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December 30, 2024

Raffi A. Balmanoukian
Registrar in Bankruptcy
Supreme Court of Nova Scotia
The Law Courts
1815 Upper Water Street
Halifax, NS B3J 1S7

Dear Mr. Registrar:

Re: In the Matter of the Bankruptcy of Atlantic Sea Cucumber Ltd.
Hfx No. 45461
Estate No. 51-2939212

1. We write as counsel to Atlantic Golden Age Holding Inc. ("**AGAH**") with respect to this matter. Specifically, we write in response to the submission filed by counsel for Weihei Taiwei Haiyang Aquatic Food Co. Ltd. ("**WTH**") submitted on or about December 20, 2024 (the "**WTH Submission**").

2. We provide the within AGAH Rebuttal as part of our right to reply by end-of-day on December 30, 2024.

3. We rely upon the submissions made on December 20, 2024 and intend to briefly respond to the WTH Submissions as succinctly as possible.

Provost Shoe Shops Limited

4. In the WTH Submissions, WTH submits that the Nova Scotia Supreme Court decision of *Re Provost Shoe Shops Limited,* 123 N.S.R. (2d) 302 (NSSC) ("***Provost***") is of limited applicability. The reasons for this are briefly summarized as follows:

{350139.1}

a. It predates the equity provision in section 140.1 of the *Bankruptcy and Insolvency Act* (the "***BIA***");

b. *Provost* has been incorporated into more recent caselaw and, in particular, *US Steel* (as cited in *Syndic de Societe fde velo en libre service*, 2023 QCCA 368, amongst other cases);

c. *Provost* is distinguishable on its facts.

5. With respect, the fact that *Provost* pre-dates section 140.1 of the *BIA* is not a relevant consideration and does not change the relevance of the case as a perfect example of the proper application of the facts in AGAH's case. Section 140.1 of the *BIA* requires a finding that amounts issued by AGAH gave rise to an equity claim and not the claim of an unsecured creditor. An equity claim is defined as:

> ***equity claim*** means a claim that is in respect of an equity interest, including a claim for, among others,
>
> **(a)** a dividend or similar payment,
>
> **(b)** a return of capital,
>
> **(c)** a redemption or retraction obligation,
>
> **(d)** a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or
>
> **(e)** contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d); (*réclamation relative à des capitaux propres*).

6. The primary submissions of AGAH are that the amounts lent are not equity claims at all. Submissions on this particular issue have already been made and AGAH relies on those submissions. In any event, the determination of whether the amounts lent are equity claims requires an examination of the same facts as an examination under s. 137 of the *BIA.* Therefore, distinguishing the decision in *Provost* on that basis is illogical.

7. Secondly, it is submitted that the very fact that the Quebec Court of Appeal in *Syndic, supra*, cites *Provost* for the proposition that "the mere fact that a sole shareholder (or

group of shareholders) advances funds to its company does not constitute *per se* a contribution to capital" demonstrates the importance of the decision as critical precedent in this case. It is not an ancient case to be dismissed. It demonstrates how a Court can assess the facts of a matter and determine that a creditor, such as AGAH, can be considered a proper, secured creditor in priority to others.

8. It is submitted that the *Provost* decision has been positively cited in the past few years. It should be treated as good law in today's legal climate. It does not infringe on the concepts of contractual interpretation or the characteristics to be reviewed in light of *Syndic, supra.* Instead, it demonstrates that, when following an analysis similar to the *US Steel* criteria found in *Syndic*, a Court (looking at characteristics similar to those of AGAH and the 2018 Loan Agreement) found in favour of the impugned creditor. This is precisely the reasons why *Provost* is relied upon by AGAH in this case.

9. Ultimately, AGAH does not dispute that this is a fact-driven analysis. AGAH relies upon its submissions on the *US Steel* criteria given at the hearing on November 22, 2024. AGAH simply submits that the *US Steel* criteria does demonstrate that AGAH has proper security. It does not have an equity claim but, rather, a secured claim with priority over that of WTH. This is demonstrated by facts which closely resemble the facts in *Provost.*

10. For example, in *Provost*:

    a. Transactions were properly and clearly recorded on the books of the company involved;

    b. Transactions involved substantial payments beinbg made on the loans;

    c. The loans were repaid irregularly, without interest; and

    d. Transactions were originally established on the advice of the companies' accountants and lawyers.

