CITATION: 1401380 Ontario Ltd. v. Wasaya Airways LP, 1401380 Ontario Ltd. v. Remotes One Remote Communities, 2024 ONSC 4701
COURT FILE NO.: CV-17-409-00, CV-16-229-00
DATE: 2024-08-23

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N: CV-17-409-00	
1401380 Ontario Limited O/A Wilderness North Air	*R. Lepere, R. Johansen, A. Colquhoun* for the Plaintiff
Plaintiff	
- and -	
Wasaya Airways LP	*M. Smiley, M. Holervich* for the Defendant
Defendant	
CV-16-229-00	
1401380 Ontario Limited O/A Wilderness North Air	*R. Lepere, R. Johansen, A. Colquhoun* for the Plaintiff
Plaintiff	
-and-	
Remotes One Remote Communities Inc.	*R. Finkel, I. Ferreira* for the Defendants
Defendant	
	HEARD: October 10-13, 16-20, 23-26 and November 28, 2023, at Thunder Bay, Ontario

Madam Justice T. J. Nieckarz

Reasons for Judgment

OVERVIEW:

[1] The Plaintiff, 1401380 Ontario Limited o/a Wilderness North Air and/or Wilderness North ("Wilderness") carries on business as an air charter operator that delivers fuel by air.

[2] The Defendant, Hydro One Remote Communities Inc. ("Remotes"), is a subsidiary of Hydro One Inc. ("Hydro One"). Pursuant to legislation, Remotes is required to provide electricity to isolated communities in Northern Ontario that are not connected to Ontario's electricity grid. Most of these communities are First Nation communities. Remotes provides electricity to these communities by operating diesel generating stations in each of the communities.

[3] Throughout the year, Remotes requires delivery of diesel fuel on an 'as and when required' basis to the communities to fuel the diesel generating stations. Delivery occurs by air, winter ice roads, or all-season roads. The demand for fuel fluctuates based on several factors, including seasonalized consumption.

[4] The Defendant, Wasaya Airway LP ("Wasaya") is a First Nations owned limited partnership that carries on business as a provider of cargo (including fuel) and passenger air services. Wasaya is part of the Wasaya Group that is owned by twelve First Nations communities (ten in 2015).

[5] Wilderness was the successful proponent under the terms of a Request for Proposals ("RFP") from Remotes for the supply and delivery of diesel fuel by air to five remote First Nations communities (the "Primary Communities"). These communities are accessible only by air and

winter roads. On June 19, 2015, Wilderness was awarded a three-year contract. The value of that contract was dependent on how much fuel was required to be delivered in the three-year period, which was not a guaranteed amount.

[6] Wilderness was also the successful proponent in being awarded a three-year contract with Remotes to be the secondary supplier of fuel to seven other First Nations communities (the "Secondary Communities". Wilderness would only be called upon for delivery to these Secondary Communities if the primary supplier was unable to deliver the fuel required from time to time.

[7] Wasaya Petroleum LP (who uses Wasaya Airways LP for air delivery services) was entirely unsuccessful in the RFP process with respect to air or winter roads delivery of fuel for the Primary and Secondary Communities.

[8] Wasaya and those of its owner First Nations that were included in the Primary and Secondary Community awards expressed their displeasure with the awarding of the air delivery contracts to an airline other than Wasaya. Band Council Resolutions (BCRs) were issued confirming that the communities would not permit anyone other than Wasaya on their land for diesel fuel delivery purposes.

[9] At different points in time after the awarding of the contract to Wilderness, Remotes notified Wilderness that it would no longer be utilizing its services for four of the five Primary Communities. Wasaya, the unsuccessful proponent in the RFP process, was awarded the air delivery contracts for one of these communities, while Private Air Inc., c.o.b. as Cargo North ("Cargo North") assumed responsibility as the primary vendor for three of the communities. These

three communities had a financial interest in Cargo North and issued BCRs expressing their support for Cargo North to be their carrier.

[10] Cargo North was also originally the successful proponent to be the primary vendor for the Secondary Communities. Four of those communities had ownership interests in Wasaya. After BCRs were issued for these communities, Cargo North released Remotes from any contractual obligation with respect to fuel delivery for these communities. When this happened, rather than issue Purchase Orders to Wilderness for fuel delivery for these Secondary Communities, Wasaya was contracted for the exclusive fuel delivery rights.

[11] Wilderness claims $6,941,280 in damages from Remotes, alleging that Remotes breached the terms of the contract between the parties by not utilizing Wilderness as the vendor for the Primary Communities, and by not utilizing Wilderness for the Secondary Communities once the contracted primary vendor released Remotes from their contractual obligations.

[12] Wilderness claims $1,000,000 in damages as against Wasaya for inducing the breach of contract and unlawful interference with economic interests. Wilderness alleges that when Wasaya learned it was unsuccessful in securing the contract for air delivery, it engaged in a course of conduct that caused Remotes to breach the contract it had with Wilderness. Wasaya denies inducing a breach and/or unlawfully interfering with economic interests. Wasaya argues that it did nothing more than express the will of its owner communities, who have a right to govern who may and may not deliver to their communities. At the conclusion of the trial Wilderness abandoned the claim for intentional interference and chose to pursue only the claim of inducing a breach.

[13] The issues to be determined by me, as outlined by the parties, are:

a. Was there a breach of the duty of good faith in the tendering process? (Remotes raises)

b. Was there a breach of contract by Remotes with respect to the communities that Wilderness was to be the primary provider for?

c. Was there a breach of contract by Remotes with respect to the communities that Wilderness was to be the secondary provider for, once the primary provider rescinded their contract?

d. Did Remotes breach its contractual duty of good faith to Wilderness?

e. Is liability for any breach limited by the terms of the contract?

f. Is Wasaya liable to Wilderness for inducing the breach?

g. What are the damages that Wilderness is entitled to (if any)?

h. Are there any damages payable by Wasaya as a result of the inducement of breach (if found)?

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

a. Wilderness does not allege a breach of duty of good faith in the tendering process. In any event there was no breach.

b. Remotes breached its contract with Wilderness with respect to the primary communities.

c. While there is a *prima facie* breach with respect to the secondary communities, I have not conclusively determined this issue as I have found I do not need to given I would not award damages in any event.

d. Remotes breached its duty of good faith in contract by failing to exercise its contractual discretion reasonably.

e. Liability for the breaches cannot be limited by virtue of the s. 18 "Purchaser's Limitation of Liability" clause.

f. Wasaya induced the breach;

g. Wilderness is entitled to damages for breach in the amount of $2,718,988 subject to adjustments for findings made herein; and

h. Wasaya is jointly and severally liable with Remotes for the amount of $856,458, subject to adjustments for findings made herein.

[15] During the trial there were submissions, and some limited evidence and caselaw, with respect to the right of First Nations to self-govern and direct what happens on their land, and HydroOne's responsibility to honour the will of the First Nation. At no point did I take any party to argue, nor should this decision be viewed as any finding, against the right of the sovereign First Nations to govern their lands. This decision is about nothing more than the contractual obligations between Remotes and Wilderness, and whether Wasaya interfered with those obligations.

THE FACTS ON WHICH THIS DECISION IS BASED:

[16] Alan Cheeseman, President and owner of Wilderness, testified that the company obtained its first contract with Remotes for the delivery of diesel fuel to several remote First Nations communities in 2007. At that time, Wilderness was the primary vendor for Deer Lake, and had a shared vendor contract for Sandy Lake (the "2007 Contract") in which they shared the volume approximately equally with another vendor. Sandy Lake was a community that had an interest in Wasaya at the time. The 2007 Contract was fulfilled with no significant issues.

[17] In addition to the 2007 Contract, Wilderness contracted directly with third parties in various remote First Nations communities for the supply and delivery of gasoline, diesel fuel, jet fuel, aviation gasoline, and the like.

[18] Seeking to expand its fuel delivery operations and given the positive relationship it felt it had developed with Hydro One and various remote communities, Wilderness acquired two additional aircraft that were modified to be suitable for fuel delivery (Air Tractor Fuel Boss aircraft).

[19] In 2010 a contract RFP was issued by Hydro for all twelve communities that required service. Wilderness was not successful in keeping the Deer Lake or Sandy Lake contracts but was awarded a contract with Remotes to be the primary vendor for fuel delivery to the Marten Falls community. Wilderness fulfilled this contract and continued to service its third-party customers within the various First Nation communities. At no point in time was Wilderness denied access to any community it served, and no significant concerns were identified with the service offered.

[20] On November 25, 2014, Remotes issued a Request for Proposals ("RFP"). The RFP contained a bid invitation letter inviting qualified companies to submit firm priced proposals for the delivery by air, winter road, and all-season road, of diesel fuel for various communities served by Remotes. The contract to be awarded was to be for a term of three (3) years with an extension at the option of Remotes for two, one (1) year terms. It was contemplated that the contract may be awarded to more than one proponent to secure multiple suppliers, at the best price, on a primary and secondary basis. In other words, the RFP contemplated that the twelve communities could be served by different primary vendors.

[21] Wilderness received a RFP package, which comprised of the following documents: (i) Request for Proposal; (ii) the Contract Standard; and (iii) template Outline Agreement ("OA"). Wilderness submitted a bid to provide fuel delivery to the twelve (12) First Nations communities provided for in the RFP.

[22] Wasaya also bid on the RFP. At that time, the following communities covered by the RFP were owners/shareholders of the Wasaya Group:

Kasabonika

Big Trout Lake

Sandy Lake

Wapekeka

Kingfisher Lake

(referred to as the "Wasaya Communities").

[23] Testifying as a witness for Wasaya was Luke Reynolds. Mr. Reynolds was a band council member for the Kingfisher Lake First Nation in 2015. He provided some background about how Wasaya came to be, and what the purpose of the First Nations owned airline was. His evidence assisted in understanding the position the Wasaya Communities took with respect to the RFP.

[24] Mr. Reynolds testified that Kingfisher was the first community to start Wasaya. Wasaya arose from a desire to drive economic development for the community (that otherwise has limited economic development opportunities), a desire to make the community less reliant on others for delivery of goods and services, and to provide a reliable passenger airline service for community members. Safety was also a key factor in establishing Wasaya, as the founding communities could establish rules to ensure that contraband was not smuggled into their communities through their airlines. The communities were invested in ensuring the viability and success of Wasaya.

[25] Cargo North was in competition with Wilderness and Wasaya for the contract. Other non-Wasaya First Nations communities to which the RFP pertained had financial interests in Cargo North. These communities were:

Lansdowne House (Neskantaga)

Webequie

Weagamow (North Caribou)

Sachigo Lake

Deer Lake

(referred to as the "Cargo North Communities").

[26] The Wasaya Communities and the Cargo North Communities stood to benefit financially if their affiliated air carrier was awarded any portion of the fuel delivery contract.

[27] The RFP contained mandatory criteria that any bidder was required to agree to, failing which their bid would be disqualified. The criteria included:

a. The proponent agreed not to take any action that would cause Remotes or any of its directors, officers, employees, agents, representatives, or business partners to be in breach of any of the obligations set out in Hydro One's Corporate Code of Business Conduct;

b. Confirmation of meeting any and all Mandatory Technical Requirements outlined in Part 3 – Terms of Reference;

c. Acknowledgement, Agreement and Acceptance of the Terms and Conditions within Part 1 – Instructions to Proponents; and

d. Submission of any bid by the deadline provided for in the documentation.

[28] All proponents that met the mandatory criteria moved on to the evaluation of the rate criteria provided for in the RFP. Each of the listed criteria had a different value assigned to it. The rated criteria and the values assigned to each rated criteria were determined by Remotes. The proponents with the highest score based on the rated criteria would likely be awarded portions of the contract. The rated criteria were:

a. General requirements including quality of proposal, proof of ability, and extended supply arrangements (50%);

b. Aboriginal Participation which may consist of ownership, partnerships with Aboriginal communities, experience working with Aboriginal communities, and past Aboriginal inclusion relevant to the contemplated work (5%)

c. Pricing/Total Evaluated Cost (40%); and

d. Reference Checks (5%).

[29] After issuing the RFP, but prior to awarding any contract, Remotes received Band Council Resolutions ("BCRs") from the Wasaya Communities. The BCRs indicated that the issuing First Nation supported the bid of Wasaya Airways and Wasaya Petro and ***directed*** Hydro One/Remotes to support the First Nation and Wasaya by utilizing Wasaya's services. The following were the BCRs passed, all of which were received by Remotes on April 1, 2015:

Kasabonika Lake First Nation dated January 21, 2015

Kitchenuhmaykoosib Inninuwug (Big Trout Lake) dated January 23, 2015

Wunnumin Lake First Nation dated January 27, 2015

Nibinamik (Summer Beaver) dated January 28, 2015

Keewaywin First Nation (connected to Sandy Lake) dated January 28, 2015

Wapekeka First Nation dated January 29, 2015

Sandy Lake First Nation dated January 30, 2015

Kingfisher Lake First Nation dated January 2015 (specific date not legible)

Fort Severn First Nation dated April 30, 2015

[30] Remotes was aware of the BCRs during the RFP process. In the RFP process, Remotes treated the BCRs as "support BCRs", meaning that the communities supported the awarding of the contract to Wasaya, but did not require it. In my view, the wording of these BCRs went well beyond support and warranted further consultation with the communities prior to the contract

award. Regardless, Remotes considered the support BCRs in relation to the aboriginal participation portion of the bid process, which had a total weight in the evaluation of the bids of only 5% of the overall score. Otherwise, the BCRs played no role in the RFP process and the initial awarding of the contract. There was no evidence of any First Nations consultation in arriving at the weighting criteria. The evidence of Remotes was that support BCRs had been received for other contracts in the past, but there was no indication as to whether those support BCRs were for vendors in which the communities had a financial interest, or whether the wording was similar.

[31] After evaluating the bids, Remotes awarded Wilderness a portion of the air delivery contract (representing 36% of the air business), with Cargo North also receiving a portion of the air delivery contract (64%) and the complete winter roads contract. No secondary vendor was identified as necessary for the winter roads contract. Wasaya Petroleum was successful in receiving an award for delivery of diesel fuel by all season roads to communities accessible by regular roads.

[32] The estimated value of the awards to each proponent was $66.8 million to Cargo North, $25.2 million to Wilderness, and $8.6 million to Wasaya.

[33] The Primary Communities for which Wilderness was the successful proponent in securing the contract for the delivery of fuel by air were comprised of Kasabonika, Lansdowne House (Neskantaga), Webequie, Marten Falls, and Weagamow (North Caribou). Cargo North was contracted as the secondary vendor for these communities.

[34] Of these communities, only Kasabonika was a Wasaya community. Lansdowne House (Neskantaga), Webequie, and Weagamow (North Caribou) were Cargo North communities at the time. I have no evidence as to whether Marten Falls had any interest in either Wasaya or Cargo North.

[35] Cargo North was the successful bidder to be the primary vendor for the delivery of fuel by air to Bearskin Lake, Deer Lake, Sandy Lake, Kingfisher Lake, Big Trout Lake, Sachigo Lake, and Wapekeka. Wilderness was contracted as the secondary vendor for these Secondary Communities.

[36] Of the Secondary Communities, Kingfisher Lake, Big Trout Lake, Sandy Lake, and Wapekeka were Wasaya Communities.

[37] Secondary vendor/carriers were selected for each community to ensure that there was 'back-up' delivery service to ensure that the communities serviced by Remotes were not without the fuel required to provide an adequate electricity supply. Air delivery was identified as potentially vulnerable for various reasons, which required a secondary vendor. Witnesses for Remotes testified that it had not previously had to resort to using a secondary vendor, but that it was prudent to have one was in place to ensure no disruption of fuel to the remote communities.

[38] Wasaya was not awarded any portion of the air delivery contract for the communities at issue, either as primary or secondary vendor. The evidence of Remotes was that Wasaya's price was too high as compared to the other proponents. Wasaya's price was 21% more than Wilderness and Cargo North and above the market price for such services. In the scoring matrix used to

evaluate air delivery proposals, Cargo North ranked at 90.07%, Wilderness at 89.43% and Wasaya at 57.30%.

[39] The OA was signed by Remotes and delivered to Wilderness on June 19, 2015 (the "Contract"). The OA incorporated the terms and contract documents enumerated therein.

[40] Wilderness signed the Vendor Acceptance Form on June 23, 2015, accepting the terms of the Contract, and returned the form to Remotes on June 24, 2015. The commencement date of the contract was July 1, 2015, and the end date was June 30, 2018, subject to the opportunity afforded to Remotes to extend the contract for up to two, one-year periods.

[41] In the meantime, Wasaya and its owner communities were unhappy with the contract allocations. Discussions continued between Wasaya and Hydro One/Remotes representatives.

[42] On June 26, 2015, Wasaya sent a letter to Hydro One/Remotes (the "Letter"), authored by Michael Rodyniuk, President and Chief Executive Officer of Wasaya at the time, stating:

> "The award was made to companies that will not be able to fulfill the contract requirements and who cannot access a number of First Nation Communities.
>
> …
>
> Finally, and perhaps most significantly, a number of sovereign, self governing First Nation communities will only accept fuel delivered by our airline, Wasaya Airways LP. Wasaya is their airline, ownership is shared by ten First Nations. We are 100% First Nations owned with over 1/3 of our workforce identified as First Nations people. I have included Band Council Resolutions (BCRs) forbiting any air carrier other than Wasaya from delivering fuel. This includes those communities where the airport may be located on Crown land and onto First nations land. In all cases, the fuel must be transited to the community off Crown land and onto First Nations Land. This will not be tolerated as evidenced in the BCRs. The Chiefs and Council of each community have vowed to do everything necessary to block any carrier from entering their community except WASAYA."

> "We are trying to de-escalate this situation and avoid any public embarrassment to Hydro One. However in the interest of safety, my shareholders, the communities served and the general public, if we do not receive word guaranteeing Wasaya Airways being used as the airline into the First Nations who have issued the BCRs attached, we will raise the issue in the public domain through news agencies and on the effective date of the new contract, our First Nations' communities will use any and all means necessary to block entry into the First nations communities by any other carrier."

Mr. Rodyniuk testified at trial.

[43] Wasaya was also in communication with its owner communities and provided direction and/or offered assistance with respect to the writing of BCRs and correspondence directed to Remotes for the support of Wasaya over the selected carriers.

[44] On July 14, 2015, Kasabonika passed a subsequent BCR that was much stronger in tone than the initial support BCR, and reflective of the tone of the Wasaya letter. The BCR was received by Remotes on July 20, 2015. The BCR directed Hydro One to utilize the services of Wasaya exclusively when purchasing fuel for the First Nation, and furthermore, "…the First [N]ation will not transport nor allow a third party to transport fuel from the airport location to Hydro One fuel storage if fuel is delivered to our community by any other carrier other than Wasaya Airways LP or supplied by Wasaya Petroleum."

[45] The Wasaya letter, combined with the BCR was concerning to Remotes. On July 21, 2015, Remotes wrote to Wilderness requesting confirmation by August 7, 2015, that Wilderness was able to deliver fuel to the Kasabonika First Nation.

