Court of King's Bench of Alberta

Citation: Remington Development Corporation v Canadian Pacific Railway Company, 2023 ABKB 493

Date: 20230830
Docket: 0801 03152
Registry: Calgary

Between:

Remington Development Corporation

Plaintiff

- and -

Canadian Pacific Railway Company and His Majesty the King in Right of Alberta, as Represented by the Minister of Infrastructure and the Minister of Transportation

Defendants

Memorandum of Decision
of the
Honourable Justice A. Woolley

Introduction

[1] On October 20, 2022, I found that the Defendant Canadian Pacific Railway had breached its contractual obligations to the Plaintiff, Remington Development Corporation, and that the Defendant the Province of Alberta had induced that contract breach: ***Remington Development Corporation v Canadian Pacific Railway***, 2022 ABKB 692 ("Trial Judgment"). I awarded

Remington $163,707,836 in damages plus interest calculated in accordance with the *Judgment Interest Act*, RSA 2000, c J-1. That award was, however, subject to adjustment to account for land acquisition costs, an issue I reserved.

[2] Since the publication of the Trial Judgment further issues have arisen that require resolution. First, Remington filed an application requesting that I rectify what they characterized as a "slip" in the judgment in relation to the calculation of an amount for mitigation of damages. The Defendants dispute the claim that a slip was made, or that an adjustment is appropriate.

[3] Second, Remington asks that I issue a certificate pursuant to the *Proceedings Against the Crown Act*, RSA 2000 c P-25; the Crown does not oppose the issuance of a certificate, but disputes the quantum of damages Remington seeks to be included pending the determination of the apportionment of liability.

[4] Third, Remington seeks an award of interest for a delay in the hearing of the post-trial issues that arose following CPR's retention of new counsel.

[5] Fourth, a disagreement arose between the parties with respect to whether the interest accruing subsequent to the release of the Trial Judgment should be characterized as pre-judgment or post-judgment interest pursuant to the *Judgment Interest Act*.

[6] These reasons address the reserved land acquisition cost issue, as well as the issues that have arisen since publication of the Trial Judgment. The issue of costs, which was also reserved, will be addressed in a subsequent decision.

Issues

[7] This decision addresses the issues raised by the parties as follows:

1. Does the Trial Judgment contain a slip with respect to mitigation that ought to be corrected?
2. Should Lot 4 be included in the land acquisition costs?
3. What quantum of damages should be included in the certificate issued pursuant to the *Proceedings Against the Crown Act*?
4. Is Remington entitled to a compensatory interest award for the delay in hearing this matter following CPR's change of legal counsel?
5. Is interest accruing since October 20, 2022 properly characterized as pre-judgment or as post-judgment interest?

Analysis

Slip Application

[8] In the Trial Judgment I held that Remington had a duty to mitigate and calculated the deduction for mitigation as $29,000,000. My reasons said in relevant part:

> [1185] What that suggests is that to assess mitigation by Remington I should look at one of two things: properties that it could have acquired but did not, or properties that it did acquire that can be considered comparable to the 10th Ave Lands and in that way reasonably profitable substitutes. Because I was given no evidence on properties that Remington could have acquired but did not, my focus is only on those that Remington did acquire.

> [1186] I thus reviewed Schedule 1 of Mr. Davidson's report, and his summary of the commercial office projects completed by Remington between 2006 and 2018. I focussed on Schedule 1, rather than Remington's activities in general, because those commercial office properties are at least in the same general category as the buildings to be constructed on the 10th Ave Lands. Remington constructed sixteen buildings during that period and earned profits of $403,900,000. Those buildings significantly varied in size, and none can be considered to be substitutes for the 10th Ave Lands. Most were suburban developments or in Edmonton; those in Quarry Park (11 of the 16) were built on land acquired before the contract breach.
>
> [1187] The only land acquired, and building constructed, that is meaningfully comparable to the 10th Ave Lands is the Meredith building, which is a commercial office building proximate to downtown Calgary, that was completed in 2016 and sold in 2018. As a single block development, it is not dissimilar to the Phase 2 building on the 10th Ave Lands, albeit smaller and across the river from downtown. According to an appraisal which was provided as an exhibit at trial, Remington purchased the land on which the Meredith building was developed in January 2009, slightly over 2 years after the December 4, 2006 meeting, and one year after the Province told Remington that no land would be available. The pro forma listed the land acquisition costs as $9,750,000 which, based on Remington's practices, would have been the land cost at the start of construction, a few years after 2009. This land acquisition cost is very close to what, prior to the adjustments necessary by virtue of this judgment, the 10th Ave Lands would have cost as of 2007, making this essentially equivalent to Remington having reinvested what it would have paid for the 10th Ave Lands. The land had a FAR of 5.61. When Remington sold the Meredith block in 2018 it made a profit of $29,000,000.
>
> [1188] I find that the Meredith block is a reasonable substitute property purchased with the funds Remington would have spent on the 10th Ave Lands, the development of which partially mitigated Remington's losses on the 10th Ave Lands. On that basis, I further reduce Remington's damages claim by $29,000,000 to $163,707,836.

[9] Remington submits that this analysis contains a slip, because evidence provided by Mr. Remington at trial indicated that Remington only had a 50% interest in the Meredith Block:

> A. That is an office building. If you come to – on Memorial Drive to get to – to downtown, you will come over the 4th Street overpass, and that's the building that is right there, and it's called "Meredith Block"
>
> Q. And what was Remington's involvement in that?
>
> A. We actually own that building with the Western Securities, the O'Connor family, in Calgary. We're 50-50 partners on that building.
>
> ….
>
> So this is a building that we did a joint venture on; we own 50 percent. And so those are the -- those are the lease rates we achieved on the building: $30.90 a

> square foot average. That's our storage rates that we received: 41,000 per annum. And that's -- the parking was basically $295 a month, I believe. So at the end of the day, we've assigned a cap rate, I believe, based on appraisal. So it's appraised at 116 million. And if you look below, it is our costs. We paid -- we paid 9.75 million for the land. We didn't own the land. We went out and bought the land. And here's your associated costs in -- in doing the construction. So the construction costs are approximately 70 million, and your soft costs -- what we call "soft costs", the developed costs, including loan interest, leasing commissions, marketing, so forth, add up to about 7.4 million. Total costs of 87 million.

[10] In addition, Remington points out that their expert witness Paul Sharp testified at trial that Remington had a 50% interest in the Meredith Block, saying that Remington "participated in a 50% joint venture in the Meredith Block property, a mixed-use building in Calgary". Mr. Sharp's evidence said that Remington held the property as "an investment in leased office space". A footnote to Mr. Sharp's report stated that "Meredith Block was appraised by Altus Group as at May 12, 2017 for $111.0 million, of which 50% is owned by RDC". In cross-examination, Mr. Sharp confirmed that Remington owned 50% of the value of the Meredith Block as set out in the Altus Appraisal.

[11] I do not accept that any adjustment ought to be made to the Trial Judgment with respect to mitigation. I accept that it is available to me to correct an error in my judgment that is "plain and manifest": ***Lewis Estates Communities Inc. v. Brownlee LLP*** 2013 ABQB 731 at para 33; *Alberta Rules of Court,* Alta Reg 124/2010, Rules 9.12 and 9.13. I am not, however satisfied that such an error exists in this case. More specifically, I am not satisfied that the judgment contains a plain and manifest error in finding that Remington earned $29,000,000 in profits in relation to the Meredith Block or, even if such an error exists, that it affects the Trial Judgment's assessment of the proper deduction for mitigation.