11. Each of these critical facts are true in this case. Once needs only to look at the Affidavit of Rong Lu, the accountant for AGAH, to see how the transactions were properly

recorded, payments on the loans were made regularly, and AGAH sought and followed the advice of its accountant. Funds have been advanced, in the same way, since 2018m when Atlantic Sea Cucumber Ltd. was thriving.

12. Simply put, the Provost case is substantially similar to AGAH's circumstances in its critical respects.

13. It is submitted in summation that the transactions do not bear the hallmarks of equity. In contrast, the transactions of AGAH bear the hallmarks of any other revolving line-of-credit arrangement between two separate entities. These transactions are all proper. They are not equity. AGAH submits that this Court should find in its favour.

Parol Evidence Rule and Contractual Interpretation

14. AGAH relies on its written submission dated December 20, 2024 in respect of the parol evidence rule and the interpretation of contracts following the Supreme Court of Canada's decision in *Sattva Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SC 53.

15. However, at paragraph 26 of the WTH Submission, WTH makes the following point:

> 26. An additional consideration in this case is that the 2018 Loan Agreement includes a clause which explicitly excludes evidence of surrounding circumstances. It provides that the whole agreement between the parties was reduced to writing:
>
> > 21. ENTIRE AGREEMENT This Agreement contains all the terms agreed to by the parties relating to its subject matter, including any attachments or addendums. This Agreement replaces all previous discussions, understandings, and oral agreements. The Borrower and Lender agree to the terms and conditions and shall be bound until the Borrower repays the Borrowed Money in full.
>
> 27. Given the above, WTH submits any evidence of surrounding circumstances is of limited use to this Court.

16. With respect, this is an incorrect statement of the law on "Entire Agreement" clauses. Recent developments in Canadian common law of contracts have called the applicability of "Entire Agreement" clauses into disrepute. In *Sattva, supra,* the Supreme Court of

Canada formally recognized the importance of surrounding circumstances in the interpretation of a contract. This is covered fulsomely in our previous submissions dated December 20, 2024.

17. The law on Entire Agreement clauses themselves was later developed in the post-*Sattva* landscape by the Court of Appeal for Ontario in *Ontario First Nations (2008) Limited Partnership v. Ontario Lottery and Gaming Corporation*, 2021 ONCA 592:

> [61] **Third, Ontario and OLG assert that the appeal judge and majority erred in law by admitting the pre-contractual negotiations into evidence** — especially evidence of Ontario's negotiator, former Minister Bryant, to the effect that Ontario and OLG's diversion of the non-gaming revenue stream and the termination of the payment of an amount equal to Comps, two of the three revenue streams referred to in the Agreement, conflicted with the parties' shared understanding. **Ontario and OLG also argue that an "entire agreement" clause, s. 1.10, precludes reliance on any pre-contractual warranty, representation, opinion, advice, or assertion of fact.**
>
> [62] **I do not agree with this submission. An entire agreement clause alone does not prevent a court from considering admissible evidence of the surrounding circumstances at the time of contract formation. As already noted, the surrounding circumstances are relevant in interpreting a contract exactly because "words alone do not have an immutable or absolute meaning":** *Sattva*, at para. 47. **Relevant background and context are often essential to understand contractual language.** I therefore agree with the following observations of Fraser C.J. for a majority of the Court of Appeal of Alberta in *IFP Technologies (Canada) v. EnCana Midstream and Marketing*, 2017 ABCA 157, 53 Alta. L.R. (6th) 96, at para. 124, leave to appeal refused, [2017] S.C.C.A. No. 303:
>
> **The mere existence of an "entire agreement" provision does not mean that the words chosen beyond that entire agreement provision admit of one interpretation only. The purpose of considering the surrounding circumstances is not to add to, contradict or vary the terms of the agreement but rather use them as an interpretive aid to determine the meaning of the words in dispute**. Where parties have concluded an agreement and a court is left to sort out the parties' objective intentions, it cannot be prevented from considering the surrounding circumstances by a provision that is itself based on the assumption that the agreement is clear — when it is not.
>
> [Emphasis Added].

18. The finding here by the Court of Appeal for Ontario is critical and demonstrative on what this Court should do in this case. The affidavits have been presented in respect of the circumstances which preceded the 2018 Loan Agreement. They are the surrounding circumstances. They are objective.

19. To say they are of "limited value" is simply incorrect. They should be reviewed by this Court to interpret the 2018 Loan Agreement.

