliberately terminated the proposed sale of the real property and replaced it with a new share sale structure in order to avoid paying a commission:" at para.53.

[35] Applying IRC's legal propositions to the undisputed facts, IRC says that it is a "creditor" within the meaning of the oppression provisions of the *Act*, and that the interest it seeks to protect is that of a "creditor," because:

- IRC and Newmont have a long-standing creditor-debtor relationship and therefore have a particular relationship of proximity, in which the conduct of Newmont's affairs could have significant consequences for IRC.
- There is an imbalance of power between those in control of Newmont and IRC, which has a genuine stake in the affairs of Newmont but no control over its conduct.
- For years, Newmont recognized a substantial future liability to IRC, including in its public filings.
- IRC is a contingent creditor, as its status as a creditor depends on the operation of the Holt Mine.
- By entering into the Strategic Alliance Agreement, Newmont structured its relationship with the mine operator in a way that deprived IRC of the payments to which IRC was otherwise was entitled.

- This was done deliberately to deprive IRC of future Royalty payments.

- But for the Strategic Alliance Agreement, the Holt Mine would have recommenced operations and continued to operate, generating royalty revenues payable by Newmont to IRC.

Position of Newmont

[36] Newmont's position is that the term "creditor" is restricted to one who was entitled to payment at the time of the allegedly oppressive act and who continues to have an entitlement to payment, and does not include a party to a contract who might have a future right to payment depending on whether or not a pre-condition is met. Newmont's position may be summarized as follows:

- The grammatical and ordinary meaning of the word "creditor" is, in part, "[a] person to whom a debt is owing by another person who is the debtor": see Gignac at para.68 and Awad v. Dover, 2004 CanLII 30248 (ONSC) at para.54.

- The purpose of the statutory oppression remedy is to address the misuse of the internal machinery of a corporation and to protect those who are vulnerable to such internal corporate manoeuvres: see First Edmonton at para.14 and Fedel v. Tan, 2010 ONCA 473 at para.56. The oppression provisions, and the word "creditor," must be considered in this corporate law context: see Wilson at para.55.

- The word "creditor," considered in its grammatical and ordinary sense in light of the statutory context and the purpose of the oppression provisions, does not include a party to whom no money is owing and where there is no liability under a contract, even if the

party might in the future have a right to payment. Such a party is not vulnerable to internal corporate manoeuvres.

- A party who has a viable or "crystallized" claim – a present right to be paid -though not yet adjudicated and though the quantum is not yet determined, qualifies as a creditor for the purpose of an oppression claim, as was the case in Gignac (a law firm that had performed the work, but had not yet sent the bill, had a claim for quantum meruit) and Bulls Eye (judgment had been granted for breach of contract but damages not yet assessed).

- Newmont's recognition in its Annual Reports of a significant liability to IRC in respect of the Royalty is not a recognition of a debt owing to IRC or that IRC is a creditor. IRC was not entitled to payment of these amounts when the Strategic Alliance Agreement was executed. The liability to IRC referred to in Newmont's Annual Reports represents a present value of what is to be realized in the future, and a recognition that the amount would likely be a liability in the future. Because the liability was not a certainty, IRC cannot be a creditor of Newmont.

- IRC seeks to use the oppression remedy to expand its contractual rights under the Royalty Agreement to require the continued operation of the mine. The oppression remedy does not protect a creditor from commercial outcomes that it could have avoided through contractual negotiations. Such outcomes are not the "interests of a creditor" protected by statutory oppression provisions: see JSM Corporation (Ontario) Ltd. v. The Brick Furniture Warehouse, 2008 ONCA 183 at para.60.

[37] Newmont distinguishes *PwC*, noting that the Court in that case found that the liabilities at issue were "inevitable": at paras.86-87.

[38] Newmont says that the parties were only able to find four cases that address the specific question of whether the term "creditor" includes a party to a contract

who does not have a present entitlement to payment but whose entitlement to payment is conditional on a pre-condition being met, and only three of these cases were decided on the merits: *Awad*, *First Edmonton* and *Remo Valente Real Estate (1990) Limited v. Portofino Riverside Tower Inc.*, 2011 ONCA 784. The fourth, *Brookfield*, was a motion to strike.