[46] The evidence of Wilderness and Remotes was that there was no reason, other than the BCRs, as to why Wilderness would not have been able to deliver fuel to Kasabonika, or any other community. Wilderness had been delivering fuel to Kasabonika pursuant to a purchase order

issued under the Contract and had delivered other items to the community unrelated to the Contract, without issue. The evidence of Wilderness is that the letter came as a complete surprise.

[47] On August 8, 2015, Wilderness responded to Hydro by email as follows:

a. Wilderness has been delivering to Kasabonika without incident or issue;

b. Hydro One fuel storage does not require transport off the airport site (not on First Nations land) and therefore the BCR does not apply;

c. Wilderness was the successful proponent in a rigorous and transparent process that did not require as a condition of the contract that Wilderness solve Remote's issues with the communities it serves;

d. Developing meaningful relationships with First Nations takes years, and not weeks or months, but Wilderness is committed to doing so. Wilderness is working on opportunities with Kasabonika for the delivery of fuel unrelated to Remotes; and

e. The BCR is a Hydro One issue, and not a Wilderness issue. Wilderness will seek financial compensation for any interference with the Contract.

[48] On August 10, 2015, Sandy Struthers of Hydro One wrote to Wasaya stating, among other things, that the RFP selection process that Hydro One conducted was fair and transparent and that Remotes' highest priority was safety.

[49] In mid-August, 2015, Kasabonika air fuel delivery for Remotes was switched to Wasaya and removed from Wilderness.

[50] BCRs were also received from Secondary Communities that had an ownership interest in Wasaya, utilizing the same wording as the Kasabonika BCR, making it clear that the First Nations will not transport or allow any third party to transport fuel from an airport location to HydroOne fuel storage if it is delivered to the community by any carrier other than Wasaya.

[51] On September 17, 2015, Wilderness was notified by Remotes, by way of Instruction Notice #1 that it was being removed as the primary vendor for Kasabonika, and as the secondary vendor for Big Trout Lake, Kingfisher Lake, Sandy Lake, and Wapekeka (all Wasaya communities).

[52] Cargo North received similar letters with respect to the Wasaya communities it served as primary vendor. While also taking the position that the BCR is directed at Hydro One, Cargo North accepted it would not be able to secure rescissions of the BCRs and accepted Hydro One's offer to release Cargo North from any contractual obligations with respect to these communities. It is unclear to me whether this includes winter road delivery or solely air delivery. I have assumed both, although nothing turns on this.

[53] Hydro One's decision to award Wasaya an air delivery contract with respect to its ownership communities, despite not originally being the successful bidder, had an impact on Cargo North communities.

[54] On October 14, 2015, correspondence was sent from the Windigo First Nations Council expressing displeasure with Hydro One's decision to revoke the awarded contract to Cargo North and award the Wasaya ownership communities' portion of the contract to Wasaya. Windigo is comprised of seven communities, most notably in relation to the contracts at issue, Weagamow (North Caribou – a Primary Community), Bearskin Lake and Sachigo Lake.

[55] The correspondence from Windigo sets out their primary position, being that the results of the procurement and bidding process should not give away to preferential treatment for another airline. Windigo explained that this precedent will affect future business relations with First nations as it will raise expectations to single source awarding of future contracts. Windigo noted

that a complaint was being lodged for violation of Hydro One's procurement policies. Windigo sought compensation for the loss of revenue to Cargo North as a result of the cancellation of contract, discussion to establish guidelines for an open and fair competitive process to keep prices from skyrocketing, and if this is Hydro One's direction, to discuss the exclusive use of Cargo North for any supplies, services and transportation to the First Nation partners of this company. In other words, the Cargo North communities were prepared to honour the results of the bidding process, but if Hydro One was going to give preferential treatment to Wasaya, they wanted the same for Cargo North.

[56] Following this correspondence, further BCRs were received from the Cargo North communities as follows:

> Weagamow (North Caribou) dated November 3, 2015
>
> Neskantaga (Lansdowne House) dated November 6, 2015
>
> Webequie dated December 7, 2015.

[57] The BCRs from the Cargo North communities differed from those received from the Wasaya communities. While these BCRs clearly directed Remotes to use Cargo North for exclusively for any business conducted for those First Nations, they did not expressly state that another carrier would not be permitted to enter the lands of the First Nation. The Weagamow BCR noted that Remotes "has recently changed its policy to accommodate a First Nation choice of preferred airline to undertake transportation of fuel to their First Nations".

[58] No BCRs were received from Deer Lake, Sachigo Lake, or Bearskin Lake, all of which were Secondary Communities for Wilderness. All three of these communities continued to support

Cargo North as their primary vendor. There is no evidence that they took any issue with Wilderness being their secondary vendor.

[59] After receipt of the BCRs, Remotes sent the following letters to Wilderness with respect to the remaining Primary Communities as follows:

> November 13, 2015 Neskantaga (Lansdowne House) First Nation, and again on January 18, 2016 asking for confirmation that the BCR had been rescinded.
>
> November 20, 2015 Weagamow (North Caribou) First Nation – Remotes requested evidence that the First Nation had rescinded its position and the related BCR as it applies to Wilderness
>
> February 1, 2016 Webequie First Nation - Requesting satisfactory evidence by February 22, 2016 that Wilderness is not impacted by the current BCRs and is able to fulfill the Contract obligations in this location.
>
> February 26, 2016 Requesting confirmation that the issued BCRs by Kasabonika, Neskantaga (Lansdowne House), North Caribou have been revoked by the communities. The letter further indicated that Remotes has a pressing need for fuel deliveries, around which it has set deadlines for rescission of the BCRs. A response was requested by March 10, 2016.

[60] During the time these letters were being sent, Remotes was in discussions with Wasaya about contracting with them to take over the fuel delivery contracts for the Wasaya Communities from the awarded primary vendors, provided that Wasaya was willing to "sharpen their pencil" on pricing. In other words, Wasaya needed to offer a better price than what was contained in their bid.

[61] In correspondence from the Kingfisher Lake First Nation dated July 31, 2015, to Mr. Struthers, President and CEO of Hydro One, reference is made to the discussions between Remotes, Wasaya and the First Nations communities and the plan that was developed to "bring

forward the BCRs then be prepared to 'sharpen your pencil' on the pricing…". The letter confirmed that a BCR had now been brought forward and a response was sought.

[62] On November 25, 2015, Wilderness sent a letter to Remotes with respect to Kasabonika, Neskantaga (Lansdowne House), and Weagamow (North Caribou) setting out once again that it continued to deliver fuel to these communities without issue (note: delivery to Kasabonika being only from July 1, 2015, to mid-August 2015 for Remotes, with delivery occurring for a third-party without issue). Wilderness repeated many of the statements from its August 2015 letter, and inquired about Remotes' position with respect to volume rebates Wilderness may be able to offer to the communities as financial compensation. Hydro did not respond to these questions.

[63] In a continued effort to address the concerns raised by the BCRs and the Wasaya letter, on November 30, 2015, Wilderness wrote to Remotes stating that "[I]n an effort to mitigate the "BCR issue" we are setting up meetings with the Chief's (sic) of both Lansdowne and Weagamow to discuss the potential of revenue sharing, rebate or some form of "partnership"…".

[64] Wilderness engaged the services of Temius Nate, an Indigenous consultant, to reach out to the First Nations and have discussions about Wilderness's fuel supply and delivery and tourism products, including a healing centre. The evidence of Mr. Cheeseman was that, despite Wilderness's position that the BCRs were a Hydro One problem to deal with, it was actively trying to arrive at solutions. Discussions were held with some of the First Nations about the options for partnerships, but according to Mr. Cheeseman the fixed price structure of the Contract made it difficult for him to come up with affordable options for a partnership solution.

[65] In the February 1st email correspondence, Wilderness confirmed that nothing had been brought to its attention that suggested it could not continue to deliver fuel to Naskantaga (Lansdowne House) and Weagamow (North Caribou) without issue or incident. Wilderness expressed concern that there was a misunderstanding or lack of knowledge in the communities about the BCRs, and that it had heard comments to the effect that the communities were having their freight and passenger services threatened if they did not support other air carriers. There was no direct evidence supporting this hearsay allegation. Despite the efforts of Wilderness, they were unable to cause the BCRs to be rescinded, and without the BCRs rescinded, Remotes was not prepared to use their services.

[66] On March 10th, 2016, Remotes sent correspondence to Wilderness stating that given no proof of rescission of the BCRs for Webequie, Neskantaga (Lansdowne House), and Weagamow (North Caribou) had been received, fuel delivery services for those communities would be transferred in accordance with the terms of the BCRs effective March 14th, 2016.

[67] An amended OA was sent to Wilderness dated March 31st, 2016, confirming these changes. Wilderness did not sign the Vendor Acceptance Form, agreeing to those changes. This new OA provided for Wilderness to be the primary vendor for Marten Falls, and secondary vendor for Bearskin Lake, Deer Lake, and Sachigo Lake First Nations.

[68] What is set out in this decision does not represent all the correspondence or communications about these issues between those involved. There were many conversations between various parties, and a fair bit of correspondence was exchanged.

[69] No one from the First Nations at issue testified with respect to the BCRs other than Mr. Reynolds. He recalled that Cargo North had been selected as the primary vendor for his community, Kingfisher Lake, with Wilderness as the secondary. The community was unhappy about this and had not consented to these other airlines delivering fuel to their community. While the community had a good relationship with Remotes, they had not been consulted about this and were invested in having Wasaya act as the primary delivery agent. Prior to the 2015 Contract, Wasaya had been the air delivery supplier for Remotes to this community.

[70] Mr. Reynolds wrote most of the BCRs for his community in 2015. There were multiple concerns. Firstly, the community was familiar with Wasaya's aircraft, and they knew it would be a reliable source of fuel delivery, and that Wasaya would adhere to their community safety rules. Secondly, and primarily, there was a greater economic benefit to the community of utilizing Wasaya. The owner First Nations of Wasaya had an interest in ensuring the success of their airline, which in turn contributed to the success of their communities.

[71] The intention of Kingfisher Lake was to prevent, in a safe manner, other carriers from delivering fuel to them. While it never came to this, he assumed that they would advise the carriers that their deliveries would not be accepted and there would be police available to keep the peace. Pilots of carriers other than Wasaya would not be allowed to complete their delivery and would be asked to leave. Wasaya was not going to be involved in any action blocking other carriers. This was the responsibility of the communities.

[72] Ultimately, out of the five primary communities and seven secondary communities, Wilderness only continued to deliver fuel to the Marten Falls First Nation.

[73] Wilderness commenced this action on May 16, 2017, against Remotes for breach of contract arising out of the foregoing. The damages claimed were estimated at fifteen million ($15,000,000) dollars. Injunctive relief was also claimed prohibiting Remotes from contracting with any other party with respect to the 2015 Contract services, but not pursued. The claim against Wasaya was brought September 1, 2017. Both actions were tried together.

ANALYSIS:

Was the RFP a Call for Bids and Not a Tender?

[74] Remotes raises a preliminary issue of whether the RFP process unfolded pursuant to a call for bids process or a call for tenders. The difference between the two being that the tender process places contractual obligations on the purchaser during the procurement process that a call for bids does not.

[75] The issue arises out of paragraph 33(a) of the Statement of Claim in which Wilderness plead a breach of the duty of fairness in the tendering process by allowing Wasaya and Cargo North to perform the portions of the 2015 Contract that Wilderness had been awarded.

[76] Remotes submits that it followed the correct procedures and principles applicable to the RFP process. It outsourced the procurement process to an arm's length third party company, and they engaged in a fair and transparent competition process, where Wilderness was ultimately awarded a Contract. Accordingly, Remotes submits that it had no duties of good faith or otherwise to Wilderness, arising from the RFP process.

[77] A breach of the duty of fairness in the procurement process was not a position pursued by Wilderness at trial. Wilderness agrees with Remotes that it complied with the RFP process in a fair and transparent manner, which provided equal treatment to all proponents, including Wasaya. Wilderness also takes no issue with Remotes' argument that it was bound to comply with the Code of Business Conduct, Aboriginal Procurement Procedures, and various other supply chain procurement procedures and policies in awarding the Contract.

[78] For Wilderness, the policies and procedures that Remotes committed to are key to understanding the factual matrix behind the 2015 Contract. Wilderness is not concerned about the distinction between the call for tender and call for bid process because ultimately, their claims of breach of contract and duty of fairness arise from the OA, executed in June 2015 and not the bid process.

[79] What is relevant to Wilderness is that there was a rigorous, highly technical, and structured procurement process that led to the awarding of the 2015 Contract to Wilderness. Wilderness was successful in securing a contract to provide primary air delivery service with respect to five communities and to provide secondary delivery service to seven communities. Wasaya was not successful in a fair and transparent RFP process in securing the primary or secondary position with respect to any of the communities at issue.

[80] I agree with Remotes that the procurement process was not a tender process but rather a call for bids. I further agree with Wilderness that the distinction in this case is largely irrelevant given that there was a concluded contract. The only relevance is to provide some context for breach of contract and breach of duty of good faith claims arising out of the executed OA. Wilderness's claim does not hinge on any breach or bad faith in the RFP process. On the contrary,

it is an important contextual argument for Wilderness that the RFP process was a fair and transparent process, and that Wilderness succeeded fair and square.

Did Remotes Breach its Contract with Wilderness?

[81] The parties agree that they entered into a contract arising out of the RFP process. The Contract is comprised of the following documents:

a. The OA dated June 19, 2015, including the Vendor Acceptance Form;
b. Various clarification emails;
c. The insurance requirements and special terms and conditions as detailed in RFP Document Number 7000005184, Part 2;
d. Contract Standard A-19-2012 (July 2012);
e. Wilderness's Proposal dated January 23, 2015; and
f. RFP documents, including the Hydro One Code of Business Conduct.

If there is any inconsistency or conflict in these documents, they take precedence in the order listed.

[82] The parties disagree as to what the Contract was for. Wilderness argues that the Contract entitled it to be the primary supplier and delivery agent for diesel fuel for the Primary Communities for a three-year period. It also entitled Wilderness to be the back-up, or secondary provider for the Secondary Communities.

[83] Wilderness argues that Remotes breached the Contract as follows:

a. by terminating the Contract with Wilderness as the primary vendor for Kasabonika, Webequie, Neskantaga (Lansdowne House), and Weagamow (North Caribou); and

b. by awarding Wasaya the fuel delivery contract for some of the Secondary Communities, namely Kingfisher Lake, Sandy Lake, Wapekeka, and Big Trout Lake, after the primary vendor for these communities released Remotes from their contract.

[84] Remotes disagrees with Wilderness's characterization of the Contract and denies any breach. Remotes denies that the Contract entitles Wilderness to the exclusive right to supply and deliver fuel to the communities at issue. Remotes argues that the Contract entitles Wilderness to nothing more than the right to have purchase orders issued for the supply and delivery of fuel, at Remotes' discretion. Remotes submits that during the term of the Contract and pursuant to the requirements of the OA, it did issue Purchase Orders authorizing Wilderness to supply and deliver fuel. Remotes submits that the OA was not executed on an exclusive basis and that it was at liberty to continue procuring other vendors. Remotes further argues that the Purchase Orders, or any undelivered portion of them, may be cancelled at any time, which is what happened. Even though Wilderness was selected as the successful vendor for the Primary Communities, this did not guarantee Wilderness the exclusive rights to purchase orders to deliver fuel to those communities. The Contract specifically contemplates that other suppliers may be utilized and that the value or volume of business realized by Wilderness may be zero.

[85] With respect to the Secondary Communities, again it is argued that there was nothing in the Contract requiring Remotes to exclusively use the secondary vendor in the event the primary vendor could or would not deliver the fuel. The contract permits the use of other vendors. Wilderness could not have become the primary vendor given that BCRs issued by the Secondary Communities prohibiting anyone other than Wasaya to deliver fuel.

[86] Overall, Remotes argues that Wilderness's claim for breach stems from a misunderstanding of the Contract. Wilderness's interpretation as being the sole supplier to be used by Remotes is not consistent with the wording or the intention of the Contract.

[87] As an alternative argument, Remotes further submits that the BCRs issued by the various communities caused a change in circumstances requiring invocation of the s. 27 Contract Cancellation clause. Remotes says that the BCRs received after the OA was executed presented a safety issue to carriers other than Wasaya and a potential supply issue that could interfere with Hydro One's statutory obligation to supply electricity to the communities. Remotes was required to recognize the right of the communities to direct what happens on their land and insist on permission before entering. When Wilderness was unsuccessful in having the BCRs rescinded, this affected the volume and value of fuel that it could deliver, and so Remotes had to procure the work elsewhere, which it was entitled to do under the terms of the Contract.

[88] Wasaya adopts and supports the position taken by Remotes that there was no breach of contract. Wasaya further argues that there cannot be a breach because the contract between Remotes and Wilderness was either frustrated by the BCRs, or in the alternative there was mistake in contract. These arguments were not advanced by Remotes and Wasaya did not expand on them, other than to raise the concepts.

[89] All parties agree that I must interpret the provisions of the Contract to determine whether Remotes' actions were authorized by the Contract, or whether they constituted a breach of the Contract.

Legal Framework:

[90] It is a fundamental principle of contract interpretation that a contract must be construed as a whole. See: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, at para. 64 ("*Sattva*"). A failure to do so is an error in law.

[91] In *Sattva*, at para. 47, the Supreme Court of Canada also noted that the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. A determination must be made as to "the intent of the parties and the scope of their understanding".

[92] To make this determination, the Supreme Court noted (also at para. 47) that when reading the contract as a whole, the decision-maker must give the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:

> No contracts are made in a vacuum: there is always a setting in which they have to be placed…In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating." (citing *Reardon Smith Line Ltd. v. Hansen-Tangen*, [1976] 3 All E.R. 570, at p. 574)

[93] In other words, determining the meaning of the words of a contract requires a contextual approach, considering various factors including the purpose of the agreement and the nature of the relationship created by the agreement. The meaning of the document is what the parties using those words, against the relevant background, would reasonably have understood them to mean.

See: *Sattva,* at para. 48, citing Lord Hoffman in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98 (H.L.).

[94] While the surrounding circumstances will be considered in interpreting the terms of a contract, those circumstances must not overwhelm the words of the contract. The focus of contract interpretation is the intention of the parties as reflected in the words used by them. Surrounding circumstances are used to help a decision-maker understand the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract. While the surrounding circumstances are relied upon in the interpretative process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement. See: *Sattva,* at para. 57.

[95] The evidence that can be relied upon in considering "surrounding circumstances" has its limits. It should consist of objective evidence of the background facts at the time of the execution of the contract that was, or ought to have been within the knowledge of both parties at or before contracting. Subject to this, and the parol evidence rule, this includes "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man". See: *Sattva,* at para. 58.

[96] As the Ontario Court of Appeal summarized in *Richcraft Homes Ltd. v. Urbandale Corp.*, 2016 ONCA 622, at para. 58, citing *Ventas Inc. v. Sunrise Senior Living Real Estate Investment Trust* (2007), 85 O.R. (3d) 254 (Ont. C.A.), at para. 24:

> 58. …

Broadly stated…a commercial contract is to be interpreted,

(a) as a whole, in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective;

(b) by determining the intention of the parties in accordance with the language they have used in the written document and based upon the "cardinal presumption" that they have intended what they have said;

(c) with regard to objective evidence of the factual matrix underlying the negotiation of the contract, but without reference to the subjective intention of the parties; and (to the extent there is any ambiguity in the contract),

(d) in a fashion that accords with sound commercial principles and good business sense, and that avoids a commercial absurdity.

