IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *H.R.S. Resources Corp. v. Thompson Creek Metals Company Inc.*, 2024 BCSC 1847

Date:20241008
Docket: S201711
Registry: Vancouver

Between:

H.R.S. Resources Corp.

Plaintiff

And

Thompson Creek Metals Company Inc.

Defendant

Before: The Honourable Mr. Justice Riley

Reasons for Judgment

Counsel for the Plaintiff:	J.B. MacLean S.T. Robertson
Counsel for the Defendant:	D.R. Brown J.R. Buysen P. Marvel
Place and Dates of Hearing:	Vancouver, B.C. 15-24 April 2024
Place and Date of Judgment:	Vancouver, B.C. 8 October 2024

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Introduction

[1] These are reasons for judgment following an eight day summary trial on claims arising from a royalty dispute. The plaintiff's claims are based on a "Royalty Agreement" pertaining to minerals from the Mount Milligan Mine, an open pit mine in northern British Columbia that was under development for many years and finally began producing concentrates containing copper, silver, and gold in 2014. The plaintiff H.R.S. Resources Corp. ("HRS") is the royalty holder. The defendant Thompson Creek Metals Company Inc. ("TCM") is the current owner and operator of the mine, and the ultimate successor to the party who granted the royalty.

[2] The Royalty Agreement provided that starting in the third year of commercial production HRS was to receive a 2% royalty on all "net smelter returns" attributable to "ores and mineral products" from the mine. A schedule to the Royalty Agreement provided that the term "net smelter returns" would apply to "the sale or deemed sale of all ores produced from the [mine] or concentrates derived therefrom determined in accordance with generally accepted accounting principles consistently applied".

[3] The dispute between the parties is focused on a proportion of the gold and copper from the mine that TCM says is subject to a "Streaming Agreement" it entered with a third party, Royal Gold Inc. ("Royal Gold"). Under the final version of the Streaming Agreement, Royal Gold advanced TCM a total of $781.5 million, in exchange for TCM's commitment to provide Royal Gold with refined gold equal to 35% of the gold derived from the mine, and refined copper equal to 18.75% of the copper derived from the mine. The price that Royal Gold was to pay for these refined metals had two components, namely (i) a cash on delivery component, and (ii) a deferred revenue component. The cash on delivery component was a per unit price, set below prevailing market rates, payable at the time of TCM's delivery of refined gold and copper to Royal Gold. The deferred revenue component was a pro-rated credit against the previously paid $781.5 million deposit. The deferred revenue component was to drop away after TCM earned the entire deposit.

[4] Against this backdrop, there are four points in dispute between the parties.

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[5] The first point of contention is whether the Streaming Agreement has any effect on the determination of royalties under the Royalty Agreement. TCM says the Streaming Agreement involves the sale of 35% of the gold and 18.75% of the copper from the mine at specified rates, and that the royalties for this portion of the “mineral products” must be calculated by reference to the associated revenue received from Royal Gold. HRS disputes this, asserting that in reality all of the mineral products from the mine are sold in the form of “concentrate” to “Offtakers” at market rates, and that the Streaming Agreement is a separate contractual arrangement between TCM and Royal Gold, which does not affect the determination of “net smelter returns” as contemplated in the Royalty Agreement.

[6] The second and third points of contention arise from alternative positions advanced by HRS.

[7] The second point has to do with TCM’s use of a “hedging” arrangement to minimize the risk of price fluctuations arising from its obligation to deliver refined gold to Royal Gold under the Streaming Agreement. HRS says that even if a proportion of the royalties are to be determined by reference to TCM’s obligation to deliver refined metals to Royal Gold under the Streaming Agreement, this does not justify TCM’s deduction from the royalty payments of hedging costs associated with the Royal Gold arrangement. HRS says hedging transactions are neither “returns” from the disposition of minerals derived from the mine, nor an allowable deduction from returns as contemplated in the Royalty Agreement. TCM disagrees, taking the position that hedging is a prudent business practice which is merely one step in a larger transaction for the sale of gold under the Streaming Agreement, in accordance with generally accepted accounting principles as contemplated in the Royalty Agreement.

[8] The third point of contention has to do with the appropriate treatment of the $781.5 million deposit that Royal Gold paid to TCM pursuant to the Streaming Agreement. HRS says even if TCM’s delivery of gold and copper to Royal Gold as provided for in the Streaming Agreement constitutes the “sale” of minerals under the

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Royalty Agreement, then the “returns” (*i.e.*, revenue) from each such “sale” must include not just the price per unit payable at the time of delivery, but also a pro-rated portion of the $781.5 million deposit, as “deferred revenue”. For its part, TCM acknowledges that while it initially treated the deposit as deferred revenue, this changed when TCM was acquired by a larger company, Centerra Gold Inc. (“Centerra”). TCM says that under applicable accounting principles, the deposit became subsumed within the fair value of TCM’s assets on Centerra’s books, and TCM was obligated to adopt a comparable approach in its books pursuant to the principle of “push down” accounting. In the result, TCM says its treatment of the deposit is consistent with generally accepted accounting principles by which net smelter returns must be determined under the Royalty Agreement.

[9] The fourth point has to do with the plaintiff’s claim for punitive damages. HRS contends that TCM breached its contractual duty of good faith, by (i) evading its royalty obligations in bad faith, and (ii) failing to disclose the consequential effect of Centerra’s acquisition – namely the removal of the deferred revenue portion of the royalty payments using “sleight of hand” accounting – both in TCM’s correspondence with HRS, and in the court filings for the plan or arrangement required to give effect to the Centerra acquisition. In response, TCM asserts that its conduct has been “honest, transparent, and forthright”, acting on objective determinations made by accounting professionals as to the proper treatment of the Royal Gold “returns” under generally accepted accounting principles. TCM says even if its arguments regarding both the Streaming Agreement and the deposit do not prevail, there has been no “independent actionable wrong”, and no “reprehensible conduct” justifying an award of punitive damages.

Facts

The Record

[10] The parties agree that all of the issues in this action can be determined by way of a summary trial application under Rule 9-7 of the *Supreme Court Civil Rules*,

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B.C. Reg, 168/2009 based on an agreed statement of facts, and the following additional material forming the record on the summary trial:

(a) Affidavit #2 of Richard Haslinger Jr., HRS's chief executive and a member of its board of directors, along with read-ins from Mr. Haslinger's examination for discovery.

(b) Affidavit #1 of Jacques Perron, TCM's former Chief Executive Officer, along with read-ins from Mr. Perron's examination for discovery. HRS objected to the admissibility of certain paragraphs of Mr. Perron's affidavit on the basis that they contained legal argument. For the reasons given below, I would not accede to HRS's position, although I would only admit certain portions of Mr. Perron's affidavit for limited purposes. For example, Mr. Perron's repeated assertions that the delivery of refined metals to Royal Gold under the Streaming Agreement amounted to "sales" are only admissible for the limited purposes of speaking to Mr. Perron's state of mind, in response to HRS's allegations of bad faith. The portions of the affidavit admitted for such limited purposes cannot be relied upon to prove the truth or legal correctness of Mr. Perron's statements.

(c) Affidavit #1 of Pam Saxton, the former Executive Vice President and Chief Financial Officer of TCM, along with the transcript of the cross-examination of Ms. Saxton. The plaintiff objected to the admission of certain paragraphs in Ms. Saxton's affidavit. I would not accede to any of the plaintiff's objections, although once again I note that Ms. Saxton's description of the delivery of refined metals under the Streaming Agreement as "sales" by TCM or "purchases" by Royal Gold are admissible for the limited purposes of narrative, state of mind, and explanation of TCM's actions in response to allegations of bad faith, and not to prove the truth or legal correctness of Ms. Saxton's descriptions.

(d) Affidavit #1 of Darren Millman, the Executive Vice President and Chief Financial Officer ("CFO") of Centerra, along with the transcript of the cross-

examination of Mr. Millman. The plaintiff objected to the admission of certain paragraphs in Mr. Millman's affidavit. Again, for reasons given below, I would not give effect to the plaintiff's objections, although I note that Mr. Millman's use of the terms "sale" and "purchase" in relation to the refined metals delivered to Royal Gold is admitted subject to the same limitations as those discussed above in relation to the affidavits of Mr. Perron and Ms. Saxton.

(e) The expert report of Dr. Graham A. Davis, a mineral economist, along with a transcript of Dr. Davis's cross-examination. The plaintiff objected to certain passages from Dr. Davis's report. For reasons given below, I find that paragraphs 13, 43, 44 (in part), 64 to 66, 67 (in part), 68 to 69, 71 (in part), 82 (in part), 88 to 90, and 96 to 108 of Dr. Davis's report are inadmissible.

(f) The expert report of Dr. Daniel B. Thornton, an accountant, along with a transcript of Dr. Thornton's cross-examination. The plaintiff objected to the admissibility of the entirety of Dr. Thornton's report. For reasons given below, I would not accede to the plaintiff's submission. I find the entire report admissible, with some limitations on the permissible use of this evidence.

<u>The Plaintiff</u>

[11] The plaintiff HRS is a British Columbia company. HRS is successor and assignee of Richard Haslinger Sr.'s position as the "optionor" under the Royalty Agreement. The only shareholders of HRS are Richard Haslinger Sr.'s three children, one of whom is Richard Haslinger Jr., HRS's chief executive. HRS's only significant assets are its interest in the Royalty Agreement, and those portions of the royalty payments which have been retained by the company.

<u>The Defendant</u>

[12] The defendant TCM is also a British Columbia company. Prior to its involvement in the Mount Milligan Mine, TCM was a base metals company that was primarily focused on copper and molybdenum production.

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[13] TCM is the ultimate successor and assignee of Lincoln Resources Ltd. ("Lincoln")'s position as the "optionee" under the Royalty Agreement. TCM acquired its status as the successor and assignee of the optionee's rights under the Royalty Agreement when it acquired Terrane Metals Corp. (Terrane) by way of an amalgamation that concluded on 20 October 2010. As a result of the acquisition, Terrane became a wholly owned subsidiary of TCM.

[14] At the time of the Terrane acquisition, TCM's shares were traded on the Toronto Stock Exchange ("TSX"), and in the U.S. over-the-counter market. TCM continued to be a publicly traded company until its shares were purchased by Centerra in a plan of arrangement that concluded on 20 October 2016. The plan of arrangement had been approved by Mr. Justice Pearlman of this Court under s. 288 of the *Business Corporations Act*, S.B.C. 2002, c. 57 ("*BCA*", or the "*Act*").

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Mineral Royalties

[15] Mineral royalties are common in the mining industry. Dr. Davis's expert report explains the economic benefits and associated risks involved in a royalty agreement pertaining to minerals. From the perspective of the miner or purchaser of a potential mining operation, a royalty arrangement involves less upfront financial burden than an up-front unconditional acquisition of mineral rights. It also reduces the purchaser's risk, since the royalty is only paid in the event of a successful project. On the other side of the ledger, the royalty holder must accept the risk that no future payments will be received if the project does not proceed, while retaining the ability to participate in the rewards of a successful project with no requirement to contribute future capital, incur additional cost, or be exposed to future liabilities.

[16] From an economic perspective, a mineral royalty allocates the benefits from mining a mineral deposit between the miner and the royalty holder. How such benefits are allocated depends on the nature of the royalty. The extent to which the benefits from mineral extraction are shared between the miner and the royalty holder can be viewed along a continuum or spectrum, with sharing of gross production of

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mineral ores at one end of the spectrum, and sharing of net profits from the mining operation as a whole at the other end.

[17] These dynamics inform the negotiation of a royalty agreement between the mineral rights purchaser (the prospective miner) and the original mineral claim holder (the royalty holder). On the one hand, the mineral claim holder will seek to secure a higher royalty rate based on a larger and more certain monetary base that includes all operating periods. On the other hand, the prospective miner will try to negotiate a lower royalty rate based on a smaller monetary base that excludes operating periods in which revenues can be used to recoup capital costs.

[18] Mineral royalties are established by contract, with the nature of the royalty being set by the terms of the particular contract. Although the nature of any royalty will always be governed by the specific terms of the contract, I accept Dr. Davis's evidence that mineral royalties can be grouped into two main categories or types, namely "production tonnage royalties", and "value-based royalties".

[19] A production tonnage royalty involves payments per tonne of metal ores removed from the mine, as opposed to payments based on the value ultimately received from the sale of the metals. Royalties of this type may be paid either "in kind" through the delivery of a share of the ores directly to the royalty holder, or by way of a fixed dollar amount per tonne of ore removed from the mine. In either case, the royalty holder's benefit is completely divorced from the ultimate monetary benefit the miner realizes from the disposition of minerals or mineral products.

[20] A value-based royalty is paid on a specified sales base received by the miner, minus allowable deductions. The effect of this type of royalty is that the return to both the miner or mine owner on the one hand and the royalty holder on the other will reflect the overall economics of the mining venture, depending on how the royalty is defined and calculated. According to Dr. Davis, there are three main types of value-based royalties, namely (i) "gross receipts" royalties, (ii) "net smelter returns" or "NSR" royalties, and (iii) "net profit interest" or "NPI" royalties.

[21] A gross receipts royalty is one in which the “royalty base” consists of all revenue received by the miner from metal sales, with no allowable deductions.

[22] A net smelter return (NSR) royalty is similarly delineated by reference to a “royalty base”, but with certain allowable deductions for smelting, refining, and transportation costs. Depending on the negotiated terms of the royalty agreement, the royalty base may consist of either all moneys actually received by the miner in connection with mineral products from the mine (which Dr. Davis classifies as a “moneys actually received NSR”), or a designated market price for metals produced from the mine irrespective of the miner’s actual receipts (which Dr. Davis classifies as a “gross value NSR”). NSR royalty rates typically range from 0.5% to 2.5% of “net smelter returns”.

[23] I accept Dr. Davis’s opinion that since at least 1986 – when Lincoln and Mr. Haslinger Sr. entered into the original Royalty Agreement for mineral rights in relation to what later became the Mount Milligan Mine – the concept of a “net smelter return” royalty was not limited to returns from actual smelters. Rather, the phrase “net smelter returns” was understood within the mining industry to apply to all “returns” or “revenues” realized from the disposition of product, whether to an actual “smelter”, or to some other kind of purchaser. This could include a purchaser engaged in trading mineral ores prior to smelting, or a purchaser that produces metals by means other than “smelting”. In effect, “net smelter returns” or “NSR” had become a term of art in the mining industry, in that the word “smelter” has been taken beyond its technical meaning, to apply to any purchaser of mineral ores, concentrates, or other mineral products obtained from the mine.

[24] A net profit interest (NPI) royalty is determined on the basis of the miner’s net profit from mining operations. Unlike an NSR royalty in which the allowable deductions are limited to costs tied to the mineral products themselves (such as transportation or smelting costs), an NPI royalty allows for the deduction of a broad range of costs, including costs associated with the mine’s operation. Thus, under an NPI royalty, the miner and the royalty holder share in the overall profitability of the

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mining operation. Because of their higher risk profile, NPI royalty rates are generally higher than rates for NSR royalties. More specifically, NPI royalties are commonly negotiated for 10% of net profit.

The Royalty Agreement

[25] The Royalty Agreement was signed by Richard Haslinger Sr. as the “optionor” and Lincoln as the “optionee” on 16 July 1986. It gave Lincoln exploration rights together with an option to acquire Mr. Haslinger’s rights under four mining claims in respect of what ultimately became the Mount Milligan Mine site, in exchange for which Mr. Haslinger was to receive, among other things, a production royalty as set out in Clause 7 and Schedule B of the agreement.

[26] Clause 7 reads as follows:

> 7. Payment of Net Smelter Returns
>
> If the mining lands are brought into production by Lincoln then Lincoln shall pay to the Optionor a Production Royalty of two per cent (2%) Net Smelter Returns attributable to production of ores and mineral products from the Mining Lands by Lincoln determined in accordance with Schedule “B” hereto.

[27] Schedule B reads as follows:

> Production Royalty
>
> 1. For the purposes of this Schedule and for determining the Production Royalty referred to in Clause 7 of the Agreement to which this Schedule is attached, the term Net Smelter Returns shall have the following meaning, have the following deductions, and commence on the following basis:
>
> Net Smelter returns for the purposes hereof shall mean any and all amounts returned from smelter to Optionee after deduction of smelting and refining charges and [deleted]. Net smelter returns shall apply to the sale or deemed sale of all ores produced from the Property or concentrates derived therefrom determined in accordance with generally accepted accounting principles consistently applied.
>
> If the ores or concentrates are treated at a smelter or refinery owned, operated, or controlled by the Optionee or an affiliate of the Optionee, smelting and refining charges are to be equivalent to the prevailing rates charged by similar smelters and refineries in arm’s length transactions for the treatment of like quantities and quality of ores and concentrates.
>
> For the purposes of this Schedule and Agreement and for determining the Net Smelter Return, the following shall apply:

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> The payment of Net Smelter Returns shall not commence until the said claims have been put into commercial production as hereinafter defined and according to the following schedule:
>
> Year one of commercial production – no payment of Net Smelter Returns.
>
> Year two of commercial production – no payment of Net Smelter Returns.
>
> Year three of commercial production – the payment of Net Smelter Returns shall commence and continue each year thereafter as long as commercial production is sustained.
>
> Net Smelter Returns shall be calculated by the Optionee at the end of the calendar quarter in which the ores or concentrates from the Property were sold or otherwise deemed disposed of and payment to the Optionor shall be made by the Optionee within 45 days after the end of each quarter.
>
> 2. “Commencement of Commercial Production” means
>
> If a Mill is located on the Property, the last day of a period of 40 consecutive days in which, for not less than 30 days, such concentrator processed ore from the Property at 60% of its rated concentrating capacity;
>
> If no Mill is located on the Property, the last day of the first period of 30 consecutive days during which ore has been shipped from the Property on a reasonably regular basis for the purposes of earning revenues; but no period of time during which ore or concentrate is shipped from the Property for testing purposes, and no period of time during which milling operations are undertaken as initial tune-up, shall be taken into account in determining the date of Commencement of Commercial Production.

[28] Clause 9 of the Royalty Agreement imposed an obligation on Lincoln to carry out all work done on the mining lands “in accordance with good mining practice and in accordance with the mining laws of British Columbia”.

[29] Clause 17 dealt with assignment. It provided that neither party could “assign all or any part of their respective interest in this Agreement without the consent of the other”, with a proviso that Lincoln could assign its interest “in whole or in part” to “the continuing corporation resulting from any statutory amalgamation, merger or consolidation in which it is a participant”, or “to any corporation which acquires all of substantially all of its assets and liabilities, or which agrees to option or develop the claims, if such permitted assignee agrees in writing to assume the obligations hereunder of the assignor…”.

[30] Clause 31 imposed an obligation on both parties, during the currency of the Royalty Agreement, to “act in good faith in respect of the others, and do or cause to

be done all things within their respective powers which may be necessary or desirable to give full effect to the provisions hereof."

[31] The Royalty Agreement was amended in writing on 16 July 1988 to extend the time frame during which Lincoln could exercise its option to acquire the mineral claims, upon payment of certain fees by certain deadlines. The amended agreement also provided that beginning in 1995, Mr. Haslinger Sr. would receive an "advance royalty" of $20,000 per year, each year until "commercial production" was achieved. This advance royalty was to be deducted from the "production royalty" as provided for in Clause 7 of the original Royalty Agreement.

Financing and Development of the Mount Milligan Mine Project

[32] The history of the Mount Milligan Mine, including its ownership history and the efforts to obtain financing for the project, is dealt with in the affidavits of Mr. Perron and Ms. Saxton. I do not intend to recount this evidence in any detail here, and it is not necessary to make findings with respect to these events, principally because the factual matrix that informs the interpretation of a contract (in this case, the Royalty Agreement) is a function of the surrounding circumstances "known to the parties at the time of formation of the contract": *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 47. Since the manner in which the Mount Milligan Mine project was developed and financed was not known to the parties when they entered into the Royalty Agreement in 1986, or when they amended it in 1988, it is not part of the factual matrix for interpretation of the contract.

[33] However, it should be noted that part of what constitutes the factual matrix informing the interpretation of a contract is the nature of the "market in which the parties [were] operating" at the time of the formation of the contract: *Sattva* at para. 47, citing *Reardon Smith Line Ltd. v. Hansen-Tangen*, [1976] 3 All E.R. 570 (H.L.) at p. 574. In this regard, I find that both parties to the Royalty Agreement would have appreciated the speculative and high-risk nature of mine development. Mining projects require substantial capital commitments, yet due to the technical, financial, and economic challenges involved, few projects ever reach commercial production.

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This basic fact emerges from Dr. Davis's report. It is also recognized in secondary materials cited by the parties, and in case law. See, for example, *Third Eye Capital Corp. v. Resources Dinar Inc.*, 2018 ONCA 253 at para. 38; *IFP Technologies Canada (Inc.) v. EnCana Midstream and Marketing*, 2017 ABCA 157 at paras. 2-3.

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[34] One more characteristic specific industry is that, throughout the life of a mining property, "its owners and their respective interests will no doubt change, often many times and in many combinations": Karl J.C. Harries, "Mineral Agreements and Royalties" (Montreal, QC: Canadian Institute of Minerals, Metallurgy and Petroleum, 2003), vol. 55 at 35.[1] The parties to the Royalty Agreement were evidently alive to this feature of the mining industry, as reflected in the assignment provisions allowing for the original optionee, Lincoln, to assign its interests in the Royalty Agreement to any entity emerging from a corporate reorganization or, any other party acquiring all or substantially all of Lincoln's assets and liabilities, provided certain conditions were met.

[35] Although it was not known to the parties at the time of the Royalty Agreement, ownership of the Mount Milligan Mine did in fact change hands a number of times from 1988 through 2010, with successive owners taking assignment of Lincoln's rights and obligations under the agreement.

[36] In 2006, Terrane acquired the mine, but was unable to secure the estimated $915 million in capital needed to develop the project. In 2010, TCM acquired all of Terrane's outstanding shares for $420 million and 2.43 million shares of TCM stock. TCM then took over the Mount Milligan Mine project, and at the same time entered into the Streaming Agreement with Royal Gold.

<u>The Mineral Extraction Process at Mount Milligan Mine</u>

[37] To understand the effect of (i) the Streaming Agreement between TCM and Royal Gold, and (ii) the Offtaker Agreements that TCM negotiated with various

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[1] Dr. Davis's report identifies Mr. Harries as a pre-eminent scholar in the field of royalty agreements in the mineral industry.

Offtakers, it is first necessary to consider the physical process of acquiring metal products from the Mount Milligan Mine.

[38] The Mount Milligan Mine is an open pit mining operation. Rock is excavated from the ground, crushed into mineral ores, and further refined on-site into a fine powder called concentrate.