[39] In *Awad*, the court found that a participant in a joint venture could not be a "creditor" unless, at the time of the alleged oppressive act and at the time he initiated the complaint, a profit had been realized and he was owed a distribution of profit that had not been paid: at paras.46-48, 55-57 and 66.

[40] In *First Edmonton*, the court held that the plaintiff landlord was not a creditor of its tenant because at the time of the alleged oppressive acts, no amount was owed under the lease: at para.80.

[41] In *Remo Valente*, the Court of Appeal held that the plaintiff was not a creditor because the pre-condition to the plaintiff's entitlement to a commission had not been triggered before the defendant terminated the listing agreement and conveyed its property to another entity: at para.22.

[42] Newmont asserts that *Brookfield* is of very little assistance to IRC for the following reasons:

1. Unlike Awad, Remo Valente and First Edmonton, Brookfield was not decided on its merits but was a motion to strike under the Ontario rules, which involves a very different test (is it plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action) and burden than the real chance of success element of a motion for summary judgment on the evidence under the Nova Scotia rules.

2. Brown J. failed to consider or follow the decision in Awad from the same court.

[43] Newmont says that IRC therefore does not qualify as a creditor because its oppression claim relates to future royalty payments that would have only been due if the Holt Mine had recommenced operations. IRC's right to the payment of the Royalty is a contingent right that will only arise if there is mineral production from the Holt Mine. IRC's interest in future payments is not the type of interest protected by the oppression remedy.

Conclusion re: Real Chance of Success

[44] In my view, despite the able submissions of counsel for Newmont, IRC has discharged the onus on it to show that its claim that it meets the definition of "creditor," and that the interest it seeks to protect is that of a "creditor," has a real chance of success. IRC's position is an arguable and realistic one that finds support in the record.

[45] IRC's position is arguably consistent with:

- the principles of statutory interpretation (see Rizzo & Rizzo Shoes Ltd., Re, [1998] 1 SCR 27 at para.21 and BellExpressVu Limited Partnership v. Rex, 2002 SCC 42 at para.26),

- the broad remedial purpose of the statutory oppression remedy,

- the equitable nature of the oppression remedy,

- the fact-specific and contextual nature of the inquiry in oppression proceedings, and

- a "latitudinous" definition of the word "creditor."

[46] In concluding that IRC's claim that it has standing to bring an oppression claim has a real chance of success, I have also taken into account the following:

- The cases relied on by the parties, while persuasive, are not binding on this court.

- The courts in this province have yet to determine the meaning of "creditor" in the Act.

- The facts of this case are unique, in that Newmont owes a Royalty in respect of a mine that it no longer owns and from which it derives no income, and the allegation is that Newmont paid the mine owner to not operate the mine, in order to eliminate Newmont's liability to IRC.

- Although no royalty payments are currently owed to IRC by Newmont because the mine has not been operating, IRC is alleging that the precondition to payment of the Royalty (the operation of the mine) would have been met but for the alleged oppressive conduct of Newmont.

[47] Newmont's position finds some support in the reasoning in *Brookfield*. While it was not a decision on the merits, the reasons of Brown J. have some persuasive value.

[48] I do not accept Newmont's argument that Brown J. failed to consider the decision in *Awad*. As pointed out by IRC, Brown J. referred to his earlier decision in *Cohen v. Cambridge Mercantile Corp.*, 2007 CanLII 21596 (ONSC) at para. 48 of *Brookfield*. In *Cohen*, Brown J. specifically considered the decision in *Awad*: at para.35.