[12] The determination of the profits earned on Meredith Block was based on evidence provided by Remington through its expert Mr. Davidson. Mr. Davidson's expert report included at Schedule 6 a "Project Margin" in relation to the Meredith Block. The Schedule set out the margin as a dollar value and as a percentage, for "Various Projects Completed Historically by Remington", including Meredith Block. Mr. Davidson's Report said at paragraph 7.2 that Schedule 6 showed Remington's "average project margin". While it is fair to note that Schedule 6 said only that these were projects "completed" by Remington, not owned by Remington, it did not identify Remington as only entitled to a portion of those amounts, and the implication of paragraph 7.2 was that this was Remington's project margin, not the project margin of Remington and others.

[13] In his testimony Mr. Davidson said that Schedule 6 and Section 7 of his Report were a reasonableness check, an opportunity to "have regard to other projects Remington had completed and have some sense of what their financial consequences…were". He said that this was a "list of projects that were in the "Office" category that Remington had completed and sold over the time period, and 16 of those were identified. So these are the office projects completed and sold by Remington". He said that he had "asked Remington for a list of office projects that they had completed and sold and – and some metrics associated with that". He said that he was provided "a measure of the selling price and the costs and, therefore, I could calculate what was the

margin and also calculate, in the second column from the right, the margin as a percentage…I took this array and I calculated, as I said, the project margins".

[14] Mr. Davidson in his testimony and in his report made it clear that he used this information to assess the reasonableness of his calculation of the profits that Remington would have earned had it developed Rail Town, saying that his

> takeaway was that Remington was in the business, that Remington had completed a number of office projects, that those office projects had been completed and sold across various years…and that there were margins that were, firstly, positive; secondly, double digit; and, thirdly, ranged as shown there.

[15] Remington provided a Pro Forma with respect to the Meredith Block. The Pro Forma listed the Profit Margin for the project as $29,006,244. The Pro Forma did not identify Remington as only entitled to a portion of those amounts or break out which costs and revenues were to Remington's account, and which were to those of somebody else.

[16] The Pro Forma was referred to in Mr. Remington's cross-examination, and in his direct examination, excerpted above ("So this was a building…").

[17] Remington's position seems to be that when Mr. Davidson referred to projects "completed and sold" by Remington in his oral testimony, and when he identified the project margins in dollars and as a percentage in Schedule 6, he was making no claim that Remington owned the buildings, or that it itself earned the dollar amount of the project margins. They say that Mr. Remington's oral testimony that Meredith Block was a 50% joint venture is sufficient to prove that Remington only earned 50% of the project margins listed in Schedule 6 of Mr. Davidson's report and in Remington's Pro Forma.

[18] Remington is correct that I understood the Pro Forma to be identifying the profits earned by Remington on the Meredith Block. I understood Mr. Davidson's language "completed and sold", and the project margins for projects completed and sold, to refer to project margins earned by Remington. I understood that the reasonableness test Mr. Davidson used to assess the profits he calculated that Remington would earn on the 10th Ave Lands was based on assessing those profits against profits Remington had earned in the past.

[19] It is also correct that I did not understand the evidence of Mr. Remington and Mr. Sharp, that this was a 50% joint venture, to either contradict that understanding of Mr. Davidson's schedule or the Pro Forma, or to provide alternative specific evidence about the profits Remington in fact earned on the Meredith Block.

[20] I am not satisfied that, in so understanding the evidence, I committed the type of plain and manifest error that it falls within my jurisdiction to correct. A joint venture involves some sharing of the risks and rewards of a project, but how those risks or rewards are shared, even within a "50% joint venture" does not necessarily prove that the profits earned will be shared equally, particularly if one party was responsible for completing the construction and leasing of the building. The evidence cited by Remington does not make the conclusion that it only earned 50% of the profits on the Meredith Block plain and manifest and, as such, cannot render my different assessment of the trial evidence to be plainly and manifestly in error.

[21] Even were I to find that my understanding of the trial evidence about the profit Remington earned on Meredith Block to be in error, however, I am satisfied that it would not result in any change to my conclusion with respect to the appropriate mitigation adjustment. As

counsel for CPR pointed out, if Remington only owned half of the Meredith Block, and was only entitled to half its profits, then I would have had what I said in my judgment I was lacking – evidence of a property that Remington could have acquired but had not: Trial Judgment, para 1185.

[22] The law on mitigation of damages does not limit adjustments for mitigation to reflect profits in fact earned by a Plaintiff; it also permits for adjustments to damages where a Plaintiff had the opportunity to mitigate through acquisition of a reasonable profitable substitute property but failed to do so: ***Southcott Estate Inc v Toronto Catholic School Board***, [2012] 2 SCR 675 at paras 58-59. The evidence with respect to Meredith Block, in the event that Remington was not entitled to the totality of the profits, supports the inference that Remington had an opportunity to acquire a reasonable substitute property, and to earn an additional $14,500,000. That evidence and inference is sufficient to show that Remington had the ability to mitigate its losses by $29,000,000, whether or not it did so in fact. It either did mitigate, or it mitigated in part and in part failed to mitigate where it had the opportunity to do so. In either event, the adjustment for mitigation remains $29,000,000.

Land Acquisition Costs – Lot 4

Introduction

[23] In the Trial Judgment I made the following findings:

1. The 10th Ave Agreement obligated CPR to sell land to Remington only after it had declared the land surplus to operational requirements.
2. The process for CPR to make a declaration that land was surplus to operational requirements was for it to survey the land, prepare a tentative subdivision plan and submit an application for subdivision.
3. CPR declared 5.1 acres of land surplus when it submitted the first subdivision application. It had taken the necessary steps internally to determine that the 10th Ave Lands were in fact surplus to operational requirements prior to submitting the first subdivision application.
4. Lot 4 was subdivided prior to the 10th Ave Agreement, and so could not be included in the first subdivision application.

[24] I reserved judgment on the issue of whether Lot 4 was included in the lands to be sold to Remington. Specifically, I reserved on the issue of whether the lands in Lot 4 should be included in the calculation of the land acquisition cost, which is to be deducted from the damages received by Remington (see. e.g., Trial Judgment, paras 266 and 1192; "Reserved Issue"). Lot 4 did not form part of the calculation of Remington's damages – that is, profits associated with development on Lot 4 were not part of the calculation of Remington's loss. As such, the only relevance of Lot 4 to the calculation of damages was with respect to land acquisition costs.

[25] In the Trial Judgment I also observed that the memorandum that Mr. Nimmo provided to Mr. Walsh, at the time the 10th Ave Agreement was entered into, said that the 5.219 parcel included for sale was "serviced to the lot line but not subdivided". I also noted that the property information summary with respect to the 10th Ave Lands said that "it would have to be subdivided to enable transfer". Citing this evidence, I stated that "at the time of the 10th Ave Agreement, CPR believed that none of the 10th Ave Lands were subdivided" (Trial Judgment, para 262).

[26] Prior to this post-trial hearing, Remington and CPR agreed that if Lot 4 was included in the land to be sold to Remington, the total acquisition cost would be $7,772,404. If Lot 4 was not included, the total acquisition cost would be $6,385,366.31.

[27] To decide the Reserved Issue requires answering three specific questions:

1. How is Lot 4 incorporated into the language of the 10th Ave Agreement?
2. What are the surrounding circumstances with respect to the inclusion of Lot 4 in the 10th Ave Agreement?
3. In light of the foregoing, should Lot 4 be included in the lands which CPR was contractually obligated to sell to Remington?

[28] Before doing so, however, I first consider my authority in relation to the Reserved Issue – what may I consider (and not consider) in resolving that issue? I also provided the background facts with respect to the Reserved Issue.