Surrounding Circumstances and Express Terms

20. At paragraphs 42 to 46 of the WTH Submissions, WTH argues that the surrounding circumstances relied upon by AGAH are being used to "alter the express terms" of the 2018 Loan Agreement. AGAH disagrees with this assertion. WTH then submits that:

> 44. …No amount of "interpretive aid" can establish that a term loan with a specified due date was in fact a revolving line of credit with no set maturity date, or that a clause specifying that the agreement may not be amended except in writing could be amended without written documentation.

21. With respect, this does not properly characterize the language of the 2018 Loan Agreement. As discussed at the hearing on November 22, 2024, there is no checkmark on the "box" which specifies a due date or maturity date on the 2018 Loan Agreement. It may have been filled in and considered. However, and importantly, it was not checked. All other "boxes" were checked as applicable. This is the precise issue that the interpretive aids are meant to illuminate. Evidence of surrounding circumstances helps demonstrate that the intention of the parties was for there to be no due date; that it would act as a revolving line of credit. The evidence tendered is necessary to understand the intent of the parties at the time the 2018 Loan Agreement was created.

22. It is not true, in any respect, that AGAH seeks to effectively create a "new agreement". AGAH is tendering evidence to interpret the 2018 Loan Agreement that exists. No words in the 2018 Loan Agreement have been impugned by AGAH. The express terms are contained in the document. The surrounding circumstances are necessary to understand what the arrangement was, given that the "box" was unchecked. That is why it is

tendered, and the evidence shows that the intent of AGAH was to issue a revolving line of credit to Atlantic Sea Cucumber Ltd.

Conclusion

23. AGAH relies upon its prior submissions and request that this Court declare its claims to be in priority to all third-party creditors.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th day of December, 2024.

Christopher Isnor

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COURT OF APPEAL FOR ONTARIO

CITATION: Ontario First Nations (2008) Limited Partnership v. Ontario Lottery and Gaming Corporation, 2021 ONCA 592
DATE: 20210901
DOCKET: C68701 & C68702

Fairburn A.C.J.O., Lauwers and Jamal JJ.A.

BETWEEN

Ontario First Nations (2008) Limited Partnership

Claimant
(Respondent)

and

Ontario Lottery and Gaming Corporation and
Her Majesty the Queen in right of Ontario,
as represented by the Minister of Aboriginal Affairs

Respondents
(Appellants)

R. Paul Steep, Bryn E. Gray and Stephanie Sugar, for the appellant, Ontario Lottery and Gaming Corporation

D. Brent McPherson, Edmund S. Huang, Manizeh Fancy and Insiyah Kanjee, for the appellant, Her Majesty the Queen in right of Ontario

Sheila Block, David Outerbridge, Leora Jackson, Nic Wall and Hannah Allen, for the respondent, Ontario First Nations (2008) Limited Partnership

Heard: June 9 and 10, 2021 by video conference

On appeal from the order of Justice Glenn A. Hainey of the Superior Court of Justice, dated March 31, 2020, with reasons reported at 2020 ONSC 1516.

Jamal J.A.:

OVERVIEW

[1] In 2008, Ontario and OLG entered into a “Gaming Revenue Sharing and Financial Agreement” with First Nations Partnership, a limited partnership of Ontario First Nations. Under the Agreement, Ontario and OLG agreed to share with First Nations three types of revenue associated with gaming in Ontario.[1]

[2] A few years later, however, OLG decided to outsource its non-gaming amenities to private operators, effectively giving them responsibility for two of the three types of revenue under the Agreement. Private sector operators assumed the risk and responsibility for non-gaming amenities, in exchange for keeping 100% of the associated non-gaming revenue. OLG described this arrangement as “modernization”. Although OLG anticipated much greater revenue under modernization, it did not disclose its outsourcing plans to the First Nations Partnership or seek to amend the Agreement to be relieved of the obligation to pay the First Nations Partnership all three types of revenue.

[1] The formal name of OLG is Ontario Lottery and Gaming Corporation. Ontario is known formally in these proceedings as Her Majesty the Queen in right of Ontario. The First Nations Partnership is known formally as the Ontario First Nations (2008) Limited Partnership.

[3] When OLG implemented modernization, it stopped paying the First Nations Partnership two of the three types of revenue under the Agreement. When the First Nations Partnership discovered this, it initiated an arbitration under the Agreement.