[49] In *Brookfield*, Brown J. distinguished the decision of the Ontario Court of Appeal in *Remo Valente*, a case relied on by Newmont. Brown J. wrote that he "could not see any suggestion in the Remo Valente case that any wrongful conduct by the defendant had caused the lack of formal project financing, the pre-condition to payment of commissions" at para.51. Brown J. held that the situation in *Brookfield* was quite different from that in *Remo Valente*, because Brookfield plead, "in effect, that but for the restructuring of the transaction into a share sale, Azorim would have been obliged to pay it a commission," and that "the wrongful conduct of Azorim deprived it of the payment to which it otherwise was entitled": *ibid.* Brown J. cautioned that "[d]ecisions in oppression cases are very fact specific and must be read with care": *ibid.*

[50] In *Brookfield*, Brown J. also discussed *JSM Corp.*, one of the cases relied upon by IRC. Brown J. wrote that, in *JSM*, "the Court of Appeal was not prepared to adopt a definitive principle of law that an oppression action did not lie where a contract existed between the parties": at para.52. Brown J. quoted from the *JSM* decision, where the court stated that "[t]he position of a creditor who can, but does not, protect itself against an eventuality from which he later seeks relief under the oppression remedy, is much different than the position of a creditor who finds his interest as a creditor compromised by unlawful and internal corporate manoeuvres against which the creditor cannot effectively protect itself" and that "[i]n the latter case, there is much more room for relief under the oppression provisions than in the former case": *Brookfield* at para.52, quoting from *JSM* at para.66.

[51] In this case, IRC is not simply making an oppression claim based on its right to future payments from Newmont under the Royalty Agreement (should the mine restart operations). IRC is saying the Newmont's allegedly oppressive conduct, against which IRC could not effectively protect itself, was *designed* to cause the mine not to operate when it otherwise would have, thereby depriving IRC of the Royalty payments to which it was otherwise entitled. It says that Newmont, by entering into the Strategic Alliance Agreement, did an "end run" around the

Royalty Agreement in order to avoid paying any further royalties to IRC. This is an arguable and realistic position, given the cases and principles relied on by IRC.

[52] In conclusion, IRC's position that it has standing as a "creditor" to bring an oppression claim against Newmont, and that the interest it seeks to protect is that of a "creditor," has a reasonable prospect for success on the undisputed facts. The claim's prospect for success cannot be characterized as one based on hunch, hope or speculation.

Duty of Good Faith Contractual Performance

Genuine Issue of Material Fact?

[53] Newmont says that the following undisputed facts are material to IRC's claim of a breach of the duty of good faith contractual performance:

- Newmont and Barrick entered into the Royalty Agreement in 2004, and the terms of the Royalty Agreement are wholly reduced to writing.
- Newmont retained responsibility for payment of the entirety of the Royalty to IRC after the sale of the Holt Mine to Kirkland Lake.
- IRC took an assignment of Barrick's rights under the Royalty Agreement in 2008.
- Kirkland Lake placed the Holt Mine into temporary care and maintenance in April 2020, and then into an indefinite suspension in July of 2020.

- Newmont and Kirkland Lake entered into the Strategic Alliance Agreement in August of 2020. The Strategic Alliance Agreement is wholly reduced to writing.

- The Holt Mine has not been operated by Kirkland Lake since 2020, and remains in care and maintenance.

[54] These facts are not in dispute.

[55] IRC says that four further facts are material to its claim that Newmont breached the duty of good faith contractual performance. I already discussed the first three facts when considering the facts material to IRC's claim to be a creditor, and found that Newmont did not dispute these facts, namely:

- The Holt Mine was economically viable and likely to operate for years into the future.

- The effect of the Strategic Alliance Agreement is to foreclose the Holt Mine from operating again.

- The true purpose of the Strategic Alliance Agreement was for Newmont to eliminate its liability to IRC.

[56] The fourth fact that IRC asserts is material to its claim of a breach of the duty of good faith contractual performance is as follows:

> Industry participants routinely include clauses in royalty agreements providing discretion to mine operators about when to operate the mine, but participants expect that discretion to be exercised based on a determination of the economic viability of the mine.
>
> See Jensen Affidavit, para.18

[57] IRC relies for this factual assertion, in part, on paragraphs 18 and 19 of Mr. Jensen's Affidavit, which say:

> 18. In my experience negotiating royalty agreements both as a mine operator earlier in my career and as a royalty holder later in my career, this [Clause D.5(d) of the Royalty Agreement] is a common provision …
>
> 19. As both a mine operator and royalty holder, it was my expectation that mine operators would exercise this discretion in good faith, and that a rational mine operator would develop and operate a mine so long as it was economical to do so, and if there weren't other impediments (for example, legal, regulatory or similar) standing in the way.