Authority to Consider a Reserved Issue

[29] In ***Dow Chemical Canada ULC v NOVA Chemicals Corporation***, 2021 ABCA 153 the Court considered the scope of a trial judge's ongoing jurisdiction following the issuance of a trial decision which includes a reserved issue. In that case the trial judge had held that NOVA was liable to Dow but had reserved the issue of later arising damages. NOVA argued that it should be able to reargue liability in relation to those later arising damages, but the trial judge held that she was *functus officio* on the issue of liability. The Court of Appeal agreed, holding that the trial judge was *functus officio* in relation to matters that she had finally decided, while remaining empowered to decide those issues on which she had reserved jurisdiction: ***Dow Chemical*** at para 73-75. See also ***Doucet-Boudreau v Nova Scotia (Minister of Education)***, 2003 SCC 62 at para 80; ***Gladue v Alberta (Attorney General)***, 2012 ABQB 5 at para 5; ***Aubin v Petrone***, 2020 ABCA 13 at paras 200-202.

[30] In this case the Trial Judgment determines the central issues between the parties, including the interpretation of the 10th Ave Agreement. Most importantly, I determined that under the Agreement "CPR had no obligation to sell any of the lands to Remington" (para 76) but that, under the Agreement, it "was given a time constraint and process" through which the surplus declaration would be made (para 85) – i.e., the submission of a tentative plan of subdivision. The Trial Judgment reserved, however, whether Lot 4 should "be included within the lands contracted to be sold to Remington pursuant to the Opening Paragraph of the 10th Ave Agreement?" (para 264).

[31] As such, my obligation here is to consider the Reserved Issue – whether Lot 4 is included within the lands contracted to be sold so that it ought to be included in the land acquisition costs – without revisiting those issues already decided, namely the structure of the 10th Ave Agreement in relation to CPR's discretion to declare the lands surplus prior to selling those lands to Remington. The decision of the Reserved Issue must not contradict, undermine or amount to a reconsideration of the decided issues.

[32] Maintaining this balance presents some complexity, given that both the Reserved Issue and the decided issues relate to the interpretation and application of the 10th Ave Agreement. Ultimately, however, the Reserved Issue is discreet, and additive to the decided issues. It requires me to consider a specific contractual complexity that arises as a result of the decision of CPR and Remington to add Lot 4 to an agreement that they did not revise to reflect fully the implications

of adding an additional and already subdivided piece of land to the "Subdivided Lands", "Lands" and "Existing Parcel".

[33] In considering the Reserved Issue I explore the evidence related to Lot 4 and make findings of fact based on that evidence. At the time of the Trial Judgment, evidence with respect to Lot 4 was in the trial record, but that evidence was never discussed, analyzed or addressed by the parties. Neither party referenced Lot 4 at any point in their extensive written briefs or in their oral argument. Evidence with respect to Lot 4 existed within the over 1000 exhibits, and 4000 transcript pages, but had not been brought to my attention so as to be meaningfully accessible for me and to permit me to analyze whether Lot 4 fell within the lands contracted to be sold to Remington. Indeed, at the time of the Trial Judgment I was uncertain about whether in fact Lot 4 had been subdivided (Trial Judgment, para 266). It was for that reason – to ensure that I had the necessary factual basis to ensure "a fair resolution" (Trial Judgment, para 266), and that I had properly heard from the parties about the applicable law and facts, that I reserved the calculation of the land acquisition costs.

[34] Through this supplementary process the parties have put before the Court the trial evidence related to Lot 4. They have provided submissions about what they understand that evidence to mean, and on whether Lot 4 ought to be included within the lands contracted to be sold to Remington. I have made my decision on the Reserved Issue based on that evidence and in light of their submissions with respect to it.

Lot 4: Background Facts

[35] The two parcels of land that make up Lot 4 are both subdivided; the grey portion was subdivided in 1899, and the brown portion in 1922.

[36] At the time the 10th Ave Agreement was entered into, Lot 4 was used by CPR as part of B Yard; it contained shop tracks and drip trays to fuel and repair locomotives and other train cars.

[37] In September 2002, in the early stages of the negotiation of the 9th Ave, 10th Ave and Interlink Agreements, Lot 4 was included with the Interlink Lands, which would have resulted in the transfer of title to those lands to Remington on closing. In the Property Information Package provided to Mr. Remington, Lot 4 was included as part of the Interlink Lands. That is why the Property Information Package described the 10th Ave Lands as needing to be subdivided to enable transfer – all of the 10th Ave Lands apart from Lot 4 required subdivision, and in the early stages of the parties' negotiations Lot 4 was part of the Interlink Lands.

[38] Thus, at the time they negotiated the 10th Ave Agreement both Remington and CPR knew that Lot 4 was subdivided. The information provided by CPR to Remington in the Property Information Package told Remington that was the case. And, as well, a title search was obtained by CPR on the lands in September 2002, including for Lot 4; while no trial testimony was entered in relation to the title search, counsel for CPR observed that the copy in the trial record had a Remington production number on it. It is fair to infer that Remington had a copy of the title search as well as CPR.

[39] In the early drafts of the 10th Ave Agreement, Lot 4 was not included in the lands to be contracted for sale to Remington; rather, it was included in the lands to be sold as part of the Interlink Agreement. In those early versions of the 10th Ave Agreement, the land for sale was 6.11 acres, comprised of lands 140 feet deep west of the 6th Street SE road allowance and extending west of 4th Street SE. The 6.11 acres did not include Lot 4.

[40] At that time, drafts of the 10th Ave Agreement did not yet include the language central to the decided issues with respect to CPR's discretion to declare the lands surplus, and the process through which the surplus decision would be made. The key language of the Opening Paragraph and Articles 1.03, 2.02, 6.05 and 6.08(c) had not yet been included.

[41] On or about October 31, 2002, Mr. Raby, who acted as counsel for CPR on the transaction, circulated a memorandum to Remington with respect to the draft agreements as at that time. It said that there should be a schedule to the agreements setting out an exact legal description of the land included in the sketch of the site plans, and that the price should be fixed for the land based on those precise acreages.

[42] In addition, his memorandum discussed the need to address CPR's discretion to declare the lands surplus within the subdivision provisions for the "6.118 Acre Parcel Purchase", i.e., in the then drafts of the 10th Ave Agreement, which did not include Lot 4:

> The [6.188 Acre Parcel] agreement is clearly conditional on subdivision. The usual subdivision issues are scattered throughout the agreement and we would suggest that they be assimilated in one clause. It is our understanding that these typical provisions should be reflected as follows:
>
> > (a) CPR is responsible for making the subdivision application and paying for the costs thereof;
> >
> > (b) CPR is responsible for hiring the surveyor to prepare the tentative plan and to pay for the surveyor's costs.
> >
> > (c) The determination of the area of the tentative plans should be in CPR's absolute discretion as this relates to which portion of the lands are surplus to existing railroad operations…

[43] Mr. Raby's memorandum did not mention the possible transfer of Lot 4 from the Interlink Agreement to the 10th Ave Agreement.

[44] The next drafts of the 10th Ave Agreement, which appear to have been drafted sometime between November 1 and 5, 2002, include preliminary versions of the clauses included in the 10th Ave Agreement with respect to the surplus declaration, and the submission of a tentative plan of subdivision.

[45] They also change the acreage referenced in the Opening Paragraph to 5.22 acres from 6.11 acres. That adjustment resulted from reducing the prior 6.11 acres by 40 feet in depth (from 140 to 100 feet), and the addition of Lot 4. The 5.22 acres were a 100-foot-deep parcel of land extending contiguously from west of 4th Street SE to east of 6th Street SE. The Opening Paragraph also included the language "or such greater or lesser area as determined in accordance with Article 6.05 hereof", which is reflected in the final agreement.