[4] The arbitration panel held that Ontario and OLG breached the Agreement. The majority ruled that Ontario and OLG breached express contractual terms when they stopped paying two of three agreed-upon types of revenue. The dissenting member found that Ontario and OLG's unilateral changes to the operation of the Agreement breached an implied contractual term, describing their conduct as "breathtaking in the age of reconciliation."

[5] The appeal judge dismissed Ontario and OLG's appeals.

[6] Ontario and OLG now appeal to this court. They argue that the appeal judge made three errors: he applied the wrong standard of review, misinterpreted the Agreement, and erred in concluding that they breached the honour of the Crown.

[7] For the reasons that follow, I would dismiss the appeals. I would uphold the majority decision of the arbitration panel on any standard of review. I see no error in the appeal judge's interpretation of the Agreement and I would find it unnecessary to address the honour of the Crown.

BACKGROUND

[8] OLG is a Crown corporation that conducts and manages lottery schemes in Ontario on behalf of the provincial government. It operates under an exemption to

the prohibition against gaming and betting in Canada under the *Criminal Code*, R.S.C. 1985, c. C-46. OLG's profits are paid to Ontario and are the province's largest source of non-tax revenue.

[9] The First Nations Partnership is a limited partnership of 132 Ontario First Nations established to receive and distribute revenue under the Agreement to promote education, health, economic, cultural, and community development in First Nations communities.

(a) Prior gaming-revenue litigation

[10] The Agreement was reached after about a decade of disputes between Ontario and First Nations involving gaming revenues. Foremost among these was litigation over an earlier revenue sharing agreement, the Casino Rama Revenue Agreement, which entitled the First Nations Partnership's predecessor to a share of revenue from Casino Rama — a casino complex located on the reserve lands of The Chippewas of Rama First Nation. First Nations sued Ontario and OLG for more than $2 billion in damages after a new Ontario government imposed a 20% "win tax" on Casino Rama's gross revenues to be paid to Ontario in priority to First Nations' entitlement. Through the Agreement, the parties agreed to settle the "win tax" and other litigation.

(b) Agreement on the definition of "Gross Revenue" to be shared

[11] In 2004, when the "win tax" litigation was underway, OLG proposed that the parties enter into a new revenue sharing agreement to address First Nations' concerns about the unpredictable and reduced revenue flows under the prior arrangements. The first phase of negotiations was between former Ontario Premier David Peterson, as Ontario's representative, and First Nations. The Order-in-Council appointing Mr. Peterson stated Ontario's desire to "establish a new Ontario First Nations Gaming Revenue Sharing Agreement that provides more stable funding and strengthens the financial position of the Ontario First Nations". Mr. Peterson's terms of reference contained a similar instruction.

[12] During the first phase of negotiations, a draft agreement was reached, but was not ratified by First Nations' Chiefs in June 2007. The parties did, however, agree on a key item, "Gross Revenue", that would eventually become part of the Agreement — the base of provincial gaming revenue to be shared with First Nations would include three sources: (1) gaming revenue from lotteries, slots, and table games from operations conducted and managed by OLG ("gaming revenue"); (2) revenues from non-gaming activities ancillary to those operations ("non-gaming revenue"); and (3) the retail value of accommodation, food and beverage services, and other services provided to gaming patrons on a complimentary basis to encourage them to visit and stay at the gaming sites ("Comps"). These three types of revenue comprised Gross Revenue. Even though

Comps were an expense to OLG and not revenue, they were deemed to be revenue for revenue sharing purposes. OLG gave First Nations' negotiators financial projections of the anticipated future revenue based on all three components of Gross Revenue, with a breakdown of each. The draft agreement provided that the First Nations Partnership would receive 1.6% of Gross Revenue, which included all three revenue sources.

[13] Before the draft agreement was presented to First Nations' Chiefs, the First Nations sought confirmation that in the future Ontario would not "turn current revenues that are received to the final account of the Province into revenues that are not". In response, Mr. Peterson provided Ontario's "unequivocal commitment to share … gross gaming revenue". He assured First Nations that Ontario would not conduct itself in any way to undermine the agreement by allowing "revenues from such gaming [to] go to third parties". He also noted that the First Nations Partnership would have "a full and equal member on the board of directors of OLG to protect and advance the interests of First Nations in Ontario". The government separately assured the First Nations Partnership that "the primary objective of the proposed draft agreements is to replace an uncertain source of revenues with stable, predictable long term funds for First Nations communities". Despite these assurances, the First Nations Chiefs did not approve the proposed agreement.