[39] The concentrate is transported by rail from the mine site in northern British Columbia to North Vancouver, where it is loaded onto ships secured by Offtakers. Shiploads of concentrate are referred to as "shipments", "parcels", or "lots".

[40] The Offtakers then ship the concentrate to destinations in Asia, where it is smelted, refined, or subject to other beneficiation processes, to produce refined copper, silver, and gold.

[41] Each shipment of concentrate contains quantities of unrefined copper, silver, and gold. By far the largest volume of metal in each lot of concentrate is unrefined copper, which after further downstream processing yields refined copper measured in tonnes. A smaller proportion of the concentrate is unrefined silver, which after further downstream processing yields refined silver, in respect of which the relevant unit of measurement is ounces. An even smaller proportion of the concentrate from the mine is unrefined gold, which after downstream processing yields refined gold, also measured in ounces.

Streaming Agreements Generally

[42] Streaming agreements were not a known phenomenon when the Royalty Agreement was initially signed in 1986, or when it was amended in 1988. The weight of the evidence indicates that streaming agreements came into use some time in the early 2000s. This emerges from Dr. Davis's report, and is also borne out by the affidavit of TCM's CFO, Ms. Saxton, who described streaming agreements as an emerging option for acquiring the substantial funds necessary to bring a mining project into commercial production.

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The History of the Streaming Agreement between TCM and Royal Gold

[43] TCM entered into the initial Streaming Agreement with Royal Gold simultaneously with TCM's acquisition of Terrane in 2010. The Streaming Agreement was thereafter varied on several occasions, as Royal Gold increased the cash deposit paid to TCM, in exchange for TCM's commitment to provide refined gold referable to larger and larger shares of the Mount Milligan Mine's total gold production. More specifically:

(a) The original version of the Streaming Agreement was signed by Terrane and Royal Gold on 10 October 2010. This iteration of the agreement contemplated that Royal Gold would provide a deposit of US $311.5 million, in exchange for Terrane's commitment to provide refined gold equal to 25% of gold production from the Mount Milligan Mine. The price per ounce was defined to include two components. The first component was a cash on delivery payment at a fixed price between $400 and $450 per ounce, depending on the volume of gold provided. The second component was a reduction in the deposit equal to the difference between the fixed price per ounce of gold as specified in the agreement and the market price per ounce of gold at the time of the delivery, until the entire deposit was repaid.

(b) The Streaming Agreement was substantially amended on 14 December 2011, at which point the parties were TCM (Terrane's successor) and Royal Gold. In this iteration of the agreement, the deposit to be paid by Royal Gold was increased to $570 million, in exchange for TCM's commitment to provide refined gold equal to 40% of the gold produced from Mount Milligan, with the cash on delivery component of the price being set at $435 per ounce.

(c) The agreement was further amended on 8 August 2012, with the deposit to be paid by Royal Gold being increased to a total of $781.5 million, TCM's corresponding commitment to provide Royal Gold with refined gold

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increasing to 52.25% of the gold derived from the mine, and the cash on delivery portion of the price remaining at $435 per ounce.

(d) The agreement was again amended on 11 December 2014. It does not appear that this amendment involved any substantial changes to either the deposit amount or the particulars of TCM's commitment to provide Royal Gold with refined gold equal to a percentage of the gold derived from the mine.

(e) The agreement was amended for a final time on 20 October 2016, in conjunction with Centerra's acquisition of TCM. The agreed upon deposit of $781.5 million (all of which Royal Gold had already provided to TCM) remained the same. However, in order to improve the profitability of the mining operations, and to address Centerra's objective of acquiring a mining operation with substantial gold production available for sale on the open market, this iteration of the agreement (i) reduced TCM's obligation to provide Royal Gold with refined gold to 35% of total production, with the cash on delivery portion of the gold price being set at $435 per ounce, and (ii) imposed a new obligation on TCM to provide refined copper equal to 18.76% of total production, with the cash on delivery portion of the copper price being set at 15% of the spot price for copper.

Key Features of the Streaming Agreement

[44] The key features of the Streaming Agreement, in all of its iterations, can be described as follows.

[45] First, the agreement was entitled, "Purchase and Sale Agreement", with Royal Gold defined as the "Purchaser" and Terrane (and in later iterations, TCM) defined as the "Vendor". For ease of reference, hereafter I will refer to the Vendor as TCM. Of course, the fact that the Streaming Agreement was self-described as a "purchase and sale" agreement is not dispositive of its legal character, status, or effect, especially when considering its implications on HRS, who was not a party to the agreement. The legal character of the Streaming Agreement and its implications

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for the determination of royalties under the Royalty Agreement must be assessed based on the substance of the arrangement between TCM and Royal Gold.

[46] Second, in terms of how the "sale" of gold was achieved under the Streaming Agreement, clause 2.1(a) provided that "the Vendor [TCM] hereby agrees to sell to the Purchaser [Royal Gold]" an "amount of Refined Gold equal to the Designated Percentage of Produced Gold". The term "Refined Gold" was defined to mean "gold bars or coins". The "Designated Percentage of Produced Gold" was initially set at 25% of "Produced Gold", although this changed over time and, in the final iteration of the agreement was set at 35%. The term "Produced Gold" was defined as "gold in whatever form or state that is derived from any material mined, produced, extracted or otherwise recovered from the Milligan Property" and "[f]or greater certainty", "shall include any gold derived from ores, concentrate, dore, tailings, waste rock, or other waste products, or other products originating from the Milligan Property".

[47] Third, the price that Royal Gold was to pay for Refined Gold was set in clause 2.4. It included two defined terms. The first was the "Reference Price", defined in clause 1.1 to be effectively the spot price per ounce or market price for gold. The second was the "Fixed Price", set at $435 per ounce in the final few iterations of the agreement. Prior to full repayment of the deposit ($781.5 million), the price per ounce would be the Reference Price (*i.e.* the market price) with (i) a Fixed Price ($435) component to be paid at the time of delivery of Refined Gold, and (ii) a deferred revenue component to be accounted for by way of a credit against the outstanding balance of the deposit. After repayment of the entire deposit, the price per ounce would be the lesser of the Fixed Price ($435 per ounce) or the Reference Price (the market price).

[48] Fourth, in terms of how TCM's "sale" and "delivery" of refined gold to Royal Gold was to be achieved, the Streaming Agreement was set up to operate as follows:

(a) Under clause 8.4, TCM was required to negotiate “Mineral Offtake Agreements” with one or more “Offtakers”, under which TCM would then “deliver” and “sell” all minerals containing “Produced Gold” to “Offtakers”.

(b) The term “Minerals” was defined in clause 1.1 as “any and all marketable metal bearing materials (including Produced Gold) in whatever form or state that is mined, produced, extracted, or otherwise recovered from the Milligan Property”.

(c) This would oblige TCM to “sell” all mineral-bearing concentrate produced from the Milligan Property to Offtakers, under Mineral Offtake Agreements providing for subsequent refining, smelting, or other beneficiation to obtain Produced Gold from the Minerals. It should be noted that the requirement to “sell” the Minerals to Offtakers under clause 8.4 was expressly “subject to” clause 2.1(a) which, as noted above, imposed an obligation on TCM to “sell” to Royal Gold quantities of refined gold equal to the designated percentage of gold produced from the mine. Also, clause 2.2(d) provided that despite TCM’s “prior sale” to Offtakers of “Minerals from which the relevant Refined Gold is derived”, TCM represented and warranted that it would be the legal and beneficial owner of all refined gold “sold” to Royal Gold.

(d) The Mineral Offtake Agreements would also provide a means for determining the quantity of Produced Gold in each “Lot” of concentrate by way of “Offtaker Documents” as defined in clause 1.1. The quantity of Produced Gold would then be used to determine the quantity (number of ounces) of Refined Gold that TCM was obligated to sell to Royal Gold, as a designated percentage of the total amount of Produced Gold obtained from a particular Lot of concentrate.

(e) Clause 2.2 provided that TCM would be obliged to deliver Refined Gold equal to the designated percentage of Produced Gold in any particular Lot within two business days of receipt of payment from Royal Gold. Clause 2.2(e) provided that TCM could deliver Refined Gold “physically resulting from

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gold mined, produced, extracted, or otherwise recovered from the Milligan Property", or alternatively TCM could elect to deliver Refined Gold acquired on the open market "for the purposes of" sale and delivery of Refined Gold required under the Streaming Agreement.

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[49] Fifth, the Streaming Agreement also included provisions for the establishment of a "Deposit Record" to track the balance of the deposit. The opening balance was the full amount of the deposit Royal Gold had provided, which in the final iteration of the Royalty Agreement was $781.5 million. Under the combined operation of clauses 2.4 and 3.6, the Deposit Record was to be reduced by an amount equal to the difference between the cash on delivery component of the price for the Refined Gold ($435 times the number of ounces of Refined Gold delivered) and the market value of that gold. Under the combined operation of clause 3.7 and 6.1(a), if the balance of the Deposit Record had not been reduced to zero within the first 50 years of commercial production from the mine, TCM would be required to repay the outstanding balance to Royal Gold.

[50] Sixth, as noted, the final version of the Streaming Agreement reduced TCM's obligation to supply Royal Gold with Refined Gold equal to 35% of Produced Gold from Mount Milligan Mine, and added a new obligation for TCM to supply Royal Gold with Refined Copper equal to 18.75% of Produced Copper from the mine. TCM's obligation to supply both Refined Gold and Refined Copper to Royal Gold were on comparable terms. This included the price provisions, except that the fixed price element for copper, described in the agreement as the "Copper Cash Price", was defined in clause 1.1 of the amended agreement to be 15% of the market price.

The Offtaker Agreements

[51] All concentrate produced at the Mount Milligan Mine is physically transferred to Offtakers pursuant to Offtaker Agreements. Some Offtakers are engaged directly in smelting, and others are engaged in the trade of concentrate prior to its processing and refinement. As a general rule, the Offtaker Agreements are similarly

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structured, with similar but not identical terms. As HRS's written submission puts it, the Offtaker Agreements "share common features".

[52] In its written submission, TCM asserts that the Offtaker Agreements provide for the sale of metals, not concentrate. However, on their face, that is not what the Offtaker Agreements say. Rather, these agreements are invariably styled as contracts for the purchase and sale of concentrates, albeit with the purchase price determined by reference to the metal content in each shipment of concentrate.

[53] The summary trial record contains 15 Offtaker Agreements involving nine different Offakers. HRS points out in its written submission that of the 15 Offtaker Agreements: (i) 10 are entitled "Copper Concentrate Sales Agreement", (ii) one is entitled "Copper Concentrate Purchase Contract", (iii) three are entitled "Purchase Contract" with the recitals specifying that the subject matter of the purchase is "copper concentrate", and (iv) one is entitled "Buyer's Contract", with the subject matter being defined as "Mount Milligan Copper Concentrates". To be clear, while the subject matter is in each case described as "copper concentrate", in reality, the Offtaker Agreements were concerned with copper, silver, and gold within the concentrate, as reflected in the pricing provisions of each contract. Even still, the point HRS makes is that all 15 of these Offtaker Agreements refer to the sale of "concentrate", not metals.

[54] For its part, TCM stresses that although the Offtaker Agreements are styled as contracts for the purchase and sale of concentrate, the pricing provisions invariably reveal that the focal point of each transaction is the copper, silver, and gold contained within the concentrate. The purchase price invariably consists of the total amount payable for copper, silver, and gold, based on a determination of the quantity of each metal recovered from the concentrate after smelting and refinement.

[55] The Offtaker Agreements invariably provide that legal title to the product – that is, the concentrate – passes from TCM to the Offtaker at some point in the process, usually upon the initial payment under the process described below. However, although title to the materials passes to the Offtakers, at least some of the

Offtaker Agreements also recognize TCM's continuing interest in the proportion of refined metals to be sold to Royal Gold under the Streaming Agreement. This is the case with Offtaker Agreements that TCM negotiated with five of the nine Offtakers. The Offtaker Agreement between TCM (as the "Seller") and Philippine Associated Smelting and Refining Corporation (as the "Buyer") is a typical example. Clause 5.1 of that agreement provides that the Seller (TCM) can convey "good and marketable title to the Concentrate, free and clear of all liens and encumbrances other than any lien or encumbrance on such Concentrate for the benefit of the Finance Parties". The "Finance Parties" is elsewhere defined to include Royal Gold. For the Offtaker Agreements that contain such a provision, the substance of the arrangement is that TCM "sells" and effectively transfers title to the concentrate to the Offtaker, subject to its obligation to deliver 35% of the gold and 18.5% of the copper contained within the concentrate to Royal Gold.

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[56] Payments under the Offtaker Agreements are structured as follows:

(a) Near the time the concentrate is shipped, TCM issues a "Provisional Invoice", which the Offtaker is required to pay. The price in the Provisional Invoice is based on the "payable copper", "payable silver", and "payable gold" contained within the concentrate, which is a function of the estimated amount of each metal, multiplied by the average market price over a recent period.

(b) Each agreement stipulates a "Quotational Period" to determine the price for the "payable" copper, silver, and gold. This is typically a one-month average spot price in the two to four month period after issuance of the Provisional Invoice.

(c) TCM later issues a "Final Invoice" specifying the final price based on the actual amount of metals in the shipment and the actual price from the Quotational Period. This results in either an additional payment from the Offtaker to TCM, or a refund paid by TCM to the Offtaker, depending on whether the amount in the Final Invoice is greater or lesser than the amount in the Provisional Invoice.

Commercial Production at the Mount Milligan Mine

[57] The Mount Milligan Mine began operations in the third quarter of 2013. By this point, the total development costs for the project were reported to be $1.6 billion, some $781.5 million of which came from Royal Gold under the terms of the Streaming Agreement.

[58] The first shipment of concentrate from the Mount Milligan Mine took place in November 2013. Both parties agree that the mine reached "commercial production" within the meaning of the Royalty Agreement on 24 June 2014.

Fulfillment of TCM's Commitment to Deliver Refined Metals to Royal Gold

[59] In the initial period of commercial production, from 24 June 2014 until the Centerra acquisition on 20 October 2016, TCM was obligated under the then-applicable version of the Streaming Agreement to deliver refined gold equal to 52.25% of the gold produced from the Mount Milligan Mine. From 20 October 2016 onward, TCM was obligated under the final iteration of the Royalty Agreement to deliver (i) refined gold equal to 35% of the gold produced from the mine, and (ii) refined copper equal to 18.75% of produced copper from the mine.

TCM's Election to Deliver Refined Metals Acquired on the Open Market

[60] TCM elected to fulfill its refined metals commitment to Royal Gold by delivering refined metals acquired on the open market, equal to the designated percentage of produced metals from the Mount Milligan Mine. I see no basis in the record to question the affidavit evidence of Ms. Saxton that TCM considered this option to be more cost effective than the alternative of physically delivering gold and copper produced from the Mount Milligan Mine.

TCM's Hedging Program

[61] For each shipment of concentrate from the mine, over a given period between the initial delivery of concentrate to the Offtaker under a particular Offtaker Agreement and the final delivery of refined gold to Royal Gold under the Streaming

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Agreement, TCM temporarily held Royal Gold's refined gold entitlement in the form of cash, rather than gold. To mitigate the risk of a drop in market price during this interval, TCM instituted what Ms. Saxton refers to in her affidavit as a "hedge program" that "mimics what would occur if TCM instead retained [Royal Gold's share of the gold from the mine] in the form of metals (as opposed to cash) until they were delivered to Royal Gold". This "hedge program" involves TCM entering into "derivative contracts" or gold futures contracts.

[62] Ms. Saxton goes on to explain in her affidavit that this hedging is "imperfect" because it is based on the estimated price and quantity of gold as set out in the Offtaker's Provisional Invoice, which could end up being different from the final price and quantity of produced gold in the Offtaker's Final Invoice. The underhedged or overhedged amount results in a gain or loss depending on the difference in the estimated price and the final quotational period price. The hedging counterparties also charge a hedging fee, resulting in a per unit hedging cost, which Ms. Saxton describes as "modest" considering the "potential volatility in metal prices".

[63] Ms. Saxton asserts in her affidavit that the hedging undertaken by TCM in the fulfillment of its commitment to Royal Gold is "not undertaken to speculate", but solely to reduce the price risk during the period that TCM holds Royal Gold's share of the gold from Mount Milligan Mine in cash. Accordingly, as explained below, TCM includes the costs attributable to this hedging program in calculating the "NSR base" under the Royalty Agreement. Ms. Saxton also points out in her affidavit that TCM engages in other hedging activities that are not considered in the determination of royalties payable to HRS.

Communications Between TCM and HRS as to the Calculation of Royalty Payments

[64] Recall that under the Royalty Agreement, TCM's obligation to pay royalties to HRS was set to begin two years after the date of commercial production. Commercial production commenced on 24 June 2014, such that TCM was obliged to start paying royalties on 24 June 2016.

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[65] In anticipation of its contractual duty to pay royalties commencing on 24 June 2016, executives at TCM took steps to determine how the royalty was to be calculated. This fell upon Ms. Saxton, the company's CFO, who is an accountant by profession.

[66] Ms. Saxton started from the premise that the royalty was to be calculated on "Net Smelter Returns" less specified deductions, under "generally accepted accounting principles". TCM's accounting was done in adherence to U.S. GAAP standards. Ms. Saxton determined that under U.S. GAAP principles, the royalty ought to be calculated as follows:

> (a) With respect to what Ms. Saxton referred to as the "Non-Royal Gold Metals", TCM "should recognize 100% of revenue received from the smelter or the mark to market price for sales that had not finalized". This would include amounts received from "all Offtakers", that is both those who are "smelters" and those who are "pure traders".
>
> (b) With respect to what Ms. Saxon referred to as the "Royal Gold Metals", for each ounce of refined gold delivered to Royal Gold, TCM "should recognize": (i) a deferred revenue component based on a pro-rated share of the deposit attributable to each ounce of gold that the Mount Milligan Mine was projected to produce over its lifetime, (ii) the cash on delivery component paid by Royal Gold at the time of delivery, and (iii) the hedging fees, along with any gains or losses from the hedging arrangement undertaken by TCM to meet its commitment to deliver refined gold to Royal Gold.

[67] Ms. Saxton then drafted a letter to HRS outlining the way the royalty payments would be calculated in accordance with generally accepted accounting principles, as provided for in the definition of "Net Smelter Returns" in the Schedule to the Royalty Agreement. The letter, which was dated 18 April 2016 and signed by TCM's chief executive Mr. Perron, read in part:

> In calculating NSR, the following factors of the NSR Definition are considered:

> 1. Amount of payable copper (“Copper Content”), payable gold (“Gold Content”), and payable silver (“Silver Content”) returned from smelter.
>
> 2. Deductions of smelting and refining charges and transportation costs (“Deductions”);
>
> 3. Applicable sales, determined in accordance with GAAP, of Copper Content (“Copper Sales”), Gold Content (“Gold Sales”), and Silver Content (“Silver Sales”), as follows:
>
> > (a) with respect to Copper Sales, Optionee recognizes revenue for 100% of the Copper Content at the applicable contractual price from the smelter or the mark-to-market price under GAAP for smelter sales that have not yet been finalized;
> >
> > (b) with respect to Silver Sales, Optionee recognizes revenue for 100% of the Silver Content at the applicable contractual price from the smelter or the mark-to-market price under GAAP for smelter sales that have not yet been finalized;
> >
> > (c) with respect to Gold Sales, the components of revenue are as follows:
> >
> > - recognition of receipts at the applicable contractual price from the smelter or the mark-to-market price under GAAP for smelter sales that have not yet been finalized for 47.75% of the Gold Content;
> > - recognition of receipts at $435 per ounce, or the spot price if lower than $435 per ounce, for 52.25% of the Gold Content; and
> > - recognition of an amount of deferred revenue based on 52.25% of the Gold Content.

[68] Mr. Perron’s letter also attached a sample calculation showing the NSR determination for the first fiscal year in which the royalties were payable.

[69] It should be noted that while Ms. Saxton drafted Mr. Perron’s 18 April 2016 letter, it made no express reference to the hedging fees or hedging adjustments that Ms. Saxton had previously determined should be accounted for in the royalty calculation. In her affidavit, Ms. Saxton explains that she “may have forgotten” to address the hedging adjustments in the letter to HRS as those adjustments “were always netted against revenue under U.S. GAAP”.

[70] Upon receipt of Mr. Perron’s letter, Mr. Haslinger Jr.’s initial reaction was that it was not how he “hoped” the royalty would be calculated.

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[71] On 2 May 2016, Mr. Haslinger sent a letter to Mr. Perron advising of HRS's position. In it, Mr. Haslinger asserted that, because the Streaming Agreement between TCM and Royal Gold "clearly postdates" the Royalty Agreement between TCM and HRS, "it is our belief that the determination of the base for the NSR payment should not be complicated by the breakdown as suggested in the three bullets under 3(c)" in Mr. Perron's 18 April 2016 letter. Mr. Haslinger went on to quote from TCM's "Form 10-K" – a corporate reporting form filed each year with the United States Securities and Exchange Commission ("SEC") – in which TCM stated that "after we sell copper and gold concentrate" from the Mount Milligan Mine to "[c]ustomers", "we purchase gold ounces in the market for delivery to Royal Gold" in an amount based on the proportion of gold in concentrate "sold to" the "[c]ustomers". On this basis, Ms. Haslinger asserted that "the base NSR for royalty payments (including gold) is the net smelter revenue generated by the sale of copper and gold concentrate" as described in TCM's corporate filings.

[72] Mr. Perron responded to Mr. Halsinger's concerns by way of a letter dated 18 May 2016. This letter contains a detailed explanation of TCM's position with respect to the relationship between the Royalty Agreement and the Streaming Agreement. Among other things, this letter stated that "once we have produced concentrate at Mount Milligan and the smelter receives the concentrate, 52.25% of the gold content in that concentrate is essentially earmarked for sale to Royal Gold" under the provisions of the Streaming Agreement. TCM "does not receive any additional economic benefit" in connection with the 52.25% of told production "earmarked" for Royal Gold. For this share of the mine's gold, the "economic benefits" consist solely of the "upfront cash payments" (i.e. the deposit) and the $435 per ounce that Royal Gold pays when the gold is delivered. In other words, the net smelter returns for Royal Gold's share of the gold is "$435 per ounce plus a portion of the deferred revenue" associated with the deposit. Thus, TCM's position was that the company "cannot simply recognize the spot price for each ounce of payable gold" in the concentrate "if GAAP accounting applies".

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First Royalty Payment

[73] TCM made its first royalty payment to HRS on 14 November 2016, covering the period from 25 June 2016 to 30 September 2016. The amount of the payment was $830,703.45. TCM's royalty calculation for this period was based on net smelter returns per the terms of the Streaming Agreement prior to the Centerra acquisition.