Discussion:

[97] The findings I must make, applying the facts and legal framework, relate to what the Contract was for, and whether it was breached.

What was the Contract?

[98] I find that Wilderness's position is most consistent with a reasonable interpretation of Contract, read as a whole. In making this finding I have considered, the specific provisions that Remotes relies upon for issuing the instruction notices removing four of the five Primary Communities from Wilderness's contract.

[99] To assist in understanding some of the terms used in portions of the Contract cited in this decision, I note that the OA and Contract Standard contain the following relevant definitions (paraphrased in some cases):

a. "Purchaser" is defined in the OA as Hydro One Inc. or one of its subsidiary corporations;

b. "OA" is the official Contract document outlining the terms and conditions that will apply to all OA PO Releases awarding business to the Vendor;

c. "Contract Standard" is noted in the OA as establishing the legal relationship between Hydro One and the Vendor, and contains Hydro One's "standard Commercial condition" and/or Terms and Conditions;

d. "Instruction Notice" is defined in the OA to mean a document issued by the Purchaser to amend the Purchase Order and agreed to by the Company through its acknowledgment;

e. "Vendor" is defined in the OA as the successful bidder in the RFP, and may also be referred to as the Bidder or Company;

f. "Company" is defined in the Contract Standard as the corporation/person to whom the Purchaser has awarded the Contract; and

g. "Work" is defined in the OA as the materials, goods etc., the delivery or supply thereof, and any ancillary services in connection therewith which is the subject of the Contract.

[100] I find that the purpose of the Contract was to create a three-year relationship with Wilderness for the supply and delivery of diesel fuel to be used by Remotes to provide power to the identified remote communities that were not on the electrical grid. It did this by identifying those communities which Wilderness would be the primary provider for, and those which it would be a secondary provider.

[101] I note that the OA contains a definition for "Contract" that indicates "the Contract establishes the legal relationship between Hydro One and the Vendor and contains the terms and conditions." What was the relationship contemplated by the Contract?

[102] In reviewing the Contract documents as a whole and based on the specific wording used in the Contract documents, I find that what the parties intended by the Contract was for Wilderness to be awarded business as the primary vendor for the Primary Communities, and secondary vendor

for the Secondary Communities for supply and air delivery of fuel. In return for the contractual benefit of being the primary vendor for the Primary Communities, Wilderness agreed to deliver fuel as required as the primary vendor, and offered a fixed price schedule that Remotes sought to enjoy the benefit of. In my view, this is clear and unambiguous on the face of the Contract.

[103] I reject Remotes' interpretation that all that was contracted for was for Wilderness to be issued purchase orders from time to time, which right could be terminated at any time by Remotes in favour of any other suppliers for any reason whatsoever. If this is what was intended, it is not clear and unambiguous. It is inconsistent with the wording of the OA, which specifically says that Wilderness is awarded business based on the twelve locations as ***primary vendor*** for air delivery for five communities, and secondary vendor for seven. Remotes' Memorandum of Purchase Approval, which is the document that recommended the contracts that arose out of the RFP process, provides that the OAs carry out the award of business by way of purchase order releases issued under the OAs as needed. The award, or the Contract, is for Wilderness being the primary vendor for five and secondary vendor for seven communities. The interpretation that Remotes asks me to adopt would render the designation of Wilderness as the primary vendor for the contract term ineffective and meaningless.

[104] Furthermore, while I agree with Remotes' statement that the Contract allowed it to cancel various purchase orders issued under the OA, and I agree that the Contract contemplated the potential use of other suppliers, I disagree with Remotes' interpretation that the Contract allowed it to not use the services of Wilderness <u>at all</u> when fuel supply and delivery to the Primary Communities was clearly required during the term of the Contract. I further disagree that the Contract permitted the use of another supplier at Remotes' sole discretion. I find that this is an

overly broad interpretation of the Contract that is inconsistent with the intentions of the parties as reflected in the Contract documents and viewed in the context of the circumstances as described by Remotes witnesses, including the RFP process.

[105] I agree with Wilderness that to interpret the various provisions of the Contract as broadly as Remotes asks me to do would create a commercially absurd result wherein one contracting party receives all the contractual benefits (fixed pricing and available vendor for a fixed duration) while the other party receives none. Through the RFP process, Wilderness offered, and Remotes accepted (upon entering into the Contract) a pricing structure in exchange for Wilderness being the primary, albeit not necessarily exclusive, vendor for the supply and air delivery of fuel to the Primary Communities. If Remotes had intended to be able to simply substitute another vendor, absent reasons specified in the Contract, as a commercially sophisticated party I find that it would have (or should have) specifically said so. The evidence does not support Remotes' actions as having been in the reasonable contemplation of the parties.

[106] Remotes' interpretation of the Contract overall would result in it having no accountability whatsoever to uphold the Contract, regardless of what the vendor may do in reliance on that Contract, giving the vendor no contractual protection. Remotes' interpretation of the Contract defeats the purpose of engaging in a rigorous RFP process that results in the identification of primary and secondary vendors for various communities at fixed prices, and the awarding of contracts to these vendors. The RFP process utilized a supply strategy that had built-in provisions to ensure stability of supply (primary and secondary vendors), which I accept was important to Remotes, and competitive pricing weighing heavily in the determination. Reliable service at the lowest cost was the priority of the RFP process. I accept Wilderness's submission that Remotes'

interpretation of what the Contract was for, and what the parties' rights were under the Contract, effectively renders the Contract meaningless.

[107] With respect to the wording of the Contract itself, I note that on page 4 of 12 of the OA, it states that Wilderness is "awarded business" on an as and when required basis as the ***primary vendor*** for five specified communities and the ***secondary vendor*** for the seven secondary communities [emphasis mine]. The wording of the Contract does not state that Wilderness is simply ***a*** vendor that will be issued purchase orders from time to time. I find that as ***primary vendor,*** the Contract contemplated that Wilderness would be the *main* vendor used for the Primary Communities. The use of the word ***primary,*** and this interpretation of what the parties contracted for, does not conflict or contradict other provisions of the Contract cited by Remotes in support of its position. It does not prevent Remotes from being able to use other vendors if required, provided that Wilderness remained the ***primary vendor*** used by Remotes. It does not guarantee that there will be *any* volume of fuel required to be supplied and delivered to a particular community. But it does commit to using Wilderness as the primary supplier and delivery agent if there is a need for those services for a particular Primary Community. As will be seen below, I do not accept Remotes' arguments that on the facts of this case, any of the provisions of the Contract allowed Remotes to remove Wilderness and replace it with Wasaya and Cargo North.

[108] In reviewing the Contract documents, both the words "contract" and "purchase order" are used. Except as I will discuss below with respect to Remotes' interpretation of s. 27 "Contract Cancellation", there is nothing in the express wording of the Contract that suggests the "purchase orders" are equated to the Contract itself. As indicated, purchase orders were a method of executing the Contract, and not the Contract.

[109] In making these findings, I acknowledge that the RFP contemplated awarding contracts to more than one supplier. This was because of the potential volume of the contract and the fact that none of the identified vendors had the capacity to satisfy the requirements for delivery to all twelve communities in the manners needed. Remotes identified that more than one supplier would be required, and Wilderness does not challenge this. Wilderness had previously shared the delivery rights to Sandy Lake equally with another vendor and does not dispute Remotes' ability to award contracts on different bases. It does not challenge the contract award that it received, but what it claims to be the contract breach.

[110] Remotes also argues that the Contract contemplates that other providers may need to be used from time to time. Section 8 in the RFP states that "At any time during the term of the OA Hydro One will not be precluded from soliciting or accepting quotations, tenders, proposals, bids, or otherwise make purchases for the same Equipment from companies other than the company selected through this RFP process." The volume of business, if any, was not guaranteed. It was the evidence of the Remotes witnesses that they need the ability to use other providers to ensure the stability of the supply, particularly if the primary provider cannot deliver the fuel litres required. It was also acknowledged in various documents such as the Remotes Memorandum of Purchase Approval that particularly with respect to air delivery there is a need to have a back-up plan in the event a particular vendor cannot deliver, or if there are performance issues. The Memorandum of Purchase Approval provides that the OAs would be set up in such a way as to identify a primary and secondary allocation for each location. This is the primary structure, with the ability to contract others, if needed, also provided for in the Contract.

[111] Again, the ability to contract others if needed did not, on the facts of this case, relieve Remotes of its obligation to the awarded primary and secondary vendors. Even though the Contract contemplates the potential for the use of other suppliers, the primary and secondary vendors were still to be given priority for the work required.

[112] While I accept that Remotes needed the flexibility to use other vendors, including secondary vendors, to ensure a stable supply and delivery of fuel to the communities, this provision does not replace, or override the awarding of the Contract to Wilderness in the OA as the ***primary vendor.*** To the extent they conflict or are inconsistent, the OA takes precedence over the RFP. Therefore, while it is contemplated in s. 8 there other vendors may be used, the OA still provides that Wilderness will be the ***primary vendor*** used to supply and deliver fuel by air, on an as and when required basis, to the Primary Communities.

[113] My overall interpretation as to what was contemplated by the Contract is consistent with the evidence of Remotes' witnesses. Evidence from the discovery of Robert Berardi, who in 2015 was the Director of Supply Chain for Hydro One (Senior Vice-President of Shared Services and Broadband at the time of trial), was read in by the Plaintiff at trial. That evidence was that primary and secondary allocations were made for air delivery arising out of the 2015 RFP process. Work was to be allocated firstly to the primary vendor. If the primary vendor could not deliver, then work was to be awarded to the secondary vendor. Mr. Berardi's understanding is reflected in the Contract itself. On page 4 of 12 of the OA (no paragraph numbering provided), it states that: "Secondary source vendor will only utilized if and only if the awarded Primary Vendor for these locations cannot fulfill the Dyed diesel Fuel delivery by Air delivery method." This suggests that Remotes' argument that it can use whatever vendor it wants, when it wants, is not accurate and not

in accordance with the express terms of the Contract. This wording of the OA, combined with the evidence given at trial, supports the identified primary vendor having a priority right over any work allocated for the Primary Communities, followed by allocation to the secondary vendor (if needed), absent performance issues. This interpretation addresses Remotes' concern that a contingency carrier be in place in the event the primary could not deliver. This addresses its concern about security of supply. It does not support Remotes' position at trial that the Contract allowed it (in these circumstances) to simply cancel a purchase order, issue an instruction notice, and substitute any other carrier at any time if felt it needed to.

[114] Other arguments of Remotes that I have rejected with respect to what the Contract was for will be addressed in discussing whether there is a breach. Both this section of these reasons and the breach section should be read together in determining the scope of the Contract and breach.

Was the Contract Breached?

[115] The evidence of Mr. Mann (Director for Remotes) was that once a contract (OA) is signed, individual purchase orders are issued. Generally, it is a one-time purchase order that is established for each community. The purchase order sets up the dollar amount and then the vendor receives weekly updates as to what fuel is remaining in the community, along with weekly burn rates so that they know when deliveries are going to be required. Provided the delivery is successful, the company invoices Remotes, thereby drawing down on the purchase order until it runs out on money or time.

[116] Pursuant to Instruction Notices issued on September 17, 2015, and April 11, 2016, Remotes cancelled the undelivered portion of services under purchase orders issued to Wilderness

for four of the five Primary Communities and four of the seven Secondary Communities. The first Instruction Notice cancelled that portion of the Contract related to Kasabonika, with the April notice cancelling the other three communities. Even though Remotes had transferred portions of the work to Wasaya and Cargo North earlier, the dates of the Instruction Notices purporting to remove the communities from the Contract, are the dates of the breaches alleged by Wilderness.

[117] Remotes argues that its actions were authorized and contemplated by the Contract and therefore there was no breach. Remotes further argues that the position taken by Wilderness requires the court to ignore all the key terms of the Contract that directly address the Plaintiff's claim, and substitute provisions into the Contract such that purchase orders may only be cancelled if there is a performance issue. This, Remotes argues, contradicts the provisions in the Contract, which are clear and unambiguous.

[118] Remotes takes the position that it has the absolute discretion under the terms of the Contract to cancel purchase orders issued to Wilderness and substitute another provider. Even if I find this not to be the case, Remotes argues that Wilderness was unable to satisfy its contractual obligations to Remotes because of the BCRs, which necessitated the use of an alternate supplier.

[119] Remotes argues that during the term of the OA, and pursuant to the requirements of the OA, it did issue purchase order releases as contemplated by the Contract, authorizing Wilderness to supply and deliver fuel to the various communities. Remotes contracted to issue purchase orders, and it satisfied this obligation. It was permitted to also cancel these purchase orders at any time, without liability and without any contractual obligation with respect to the cancelled portion. Again, the Contract was not executed on the basis that Wilderness would be an exclusive provider. Wilderness did receive an award of business, just not the business it had hoped to receive. The

Contract did not guarantee a level of business awarded, and the RFP and Contract (which incorporates the RFP) specifically contemplated in multiple different places that the volume of business could be minimal or zero and could be awarded to more than one supplier. Remotes takes the position that despite the original RFP process and executed contract, it was entitled to cancel the purchase orders issued to Wilderness, and by doing so be relieved from its contractual obligations. It was also entitled to continue procuring at all times, as required, to ensure uninterrupted supply and delivery.

[120] I find that while Remotes was entitled under the Contract to manage fluctuating needs for fuel by cancelling purchase orders, this did not alleviate it from its contractual obligation to use Wilderness as the primary vendor for the four communities in question when fuel had to be delivered. This is the term of the OA that was breached. It was fundamentally what Wilderness bargained for. Wilderness was not utilized as the primary vendor for the supply and delivery of fuel for four of the five Primary Communities for the duration of the Contract term, whatever the volume would have been for those communities. Wasaya and/or Cargo North became the primary vendors contrary to the terms of the Contract that Wilderness had fairly secured pursuant to the requirements of the RFP process. With Cargo North releasing its contractual obligations with Remotes, there is a *prima facie* breach of the Contract when Wilderness was also not afforded the option to become the primary vendor for the various Secondary Communities, subject to Wilderness's ability to deliver to these communities.

<u>s. 27 Contract Cancellation Clause:</u>

[121] Remotes relies on various provisions of the Contract in support of its position, and notably s. 27 of the Contract Standard. The s. 27 Contract Cancellation clause in the Contract Standard is noted by both parties as important to determining these issues.

[122] Section 27 states as follows:

> 27 Contract Cancellation
>
> (a) The Purchaser shall have the right, which may be exercised at any time, and from time to time, to cancel any undelivered portion of the Work, without any costs, interest, or penalties to the Purchaser. Except to the extent any such cancellation arises in respect of any event of default by the Company, the Purchaser will pay the Company the amounts set out below, supported by any audit requested by the Purchaser (including an audit performed by the members of the Purchaser's internal audit staff):
>
> (i) reimbursement at the Contract rate for all items completed and delivered; and
>
> (ii) reimbursement for the reasonable, necessary, unavoidable and unrecoverable direct out-of-pocket costs directly caused by the cancelation.
>
> (b) The Purchaser shall not be liable to the Company for loss of anticipated profit on the cancelled portion or portions of the Work, or any other incidental, indirect or consequential damage.
>
> (c) Title to all Work for which reimbursement is made shall vest with the Purchaser.

[123] Remotes argues that by virtue of this provision, and the Contract interpreted as a whole, it was entitled to cancel purchase orders. This was done by issuing an Instruction Notice (as defined in the OA) and as provided for in s. 2(b) of the Contract Standard.

[124] Remotes argues that this provision, combined with section 8 of the RFP, was all that it needed to allow it to engage Wasaya and Cargo North to deliver fuel to the Primary Communities. The ability to cancel purchase orders at any time, for any reason, combined with the ability to

continue procuring is all that Remotes says it required to alleviates it of the obligation to use Wilderness as the primary vendor for the Primary Communities. Wilderness disagrees and argues this is an overly broad interpretation of this provision.

[125] The question to be determined is what is the scope of s. 27, meaning what may be cancelled and when?

[126] Based on the wording of the Contract, considered in the context of the whole Contract and other evidence, I do not accept the position of Remotes that s. 27, when read in the context of the Contract as a whole, alleviates Remotes of its obligation to use Wilderness for the delivery of fuel that is required.

[127] Firstly, what is the scope of s. 27? This provision is not clear and unambiguous. Some confusion arises because of a contradiction between the title to s. 27 and the body of the section itself. The title to the section suggests that the provision provides for the termination of the Contract. Having said this, within s. 27 reference is made only to the cancellation of the Work. Based on my reading of the Contract as a whole, "Work" and "Contract" do not mean the same thing. They are defined differently, with the Contract being defined in the OA as the document that establishes the legal relationship between the parties, and Work being defined in the Contract Standard as referring to the supply and delivery of the goods, materials, and other things. These are, on a plain reading of the text, very different things and the use of these terms throughout the Contract suggests they are not the same thing. Therefore, even though the heading of s. 27 is "Contract Cancellation", I find that this term of the Contract refers to the cancellation of the supply and delivery of fuel, from time to time, or the purchase orders. Section 27 does not clearly and unambiguously alleviate Remotes from the contractual obligation of using Wilderness as its

primary vendor if there is in fact "Work" to be performed and Wilderness is capable of performing that work. It does not alleviate Remotes of all obligations under the Contract. It merely allows for the cancellation of undelivered portions of the Work (purchase orders).

[128] The ambiguity of s. 27 may be resolved by viewing it in the context of the rest of the Contract and the evidence of the parties.

[129] The wording of s. 27 may be contrasted with other provisions of the Contract in which it is abundantly clear that Remotes reserves the right to terminate the Contract and not just "Work". The word "Contract" is specifically used, or alternatively when "Work" is used, what is being terminated is specified. I note the following portions of the Contract that in my view are clear as to what was intended, unlike s. 27:

a. Section 4(c) of the Contract Standard specifically states that the Purchaser (Remotes) may immediately terminate the *Contract* [emphasis mine] upon giving notice to the Company where the Company is in breach of FIPPA records and compliance obligations. It does not simply say that Remotes only needs to cancel the "Work" to be able to cancel the Contract.

b. Section 16(e) of the Contract Standard sets out the remedies available to the Purchaser if the Company fails to comply with provincial or federal environmental statutes, reporting of spills or contamination, and remediation requirements. Section 16(e)(ii) reserves to the Purchaser the right to "terminate all or any portion of the *Contract…*" [emphasis mine].

c. Section 26 of the Contract Standard deals with default by the Company. Paragraph 26(c)(i) gives the Purchaser the right to "terminate the Purchaser's utilization of the Company to perform the Work or any part thereof." Section 26(c)(iii) gives the Purchaser the right to "finish or replace the Work by whatever means it may deem appropriate under the circumstances". While the word "Contract" is not used, this section of the Contract specifically states that it is *"utilization of the Company to perform the Work…"* that may be terminated or replaced. Not just the Work. Unlike s. 27, this section is very clear as to what is intended.

d. Section 30(a) with respect to conflicts of interests states in part "…the Company covenants to immediately advice Purchase of same, and Purchaser may, at its discretion, terminate this *Contract*, or any part thereof, for cause." [emphasis mine]. Section 30(b) similarly refers to "terminate this Contract, or any part thereof…"

[130] The evidence of the parties, supported by the text of the various Contract documents, was that Remotes needed the flexibility to be able to change or cancel purchase orders to deal with fluctuating needs for the supply and delivery of fuel.