[46] No direct evidence was given at trial about the rationale for the decision to add Lot 4 to the 10th Ave Agreement. Mr. Remington testified that the decision was made to move Lot 4 from Interlink to the 10th Ave Agreement but he did not say why. None of the CPR witnesses testified about the decision to move Lot 4 into the 10th Ave Agreement.

[47] The executed version of the 10th Ave Agreement, in addition to retaining the reference to 5.22 acres in the Opening Paragraph, includes Lot 4 on Schedule A. On Schedule A, as well as

showing Lot 4 in the illustration, it sets out Lot 4's specific acreage and its subdivision numbers. Schedule B included the legal descriptions for the two titles making up Lot 4.

[48] As a result of its inclusion in Schedule A and Schedule B, Lot 4 was included in the Opening Paragraph's defined terms "Subdivided Lands", "Lands" and "Existing Parcel". As a consequence it was, by definition, included in the reference to "Subdivided Lands" and "Lands" in, *inter alia*, Article 1.03 ("Subdivided Lands"), 2.02 ("Lands"), 6.05 ("Subdivided Lands"), 6.08(c) ("Lands") and 7.01 ("Lands"; "Subdivided Lands"). It was also included in the reference to "Existing Parcel" in Articles 1.03, 2.02, 6.05, 6.06 and in 6.08(c). These terms are discussed in more detail below.

[49] Lot 4 is also included in the acreage within "Lot 1" in Article 1.03, referenced again in Article 2.02.

[50] No evidence revealed how the parties at the time understood the inclusion of Lot 4 in relation to the operation of the terms of the 10th Ave Agreement. As noted, Mr. Remington said that the decision was made to move it, not why. Mr. Raby's October 31, 2002 memorandum does not mention the decision to move Lot 4, or how that should be dealt with as a matter of contractual drafting. No other legal memorandum or discussion on this point was identified in the trial record. Mr. Nimmo's memo to Mr. Walsh seeking approval of the 10th Ave Agreement suggests that at that time Mr. Nimmo understood all of the lands within the 10th Ave Agreement to require subdivision. Remington entered a caveat on the 10th Ave Lands on or about September 15, 2003; however, it did not include the legal descriptions for Lot 4 in the schedule to the caveat.

[51] After the 10th Ave Agreement, Lot 4, like the rest of B Yard, continued to be used by CPR as part of an active railyard, although it had relatively fewer tracks than other parts of B Yard.

[52] The Trial Judgment found that prior to November 2004 CPR decided that B Yard was surplus to operational requirements, although it took no practical steps to move B Yard (Trial Judgment, paras 106, 228, 232). B Yard included Lot 4.

[53] On November 24, 2004, IBI submitted the first tentative plan of subdivision. "It included approximately 5.1 acres, which was 140 feet at the west boundary of the lands, dropping to 100 feet at 4th St SE, and carrying on east only to 6th Street SE. No lands east of 6th Street SE were included in the application" (Trial Judgment, para 108). The first tentative plan of subdivision did not include Lot 4 which had been previously subdivided.

[54] At the trial of this matter in 2022, the parties did not address the relationship between Lot 4 and the terms of the 10th Ave Agreement.

[55] That Lot 4 was previously subdivided causes, however, a complication for CPR's position on the interpretation of the 10th Ave Agreement and, as well, for the alternative position on the 10th Ave Agreement taken by Remington.

[56] CPR maintained that it had the absolute discretion to declare some, all or none of the 10th Ave Lands surplus, subject only to the 100 feet minimum imposed with respect to Lot 2. CPR submitted that that discretion was not exercised through the subdivision provisions of the 10th Ave Agreement but was, rather, a discretion to be exercised separately from the operation of the subdivision provisions. The subdivision provisions created an additional, second condition to the 10th Ave Agreement, which CPR described as the "Subdivision Condition": "Article 6.05

addressed the need to subdivide the lands before title could be transferred…the subdivision process in Article 6.05 and the surplus process in Article 2.02 were completely independent processes". Under CPR's interpretation of the 10th Ave Agreement, CPR would declare the lands surplus through the Surplus Condition. It would then, additionally, satisfy the Subdivision Condition. Once the Surplus Condition *and* the Subdivision Condition were satisfied, the quantity of land sold to Remington would be identified through the incorporation of Article 6.05 in the Opening Paragraph.

[57] CPR maintained, of course, that it never exercised its discretion to declare the lands surplus. Yet, on its interpretation, had it done so, say declaring the whole 1.116 acres of Lot 4 and 2 further acres of Lot 1 to be surplus, for a total of 3.116 acres, it would have run into a variant of the issue now before the Court in satisfying the Subdivision Condition: how would the (hypothetical) 3.116 acres be incorporated into the Opening Paragraph of the Agreement? The "Land" declared surplus is less than 5.22 acres, but its boundaries cannot be effectively determined through subdivision under Article 6.05, since an application to "subdivide the Subdivided Lands from the Existing Parcel" would not include Lot 4 (Article 6.05; Article 7.01).

[58] I do not criticize CPR for not raising the complexities of Lot 4 for the Subdivision Condition – as noted, CPR's position was that the Surplus Condition was not satisfied, so the Subdivision Condition had no bearing on the facts before me. Nor do I suggest that CPR could not offer a resolution to the complexities of Lot 4 for the Subdivision Condition; as discussed below, in my view the issue can be resolved through the implication of language into the Agreement to reflect the parties' intentions with respect to Lot 4. My point is only that the issue of how land already subdivided fits within the terms of the 10th Ave Agreement is not an issue limited to the interpretation of the 10th Ave Agreement provided by the Trial Judgment.

[59] Remington's primary interpretation of the 10th Ave Agreement does not give rise to a material issue in relation to Lot 4. Its position was that CPR agreed to sell it 5.22 acres, including Lot 4, and that CPR's surplus decision related only to other land within the Existing Parcel, which was not subdivided. On this interpretation, Lot 4 would be included within the 5.22 acres, and the additional amounts would be included through the operation of Article 6.05. Complexities in relation to Lot 4 would still have arisen given the wording of the various clauses of the Agreement, as discussed below; in its essence, however, Remington's interpretation can account for Lot 4 in the land to be sold as provided for in the Opening Paragraph.

[60] Remington also, however, offered an alternative interpretation of the 10th Ave Agreement, one similar to that ultimately adopted in the Trial Judgment, suggesting that "once CPR had the lands surveyed to three decimal places and submitted a subdivision application as contemplated by Article 2.02, its exercise of discretion on the "surplus" nature of the lands included had been exercised (or, alternatively, that condition had been fulfilled)". Under this interpretation, as with the interpretation in the Trial Judgment, the question of how or whether Lot 4 could fall within the surplus declaration when it could not be included in a subdivision application, would need to be resolved.

[61] As was the case with CPR, my point here is not to criticize Remington for not addressing the complexity of Lot 4, which arose only in relation to its alternative argument, but only to show that the Reserved Issue did not come into existence with the Trial Judgment.

Language of 10th Ave Agreement

[62] As set out in the Trial Judgment, contract interpretation requires the Court to determine, objectively speaking, the intention of the contracting parties; it must identify the parties' intentions based on the "ordinary and grammatical meaning" of the words the parties used in light of the surrounding circumstances known to the parties at the time of the formation of their contract: Trial Judgment, para 50, citing ***Sattva Capital Corp v Creston Moly Corp,*** 2014 SCC 53 at para 47.