[74] The royalty payment was accompanied by a letter written by TCM's new chief executive, Mr. Kwong. The letter attached a detailed breakdown of the way the royalty was calculated, in accordance with TCM's position as set out in prior correspondence. The penultimate paragraph of the letter read as follows:

> Please note that the first royalty payment relates to sales during the third calendar quarter of 2016 of concentrate produced at the Mount Milligan Mine on or after June 25, 2016. These sales precede the effective date of Centerra's acquisition of Thompson Creek. We are continuing to review the accounting treatment of sales of concentrate from Mount Milligan following the acquisition which occurred on October 20, 2016 as well as its impact on the calculation of the production royalty under the Agreement [defined earlier in the letter to be the Royalty Agreement]. Once we have evaluated any such changes and have had the opportunity to adequately review and consider the Agreement, the correspondence between the parties to date, and other pertinent information, we will reach out to you to discuss the calculation of future royalty payments under the Agreement.

Ongoing Financial Difficulties Leading to Centerra's Acquisition of TCM

[75] Even after achieving commercial production at the Mount Milligan Mine, the operation was not a profitable undertaking for TCM, due to a combination of factors, including processing inefficiencies, a rapid drop in copper prices, and ongoing financial obligations arising from TCM's heavy debt load.

[76] Some 18 months after the Mount Milligan Mine had reached commercial production, TCM was in continuing financial difficulty. TCM's shares were traded on the TSX, and over-the-counter in the U.S. market regulated by the SEC. On 14 January 2016, the SEC suspended trading of TCM's common shares, pending proceedings to de-list the stock. TCM's shares continued to be traded on the TSX, but the price had dropped to $0.07 per share.

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[77] Between April 2016 and June 2016, TCM entertained proposals from new investors to save the company from insolvency.

[78] On 5 July 2016, TCM and Centerra entered into an agreement whereby Centerra would pay all of TCM's debt and acquire 100% of its shares in exchange for approximately 8% of Centerra's shares. In conjunction with Centerra's acquisition of TCM, an arrangement was also struck with Royal Gold, in which the Streaming Agreement would be amended to provide that, in the place of its right to acquire 52.25% of all gold produced from the Mount Milligan Mine, Royal Gold would have a right to acquire 35% of all gold and 18.75% of all copper produced from the mine.

[79] On 5 August 2016, Mr. Perron had a meeting with Mr. Haslinger Jr. in Vancouver to explain how the Centerra acquisition was expected to work. Mr. Perron also advised that TCM's new chief executive would write to Mr. Hasslinger to provide further information about how the royalty would be calculated going forward.

Centerra's Anticipated Accounting Treatment of the Streaming Agreement

[80] In anticipation of Centerra's acquisition of HRS, Centerra's internal finance team began considering how the Streaming Agreement would be accounted for in Centerra's financial statements. Under Mr. Millman's leadership, Centerra's internal finance team retained Grant Thornton LLP to advise on the correct approach.

[81] On 15 August 2016, Grant Thornton delivered a memorandum setting out recommendations as to how the Streaming Agreement ought to be dealt with in Centerra's financial statements. It should be noted that no affidavit evidence was tendered by the author of the Grant Thornton memorandum, nor was the memorandum tendered as an expert report. In this regard, the evidence about the Grant Thornton memorandum is admissible for a limited purpose, namely as part of TCM's response to the alleged breach of its contractual duty of good faith.

[82] One of the issues addressed in the Grant Thornton memorandum was whether the Streaming Agreement involved a sale of minerals that would be subject to royalty payments under the Royalty Agreement. On this point, Grant Thornton

concluded that “[w]hile there are some mixed indications”, which is “very common in such complex arrangements”, on balance the relevant “indicators” supported the conclusion that the Streaming Agreement was “primarily an acquisition of mineral interests (gold and copper) by Royal Gold based on the economic substance of the relationship”. This conclusion was consistent with TCM’s earlier determination that, for the share of metals from the Mount Milligan Mine that were the subject of the Streaming Agreement, the royalty payable to HRS ought to be calculated based on revenue TCM received from Royal Gold.

[83] Another issue addressed in the Grant Thornton memorandum had to do with the deferred revenue portion of the royalty. This required a consideration of whether the $781.5 million deposit paid to TCM under the Streaming Agreement ought to be treated as deferred revenue realized when TCM delivers refined gold to Royal Gold, or alternatively whether the deposit ought to be accounted for as part of the fair value of the Mount Milligan Mine operation as a whole. On this point, Grant Thornton determined that “based on the substance of the arrangement”, presentation of TCM’s property, plan, and equipment net of the fair value of the Streaming Agreement was “appropriate”. Focussing on the net fair value of the Streaming Agreement made the $781.5 million deposit that TCM had already received from Royal Gold irrelevant. Hence there was no “deferred revenue to be recorded on the acquisition date, which will impact revenue on a go-forward basis”. In the result, after Centerra’s acquisition of TCM, the revenue from the Streaming Agreement would consist of the cash on delivery payments and the hedging adjustments, with no recognition of “deferred revenue” attributable to the Royal Gold deposit.

[84] These conclusions were ultimately reflected in notes to the pro forma financial statements made available to the public as part of the plan of arrangement effecting Centerra’s acquisition of TCM. The details are set out in paragraph 91 below.

The Plan of Arrangement Relating to Centerra’s Acquisition of TCM

[85] Centerra’s acquisition of TCM proceeded by way of a plan of arrangement under the *BCA*. In particular:

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(a) On 28 July 2016, TCM filed a petition in this Court seeking approval of the plan of arrangement under s. 288 of the *Act*.

(b) The petition was supported by an affidavit sworn by Ms. Saxton, in which she described how the plan of arrangement would affect TCM "security holders", that is, shareholders and holders of options to purchase shares, and TCM creditors. Ms. Saxton's affidavit also asserted that:

(i) all of the relevant documents, including the "Arrangement Agreement" between TCM and Centerra, and a "Preliminary Circular" containing a detailed description of the arrangement, had been posted on the System for Electronic Document Analysis and Retrieval ("SEDAR") website, for review by anyone, including the public, free of charge; and

(ii) once approved by the Court, the final version of the "Information Circular" containing a detailed description of the arrangement would also be posted on the SEDAR website.

(c) The Preliminary Circular attached to Ms. Saxton's affidavit included, among other things, a "fairness opinion" from a financial institution expressing the conclusion that the exchange ratio of 100% of TCM's shares for 8% of Centerra's shares was fair to TCM shareholders.

(d) On 28 July 2016, counsel for TCM appeared in chambers and obtained an interim order under s. 291(2) of the *Act* for "advice and directions" from the Court in connection with the proposed arrangement. The Court issued an order approving the following details of the plan of arrangement:

(i) TCM would hold a special meeting of its shareholders on 26 October 2016 to seek shareholder approval for the arrangement;

(ii) TCM was to give notice of the meeting, together with meeting materials, including an Information Circular outlining Centerra's

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proposed purchase of TCM's shares, to all TCM "security holders", that is all shareholders and share option-holders.

(iii) TCM could then apply to the Court for a final order approving the plan of arrangement under s. 291(4) of the *Act*, on notice to the security holders.

(e) The special meeting of TCM's shareholders proceeded as scheduled on 18 October 2016. A quorum was achieved, and the share purchase plan was approved, with almost 97% of votes for those represented at the meeting cast in favour of approval.

(f) On 19 October 2016, counsel for TCM appeared in chambers seeking a final order approving the plan of arrangement under s. 291(4) of the *Act*. No one filed an application response or appeared in court to oppose the order. The order was granted by Mr. Justice Pearlman. It provided that:

(i) the arrangement was substantively and procedurally fair to TCM's security holders as contemplated under s. 291(4)(c) of the *Act*.

(ii) the arrangement was approved pursuant to s. 291(4)(a) of the *Act*; and

(iii) TCM and Centerra had leave to apply to amend the order or to seek further directions of the Court with respect to implementation of the plan of arrangement.

[86] HRS did not receive formal notice of TCM's petition seeking court approval for the plan of arrangement. TCM says it was not legally required to give notice to HRS, and further that HRS's interests were not prejudiced by the Court's order approving of the arrangement. HRS takes the position that TCM's failure to: (i) give formal notice of the petition proceedings to HRS, (ii) fully describe the effect of the plan of arrangement on HRS's position in the petition materials, and (iii) advise the presiding

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judge of the effect of the arrangement on HRS amounted to a breach of the duty of full, frank and fair disclosure.

Effect of the Centerra Acquisition on the Calculation of HRS's Royalties

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[87] After the Centerra acquisition, TCM's calculation of the royalty payable to HRS changed in two different ways.

[88] First, the amendment to the Streaming Agreement negotiated in conjunction with the Centerra acquisition led to a change in the proportion of refined metals that TCM was contractually obligated to deliver to Royal Gold. Under the prior iteration of the Streaming Agreement, TCM was obliged to deliver refined gold equal to 52.25% of the gold produced from the Mount Milligan Mine. Under the final iteration of the agreement, TCM was obligated to deliver refined gold equal to 35% of the produced gold and refined copper equal to 18.75% of the produced copper from the mine. This had a direct impact on TCM's calculation of the royalty payable to HRS.

[89] Second, following the Centerra acquisition, TCM determined that the royalty calculation should no longer include "deferred revenue" related to the Royal Gold deposit. The reason for this was that, applying generally accepted accounting principles, Centerra's financial statements included the Royal Gold deposit within the fair value of TCM's assets, rather than classifying the deposit as a prepaid stream of future income. TCM then applied the principle of "push down" accounting – under which a subsidiary adopts the same accounting treatment as a parent company – to classify the Royal Gold deposit in the same manner.

[90] HRS's primary position throughout has been that the Streaming Agreement is an aftermarket arrangement between TCM and Royal Gold, and that it should have no effect on the calculation of the royalties payable to HRS under the Royalty Agreement. HRS says the royalties for 100% of all metals derived from the mine ought to be calculated based on TCM's "sale" of mine concentrate to Offtakers. If this position is correct, then neither of the changes described above, namely (i) the change in the proportion of refined metals to be delivered to Royal Gold under the

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final version of the Streaming Agreement, or (ii) the reclassification of the Royal Gold deposit to eliminate the deferred revenue portion of the royalty, would have any relevance to the proper calculation of the royalties payable to HRS. Above and beyond this, HRS also complains that TCM breached the contractual duty of good faith owed to HRS under the Royalty Agreement by, among other things, failing to properly disclose the implications of the Centerra acquisition and its effects on the royalty calculation. In particular, HRS says that TCM failed to notify HRS, failed to make full, frank, and fair disclosure of how the Royal Gold deposit would be reclassified following the Centerra acquisition, and failed to articulate the implications of this for HRS as a party affected by the plan of arrangement.

[91] Part of TCM's response to these allegations is an assertion that the plan of arrangement was conducted with full transparency. TCM says that both the amendments to the Streaming Agreement, and the intended reclassification of the Royal Gold deposit were fairly described and disclosed to the public during the plan of arrangement process. In particular:

(a) The change in the terms of the Streaming Agreement was clearly disclosed in both the draft Information Circular and the final Informational Circular made available for public inspection on the SEDAR website.

(b) The way Centerra intended to classify the Royal Gold deposit was disclosed in notes to the pro forma financial statements included within the final Information Circular posted on the SEDAR website. The two notes describing the intended treatment of the Royal Gold deposit were note 5(g) on page 147 and note 5(l) on page 148.

(c) Note 5(g) read in part that, "Centerra assessed the streaming arrangement and determined that Centerra was acquiring a net interest in the underlying mineral property and accordingly netted the fair value of the streaming arrangement within the fair values of property, plant, and equipment".

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(d) Note 5(l) stated that there had been adjustments to the "cost of sales" in periods preceding the Centerra purchase, to reflect a "reclassification of the amortization of the streaming arrangement". These adjustments were necessary to make the treatment of past "cost of sales" consistent with the "fair value adjustment to Thompson Creek's streaming arrangement, as discussed in Note 5(g)."

[92] TCM emphasizes that these documents were publicly accessible on the SEDAR website, and adds that there is some evidence that HRS actually consulted them. In particular, Mr. Haslinger Jr. stated in his examination for discovery that one month before the plan of arrangement process began, HRS retained counsel to represent its interests in a possible dispute over the royalty calculation. Mr. Haslinger "believes" his solicitors subsequently obtained a copy of the Information Circular. TCM's position is that this would have placed HRS (through its solicitors) in a position to assess the implications of the Centerra acquisition on the royalty calculation. TCM also says that, in any event, HRS would not have been concerned about the elimination of the deferred revenue component of TCM's royalty calculation, considering HRS's position that the Streaming Agreement was irrelevant to its royalty entitlement, which in HRS's view ought to be calculated based on the sale of 100% of the mine's concentrates to Offtakers.

Second Royalty Payment

[93] TCM made the second royalty payment to HRS on 15 February 2017. The amount of the payment was $2,318,365.54. Once again the payment was accompanied by a letter from TCM's new chief executive Mr. Kwong, enclosing an explanation for the way TCM had calculated the royalty.

[94] This second royalty payment was for revenues received in the fourth quarter of 2016. The payment period straddled the date on which Centerra had acquired TCM, such that (i) the royalties for the period from 1 October 2016 to 19 October 2016 were calculated based on 52.25% of gold sales being attributed to revenue received from Royal Gold under the then-applicable version of the Streaming

Agreement, and the balance of the mineral sales determined based on revenue received from Offtakers, and (ii) the royalties for the period from 20 October 2016 to 31 December 2016 were calculated based on 35% of gold sales and 18.75% of copper sales being attributed to revenue from Royal Gold under the final version of the Streaming Agreement, and the balance of the mineral sales determined based on revenue received from Offtakers.

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[95] For the latter period, TCM had calculated the royalties referable to Royal Gold’s share of the gold and copper from Mount Milligan Mine taking into account (i) the cash on delivery payment received for all shipments of refined gold and copper delivered to Royal Gold during the quarter, and (ii) hedging costs associated with TCM’s obligation to deliver refined gold under the Streaming Agreement. TCM’s calculation of royalties attributable to Royal Gold’s share of the metals from the mine no longer included a pro-rated deferred revenue component attributable to the Royal Gold deposit. In his covering letter, Mr. Kwong explained this change as follows:

> Prior to the acquisition, Thompson Creek had recognized, as revenue, a portion of its deferred revenue (which was recorded at the time of the initial Royal Gold streaming transaction) which related to shipments of concentrate made from Mt. Milligan. Following the acquisition however, as required by IFRS, Centerra recorded the Thompson Creek assets at their fair value, net of the deferred revenue previously recorded on Thompson Creek's balance sheet. Accordingly, under IFRS there is no longer deferred revenue recorded on Thompson Creek's balance sheet and therefore no deferred revenue will be recognized when shipments are made.

[96] The acronym IFRS in Mr. Kwok’s letter is a reference to International Financial Reporting Standards. As explained in more detail below, IFRS is one of two commonly used sets of generally accepted accounting principles. The other commonly used standard is U.S. GAAP. Prior to its acquisition by Centerra, TCM prepared its financial statements in accordance with U.S. GAAP. By contrast, Centerra prepares its financial statements in accordance with IFRS. The significance of this will be discussed later.

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Subsequent Royalty Payments

[97] TCM has continued to pay royalties to HRS each quarter, based on the approach articulated in paragraph 95. In other words, for the portion of gold and copper from the Mount Milligan Mine that TCM is obligated to deliver to Royal Gold under the Streaming Agreement, TCM calculates the royalties considering (i) the cash on delivery payment received from Royal Gold, and (ii) the hedging costs associated with its delivery of refined metals to Royal Gold.

Expert Evidence Explaining TCM's Calculation of Royalties Payable to HRS

[98] TCM relies on the expert report of Dr. Thornton in support of its position that the proper calculation of royalties is pursuant to "generally accepted accounting principles consistently applied" as contemplated in Appendix B, clause 1(a) of the Royalty Agreement.

[99] HRS objected to the admissibility of Dr. Thornton's report on several grounds. As set out above, I have concluded that the entirety of the report is admissible, with some limitations on the use that can be made of certain portions of it. The reasons for my conclusion on admissibility and use of the report are set out in the legal analysis below.

[100] Included within an appendix to Dr. Thornton's report is a list of assumptions. These include the assumption, borne out by the evidence in the record, that (i) prior to its acquisition by Centerra, TCM prepared its financial statements in accordance with U.S. GAAP, and (ii) Centerra prepares its financial statements in accordance with IFRS. For this reason, Dr. Thornton's report involves a consideration of generally accepted accounting principles under both U.S. GAAP and IFRS.

[101] Dr. Thornton's report addresses three "significant accounting topics". The first is how revenue associated with the Streaming Agreement should be determined under U.S. GAAP and IFRS. The second is whether TCM's obligation associated with the $781.5 million deposit paid by Royal Gold ought to be classified as a "financial instrument" (*i.e.* a debt obligation), or alternatively as deferred revenue.

The third is how, if at all, TCM's accounting treatment of the Streaming Agreement ought to be affected by Centerra's acquisition of TCM.

(i) Determination of TCM's Revenue Associated with the Streaming Agreement

[102] Dr. Thornton's analysis under this heading begins with a consideration of the nature of the Streaming Agreement. Dr. Thornton considers whether, "for accounting purposes", the Streaming Agreement ought to be classified as a "commodity sales agreement" giving rise to revenues as opposed to a financing arrangement giving rise to a debt obligation on the part of TCM.

[103] Dr. Thornton's conclusion is that the Streaming Agreement is properly classified as a "commodity sales agreement". This opinion appears to rest on two concepts, namely (i) the generally accepted accounting principle of recognizing substance over form, and (ii) the concept of risk versus reward in distinguishing between a purchase on the one hand and a financing arrangement on the other.

[104] With regard to substance over form, Dr. Thornton explains that investors and creditors who consult financial statements will want to have a clear picture of the economic substance of a particular transaction or financial arrangement, as opposed the technical form that the transaction or arrangement may take. Substance over form is recognized as an accepted principle under IFRS. Under U.S. GAAP, the concept of substance over form is simply a manifestation of the principle of "faithful representation" in financial statements.

[105] Dr. Thornton opines that TCM's decision to treat the Streaming Agreement as a metal sales agreement giving rise to revenues, as opposed to a financing agreement involving advancement of a principal and a concomitant debt obligation, "reflects the economic substance of the Streaming Agreement for accounting purposes". However, Dr. Thornton expressly qualifies this opinion by noting that, "[w]hether it also reflects the legal form of the Agreement is not explicitly considered, as it is outside my areas of expertise".

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[106] With regard to risk versus reward, Dr. Thornton explains that the risk-reward profile for a debt arrangement is “starkly different” from the risk-reward profile for a commodity purchase arrangement. In the case of debt, the creditor’s rewards generally comprise the promised return of principal plus interest, and the only risks are “credit risks”, that is, the risk that the borrower will default on its debt obligations. By contrast, in the case of an investor who participates in a commodity purchase arrangement, the investor’s rewards will vary with the productivity of output, giving rise to an accompanying “production risk”, and with the prevailing price of the commodity, giving rise to a “price risk”. Further, the chance, “however remote”, that the investor will receive substantially less gain via the commodity purchase than the amount of the original investment yields a “credit risk”, although for some reason Dr. Thornton appears to be of the view that such a risk is minimal or non-existent.

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[107] Dr. Thornton goes on to consider the nature of the risks presented to Royal Gold under the Streaming Agreement. In Dr. Thornton’s view, both the “contract terms” and the language in TCM’s “accounting filings” focus on the “delivery of commodities” to Royal Gold rather than a return of “principal and interest”. Dr. Thornton’s reference to the “contract terms” appears to be based on the terms of the Streaming Agreement itself, without consideration for the interaction between the Streaming Agreement and the Offtaker Agreements. The reference to TCM’s “accounting filings” draws upon, among other things, TCM’s Form 10-K filings required by the SEC in connection with the listing of shares for over-the-counter trading in the U.S. Based on these sources, Dr. Thornton concludes that the arrangement between TCM and Royal Gold exposes Royal Gold to both production risk and price risk, such that, on a risk versus reward analysis, the Streaming Agreement is properly accounted for as a “commodity sales agreement” and not a “financial agreement”.

[108] Dr. Thornton goes on to observe that both TCM and Centerra conducted an analytical exercise similar to the one Dr. Thornton himself had conducted, concluding that the Streaming Agreement was a commodity sales agreement. TCM reached that conclusion by applying U.S. GAAP. Centerra reached a similar

conclusion by applying IFRS. Both sets of accounting principles led to the same conclusion, which marries up with Dr. Thornton's expert opinion on this issue.

[109] Dr. Thornton's report then moves through a rather detailed consideration of the concept of revenue recognition under both U.S. GAAP (for TCM) and IFRS (for Centerra). His conclusion is that under both sets of accounting standards, the revenue associated with TCM's "sale" of refined gold and copper to Royal Gold under the streaming agreement properly includes both the cash-on delivery component of the per ounce purchase price, and the financial implications of TCM's hedging program.

[110] With regard to the cash-on delivery component of the revenue, Dr. Thornton opines that under both U.S. GAAP and IFRS, the proper measure of revenue is the fixed price of $435 per ounce of gold and 15% of the prevailing market price per ounce of copper, as specified in the Streaming Agreement.

[111] With regard to hedging, Dr. Thornton's opinion is that TCM's hedging activities are properly regarded as "an identifiable component of a single transaction reflecting the economic substance of the arrangement [between TCM and Royal Gold] for accounting purposes". Under U.S. GAAP, it is sometimes necessary to apply revenue recognition criteria to "separately identifiable components of a single transaction in order to reflect the substance of the transaction". Similarly, under IFRS, "it may be necessary to treat rights and obligations arising from [a] group or series of contracts as a single unit of account", where that group or series of contracts is set up to "achieve an overall commercial effect".

[112] The third and final component of TCM's revenue under the Streaming Agreement is the "deferred revenue" component arising from TCM's accounting treatment of the Royal Gold deposit. Dr. Thornton deals with this in a separate section of his report, as described under the next sub-heading.

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(ii) TCM's Accounting Treatment of the Royal Gold Deposit

[113] Dr. Thornton's report explains that, under a forward purchase contract – in which the purchaser pays in advance in exchange for goods to be delivered by the vendor in the future – accountants generally refer to the vendor's future obligation to deliver the goods as a "real" liability as opposed to a "financial" liability. This is because the vendor's future obligation is to provide something "real", *i.e.* the goods as opposed to something abstract, *i.e.* money. By way of analogy, Dr. Thornton cites the example of a magazine subscription contract. The customer pays the entire subscription price up front, and the publisher then has what accountants would consider to be a "real" liability to send magazines to the customer on a periodic basis for the duration of the subscription period.

[114] Dr. Thornton goes on to explain how such "real liabilities" are recognized under both U.S. GAAP and IFRS.