[131] The evidence of the Remotes witnesses was consistent in terms of their understanding as to when and why Remotes may need to terminate or cancel purchase orders, or portions of them. This was consistent with the understanding of Mr. Cheeseman. This evidence helped to provide some context for the concerns the Contract attempted to address, which assists in objectively determining the intention of the parties. This context is consistent with my interpretation of s. 27. I did not take any of the evidence of the Remotes witnesses as suggesting that they understood Remotes to have an absolute right to cancel the Contract absent cause, or a downward fluctuation in the need for supply such that it was no longer required. The reasons suggested by the Remotes and Wilderness witnesses were:

a. The community no longer needed fuel because they were using a different fuel source or had become attached to the electricity grid. In which case, there was no need for fuel and Remotes needed to be able to terminate the Contract for that community.

b. The electricity needs of the community fluctuate (increase or decrease) throughout the year and from year-to-year, be it because of weather, infrastructure changes or because more fuel may be delivered by winter road if the winter road season was longer. If less fuel is required than the purchase order contemplates for the period of time of the Contract, Remotes needed to have the ability to cancel the unused portion without becoming liable to Wilderness for the unused portion of the purchase order in which required volume was only estimated.

c. Wilderness was unable to fulfill the Contract and deliver the required litres.

[132] Keeping in mind that the aim of contractual interpretation is to give effect to the intentions of the parties, objectively determined, the documentary and oral evidence as to the needs Remotes sought to address by the Contract, supports the interpretation I have adopted.

[133] To accept the interpretation of Remotes that it had a right pursuant to s. 27 to cancel undelivered portions of purchase orders and thereby terminate or cancel portions or the whole of the Contract after it was awarded, for any reason, renders the Contract meaningless. Remotes interpretation equates a cancellation of purchase orders with a cancellation of the Contract obligations (or part of them). As set out above when determining what the parties contracted for, this makes no sense and creates an absurd result where one contracting party can take advantage of the benefits of a contract and then simply terminate it, at any time, for any reason whatsoever. It is also inconsistent with the evidence of the witnesses for Wilderness and Remotes as to what flexibility Remotes required and why. In other words, it is inconsistent with the intention of the parties as to the purpose of s. 27. There is no evidence to suggest that any one contemplated completely replacing a vendor absent cause, and I do not find the wording of any provision of the Contract sufficiently clear to allow for this interpretation. If I were to accept Remotes' argument the absurdity extends even further when considering the exclusion of liability provisions (discussed in greater detail below). One contracting party could, in reliance on the Contract incur other obligations (such as leasing more planes) just to have the Contract arbitrarily cancelled. The financial consequences could be significant. If such a result was intended, it needed to be set out clearly in the Contract so that Wilderness knew what risk it was assuming.

[134] The risk that Wilderness was prepared to accept, and that is consistent with the wording of the Contract, taken as a whole, and viewed in context, is that although it was primary vendor for the five communities, there was no guarantee as to how much fuel would be required over the term of the Contract *and* that a community may no longer require fuel delivery at all because they are switched to a different source of electrical power. Wilderness knew, weighed, and accepted

this risk. It is for this purpose, which is to give Remotes flexibility for changes in supply and delivery needs, that s. 27 exists. The intention is to provide the ability to cancel purchase orders to deal with changes in fuel requirements. I agree with Remotes that it did not necessarily need to fall in the list of reasons given by the witnesses as examples of what was contemplated in order to cancel the Contract. I disagree that s. 27 exists, either alone or in combination with other parts of the Contract, including s. 8 of the RFP, to simply be able to replace an awarded primary or secondary vendor with another.

[135] This interpretation of s. 27 does not, as Remotes alleges, require a reading into s. 27 of limitations on its rights to cancel purchase orders. I accept that the undelivered portions of purchase orders may be cancelled at any time and not just for performance issues. It is the cancellation of the purchase orders combined with the utilization of a carrier other than Wilderness for ongoing supply and delivery of fuel during the period of the Contract that creates the breach.

s. 8

[136] As indicated above in greater detail, I disagree that section 8 of the RFP, or any other provision of the Contract can be utilized to justify *not* using Wilderness as the primary vendor for the Primary Communities. Remotes argues that it retained the discretion to award the contract to the most appropriate vendor at any time. While the Contract afforded Remotes the opportunity to use other providers, it still contractually obligated Remotes to use Wilderness as the primary provider for the Primary Communities and secondary provider for the Secondary Communities. Section 27 does not allow for the termination of this obligation. The Contract terms do not support Remotes' position that it did not have to use Wilderness at all when there are litres requiring delivery, nor does the contextual evidence.

Volume Not Guaranteed and May Be Zero

[137] I also disagree that any provisions in the Contract that state that the volume is not guaranteed and may be "zero" support Remotes' argument as to the interpretation of s. 27 or otherwise allow for the termination of service to the four primary communities.

[138] Remotes argues that because there is no guaranteed value or volume of work awarded to Wilderness, there is no breach. Remotes further argues that Wilderness is claiming damages for cancellation of Purchase Orders and failure to provide purchase orders despite the provisions in the Contract which specifically say the value may be zero and that Remotes "does not commit to minimum purchased contract quantities at any time during or at completion" of the contract. Furthermore, s. 8 allows Remotes to continue to procure.

[139] The Contract requires the delivery of fuel as needed to maintain minimum fuel reserve levels in the various communities throughout the contract period. Demand for fuel delivery by air is seasonal. In the Terms of Reference, Remotes estimated 15 million litres to be supplied as part of the RFP (for all communities, not just the Primary Communities), but did not commit to minimum purchased contract quantities at any time during the contract. Estimates of the quantities by location were provided in the RFP solely for the purpose of assisting with pricing. The evidence was that there are many factors at play that make it virtually impossible for Remotes to accurately estimate the amount of fuel required. But even though the volume cannot be predicted, and for many reasons may be zero, as I concluded above this does not change the fact that Remotes entered into a Contract with Wilderness to be the primary vendor for the Primary Communities for whatever volume was required. Wilderness does not seek to hold Remotes to the estimates provided in the RFP. It was prepared to assume the risk that the volume could be zero if there was

no longer a need for delivery to a particular community. But that is not the evidence. There was an ongoing need throughout the three-year period of the Contract for the supply and delivery of fuel to all four of the Primary Communities removed from Wilderness. The no guarantee of volume or potential for zero volume does not alleviate Remotes of its obligation to utilize Wilderness primarily for this service.

Termination of the Contract by Instruction Notice:

[140] I also note that the purported method of terminating the Contract was by Instruction Notice. I note that on page 4 of 12 of the OA, it states that the OA is subject to amendments in the form of Instruction Notices, which take precedence over the documents amended thereby. As outlined earlier in this decision, an Instruction Notice is defined in the OA as a document issued by Remotes to amend the *purchase order* and agreed to by Wilderness through its acknowledgement. As I have already found, the purchase order was not the Contract, but rather issued pursuant to the terms of the Contract.

[141] The OA, which takes precedence over the Contract Standard, further states that any changes affecting the scope, price, source of supply or any terms and conditions of *this* Purchase Order will be contractually binding only when issued by the Purchaser, by way of an Instruction Notice. Again, this provision is not clear and unambiguous in that it refers to this "Purchase Order" as opposed to Outline Agreement, which is referred to throughout the rest of the document. Other parts of the OA talk about *the* purchase order, suggesting a purchase order issued pursuant to the OA. The OA states that any changes to the scope and any terms or conditions are binding when issued by the Purchaser, suggesting a unilateral right. However, that change must be made by way of Instruction Notice, the definition of which requires agreement by the vendor through their

acknowledgment. Wilderness did not sign the vendor acknowledgement form accompanying either Instruction Notice.

[142] The amendment provisions of the OA are unclear as to the extent to which Instruction Notices can amend the Contract (referring to the "this" Purchase Order issue instead of this OA), or just a purchase order. It does not even suggest a unilateral right to issue an Instruction Notice to change a purchase order, even though I acknowledge the understanding of the parties that this could happen for reasons related to fluctuation in need for supply. Even though the parties did not argue this part of the OA in support of their positions, and even though it is not determinative of my findings, it is indicative of how this Contract is certainly not clear and unambiguous in all respects, and how various provisions seem to contradict others and the understandings of both parties (which understandings are consistent with each other).

Could Wilderness deliver fuel to the First Nations communities?

[143] The parties agree that Wilderness was contractually obligated to deliver fuel to the Primary Communities, as and when required by Remotes. If it could not fulfill that obligation, then there seems to be little dispute that Remotes would have needed to exercise its ability to move to the secondary vendor (which it did by giving Cargo North three of the communities) or continue to procure (as was the case with Kasabonika, and given that Cargo North was prepared to release).

[144] Remotes argues that Wilderness has provided no evidence that it had the capacity to service all the Primary Communities. Remotes points to evidence from their aviation expert, Dr. Meyers, that in order to service the volume required for the duration of the Contract, additional aircraft would have been required over and above what Wilderness had available to it. Remotes

argues that in the RFP Wilderness proposed using all three of its aircraft for air delivery, but Wilderness had other customers to which it delivered fuel. To get a new plane, the evidence was that it would take a minimum of 12 – 18 months to secure an aircraft configured to transport diesel fuel.

[145] While the availability of aircraft is an issue for damages, it does not belong in an analysis of whether the Contract was breached or not. I am not clear, based on the written submissions of Remotes whether this argument is restricted only to the question of damages and so I will address it briefly. The parties have acknowledged that the sole reason for terminating utilization of Wilderness for four of the Primary Communities was the BCRs. Wilderness says it could have managed the volumes required with the aircraft available to it and I accept this, as did Remotes when it evaluated Wilderness's RFP.

[146] Remotes also argues that the RFP, which forms part of the Contract, required proponents to be able to deliver fuel to the communities or have access to the communities. Wilderness says there was no term of the RFP or Contract that requires this. Mr. Berardi's transcript was read in at trial where he confirmed this was not a term. No approval or permission from the community was required as a term of the Contract. Unless there is conduct of the vendor that creates an issue, I find it was Remotes/Hydro's responsibility to ensure that the appropriate permissions were obtained from the various communities to provide the necessary fuel for their diesel generating stations, just as it was Remotes' obligation to obtain the appropriate land use permits for the stations. If Remotes expected the proponents to do this, they should have said so. The RFP speaks only to encouraging relationships with the communities. -

[147] The question then to be answered is whether Wilderness was able to fulfill its contractual obligation of delivering fuel as required, or did the BCRs prevent them from doing so, thereby entitling Remotes to cancel and terminate portions of the Contract in favour of another supplier?

[148] This requires a determination of what "delivery" means under the terms of the Contract. The Contract Standard (s. 7(d)) provides that delivery shall not be deemed to have occurred until such time as the fuel has passed the Purchaser's offload connection point and the Purchaser's prescribed offload procedures have been adhered to by the Company.

[149] Part 2(A) Special Terms and Conditions Supplemental to Contract Standard, in relation to ownership of fuel states that Remotes does not take ownership of the fuel and delivery has not occurred until the fuel passes through Remotes' meter at the off-load area. The Diesel Generating Station (DGS) meter is the purchaser's offload connection point. The DGS and Final "Delivery Point" is not located at the airport in Bearskin, Big Trout Lake, Fort Severn, Kingfisher Lake, Sandy Lake, and Wapekeka. These sites require ground transportation. The inference is that the DGS is located at the airport in all other communities. The Contract is clear that Remotes will not acknowledge any delivery until it has specifically passed through the Delivery Point. Remotes does not have to pay for any delivery to an airport until it has passed through the Delivery Point. This is important to keep in mind given the wording of the Wasaya BCRs that were passed after the award of the Contract.

[150] The evidence of Mr. Mann was that when a vendor lands at an airport where the tanks are located on site, they pull up to the fuel kiosk and pump the fuel directly into the tanks. The evidence of Remotes is that there are site operators who are First Nations community members, and provided that notice is given and the vendor is operating during the hours provided for in the

Contract, they meet the aircraft to assist with offloading the fuel. The Wilderness pilot, Daniel Murray, testified that often there is no one at the airport to meet them and he pumps the fuel into the final delivery point himself. When the DGS and final delivery point is not at the airport, the vendor pumps the fuel into a tank at the airport, which then must be transported to the final Delivery Point by ground.

[151] As set out earlier in this decision in greater detail, two sets of BCRs were received with respect to the Wasaya communities; one before the award that Remotes has referred to as the "support" BCRs which set out their support for Wasaya's bid, and the second set that was received after the Contract was awarded that Remotes has referred to as the "forbidding" BCRs. Remotes argues that Cargo North recognized that it had an obligation to deliver under the Contract and the Wasaya BCRs could have caused it to be contractually liable for non-delivery. For this reason, Cargo North accepted Remotes' offer to release it from its contractual obligations. Similarly, the Wasaya communities BCRs, and then the Cargo North community BCRs negatively impacted Wilderness's ability to deliver fuel to the fuel tanks.

[152] The only Wasaya community that was a Primary Community was Kasabonika. Wilderness argues that there is no evidence before the Court to support a finding that after the execution of the "forbidding" BCR by Kasabonika, Wilderness was unable to deliver. Wilderness delivered fuel for Remotes for a short period after receipt of the BCR, and for others without incident. While factually Wilderness is correct, I note that Remotes was negotiating with Wasaya and the First Nations during the initial month or so following the execution of the BCR and therefore it is not surprising that Wilderness did not encounter any difficulty.

[153] Secondly, Wilderness argues that the Ontario Court of Appeal in *Hiawatha First Nation v. Cowie,* 2023 ONCA 524 spoke to the differences between bylaws that are issued by First Nation communities (or Chief and Council) and BCRs. BCRs are simply expressions of the will of the council that cannot create rights and duties for band members or others and does not have the force of a by-law (at para. 61). A by-law can bind others, whereas a BCR can bind only the band council itself. This distinction is particularly important when there is a potential legal interference with rights (at para. 62). Therefore, while Wilderness respects the rights of the First Nations, and appreciates the difficult position Remotes found itself in, it argues that legally the BCRs could not prevent Wilderness from fulfilling its contract because they were not binding on Remotes or Wilderness. While the *Hiawatha* case was factually different, it provides an appropriate legal analysis as to the force of the BCRs, which I accept.

[154] Most compelling is Wilderness's argument based on the actual wording of the BCRs. The Wasaya communities' BCRs say that they will not allow fuel to be transported from the airport to the diesel generating stations, by ground, if fuel is delivered by a carrier other than Wasaya. The BCRs do not say they will prevent carriers from landing. The Contract documents and the evidence of Mr. Mann confirm that the airport for Kasabonika and the DGS are not on lands of the Kasabonika First Nation. They are on Provincial Crown land. There is no evidence that fuel needed to be transported from the airport to the DGS by ground for Kasabonika. The Wasaya "threat" letter of June 26, 2015, references the First Nations using all means necessary to block entry into their community by other carriers. Wilderness did not need to enter Kasabonika to deliver fuel for Remotes.

[155] The evidence of Mr. Mann was that for communities such as Kasabonika where the airport is not on reserve lands, the position the First Nations generally take is that even the Crown lands are their territorial lands, the airports exist solely for their benefit, and therefore are subject to their control. Whether on Crown land or not, they have a vested and keen interest in what is going on at the airport. I do not dispute the interest the First Nations have in the airport and what enters their community through the airport. However, there is no legal authority for Kasabonika to prohibit the landing of Wilderness at the airport situated outside of the community, or delivery to the DGS point (also outside of the community). The carefully worded BCRs suggest that the communities were alive to this issue and the land they could exert some authority over, despite Mr. Mann's concerns.

[156] The Wasaya letter, on the other hand, said that the communities were prepared to do what was necessary, even in situations in which the airport was on Crown land. The Wasaya letter went further than the BCRs. Mr. Rodyniuk testified that the position of Wasaya expressed the will of the Wasaya Communities. Remotes' concern was that the worst-case scenario involved a blockade, consistent with the evidence of Mr. Reynolds, in which Chief and Council attend the airport and ask the aircraft to leave before fuel can be unloaded and delivery completed. I note, however, that Kingfisher Lake First Nation was a community for which ground transport was required from the airport into the community. This is not the case for any of the Primary Communities. No entry into the communities was required and there was no evidence from these communities.

[157] Mr. Mann testified that Remotes contemplated scenarios such as the site operator being influenced by Chief and Counsel not to allow the value to be opened. On the other hand,

Wilderness argued that often they do not require a site operator to do this for them. Remotes' primary concern was with ensuring safe and reliable power and Remotes considered the BCRs a threat to that. From a safety perspective I accept that Remotes did not want any potential for confrontation between its delivery agents and the First Nations. From a security of supply perspective, I accept there was a concern that if the primary vendor could not deliver, power for the community was at risk. I am sure that neither Remotes nor the First Nations wanted to engage in a game of "chicken" with their power supply to see who would give in first. I also note the evidence of Mr. Mann was it had become a political issue with MP's becoming involved. I further note the threat in the Wasaya letter of going public with their concerns. Not having given more weight to the express wishes of the First Nations as to delivery to their communities than 5% in the RFP process, with effective service at the lowest cost being a bigger concern, Hydro One faced a potential public relations and political issue if matters progressed to the point of Hydro having to seek an injunction preventing interference with delivery on non-reserve lands. First Nations sovereignty and whether Hydro was respecting the will of the First Nations was becoming the greater issue. While this is an important issue, it had nothing to do with whether Wilderness legally could deliver the fuel or not. In fact, the evidence suggests that Remotes may have made a decision to transfer the litres to Wasaya in early July before even seeing the BCRs, but perhaps in anticipation of them following a meeting with Wasaya. For the purpose of this decision I find there was no legal impediment to delivery, and no evidence based on the wording of the BCR that Wilderness would not have been able to fulfill the delivery terms of the contract, particularly given that ground transportation was not required for Kasabonika.

[158] With respect to the other three primary communities, they were Cargo North communities. There is no evidence that after the execution of the BCRs Wilderness was prevented from delivering to these communities, and again, it did continue to deliver for some time. This alone is not determinative of the issue of Wilderness's ability to fulfill the Contract terms. The evidence of Mr. Mann was that Cargo North and its communities were pressing Remotes to see what was happening over the BCRs, and Remotes was 'dragging its feet' in the hope that the issue would resolve itself. The fact that the communities and Cargo North were respectful of the process following the issuance of the BCRs and did not obstruct Wilderness's ability to deliver during this time, simply says that the communities were respectful of the negotiation process.

[159] The situation with the Cargo North communities was considerably different than the Wasaya communities. Cargo North had been awarded the largest portion of the air delivery, and all the winter road contract. Wasaya was only successful in securing all season road delivery, which represented the smallest part of the contract award.