[58] I omitted Mr. Jensen's interpretation of Clause D.5(d) of the Royalty Agreement in the rest of para.18 of his affidavit.

[59] Newmont objected to these paragraphs of Mr. Jensen's Affidavit on the basis that they constitute improper legal submissions, argument or opinion on the interpretation of the Royalty Agreement. This is not an objection to the part of Mr. Jensen's evidence that comments on the frequency of such clauses. To the extent that Newmont objects to the balance of Mr. Jensen's evidence on this point - his expectation that a mine operator would operate a mine if it was economically viable to do so – I respectfully dismiss that objection. Mr. Jensen's evidence is relevant to IRC's claim that the Strategic Alliance Agreement nullified the objectives of the Royalty Agreement.

[60] The facts relied on by IRC for its claim that Newmont breached its duty of good faith contractual performance are undisputed.

Question of Law?

[61] There is a question of law: whether the specific doctrine within the general organizing principles of good faith contractual performance relied on by IRC is one known to law.

Real Chance of Success?

Position of IRC

[62] IRC states that, within the general organizing principle of good faith contractual performance, there is a specific doctrine that prohibits a party to a contract from taking steps to evade its contractual duties, or engaging in conduct that has the effect of defeating rights under the agreement, that nullifies the objectives of the agreement or that undermines the core of the contractual bargain between the parties.

[63] IRC relies on *Bhasin v. Hrynew*, 2014 SCC 71, where the court referred to Professor McCamus' text, *The Law of Contracts*, and his identification of the following three broad types of situations in which a duty of good faith performance

of some kind has been found to exist: (1) where the parties must cooperate in order to achieve the objects of the contract; (2) where one party exercises a discretionary power under the contract; and ***(3) where one party seeks to evade contractual duties***: at para.47 (emphasis added), citing *CivicLife.com Inc. v. Canada (Attorney General)* (2006), 2006 CanLII 20837 (ON CA), 215 O.A.C. 43, at paras. 49-50.

[64] IRC relies on the third type of situation in which a duty of good faith has been found to exist.

[65] In *CivicLife*, cited by the court in the passage from *Bhasin* above, the Ontario Court of Appeal also referred to Professor McCamus' text, where he gave as an example of the third doctrine "engaging in conduct not strictly prohibited by the letter of the terms of their agreement but that ***has the effect of defeating rights under the agreement***": at para.49 (emphasis added).

[66] IRC relies on the decision of the trial judge in *CivicLife*, who stated that: (1) if the evidence discloses that a party "acts in a manner that substantially nullifies the contractual objectives contrary to the original purpose or expectations of the parties," that party has breached the terms of the contract; and (2) there is an implied term of a commercial contract that a party will not deliberately nullify the objectives of the contract: [2005] O.J. No. 3485 (S.C.J.) at para.51. In *CivicLife*,

the conduct at issue was Industry Canada's interference in the relationship between the plaintiff and another contractor that had the effect of defeating the contractual objective of an eventual national rollout of the plaintiff's work, where the contract between the plaintiff and Industry Canada did not prohibit Industry Canada from talking to the other contractor: see paras.51 and 59 of the trial decision; and see para.42 of the appeal decision.

[67] IRC says that Newmont breached this third doctrine by paying Kirkland Lake not to operate the Holt Mine in order to escape Newmont's contractual obligation to pay the Royalty to IRC, thereby defeating IRC's rights under the Royalty Agreement, nullifying the objectives of the agreement and undermining the core of the contractual bargain between the parties, relying on Mr. Jensen's evidence.