[115] The relevant rule in U.S. GAAP applies to "[s]upply or service transactions" that involve an initial non-refundable fee with subsequent periodic payments for future products or services. In such an arrangement, the up front fees – even if non-refundable – "are earned as the productions and/or services are delivered and/or performed over the term of the arrangement or the expected period of performance". The up front fees "generally should be deferred and recognized systematically over the periods that the fees are earned".

[116] Under the applicable IFRS rule, "the fulfilment of all or part of the liability gives rise to income measured at the value of the consideration received for the part fulfilled". Thus, when part of the liability is fulfilled in any particular period, the corresponding income is recognized in that period, based on a pro-rated determination of the value of consideration received.

[117] In Dr. Thornton's opinion, by applying U.S. GAAP, TCM "properly accounted for Royal Gold's contribution", *i.e.* the $781.5 million deposit, as "deferred revenue" attributable to a "real liability", to be "amortized over the life of the Mount Milligan

Mine, based on volume of production". Dr. Thornton further opines that after TCM had been acquired by Centerra, "the same accounting would apply under IFRS, *but for* other adjustments that occurred due to the acquisition". [emphasis in original]

[118] In a separate section of his report, Dr. Thornton explains that TCM's treatment of the Royal Gold deposit as deferred revenue for the purpose of calculating revenues in connection with Royal Gold's proportion of the refined gold and copper from the Mount Milligan Mine was different from TCM's internal accounting of the "Deposit Record". The Deposit Record was a "financial obligation" that would only affect TCM's bottom line if TCM experienced financial stress or if the supply of gold and copper from the mine was exhausted before the Deposit Record balance was "reduced to nil" per the terms of the Streaming Agreement. In Dr. Thornton's view, "information about the Deposit Record was properly described in the footnotes to the financial statements to inform readers of the conditions under which it might be recognized in the future if certain events were to occur". By contrast, as explained above, the deposit itself was a "real liability" tied to TCM's obligation to deliver refined gold and copper to Royal Gold, and as such it was necessary for TCM to include the associated deferred revenue in its financial statements.

(iii) The Accounting Implications of Centerra's Acquisition of TCM

[119] Dr. Thornton's report addresses the accounting implications of the Centerra acquisition in two steps. First, Dr. Thornton considers the proper post-acquisition treatment of TCM's arrangement with Royal Gold in Centerra's financial statements. Second, Dr. Thornton considers whether Centerra's accounting treatment of TCM's future obligations to Royal Gold ought to have any impact on TCM's financial statements.

[120] As noted, Centerra's financial statements are prepared under IFRS. The relevant rules provide that where a parent company such as Centerra acquires a subsidiary such as TCM, the parent company must produce "consolidated" accounts. As part of the consolidation, the parent company must "assign fair values

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to the individual assets and liabilities" of the subsidiary. Dr. Thornton explains that when Centerra acquired TCM, this "fair value" requirement "eliminated the historical cost basis of the Mount Milligan Mine", which included what TCM had previously classified as deferred revenue relating to "Royal Gold's contribution to the mine". In this way, "the consolidated financial statements reflected the fair value of, among other things, the consolidated entity's net interest in the mine, after allowing for Royal Gold's interest in the mine's output".

[121] Dr. Thornton's report then moves to a detailed consideration of the way the fair value of Mount Milligan Mine ought to be determined. With regard to the value associated with the Streaming Agreement, Dr. Thornton explains that there were different approaches, all of which would lead to the same result, namely that the value of the Streaming Agreement was limited to the future revenue TCM would receive from Royal Gold in connection with 35% of the gold and 18.75% of the copper projected to be produced over the life of the mine.

[122] Because the fair value of the Streaming Agreement was to be recorded on a prospective, net basis in Centerra's financial statements, the deposit (which had already been fully paid by Royal Gold to TCM at the time of the Centerra acquisition) was no longer relevant. The deposit was part of the historical cost base of the Mount Milligan Mine, with no relevance to the current fair value of Centerra's assets under IFRS. This meant that, as Dr. Thornton had put it in an earlier portion of his report, the deferred revenue component of the royalty calculation "vanished" in Centerra's consolidated financial statements.

[123] Dr. Thornton's report goes on to consider how the deposit ought to be recorded on TCM's financial statements after the Centerra acquisition. Dr. Thornton considers two approaches.

[124] One approach would be for the subsidiary to continue using its pre-acquisition accounting practices in the preparation of its financial statements. On this approach, the subsidiary would continue to keep its own stand-alone financial statements, and

the parent company would be obliged to prepare and continuously update a separate set of books for the purposes of its consolidated financial statements.

[125] The other approach would be for the subsidiary, in preparing its financial statements going forward, to adopt the accounting practices of the new parent company. Dr. Thornton refers to this approach as "push down accounting", under which the parent company's accounting practices are "pushed down" to the subsidiary.

[126] Dr. Thornton's report goes on to canvass the "arguments" in favour of and against the practice of push down accounting. The main point in favour of this practice is that it is the best overall measure of the value of the subsidiary's assets and liabilities going forward. It is as if the parent company purchased the subsidiary's assets and liabilities and then used them to "establish a new entity" to carry on the subsidiary's business. The main point against push down accounting is that in some respects it may conflate the position of the subsidiary's shareholders with the position of the subsidiary itself. While the shareholders may be most interested in the current net value of the company, in reality the subsidiary company continues to exist in its own right, and from its perspective it may be hard to justify accounting for its assets and liabilities using anything other than their original values.

[127] Dr. Thornton next canvasses the literature on push down accounting. Under U.S. GAAP, the approach to push down accounting has changed over time. In 1979, the relevant U.S. advisory committee reached no consensus on the practice, although eight of 13 committee members supported its use. In 1983, the SEC (which had since become responsible for setting U.S. GAAP standards) mandated push down accounting for wholly-owned subsidiary companies. However, in 2014 the SEC rescinded that mandate, and left reporting entities with "the option" for a subsidiary to use push down accounting in its stand-alone financial statements, following an acquisition by a principal. Under IFRS, there is "nothing that prohibits or requires the use of pushdown accounting".

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[128] Dr. Thornton's conclusion is twofold. First, he opines that Centerra properly employed the "fair value methodology" in its acquisition of TCM, and therefore properly eliminated deferred revenue associated with the Royal Gold deposit in its consolidated financial statements. Second, Dr. Thornton opines that one could "justify" using push down accounting to eliminate the deferred revenue associated with the Royal Gold deposit in TCM's "standalone" financial statements.

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Analysis

Principles of Contract Interpretation

[129] The court's goal in the interpretation of a contract is to ascertain the objectively discernible intention of the contracting parties based on the words the parties chose to use in their agreement: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 47, 57. The intention of the parties is determined on an objective basis. The question is how a reasonable person would understand the contract based on its text and in light of the surrounding circumstances: *Prairiesky Royalty Ltd. v. Yangarra Resources Ltd.*, 2023 ABKB 11 at para. 60.

[130] To achieve the goal of discerning contractual intent, one must "read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract", and also consistent with the relevant commercial realities and good business sense: *Sattva* at paras. 47; *Prism Resources Inc. v. Detour Gold Corporation*, 2022 ONCA 326 at para. 16(ii). I find it helpful to break down this succinct summary of the proper approach by focusing on four discrete but overlapping points of interpretation.

[131] First, the interpretive exercise should always start with the text of the contract itself. In the case of a written contract, the contracting parties have chosen to express their agreement in particular terms. The starting point should be that the parties "intended what they said in the written document": *Prism* at para. 16(i).

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[132] Second, it is “a fundamental principle of contractual interpretation that a contract must be construed as a whole”: *Sattva* at paras. 47, 64. This means that interpretation of a particular contractual provision must always be “grounded in the text and read in light of the entire contract”: *Sattva* at para. 57. The court must adopt an interpretation that “gives meaning to the terms” of the agreement, in a manner that does not render any of those terms “ineffective”: *Prism* at para. 16(ii); *Prairiesky* at paras. 59-60.

[133] Third, courts have acknowledged the difficulty in ascertaining contractual intent based on the words in the contract alone. Words on a page do not necessarily have a singular or immutable meaning, and they often take on shape based on the context in which those words are used: *Sattva* at para. 47. For this reason, it is necessary for the court to consider the surrounding circumstances – sometimes referred to as the factual matrix – in which the agreement was made as part of the interpretive exercise: *Sattva* at paras. 46, 50, 58; *Prairiesky* at paras. 60-61; *Prism* at para. 16(iii); see also *St. Andrew Goldfields Ltd. v. Newmont Canada Limited*, 2009 CanLII 40549 (ON. S.C.) at para. 15, aff’d 2011 ONCA 377; *Lake Louise Limited Partnership v. Canad Corp. of Manitoba Ltd.*, 2014 MBCA 61 at para. 33.

[134] Fourth, courts must also strive to interpret the text of the contract in a manner that accords with “sound commercial principles and good business sense, avoiding a commercially absurd result, objectively assessed”: *Prism* at para. 16(iv); see also *Consolidated Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co.*, [1980] 1 S.C.R. 888 at para. 26. In the particular context of agreements concerning natural resource extraction, “[c]ourts must interpret royalty agreements according to sound commercial principles and business sense to avoid results that are unrealistic, absurd, or unreasonable with respect to the commercial realities of the industry”: *Prairiesky* at para. 61.

[135] Many of the leading cases acknowledge the importance of the surrounding circumstances to the interpretive exercise. In this regard, a few further points must be noted.

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[136] The goal in considering evidence of the surrounding circumstances is to "deepen a decision maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract": *Sattva* at para. 57. As Madam Justice L.B. Roberts put it in *St. Andrew Goldfields* at para. 15, "even when the terms of an agreement are not ambiguous, the evidence of surrounding circumstances and of custom or usage may be admitted as an aid in interpreting and giving business efficacy to those terms".

[137] It is important to bear in mind that the factual matrix is limited to facts that were "known or ought reasonably to have been known to the parties" at the time the contract was formed: *Prairiesky* at para. 61, citing *Sattva* at paras. 58, 60, and *IFP Technologies (Canada) Inc. v. Encana Midstream and Marketing*, 2017 ABCA 157 at para. 83; see also *Prism* at para. 16(iii). This "necessarily includes" the "genesis of the agreement", "its aim or purpose", the "nature of the relationship created by the agreement", and the "nature" and "customs" of the industry: *Prairiesky* at para. 61, citing *Sattva* at para. 47 and *IPF* at para. 83; see also *Prism* at para. 16(iii). The surrounding circumstances can also include the degree of sophistication of the parties, and the nature of the risks considered by those parties in negotiating the contract: *Sattva* at para. 66.

[138] The factual matrix does not include evidence of "the subjective intention of the parties", "negotiations", or the "subsequent conduct of the parties" after the execution of the contract: *Lake Louise* at para. 34. Indeed, evidence as to the subjective intentions of the parties, along with evidence of their post-contract conduct, is presumptively inadmissible. Such evidence is only admissible to resolve ambiguity, where the words of the written contract read in the context of the surrounding circumstances are genuinely ambiguous in the sense that they could reasonably support multiple, equally plausible meanings: *Prairiesky* at para. 62.

[139] Finally, the factual matrix cannot be allowed to "overwhelm" the words of the contract, or change the words so as to undermine the obligations and rights that the parties assumed when they entered the contract. Thus, while the surrounding

circumstances are a relevant and important part of the interpretive process, courts "cannot use them to deviate from the text such that the court effectively creates a new agreement": *Sattva* at para. 57; *Prism* at para. 17.

Distinction Between Contract Interpretation and Contract Application

[140] Since neither the concept of streaming agreements generally, nor the existence of the particular Streaming Agreement entered into between TCM and Royal Gold in this case were known to the parties when the Royalty Agreement was executed, nothing about the Streaming Agreement can form part of the factual matrix relevant to the interpretation of the Royalty Agreement. The same can be said of the Offtaker Agreements, executed years after the Royalty Agreement.

[141] Further, since neither Mr. Haslinger Sr. nor his successor in title HRS were parties to the Streaming Agreement between TCM and Royal Gold, the Streaming Agreement could not have the effect of modifying or altering the contractual rights and obligations of the parties to the Royalty Agreement. Again, the same can be said of the Offtaker Agreements, negotiated between TCM and the Offtakers.

[142] The key issue of contractual interpretation to be decided in this case is what does or does not constitute net smelter revenues from ores, concentrates, or mineral products under the Royalty Agreement. That interpretive question must be answered based on the words of the Royalty Agreement, read in the context of what was within the knowledge and contemplation of the parties – including their knowledge of the mining industry and industry practices – at the time they negotiated the agreement.

[143] In this context, the sole relevance of the Streaming Agreement and the Offtaker Agreements pertains not to the interpretation of the Royalty Agreement, but rather to its application in determining what does or does not qualify as "net smelter returns" for the purposes of determining the production royalty to be paid to HRS. This is a question of contract application, not contract interpretation.

[144] Thus, after concluding the interpretive exercise by ascertaining the proper scope of net smelter returns in the Royalty Agreement, it will then be necessary to

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decide whether TCM's revenues from delivery of refined metals to Royal Gold under the Streaming Agreement qualify as net smelter returns. This will require a consideration of events subsequent to the execution of the Royalty Agreement, in order to (i) properly characterize the Offtaker Agreements and the Streaming Agreement and (ii) ascertain the way TCM in fact received returns in connection with ores, concentrates, or mineral products from the Mount Milligan Mine.

[145] To sum all of this up, the Royalty Agreement must be interpreted in light of what was known to the parties at the time, and then that interpretation must be applied in light of subsequent events, including the way TCM generated revenue from ores, concentrates, or mineral products obtained from the Mount Milligan Mine. This latter step, applying the Royalty Agreement, will require a legal characterization of both the Offtaker Agreements, and the Streaming Agreement. It will also involve a consideration of how net smelter returns are properly determined under "generally accepted accounting principles consistently applied" as provided for under the Royalty Agreement.

Admissibility of Expert Evidence

[146] As noted at the outset, the summary trial record includes expert reports from (i) Dr. Graham A. Davis, a mineral economist, and (ii) Dr. Daniel B. Thornton, an accountant. The record also includes cross-examination of both experts on their reports. Both expert reports were tendered by TCM. HRS objects to the admission of the reports on various grounds.

[147] The proper approach to admissibility of expert evidence is articulated in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23. The analysis proceeds in two steps. The first step involves a consideration of the four criteria of admissibility set out in *R. v. Mohan*, [1994] 2 S.C.R. 9, under which the trial judge must be satisfied that the proposed evidence is: (i) relevant in the sense of being logically probative of a material fact, (ii) necessary in that the proposed expert can provide information that is "likely to be outside the ordinary experience and knowledge of the trier of fact", (iii) not subject to an exclusionary rule, and (iv)

presented through a properly qualified expert. If these criteria are met, then at the second stage of the analysis the judge must exercise a gatekeeping function by determining whether the potential benefits of admitting the evidence outweigh the potential risks or prejudicial effects.

Admissibility of Dr. Davis's Expert Opinion Evidence

[148] HRS contends that Dr. Davis's report is inadmissible because it treads on the role of the trial judge in purporting to interpret the Royalty Agreement. HRS further contends that the report goes beyond merely providing objectively helpful information, and descends into impermissible advocacy.

[149] TCM's response is that Dr. Davis's report is not tendered to speak directly to the interpretation of the Royalty Agreement. Some aspects of Dr. Davis's report are said to go to the factual matrix of the Royalty Agreement, including the discussion of the significance of royalty arrangements in the mining industry, the common kinds of royalties in the industry, and the common usage of the term "returns" in the industry. Other aspects of Dr. Davis's report are said to be relevant not to the interpretation of the Royalty Agreement, but rather to the question of how the Royalty Agreement applies to revenues received by TCM under the Streaming Agreement. This, in turn, will require a consideration of the factual matrix underlying the Streaming Agreement, and the commercial realities in which it operates. These are issues that Dr. Davis addresses from the perspective of a mineral economist.

[150] With regard to relevance, I find that the bulk of Dr. Davis's report includes information going to the "commercial purpose of the contract", the context, and the "market in which the parties are operating", all of which are relevant as part of the factual matrix in which the Royalty Agreement was negotiated. Other parts of the report go to the economic features of the relevant transactions, which can assist the court in assessing whether a particular interpretation of the contract accords with sound business practice and does not produce an absurd result. Finally, I agree with TCM that some aspects of Dr. Davis's report are relevant to the commercial realities

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bearing on the Streaming Agreement. This is part of the context in which the Streaming Agreement was created, bearing on its proper legal characterization.

[151] Turning to the question of necessity, HRS says that while Dr. Davis's report purports to "explain and analyze" royalties, and in particular net smelter return royalties from an "economic perspective", in substance the report's true focus is to opine on the interpretation of the Royalty Agreement. The report makes extensive reference to published articles authored by lawyers. HRS says Dr. Davis's report is therefore unnecessary, in that it offers what amounts to a legal opinion, or an economist's opinion on a legal issue, namely contract interpretation.

[152] HRS cites several cases in support of its position on necessity. In *Lake Louise* at para. 38, the majority found the trial judge in error in relying on expert evidence from an accountant to determine the relationship between certain terms in a contract, reasoning that – except when required to interpret technical terms – "experts cannot provide opinions on what a contract means". In *McNamara Construction Co. v. Newfoundland Transshipments Ltd.*, [2000] N.J. No. 447 [Q.L.], the Court stated at para. 6 that it is not "the role of the expert to interpret the law", nor to offer "suggestions of proper contractual interpretation". In *Dow Chemical Canada Inc. v. Shell Chemicals Canada Ltd.*, 2010 ABCA 126, the Court explained at paras. 17-18 that the opinion of a third party concerning the meaning of a contract is inadmissible, even where that third party is a "knowledgeable" about the industry in which the contract in issue was negotiated. Drawing on these authorities, HRS says that Dr. Davis's report runs afoul of the necessity criterion, because it is the role of the Court to interpret the Royalty Agreement.

[153] I have considered HRS's argument, but I find that the bulk of Dr. Davis's report is focused on the nature and purposes of net smelter return royalties from an economic perspective. I have no difficulty concluding that Dr. Davis's expertise in mineral economics is extensive and can assist the Court. Without Dr. Davis's evidence, the Court would not have a proper understanding of the importance of royalty arrangements in the mining industry, the different types of royalties in use in

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the industry, and the economic considerations that went into the negotiation of royalty agreements in this industry at the time that parties entered into the Royalty Agreement.

[154] Nor do I find any merit in the argument that Dr. Davis's report is inadmissible because it draws upon articles written by legal professionals, most notably Karl J.C. Harries. Mr. Harries is both a lawyer and a mining engineer, who is recognized as a leading scholar on the subject of royalty agreements in the mining industry. I would not question Dr. Davis's reliance on the work of Mr. Harries in forming opinions on topics of mineral economics simply because Mr. Harries has a background in both engineering and law.

[155] Having said that, I do agree with HRS's submission that certain portions of Dr. Davis's report impermissibly wade into areas of legal argument and contract interpretation and therefore run afoul of the necessity criterion. I have identified the inadmissible portions in paragraph 166 below.

[156] I move on to address the third criterion, namely whether any portions of Dr. Davis's report offend the rules of admissibility. I see two concerns.

[157] The first concern as to the rules of admissibility is the contention that Dr. Davis's report goes beyond objective expert opinion offered to assist the court, and into impermissible advocacy. I agree that some portions of Dr. Davis's report wade into advocacy, although I do not find that this concern pervades the entire report in a manner that would call into question Dr. Davis's objectivity or his understanding of the role of an expert witness. To a large extent, the concerns about impermissible advocacy overlap with the concerns about necessity. The portions of Dr. Davis's report that I find to be inadmissible on this basis are set out below in paragraph 166.

[158] The second concern is that certain portions of Dr. Davis's report go beyond the scope of what is considered part of the factual matrix or surrounding circumstances of the Royalty Agreement. The jurisprudence instructs that the surrounding circumstances are limited to those facts known or reasonably capable of

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being known by the parties at the time that the contract in issue was formed. In this case, the Royalty Agreement was signed in 1986, and an addendum was negotiated and signed in 1988. In that time frame, neither the Offtaker Agreements nor the Streaming Agreement were in existence. Indeed, Dr. Davis points out that streaming agreements did not come into use until the early 2000s. Hence, Dr. Davis's opinions about the Streaming Agreement, and his passing references to the specific terms of the Offtaker Agreements, would not be admissible as part of the factual matrix relevant to the interpretation of the Royalty Agreement.

[159] However, independent of the factual matrix or surrounding circumstances relevant to interpretation of the Royalty Agreement, it will also be necessary for the court to consider commercial reasonableness and business efficacy, in assessing whether a proposed interpretation of the agreement accords with sound business practice and does not produce an absurd result, as contemplated in *Consolidated Bathurst* at p. 901-902. Moreover, even after arriving at a proper interpretation of the scope of the Royalty Agreement, the court must go on to consider how the Royalty Agreement, properly interpreted, actually applies to amounts received by TCM from the Offtaker Agreements and the Streaming Agreement. I accept TCM's submission that certain aspects of Dr. Davis's report are relevant to that stage of the analysis.

[160] By way of example, Dr. Davis's report offers opinions about the nature of hedging activities from the perspective of a mineral economist. In Dr. Davis's opinion, certain hedging activities undertaken by mine operators are properly viewed in mineral economics as safeguarding activities, as opposed to speculative business transactions that are independent of mining operations. Although there is some evidence to suggest that the concept of hedging was not entirely foreign to the mining industry when the Royalty Agreement was executed in the late 1980s, Dr. Davis does not restrict his opinions to historical observations. Rather, he offers opinions about the hedging transactions undertaken by TCM in connection with its obligations under the Streaming Agreement, which came into existence years after the Royalty Agreement was executed. In my view, Dr. Davis's opinions about TCM's hedging transactions are properly admitted, in order to understand the economic

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realities in play, and to understand current aspects of safeguarding activities undertaken by mine operators. I would therefore admit Dr. Davis's opinion evidence about hedging tied to TCM's handling of the portion of Mount Milligan Mine gold that it was obligated to deliver to Royal Gold under the Streaming Agreement, even though all of this came into being after the execution of the Royalty Agreement.

[161] Turning to the fourth criterion, namely the requirement for a properly qualified expert, I am satisfied based on Dr. Davis's statement of qualifications that he has the requisite education, training, and experience to offer expert opinions in the field of mineral economics. Although I found some merit in HRS's complaint that Dr. Davis's report is inadmissible on the basis of advocacy, these concerns do not lead me to conclude that Dr. Davis is biased or incapable of presenting an objective expert opinion. The concerns relate to specific parts of Dr. Davis's report. They do not call into question Mr. Davis's professional integrity.

[162] This brings me to the court's gatekeeper function. At this stage, the trial judge must scrutinize the proposed evidence to ensure that it is sufficiently cogent to justify the time, prejudice, and potential confusion that can arise from the presentation of expert evidence to the trier of fact: *White Burgess* at para. 24, citing *R. v. Abbey*, 2009 ONCA 624, leave to appeal to SCC ref'd, [2010] S.C.C.A. No. 125 at para. 76.