[160] The primary position of the Cargo North communities was that the Contract and the RFP process leading up to the award of the Contract ought to be respected. It was only once portions of Cargo North's purchase orders were cancelled and being transferred to Wasaya, that the Cargo North communities also began passing BCRs. As set out earlier in this decision, the Windigo Tribal Council, of which some Cargo North communities are members, expressed some considerable concern about the precedent Hydro was setting in capitulating to the Wasaya BCR strategy and was concerned about the impact on price and stability of service. But for Remotes' decision to terminate portions of Cargo North's contract as primary vendor for certain Wasaya

communities, the Cargo North communities would have been prepared to honour the contract award to Wilderness for the Primary Communities.

[161] With respect to the wording of the Cargo North community BCRs, they are also quite different from the Wasaya communities. They are more akin to the "support" BCRs that the Wasaya communities issued prior to the Contract being awarded. These BCRs direct Hydro One to use Cargo North but did not use any language stating that they would either prevent other air carriers from coming on to their land or that they would refuse any required ground transport for fuel that arrived from carriers other than Cargo North.

[162] The evidence of Mr. Berardi was that it is not uncommon for First Nations to give support to preferred vendors. The Wasaya support BCRs were not deemed a threat in the procurement process and Remotes did not feel bound by these BCRs in that process such that the support BCRs of Wasaya would override the rating criteria. Remotes provided no evidence as to why that position changed with respect to the support BCRs issued by the Cargo North communities post-award such that Remotes felt they should override contractual obligations. I can only conclude that having revoked Cargo North and Wilderness's award for the Wasaya communities, it also felt compelled to do so for the Cargo North communities. While this may have been the fair thing to do for the Cargo North communities, it does not mean that Wilderness was unable to satisfy its contractual obligations.

[163] I also find that Remotes' position that it was legally obligated to honour the wishes of sovereign First Nations as expressed in the Cargo North BCRs, and that these BCRs prevented Wilderness from fulfilling its contractual obligations, somewhat disingenuous in light of Remotes' conduct. Mr. Berardi's evidence was that Remotes took the BCRs seriously and wanted to honour

and respect the direction of sovereign First Nations. Yet while Remotes took this position with respect to the air fuel delivery by Wilderness to the Cargo North communities and treated the BCRs as indicative of Wilderness's inability to fulfill its contractual obligations with respect to air delivery, Remotes disregarded other portions of the BCRs because they presented some operational impairments to Remotes. The BCRs of two of the three Cargo North communities extended beyond supporting Cargo North for air delivery for fuel. The BCRs stated that "We are directing Remotes to use Cargo North for *all services…"* Despite this, in an email dated January 28, 2016, from Mr. Mann to Mr. Berardi and Mr. Coulter with respect to Webequie, it was recommended that the "rescind BCR" letter be sent with respect to fuel delivery (presumably to Wilderness) but that Remotes should avoid commenting or addressing the staff transportation aspect of the BCR due to operational implications. Mr. Mann's evidence was that the email reference is with respect to potential operational concerns if Cargo North had to be used to transport Hydro/Remotes employees in and out of the community. His evidence was that Remotes did not agree to this part of the BCR because it was too difficult to manage and too challenging. His evidence was further that Remotes tries to use the carrier directed by the community for staff transport "when possible", but not all the time. There is no evidence of any other carrier having been prevented from delivering staff to these communities.

[164] For these reasons I agree with Wilderness that the evidence does not support the conclusion that Wilderness could not meet its contractual obligations to delivery fuel because of the BCRs. I find that Wilderness was ready, willing, and able to fulfill its contractual obligations.

[165] Nothing in this decision should be taken to mean that Remotes was morally wrong to have respected the will of the First Nations, or that the First Nations were wrong for wanting to

support carriers in which they had a direct financial interest. The only conclusion that is to be drawn from this decision is that in making this decision, Remotes made a choice that caused it to breach its contractual obligations to Wilderness.

Was there a breach with respect to the obligation to use Wilderness as Primary Vendor once Cargo North released its contractual obligations pertaining to the Secondary Communities?

[166] When Cargo North released its contractual obligations with Remotes, I agree with Wilderness that Remotes was then contractually obligated to give Wilderness an opportunity to perform the Contract for the four Wasaya Secondary Communities. This distinguishes the situation from the secondary supplier cases relied upon by Remotes.

[167] Having said this, I recognize that three of the four Wasaya Secondary Communities that issued BCRs do require ground transport from the airport into the community to complete delivery. Regardless of the legal effect of the BCRs, this may result in a different analysis as to Wilderness' ability to deliver and fulfill its contractual obligations as secondary vendor. I do not have to decide this as I would not grant damages for breach of the Secondary Communities contractual obligations in any event. My reasons are set out below under the category of "damages".

Wasaya's arguments re whether there was a breach:

[168] In defending a claim of inducement of breach, in addition to adopting Remotes' arguments, Wasaya argues that there can be no breach of contract because the Contract was frustrated by the BCRs, or in the alternative that there was a mistake in contract as between Wilderness and Remotes because the BCRs directed Remotes to utilize the services of Wasaya, and therefore neither Wilderness nor Remotes could perform the Contract.

[169] With respect to frustration of contract, the argument of Wasaya is that the second round of BCRs prevented Wilderness from delivering the fuel, thereby frustrating the Contract. At that point it became abundantly clear that the actions of the First Nations made it impossible for the parties to the Contract to perform their obligations.

[170] "Frustration" is a doctrine that relieves innocent contracting parties from further performance of their contractual promises on the basis that a supervening event that they could not have reasonably predicted has made it impossible for them to fulfill their obligations.

[171] As I have found the BCRs did not prevent Wilderness from delivering fuel to the Primary Communities, the Contract for the Primary Communities was not frustrated. If I am wrong, the determination as to whether the situation could have reasonably been predicted by Remotes is a difficult one. Firstly, Remotes did not argue frustration. Secondly, the evidence of Remotes is that support BCRs were commonly received during the RFP process, but Remotes had never encountered a situation such as this after the award of a contract. I do not have other support BCRs before me to compare the wording. I note that the first round of Wasaya BCRs "directed" the use of Wasaya. I must conclude from this that Remotes should have known there could be issues if it did not honour the clear direction of the communities.

[172] With respect to Wasaya's alternative argument of mistake, there is no basis on which to find that there was any mistake of the parties in entering into this Contract. While Remotes misjudged the strength of the will of the Wasaya communities, this is not sufficient reason to void the Contract.

Did Remotes Breach Its Duty of Good Faith in Contract?

[173] Wilderness argues that if I do not find a breach of contract, Remotes breached its contractual obligations to act in good faith in three ways:

a. Remotes breached its duty of honest performance by negotiating with, and ultimately transferring the greatest portion of the Contract to Wasaya and Cargo North without informing, and actively misleading Wilderness. Wilderness points to the testimony of Mr. Mann, Mr. Coulter, Mr. Berardi, and Mr. Struthers, who were each aware of the BCRs, knew that the communities would not rescind them, and that Remotes intended to honour the BCRs. Meanwhile, until March 2016, Remotes repeatedly communicated to Wilderness that they must obtain BCR rescissions, allowed them to continue in their efforts to do so, knowing that the communities would not rescind. Remotes also did not advise Wilderness that Cargo North had released its primary vendor contract, which should have entitled Wilderness to that Secondary Community work.

   Furthermore, Wilderness submits that Remotes breached its duty of honest performance by misrepresenting the effect and wording of the BCRs to Wilderness, by not providing it with copies, and by requiring Wilderness to provide proof that they could fulfill the Contract in light of the BCRs. Remotes issued an emergency Purchase Order for Kasabonika, which was based on a false narrative of Wilderness's inability to deliver. Finally, Remotes breached its duty of honest performance by placing an obligation on Wilderness to secure a recission of the BCRs, which obligation was not found in the Contract, nor was it contemplated by the Contract. This was Remotes' issue to resolve and not Wilderness's.

b. Remotes breached the duty to exercise its contractual discretion to cancel the purchase orders in good faith. Remotes' discretion to cancel the purchase orders was for the more limited purpose of protecting Remotes from paying for fuel delivery and supply where the needs of the First Nations communities changed, which may have affected the quantities set out in purchase orders. None of the contractual provisions were intended to allow Remotes to arbitrarily select another service provider.

c. Remotes breached its duty to co-operate to achieve the objects of the Contract by quickly deciding to transfer portions of the Contract to the unsuccessful bidding party, Wasaya, or to Cargo North. Remotes made little to no effort to uphold the Contract and effectively thwarted Wilderness's efforts to work with the communities to obtain rescissions.

[174] Remotes denies it acted contrary to the obligation to act in good faith. Remotes submits that its primary duty is to provide electricity in accordance with its statutory mandate. It argues that one of the main purposes of the contract was to provide for reliable and safe delivery of diesel

fuel to remote First Nations communities. To fulfill this purpose, they were required to exercise their discretion in a manner consistent with ensuring that the Contract could be fulfilled and fulfilled safely. At all times, Remotes' use of discretion was connected to its purpose. As Wilderness could not provide safe and reliable delivery of fuel in the face of multiple BCRs prohibiting anyone other than Wasaya from delivering fuel, remotes' concerns about safety and reliability of supply were reasonable, and that safety includes prevention of incidents which could compromise people, equipment and reliability. Remotes argues that being safe means that it was required to anticipate what could happen and be proactive to prevent it. The duty of good faith did not require Remotes to gamble the safety of its fuel, the safety of its personnel, and the safety of its assets. Remotes argues that the Wasaya letter gave some insight, combined with the BCRs as to potentially what could happen if it disregarded the direction of the First Nations. Remotes submits it was reasonable, and not bad faith, to go to the vendor that the First Nations mandated when Remotes' efforts and Wilderness's efforts to change the prohibitions in the BCRs were unsuccessful. Remotes believed that the Contract terms allowed for this based on its interpretation. In other words, Remotes did the best it could in a difficult situation, within the parameters of the Contract, to ensure that its legislated mandate and the purpose of the Contract in ensuring a safe and reliable supply of diesel fuel to generate electricity was not compromised.

[175] Even though I have found that Remotes breached the Contract, it is necessary to determine the good faith issue in the event I am wrong in that conclusion, but also because it is important in considering the limitation of liability provisions of the Contract.

Duty of Honest Performance:

[176] Parties have an obligation of good faith in contract. This requires parties to a contract to perform their contractual duties honestly and reasonably and not capriciously or arbitrarily. In doing so, a contracting party should have appropriate regard to the legitimate contractual interests of the other contracting party. This does not require acting to serve those interests in all cases. The duty requires that a contracting party not seek to undermine the contractual interests of the other in bad faith: *Bhasin v. Hrynew*, 2014 SCC 71, at paras. 33, 63, 65 and 70.

[177] The duty of honesty in contractual performance means that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. It does not impose any duty of loyalty or disclosure, but rather is a simple requirement not to lie or mislead the other party about one's contractual performance.

[178] In determining whether the duty of honest performance of a contract was breached, the question to be asked is "whether a right under that contract was exercised, or an obligation under the contract was performed, dishonestly." The duty does not change or constrain the contractual right, it merely informs how it must be exercised. No contractual right, including a termination right, can be exercised dishonestly and, as such, contrary to the requirements of good faith. See: *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45, at paras. 37 and 48.

[179] While I do not agree with how Remotes handled the entire BCR issue reasonably, or with its interpretation of the s. 27 Contract Cancellation clause and s. 8 of the RFP, I cannot conclude that Remotes was dishonest with Wilderness or knowingly mislead it such that the duty of honest performance was breached. I make this finding for the following reasons:

a. There is no evidence that Remotes lied to Wilderness.

b. There is no evidence that Remotes mislead Wilderness. Remotes was clear in its position that it viewed the BCRs as an impediment to Wilderness being able to deliver fuel to the communities that had issued them, and that the Contract for those communities would not continue in the face of the BCRs. While I have disagreed with that conclusion and have found that Remotes' actions constituted a breach of contract, I cannot say its actions were dishonest.

c. While Remotes may not have specifically communicated to Wilderness that it had decided to give portions of the Contract to Wasaya, Wilderness must have had some indication this was the direction as early as mid-August 2015 when Remotes stopped using Wilderness for fuel delivery to Kasabonika. Then again in September 2015 with Instruction Notice #1, which removed the Kasabonika purchase order entirely from Wilderness. Wilderness was aware that Remotes' position was that it needed to secure the rescission of the BCR to continue that portion of the Contract. Wilderness voiced its displeasure and intention to seek damages. Wilderness knew that Kasabonika was a Wasaya community and supported Wasaya. There is no evidence to suggest that Remotes would not have been willing to reconsider its position if the BCR had been rescinded. The correspondence between Remotes and Wilderness suggests that Remotes may have reconsidered. Particularly given Remotes' position that it can simply cancel purchase orders and change or add suppliers at any time, Remotes would not have perceived a contractual barrier with Wasaya if it changed back to Wilderness as primary vendor. In fact, it would have been in Remotes' best interests to do so given that the cost of the new contract was greater for Remotes. Remotes was also unhappy about the position it felt it had been placed in by the BCRs. Had the BCRs been rescinded, Remotes' initial objectives as set out in the RFP of cost-effective service could have been met.

d. Similarly with respect to the Primary Communities that issued BCRs in favour of Cargo North. The evidence of Remotes was that it was hopeful that the BCR issue could be resolved and it 'dragged its feet' to try to afford time to do this, not issuing Instruction Notice #2 until March. In the meantime, Remotes honoured the Contract and Wilderness continued to deliver. There is some indication in the evidence that this also had to do with operational considerations (to coincide the new Cargo North contract with the end of the Winter Roads season), but regardless, Remotes did not mislead Wilderness as Wilderness was aware of the BCR rescission position.

e. While Remotes may not have communicated to Wilderness information that suggested the First Nations were not going to rescind the BCRs, and it would have been preferable for there to have been more disclosure at the time surrounding Remotes' conversations with the communities, I do not find that Remotes misled Wilderness in continuing to ask for rescission of the BCRs as a precondition to continuing with their contractual obligations. The evidence of Remotes was that it was aware that Wilderness had other relationships with the First Nation and was hopeful it could use those relationships to assist with the BCR issue. Correspondence from Wilderness to Remotes, dated November 30, 2015, indicated that Wilderness had received a positive response and willingness to meet from the Chiefs of Lansdowne and Weagamow.

f. What is more troubling is the evidence of Mr. Coulter that right after the July 7th, 2015, de-brief meeting with Wasaya, Remotes knew that if the BCRs came in as was discussed at that meeting, the Wasaya communities would be removed from Wilderness and Cargo North and go to Wasaya. By early July, Remotes knew it was "backed into a corner" and that portions of the Contract would be going to Wasaya. This is why Mr. Coulter told Wasaya to "sharpen their pencils". The evidence of Mr. Berardi was that as soon as the BCRs were on his desk he was going to follow the direction of the communities. There is no evidence that any of this was communicated to Wilderness in July. In fairness to Remotes, it had not yet seen the BCRs and what they said. The evidence is also that Remotes through correspondence (such as the Struthers response to the Wasaya letter) and other communications were trying to encourage a reconsideration of the position of Wasaya and its communities. *Bhasin* does not impose a duty to disclose, merely not to mislead. I do not find that Remotes mislead Wilderness by failing to disclose what was occurring in July.

g. The evidence does not support a conclusion that Remotes was dishonest in not providing copies of the BCRs to Wilderness and instead misrepresented the effect, nature, and wording of the BCRs as preventing Wilderness from delivering fuel, all in a deliberate attempt to force Wilderness to release the Contract so that Remotes could easily transfer portions of it to other vendors. The evidence of Remotes witnesses was that they viewed the BCRs, combined with the Wasaya letter as a threat to safety and security of supply. This was Remotes' interpretation. Mr. Cheeseman's letter to Remotes in early August 2015 suggested he was aware of the wording of the BCRs, whether or not he had physically seen them at this point. While I disagree with Remotes' interpretation as to the legal effect of the BCRs, Remotes' actions in relation to their contractual obligations were more unreasonable than dishonest.

h. The issuance of the emergency purchase order in favour of Wasaya in August 2015 was neither dishonest nor misleading towards Wilderness. While Remotes did not communicate any supply issues to Wilderness, this is consistent with the decision already made to award the Kasabonika portion of the contract to Wasaya.

Duty to Exercise Contractual Discretion in Good Faith:

[180] In *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7 ("Wastech"), at paras. 62-63, the Supreme Court noted that the duty to exercise contractual discretion in good faith requires the parties to exercise their discretion in a manner consistent with the purposes for which it was granted in the contract. Even unfettered discretionary powers have purposes that reflect the parties' shared interests and expectations. The duty is breached where the discretion is exercised unreasonably, in a manner unconnected to the purposes underlying the

discretion. The fact that the exercise of discretion substantially nullifies or eviscerates the fundamental contractual benefit may be relevant but is not a necessary pre-requisite to establishing a breach: *Wastech,* at para. 88.