[63] The question of whether Lot 4 ought to be included within the lands contracted to be sold to Remington must, therefore, focus on the intention of the parties in relation to Lot 4 as discerned from the language of the 10th Ave Agreement.

[64] The Opening Paragraph of the 10th Ave Agreement states:

> REMINGTON DEVELOPMENT CORPORATION (herein called the "Purchaser") hereby offers to purchase a portion of those certain lands and premises of the Vendor situated in the City of Calgary, in the Province of Alberta, consisting of **5.22** acres, or such greater or lesser area as determined in accordance with Article 6.05 hereof, which portion is heavily outlined in red on Schedule "A" attached hereto and shaded or hatched on such sketch plan as referenced in Schedule "B" (herein called the "Subdivided Lands" or the "Lands") and which Lands are within those existing parcels of land legally described as set forth in Schedule "B" attached hereto (collectively, the "Existing Parcel"), on the terms and conditions herein set forth.

[65] The 5.22 acres included Lot 4. Specifically, Lot 4 falls within the portion "heavily outlined in red on Schedule "A". It is also included in "existing parcels of land legally described as set forth in Schedule "B". Its legal descriptions are contained in Schedule B. The Legend on Schedule "A" states:

Title No.		Acres
Green	871 234 742A SE ¼ 15-24-1 W5M	3.951
Blue Stripe	771 027 392	0.152
Grey	AG154	0.400
Brown	28S201	0.716
TOTAL		5.219

[66] Lot 4 is made up of the "Grey" and "Brown" portions.

[67] It is clear from Schedules A and B, and the Opening Paragraph, that the parties intended for Lot 4 to be within the lands that could be sold to Remington should CPR declare those lands surplus.

[68] The difficulty, however, is determining the mechanism through which the parties contemplated Lot 4 being included in those lands to be sold to Remington. As decided in the Trial Judgment, the 10th Ave Agreement gives CPR the absolute discretion to declare any lands within the Existing Parcel to be surplus and uses the process of CPR surveying the lands for

preparation of a tentative subdivision plan, and submitting the subdivision application, as the method for it to make and communicate that surplus declaration.

[69] As a result of the terms of the Opening Paragraph, Lot 4 falls within the definitions "Subdivided Lands", "Lands" and "Existing Parcel". It is part of the portion "heavily outlined in red on Schedule 'A'" and is within the "existing parcels of land" described on Schedule B. Lot 4 is thus included and referenced in the following provisions of the 10th Ave Agreement related to CPR's surplus declaration, and its subdivision applications:

> **1.03** The parties acknowledge that in the course of creating the Subdivided Lands, the plan of subdivision creating same or a subsequent plan of subdivision may create more than one parcel comprising the Subdivision [sic] Lands and each such separate parcel is hereafter referred to as a "Parcel"…
>
> **2.02** The Purchaser acknowledges that the Existing Parcel is rail right-of-way lands and that the only portion of the Existing Parcel that the Vendor is capable of selling to the Purchaser is that portion of the Existing Parcel which the Vendor determines, in its discretion but in accordance with the Railway Act, to be surplus to its operational requirements. Upon the Vendor's determination of the area of the Lands in accordance with Article 6.05 hereof, the Vendor shall cause the Alberta land surveyor preparing the tentative subdivision plan for the Lands to certify as to the number of acres and fractions thereof correct to three (3) decimal places contained in each of Lot 1 and Lot 2 …
>
> **6.05** By March 31, 2003, the Vendor shall have determined that it is lawfully entitled to make application to subdivide the Subdivided Lands from the Existing Parcel and shall have made a determination of the boundaries of Subdivided Lands such that the depth of Lot 2 shall be no less than one hundred (100) feet.
>
> **6.06** By March 31, 2004, the Vendor shall have obtained approval to a tentative plan of subdivision which will subdivide the Subdivided Lands from the Existing Parcel and both the Vendor and the Purchaser shall be satisfied as to the conditions of such tentative subdivision plan approval…
>
> **6.08(c)** the determination of the area of the Lands included in the tentative plan of subdivision shall be in the Vendor's absolute discretion as it relates to which portion of the Existing Parcel is surplus to the Vendor's existing railroad operations;
>
> **7.01** The Purchaser acknowledges that the Lands are presently part of the Existing Parcel. Upon acceptance of this Offer by the Vendor, the Vendor shall forthwith apply for the subdivision of the Lands from the Existing Parcel.

[70] Given that Lot 4 falls within the defined terms, the following observations can be made in relation to how Lot 4 fits within the subdivision provisions on the ordinary and grammatical meaning of the language of the Agreement, starting with the three most important in relation to the parties' dispute:

- Article 6.05 refers to CPR determining that it is lawfully entitled to "subdivide the Subdivided Lands from the Existing Parcel". Since Lot 4 is included in the defined

terms “Subdivided Lands” and “Existing Parcel”, Article 6.05 gives CPR the authority to determine if Lot 4 will be subdivided from the Existing Parcel.

- Article 6.08(c) refers to determining the “area of the Lands included in the tentative plan of subdivision”. Since Lot 4 is part of the defined term “Lands”, Article 6.08(c) gives CPR the absolute discretion to determine if Lot 4 is within the area of Lands that could be included in the tentative plan of subdivision.

- Article 2.02 refers to determining “the area of the Lands in accordance with Article 6.05” (i.e., through subdivision), and to preparing a subdivision plan for “the Lands”. Since Lot 4 is within the defined term “Lands” Article 2.02 suggests that Lot 4 could be part of the area determined through subdivision, and for which a subdivision plan was to be prepared.

- Article 1.03 refers to “creating the Subdivided Lands” and to the “plan of subdivision creating same”. Since Lot 4 is within the defined term “Subdivided Lands”, Article 1.03 contemplates it being created through the plan of subdivision.

- Article 7.01 refers to applying “for the subdivision of the Lands from the Existing Parcel”. Since Lot 4 is within the terms “Lands” and “Existing Parcel”, Article 7.01 contemplates Lot 4 being part of the Lands for which subdivision is to be applied.

[71] Considering the language of these provisions of the Agreement, and in particular the incorporation of Lot 4 in the terms Lands and Subdivided Lands, and in the term Existing Parcel, shows that the parties intended for Lot 4 to be included within CPR’s discretion to declare the lands surplus, and to be part of the subdivision application through which that surplus decision would be made and communicated.

[72] Yet, because Lot 4 was already subdivided, it would not be included in a subdivision application, or in a plan of subdivision. In the *Municipal Government Act* in force in November 2002, ““plan of subdivision” means a plan of survey prepared in accordance with the *Land Titles Act* for the purpose of effecting a subdivision”: *Municipal Government Act*, RSA 2000, c M-26 s. 616(u) (referenced through CanLII as the version in force between January 1, 2002 and May 19, 2003). A subdivision cannot be effected when it has already been effected.

[73] The parties thus wrote the 10th Ave Agreement to include Lot 4 in the lands that could be declared surplus by CPR, that were anticipated to be submitted as part of a plan of subdivision if declared surplus and that could, in that event, be sold to Remington. But because Lot 4 was already subdivided, that intention cannot be realized on the words of the contract as written. Lot 4 is included in the subdivision clauses even though it could not be subdivided; it could not be subdivided from the Existing Parcel or included in the tentative plan of subdivision. At the same time, no other contract term, provision or language in the 10th Ave Agreement indicates how previously subdivided land could be declared surplus or determined to be within the land to be transferred to Remington.