[163] TCM cites *Taylor v. Liong*, 2007 BCSC 231, discussing the distinction between a trial by judge alone and a trial by judge and jury. Justice Cullen, as he then was, adopts the reasoning of Justice Lox of the Ontario Superior Court of Justice in *Chan v. Erin Mills Town Centre Corp.*, [2005] O.J. No. 5027, 2005 CanLII 43678 at para. 31, explaining that "the metaphor of the judge as gatekeeper loses much of its symbolic force when it is the judge who is the trier of fact". Although the judge is not "excused from scrutinizing evidence", the "likelihood of a judge being overwhelmed by the 'mystic infallibility' of the evidence", or allowing it to "distort the fact-finding process" is "far more remote" than it would be in a jury trial. Hence, "[t]he dangers that the principles are designed to avoid begin to fall away".

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[164] *Taylor*, which was decided before *White Burgess*, was focussed on the admissibility of novel scientific evidence in light of the principles developed by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals Inc.*, (1993) 113 S. Ct. 2786. Moreover, I expect that there are judge alone cases, both before and after *White Burgess*, where expert evidence has been screened out under the gatekeeper function. Nevertheless, I accept the point about the diminished risk of expert evidence being misused to distort the fact-finding process in a judge alone trial. A judge sitting as a trier of fact can be expected to scrutinize and weigh expert evidence without being overwhelmed by impressive credentials, erudite language, or byzantine technicality.

[165] I find that Dr. Davis's expert opinions in relation to mineral economics are sufficiently probative to justify the admission of his evidence. The report offers expert opinion evidence on topics outside the knowledge of the Court as the trier of fact, including the significance of royalty agreements in the mining industry, the economic benefits and associated risks involved in royalty agreements pertaining to minerals, the different classes of royalties common in the industry, industry usage of the term "smelter returns" in NSR royalty agreements, and the significance of "safeguarding measures" undertaken by mine owners and operators. Although there are aspects of Dr. Davis's report that stray outside his area of expertise and wade into contract interpretation and argument, these concerns do not taint the whole of Dr. Davis's evidence. In these circumstances, it is not necessary to rule the entire report inadmissible pursuant to the Court's gatekeeper function.

[166] I conclude that, with the exception of (i) certain extracts from Dr. Davis's report that offend the necessity requirement, and (ii) those portions that stray into impermissible advocacy, the balance of the report is properly admitted as expert opinion evidence. The extracts of Dr. Davis's report that I find inadmissible are:

a) Paragraph 13, which sets out Dr. Davis's opinion as to the proper interpretation or scope of the NSR "royalty base" in the Royalty Agreement. Although presented as an opinion "from an economic perspective", Dr.

Davis's evidence on this matter is in substance legal opinion, which is unnecessary and unhelpful to the Court.

b) Paragraph 43, which discusses the Streaming Agreement. Exception for the first sentence, this paragraph reads as an argument or legal opinion on the interrelationship between the Royalty Agreement and the Streaming Agreement. It is not necessary to receive opinion evidence from an economist on the proper interpretation of the terms of these contracts.

c) With the exception of the first sentence, the balance of paragraph 44, which appears to be an argument or a legal opinion as to the meaning of "net smelter returns", drawing on the positions of the parties as stated in the pleadings. Again, it is unnecessary to consider the views of an economist to assess the impact of the pleadings on the legal issues to be resolved by the Court.

d) Paragraphs 64 to 66, which also deal with the Streaming Agreement. In these paragraphs, Dr. Davis offers opinions on the proper legal characterization of the Streaming Agreement, again considering the positions of the parties as stated in the pleadings. These paragraphs therefore exceed the scope of Dr. Davis's expertise as a mineral economist, by offering legal opinion or argument that is unhelpful to the Court.

e) The last sentence of paragraph 67, which is also a legal opinion.

f) Paragraphs 68 and 69, which present as legal arguments in support of Dr. Davis's legal characterization of the Streaming Agreement. Because legal characterization of a contract is within the purview of the Court, Dr. Davis's evidence on this topic runs afoul of the necessity criterion.

g) The last phrase in paragraph 82, in which Dr. Davis offers an impermissible legal conclusion. The balance of the paragraph is in my

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view properly admitted because Dr. Davis's opinions on the use of hedging activities as a "safeguarding" measure are within the scope of his experience as a mineral economist. This information speaks to the commercial realities of the mining industry. It may assist the Court in considering whether a particular interpretation of Royalty Agreement makes business sense so as to avoid commercially absurd consequences. In any event, this evidence does not really speak to the interpretation of the Royalty Agreement, but rather to its application to subsequent transactions undertaken by TCM.

h) Paragraph 88, which offers an opinion on an issue of contract interpretation, namely what is or is not properly included in the NSR "royalty base".

i) Paragraphs 89, 90 and 96, which on their face offer Dr. Davis's opinion on a matter of contract interpretation, namely whether the Royal Gold deposit is properly included within the NSR royalty base. However, I would not extend this conclusion to the intervening paragraphs – paragraphs 91 through 95 – which set out Dr. Davis's opinions on various aspects of the Royal Gold deposit from the perspective of a mineral economist. Although these opinions relate to a third party contract that was executed years after the Royalty Agreement and therefore do not form part of the factual matrix of that agreement, Dr. Davis's opinions in this area are relevant to the commercial realities of the mining industry, and in any event can be considered in the application of the Royalty Agreement.

j) Paragraphs 97 to 108, which set out Dr. Davis's opinion on possible interpretations of the scope of the NSR royalty base contemplated in the Royalty Agreement. These paragraphs contain inadmissible opinion evidence on an issue of contract interpretation. To the extent that the Court requires assistance from an expert in deciding how to determine the NSR royalty base, it would have to come from an accounting expert able

to give evidence about "generally accepted accounting principles consistently applied" as contemplated in the Royalty Agreement.

Admissibility of Dr. Thornton's Opinion Evidence

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[167] TCM submits that Dr. Thorton's report is both relevant and necessary to help the Court understand how the 2% NSR royalty is to be "determined in accordance with generally accepted accounting principles consistently applied" as required under Schedule B clause 1(a) of the Royalty Agreement. TCM says this is not a matter of contract interpretation, but rather a matter of contract application. Because the Royalty Agreement requires that the NSR royalty be determined under GAAP principles, TCM says the Court should, or indeed must receive expert accounting evidence concerning the proper application of GAAP in such circumstances.

[168] HRS contends that Dr. Thornton's evidence runs afoul of both the relevance criterion and the necessity criterion. I will address each of these points in turn.

[169] HRS argues that Dr. Thornton's report is irrelevant because it speaks to whether TCM and Centerra's financial statements complied with applicable GAAP standards as regards their treatment of the Streaming Agreement. HRS says there is no connection between that question and the central issue in this case, that being whether TCM properly calculated the 2% NSR royalty under the Royalty Agreement.

[170] Near the beginning of his report, Dr. Thornton points out that GAAP standards are only applicable to audited financial statements. Although an auditor relies on a company's books and records to produce audited financial statements, the auditor's opinion on the financial statements does not mean that the underlying books and records comply with the relevant accounting standards. In other words, "only financial statements can comply (or not comply) with GAAP or IFRS". Later in his report, Dr. Thornton adds that "the objective of preparing financial statements of a business enterprise is to provide relevant and reliable information to present and potential investors and creditors" to facilitate evaluation of the enterprise's financial performance and its prospect of providing future returns.

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[171] HRS points to these portions of Dr. Thornton’s report to argue that it is entirely irrelevant to the issues to be determined in this case. HRS says that Dr. Thornton’s report is focused on whether the financial statements of TCM and Centerra were prepared in compliance with relevant accounting standards, with the idea that financial statements are a means of reporting information to investors and creditors. While this may be Dr. Thornton’s focus, HRS says the financial statements of TCM and Centerra have nothing to do with the issues in this case, which are focused on the determination of net smelter returns as contemplated in the Royalty Agreement, and the relevance of GAAP principles to that exercise.

[172] Although I see some logic in HRS’s point, in my view this does not render the report inadmissible. This aspect of Dr. Thornton’s report is simply an acknowledgement of the limits of his opinion, based on the proper scope or role of GAAP in the accounting profession. It appears from Dr. Thornton’s report that GAAP was never designed to regulate specific transactions such as the calculation of royalties based on minerals produced from a mine. Despite this, the parties to the Royalty Agreement agreed by contract to rely on GAAP as an objective standard to be used in the determination of “net smelter returns”. In effect, the parties made a contractual agreement to extend GAAP beyond its intended purposes in the accounting profession.

[173] Thus, although an accountant could never certify that net smelter returns had been determined in accordance with GAAP, the parties were still free to use GAAP standards as they saw fit in their contractual arrangement. From an accounting expert’s standpoint, this is like trying to fit a square peg into a round hole. In this regard, I view Dr. Thornton’s comment about the limited use of GAAP merely as an acknowledgement or qualification on the focus of his opinion. That does not make the opinion completely inadmissible or useless. Indeed, for reasons explained below, I find that evidence about how GAAP principles apply in this case to be relevant and necessary to decide at least some of the issues to be determined.

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[174] HRS further asserts that to the extent that it speaks to the proper interpretation of the Royalty Agreement, Dr. Thornton's report runs afoul of the necessity criterion. HRS relies on *Lake Louise* for the proposition that an accounting expert's opinion on the proper interpretation of a contract is inadmissible. In *Lake Louise*, the contracts in issue stated that all calculations of revenue were to be made "in accordance with generally accepted accounting principles", "on a consistent basis, except if otherwise provided herein". The trial judge relied on expert accounting evidence to determine whether certain contractual terms were ambiguous, and whether the transactions that were the subject of the litigation were expressly excluded from the contractual requirement for revenues to be determined under GAAP. The appeal court held (at para. 38) that the trial judge erred in relying on expert accounting evidence to decide these issues, because contract interpretation is a "core judicial function".

[175] I do not find HRS's submission convincing. Indeed, I agree with TCM that the passages in *Lake Louise* relied upon by HRS are distinguishable, and that other passages in the same decision explain why expert accounting evidence is in fact necessary in this case.

[176] I accept the proposition that a court cannot rely on the opinion of an accounting expert as to the proper meaning of a contract. Just as the trial judge in *Lake Louise* erred by relying on the opinion of an accounting expert as to the scope of an exception clause in issue, it would be wrong for this Court to rely on an opinion proffered by Dr. Thornton as to the meaning of the phrase "Net Smelter Returns" in the Royalty Agreement.

[177] However, I agree with TCM that Dr. Thornton's expert evidence does not go to the <u>interpretation</u> of the contract, but rather to its <u>application</u>. The parties to the Royalty Agreement expressly agreed that net smelter returns were to be determined "in accordance with generally accepted accounting principles consistently applied". It is therefore necessary to have regard to GAAP when determining or calculating net smelter returns. GAAP is a set of objective and independent rules established by

accounting professionals. This is a technical subject matter beyond the knowledge and experience of the Court. Thus, while it is the Court's responsibility to interpret the Royalty Agreement to ascertain its meaning and scope, once that step in the analysis is complete the Court can then consider the expert accounting evidence of Dr. Thornton in assessing whether TCM properly calculated the NSR royalty "in accordance with generally accepted accounting principles consistently applied." Evidence from an accounting expert as to the proper application of GAAP will be an important tool to assist the Court in determining NSR royalties in connection with TCM's disposition of mineral products from the Mount Milligan Mine.

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[178] A careful reading of *Lake Louise* supports this approach. The plaintiff and the defendants jointly owned several hotels. The hotels were operated by one of the defendants under a management agreement providing that the management company was to receive a percentage of hotel revenues (2.0% for one hotel, and 2.5% for the other), to be determined under GAAP, unless otherwise expressly provided. A major source of revenue for the hotels came from video lottery terminals ("VLT"s) operated through an arrangement with the provincial gaming authority, in which the hotels were to receive a 20% share of net VLT wins. For several years the defendant management company used its 20% share of net VLT wins as a basis for calculating the management fee. However, at some point the management company changed its approach, thereafter using the gross coin receipts from the VLTs as the revenue base for its management fee. The plaintiff brought an action seeking a declaration that the management fee had to be calculated on 20% net VLT wins as opposed to gross coin receipts from the VLTs.

[179] At trial, both parties tendered evidence from accounting experts about how the management fee should be calculated. The trial judge ultimately relied upon the expert evidence in determining (i) whether the contract terms were ambiguous, and (ii) whether the VLT revenues were expressly exempted from the contractual requirement to calculate revenue under GAAP.

[180] In the Court of Appeal, the majority held that the trial judge erred in relying on the expert evidence to determine issues of contract interpretation. Having found reviewable errors in the trial judge's approach, the appeal court went on to conduct a "fresh analysis". Speaking for the majority, Chief Justice Chartier reasoned at para. 48 that "the accounting expert evidence can be considered as an interpretive aid to better understand how GAAP would typically treat the VLT monies with respect to the determination of Gross Revenues and the calculation of the management fee".

[181] This reasoning is apposite in the case at bar, although I would not admit the expert opinion evidence of Dr. Thornton as an "interpretive aid". Rather, I would admit Dr. Thornton's evidence as a useful tool in understanding the applicable generally accepted accounting principles, for the purposes of determining the NSR royalty. In other words, the evidence is not relevant to the interpretation of the contract, but rather its application. The key question will be whether TCM properly calculated its royalty obligations under GAAP, based on the scope and meaning of the terms in the Royalty Agreement as interpreted by the Court. Dr. Thornton's evidence will be of assistance to the Court in considering how GAAP applies to the determination of NSR royalties.

[182] To sum up, Dr. Thornton's evidence satisfies the expert opinion admissibility criteria, and at the gatekeeper stage I find this evidence to be sufficiently probative to justify its admission. For the sake of completeness, I note that certain portions of Dr. Thornton's report, most specifically those commenting on accounting treatments undertaken by TCM and Centerra, are admissible only for the limited purpose of assessing HRS's claim that TCM breached its contractual duty of good faith.

Objections to Admissibility of TCM's Affidavit Evidence

[183] HRS also objected to the admission of certain portions of the affidavit evidence of Mr. Millman, Ms. Saxton, and Mr. Perron. The basis for the objections was generally that (i) the assertions of these witnesses as to their subjective understanding of the terms of the Royalty Agreement are legally irrelevant, and (ii) in any event, these assertions are argument and not evidence. TCM's response, which

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I accept, is that the impugned passages of the affidavits of Mr. Millman, Ms. Saxton, and Mr. Perron are admissible to address the allegation that the way TCM calculated the 2% NSR royalty – more specifically the removal of the deferred revenue component of the royalty – amounted to a breach of TCM's contractual duty of good faith. The portions of the affidavit evidence objected to by HRS are admissible to explain the state of mind of the affiants and to explain the conduct of TCM and Centerra as regards the determination of NSR royalties.

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Interpretation of the Royalty Agreement

[184] The overall objective of the exercise is to determine the intent of the parties in entering the Royalty Agreement, and the scope of their understanding. To do this, it is necessary to read the terms of the Royalty Agreement as a whole, giving the words chosen by the parties their ordinary meaning, consistent with the surrounding circumstances that were or could reasonably be expected to have been within the knowledge of the parties at the time of the agreement.

[185] The text of the Royalty Agreement, that is, the words chosen by the parties, is the touchstone of the exercise. However, before examining the text of the agreement, it is helpful to first set out the surrounding circumstances in which it was negotiated, to place the words in the document in their proper context.

The Surrounding Circumstances

[186] The Royalty Agreement was negotiated in 1986, and then extended by the parties in 1988. Within that time frame, the facts that were known to the parties or that could reasonably be expected to have been within their knowledge, and which I consider most salient to the interpretive exercise, can be summarized as follows:

(a) Mr. Haslinger Sr. had the exclusive right to certain mineral claims in relation to the subject property. Given the highly risky and capital intensive nature of mineral extraction, he would have been fully aware that he did not have the means to commercialize these mineral rights on his own. Still, Mr. Haslinger Sr.'s exclusive right to any mineral deposits was potentially

valuable, both to himself and to any suitable strategic partner. If any such mineral deposits could be successfully brought to market, the value of Mr. Haslinger Sr.'s interest would be very substantial indeed. It was in Mr. Haslinger Sr.'s best interest to retain the greatest possible financial interest in the minerals, with the least amount of capital commitment, and the least possible exposure to risks associated with establishing a commercial mining operation. At the same time, Mr. Haslinger Sr. would also have been interested in the successful commercialization of his claims and, as a consequence, he would have been interested in arrangement that maximized the likelihood of a successful mining operation on the subject property.

(b) Lincoln was interested in developing the mining lands, with the expectation of accessing and commercializing any substantial mineral deposits. Like Mr. Haslinger Sr., Lincoln would have been cognizant of the highly risky and capital intensive nature of mineral extraction. It would have been in Lincoln's best interest to acquire Mr. Haslinger Sr.'s right to the mineral claims, with the smallest possible up front financial obligation toward him, while also committing to him the smallest possible future share of the commercial benefits. The greater the share of the potential commercial benefits that Lincoln committed to Mr. Haslinger Sr., the smaller the share that Lincoln would have for itself. This could impact not just on profitability for Lincoln, but also the economic viability of the mining project itself.

(c) I find the following extract from Dr. Davis's report to be helpful in describing both the dynamics between the parties at the time, and the role that a royalty agreement could play in advancing their mutual interests:

> Royalties typically originate as a negotiated form of payment upon the first transfer of control or ownership of a newly staked mineral claim, with the royalty holder being the geologist or prospector who staked the claim. The royalty supplements any up-front cash payment associated with the property transfer, promising additional moneys to the original owner when and if the property begins production. The advantage of a royalty in lieu of an additional up-front cash payment is that it reduces the immediate financial burden

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> on the purchaser, allowing them to retain funds needed to advance and develop the project. It is [sic] also reduces the risk to the purchaser, as the royalty is only paid in the event of a successful project. The royalty holder, in admitting and allowing the deferred payments in the form of a royalty, and in accepting the risk that no future payments may be coming if the property is not developed, signals to the purchaser that the property has merit possibly unseen by the purchaser, and that the seller is willing to “bet” that the project will be profitable for the buyer. Such signalling helps to lubricate the wheels of the transaction given the commercial and technical uncertainties that remain about the property at the time. It also allows the original landowner to participate in the rewards of a successful project. Because mineral royalties are tied to mine production the royalty holder’s and the royalty payer’s fortunes are correlated, reflective of benefit sharing.

(d) Neither party could be certain that the property would be developed into a commercially viable mining operation. Nor did they know how it would be developed, or what form any such mining operation would take.

(e) Both parties would have appreciated that, if the subject property was developed, it was possible if not likely that ownership of the project would change hands, possibly multiple times, before it achieved commercial production.

(f) Mr. Haslinger Sr., as a mineral geologist, and Lincoln, as a resource development company, could both be expected to have a fair understanding of the different types of royalty agreements that were common in the resource extraction industry. The options would include (i) production tonnage royalties, and (ii) value based royalties. Regarding value based royalties, the common kinds of royalty arrangements included (ii.1) gross receipts royalties, (ii.2) net smelter returns (NSR) royalties, and (ii.3) net profit interest (NPI) royalties. One could expect that both parties would have had some appreciation of the different risk-reward profiles of these different kinds of royalty arrangements, as described in Dr. Davis’s expert report.

(g) With regard to NSR royalties, it was the commonly recognized in the mineral extraction industry that such royalty arrangements were a form of

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"production royalty", in which royalty payments would be paid as a percentage of the "returns" received by the mine operator for mineral products obtained or derived from the mine, with limited, specifically enumerated allowable deductions. The allowable deductions would be linked to production of mineral products, not the profitability of the operation or the profits of the mine operator.

(h) The royalty rate for an NSR royalty was typically in the range of 2.0% to 2.5% of returns on production. This is considerably lower than the royalty rate in a typical NPI royalty arrangement, which was 10% to 20% of net profit. The lower rate of return associated with an NSR royalty is reflective of the lower volatility and lower risk profile associated with such an arrangement, by comparison to an NPI royalty in which the royalty holder's fortunes are tied to a much greater extent to the ultimate profitability of the mining operation.

(i) It was also commonly understood in the mineral extraction industry that the concept of a "smelter return" royalty was not limited to returns from actual smelters. Rather, the phase "smelter returns" was understood within the mining industry to apply to all "returns" or "revenues" realized from the disposition of product, whether to an actual "smelter", or to some other kind purchaser. This could include a purchaser engaged in trading of mineral ores prior to smelting, or a purchaser that produces metals by means other than "smelting". In effect, the phrase "smelter returns" had become a term of art in the mining industry, with the word "smelter" being taken beyond its technical meaning, to apply to any purchaser of mineral products obtained from the mine. All of this is entirely consistent with the notion that neither the owner of the mineral rights (the prospective royalty recipient), nor the prospective purchaser of those rights (the prospective royalty payor) could know from the outset what form the actual mineral extraction operation might take, and how the mine operator would monetize its interest in the mineral products derived from the mine.

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[187] In considering the factual matrix in place at the time the Royalty Agreement was negotiated, it should be apparent that the phenomenon of streaming agreements as a means of securing capital to bring a mining development into commercial production had yet to emerge. Thus, the unique manner in which such arrangements trade off an up-front commitment of capital in exchange for a future commitment to sell mineral products at a fixed or favourable price was entirely unknown to both Mr. Haslinger Sr. and Lincoln.

[188] Nonetheless, when one considers the commercial realities of the mining industry, it is fair to observe that streaming agreements are not entirely one-sided in the sense of benefitting the mine owner and harming the royalty holder. This is because the mine owner's ability to secure up-front capital from the counterparty to a streaming agreement can greatly increase the owner's ability to achieve commercial production, and the achievement of commercial production inures to the benefit of both the mine owner and the royalty holder. The trade off is that once commercial production is achieved, the upside for the mine owner – and the royalty holder – is reduced by the obligation to sell a share of the mine's production to the counterparty in the streaming agreement at a fixed or favourable price.

[189] From a mineral economics perspective, the risk-reward dynamic can be stated as follows. The mine owner and the royalty holder would share in the returns from production, and as a consequence they had a mutual interest in seeing the mine reach commercial production, and in the maximization of subsequent returns. Anything that increased the likelihood of achieving commercial production would be to their mutual benefit. Anything that reduced the future returns from production, once achieved, would be to their mutual detriment.

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The Text of the Royalty Agreement

[190] Appreciating that the whole of the Royalty Agreement must be taken into consideration, the key elements of the agreement relating to the scope and meaning of Lincoln's royalty obligation can be summarized as follows:

(a) The original agreement was dated 16 July 1986. The parties to the agreement were Mr. Haslinger Sr. and Lincoln.