(c) Reaching the Agreement

[14] A second phase of the negotiations began in late 2007 on a government-to-government basis between First Nations' Chiefs and the Minister of Aboriginal Affairs, Michael Bryant, based on the same agreed-upon definition of Gross Revenue. The negotiations were solemn and based on First Nations' traditions, including smudge ceremonies and the presence of sacred objects. The terms of the Agreement were ultimately reached in 2008. The Agreement now provided that the First Nations Partnership would receive 1.7% of Gross Revenue, again based on all three revenue sources.

[15] Before the Agreement was approved by First Nations' Chiefs, Minister Bryant assured the Chiefs that the agreement "provides stability of revenue for 25 years" grounded in "a new relationship based upon respect and autonomy". After hearing Minister Bryant, the First Nations' Chiefs approved the Agreement.

(d) Key terms of the Agreement

[16] The key terms of the Agreement are set out in the Appendix to these reasons.

(e) Events leadings to this litigation

[17] In 2010, less than two years after the Agreement was signed, OLG began a strategic business review of its operations to address declining provincial gaming revenues. Based on that review, OLG decided to outsource its non-gaming

amenities to the private sector — a process it called “modernization”. Under modernization, private sector operators would assume the risk and responsibility for non-gaming amenities in exchange for keeping 100% of the associated non-gaming revenue. OLG believed this was necessary to attract world-class private operators to invest in OLG’s non-gaming amenities. OLG anticipated much greater revenue after modernization, projecting a $1.3 billion increase in net profits annually once implemented.

[18] When the Agreement was signed in 2008, neither OLG nor the First Nations Partnership believed that it was legally possible for OLG to outsource its non-gaming operations. OLG only changed its position in 2011, based on its strategic business review of the benefits of modernization. As the appeal judge noted, modernization “represented a wholesale reinterpretation by Ontario and OLG of OLG’s mandate relating to non-gaming amenities under its enabling legislation. It was completely different from what the parties mutually understood to be legally possible during the negotiation of the [Agreement].”

[19] For several years, OLG did not disclose its planned outsourcing to either the First Nations Partnership or the provincial government, including the provincial Ministry of Indigenous Relations and Reconciliation. By early 2013, OLG had decided that once it outsourced its non-gaming operations, it would stop sharing non-gaming revenue and Comps with the First Nations Partnership. Internal OLG emails in October 2015 show that OLG knew this would be a “hot button” issue for

First Nations. OLG also knew that turning off two of the three revenue “taps” could lead to decreasing payments under the Agreement. One internal OLG email noted that payments to the First Nations Partnership “could decrease simply based on the fact that they will not be entitled to the 1.7% of non-gaming revenue as this will remain with the [private] service provider”. Even so, OLG did not disclose its plans to the First Nations Partnership or to First Nations. OLG disclosed its plans to Ontario’s Ministry of Finance for the first time during a conference call in or around December 2015. Even then, OLG still did not tell the Ministry of Indigenous Relations and Reconciliation, which had government responsibility for First Nations peoples.

[20] In January 2016, OLG implemented modernization: it began the process of outsourcing its non-gaming operations to private operators and ceasing to share non-gaming revenue and Comps with the First Nations Partnership. The First Nations Partnership learned this in June 2016, through a note to the 2016 audited financial statements required under the Agreement. The Ministry of Indigenous Relations and Reconciliation learned this in the summer of 2016, when the First Nations Partnership began the arbitration process.

[21] One reason the First Nations Partnership did not learn of OLG’s plans for so long was because Ontario and OLG failed to seat a representative of the First Nations Partnership on OLG’s board from 2008 until 2015, even though doing so was a contractual obligation under the Agreement. When the First Nations

Partnership pursued arbitration under the Agreement to secure its promised board member, a panel composed of three retired judges of the Ontario Superior Court of Justice unanimously held that Ontario had breached the Agreement in bad faith and in a manner that was “egregious” and exhibited “an odour of moral failure”. The panel also noted that the First Nations Partnership had not been “consulted or invited to take part” in OLG’s strategic business review at a time when it had no board member.

[22] The arbitration that is the subject of the present appeals was formally commenced against Ontario and OLG in late February 2017. The First Nations Partnership claimed Ontario and OLG breached the Agreement when they stopped sharing non-gaming revenue and Comps, two of the three types of revenue they had agreed to share under the Agreement.