Surrounding Circumstances

[74] The surrounding circumstances of the 10th Ave Agreement are discussed in the Trial Judgment at para 85-101, with my analysis concluding as follows:

> [99] This, then, is the context in which the 10th Ave Agreement was written. The 10th Ave Lands were not surplus and were still in use. CPR was moving towards making the lands surplus, anticipated that happening relatively soon and communicated that information to Remington in the property information summary. The 10th Ave Agreement created economic advantages to support declaring the lands surplus. The 10th Ave Lands were conceived of, and marketed as, part of a larger parcel of lands suitable for development and, in the original information document, were described as being 6.11 acres in size. Remington did not have a specific plan in mind for the 10th Ave Lands, but did plan on developing them, and was approached by CPR because it was a developer.
>
> [100] In that context, reasonable parties in the position of CPR and Remington would give CPR the ability to ensure the 10th Ave Lands were surplus prior to finalizing the sale but would expect CPR to make that decision in relatively short order. They would want to have clarity and a process by which Remington would have confidence that the decision had been made and be able to move forward with its plans for development. Remington entered into three contracts, but its intention was to acquire all three parcels of land. It accepted the risk that it might not be able to do so, but only in the context that it understood that CPR was moving towards declaring the 10th Ave Lands surplus. And, in actuality, CPR was assessing the lands to see if they could be declared surplus. In that light, Remington's risk that it would be left without the middle strip of land would not seem excessive.
>
> [101] Reasonable parties would, in other words, have reached an agreement much like the one that CPR and Remington did reach: CPR had the discretion to determine if, or how much of, the lands in the Existing Parcel were surplus to operational requirements. Once it had done so it would survey the lands for a tentative plan of subdivision and submit the subdivision application for approval. Doing so would conclude the exercise of its surplussing discretion, and Remington could move forward with that understanding to begin the process of developing the lands.

[75] The only additional surrounding circumstance evidence highlighted with respect to the Reserved Issue is the memorandum of Mr. Raby, which supports the determination in the Trial Judgment that the parties intended to allow CPR to have absolute discretion to determine the area included in the plan of subdivision.

[76] In addition to providing that information in relation to the parties' intentions, Mr. Raby's memorandum shows that the parties decided to amend the language of the 10th Ave Agreement to reflect that intention at a time when the 10th Ave Agreement did not yet include Lot 4.

Was CPR contractually obligated to sell Lot 4 to Remington?

[77] In my view the language of the 10th Ave Agreement in the surrounding circumstances demonstrates that the parties intended Lot 4 to be included in the lands available for sale to Remington and intended that Lot 4 could be declared surplus along with the other 10th Ave Lands. In its plain and ordinary meaning, the contract shows that Lot 4 was included in the land available for sale – in the Existing Parcel – and was included in the land that could be declared surplus and submitted for subdivision – as Subdivided Lands or Lands within the Existing

Parcel. The first of these points shows that they intended Lot 4 to be available for sale. The second shows that they intended that Lot 4 could be declared surplus along with the other 10th Avenue Lands. The parties just did not manage to write a contract that fully captured those intentions given that a) Lot 4 was already subdivided; and b) the mechanism for allowing lands to be declared surplus was through the subdivision process.

[78] Given the parties' intentions in relation to Lot 4, I am satisfied that it is appropriate to imply terms in the 10th Ave Agreement to reflect those intentions: ***MJB Enterprises Ltd v Defence Construction (1951) Ltd***, [1999] 1 SCR 619 at para 27 and para 29; ***Double N Earthmovers Ltd v Edmonton (City)***, 2007 SCC 3 at para 30.

[79] I acknowledge the point made by the Court of Appeal in ***Benfield Corporate Risk Canada Limited v Beaufort International Insurance Inc,*** 2013 ABCA 200 at paras 104-114, that it is not the role of the court to imply a term to make a contract more businesslike or more just. Business efficacy and justice is not, however, the reason to imply a term here. Rather, the point is to give effect to the clear intentions of CPR and Remington given the words of the contract they drafted: that Lot 4 was available for sale to Remington so long as CPR declared it to be surplus to its operational requirements: ***Benfield*** at para 111.

[80] Without considering every provision of the 10th Ave Agreement, two implied terms seem relatively obvious and, while by no means artfully drafted, sufficient to reflect the parties' intentions, and to allow analysis of the Lot 4 issue. Specifically, the italicized additions can be implied in Article 6.05, and Article 6.08(c):

> **6.05** By March 31, 2003, the Vendor shall have determined that it is lawfully entitled to make application to subdivide the Subdivided Lands from the Existing Parcel and shall have made a determination of the boundaries of Subdivided Lands such that the depth of Lot 2 shall be no less than one hundred (100) feet *and such that, if the Vendor has determined that any previously subdivided lands within Lot 1 are surplus to existing railroad operations, then the boundaries of the Subdivided Lands shall include that part of Lot 1 previously subdivided.*
>
> **6.08(c)** the determination of the area of the Lands included in the tentative plan of subdivision, *and the determination of the area of the Lands that have already been subdivided*, shall be in the Vendor's absolute discretion as it relates to which portion of the Existing Parcel is surplus to the Vendor's existing railroad operations;

[81] These implied terms are sufficient to allow Lot 4 to be incorporated into Article 2.02 if CPR identifies it as surplus to its railroad operations ("the determination of the area of the Lands in accordance with Article 6.05 hereof") and to be incorporated into the Opening Paragraph ("or such greater or lesser area as determined in accordance with Article 6.05 hereof"). They reflect the intention of the parties to include Lot 4 in the lands available for sale to Remington and to allow CPR the absolute discretion as to whether to declare Lot 4 to be surplus.

[82] Implying these terms does not change the rights, entitlements and obligations of the parties under the 10th Ave Agreement. CPR still has the absolute discretion to determine the portion of the 10th Ave Lands that are surplus to operational requirements. It still has a process and timeline for making that determination and communicating it to Remington. Remington still has the certainty of being able to rely on CPR making that determination in a timely fashion, and

on a basis set out in the contract. Remington still has the right to acquire that portion of the 10th Ave Lands that CPR has declared surplus to operational requirements. The implied terms simply make those rights, entitlements and obligations workable with respect to Lot 4 when the contract as written did not.

[83] With those implied terms, was Lot 4 included in the land CPR was obligated to sell to Remington? It was. The Trial Judgment concluded that CPR had determined that B Yard was surplus to operational requirements prior to the submission of the first subdivision application. Lot 4 falls within B Yard and was assessed by CPR as part of that process. Lot 4 had relatively minor operational significance. As such, I am satisfied that CPR exercised its discretion to determine that Lot 4 was surplus pursuant to Article 6.08(c) and 6.05. Lot 4 falls within the boundaries of the Subdivided Lands pursuant to Article 6.05 and, consequently, Lot 4 falls within the scope of the Opening Paragraph. It was part of the Subdivided Lands that CPR was obligated to sell to Remington and that, in breach of its contractual obligations, it instead sold to the Province.

[84] The land acquisition cost to Remington should thus be set at $7,772,404.

Crown Certificate

[85] Pursuant to s. 24 of the *Proceedings Against the Crown Act*, RSA 2000 c P-25, enforcement of a judgment against the Crown requires the issuance of a certificate. Section 24 provides in relevant part:

> 24(1) Subject to this Act, when in proceedings against the Crown an order for costs or any other order is made by a Court against the Crown, the proper officer of the court, on an application in that behalf, shall issue a certificate for it.
>
> (2) If the court so directs, a separate certificate shall be issued with respect to the costs, if any, ordered to be paid to the applicant.
>
> …
>
> (4) When the order provides for the payment of money by way of damages or otherwise, or of costs, the certificate shall state the amount so payable and, subject to subsection (5), the President of Treasury Board and Minister of Finance shall pay out of the General Revenue Fund to the person entitled or to the person's order the amount appearing by the certificate to be due together with the interest, if any, lawfully due on it.
>
> (5) The court by which the order is made or a court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole of the amount so payable or any part of it is suspended and if the certificate has not been issued may order the direction to be inserted in it.