(b) Clause 6 provided that upon giving notice of intention to acquire Mr. Haslinger Sr.'s right, title, and interest in the "Mining Lands", Lincoln would then have an obligation to pay a "Net Smelter Returns" royalty as provided for in Clause 7.

(c) Clause 7 provided that if the Mining Lands were "brought into production" by Lincoln, then Lincoln would be obligated to pay Mr. Haslinger Sr. "a Production Royalty" of "two percent (2%) Net Smelter Returns", "attributable to production of ores and mineral product from the Mining Lands", "determined in accordance with Schedule B".

(d) Clause 17 set out the conditions and limitations on either party's ability to assign its interests. Neither party could assign its interest in the agreement without the consent of the other, with the exception that Lincoln could assign its interest to any entity emerging from an amalgamation, merger, consolidation or corporate acquisition, provided certain conditions were met.

(e) Clause 21 provided that both parties were to "act in good faith" in respect of the other, and "do or cause to be done all things within their respective powers which may be necessary or desirable to give full effect" to the agreement.

(f) Schedule B was entitled "Production Royalty". Schedule B, clause 1 stated that for the purposes of "determining the Production Royalty" referred

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to in clause 7, the term "Net Smelter Returns" "shall have the following meaning", "deductions", and commencement.

(g) Schedule B, clause 1(a) stated that "Net Smelter Returns… shall mean any and all amounts returned from smelter" to Lincoln, after deduction of "smelting and refining charges", and "transportation costs". It went on to state that "Net Smelter [R]eturns shall apply to the sale or deemed sale of all ores produced from the Property or concentrates derived therefrom", "determined in accordance with generally accepted accounting principles consistently applied".

(h) Schedule B, clause 1(b) provided that where "ores or concentrates" were treated at a smelter or refinery owned, operated, or controlled by Lincoln, then "smelting and refining charges are to be equivalent to the prevailing rates charged by similar smelters and refiners in arm's length transactions".

(i) Schedule B, clause 1(c) effectively provided that Lincoln was obligated to pay the NSR royalty starting in the third year of "commercial production", continuing "as long as commercial production is maintained".

(j) Schedule B, clause 1(d) dealt with the timing for calculation and payment of the NSR royalty. It provided that the royalty was to be calculated at the end of each calendar quarter in which "the ores or concentrates from the Property were sold or otherwise deemed disposed of" by Lincoln, and then paid to Mr. Haslinger Sr. within 45 days of the end of the quarter.

(k) Schedule B, clause 2 defined "Commencement of Commercial Production" by reference to either (a) specified levels of processed "ore" at an on-site mill, or (b) specified frequency of shipments of "ore" from the property.

(l) The agreement was amended on 16 July 1988. The amendment extended Lincoln's deadline for exercising the option to acquire Mr. Haslinger

Sr.'s rights and interests in the subject property, upon Lincoln making certain payments to Mr. Haslinger Sr. on certain deadlines.

(m) The 16 July 1988 amendment also provided for an "advance royalty" of $20,000 per year starting in 1995, to be subsequently deducted from the "operating royalty" which was payable in the third year of commercial production per Schedule B, clause (1)(c) of the original agreement.

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[191] I make the following observations about the language the parties chose to use in the Royalty Agreement.

[192] First, the agreement referred to the royalty variously as a "production royalty", a "Net Smelter Return" royalty, and an "operating royalty". This language, read in light of industry usage at the time, signals that the parties had in mind a royalty obligation defined by reference to the "returns" that the mine operator would receive from materials produced from or derived from the mine. The parties had in mind a production royalty, which was revenue-based as opposed to profit-based. This conclusion is reinforced by the fact that the agreed upon royalty rate was 2%, in line with industry standards for NSR royalties. Of course, this is only context and does not dictate the meaning and scope of the provisions in the Royalty Agreement because, "[a]ll royalties and royalty agreements are unique and have to be read with care": *St. Andrew Goldfields* at para. 53. I conclude, based on the descriptions used in the Royalty Agreement, and the common meaning of those terms in the mining industry at the time, that the parties understood Mr. Haslinger Sr. was to receive an NSR-type production royalty.

[193] Second, the parties used a variety of terms to identify the products or material to which the royalty obligation was to attach. Clause 7 referred to net smelter returns "attributable to" the "production" of "ores and mineral products" from the subject property. The first sentence in Schedule B, clause 1(a) referred to "all ores produced from" the subject property, or "concentrate derived therefrom". Schedule B, clause 1(b) and clause 1(d) both referred to "ores and concentrates".

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[194] It is useful to consider the meaning of each of these terms, in common parlance and in the mining context. Thus:

(a) The ordinary meaning of the term “mineral” is “a naturally occurring homogeneous substances (such as stone, coal, salt, sulfur, sand, petroleum, water, or natural gas) obtained usually from the ground”. Gold, silver, and copper are all minerals. A dictionary of mining, mineral, and related terms sets out an extensive definition that concludes with the following assertion, “In a broad nontechnical sense, the term embraces all inorganic and organic substances that are extracted from the earth for use by man, for example, the mineral fuels.”: Paul W. Thrush, (Washington, U.S. Department of the Interior, Bureau of Mines, 1968) (“*Dictionary of Mining*”). There is case law to support the proposition that, in the context of mining, the term “mineral” has been interpreted “broadly and in its ordinary sense unless statutory context shows otherwise”: *Almaden Minerals Ltd. v. British Columbia (Finance)*, 2009 BCSC 901 at para. 62. I therefore interpret the phrase “mineral products” to mean any product containing minerals. This would include the final product, that is, the mineral itself.

(b) The ordinary meaning of the word “ore” is “a naturally occurring mineral containing a valuable constituent (such as metal) for which it is mined and worked”. The aforementioned *Dictionary of Mining* provides several, the most succinct of which is, “A mineral, or mineral aggregate, containing precious or useful metals or metalloids, and which occurs in such quantity, grade, and chemical combination as to make extraction commercially profitable.”

(c) The ordinary meaning of the term “concentrate” is “a mineral rich product obtained after initial processing of ore”. The *Dictionary of Mining* describes “concentrate” as “the product of concentration”, and describes the concentration process as follows: “The concentration of ores always proceeds by steps or stages. Thus the ore must be crushed before the mineral can be

separated, and certain preliminary steps, such as sizing and classifying, must precede the final operations, which produce the finished concentrates."

[195] The parties advance competing positions as to the material or product to which the royalty obligation attaches. On the one hand, HRS argues that the royalty obligation should be focused on "concentrate", which is one of the terms used in the Royalty Agreement, and happens to be the material produced from the mine and ultimately sold by TCM. On the other hand, TCM argues "metal" is the product that should be the focus of the royalty obligation, because this is the material that is truly of value to the parties. TCM points out that even in the sale of concentrate, the pricing is based on the metal content. I do not find either position to be a fair reflection of the intention of the parties at the time of contract formation. Each of these positions is results-oriented and focused on the bottom line position of the party advancing it. HRS's position is focused on concentrate, because that is what HRS sells to Offtakers under the Offtaker Agreements. TCM's position is focused on metals, because the Streaming Agreement deals with sale and delivery of refined metals. Both positions are tied to contractual arrangements between TCM and third parties, in contracts that were created years after Mr. Haslinger Sr. and Lincoln entered into the Royalty Agreement.

[196] The fact that the Royalty Agreement employed a variety of phrases, namely "ores and mineral products", "ores produced from", "concentrate derived therefrom", and "ores and concentrates" is in my view reflective of the fact that, when the agreement was negotiated in the late 1980s, the parties had no way of knowing what form the prospective mining operation might take, or what its products might be. The mine's yield could take the form of "ores", "concentrates", or any other "mineral products". Further, as indicated by the language in Schedule B clause 1(b), the material extracted from the mine could be "ore" or "concentrate" treated at a smelter or refinery controlled by the mine operator, in which case the deductible refining costs were to be set at rates charged by a comparable arm's length smelter or refinery. Based on the text of Schedule B, clause 2, it was within the contemplation

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of the parties that the material extracted from the mine could be refined or treated in an on-site mill, or shipped off-site in the form of “ore”.

[197] The language the parties used in the Royalty Agreement, coupled with their uncertainty as to the form of the mine’s production, tells us that the objective intention of the agreement was to capture any and all “mineral products” derived from the mine by the operator, in whatever form those products might take. The term “mineral products” is broad enough to encompass “minerals”, “ores”, and “concentrates”. This broad interpretation gives effect to the mutual intention of the parties for the royalty holder (Mr. Haslinger Sr.) to receive the net 2% production royalty regardless of the form the product happened to take when disposed of or monetized by the mine operator (Lincoln).

[198] Third, the royalty rate was pegged to smelter returns, not market prices for refined minerals. A royalty pegged to smelter returns effectively aligned the risks and rewards of the royalty holder (Mr. Haslinger Sr.) to those of the prospective mine operator (Lincoln) to a much greater extent than a royalty pegged to the market price for refined minerals. The commercial realty underlying a royalty rate pegged to smelter returns was that it would always be in Lincoln’s best interest to maximize its own returns. Mr. Haslinger Sr., in turn, would have a corresponding interest in Lincoln’s maximization of returns. Such an arrangement enhanced the likelihood that the mine would reach commercial production, because Lincoln would only ever have to share a portion of its returns with Mr. Haslinger, whereas if the royalty rate was pegged to the market price for refined minerals, this would have placed constraints on how Lincoln monetized the mineral products obtained or derived from the mine site. A royalty rate pegged to the market price of refined minerals would have offered Mr. Haslinger Sr. more certainty, but it would have carried with it an increased risk that the mine would never make it to commercial production, due to the added financial constraint on Lincoln.

[199] Fourth, with regard to the identification of “returns” to which the royalty would attach, clause 7 used the phrase “Net Smelter Returns attributable to production”.

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Schedule B, clause 1 stated that "Net Smelter Returns" was to have the meaning set out in the subclauses. The first sentence in Schedule B, clause 1(a) stated that "Net Smelter [R]eturns" shall mean "any and all amounts returned from smelter", less certain enumerated deductions. The second sentence in Schedule B, clause 1(a) stated that "Net [S]melter [R]eturns shall apply to the sale or deemed sale" of ores or concentrates from the subject property. Finally, Schedule B, clause 2(d) referred to ores or concentrates "sold or otherwise deemed disposed of".

[200] The concept of "returns" is antiquated and technical. Based on its historical usage in the industry, and the context in which it was used throughout this particular Royalty Agreement, I conclude that the word "return" is synonymous with "revenues". I accept Dr. Davis's statement that, "What is to be counted are sales revenues from any and all payors for the minerals produced". Although Dr. Davis does not orient this statement to any specific point in time, I reach the conclusion based on the whole of the evidence, including the evidence about historical usage of NSR royalties, that this was the state of knowledge or understanding in the mineral extraction industry in the late 1980s, when the Royalty Agreement and its subsequent extension were negotiated. Interpretation of the term "returns" as being synonymous with revenues is also consistent with the phrase "all amounts returned from smelter" in the first sentence of Schedule B, clause 1 in the Royalty Agreement.

[201] HRS maintains that it would be wrong to equate the term "returns" with "revenues", because this would have the effect of conflating what was intended to be an NSR royalty with an NPI royalty. In other words, HRS says the concept of revenues is too close to the term "profits", and that is not what the parties intended when they negotiated an NSR royalty. I do not agree. The *Cambridge Dictionary* defines revenue as "money that a company receives, especially from selling goods or services". The *Cambridge Dictionary* defines "profit" as "money that is earned in a trade or business after paying the costs of producing and selling goods and services". Clearly, revenue is a broader concept, referring to funds taken in or received from business operations, whereas profit is a narrower concept, referring to the amount left over after all relevant expenses are deducted from revenue. Indeed,

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HRS's reply submission includes an acknowledgment that, "Undoubtedly, 'revenues' can in some loose sense be equated with 'amounts returned' from any sale".

[202] We can see from the text of the Royalty Agreement that the "Net Smelter Royalty" was to include "all amounts returned from smelter", less certain narrow categories of allowable deductions. In this context, "returns" was clearly intended by the parties to refer to all revenues received by Lincoln from the disposition of all mineral products attributable to production from the subject property.

[203] HRS also objects to TCM's use of the term "royalty base" in reference to net smelter returns. HRS contends that use of this term is not appropriate because it is not contained within the text of the Royalty Agreement, and because it is another instance of conflating an NSR royalty (based on net returns) with an NPI royalty (based on net profits). I take the point that the parties did not use the term "royalty base" in the Royalty Agreement. Nevertheless, despite HRS's objection, I consider that the concept of a "royalty base" can be useful, because the parties agreed on a royalty that was "net" of certain specifically listed deductions. Further, the royalty base concept is helpful in describing revenue recognition under generally accepted accounting principles, as discussed below. For all these reasons, I may use the term royalty base from time to time in discussing net smelter returns. This should not be taken as a failure to appreciate that the parties agreed to an NSR royalty (focused on revenue, with certain narrow allowable deductions relating to smelting and transportation), not an NPI royalty (focused on profit, taking into account all possible deductions bearing on the mine operator's bottom line).

[204] Fifth, I accept the expert evidence of Dr. Davis that the concept of "smelter returns" or "returns from smelter" was not understood in the mining industry to be limited to only returns received from actual smelters. Rather, this concept was understood to apply to all "returns" or revenues received by Lincoln from the disposition of product, whether to an actual "smelter", to a third party engaged in trading of ores or concentrates prior to smelting, or to a third party that produced metals by means other than "smelting". Again, this is consistent with the idea that at

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the time they negotiated the Royalty Agreement, the parties did not know what form the mining operation would take, and precisely what form, grade, or quality of mineral product the mine operator would produce.

[205] In my view, the language the parties used to describe net smelter returns reflects their mutual intention to have the royalty attach to any and all “returns” – meaning any and all revenues – received by the mine operator in connection with production of mineral products from the mining operation. The royalty was labelled as a production royalty, and the parties intended that it would attach to any returns or revenues received by the mine operator based on the mine’s production.

[206] Sixth, the triggering event engaging the royalty was described in the first sentence of Schedule B, clause 1(a) as “any and all amounts returned from smelter”, and in the second sentence as “the sale or deemed sale” of ores or concentrates derived from the mine. Also relevant is Schedule B, clause 1(d), which discussed the timing of Lincoln’s obligation to pay the royalty using the phrase “sold or otherwise deemed disposed of”. I would ascribe the widest possible scope to the events that would trigger Lincoln’s royalty obligation. I would not limit the triggering events to “sale” or “deemed sale”, for two reasons, one relating to the text of the agreement, and the other to the surrounding circumstances in which the Royalty Agreement was negotiated.

[207] With regard to the text of the agreement, the phrase “any and all amounts returned” as set out in the first sentence of Schedule B, clause 1(a) is broader than merely “sale or deemed sale”. The phrase “any and all amounts returned” implies that Lincoln’s royalty obligation would be triggered by any returns, that is, any realization of revenue associated with mineral products obtained from the mine. Similarly, the phrase “sold or otherwise deemed disposed of” in Schedule B, clause 1(d) is also broader than “sale or deemed sale”.

[208] With regard to the surrounding circumstances, I once again consider it relevant that when the parties negotiated the Royalty Agreement, they did not know what form the mining operation would take, what kind of material the mine would

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produce, or the way the product would be brought to market by the mine operator. Against this backdrop, I find that it was the mutual intention of the parties to define Lincoln's royalty obligation in the widest possible terms, by reference to any revenues generated by Lincoln in connection with material produced by the mine. Again, the underlying economic reality is that it would always be in Lincoln's best interest to maximize its return, and under an NSR royalty arrangement it would be in Mr. Haslinger Sr.'s interest for Lincoln to do so. Mr. Haslinger Sr. contracted for a net 2% share of "any and all returns" received by Lincoln in connection with mineral products derived from the mine, whether those returns came from a sale of mineral products, a deemed sale, disposition, or, any other transaction by which Lincoln generated revenue derived from the mine's production. However Lincoln monetized the mineral products it obtained from the mine, Mr. Haslinger Sr. was to receive a net 2% share of the returns. In my view, that is the essence of a net smelter return production royalty as contemplated by the parties when they negotiated the Royalty Agreement. This interpretation fits with the text of the agreement, read in light of the factual matrix in which it was negotiated.

[209] Seventh and finally, with regard to the manner in which the NSR royalty was to be "determined", the second sentence in Schedule B, clause 1(a) employed the phrase "determined in accordance with generally accepted accounting principles consistently applied". The parties made reference to a well recognized set of independent, objective standards used by accounting professionals in their reporting of, *inter alia*, revenue. In my view, the reference to GAAP was intended to modify the phrase "Net smelter returns" at the beginning of the sentence. This is because within the mineral extraction industry at the time, the word "returns" was synonymous with the word "revenues", which is a well known concept in accounting.

[210] I would interpret the last sentence in Schedule B, clause 1(a) to reflect the mutual intention of the parties that net smelter returns were to be determined in accordance with generally accepted accounting principles consistently applied. The parties agreed to use generally accepted accounting principles as the tool for determining "returns". The subject matter of the "returns" – referred to in different

parts of the Royalty Agreement as returns "attributable to" the "production" of "ores and mineral products", or returns from "all ores produced" from the mine, "or all concentrates derived therefrom" – is in my view a matter of contractual interpretation, and I would adopt the interpretation set out in the second and sixths point of interpretation addressed above at paragraphs 193 to 197 and paragraphs 206 to 208 respectively. Thus, to be clear, the concept of generally accepted accounting principles is not a means of interpreting the contract, but rather a tool or mechanism to be used in applying the contract to qualifying "returns".

[211] I accept HRS's submission that the Royalty Agreement's reference to GAAP cannot "trump other parts of the contract", nor can it be read in a way that ignores or renders meaningless other parts of the written agreement. The reference to GAAP was not intended to delineate the scope of mineral products to which the royalty obligation was to attach, or the transactions that would trigger the royalty obligation. These are matters of contract interpretation. The reference to GAAP was intended by the parties to provide an independent, objective standard for the actual determination of returns realized by Lincoln in connection with Lincoln's disposition of mineral products from the mine.

[212] HRS stresses that accounting principles are non-legal tools that cannot be used as a basis for interpreting contracts, and cannot be determinative of questions of law. HRS cites a collection of cases demonstrating the limited use that can be made of GAAP as a means of determining questions or law or contract interpretation, namely *Canderel Ltd. v. Canada*, [1998] 1 S.C.R. 147, *Diorite Securities v. Trevali*, 2019 ONSC 4225, *Close v. Weigh West Marine Resort Incorporated*, 2009 BCCA 216, and *Lake Louise*.

[213] In *Canderel*, the issue was whether a taxpayer, in calculating income in a particular tax year, could deduct the entirety of a tenant inducement payment associated with a multi-year tenancy. The taxpayer relied on its accountants, who had determined that it was permissible under GAAP to deduct the entire payment from income in the first year of the tenancy. The Court reasoned that while accepted

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business practices – including GAAP – could be considered in calculating income, ultimately the determination of what constitutes income for the purposes of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*") is ultimately a question of law. Hence GAAP, a collection of well-established business practices recognized in the accounting profession, is a "non-legal tool" that is "external" to the determination or meaning of profit, whereas the provisions of the *ITA* and other established rules of law form the very foundation of the concept of profit and income. In this context, GAAP is merely a tool to be applied on a "case by case basis", in a manner "subservient to" the ultimate legal question of what constitutes profit for income tax purposes: *Canderel* at paras. 37, 53.

[214] While *Canderel* is helpful in illustrating the point that GAAP is a non-legal tool rather than a source of law, it offers limited insight into the significance of GAAP in the case at bar. It was a tax case, involving interpretation of the *ITA*, which makes no reference to GAAP. This helps to explain why GAAP was said to be "external" to the determination of profit (net income) under the *ITA*. This can be contrasted with the case at bar, a contract case in which the parties expressly included a reference to GAAP in their contract, signalling their mutual intent to rely on GAAP for an agreed upon purpose. Still, *Canderel* is helpful in its description of GAAP as a non-legal set of standards to be considered and applied on a case-by-case basis. This is entirely consistent with the notion that in the case at bar, GAAP is not relevant to the contractual interpretation of the scope of TCM's obligations under the Royalty Agreement. Rather, GAAP is a tool, to be used in the application of the contract to subsequent transactions, to properly determine "net smelter returns" associated with those transactions.

[215] The central issue in *Diorite* was the proper interpretation and application of an NPI royalty contract. The contract included a term specifying that the royalty was to be determined in accordance with GAAP. The matter went to arbitration. The arbitrator found "the expert evidence relating to GAAP and IFRS as they apply to financial statements of companies to be irrelevant", and went on to reason that GAAP could not override the terms of the contractual arrangement or specific

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contractual provisions most relevant to the issues to be decided in the arbitration. The Court found no reviewable error in the arbitrator's analysis, noting that the arbitrator's assessment of the accounting evidence was a matter of mixed fact and law attracting a high level of deference. The point I take from *Diorite* is that even where a contract refers to GAAP, this is no basis for overriding the specific terms of the agreement

[216] In *Close*, the parties entered into a share purchase agreement that included a provision for adjustments to the share purchase price based on audited financial statements prepared under GAAP. The parties later reached an impasse as to the valuation of the adjustments to the purchase price, and the matter ended up in court. At trial, both parties called evidence from accountants as to how the share price adjustments ought to be made in accordance with GAAP. In that context, the Court of Appeal addressed the relevance of GAAP to the point in issue as follows:

> [18] The Vendor says the parties were bound to accept the determination by the Company's accountants of the Net Company Balance Adjustment or, alternatively, deference should be given to their determination unless it is clearly wrong. The Vendor also argues the inclusion of the entry for inventory supplies in the closing financial statements did not make them inconsistent with the prior year-end statements.
>
> [19] In my opinion, the parties did not delegate the determination of the Net Company Balance Adjustment to the Company's accountants. Clause 3(d) of the Share Purchase Agreement did not provide that the accountants were to make the determination but, rather, they were to prepare the closing financial statements so that the determination could be made. Section 1.4 of the Agreement required the statements to be prepared in accordance with generally accepted accounting principles applied on a basis consistent with prior years. If either party could show that the statements were not prepared as required under section 1.4, it was open to that party to challenge the calculation of the Net Company Balance Adjustment to the extent that the statements were deficient.
>
> [20] The summary trial judge considered the expert accounting opinions in evidence at the summary trial and made a finding of fact that the closing financial statements were not prepared in accordance with generally accepted accounting principles on a basis consistent with prior years. The judge was not required to give any deference to the Company's accountants.
>
> …
>
> [22] In the present case, there is no basis to interfere with the judge's finding of fact that the closing financial statements were not prepared in accordance with generally accepted accounting principles on a basis

> consistent with prior years. There was evidence to reasonably support this finding, and the judge did not make a palpable error.

[217] Two important points emerge from this reasoning.