Position of Newmont

[68] Newmont says that the Supreme Court of Canada has, in and after *Bhasin*, identified two specific doctrines that fall within the general organizing principle of good faith contractual performance: (1) the duty of honest performance (as recognized in *Bhasin* at para.93) and (2) the duty to exercise contractual discretion consonant with the purposes for which the discretion was granted (as recognized in

Wastech Services Ltd. v. Greater Vancouver Sewerage and Draining District, 2021 SCC 7 at para.111).

[69] Newmont says that the Supreme Court of Canada has not recognized the specific doctrine relied upon by IRC in this case.

[70] Newmont points out that the Court of Appeal in *CivicLife* held that it was unnecessary to determine whether Industry Canada's misconduct should be characterized as a breach of the duty of good faith, as an abuse of the exercise of discretion or simply as undermining the reasonable expectations of the parties to the agreement. Rather, the Court of Appeal held that the trial judge was entitled to find, as he did, that Industry Canada's conduct breached its contractual obligations to CivicLife: at para.51.

[71] Newmont also relies on the court's statement in *Bhasin* that these examples "provide a useful analytical tool to appreciate the current state of the law on the duty of good faith," *but* that "[t]hey also reveal some of the lack of coherence in the current approach": at para.48.

[72] Newmont also says that, if the court were to recognize a specific duty of good faith performance falling within Professor MacCamus' third category, it would require the exercise of a *contractual power* to evade the contractual duty:

see *Mason v. Freedman*, 1985 CanLII 7 (SCC), referred to by the court in *Bhasin* at para.51.

Conclusion re: Real Chance of Success

[73] IRC has established that its claim that Newmont breached of the duty of good faith contractual performance has a reasonable chance of success on the undisputed facts. IRC's position is arguable and realistic. The Supreme Court of Canada in *Bhasin* appears to have recognized the existence of the specific doctrine relied upon by IRC, as did the Ontario Court of Appeal in *CivicLife*. Before stating that it was unnecessary for it to determine whether Industry Canada's misconduct was a breach of the duty of good faith, the Court of Appeal in *CivicLife* stated as follows in the same paragraph: "Thus, Industry Canada's conduct appears to come within each of the three categories that courts have recognized as giving rise to the imposition of a duty of good faith:" at para.51. Moreover, *CivicLife* did not involve the use of a contractual power to evade a contractual duty.

[74] IRC's claim that Newmont breached its duty of good faith by paying Kirkland Lake not to operate the Holt Mine in order to eliminate Newmont's liability to IRC under the Royalty Agreement, thereby acting to evade its contractual duties with the effect of defeating IRC's rights under the agreement,

has a reasonable prospect for success on the undisputed facts. The claim's prospect for success cannot be characterized as one based on hunch, hope or speculation.

Should I Finally Determine the Issues of Law?

[75] In *Shannex*, Fichaud J.A. stated that it was not the case to catalogue the principles that will govern the judge's discretion under Rule 13.04(6)(a) whether or not to determine the full merits of the claim: at para.34. He stated that those principles will develop over time, but that proportionality criteria, such as those discussed in *Hryniak v. Mauldin*, 2014 SCC 7, will play a role. A party who wishes the judge to exercise discretion under Rule 13.04(6)(a) should state that request, with notice to the other party: *Shannex, ibid*.

[76] In its brief and in oral argument, IRC briefly asserted that it was open to me to exercise my discretion to finally determine IRC's standing to bring an oppression claim as a "creditor." Counsel for Newmont briefly asserted that there would be no efficiency achieved if I determined this discrete issue.

[77] Neither party asked that I finally determine the breach of good faith claim.

[78] In these circumstances, I decline to exercise my discretion to finally determine whether IRC has standing as a "creditor" to make an oppression claim

against IRC, or whether Newmont breached the duty of good faith contractual performance. Those decisions should, in my view, be made by the trial judge based on all of the facts.

Conclusion

[79] Newmont's motion for summary judgment is dismissed. IRC is entitled to its costs of the motion. If the parties cannot agree on the issue of costs, I will receive written submission from IRC within two weeks of this decision and from Newmont within four weeks of this decision.

Gatchalian, J.