[86] The Crown asks that the Court not issue a certificate for the entire amount because the issue of apportionment has yet to be decided by the Court.

[87] It did not request that the certificate be suspended pursuant to s. 24(5), which is an order equivalent to a stay, a "more specific statutory provision on the subject of a stay of execution of money judgments against the Crown": ***Saskatchewan v Racette*** 2018 SKCA 17 at para 10; ***Nova Scotia (Attorney General) v BMG,*** 2007 NSCA 57 at para 5; ***Air Canada v British Columbia***, 1984 CanLII 348 at para 3 (BCSC).

[88] I acknowledge the unfairness of issuing a certificate against the Crown for the entirety of the loss when the issue of apportionment remains outstanding. I do not see any other result as legally available, however, given that the Crown is jointly and severally liable to Remington, and that the issue of apportionment of damages was not pursued at trial.

[89] The Crown may apply for a suspension of payment pursuant to s. 24(5) or a stay pending appeal but, given that it did not do so before me, I do not view myself as having the jurisdiction to grant same.

Adjournment Delay

[90] Remington submits that it is entitled to compensation for losses it has suffered because of the delay between March 24, 2023, when the post-trial matters were originally scheduled to be heard, and August 2-4, 2023, when the post-trial matters were in fact heard.

[91] It submits that the adjournment of the hearing has delayed its ability to collect on its judgment by four months. Further, had it been able to collect on its judgment it could have used those amounts to discharge existing debt. As such, it says that it should be awarded interest based on the amount of interest it pays on its debts as compensation for the adjournment.

[92] Remington provided the Court with evidence to suggest that the four-month adjournment cost it $2,184,408. CPR challenged the sufficiency of that evidence; the quantification of Remington's loss was deferred pending determination of whether the loss could be claimed against CPR in the circumstances.

[93] The original hearing was scheduled to determine the Reserved Issue, Remington's slip application, and costs. The Crown certificate issue was not yet before the Court. The original hearing was scheduled for two days – one day of oral argument, and one day of reading.

[94] CPR changed counsel in early 2023 and, on February 9, 2023, provided Remington with notice of its change in counsel. On that date CPR also indicated that Mr. Mohamed, their new counsel, was not personally available for the March 24, 2023 hearing.

[95] By the time the parties contacted the Court, the winter-spring sitting schedule had been set and the earliest dates available to reschedule the hearing were after June 30, 2023; the August 2-4, 2023 dates (with an additional two reading days) were the first mutually agreeable dates of sufficient length to address all of the post-hearing issues.

[96] The oral argument of the post-trial matters took all of the three days scheduled, and the filed written materials were extensive.

[97] Remington submits that while the granting of an adjournment is in the discretion of the Court, the Court must assess prejudice to the parties, and whether the costs arising from the adjournment can be compensated. Remington says that costs arising from an adjournment should be paid by the party whose conduct resulted in the adjournment.

[98] Generally speaking, compensation to a party for harm arising from an adjournment relates to thrown away costs, such as wasted lawyer time: see, e.g., ***Goddard v Day***, 2000 ABQB 799 at paras 20-21. Remington did not provide the Court with any authority supporting an order compensating a party for a lost opportunity to reduce its debts, or an equivalent compensatory amount, to address the adverse effects of an adjournment.

[99] Remington relies on ***321665 Alberta Ltd v ExxonMobile Canada Ltd.***, 2012 ABCA 211. In that case the parties sought a stay of a trial judgment. The Court held that in determining whether to grant a stay, "the ability of a party to profit to the detriment of another is properly taken into account": ***321665*** at para 18. The Court held that it could impose conditions on the stay that take into account, *inter alia*, the "arguable advantages of securing at this time a preferred interest rate (i.e. greater than the statutory rate) on the monies awarded in the Court below pending appeal": ***321665*** at para 22. The Court ordered that the judgment be paid into and retained in an interest-bearing account or other instrument pending appeal.

[100] I reject Remington's application to be compensated for the adjournment delay.

[101] The post-trial matters could not have been completed in the one day scheduled in March 2023. An adjournment was inevitable. Addressing only the Lot 4 issue took a full day. The slip application took over a half a day, as did the costs application.

[102] In addition, prior to the oral hearing it was necessary for the Court to hear an application by CPR for better production relation to Remington's costs claim, an application which was successful.

[103] Once an adjournment was inevitable so was the four-month delay, given the schedule of the Court, the length of Court time required, and the short notice provided of the need for an adjournment. This means that there is an insufficient factual basis for attributing the adjournment delay to CPR.

[104] Even if the adjournment were attributable to CPR, however, I would not grant Remington the relief it seeks.

[105] I acknowledge Remington's point that CPR continues to enjoy the use of the money that it owes to Remington and that, were it responsible for the adjournment, that would be *prima facie* unfair. I have, however, serious concerns about the public policy implications of allowing a party to make a claim equivalent to compensatory damages as a result of an adjournment that did not arise from wrongdoing or an abuse of the Court's process. A legitimate need for an adjournment should not give rise to further litigation to quantify the financial burdens and benefits that adjournment caused to both parties. Requesting reimbursement of thrown away costs – for example, the time a lawyer took to prepare – is one thing; seeking compensation based on the broader costs and benefits arising from the adjournment is another.

[106] Litigation about litigation is sometimes necessary to ensure justice and fairness, but brings with it risks of delay, increased conflict, focus on issues other than those substantially in dispute, and inefficiency. It risks injustice and unfairness. It is rarely a good use of limited judicial resources and should generally be discouraged.

[107] Further, I have concerns with focussing on one adjournment, an adjournment arising from CPR's reasonable decision to change counsel pending appeal, without considering the broader context of this litigation, when the time from breach of contract to trial was 16 years. It amounts to cherry picking responsibility for the time between the breach of contract, and the payment of the judgment, and in my view is inappropriate.

Pre or Post-Judgment Interest

Introduction

[108] At the outset neither party raised with the Court the question of whether interest payable for the period following the release of the Trial Judgment is pre-judgment or post-judgment interest. In addressing the adjournment delay issue, and in response to a question from the Court, counsel for CPR agreed that the interest payable for the period following the Trial Judgment was "payable on a post-judgment rate". Counsel for CPR later clarified that this response was not correct, and that they were not sure whether the post-judgment rate applied as of the release of the Trial Judgment. On being asked by the Court why it mattered, since the rate of interest under the *Judgment Interest Act* was the same for both pre-judgment and post-judgment interest, counsel for CPR observed that case law has held that post-judgment interest accrues on both the final damages and the pre-judgment interest: ***Michel v Lafrentz***, 2002 ABQB 434 at para 15.

[109] At that time, it remained unclear whether the parties disagreed on the issue of whether the interest accruing after the Trial Judgment was pre-judgment or post-judgment interest:

> Mr. Vogeli: And there's a fourth possibility that the lawyers might actually agree on something in this case so –
>
> Mr. Mohamed: That is highly likely as well, so that's why I said it would be –
>
> The Court: Oh listen, I would think it was wonderful if you guys could agree on this.

[110] The parties advised the Court that they would seek to resolve the question and, if they could not, would submit briefs to the Court. As it turns out, the parties do not agree. Remington submits that the interest accruing subsequent to the Trial Judgment is post-judgment interest. CPR and the Crown submit that interest accruing subsequent to the Trial Judgment, and prior to the release of this decision, is pre-judgment interest.