[181] For the following reasons I find that by cancelling the purchase orders for the Primary Communities that Wilderness was contracted to serve (s. 27 Contract Cancellation clause) and giving the Work to Wasaya and Cargo North (s. 8 RFP), Remotes breached its duty to exercise contractual discretion in good faith:

a. As I have already found, the purpose of the s. 27 Contract Cancellation discretionary clause was to give Remotes sufficient operational flexibility to cancel purchase orders to deal with matters such as changing fuel requirements and delivery mechanisms (winter road vs. air delivery), without being liable to the vendor for the full estimated amount of fuel required as set out in the purchase orders.

b. The purpose of s. 8 RFP Process/Debriefings clause was to allow Remotes to procure and transport the required fuel to the First Nations communities if there was an issue with the Primary and Secondary vendor that meant they could not deliver the fuel. This allowed Remotes to meet its statutory obligation to ensure the communities have power and was consistent with one of the overriding objectives of the Contract, which was to provide for the supply and deliver of fuel to generate power.

c. The purpose of the provisions in the Contract that make reference to there being no guarantee as to volume or value was also to allow sufficient flexibility to deal with changing fuel requirements and delivery mechanisms.

d. While Remotes' motives and conduct *vis-à-vis* the First Nations were honourable in wanting to respect the BCRs, Remotes exercised its contractual discretion under these provisions with a manner inconsistent with the purpose for which the discretion was granted. For reasons already set out in this decision, it was not reasonable contractual performance, in that the discretion referred to in paragraphs (a)-(c) was not exercised in a manner consistent with the purpose for which it was granted to substitute Wasaya and Cargo North as the primary vendors for the Primary Communities when Wilderness was capable of satisfying its contractual obligations.

e. Related to the exercise of that discretion was conduct that was unreasonable:

    i. Remotes adopted a "BCR recission" approach, insisting it was Wilderness's responsibility to secure the recission of the BCRs as a condition to continuing the

contract, or alternatively Remotes was going to exercise discretion (inappropriately) under s. 27 Contract Cancellation and s. 8 RFP. Remotes also placed a burden on Wilderness as a condition of continuing the Contract (that is not found in the contract itself) requiring it to secure the support and/or consent of the communities.

ii. The situation that had developed arose out of Remotes' failure to honour the clear direction of the Wasaya communities during the procurement process. While I accept the evidence of Remotes that they had received support BCRs in the past but never been faced with a situation such as this, it was never Wilderness's responsibility (or Cargo North for its Wasaya primary communities) to fix the problem that arose when the communities chose to issue further and more forceful BCRs in support of Wasaya's position. While Wilderness needs to be able to deliver fuel, this was not an issue of Wilderness's making. Wilderness had not done something in the performance of its duties or in its other relationships with the communities to cause this problem. It was an issue that arose out of Remotes' procurement process, and it was Remotes' obligation to fix it. Some steps were taken (correspondence and discussions) but it was not enough to ensure Remotes met its contractual obligations to Wilderness. It was Remotes' obligation to ensure that it had the necessary consents for any portions of its DGS process that required access to First Nations communities and/or territorial lands.

iii. Remotes' conduct was also unreasonable in continuing to insist on the rescission of certain BCRs when it knew that this would not happen. Mr. Cheeseman's uncontradicted evidence is that these relationships are not developed overnight and can take years. Remotes had been told by certain communities that the BCRs would not be rescinded. While I do not find its conduct amounted to dishonesty, it was not reasonable to keep sending the BCR rescission letters to Wilderness, particularly for Kasabonika when it was clear that the Wasaya communities would not rescind. The situation may have been different, particularly given the Wilderness November 30, 2015 letter There was no evidence of the conversations between Wilderness and Remotes abouts what was happening, and no evidence of an attempt jointly to assist in finding solutions. Wilderness was not even given the opportunity with the Secondary Communities. If solutions were not available and the Contract needed to be breached, then Remotes would need to accept those consequences. Instead, Remotes adopted the BCR rescission narrative. Wilderness incurred costs associated with a consultant. Remotes also provided little to no support to Wilderness in this process. Wilderness sought Remotes' support for offering a rebate to the First Nations, initially proposed for the benefit of Remotes as part of the procurement process. Remotes did not even respond. While Mr. Reynolds testified that a rebate would not have changed his community's mind for ideological and other reasons related to protecting the community visions of ownership and protection of First Nations interests, there is no evidence that Wilderness knew this at the time. Remotes knew, or ought to have known, that economic development was a large part of the concern of the communities. The

evidence of Mr. Cheeseman is that having committed to a pricing structure as part of the RFP process, without Remotes' assistance it was difficult for his company to be able to offer sufficient economic incentives to the First Nations to secure rescissions of the BCRs. Remotes knew what direction it was going in at this point, and needed Wilderness to fail in securing the rescissions to attempt (incorrectly) to justify the termination of the contract. Its conduct ensured this would happen. Remotes was successful with this strategy with Cargo North. There were larger issues at play such as self-governance and the potential for a public relations issue if Remotes did not respect the fuel delivery portions of the BCRs.

iv. Remotes argues that its recognition of the First Nations' rights to govern their territories and traditional lands renders its actions reasonable. I have a two difficulties with this argument, which have been addressed in greater detail earlier in this decision. Remotes should have given greater consideration to the clear direction of the Wasaya communities in the procurement process before entering into the Contract. Secondly, Remotes decision with respect to the staffing transport aspect of certain Cargo North community BCRs, is inconsistent with this argument, as is its disregard of the Windigo position.

v. Remotes argues its actions were reasonable because of its statutory obligation under the *Electricity Act* to provide electricity. I have found that Wilderness was capable of delivering in accordance with the requirements of the Contract. Furthermore, while Remotes has a clear statutory duty, it also had a contractual obligation to Wilderness and a contractual duty of good faith.

Does the Limitation of Liability Clause Apply To Exclude or Limit Wilderness's damages?

[182] Remotes argues that if there is a breach of the Contract, and/or I find that Remotes breached the duty of good faith in contract law (which are denied), the Contract limits its liability.

[183] In written argument Remotes raised the section 11 disclaimer clause contained in the RFP document. The key portion of that clause reads as follows:

> Subject to all other exclusions and limitations anywhere in the RFP documents, Hydro One's maximum liability in the event of any loss or damages due in whole or in part to the Hydro One's act or omission, including, without limitation any negligence, breach of any statutory or other duty of care, or breach of contract, shall not exceed one thousand dollars ($1,000).

[184] While not clear, this may have only related to Remotes' misunderstanding of Wilderness's argument with respect to the role of the RFP process in the breach of duty of good faith arguments. I find that the relevant limitation of liability clause for consideration by me is s. 18 of the Contract Standard (the clause primarily relied upon by Remotes. The Contract standard document in which s. 18 is found has priority over the RFP document. The s. 11 RFP exclusionary clause applies only to liability arising from the RFP process. The Plaintiff's claims arise from breaches of the Contract, not the RFP process.

[185] Section 18 of the Contract Standard reads as follows:

> 18. Purchaser's Limitation of Liability
>
> Subject to all other exclusions and limitations in the Contract documents, the Purchaser's maximum liability to the Company, or anyone claiming through the Company, shall not exceed the lesser of the Contract Price or fifty thousand dollars ($50,000.00), and in no event shall the Purchaser be responsible for any loss or damages that are indirect, consequential, punitive or for economic loss, loss of revenues, loss of profits, loss of business opportunity, or as a result of fines levied by governmental authorities or the courts thereof. This limitation of liability shall apply where the claims are based on contract, under any statute, or otherwise.

[186] The clause limits liability to $50,000. It is unclear as to what that liability relates to because the balance of the provision provides that in *no* event shall Remotes be responsible for *any* loss or damage, including economic loss, whether under contract or otherwise. It is not disputed that Wilderness claims damages for the economic loss suffered by virtue of Remotes' breach of contract.

[187] Does s. 18 of the Contract Standard protect Remotes from damages for economic loss for the breaches I have found.

[188] Despite the arguments of Remotes, *Bhasin* at para. 75 is clear that parties cannot exclude the duty to act in good faith, and therefore cannot exclude liability from such a breach. This determines the issue given my finding of a breach of the duty of good faith.

[189] In the event I am incorrect with respect to my finding of a breach of the duty of good faith, I must determine whether damages for breach of contract are excluded by s. 18.

[190] The meaning and effect of a limitation or exclusion of liability clause must be determined in accordance with the analytical approach set out in *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways),* 2010 SCC 4. In *Tercon,* at, paras. 122-123, the Supreme Court of Canada adopted the following approach to exculpatory provisions:

a. Does the exclusion clause apply to the facts as found? This will depend on the Court's assessment of the intention of the parties as expressed in the contract. When interpreting whether the clause applies in the circumstances, principles of contractual interpretation apply such that the words of the provision must not be read in isolation but rather considered in harmony with the rest of the contract and in light of its purposes and commercial context.

b. If the clause applies, was it unconscionable at the time the parties entered into the contract?

c. If the clause applies and was not unconscionable, are there public policy reasons that are sufficiently strong to outweigh the public interest in the enforcement of contracts, and that warrant not enforcing the contract? Otherwise, a court has no discretion to refuse to enforce a valid and applicable contractual exclusion clause (see para. 82).

See also: *Ferraro v. Neilas,* 2023 ONCA 297, at para. 52.

[191] Additional principles applicable to the interpretation stage of the *Tercon* framework include:

a. When there is ambiguity or contradiction in an agreement that cannot be resolved by other rules of construction, an exculpatory provision is interpreted *contra proferentem,* meaning

that the language of the contract will be construed against the party that inserted the exculpatory provision.

b. Exculpatory provisions are interpreted strictly, and clear words are necessary for the exclusion to apply.

See: *Ritchie v. Castlepoint Greybrook Sterling Inc.,* 2020 ONSC 3840, at paras. 64 and 73, aff'd 2021 ONCA 214.

[192] Parties to a contract, particularly sophisticated entities operating on a level playing field and engaged in a commercial relationship, are free to allocate risk as they see fit. Exclusion or limitation of liability clauses are a means of allocating risk. The extent to which the risk of breach is reallocated to the non-breaching party will depend on the language of the exclusion clause considered in the context of the entire agreement: *Chuang,* at para. 32, citing *Tercon,* at paras. 96 and 102.

[193] In *Chuang,* at para. 34, the Court of Appeal noted that the exclusion clause in that case was broadly written. The Court noted that the inclusion of the word "damages" was particularly telling in that damages occur as a consequence of a breach of an agreement. The exclusion clause was specifically written to apply in the event of a termination. The Court of Appeal concluded that the broad language of the exclusion clause and, in particular, the reference to "damages" indicates that it reaches beyond a termination in compliance with the terms of the agreement, but also a termination that occurred in breach of the contract.

[194] In *Chuang,* the plaintiff argued that an interpretation of the exclusion clause that protected the defendant from the consequences of its own unlawful, unreasonable, and arbitrary termination of the agreement would lead to a commercial absurdity. This argument was rejected by the Court of Appeal for several reasons related to the specific facts of that case. The Court also found that the exclusion did not prevent the plaintiff from seeking specific performance. Overall,

the plaintiff had chosen to accept the terms and take on the risks associated with termination that were clearly set out in the contract.

[195] Remotes argues that under the *Tercon* framework, and considering the *Chuang* principles and decision overall, the exclusion clause applies. When interpreted in the context of the whole agreement, the clause is applicable as it excludes economic loss, and this is an economic loss claim. Wilderness does not argue unconscionability. There are no public policy reasons to disregard the exclusion clause. This was a freely negotiated contract in which both parties had an opportunity to obtain independent legal advice prior to signing. Wilderness entered into the bid with full knowledge of the terms of the Contract. It knew that if it wanted the bid, it had to accept the terms, and it agreed to do so. Wilderness had also previously delivered fuel for Remotes, by air, to remote First Nations communities and knew the risks. In entering into the Contract in this context, Wilderness agreed to assume the risk that it could suffer economic loss damages that were not recoverable. The Contract expressly allocates risk as between two sophisticated business parties. What Wilderness asks the Court to do is exactly what it must not do, which is to set aside the exclusion clause simply on the basis that it may be unfair and unreasonable.

[196] After considerable reflection, I must disagree with Remotes and find that s. 18 does not apply to limit Remotes' liability to Wilderness for the breach of contract.

[197] Firstly, the clause is not clear and unambiguous. I struggled to understand its application, as set out above. It also commercially makes very little sense. While it is subject to other exclusions and limitations, it is not also subject to other provisions of the Contract. A broad interpretation of the provision could mean that Remotes would not even have to pay anything

beyond $50,000 (if that) for delivered fuel payments outstanding. The clause is confusing as to when it applies and what it applies to.

[198] Based on the balance of the Contract, what Remotes sought to do was exclude liability for undelivered portions of fuel, or for any expectation as to the volume of fuel to be delivered. The contingencies otherwise discussed in this decision is what Remotes had an interest in ensuring it was protected from, even if that resulted in damages and economic loss to Wilderness.

[199] Remotes' written submissions is telling when it argues that "WNA knew the contract terms and the contingencies involved in delivering fuel by air to remote communities. WNA agreed to the terms of the Contract." (Trial Closing Statement of Remotes, at para. 141). Remotes continues to state that "[f]uel must be delivered on an 'as needed basis'. There are many factors that affect the need for fuel. Contingencies were provided for in the contract. I find that this is what the exclusion of liability seeks to protect, and this is the risk that Wilderness was required to accept. An inability to recover damages for a unilateral termination of the Contract would not have been in the contemplation of the parties given the wording of s. 18 or the surrounding circumstances.

[200] Remotes cites *Ritchie v. Castlepoint Greybrook Sterling Inc.,* (specifically para. 93 of the trial decision) for the proposition that contracts that exclude economic loss are considered to be a complete defence to any claim. With respect, this overstates *Ritchie.* At para. 93, Perell J., merely concluded that the exculpatory provision in *that* case applied. The facts of that case are different than the case at hand, as is the exculpatory clause. The exculpatory clause in *Ritchie* specifically provided for what the purchaser was entitled to in the event the vendor terminated the agreement, and what it was not entitled to. That clause was clear and unambiguous.

[201] What I do agree with, is Remotes statement that where the language is clear, an exculpatory provision can apply to even a breach of a fundamental term (*Ritchie*, at para. 80). That is not the case here.

Did Wasaya Induce the Breach?

[202] Wilderness alleges that when Wasaya learned it was unsuccessful in securing any portion of the air delivery contract with Remotes through the competitive bidding process, pursuant to instructions from some of its owners (the Wasaya Communities) it hatched "the BCR plan" to secure the contract in a different way. Wilderness alleges that this plan included exerting threats, pressure, and influence over Remotes and Hydro to force Remotes to change the award of the air delivery contract. Wilderness alleges that Wasaya is jointly and severally liable with Remotes for having committed the tort of inducing a breach of contract.

[203] A person who persuades a party to a contract to break his/her contract ought to be held responsible, along with the one who actually commits the wrong. See: *Alleslev-Krofchak v. Valcom Ltd.*, 2010 CarswellOnt 6085, 2010 ONCA 557, at paras. 94 and 97.

[204] While the parties frame the test slightly different, they do not disagree as to what the test is for inducting a breach of contract. To succeed, Wilderness must establish all four of the following elements:

a. Was there a valid and enforceable contract between Wilderness and Remotes?
b. Was Wasaya aware of the existence of this contract?
c. Did Wasaya intend to and procure (cause) a breach of this contract?
d. Did Wilderness suffer damages as a result of the breach?

See: *Chaba v. Khan*, 2020 CarswellOnt 14844, 2020 ONCA 643, at para. 17.

[205] There is no dispute that Remotes and Wilderness had a valid and enforceable contract. Particularly in light of the contents of the June 26, 2015, Wasaya letter, it is also reasonable to conclude that Wasaya was aware of the existence of this contractual relationship. The first two elements of the tort are satisfied.

[206] Where the dispute lies is whether the actions of Wasaya procured the breach, and whether this was its intention. Intention is proven by showing that Wasaya acted with the desire to cause a breach of contract, or with the substantial certainty that a breach of contract would result from its conduct. The fact that breach was a natural consequence of Wasaya's conduct is not sufficient: Wasaya must have intended it. See: *Drouillard v. Cogeco Cable Inc.*, 2007 ONCA 322, at paras. 29 and 30.

[207] For the following reasons I find that the actions of Wasaya, along with the Wasaya communities, procured the breach, and intended to do so:

a. On June 26, 2015, the Wasaya 'threat' letter was sent. I disagree with the position of Wasaya that the letter merely set out the position of the owner communities and had no impact on the breach. The letter was written by Mr. Rodyniuk as President & Chief Executive Officer of Wasaya. It went beyond the threats of the First nations. On page two of the letter, Wasaya threatened that "…if we do not receive word guaranteeing Wasaya Airways being used as the airline into the First Nations who has issued the BCRs attached, *we will raise the issue in the public domain through news agencies, and…"* **[**emphasis mine]. While I accept that the letter alone would not have induced the breach, Wasaya's overall participation in the BCR plan that was advanced in the letter, and in vigorously pursuing the termination of the contract to secure it for itself, is what attracts the liability.

b. I also do not accept Wasaya's argument that any impact the BCRs had on Remotes in its dealings with Wilderness cannot be attributed to Wasaya. I disagree that a finding that Wasaya induced the breach is equivalent to attributing the actions of the First Nations to Wasaya. Wasaya is being held responsible for its' actions that contributed to the breach. While the evidence of Remotes supports a conclusion that the BCRs were the deciding

factor and Mr. Berardi's evidence was that the letter was perceived by him as threats from the First Nation, Wasaya did have involvement in the BCR plan through the letter and as set out below. Even if the threats in the Wasaya letter were those of the First Nations, Wasaya's letter reinforces those threats. Some BCRs (it is not clear which ones, if any were attached to the actual letter) were provided through Wasaya. Wasaya was an active participant in the BCR plan, the goal of which was to force the cancellation of the Wilderness and Cargo North contracts for the Wasaya communities, and award that contract to Wasaya.

c. Correspondence between Wasaya and its member communities supports a conclusion that it was involved with the First Nations in trying to compel Remotes to change the contract award through the issuance of BCRs. As an unsuccessful proponent it did not merely sit back and allow the First Nations to communicate their dissatisfaction and direction to Remotes. Wasaya was actively involved in coordinating and advancing the effort.

d. On June 22, 2015, as part of an email chain started by Colleen Slipperjack (Executive Assistant at Wasaya, with Mr. Rodyniuk copied) attached a "revised BCR in support of Wasaya with regards to the Hydro One contract.". The email went on to state that:

> "I would like to express the concern and the importance of providing Wasaya with the ownership community support resolution to be forwarded to Hydro One Remote Communities. The importance being is Wasaya airways was not awarded any communities for the contract. The whole contract was awarded to another carrier.
>
> Please forward the resolutions to my attention at your earliest convenience."

The draft was not attached to the exhibit entered at trial. While Mr. Rodyniuk's evidence was that Ms. Slipperjack was also the executive assistant to the Chair of the Board and the Chiefs, the inference being it could have been sent on their behalf, the email specifically says it was sent "On behalf of Wasaya Management".

Mr. Rodyniuk's evidence was that he had no input with respect to the revised BCR. There was no evidence lead by Wasaya as to who prepared the BCR. Regardless of who prepared it, Wasaya actively encouraged the signing and delivery of the BCRs, which ultimately lead to the breach of contract with respect to Kasabonika. It also lead to the breach of the Cargo North contract, which caused the Cargo North communities to adopt similar positions.

I note that follow up email correspondence was sent from Ms. Slipperjack to various Chiefs, including Kasabonika on July 8, 2015, stating in part…

> "Wasaya is requesting and requires full support of the ownership communities for the Hydro One contract by way of forwarding a BCR that we can present to Hydro One Remotes Communities.

> Please see the attached revised BCRs for the communities that are serviced by Hydro…"

e. On July 27, 2015, Mr. Rodyniuk sent email correspondence to Chief James Mamakwa, Kingfisher Lake First Nation, with an attachment "Kingfisher Hydro One.doc". The email attached a proposed letter for Kingfisher Lake to send to Hydro One about the air delivery contract. In evidence Mr. Rodyniuk could not remember if he authored the letter or not. Whether or not he did, he encouraged the sending of it by this community.

f. Also on July 27, 2015, Mr. Rodyniuk sent email correspondence to Yvonne Wood and others attaching the Kingfisher Lake Hydro One letter, asking her to forward the letter to "all our ownership Chiefs as soon as possible. *This is a suggested response* to the letter they would have received from Hydro One late last week…". [emphasis mine]. Presumably, although it is not clear, this would have been forwarded to Kasabonika.

g. On August 2, 2015, Mr. Rodyniuk sent correspondence to Chief Bart Meekis of the Sandy Lake First Nation, copying two others. The letter stated that Wasaya had been awarded litres of fuel for delivery to Angling Lake (Wapekeka), and Hydro has asked Wasaya to "revise our numbers". The letter goes on to stated that "…[a]ll ownership communities will experience the same success if the letters are sent in to Hydro One. I recommend either you or I write the letter on behalf of all the ownership communities. I believe it would be more powerful if you were to sign the letter**.** Of course we would have to get approval from each to send the letter on their behalf."