[218] First, as Justice Tysoe explained in *Close* at paras. 18 to 19, the term in the agreement providing that the adjustments to the purchase price were to be determined in accordance with GAAP did not mean the parties had agreed to be bound by financial statements prepared by the company's accountants. Rather, the relevant provision required share price adjustments to be made in accordance with GAAP. When the parties could not agree on the quantification of the adjustments, the judge had to decide the point, considering the expert evidence about relevant GAAP principles. This point reveals the flaw in HRS's suggestion that the Court is being invited to read the GAAP reference in the Royalty Agreement as "allowing the mine operator, at its whim, to sidestep its substantive contractual obligation simply through the use of accounting tools". The reference to GAAP is not a license to the mine operator to use whatever tricks of accounting it chooses to determine its own royalty obligation; it is a reference to an objective standard to be applied in the determination of NSR returns. If HRS disagreed with TCM's determination of NSR returns, and a court action ensued, a court would be required to resolve the issue, using GAAP as a set of objective standards to guide that determination.

[219] Second, as Tysoe J.A. explained in *Close* at para. 22, the trial judge's conclusion that the company's financial statements (used as a basis for the share price adjustment) were not prepared in accordance with GAAP was a finding of fact. It was not a question of contract interpretation, but rather a fact-specific application of the rules in the contract to ascertain whether the adjustments to the purchase price were determined correctly in accordance with the objective standards that the parties had agreed to apply. Similarly, in the case at bar the relevance of GAAP is not to interpret the meaning or scope of the terms in the Royalty Agreement, but rather in the application of the contract to determine the proper treatment of transactions that engage the royalty obligation.

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[220] Another case relied upon by HRS in support of its position on the proper role of GAAP is *Lake Louise*. In my view, a careful reading of *Lake Louise* actually supports TCM's position. After finding that the trial judge was wrong to rely on GAAP to (a) identify contractual ambiguity and (b) determine the scope of an exclusion term, the appeal court went on to consider whether the royalty was properly calculated, using GAAP as a relevant tool as provided for in the contract.

[221] HRS acknowledges that the reference to GAAP in Schedule B, clause 1(a) must be given some meaning so as not to be superfluous, but argues that its role should be limited to use as a tool for ascertaining (i) the timing of a particular sale of shipments of concentrate, (ii) the timing of payments received for concentrate sales, and (iii) the matching of allowable smelting fees and transportation costs to particular revenues realized from each sale of a shipment of concentrate. Counsel for HRS points to Dr. Thornton's evidence in cross-examination, acknowledging that generally accepted accounting principles – under both GAAP and IFRS – could be applied to the determination of timing of sale, timing of payment, and matching of allowable deductions related to the sale of concentrate.

[222] While these are all ways in which GAAP may be used as a tool for determining net smelter returns as contemplated in Schedule B, clause 1(a), there is no indication in the text of the Royalty Agreement that the parties intended to limit the use of GAAP to these specific features of net smelter returns. Rather, the mutual intention of the parties was to use GAAP as a set of discernible objective standards to be applied in the determination of net smelter revenues. This involves the consideration of GAAP standards in determining how to analyze qualifying transactions, *i.e.* transactions which, on a proper contractual interpretation of the scope of the Royalty Agreement, trigger royalty obligations.

Conclusion on Interpretation of the Royalty Agreement

[223] I conclude that the parties agreed to a conventional NSR production royalty, with the royalty base consisting of all returns or revenues received by the mine operator in connection with the sale, deemed sale, or disposition of any mineral

products attributable to production from the subject property. From this royalty base, allowable deductions were to be made for specifically listed expenses, relating to smelting, refining, and transportation only. For any qualifying transactions – that is, any transactions falling within the scope of the mine operator's royalty obligation – net smelter returns were to be determined by reference to generally accepted accounting principles consistently applied.

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[224] In its reply submissions, HRS stresses that the Royalty Agreement creates a "production royalty", and that Schedule B, clause 1(a) offers a closed definition of "net smelter returns" that targets "the sale or deemed sale of ores produced from the property, or concentrates derived therefrom" [emphasis added]. HRS also cites several cases discussing the scope of mine production, namely *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20 and *Almaden Minerals* at paras. 51, 79-93, 103-105, and 108-117. In HRS's submission, it "beggars belief" that anyone could reasonably interpret the Royalty Agreement to include revenue generated from the sale of refined metals produced by other mines, when the text of the agreement is clearly focused on the "production" of "ores and mineral products" from the subject property, that is, the Mount Milligan Mine. HRS emphasizes that in fact TCM sells "all mineral product from [the mine] in the form of concentrate to offtakers", with the result that net smelter revenues should be interpreted to apply only to TCM's returns from Offtaker sales. HRS contends that this is mandated by clause 7 of the Royalty Agreement, which states the royalty obligation attaches to "mineral products from the Mining Lands".

[225] Dealing with the last point first, clause 7 of the Royalty Agreement states that Lincoln's obligation to pay royalties attached to "Net Smelter Returns attributable to production of ores and mineral products from the Mining Lands", "determined in accordance with Schedule B". [emphasis added] In my view, the concept of net smelter returns "attributable to" production of mineral products from the subject property is very broad language, intending to encompass all returns realized by Lincoln in connection with "mineral products" from the subject property. This broad interpretation is reinforced by the first sentence in Schedule B, clause 1(a), which

states that net smelter returns "shall mean any and all amounts returned from smelter", less certain deductions. [emphasis added] We also know that, in the mineral extraction industry, the term "smelter" was commonly understood to include any purchaser of mineral products, not just conventional smelting operators.

[226] The cases cited by HRS, *Placer Dome* and *Almaden Minerals*, are both taxation cases that are not particularly helpful in advancing the contract interpretation exercise required in the case at bar. In *Placer Dome*, the issue was whether hedging transactions based on derivatives contracts were subject to taxation as mining activities, even though the hedging transactions did not necessarily involve the physical production of minerals by the mining company. The Court's reasoning was focused on the interpretation of taxation statutes and the importance that the text of the statute must play in such a technical and precise field. See in particular *Placer Dome* at para. 21, wherein Justice LeBel reasoned that where the words of a taxation statute are "precise and unequivocal, those words will play a dominant a dominant role in the interpretive process".

[227] In *Almaden*, the issue was whether the taxpayer was entitled to claim certain deductions against income, when there was a dispute about whether the taxpayer was engaged in "production of minerals" from a mine in a particular tax year. The decision contains a helpful discussion of certain mining terms, including "mineral products" and "production of minerals". With regard to the latter, Justice Walker noted that this phrase was not defined in the statute. After considering the expansive meanings set out in comparable tax statutes in other jurisdictions, he concluded at para. 98 that "[d]etermining whether or not a mining owner or operator is engaged in the production of minerals is a fact-based inquiry arising in the circumstances of each particular case". In the end, Walker J. held that the taxpayer's conduct in merely transferring stockpiled concentrate to smelters constituted "producing minerals" in the tax year so as to allow for deduction of the relevant expenses. However, this outcome turned on the facts and the terms of the tax statute, offering little guidance in interpreting the Royalty Agreement at issue in this case.

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[228] Finally, I turn to HRS's submission that TCM actually sells "all mineral product from [the mine] in the form of concentrate to offtakers", such that net smelter returns should be interpreted to apply only to TCM's returns from Offtaker sales. This argument is subject to the same criticism that HRS levels at TCM, in that it rests on post-contract events that were not part of the factual matrix known to the parties at the time the contract was formed. The evidence reflects that when the Royalty Agreement was negotiated, the parties did not know and could not foresee the actual form that any mining operation on the subject property might take, nor could they appreciate the way the mine operator would monetize its interest in the mineral products the mine yielded. This is part of the reason why, on my interpretation, the parties intended that Lincoln's royalty obligation would apply very broadly, to encompass any returns realized by the mine operator in connection with the sale, deemed sale, or disposition of any mineral products attributable to production from the subject property.

Issue (1): Whether the Streaming Agreement Engages TCM's Royalty Obligations

The Positions of the Parties

[229] HRS's position is that the mineral products TCM obtains from Mount Milligan Mine are sold to Offtakers pursuant to the terms of the Offtaker Agreements, which sales engage TCM's royalty obligation to HRS. On this approach, TCM is obliged to pay HRS a 2% NSR royalty on 100% of the concentrate produced from the mine and sold to Offtakers at market rates. It follows, says HRS, that TCM's delivery of refined metals to Royal Gold under the Streaming Agreement is an aftermarket arrangement between TCM and Royal Gold, with no effect at all on the determination of net smelter returns under the Royalty Agreement.

[230] TCM's position is that under the combined operation of the Streaming Agreement and the Offtaker Agreements, 35% of the refined gold and 18.75% of the refined copper from the Mount Milligan Mine is ultimately "sold" to Royal Gold. Thus TCM maintains that the "returns" from this share of the Mount Milligan Mine production consist of the revenues that TCM receives from Royal Gold.

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Analysis

[231] Based on my interpretation of the scope of TCM's royalty obligations under the Royalty Agreement, and an analysis of the substance of TCM's marketing arrangements with both the Offtakers and Royal Gold, I conclude that TCM's position must prevail. Regarding the scope of the Royalty Agreement, I concluded above that it applies to "any and all amounts returned" to TCM in connection with mineral products from the subject property, in other words, all revenues received by TCM in connection with the sale, deemed sale, or disposition of any mineral products attributable to production from the mine site. Applying this interpretation to the substance of TCM's marketing arrangement, I find that under the combined operation of the Offtaker Agreements and the Streaming Agreement, 35% of the refined gold and 18.75% of the refined copper attributable to production at the Mount Milligan Mine is ultimately sold to Royal Gold at the per unit price specified in the Streaming Agreement. For this portion of the mine's production, TCM's revenue or returns consist of the funds it receives from Royal Gold.

[232] HRS argues that under the terms of the Offtaker Agreements, TCM sells 100% of its concentrate to Offtakers, who legally take title to the concentrate upon payment of the first installment on the purchase. Thus, in HRS's submission, 100% of TCM's production returns come from the sale of concentrate to Offtakers. In my view, this approach overlooks the substance of the situation. Whether one examines the matter from the perspective of (i) the totality of the contractual arrangements in place between TCM, the Offtakers, and Royal Gold, (ii) the economic reality in terms of how TCM monetized its production of mineral products from the Mount Milligan Mine, or (iii) the substance of the transactions in issue from an accounting perspective, one is driven to the conclusion that in essence, 35% of TCM's returns from the mine's gold production and 18.75% of TCM's returns from the mine's copper production come from Royal Gold.

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(i) Substance of TCM's Contractual Arrangements for Marketing of Mineral Products from Mount Milligan Mine

[233] Looking at the substance of the contractual arrangements, what is important in my view is not only the terms of the Offtaker Agreements, but the sum total of TCM's contractual obligations in terms of production from Mount Milligan Mine. Accepting that TCM sells concentrate to Offtakers under the Offtaker Agreements, TCM retains the ability to secure refined metals referable to the share of that concentrate from the Offtakers, concomitant with its contractual obligation to deliver refined metals equal to the metal content in the concentrate to Royal Gold under the Streaming Agreement. The sum and substance of this contractual arrangement is that TCM has a contractual commitment to deliver refined gold equal to 35% of the mine's gold production and refined copper equal to 18.75% of the mine's copper production to Royal Gold, in exchange for which it receives revenues at the per unit prices provided for in the Streaming Agreement.

[234] HRS argues that if in fact TCM's sale of refined gold and copper to Royal Gold under the Streaming Agreement amount to the "sale" of mineral products from Mount Milligan Mine, this would violate principles of assignment of contract, both at common law and under the assignment clause in the Royalty Agreement. In HRS's submission, the only way that TCM could alienate mineral rights in the Mount Milligan Mine site would be by way of a novation, that is, a tripartite variation of the Royalty Agreement, negotiated by HRS, TCM, and Royal Gold.

[235] HRS cites *St. Andrew Goldfields* as an example of an impermissible unilateral assignment of a party's obligations under a royalty contract. The mine owner, Newmont, had a royalty obligation to the royalty holder, Barrick. The agreement stipulated that Newmont would remain liable for any royalties payable to Barrick unless Newmont obtained Barrick's consent to any transfer, along with an assumption agreement from the transferee. Having drastically misunderstood and undercalculated the royalty rate, Newmont (i) obtained an assumption agreement from St. Andrew premised on a misunderstanding of the royalty rate, and (ii) did not bother to obtain Barrick's consent to the transfer of the mine to St. Andrew. On these

facts, the trial judge held Newmont solely liable to Barrick for the entire amount of the royalty, and further held that Newmont was only entitled to indemnification from St. Andrew for the fraction of the royalty rate that St. Andrew had been told it would have to pay: *St. Andrew Goldfield* at paras. 110-111.

[236] TCM says the same reasoning ought to apply in this case. If in fact the Streaming Agreement involved the sale or alienation of TCM's interest in 35% of the gold deposits and 18.75% of the copper deposits in the Mount Milligan Mine to Royal Gold, this was an impermissible assignment of TCM's interest in this proportion of the mineral rights and its corresponding obligation to pay royalties to HRS. Such an assignment, made without HRS's consent or a novation agreement, would be in breach of the assignment clause in the Royalty Agreement and the common law rule against unilateral assignment of contractual obligations.

[237] I do not find any merit in this position, because in my view the Streaming Agreement did not involve an alienation of TCM's right to exploit gold and copper deposits from the Mount Milligan Mine site as of the date that the agreement was executed. Rather, in entering into the Streaming Agreement, TCM made a contractual commitment for the future sale of refined gold equal to 35% of the gold content, and refined copper equal to 18.75% of the refined copper content, in connection with each shipment of concentrate from the mine. I would characterize the Streaming Agreement as a contract for the future purchase and sale of refined metals referable to Mount Milligan Mine production, with the actual purchase and sale of the metals taking place at the time of delivery.

[238] Nor do I accept the related submission that, by entering into the Streaming Agreement, TCM unilaterally altered HRS's rights under the Royalty Agreement. The Streaming Agreement does not unilaterally alter HRS's rights. It merely involves a future commitment to sell of a proportion of the mineral products from Mount Milligan Mine, at a per unit price that includes a cash on delivery component, and the deferred revenue component. It is important to keep in mind that in the Royalty Agreement, Mr. Haslinger Sr. did not contract for a royalty based on fixed prices, or

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prevailing market rates for mineral products. Rather, Mr. Haslinger Sr. contracted for a royalty that was 2% of net smelter returns from the mine’s production. The funds TCM receives from Royal Gold are “returns” attributable to 35% of the gold production and 18.75% of the copper production from the mine. Under the Royalty Agreement, HRS is entitled to a net 2% royalty on these returns.

[239] Finally, the fact that the Streaming Agreement gives TCM the option to deliver refined metals acquired on the open market in the place of refined metals physically produced from the Mount Milligan Mine site does not alter the substance of the arrangement. Under the Streaming Agreement, TCM is obligated to (i) operate the Mount Milligan Mine, (ii) have in place Offtaker Agreements with respect to concentrate produced from the mine, and (iii) ultimately deliver refined metals equal to 35% of the gold content and 18.75% of copper content for each shipment of concentrate from the mine. The refined metals obligation is defined by reference to actual production from Mount Milligan Mine. The revenues TCM receives from these refined metal sales are therefore “attributable to production of ores and mineral products” from the mine as contemplated in clause 7 of the Royalty Agreement.

(ii) The Economic and Commercial Reality of TCM’s Arrangements for Marketing of Mineral Products from Mount Milligan Mine

[240] An examination of the economic and commercial reality of the situation supports the same conclusion, for the reasons that follow.

[241] TCM’s interest has always been to maximize its return from the Mount Milligan Mine. To do so, TCM entered into the Streaming Agreement in which it contracted to sell 35% of the refined gold and 18.75% of the refined copper from the mine to Royal Gold at specified prices. The price per unit for the Royal Gold proportion of the mine’s production has two components, namely (i) the cash on delivery component, and (ii) the deferred revenue component consisting of a pro-rated credit against the previously-paid $781.5 million deposit. This is the return that TCM realizes with respect to the Royal Gold share of production from the mine. TCM can sell the balance of the mineral products from the mine at market prices.

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[242] This entire arrangement was undertaken for sound business reasons, in order for TCM to bring the Mount Milligan Mine into production and to maximize production returns. This arrangement was not only in TCM's economic interest, but also in the economic interests of HRS. If the mine never reached production, there would be no royalties at all. Further, HRS is not deprived of its share of the returns from the proportion of mine production that goes to Royal Gold, because the return associated with each sale of refined metals to Royal Gold includes not just the cash component, but also the deferred revenue component referable to the Royal Gold deposit. Thus, TCM sought to maximize its production returns from the mine, and HRS was to receive royalty payments based on the full amount of those returns.

[243] This conclusion is entirely consistent with the allocation of risks and rewards that the parties had negotiated in the Royalty Agreement. Mr. Haslinger Sr. exchanged his mineral claims in respect of the subject property for a net 2% royalty on all returns Lincoln received in connection with production from the subject property. In this arrangement, both Mr. Haslinger Sr. and Lincoln had a mutual interest in (i) seeing a mine reach commercial production, and (ii) maximizing returns from subsequent mine production. Further, Mr. Haslinger Sr. did not contract for a royalty based on the market value of mineral products from the mine. Rather, he contracted for a royalty based on the mine operator's returns from production.

[244] Ultimately, as part of a *bona fide* and financially prudent business decision undertaken to bring Mount Milligan Mine into commercial production, Lincoln's successor in title (TCM) contracted with Royal Gold for the future sale of refined metals equal to 35% of the mine's gold production and 18.75% of the mine's copper production, in exchange for a substantial up front deposit, and cash on delivery payments at fixed prices. With respect to this share of the mine's production, HRS's returns consist of the revenues received from the sale of refined metals to Royal Gold, including both the cash on delivery component and the deferred revenue component attributable to the Royal Gold deposit. Mr. Haslinger Sr.'s successor in title (HRS) is entitled a net 2% royalty on these "returns". The returns for the balance of the mine's production come from the sale of mineral products to Offtakers at

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market rates. This outcome accords with the allocation of risks and rewards that the parties had agreed to in the Royalty Agreement.

[245] Further, looking at the commercial reality of the situation, it does not matter whether TCM's delivery of refined metals to Royal Gold consists of actual metals produced at the Mount Milligan Mine site, or equivalent quantities of refined metal acquired on the open market. This is because the exact quantities of refined metal that TCM is obligated to deliver to Royal Gold are determined by reference to the metal content in each shipment of concentrate from the mine, and refined metals are a fungible commodity.

(iii) The Economic and Commercial Reality of TCM's Arrangements for Marketing of Mineral Products from Mount Milligan Mine

[246] One reaches the same conclusion when considering the substance of TCM's arrangement with Royal Gold from an accounting perspective, taking into account generally accepted accounting principles.

[247] I accept Dr. Thornton's opinion regarding the proper treatment of TCM's revenue associated with the Streaming Agreement under GAAP. In particular, I accept Dr. Thornton's opinion that, under GAPP, the Streaming Agreement is properly characterized as a commodity sales agreement as opposed to a financing agreement. As Dr. Thornton explains in his report, his opinion on this issue is driven by the principle that the proper accounting treatment of the Streaming Agreement must be based on its substance rather than its form, and by an assessment of the risk-reward profile of the Streaming Agreement from the perspective of TCM and Royal Gold as the respective "seller" and "purchaser" under the agreement.

[248] In its written reply, HRS contends that Dr. Thornton's evidence on this issue runs afoul of the admonition in *Lake Louise* at para. 38 that expert accounting evidence cannot be considered on a question of contract interpretation, because contract interpretation is a "core judicial function". However, Dr. Thornton's analysis does not go to interpretation of the contract at issue in this case, that being the Royalty Agreement. Dr. Thornton's analysis is focused on the proper

characterization of the Streaming Agreement, from the perspective of an accounting expert opining on GAAP. This is part of an exercise in contract application as required under Schedule B, clause 1(a) of the Royalty Agreement.

[249] Moving on to the next point in Dr. Thornton's analysis, I accept his opinion that the funds received by TCM under the Streaming Agreement constitute revenue from the sale of refined metals. This conclusion is significant when considered together with the point that the refined metal TCM sells to Royal Gold is a function of the metal content in concentrate produced by Mount Milligan Mine. All of this is in harmony with the conclusion in paragraph 234 above that TCM's revenues from sales of refined metals under the Streaming Agreement are returns "attributable to production of ores and mineral products" from Mount Milligan Mine as contemplated in clause 7 of the Royalty Agreement.

Conclusion: Revenues TCM Receives from Royal Gold are to be Included within the Determination of Net Smelter Returns

[250] My conclusion on the first of the four points of contention between the parties is that, with respect to the share of Mount Milligan Mine production that TCM sells to Royal Gold under the Streaming Agreement, HRS's royalty is to be determined based on the revenues TCM receives from Royal Gold. I reject HRS's contention that the Streaming Agreement is an aftermarket arrangement with no effect on the determination of royalties payable under the Royalty Agreement.

Issue (2): Whether Hedging Activities Associated with TCM's Sales of Refined Gold under the Streaming Agreement Must be Accounted for in the Determination of Net Smelter Returns

Positions of the Parties

[251] TCM's position on this issue starts from the premise that net smelter returns are to be determined by reference to generally accepted accounting principles as provided for under Appendix B, clause 1(a) of the Royalty Agreement. TCM says hedging is a prudent business practice, and that under GAAP, hedging activities associated with TCM's sale of refined gold under the Streaming Agreement are part

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of a single, larger transaction such that these activities are properly considered in determining TCM's revenue from production derived from the mine.

[252] HRS argues to the contrary, asserting that TCM's hedging activities do not fit within the meaning of "returns" from the disposition of mineral products from the Mount Milligan Mine, nor do the costs associated with such activities fit within the narrow scope of allowable deductions from returns as set out in Appendix B, clause 1(a) of the Royalty Agreement. Accordingly, HRS objects to TCM's accounting for costs associated with the hedging transactions in the determination of net smelter returns upon which HRS's royalty entitlement is calculated.

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Analysis

[253] In the contract interpretation exercise undertaken above, I concluded at paragraph 223 that, in respect of all transactions falling within the scope of TCM's royalty obligation, net smelter returns were to be determined by reference to GAAP. I have further concluded that TCM's sales of refined metals to Royal Gold under the Streaming Agreement fit within the scope of its royalty obligations. Accordingly, the net smelter returns from TCM's sales of refined metals under the Streaming Agreement must be determined by reference to GAAP.