The Law

[111] The *Judgment Interest Act* provides in relevant part:

> **1** In this Act…
>
> **(b)** "judgment" includes an order of a court.
>
> **2(1)** Where a person obtains a judgment for the payment of money or a judgment that is owing, the court shall award interest in accordance with this Part from the date the cause of action arose to the date of judgment…
>
> **6(1)** In this section, "judgment debt" means a sum of money or any costs, charges or expenses made payable by or under a judgment in a civil proceeding.
>
> **(2)** Notwithstanding that the entry of judgment may have been suspended by a proceeding in an action, including an appeal, a judgment debt bears interest from the day on which it is payable by or under the judgment until it is satisfied, at the rate or rates prescribed under section 4(3) for each year during which any part of the judgment debt remains unpaid.

[112] The issue is thus whether the Trial Judgment gave rise to a "judgment debt" pursuant to s. 6(1) of the *Judgment Interest Act* so as to entitle Remington to post-judgment interest under sections 4(3) and 6(2).

[113] In ***Guarantee Company of North America v City of Regina***, (1962), 32 DLR (2d) 315 (SCC), the Court interpreted s. 13 of the *Interest Act*, RSC 1952, c 156 which stated that every "judgment debt shall bear interest at the rate of five per cent per annum until it is satisfied", and s. 15 which defined the scope of a "judgment debt". The appellant argued that the judgment did not create a judgment debt because at the time it was issued "there was no specific sum of money made payable by the appellant to the respondent"; to be a judgment debt it must "be in terms sufficient in itself to adjudge payment of a specific sum of money": ***Guarantee*** at 317. The Court held that the judgment debt arose after the expiration of 30 days, because the effect of the decision was that after 30 days the amount of money recoverable by the respondent was "immediately ascertainable": ***Guarantee*** at 318.

[114] Section 13 of the *Interest Act*, RSC 1970 c I-18 was considered again in ***Prince Albert Pulp Co Ltd v The Foundation Company of Canada***, [1977] 1 SCR 200. In that case, which dealt primarily with the calculation of pre-judgment interest, the Court said with respect to post-judgment interest:

> Section 13 of the Act…prescribes the rate of interest payable on a judgment debt. This means that, ***when the Court has determined the amount payable pursuant to its judgment***, thereafter interest at the prescribed rate is payable on that amount. What we are concerned with here is as to what should be the amount of that judgment. The *Toronto Railway* case stated that, by its judgment, a Court may, in the circumstances defined in that case, require the debtor to make compensation for failure to pay a just debt, in the form of interest upon the amount of that debt at a rate prescribe by the Court in its judgment. The debt plus the interest allowed would then be the amount of the judgment. It is only at that stage that s. 13 [imposing 5% interest on a judgment debt] would apply: ***Prince Albert*** at 211-212 [emphasis added].

[115] In ***Union Tractor Ltd v Horseshoe Contracting Ltd.***, 2003 ABCA 154 at para 11, the Court addressed an argument by Union Tractor that a declaratory judgment did not constitute a "judgment"; Union Tractor wanted to continue to collect interest at its contract rate, rather than pursuant to the *Judgment Interest Act*. The Court held that the decision in question was a judgment – it set out the rate of interest, and "the obligation to pay can be readily inferred": ***Union Tractor*** at para 12. The Court noted that while the amount owing "could only be ascertained as of the date of payment, there was no need for the court to make that determination prior to execution": ***Union Tractor*** at para 12.

[116] In ***Uram v Uram***, 1985 CanLII 590 (BCSC), a trial judge had held in December 1981, that Ms. Uram was entitled to a share in the family assets, valued at $220,000. Mr. Uram was ordered to make that amount available to her in the form of cash or equivalent negotiable property by March 31, 1982. As of March 15, 1982 that order "was settled as a judgment for $220,000 payable 31st March, 1982": ***Uram*** at para 2. Ms. Uram argued that she was entitled to post-judgment interest commencing in December 1981. The Court disagreed on the basis that not all substantial matters had been determined when the December 1981 decision was issued, and in particular no decision was made with respect to the matrimonial home. The Court said further

that "a judgment does not create a 'judgment debt' within the meaning of the *Interest Act* if, at the date of the judgment, there was no specific sum of money made payable to a party": ***Uram*** at para 8. See also, ***Boutsakis v Alexis House Café Limited***, 2014 BCSC 221 at para 23; ***Jacobs v Yehia***, 2019 BCSC 2086 at paras 17-24.

[117] In ***Michel v Lafrentz***, in finding that post-judgment interest was payable on pre-judgment interest, the Court said that the purpose of post-judgment interest "is to make the plaintiff whole once the 'crystallized loss' has been calculated; interest on that whole amount is part of the remedy": ***Michel*** at para 15.

[118] The Court in ***Labbee v General Accident Assurance Company of Canada***, 2000 ABQB 121, considered the question of whether post-judgment interest can be considered to be "compensatory damages". The Court held that "once a judgment is obtained the claim for damages is extinguished and replace with a judgment debt"; once "the Court orders a sum of money is payable it becomes a judgment debt and interest is payable at the specified rates": ***Labbee*** at para 16. See also at ***DZ v WZ***, 1978 ALTASCAD 114 at paras 46-47.

Analysis

[119] This case law suggests that for a court's decision to create a "judgment debt" it must allow for a precise calculation of what one party owes to another. It cannot be an approximation, or a close estimate; it must establish the particular sum to be paid. This is consistent with the terms of the *Judgment Interest Act*, which refers not to a claim, or to a judgment, but to a "judgment *debt*": an identifiable amount that one party owes to another following the decision of the Court.

[120] The Trial Judgment did not specify the claim of Remington against CPR and the Crown sufficiently to constitute a judgment debt. It thus does not give rise to a claim for post-judgment interest pursuant to s. 6 of the *Judgment Interest Act*.

[121] The Trial Judgment established CPR and the Crown's liability and quantified Remington's damages apart from the specific issue of Lot 4. I acknowledge the point, emphasized by Remington, that the Crown and CPR had substantial knowledge of the amount they would owe, subject only to a relatively modest adjustment upon resolution of the Reserved Issue. Nonetheless, until the Reserved Issue was decided the amount owing by CPR and the Crown was not "a specific sum of money made payable to a party": ***Uram*** at para 8. It did not permit identification of the particular amount of money owed by the Defendants to Remington. As a result, it did not create a judgment debt and did not give rise to a claim for post-judgment interest.

Conclusion

[122] Based on this analysis, and the analysis in the Trial Judgment, Remington's damages are $165,166,431, with pre-judgment interest payable from December 4, 2006. The issue of costs in relation to the Reserved Issue, the slip application, the certificate application, the adjournment delay application and the interest issue may be addressed as part of the parties' other costs submissions on the timeline previously directed by the Court.

Heard on the 2nd, 3rd, and 4th days of August, 2023.
Dated at the City of Calgary, Alberta this 30th day of August, 2023.

A. Woolley
J.C.K.B.A.

Appearances:

Grant Vogeli, KC/Shannon K. Hayes/Michael J. Donaldson, KC/Rosemary Gregg– Lawson Lundell LLP
for the Plaintiff, Remington Development Corporation

Munaf Mohamed, KC/Ciara Mackey/Douglas Fenton – Bennett Jones LLP
for the Defendant, Canadian Pacific Railway Company

Keltie Lambert/Edward Furs – Witten LLP
for the Defendant, His Majesty the King in Right of Alberta, as represented by the Minister of Infrastructure and the Minister of Transportation