   While Sandy Lake was not a Primary Community for Wilderness, this letter supports the conclusion that Wasaya was actively encouraging its communities, and actively assisting them in procuring the breaches of contract with Wilderness and Cargo North, in an effort for Wasaya to be awarded contracts it was not successful at procuring during the RFP process.

h. Mr. Rodyniuk also had various discussions and meetings with Remotes to advance Wasaya's position. While there is little evidence before me as to what transpired during these meetings and discussions, I am not left with the impression that they were simply a post-RFP debrief, which the process provides for. The evidence of Mr. Coulter was that following the July 7th meeting with Wasaya, the decision was made to transfer the contracts for the Wasaya communities upon receipt of the BCRs.

i. Based on the evidence before me, I do not accept the argument of Wasaya that it did nothing wrong in carrying out the wishes of its member communities. Wasaya clearly was active in coordinating and advancing the position and encouraging the community support of that position. Wasaya is a corporation and unsuccessful proponent. Its involvement in causing the breach of contract, for whatever reason, even if it is carrying out the wishes of its shareholders, renders it liable for inducement of breach.

j. It is clear from the correspondence and other evidence that there was a clear intention on the part of Wasaya to induce a breach of the Wilderness and Cargo North contracts to

secure that work for itself. The facts of this case are somewhat similar to *Fleck et. Al. v. Jones*, 1972 CanLII 127 (SCC), [1973] S.C.R. 42. In that case, a dairy was held liable for inducing a breach of contract between milk producers, from whom the dairy purchased milk, and the plaintiff (Jones), who contracts with the producers for the transport of milk to the dairy. Anxious to secure the transportation business for itself and knowing of the contract between the producers and plaintiff, the dairy threatened not to purchase the producers' milk unless they shipped to the dairy using the dairy's own transportation service. The producers reluctantly complied and breached their contracts with Jones. The Supreme Court, at page 50 noted:

> "…the question in this Court as in the Courts below is whether they decided upon repudiation because of illegal pressure from English (by way of a threat to refuse to take delivery of their milk from Jones) or simply as a matter of coming to their own decision uncoerced but knowing that the dairy wanted to do the hauling."

Then at page 52, the Court concluded that the requirement of intention was satisfied since this "is not a case where the defendants merely caused a breach of contract, although knowing of its existence, in pursuit of a different object of their own, but one where there was an intentional and knowing procurement of the breach through pressure on the contracting producers in pursuance of the same object as that realized by Jones in consummating his contracts with the producers."

The case at hand is similar. While the BCRs were the cause of Remotes' cancellation of Wilderness's contract with Kasabonika (the only Wasaya community), Wasaya was involved in the actions that coerced Remotes to breach that contract.

[208] Once the four elements of the tort have been made out, I must consider whether the actions of Wasaya were justified, such that the defence of justification is available to Wasaya. See: *Drouillard*, at para. 26.

[209] The defence of justification has a narrow scope. It requires a "scrupulous consideration" of all the surrounding circumstances to determine whether the motive, object, and reason for inducing a breach of contract should excuse the defendant. It is not enough for the defendant to say that it acted without malice or bad faith. See: *Johnson v. BFI Canada Inc.*, 2010 CarswellMan 627, 2010 MBCA 101, at para. 78, and *Drouillard*, at para. 39.

[210] The following factors are relevant to the determination of justification:

a. The grounds for the interference. Is there a statutory, contractual, or some important social or public policy reason?

b. The purpose of the interference. Was there a legitimate financial interest requiring protection. Was the defendant acting in good faith or motivated by malice?

c. The means used (did the defendant exceed its authority?)

d. The nature of the contract being interfered with.

e. The consequence of the breach.

See: *Alleslev-Krofchak v. Valcom Ltd.,* 2009 CanLII 30446, at paras. 401-417, affirmed 2010 ONCA 557, application for leave dismissed 2011 CanLII 19614 (SCC); and *Even v. El Al Israel Airlines Ltd.,* 2006 CarswellOnt 1046, at para. 115.

[211] Wasaya argues its actions were justified in "relaying" the legitimate safety, economic, and self-governance concerns and positions of the First Nations.

[212] The defence of justification has not been established for the following reasons:

a. When Wasaya submitted its bid, it agreed to the terms of the RFP process. Wasaya had a fair and equal opportunity to obtain the air delivery contract for the Wasaya communities through the RFP process, but pursuant to that process was not the successful proponent.

b. While the Wasaya communities have legitimate interests in the protection of their rights of self-governance, their economic development initiatives and in the safety of their communities, Wasaya as an unsuccessful proponent in the RFP process (and a competitor with the successful proponents) should not have been at the forefront of those advocacy initiatives. The communities were having their own discussions with Remotes/Hydro and there was no evidence as to why Wasaya needed to be involved in the manner it was.

c. There is no evidence of any legitimate safety concerns that Wilderness presented, nor is there evidence that Wilderness could not deliver the required fuel.

[213] For these reasons I find Wasaya liable to Wilderness for the tort of inducing a breach of contract.

[214] I do note that Wilderness unsuccessfully brought a motion prior to trial to have Wasaya Petroleum added as a defendant. No one argued whether the Wasaya defendant in this case is the appropriate named defendant.

Damages:

General Principles:

[215] The burden of proof is on Wilderness to prove the damages it claims to have suffered as a result of the breaches of contract and duty of good faith by Hydro, and as a result of the inducement of breach by Wasaya. See: *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2012 SCC 51 at para. 73 and *Daniels CCW Corporation v. Shewchuck*, 2023 ONSC 2955, at para. 48.

[216] The Supreme Court of Canada in *Asamera Oil Corporation Ltd. v. Sea Oil & General Corporation et.al.*, 1978 CanLII 16 (SCC), at paras. 19 and 24, confirmed the following general principles that must be applied when considering what damages are appropriate to award:

a. the calculation of damages for breach of contract are limited to those which will place the injured party in the same position as it would have been if there had been proper performance of the contract by the defendant;

b. the injured party is only entitled to recover such part of the loss that was at the time of the contract reasonably foreseeable as a result of the breach and whether a loss was reasonably foreseeable depends on the knowledge possessed by the party who later commits the breach; and

c. the onus is on the wronged party to prove its damages, and there is therefore a burden to establish on a balance of probabilities what its loss is.

I have applied these principles to this decision.

Amounts each party says are appropriate:

[217] Wilderness seeks damages in the amount of $6,941,280 plus pre-judgment interest at 0.8% calculated from August 17, 2015, to the date of judgment. This amount represents what Wilderness says is its net economic loss had it been able to perform the Contract as contemplated for the Primary Communities, and if it had been allocated the Secondary Community work for Kingfisher Lake, Big Trout Lake, Sandy Lake, and Wapekeka once Cargo North released their contractual obligations. The total amount is allocated as between the Primary and Secondary Communities as follows:

a. Primary Communities lost profit: $3,370,589
   Less deduction for mitigation: $ 651,601
   Estimated loss after mitigation: $2,718,988 for the four Primary Communities; plus
b. Secondary Communities lost profit: $4,753.340
   Less deduction for mitigation: $ 531,048
   Estimated loss after mitigation: $4,222,292 for the four Secondary Communities.

[218] The damages sought by Wilderness were calculated by its expert, Donna Bain Smith. Ms. Bain Smith (Bain Smith Consulting) testified at trial. Her reports setting out her calculations and the basis for them were filed as exhibits.

[219] Remotes argues that these damages are excessive, offend the principle of minimum performance, and do not properly consider mitigation efforts by Wilderness.

[220] Remotes argues that I should prefer the calculations of its expert, Greg McEvoy (Cohen Steger Hamilton). Mr. McEvoy testified at trial, and his reports were also filed as exhibits. He calculated the losses suffered by Wilderness resulting from the breach of contract as follows:

Primary communities only:	$2,379,322
Less profits from mitigation:	$3,617,089
Estimated loss after mitigation:	0 (Wilderness realized profit and not loss)
Primary and Secondary communities:	$4,650,015
Less profits from mitigation:	$3,617,089
Estimated loss after mitigation:	$1,033,000

[221] Both experts calculated damages by estimating the revenue lost as a result of the breach of contract and the incremental costs that Wilderness would have incurred to generate the lost revenue. Then they applied a discount rate to determine the present value of that loss.

[222] In determining certain expenses in the calculation of Wilderness's loss, Mr. McEvoy relied on the findings of Dr. Steven Meyers, an aviation expert retained by Remotes, and his report dated May 17, 2023 (the "DVI Report"). Dr. Meyers was qualified as an aviation expert at trial and testified as to his findings related to the number of aircraft required by Wilderness, maintenances requirements, and hours/days per year that the aircraft could be flown.

[223] The primary differences between the calculations of the experts, and the issues I must resolve, as identified by counsel, are:

a. Whether profits realized from a subsequent contract entered into between Wilderness and a third party should be considered mitigation and deducted from the damages otherwise payable?

b. What are the appropriate factual assumptions to be applied to the calculation of various incremental costs Wilderness would have incurred in order to service the Contract?

c. What is the appropriate discount rate to be applied?

I must also determine whether damages are payable at all for the Secondary Communities, or just the Primary Communities.

Issues:

Are Damages Payable for the Secondary Communities:

[224] I agree with Remotes, albeit for different reasons, that even if there was a breach of the Contractual obligation to use Wilderness as the vendor for the Secondary Communities after Cargo North released its contractual rights, Wilderness should not receive damages on account of the Secondary Communities lost.

[225] Remotes argues that in determining what the Plaintiff's position would have been but for the breach of the contract, the minimum performance principle as confirmed by the Supreme Court of Canada in *Hamilton v. Open Window Bakery Ltd.,* 2004 SCC 9, [2004] 1 S.C.R. 303 should be applied. The principle provides that where there are several ways in which a contract may be performed, damages are awarded based on the mode of performance that is least profitable to the plaintiff and the least burdensome to the defendant.

[226] The evidence was clear that Remotes has never had to call on a secondary vendor for air delivery. For the three communities that Wilderness remained secondary vendor, Wilderness was not required to deliver. Remotes argues that the conclusion to be drawn is that there cannot be damages for the removal from the Contract of the four Secondary Communities because

Wilderness would not have been called upon to deliver in any event. This is true but misunderstands the argument of Wilderness.

[227] Wilderness argues that it is entitled to damages for the Secondary Communities that Cargo North released as primary vendor. The evidence was that if a primary vendor could not perform, the secondary vendor would be called upon. Once Cargo North released its obligations then Wilderness should have become the primary vendor.

[228] Damages are intended to place a plaintiff in the position they would have been had the Contract not been breached. The Court must make sure that the wronged party is compensated for its loss, but also make sure that the wrongdoer(s) are not abused. A victim should not profit from a breach, but rather obtain the financial equivalent of performance of the contract. See: *Southcott Estates v. Toronto Catholic District School Board*, at paras. 20-25, and *Atos IT Solutions v. Sapient Canada Inc.*, 2018 ONCA 374, at para. 30, application for leave to appeal dismissed 2019 CanLII 21184.

[229] But for the breaching conduct, Wilderness would have only delivered as the Primary Vendor to the Primary Communities. If Remotes had not insisted on Wilderness and Cargo North obtaining rescissions of the BCRs as a precondition to continuing to service the various Wasaya communities, then Cargo North would have continued as primary vendor for the Secondary Communities and Wilderness as secondary. Wilderness would not have been called upon to provide any services for these communities.

[230] While Wilderness is correct in that it should have received those communities (assuming it could deliver, and I have made no findings with respect to the Secondary Communities, some of

which do require ground transportation of the fuel into their communities and therefore may present some different considerations to my analysis of the Primary Communities), it strikes me that in claiming damages for the Secondary Communities Wilderness is seeking to obtain a benefit from the breach that it would not have had if Remotes did not adopt the BCR rescission approach that affected both Wilderness and Cargo North. A damage award that compensates Wilderness for the loss of the Primary Communities, in my view, makes Wilderness whole. To award for both the Primary and Secondary Communities strikes me as punitive towards Remotes and Wasaya and provides Wilderness with a windfall it would not have otherwise received had everything proceeded as originally contemplated following the RFP process.

Mitigation:

[231] Remotes and Wasaya argue that there are no damages because Wilderness has fully mitigated its loss. When mitigation results in a sum of money equal to or greater than the original loss, a plaintiff has made himself whole, and cannot claim further from the defendant. See: *British Columbia v. Canadian Forest Products Ltd.*, 2004 CarswellBC 1278, 2004 SCC 38, [2004] S.C.J. No. 33, at para. 106.

[232] In September 2015, Wilderness entered into a contract to deliver fuel with Pelita ("Indonesia Contract"). In August of 2016, Wilderness sent two of its three fuel aircraft to Indonesia to satisfy the requirements of that Contract. The Indonesia Contract was financially lucrative for Wilderness, with it achieving increases in revenue greater than it would have realized from the Contract. Remotes says that the Indonesia Contract represents mitigation and given that Wilderness did better financially under this contract than it would have under the Remotes contract, it has suffered no actual damages.

[233] Wilderness argues that the profits earned from the Indonesia Contract are not relevant to the issue of mitigation because it is not a contract that was sought after and substituted for the Remotes contract once that had been breached, but rather a contract that Wilderness had been exploring since as early as 2014 to operate concurrently with the Remotes contract.

[234] The Supreme Court of Canada in *British Columbia v. Canadian Forest Products Ltd.*, at paras. 107-109 recognized that there are two different, but similar ways of phrasing the question to be answered:

a. did the Indonesia Contract (the subsequent transaction) arise out of the consequences of the breach and not, in the ordinary course of business? or

b. could Wilderness have earned the increased revenue from the Indonesia Contract if Remotes did not breach the contract and Wilderness continued to service the Primary Communities?

[235] There is no documentary evidence provided as to when the negotiations for the Indonesia Contract began. Mr. Cheeseman's evidence was that for years prior to the Contract, Wilderness had been looking to expand its fuel delivering business, including exploring overseas opportunities. In contemplation of expanding its business, Wilderness had expanded its fleet of Air Tractors in 2008 and 2010. Mr. Cheeseman says that he had been having discussions with parties in Indonesia at least two years, and possibly longer, prior to the start of the Contract. In other words, it was contemplated that the Remotes contract and Indonesian contract would be performed concurrently if they both came to fruition.

[236] Remotes argues that I should not accept Mr. Cheeseman's evidence, which amounts to nothing more than "trust me, I was talking to them for years". This, Remotes argues, is not credible. Remotes further argues that a negative inference should be drawn from Wilderness's

failure to produce documents showing when negotiations commenced. Remotes asked for these documents and even brought a motion for production of these and other documents. In the context of a contract for multi-millions, it is reasonable to expect that there would be some documentary evidence as to when negotiations of when the Indonesia Contract began and began to take shape. If not, Remotes argues that Wilderness should have called a representative of Pelita to give evidence.

[237] Wilderness says that no negative inference should be drawn. Remotes brought a motion for production of information. Information was produced. Remotes did not seek or request anything further and cannot now complain that failure to provide should result in an adverse inference.

[238] A motion was brought by Remotes. The motion sought, amongst other things, a request for the Indonesia Contract. An Endorsement on April 6th suggests that the issues had been resolved based on the Plaintiff's agreement to produce certain documents. The Plaintiff provided the contract. On April 18, 2023, Remotes requested further information pertaining to the RFP process and emails confirming the discussions that took place surrounding the contract. The Plaintiff responded by advising that there was no RFP process. I am uncertain as to what further requests followed. Mr. Cheeseman's evidence spoke to "discussions" and travelling to Indonesia. I am uncertain as to how much of the discussions may have occurred in writing.

[239] I found Mr. Cheeseman to be a very credible witness. He answered questions in a straightforward manner, including in cross-examination. I was impressed by how balanced he was in his evidence. He was not evasive. He conceded points that were reasonable to concede. Despite the impact this evidence has on the calculation of damages, I have no reason to disbelieve him

when he says that the Indonesia Contract was something he had been working on since prior to the 2015 Contract. In the circumstances, I see no need to draw an adverse inference from the failure to provide further documents supporting when the discussions surrounding this contract began. I find that the Contract did not arise out of the breach, but represented an expansion of business based on opportunities that pre-existed the Contract.

[240] This does not mean that the Indonesia Contract has no impact on the calculation of damages. Ms. Bain Smith's calculations provide for a deduction for mitigation in terms of saved fixed costs relating to aircraft lease costs, insurance, and pilot costs as a result of having the Indonesia and Remotes contracts.

[241] Ms. Bain Smith's calculations assume that Wilderness could service both the Indonesia and Remotes contracts at the same time. Her report notes that "[r]egardless of the Hydro One Contract, Wilderness North Air management advised us that they still would have moved forward with the Indonesia contract, simply by leasing aircraft and hiring pilots to fulfill the contract as required." Mr. Cheeseman's evidence was that there were various financing programs also available to allow for the acquisition of further aircraft, and it was also available to Wilderness to subcontract fuel delivery if required.

[242] Remotes argues that Ms. Bain Smith's assumption that both contracts could occur concurrently is flawed. If both contracts were to operate at the same time, more planes would have been required. It argues that it would have cost $6 million for Wilderness to buy two planes and convert those planes to fuel boss planes. It would have also taken 12 to 18 months to acquire those planes. The only reason Wilderness was able to enter into the Indonesia Contract was because it had the two required planes available because of the cancellation of the majority of the Remotes

contract. The terms of the lease are clear that the lease payments begin when the planes are delivered. They were delivered shortly before the lease date only because they were available. As such, consistent with the conclusion reached by Dr. Myers, Mr. McEvoy has assumed that Wilderness could not have serviced both contracts at the same time. Furthermore, an approach that deducts fixed costs saved as a result of servicing two contracts concurrently is not properly mitigation.

[243] The evidence is that two planes were required for fuel delivery for Wilderness, and two Air Tractor/fuel boss planes were required to service the Indonesia Contract. As I interpret Ms. Bain Smith's evidence, she has factored into her calculations the costs associated with leasing/acquiring additional aircraft to ensure both contracts could be satisfied. If I am incorrect in this assumption and the result of a failure to do so inflates Wilderness's damages, then her calculations of damages must be adjusted to ensure that there were four fuel delivery planes available to satisfy the Primary Community needs and the Indonesia Contract.

[244] The question also arose as to whether it was even possible to service both contracts concurrently given that additional aircraft would have to be obtained. The evidence was that to obtain a new plane and make the required fuel boss modification would take 12 to 18 months. Mr. Cheeseman's evidence was that he would have leased or purchased the required aircraft. His evidence was further that quite often there are other planes available. In November 2016, for example, there were used Air Tractor planes available for sale. The only delay to the Indonesia contract would have been the 6 months for the fuel boss modification.

[245] I note that the Indonesia Contract does not require delivery of the two Air Tractors by a particular date. This is consistent with Mr. Cheeseman's evidence. The term of the contract was

to begin running, and payments to Wilderness to commence, once there was delivery of the planes. While I am satisfied that any delay in acquiring additional aircraft would not have delayed the ability of Wilderness to secure the Indonesia Contract or impact the total revenue realized under that contract, it would have delayed when income would have started to be earned. I find that at a minimum, the planes could not have been delivered, and income not earned on the Indonesia contract until July 2017 (12 months after the contract being signed). Even though the evidence supports the availability of second-hand aircraft in November 2016, I do not know what was available when the contract was negotiated in June 2016. Furthermore, Mr. Cheeseman's oral evidence was that he likely would have bought new directly from Air Tractor or a dealer he has used previously. Therefore, I have assumed that Wilderness would have ordered the new aircraft to be acquired once the contract was secured at the end of June, with a 12-month delay in commencing the Indonesia Contract. If this finding decreases damages because the Indonesia contract could not start until 2017 (but would still run its full duration), the calculations should be revised accordingly. I am unclear as to whether this finding has any impact on the expense or discount rate calculations.