DECISIONS BELOW

(a) The arbitration decision

[23] The arbitration involved a ten-day hearing held in September and October 2018 before a three-member panel chaired by Hon. Mr. Stephen T. Goudge, Q.C., and including Mr. Stan G. Fisher, Q.C. and Mr. John Campion. The panel received affidavit evidence and expert reports and heard seven days of *viva voce* evidence from ten witnesses, including several who were directly involved in the process

leading to the Agreement, such as Mr. Bryant. The panel released a comprehensive, 385-paragraph arbitration award.

[24] The panel majority, Mr. Goudge and Mr. Fisher, ruled that the Agreement required the appellants to share 1.7% of the three revenue sources existing when the Agreement was signed in 2008, namely, gaming revenue, non-gaming revenue, and Comps. The majority ruled the appellants breached the Agreement when they stopped paying non-gaming revenue and Comps as a result of modernization, because modernization did not relieve them of their payment obligation under the Agreement. The majority ordered OLG to provide an accounting and to pay the respondent 1.7% of the non-gaming revenue and Comps from January 2016, when the first outsourced site began operating, to the end of the term of the Agreement.

[25] The majority took the view that the honour of the Crown doctrine was engaged by the Agreement and was relevant to its interpretation. Although the majority ultimately interpreted the Agreement without relying on the honour of the Crown, they noted the doctrine provided “clear moral support” for their interpretation.

[26] The dissenting member, Mr. Campion, found that the arbitration turned on “reasonable differences in the interpretation of the Agreement”. In his view, Ontario and OLG had not breached any obligation under the Agreement to pay the First

Nations Partnership 1.7% of the three revenue sources after modernization, because the First Nations Partnership had no right to share in revenues that OLG did not receive. In his opinion, the majority's interpretation of the Agreement relied on inadmissible evidence of the parties' negotiations leading to the Agreement. Finally, he noted that even if Ontario and OLG had breached the Agreement by not paying 1.7% of all three revenue sources, the First Nations Partnership had not suffered any damages.

[27] However, the dissenting member concluded that Ontario and OLG breached an implied term of the Agreement to disclose and consult with the First Nation Partnership before it made any fundamental changes to the revenue structures under the Agreement. He found OLG "fail[ed] to meet these minimum standards of notice and consultation". In his view, Ontario and OLG "failed in their government-to-government commitment with [the First Nations Partnership] in not giving them notice and consulting with them" before they "changed" the Agreement by outsourcing two of the three revenue sources. He stated that "[t]he contrast between the words of hope, promise, respect, trust and self-government and the unilateral action of OLG and Ontario in changing the [Agreement] without notice and consultation is breathtaking in the age of reconciliation". Even so, he concluded the First Nations Partnership suffered no damages for breach of the implied term. In his view, the honour of the Crown doctrine did not apply to the Agreement.

(b) The appeal decision

[28] The appeal judge dismissed Ontario and OLG's appeals. He noted he had no jurisdiction to review the panel's many findings of fact because s. 9.2 of the Agreement limited any appeal of an arbitration award to "questions of law, or questions of mixed fact and law".

[29] The appeal judge ruled that the reasonableness standard of review applied to the majority's contractual interpretation of the Agreement and the damages award. He based his conclusion on the Supreme Court of Canada's decisions in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, and *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32, [2017] 1 S.C.R. 688, which in his view were unaffected by *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1. The appeal judge found the majority's interpretation of the Agreement was both reasonable and correct.

[30] The appeal judge determined that the majority had not allowed the factual matrix to overwhelm the words of the contract and rejected OLG's submission that the majority ignored provisions of the Agreement to reach a commercially absurd interpretation. He also held the majority did not err in deciding that the Agreement engaged the honour of the Crown, but in any event, noted that the majority's reference to the doctrine was *obiter*.

[31] Finally, the appeal judge held that the damages awarded by the majority were both reasonable and correct.

ISSUES

[32] Ontario and OLG raise three issues:

1. Did the appeal judge err as to the standard of review?
2. Did the appeal judge err in interpreting the contract?
3. Did the appeal judge err in applying the honour of the Crown?

DISCUSSION

Issue #1: Did the appeal judge err as to the standard of review?