[254] On all the evidence before the Court, including Ms. Saxton's explanation of TCM's hedging activities, and the expert opinion evidence of Dr. Davis, I find that the hedging transactions associated with TCM's delivery of refined gold pursuant to the Streaming Agreement constitute prudent business practice. This hedging activity is not a separate line of business undertaken by TCM as a form of speculative aftermarket trading in precious metals. Rather, the hedging transactions in issue are undertaken to minimize the financial risk associated with the time lag between TCM's receipt of payments for concentrate under the Offtaker Agreements and the delivery of refined gold to Royal Gold under the Streaming Agreement. I accept Dr. Davis's evidence that hedging of this sort is a commonly accepted form of safeguarding activity in the mining industry. To be clear, this evidence does not go to contract interpretation, but rather to subsequent contract application under generally

accepted accounting principles as discussed below. Dr. Davis's evidence is not expert opinion evidence from an accountant. It is evidence about the commercial reality and financial prudence of the transactions in issue, which I consider relevant as a preliminary step in determining net smelter returns in accordance with GAAP.

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[255] Regarding the GAAP treatment of revenues and costs associated with such hedging activities, I begin with the observation that TCM historically prepared its financial statements in accordance with U.S. GAAP, but this changed when Centerra acquired TCM on 20 October 2016. After that date, TCM switched to IFRS so that its financial statements would be prepared under the same reporting standards used by its new parent company.

[256] Nevertheless, I have no difficulty accepting Dr. Thornton's evidence that there is no material difference in approach between the two sets of accounting standards, at least on this issue. Pre-acquisition, the hedging program would be characterized under U.S. GAAP as a smaller component in a "single transaction" the substance of which TCM's sale of refined gold to Royal Gold in quantities equal to the metal content in concentrate produced from Mount Milligan Mine. Post-acquisition, the hedging program would be classified under IFRS as one step in a "series of contracts" designed to "achieve an overall effect", such that the revenue associated with the entire series of contracts is considered "a single unit of account".

Conclusion

[257] I conclude that all the gains and losses arising from TCM's hedging program, along with the associated transaction costs, are properly considered in determining TCM's revenue, or "returns", in connection with the sale of refined metals to Royal Gold under the Streaming Agreement. To be clear, the losses and transaction costs are not deductions from "returns" as contemplated in Schedule B, clause 1(a) of the Royalty Agreement. They do not fit within the scope of allowable deductions, which are limited to smelting fees and transportation costs. Instead, the hedging losses and transaction costs, together with the hedging gains, are all elements of TCM's revenue in connection with the sale of refined metals to Royal Gold. The hedging

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transactions and associated costs fall into what is sometimes referred to as the "revenue base". This is because net smelter returns are to be determined under GAAP, which contemplates that all of the hedging transactions are smaller components in a "single transaction" (per U.S. GAAP), or a "series of contracts" treated as a single "unit of account" (per IFRS).

Issue (3): Whether the Royal Gold Deposit is Properly Treated as "Deferred Revenue" Contributing to Net Smelter Returns under the Royalty Agreement

Positions of the Parties

[258] HRS's stance on this issue is stated in the alternative. If the Court rules against HRS on the first issue, above, then to the extent that the payments TCM receives from Royal Gold under the Streaming Agreement constitute returns from smelter within the meaning of the Royalty Agreement, HRS says this reasoning must apply not just to the cash on delivery payments from Royal Gold, but also to the Royal Gold deposit. HRS says the Royal Gold deposit is properly classified as deferred revenue. Finally, HRS asserts that this is the proper treatment of the Royal Gold deposit both before and after TCM was acquired by Centerra. To hold otherwise would be to allow TCM to reduce its royalty obligation by means of nothing more than "sleight of hand" accounting.

[259] TCM agrees that, at least prior to the Centerra acquisition, the "smelter returns" from its refined metal sales to Royal Gold ought to include both the cash on delivery component and the deferred revenue component attributable to the Royal Gold deposit. TCM says this position is based on a proper application of U.S. GAAP to the determination of net smelter returns as required under Schedule B, clause 1(a) of the Royalty Agreement. However, TCM asserts that after the acquisition by Centerra, the proper accounting treatment of the deposit changed. The Royal Gold deposit became subsumed within the fair value of TCM's assets on Centerra's consolidated financial statements. TCM then invoked the principle of "push down accounting" to adopt a similar treatment. In the result, applying generally accepted accounting principles to the determination of net smelter returns as required under

the Royalty Agreement, there was no longer any deferred revenue component in connection with TCM's sale of refined gold under the Streaming Agreement.

Analysis

[260] The Royalty Agreement provides that net smelter returns are to be determined in accordance with GAAP. Applying the reasoning in Dr. Thornton's report, the Streaming Agreement is properly characterized as a forward purchase contract, and the Royal Gold deposit is an advance payment in relation to a "real" liability, namely the obligation to deliver refined metals equal to the gold and copper content in each shipment of concentrate. Under U.S. GAAP, a pre-paid deposit in connection with such a forward sales contract will generally be "deferred and recognized systematically over the periods that the fees are earned". On this reasoning, the Royal Gold deposit is properly recognized as deferred revenue.

[261] In the result, I accept Dr. Thornton's opinion that, prior to TCM's acquisition by Centerra, the Royal Gold deposit was properly treated as deferred revenue to be considered in determining net smelter returns in respect of which HRS was entitled to a 2% royalty.

[262] I have considered the argument that since the entire $781.5 million deposit was paid prior to the commencement of TCM's royalty obligation in the third year of commercial production, no royalty ought to be payable on the deposit. I do not agree with that submission for two inter-related reasons.

[263] First, I accept Dr. Thornton's evidence that under U.S. GAAP, revenue in connection with an advance payment is "deferred" and recognized systematically "over the periods" in which the payment is earned. This implies that the deferred revenue is to be pro-rated as a proportionate share of the refined metals that the Mount Milligan Mine would produce over its lifetime, with a pro-rated share recognized as revenue each time TCM delivers refined metals to Royal Gold.

[264] Second, this accords with the pricing structure of the Streaming Agreement. The price per unit for the refined metals that TCM was to deliver to Royal Gold had

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two components, namely (i) the cash on delivery component, and (ii) the deferred revenue component consisting of a pro-rated credit against the $781.5 million deposit. The pricing formula in the Streaming Agreement may not be exactly the same as the accounting treatment called for under U.S. GAAP (owing to different approaches to the life of the mine or the total estimated yield over its lifetime), but the concept is the same or similar. The Streaming Agreement characterized the $781.5 million deposit as a pro-rated pre-payment for refined metals that TCM is obligated to sell to Royal Gold, until the entire deposit is exhausted.

[265] Both points run contrary to and, in my view negate the argument that TCM has no royalty obligation in relation to the Royal Gold deposit because the deposit was received by TCM prior to the third year of production. Although TCM received the deposit prior to the third year of production, TCM in fact earns a pro-rated portion of the deposit in connection with each delivery of refined metals to Royal Gold.

[266] This brings me to a consideration of TCM's post-acquisition treatment of the Royal Gold deposit. On this issue, I accept Dr. Thornton's opinion that applying IFRS principles, Centerra was obligated to produce consolidated financial statements including TCM's assets and liabilities. I also accept the opinion that Centerra properly included the Royal Gold deposit within the fair value of TCM's assets at the time of acquisition, with the result that the deposit would not be characterized as deferred revenue in the consolidated statements.

[267] However, I do not accept that as a consequence of its parent company's accounting, TCM properly re-characterized the Royal Gold deposit as part of the fair value of its assets, with the consequence that the deposit was removed from the determination of net smelter returns. I say this for a number of reasons.

[268] To begin with, I accept HRS's submission that what constitutes proper accounting treatment in these circumstances largely depends upon one's perspective.

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[269] From Centerra's perspective, the Royal Gold deposit was properly regarded as an historical input factored into the fair value of TCM's assets at the time of acquisition. As I understand the reasoning in Dr. Thornton's report, this approach provided Centerra's investors and creditors with the most accurate picture of the consolidated financial position of Centerra and TCM after the acquisition.

[270] From TCM's perspective, the proper accounting treatment of the Royal Gold deposit is less clear. If, prior to the acquisition, TCM's accountants had determined that the most accurate representation of the company's assets and liabilities under U.S. GAAP was to treat the Royal Gold deposit as deferred revenue, I find it difficult to understand how that accounting treatment would be any less accurate after TCM had been acquired by Centerra. The acquisition was a share purchase arrangement, under which TCM's shareholders were given shares in Centerra, leaving TCM intact as a wholly owned subsidiary.

[271] From the perspective of the two parties to the Royalty Agreement, namely TCM and HRS, the treatment of the Royal Gold deposit as deferred revenue would afford an objectively more accurate picture of "net smelter returns" than a new accounting treatment in which the deposit would, to use the language in Dr. Thornton's report, "vanish". This is especially so since, as noted above, the Streaming Agreement itself specified that the purchase price for each delivery of refined metals had two components, one being the cash on delivery component and the other being the deferred revenue component referable to the Royal Gold deposit.

[272] Dr. Thornton's report does not assert that TCM's decision to adopt its new parent company's financial reporting practices was mandated by any particular accounting rule, principle, directive, or regulatory body. As I understand it, TCM made a judgment call to adopt the reporting practices used in Centerra's financial statements. It would have been open to TCM to retain its own reporting practices in its "standalone" financial statements. I reach this conclusion based at least in part on the acknowledgment in Dr. Thornton's report that, "[o]ften" after an acquisition, a

subsidiary "continues to exist as an independent entity and produces its own financial statements".

[273] What evidently induced TCM to sign on to Centerra's accounting treatment of the Royal Gold deposit was a decision to employ "push down accounting", a practice dealt with at length in Dr. Thornton's report.

[274] Dr. Thornton explains that at one time push down accounting was mandatory for companies operating under U.S. GAAP. However, in 2014, the SEC (which sets U.S. GAAP standards) revisited its position, issuing a new bulletin stating that an acquired entity had "the option of applying push-down accounting in its stand-alone financial statements upon a change-in-control event". As an entity operating under U.S. GAAP prior to its acquisition by Centerra, TCM therefore had "the option" to apply or not apply push down accounting in its own financial statements.

[275] Dr. Thornton goes on to explain that IFRS is completely silent on the topic of push down accounting. In other words, nothing under IFRS either prohibits or requires a newly acquired subsidiary to adopt the financial reporting practices of its parent company. As an entity operating under IFRS both before and after acquiring TCM, Centerra would have been free to apply or not apply push down accounting in TCM's standalone financial statements (assuming of course that Centerra had the ability to make such a decision on TCM's behalf, or to require TCM to make it).

[276] Dr. Thornton's report also contains a discussion of the "arguments in favour of and against" push down accounting. The principal argument in favour of the practice is that the parent company's purchase of the subsidiary establishes a "new basis for accountability and performance evaluation" of the subsidiary. The principal argument against the practice is that the parent company's acquisition of the subsidiary's shares does not involve any "actual transactions" relating to the assets and liabilities of the subsidiary and, so the argument goes, the subsidiary's assets and liabilities "should continue to be accounted for" using their original values.

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[277] Based on all of this, Dr. Thornton concludes that Centerra could “justify” the use of push down accounting in TCM’s “standalone” financial statements. I would not interpret this as a definitive opinion that either Centerra or TCM were compelled to employ push down accounting to bring TCM’s financial statements in line with the consolidated financial statements prepared by Centerra. Taking into account all the evidence, I find that TCM’s choice to do so was a judgment call.

[278] In the circumstances of this case, the arguments against push down accounting have much more resonance than the arguments in favour of its application. Centerra’s acquisition of TCM had no effect on the terms of the Royalty Agreement, and no effect on the way TCM produced concentrate from Mount Milligan Mine and ultimately sold refined metals equal to 35% of the mine’s gold production and 18.75% of the mine’s copper production to Royal Gold under the Streaming Agreement. In these circumstances, the way TCM accounted for the Royal Gold deposit prior to the TCM acquisition presented a more accurate picture of the substance of the transaction than the way Centerra treated the Royal Gold deposit in its post-acquisition consolidated financial statements. Indeed, under Centerra’s approach, the Royal Gold deposit simply “vanished”. While Centerra’s approach may have been an entirely accurate and appropriate way to report the assets and liabilities of the parent and its new subsidiary in the consolidated financial statements, it did not accurately reflect the determination of net smelter returns from the Mount Milligan Mine operation from the perspective of the parties most interested in that issue, namely TCM and HRS.

[279] Recall that Appendix B, clause 1(a) of the Royalty Agreement provided that net smelter returns were to be determined in accordance with generally accepted accounting principles, “consistently applied”. I find that TCM’s unilateral decision to adopt its parent company’s reporting practices in its standalone financial statements, which was in turn used to justify a significant change in the accounting treatment of the Royal Gold deposit to HRS’s detriment, was not a “consistent” application of GAAP as contemplated in the Royalty Agreement.

[280] Recall as well that clause 11 of the Royalty Agreement imposed an obligation on each party to "act in good faith" in respect of the other, and to "do or cause to be done all things" within its power and "which may be necessary or desirable to give full effect to the provisions" of the agreement. Faced with the choice of two different accounting treatments – one which would see the determination of HRS's royalty continue to include a substantial deferred revenue component, and the other which would cause the deferred revenue component of the royalty to "vanish" – TCM had a contractual duty to act in good faith by choosing the former over the latter.

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Conclusion

[281] I conclude, having regard to "generally accepted accounting principles consistently applied" as provided for under the Royalty Agreement, that deferred revenue associated with the Royal Gold deposit must be included in the determination of TCM's net smelter returns for the purposes of determining the royalty payable to HRS, both before and after Centerra's acquisition of TCM.

Issue (4) Whether TCM Breached its Contractual Duty of Good Faith in a Manner that Warrants an Award of Punitive Damages

[282] HRS argues that TCM breached its contractual duty of good faith. More specifically, HRS alleges that TCM breached (i) its duty of honest performance, and (ii) its contractual duty to act in good faith. HRS says TCM's conduct so markedly departed from standards of decent behaviour that it requires an order of punitive damages to achieve the objectives of retribution, denunciation, and deterrence.

(i) Duty of Honest Contractual Performance

[283] In *Bhasin v. Hrynew*, 2014 SCC 71, the Court recognized a "general duty of honest in contractual performance", under which the parties to a contract must not "lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract": *Bhasin* at para. 73. This duty is not to be regarded as an implied contractual term. It is, rather, a "general" contractual duty that establishes

a "minimum standard" of honesty in relation to the performance of the contract: *Bhasin* at para. 74.

[284] The duty of honest performance is not to be equated with a duty of fiduciary loyalty. Thus, a contracting party has "no general duty to subordinate his or her interest to that of the other party": *Bhasin* at para. 86.

[285] Nor does the duty of honest performance go so far as to create positive disclosure obligations. Nevertheless, the absence of such a positive obligation does not mean there is no obligation to correct a false impression created by a party's own conduct: *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45 at para. 38. The duty goes further than merely protecting against outright lies. It also protects against half-truths, omissions, and even silence in some cases, although the circumstances in which one contracting party will be found to mislead another are "highly fact specific": *C.M. Callow* at para. 91.

[286] HRS contends that TCM breached the duty of honest contractual performance: (i) in its correspondence with HRS about the way the NSR royalty would be calculated, and (ii) in its "lack of candour" in the course of the petition proceedings seeking court approval for the plan of arrangement under which Centerra acquired TCM.

[287] In response to these allegations, TCM relies on *C.M. Callow* at para. 83 for the proposition that a breach of the duty of honest contractual performance would only arise if TCM were shown to have "lied or otherwise knowingly mislead" HRS "in respect of a matter that is directly linked to the performance of the contract". TCM says the evidence does not show any such conduct on its part. With regard to the way the royalty would be calculated and paid, TCM maintains that it was "honest, transparent, and forthright" in its communications with HRS. With regard to the plan of approval process, TCM contends that HRS was not legally affected by the petition procedure, and that court approval of the plan of arrangement did not prejudice HRS's ability to seek legal redress for any prejudice to its interests, which HRS has in fact done through the present court action.

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[288] I accept TCM's position on both points.

[289] First, I accept TCM's submission that its communications with HRS concerning the status of the royalty payments and the manner of their calculation were transparent and forthright. Before the first royalty payment was due, TCM advised HRS in writing of its position on how the royalty amount would be calculated. Thereafter, the parties engaged in an open dialogue and exchange of positions about the calculation of the royalty. Although the parties did not agree, I see no evidence that TCM actively misled HRS, or through its actions allowed HRS to form a mistaken impression of the way the royalties would be calculated. Each royalty payment was accompanied by an explanatory letter, and a breakdown of the royalty calculations.

[290] The most that can be said is that in drafting a letter on behalf of Mr. Perron, Ms. Saxton failed to explicitly address the fact that hedging costs had been factored into the determination of net smelter returns. Ms. Saxton avers that she forgot to mention this in the letter to Mr. Haslinger Jr., and I have no reason to question the veracity of this assertion. In my view, this failing, considered on its own and in conjunction with TCM's entire course of conduct, is not sufficient to ground a finding that TCM failed to honour its duty of honest contractual performance.

[291] Second, I accept TCM's submission that its conduct in the petition proceedings did not involve any attempt to mislead the Court, nor did it deprive HRS of any legal rights, or prejudice HRM's ability to seek redress for any actionable wrong or prejudice to HRS arising from Centerra's acquisition of TCM.

[292] I do not intend to review the law concerning the scope of petition proceedings for plans of approval under the *BCA*. It is enough to say that: (i) such proceedings involve a consideration of the reasonableness of the arrangement from the perspective of those whose legal rights are affected, not the economic interests of third parties, and (ii) the fact that the Court granted approval for the plan of arrangement, allowing Centerra's acquisition of TCM to proceed, did not in any way

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impair HRS's ability to take legal action for prejudice to its interests as a consequence of the acquisition.

(ii) Duty of "Good Faith" in Contractual Performance

[293] HRS relies on clause 21 of the Royalty Agreement, providing that both parties "shall" at all relevant times "act in good faith in respect of the others, and do or cause to be done all things within their respective powers which may be necessary or desirable to give full effect to the provisions hereof." HRS also relies on case law discussing the "organizing principle" of good faith contractual performance.

[294] The organizing principle of good faith in contractual performance contemplates that parties will perform their contractual duties "honestly", and "reasonably and not capriciously or arbitrarily": *Bhasin* at para. 63. As an organizing principle, this concept is not a "free-standing rule", but rather a standard that "underpins and is manifested in more specific legal doctrines": *Bhasin* at para. 64.

[295] In *IFP* at para. 191, the Court explained that the principle of good faith performance "does not compel a party to put the interests of others above its own". As Justice Cromwell stated in *Bhasin* at para. 65, this principle "merely requires that a party not seek to undermine those interests in bad faith".

[296] The Court in *IFP* posited an implied contractual term "limiting one party's ability to perform a contract in a manner which undermines the interests of the other party": *IFP* at para. 192 see also: *Hudson King v. Lightstream Resources Ltd.*, 2020 ABQB 149 at para. 152. In this case, it is unnecessary to have resort to such an implied term, since the parties expressly agreed upon a mutual duty to "act in good faith" toward each other in the performance of the contract.

[297] HRS takes the position that TCM breached its duty of good faith contractual performance by advancing "disingenuous" positions concerning the interpretation of the Royalty Agreement. Although HRS does not say so explicitly, I take this submission to extend to TCM's position with respect to the determination of net smelter returns, and the resulting calculation of royalties payable to HRS.

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[298] I agree with TCM that there is no merit in HRS's submission on this point. The evidence reflects that TCM made a *bona fide* effort to determine net smelter returns in accordance with generally accepted accounting principles. This included both in-house assessments by accounting professionals, and the commissioning of independent opinions from outside experts. I see no basis on which to question the *bona fides* of TCM's conduct in this regard.

[299] The sole aspect of TCM's conduct that I have found to be inconsistent with its duty of good faith contractual performance as set out in clause 21 of the Royalty Agreement is TCM's post-acquisition decision to adopt Centerra's accounting treatment of the Royal Gold deposit. At paragraph 277 above, I characterized this as a judgment call or choice by TCM to employ push down accounting as a rationale for adopting Centerra's financial reporting, which in turn had the effect of causing the deferred revenue in connection with the Royal Gold deposit to "vanish". This was, in my view, a decision by TCM to perform its duties under the Royalty Agreement in a manner which undermined the interests of the other contracting party, HRS.

[300] TCM's choice of accounting treatments was rational and supported by at least some objective evidence. Nevertheless, this choice did not align with the reasonable expectations of the parties as reflected in clause 21 of the Royalty Agreement, in that it significantly prejudiced the interests of the other contracting party.

Punitive Damages

[301] A punitive damages award can only be made in connection with a breach of contract claim where the defendant's conduct involves an independent "actionable wrong": *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 at paras. 78-83. The independent "actionable wrong" may take the form of an independent tort, or "breach of a distinct and separate contractual provision or other duty such as a fiduciary obligation": *Whiten* at para. 82.

[302] Furthermore, punitive damages are only to be awarded in exceptional cases, based upon proof of "high-handed, malicious, arbitrary or highly reprehensible

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misconduct", where the misconduct would "otherwise be unpunished", and where compensatory damages are insufficient to accomplish the objectives of retribution, deterrence and denunciation: *Whiten* at para. 94.

[303] The only conduct in this case that could conceivably qualify as an "independent actionable wrong" is TCM's post-acquisition decision to adopt its parent company's accounting treatment of the Royal Gold deposit. Even assuming that this amounts to an independent actionable wrong, it does not rise to the level of reprehensible conduct deserving of rebuke by way of an order of punitive damages.

[304] TCM's decision to adopt Centerra's financial reporting was, as I have said several times, a judgment call. What is more, it was a judgment call made with the benefit of input from accounting professionals. Although I have found that the decision failed to adhere to the duty of good faith contractual performance, this is not conduct warranting the exceptional remedy of punitive damages.

Summary and Conclusion

[305] To summarize the result:

(a) With respect to the share of Mount Milligan Mine production that TCM sells to Royal Gold under the Streaming Agreement, net smelter returns within the meaning of Schedule B, clause 1(a) of the Royalty Agreement are to be determined based on the payments TCM receives from Royal Gold.

(b) All transactions relating to TCM's hedging tied to the delivery of refined metals to Royal Gold are properly considered in determining net smelter returns under Schedule B, clause 1(a) of the Royalty Agreement.

(c) Deferred revenue associated with the Royal Gold deposit must be included in the determination of net smelter returns under Schedule B, clause 1(a), both before and after Centerra's acquisition of TCM; and

(d) HRS's claim for punitive damages is dismissed.

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Costs

[306] If the parties cannot agree on costs, then: (i) within 14 days of the judgment, the plaintiff is to file a written submission, no more than six pages in length, plus any supporting materials; (ii) within 28 days of the judgment, the defendant is to file any responding submissions, no more than eight pages in length, plus supporting materials; and (iii) within 35 days of the judgment, the plaintiff may file a written reply submission, no more than two pages in length. If either party believes that written submissions will not be adequate, that party may contact Supreme Court Scheduling, no more than 35 days after the judgment, for the purposes of scheduling an oral hearing.

“Riley J.”