[246] Given the findings I have made as to mitigation, I have no evidence to suggest that treating the fixed costs arising out of servicing both the Indonesia Contract and Remotes Contract as mitigation inflates the damages payable. These costs are appropriate to deduct, in some fashion, from the losses estimated for the Contract period.

Incremental Costs:

[247] In completing their damage calculations, each of the experts calculated the variable and other incremental costs that would have been incurred by Wilderness in order to perform the

Contract, and therefore ought to be deducted from the estimated revenue that Wilderness would have earned had it performed the Contract. As costs associated with earning the revenue increase, profit decreases.

[248] The difference between the incremental costs calculated by the experts is quite substantial and has a significant impact on the overall damages.

[249] The differences in the calculations arise because of the following:

a. Different assumptions between the experts on the existing infrastructure Wilderness had to service the Contract and what was required ongoing.

b. Different factual assumptions as to the number of aircraft, pilots, and mechanics required to fulfill the Contract.

[250] With respect to the infrastructure, in calculating the other incremental costs, Ms. Bain Smith assumed that Wilderness had three aircraft that it would use to service the Contract. Mr. McEvoy assumed that in 2016 Wilderness sent two of its existing aircraft that were servicing the Contract to service the Indonesia Contract. His calculations assume that as of 2016, Wilderness only had one aircraft to service the Contract. Ms. Bain Smith assumes that Wilderness would acquire additional aircraft to service the Indonesia Contract. This issue is difficult to resolve and involves a certain amount of speculation. The evidence of Mr. Cheeseman is that various options were available to ensure the required number of aircraft, including purchasing or leasing and subcontracting delivery of fuel. If I must choose one approach over the other, consistent with my findings on mitigation, I find that Wilderness would have used the required existing aircraft to firstly service the Contract, and then acquired additional aircraft needed for the Indonesia Contract.

The Remotes contract was time sensitive with respect to fuel delivery requirements. The Indonesia Contract was not time sensitive with respect to the delivery of the aircraft.

[251] With respect to the differences in factual assumptions. It was agreed that incremental costs change with the number of air hours. The difference in calculating the costs associated with the air hours that would have been flown relate to assumptions as to the following:

a. How many aircraft are required to satisfy those hours. This requires a determination of the number of days, airtime hours and working hours (evenings and weekends) the Air Tractor aircraft could operate and deliver fuel;

b. The number of maintenance hours required to service the Air Tractor; and

c. Discrepancies in the use and definitions of airtime hours and flight time hours.

[252] Ms. Bain Smith relied on Wilderness management for her assumptions, while Mr. McEvoy relied on Dr. Steven Myers, aviation expert retained by Remotes. Dr. Myers testified at trial.

[253] The challenge for me in determining the damages issues overall, is that many of the assumptions used and calculations contemplate that the Wasaya secondary communities would also be serviced, which I have determined they would not have. It was not always clear to me in reviewing the evidence whether an area of dispute was applicable to both the Primary and Secondary Community damage calculations, or if they were irrelevant to the Primary Community damages. I am also not able to calculate the impact of my findings on the loss calculations. Therefore, throughout my assessment of damages I have made the findings and counsel may work with their experts to determine the impact, if any, on the calculation of damages for the Primary Communities. If they cannot agree, an appointment shall be scheduled before me for further submissions.

[254] Firstly, while I was asked to determine various issues required to determine the number of aircraft required to service the Contract, it appears that Dr. Meyers (and therefore Mr. McEvoy) and Wilderness (therefore Ms. Bain Smith) agree that two aircraft would have been required to service the Primary Communities. They disagree as to how many aircraft are required to service Primary and Secondary Communities and Air Tourism. Based on my findings to date, I do not need to deal with the latter discrepancy. The Primary Community damages are calculated based on two aircraft being required.

[255] With respect to pilots, Ms. Bain Smith has calculated that more pilots are required by Wilderness during the Contract period than Dr. Meyers calculated. She assumed that a pilot would fly 900 hours per year, while Dr. Meyers assumed 1200 hours. It strikes me that the Wilderness assumptions are in Remotes' favour. To the extent that they are not (if it impacts costs associated with pilot earnings or otherwise to decrease the damage award), then I find that 1200 hours should be used. Mr. Cheeseman agreed that 1200 is reasonable.

[256] The assumptions of the experts differ as to the number of mechanics required to service Primary Communities contract:

	2016	2017	2018
Mr. McEvoy/Dr. Meyers	5	5	7
Ms. Bain Smith	3	4	4

[257] This requires me to make findings with respect to the number of maintenance hours required per aircraft. Ms. Bain Smith uses 1.45 – 1.54 mechanic hours per airtime hour whereas

Dr. Meyers concludes that the ratio should be 1.7 mechanic hours per flight hours. 1.7 flight hours is the United States' manufacturer recommendation.

[258] I find that 1.45 – 1.54 is reasonable for the following reasons:

a. Ms. Bain Smith relied on actual evidence of the hours recorded by each mechanic employed by Wilderness that he/she spent performing maintenance on the Air Tractors, as reflected in the accounting records. A damages award is intended to place a party in the position it would have been had the contract been performed. The evidence of what is done by Wilderness with respect to maintenance, unless otherwise unreasonable, is the best evidence.

b. I find that what was done by Wilderness was not unreasonable. Dr. Meyers disregarded the accounting records because he was unable to confirm their accuracy without reviewing the technical maintenance records of Wilderness for the aircraft, and without effectively conducting a forensic audit of those records as compared to the accounting records. His evidence was that without this information, which provides particulars as to what specific maintenance was performed on each aircraft, he could not verify that all required maintenance was in fact performed. Remotes asks me to draw an adverse inference from the failure to produce. I am not inclined to do so. Wilderness is subject to audits and reviews by Transport Canada to ensure it meets its maintenance obligations, and there is no evidence to suggest there has been any non-compliance or any "cutting corners" as inferred by Dr. Meyers. Mr. Booth's evidence was that the most recent Transport Canada audit revealed no negative findings, and that Wilderness followed regulatory requirements. While the audit results were not adduced into evidence, I have no reason to doubt the evidence of Mr. Booth, who struck me as a very credible and reliable witness.

c. Mr. Booth further testified that as a mechanic, he maintains an aircraft in accordance with Transport Canada requirements, and not necessarily based on manufacturer recommendations. He noted that maintenance requirements change based on the use of an aircraft. He further noted that the Air Tractor is built to be a crop sprayer, which would have a significant amount of maintenance required. The Wilderness use of the planes is very different.

d. While Dr. Meyers was extremely knowledgeable, his conclusion as to the required maintenance hours was based on manufacturer recommendations and U.S. statistics, without consideration of the differential use. Mr. Hirsch, President and CEO of Air Tractor confirmed Mr. Booth's evidence that the required maintenance hours will depend on how the aircraft is used and may vary from any manufacturer recommendations. Mr. Hirsch's evidence was that while 1.7 hours may be reasonable, 1.45 – 1.54 hours may also be reasonable given the way Wilderness operates the aircrafts.

[259] I am also asked to resolve an issue in the calculation of maintenance hours as to air time vs. flight time. Dr. Meyers in his report calculates the required maintenance hours based on recorded flight time, while Ms. Bain Smith calculates based on air time hours. Using flight time hours increases the maintenance hours required for each aircraft as the maintenance obligations will arise more frequently when calculated on this basis.

[260] Pursuant to s. 101.01(1) of the *Canadian Aviation Regulations, "*air time" is defined to mean the time from when an aircraft leaves the surface until it returns to the surface, while "flight time" is the time calculated from the moment the aircraft first moves under its own power for the purpose of taking off until the moment it comes to rest as the end of the flight.

[261] Wilderness points to s. 625.93 "Technical Records – General" of the *Canadian Aviation Regulations,* which states:

> "(1) pursuant to Item 4 of Schedule l to subpart 605, persons calculating times between maintenance activities need only consider air time."

[262] Dr. Meyers testified that in his view, the maintenance hours should be calculated using flight time hours, partially because the aircraft was manufactured in the United States, and this what would be required there. The manufacturer estimate of 1.7 hours is flight hours.

[263] Dr. Meyers further testified that the Transport Canada Approved Maintenance Schedule for the Air Tractors owned by Wilderness required maintenance based on flight time hours. Dr. Meyers relies on a reference that states "engine condition trend monitoring data shall be recorded at least once every flying day or once for every six (6) flight hours if the engine is flown more than six (6) hours a day."

[264] Unfortunately, there is no specific evidence from Transport Canada or a Canadian expert as to how the maintenance schedule is to be followed, whether in flight time or air time.

[265] I conclude based on the evidence of Mr. Booth and the regulations cited that the appropriate measure if air time hours. This aircraft is subject to governance by Canadian regulations. I am satisfied that pursuant to the above-mentioned portion of the regulations, air time hours are appropriate. The excerpt from the Approved Maintenance Schedule referred to by Dr. Meyers refers to only one component.

Flight Hours and other assumptions:

[266] Because there is no discrepancy as to the number of aircraft required for the Primary Communities, my understanding of the evidence leads me to conclude that I do not need to make findings with respect to annual flight days, hours approved to fly (1200-1600), or operational limitations and weather conditions. If such issues are relevant to a determination of the mechanic hours, I make the following findings:

a. Based on the approval recently secured by Wilderness and the evidence of Mr. Cheeseman, I find that if the demand had been sufficient, the Air Tractor would have been approved to fly up to 1600 hours annually during the loss period.

b. I find that 270 flight days annually is reasonable. The evidence of Wilderness is that prior to 2022, and largely because of the cancellation of the Contract, there was insufficient demand for the Air Tractor. In 2022, the demand for the Air Tractor resulted in it flying 281 days. A different aircraft flew between 299 to 313 days in 2020-2022.

> In making this finding I have considered that the comparison period for the number of flight days provided by Wilderness is different than the Contract period and I have no evidence as to how weather conditions differed, or what communities those days relate to. The weather statistics obtained by Dr. Meyers are for weather conditions at Pickle Lake, Ontario, and his weather analysis can only consider whether there is any inclement weather on a particular day, and not whether it was of such duration that it would have prevented flight. The evidence of Mr. Murray, Chief Pilot for Wilderness is preferable as to the actual winter flight conditions experienced by a pilot for Wilderness, and what the functional limitations on the aircraft are. The most inclement weather is experienced during November and December. Wilderness had delivered to some of the primary communities in November and December 2015, flew to various communities on a year-round basis with Air Tractors prior to the Contract, and continues to fly to various communities for work unrelated to Remotes. Wilderness's evidence is based on experience with the aircraft and communities, whereas Dr. Meyer's assumptions are not. For these reasons, I accept Wilderness's evidence with respect to weather conditions and restrictions it places (including temperature and impact on ability to fly).
>
> Similarly, while Dr. Meyers' conclusions with respect to restrictions on days and times for delivery are reasonable given the Contract terms, I also accept Wilderness's evidence that frequently deliveries have to and do occur outside of those hours and on weekends.
>
> While I draw no adverse inference, I simply note that Wasaya would have had actual information as to flight days for at least Kasabonika, as it serviced this community from August 2015 onward. There is no evidence that this was produced to the experts for consideration.

Discount Rate:

[267] The discount rate is a rate applied to calculate the present value of the estimated lost profits. As Mr. McEvoy and Ms. Bain Smith both explained, the purpose of the calculation is to recognize that a "…dollar earned today is worth more than a dollar earned in the future." Discounting the estimated loss to a present value using an appropriate discount rate also accounts for the risk that these lost profits may not have been achieved.

[268] Ms. Bain Smith and Mr. McEvoy agree on the approach to determining the discount rate. They do not arrive at the same rate. Ms. Bain Smith uses a rate of 10%, while Mr. McEvoy uses 15% (both rates rounded).

[269] With respect to the Primary Communities only, the differences in their rates are on account of the following elements included in the calculation:

a. Differences in the company specific risk premium (which impacts the cost of equity calculation);

b. Differences in cost of debt percentages; and

c. Different weighting of the cost of equity and cost of debt.

Company Specific Risk:

[270] Ms. Bain Smith applies a company specific risk factor of 2.00% for delivery to the Primary Communities, whereas Mr. McEvoy's calculations include a risk factor of 5.00%. There is also a difference in the calculation for the Secondary Communities, which I do not need to resolve given my findings on damages for those communities. Both experts agreed on the contract risk premium for the Primary Communities.

[271] Both experts also agree that the determination of these risk factors is subjective.

[272] Mr. McEvoy believes that his company specific risk factor for the Primary Communities is appropriate based on the following:

a. Wilderness's financial position at the date of the breach (which he describes as volatile earnings and a large deficit); and

b. The volatile earnings, low working capital and few capital assets to use as collateral limited the company's borrowing capacity.

[273] Ms. Bain Smith uses hindsight when assessing the relevant factors to determine the company specific risk and takes advantage of knowledge of what has happened since the breach of the Contract. In performing her calculations, she used actual data when reaching conclusions as opposed to making assumptions. I do not have evidence to explain why the use of hindsight is not appropriate in this case. Wilderness has satisfied me that this is a preferable approach on the circumstances of this case.

Debt/Equity Ratio and Cost of Debt:

[274] Mr. McEvoy explained that the determination of the discount rate includes an allocation of cost of equity and the cost of debt based on an estimate of Wilderness's debt to equity ratio. Mr. McEvoy includes cost of equity (being what investors would expect on a rate of return) in the range of 16.5% for the Primary Communities to 27.5% for the Secondary Communities, an after-tax cost of debt of 7.18% to 8.45% (adjusted to 6.25% to 7.35% after reflection) and a ratio of 15% debt to 85% equity. [numbers rounded]

[275] Ms. Bain Smith calculates a cost of equity in the range of 13.5% for the Primary Communities to 18.5% for the Secondary Communities, an after-tax cost of debt of 7.35% and a ratio of 53% debt to 47% equity.

[276] Where the disagreement lies, seems to be two-fold:

a. Differences in assumptions applicable to the cost of equity (which are dealt with under company specific risk differences); and

b. Ms. Bain Smith's use of the RMA and CSI statistics to support her assumed debt to income ratio, which (in Mr. McEvoy's opinion) are applicable to companies much larger than Wilderness was at the date of the breach.

[277] Mr. McEvoy says that certain statistics relied upon by Ms. Bain Smith are applicable to companies with revenue starting at $10 million. Mr. McEvoy further states that the Statistics Canada data referenced by Ms. Bain Smith does not indicate the size of the underlying companies, but likely reflect ratios for companies much larger. On the other hand, the debt-to-equity ratio applied by him reflects the average ratio of other companies in the air transportation industry according to the Kroll Cost of Capital Industry Benchmark report, adjusted for relative size differences. Mr. McEvoy used U.S. data. In Mr. McEvoy's opinion, the adjustment he made, was necessary given the significantly smaller size of the company than industry competitors, few capital assets, volatile earnings history, and given that it was historically in a deficit position. Mr. McEvoy opined that Ms. Bain Smith erred in not applying a size adjustment to her calculations given that the companies in the data used by her had revenues starting at $10 million.

[278] Given the subjective nature of the calculation, I cannot say that one expert is correct and the other is not. I find that the plaintiff has met its burden of satisfying me that data used by Ms. Bain Smith, and her calculations are appropriate in the circumstances. Firstly, Ms. Bain Smith uses data from various sources including Statistics Canada data, "RMA" and "CSI Market", which includes data across all industries and specific to air transportation, for companies of all sizes, giving her a broad range of comparisons. This reflects a combination of Canadian and U.S. data, whereas Mr. McEvoy has used one source, reflecting U.S. data for eight large airlines. Secondly, I am satisfied with Ms. Bain Smith's explanation for not making a size adjustment to the debt-to-equity ratio to account for the fact that Wilderness is a small company compared to the subject companies underlying the studies. Ms. Bain Smith's evidence was that no adjustment was required

given that if it had continued to service the Contract, Wilderness's revenues would have approached the minimum level of earnings of the subject companies in the RMA comparison. Her comparisons are appropriate given the nature and size of the Wilderness business. Based on the use of hindsight and the comparisons cited by her, I am satisfied that Wilderness would have been able to finance the level of debt assumed by her.

How are damages to be apportioned between Remotes and Wasaya?

[279] The evidence of Donna Bain-Smith is that the loss to Wilderness from Kasabonika (the only Wasaya community) is $856,458. Wasaya takes the position that this is the maximum possible damages recoverable against it.

[280] Damages for inducing a breach of contract are not limited to those recoverable from the contract-breaker. See: *Drouillard*, at para. 43.

[281] Neither Wasaya nor Remotes took any real issue with Wilderness's proposal that Wasaya and Remotes be jointly and severally liable for this portion of the damages award. Subject to any adjustments to this amount for the findings I have made above, Wasaya shall be found jointly and severally liable for the damages suffered by Wilderness from the loss of the Kasabonika portion of the Contract.

Order:

[282] For the foregoing reasons, and subject to any downward adjustments to the damages claim required as a result of my findings, Wilderness shall have judgment against Remotes for damages payable in the amount of $2,718,988, plus pre-judgment interest.

[283] Wilderness seeks pre-judgment interest from August 15, 2015, being the date the Kasabonika portion of the Contract was cancelled. The other three communities were not removed from Wilderness's contract formally until the April 12, 2016, Instruction Notice. Pre-judgment interest shall be calculated as of, and run from, April 1, 2016. Post-judgment interest shall be payable in accordance with the *Courts of Justice Act.*

[284] Wasaya shall be jointly and severally liable with Remotes for the portion of those damages related to Kasabonika, in the amount of $856,458.

[285] If the parties cannot agree on costs, written submissions, limited to 10 pages, double-spaced, excluding a bill of costs and necessary attachments, shall be delivered as follows:

a. By Wilderness no later than 30 days from the date of release of this decision, failing which costs will be deemed to have been resolved;

b. By Remotes and Wasaya, no later than 30 days from the date of receipt of Wilderness's submissions; and

c. Any reply by Wilderness shall be limited to 5 pages, double-spaced, delivered within 15 days of receipt of the last of Remotes' and Wasaya's submissions.

"Original signed by"
The Honourable Madam Justice T.J. Nieckarz

Released: August 23, 2024

CITATION: 1401380 Ontario Ltd. v. Wasaya Airways LP, 1401380 Ontario Ltd. v. Remotes One Remote Communities, 2024 ONSC 4701
COURT FILE NO.: CV-17-409-00, CV-16-229-00
DATE: 2024-08-24

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N: **CV-17-409-00**

1401380 Ontario Limited O/A Wilderness North Air

Plaintiff

- and -

Wasaya Airways LP

Defendant

CV-16-229-00

1401380 Ontario Limited O/A Wilderness North Air

Plaintiff

-and-

Remotes One Remote Communities Inc.

Defendant

REASONS FOR JUDGMENT

Nieckarz J.

Released: August 23, 2024