[33] Ontario and OLG assert that the appeal judge erred in concluding that the standard of review of the majority's interpretation of the Agreement and its damages award is reasonableness. They say the appropriate standard of review, in the wake of *Vavilov*, is the appellate standard: correctness for questions of law and palpable and overriding error for questions of mixed fact and law.[2]

[34] Ontario and OLG acknowledge that the Supreme Court in *Sattva*, at para. 75, ruled that the standard of review in an appeal from a commercial

[2] As noted above, under s. 9.2. of the Agreement, there may be an appeal from any arbitration award only on questions of law or questions of mixed fact and law; there is no provision for an appeal on questions of fact.

arbitration conducted under the former *Arbitration Act*, R.S.B.C. 1996, c. 55, which was limited to a "question of law arising out of the award", is "almost always" reasonableness; see also *Teal Cedar*, at para. 74.[3] They contend, however, that the reasonableness standard of review for questions of law prescribed by *Sattva* and *Teal Cedar* has been overtaken by *Vavilov*, where the majority ruled that an administrative decision subject to a statutory right of appeal should be reviewed under the appellate standard: correctness for questions of law, and palpable and overriding error for questions of fact and questions of mixed fact and law where the legal principle is not readily extricable: at paras. 36-38, 44. They say *Vavilov* applies whenever the legislature has provided for a statutory appeal, such as under Ontario's *Arbitration Act, 1991*, S.O. 1991, c. 17. They also claim that even if the reasonableness standard of review applies, the appeal judge erred in concluding that the majority's decision was reasonable.

[35] The First Nations Partnership disputes the claim that *Vavilov* effectively overruled *Sattva* and *Teal Cedar* on the standard of review of a commercial arbitration decision on questions of law. It submits that *Vavilov* governs the standard of review in administrative law but does not apply to commercial

[3] The *Arbitration Act*, R.S.B.C. 1996, c. 55, was repealed and replaced in 2020 by the *Arbitration Act*, S.B.C. 2020. Section 59(2) of the new Act likewise limits appeals to questions of law.

arbitration decisions, which should continue to be reviewed under a deferential standard on questions of law.

[36] The First Nations Partnership's more fundamental point, however, is that the standard of review does not affect the outcome of these appeals. It says that whether or not *Vavilov* applies to the review of a commercial arbitration decision, Ontario and OLG have largely raised questions of mixed fact and law — questions about the interpretation and application of the Agreement that do not involve extricable legal errors. It submits that a deferential standard of review applies to these questions.

[37] In my view, it is unnecessary in these appeals to address whether *Vavilov* changed the standard of review analysis in *Sattva* and *Teal Cedar* in an appeal from a commercial arbitration decision, for two reasons.

[38] First, as I will address below, whether the standard of review on questions of law is reasonableness or correctness, the appeal judge did not err in upholding the majority's decision. Because a court should generally refrain from deciding issues of law that are unnecessary to the resolution of an appeal (*Phillips v. Nova*

Scotia (Commission of Inquiry into the Westray Mine Tragedy), [1995] 2 S.C.R. 97, at para. 6), I would not address the standard of review issue.[4]

[39] The Supreme Court took the same approach in *Wastech Services Ltd. v. Greater Sewerage and Drainage District*, 2021 SCC 7, 454 D.L.R. (4th) 1, at para. 46, where the majority, *per* Kasirer J., declined to consider "the effect, if any, of *Vavilov* on the standard of review principles articulated in *Sattva* and *Teal Cedar*", partly because the outcome of the case did not depend on the standard of review.

[40] Second, I agree with the First Nations Partnership that, putting aside the extricable errors of law alleged, Ontario and OLG largely advance questions of contractual interpretation, which since *Sattva* it has been accepted are questions of mixed fact and law attracting a deferential standard of review. There has been no suggestion that *Vavilov* changed the law on this point, which is distinct from the issue of whether an arbitrator's decision on a question of law is reviewable under a standard of reasonableness or under the appellate standard.

[41] In *Corner Brook (City) v. Bailey*, 2021 SCC 29, 17 B.L.R. (6th) 1, *per* Rowe J., the Supreme Court affirmed the direction from *Sattva* that a deferential

[4] This court recently granted leave to appeal in another case involving an appeal from a commercial arbitration award that may consider whether *Vavilov* changed the standard of review principles in *Sattva* and *Teal Cedar*: see *Tall Ships Landing Devt. Inc. v. City of Brockville*, 2019 ONSC 6597 and *Tall Ships Devt. Inc. v. City of Brockville*, 2020 ONSC 5527, leave to appeal to Ont. C.A. granted, M51065 (July 22, 2021).

standard of review applies to questions of mixed fact and law involving the interpretation of a contract. The court in *Corner Brook* underscored that "contractual interpretation is a fact specific exercise, and should be treated as a mixed question of fact and law for the purpose of appellate review, unless there is an 'extricable question of law'": at para. 44. As the court explained, "[e]xtricable questions of law in the context of contractual interpretation include 'the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor'": at para. 44 (citations omitted). The court also cautioned that "[t]he circumstances in which a question of law can be extracted will be uncommon. Whether something was or should have been within the common knowledge of the parties at the time the contract was entered into is a question of fact": at para. 44 (citations omitted); see, to the same effect, *Sattva*, at paras. 50, 55; *Teal Cedar*, at paras. 47, 57.

[42] Here, the parties agree on the applicable principles of contractual interpretation. Where they disagree is how those principles should be applied to the contractual facts, consisting of the Agreement itself and the factual matrix or surrounding circumstances. Absent an extricable error of law, such an exercise of contractual interpretation by a first-instance decision maker — whether a court or an arbitrator — attracts appellate deference.

[43] I now turn to whether the appeal judge erred in interpreting the Agreement.

Issue #2: Did the appeal judge err in interpreting the Agreement?

(a) Introduction

[44] Ontario and OLG submit that the appeal judge erred in law in interpreting the Agreement in four respects. First, they say he ignored their limited payment obligation under the Agreement. Second, they say his decision conflicts with the Agreement read as a whole. Third, they claim he failed to apply the entire agreement clause in the Agreement and to correct the majority's decision to admit extrinsic evidence that overwhelmed the words of the Agreement. Fourth, in the alternative, OLG argues the appeal judge erred in affirming the majority's damages award.

[45] I will first summarize the applicable principles of contractual interpretation and then address these four arguments. As I will elaborate, Ontario and OLG largely repeat arguments that the appeal judge rejected. I see no basis to reach a different conclusion.

(b) Applicable principles of contractual interpretation

[46] The parties agree that the appeal judge correctly stated the applicable principles of contractual interpretation. Those principles were discussed in the Supreme Court's unanimous decisions in *Sattva*, *per* Rothstein J., and more recently in *Corner Brook*, *per* Rowe J. They may be summarized as follows:

1. Courts should take “a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine ‘the intent of the parties and the scope of their understanding’”: *Sattva*, at para. 47 (citations omitted).
2. Courts must “read the contract as a whole, giving the words used their ordinary grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract”: *Sattva*, at para. 47; *Corner Brook*, at para. 20.
3. The surrounding circumstances should be considered in contractual interpretation. “[A]scertaining contractual intention can be difficult when looking at words on their own, because words do not have an immutable or absolute meaning”: *Sattva*, at para. 47. The meaning of words in a contract often derives from contextual factors, such as the purpose of the agreement and the nature of the relationship it creates: *Sattva*, at para. 48. A contract is not made in a vacuum and must be placed in its proper setting. Interpreting a commercial contract requires knowledge of the commercial purpose of the contract, based on “the genesis of the transaction, the background, the context, the market in which the parties are operating”: *Sattva*, at para. 47, citing *Reardon Smith Line Ltd. v. Hansen-Tangen; Hansen-Tangen v. Sanko Steamship Co.*, [1976] 3 All E.R. 570 (U.K. H.L.), at p. 574, *per* Lord Wilberforce.

4. The nature of the evidence that may be considered as part of the surrounding circumstances will vary from case to case, but should include only "objective evidence of the background facts at the time of the execution of the contract", that is, "knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting". That determination is inherently fact specific: *Sattva*, at paras. 55, 58 (citation omitted); *Corner Brook*, at para. 20.
5. The surrounding circumstances should never be allowed to overwhelm the words of the agreement. The surrounding circumstances are considered in order "to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract". Courts cannot use the surrounding circumstances to deviate from the text of the contract to the point that the court "effectively creates a new agreement": *Sattva*, at para. 57; *Corner Brook*, at para. 20.

[47] I will now apply these principles to Ontario and OLG's four contractual interpretation arguments.

(c) Ontario and OLG's contractual interpretation arguments

(i) *Did the appeal judge ignore Ontario and OLG's limited payment obligation under the Agreement?*

[48] First, Ontario and OLG assert that both the appeal judge and the majority ignored their limited payment obligation under the Agreement. They say several provisions of the Agreement confirm that they only have to pay the First Nations Partnership 1.7% of gaming revenue, non-gaming revenue, and Comps received by OLG, so they do not have to pay any of the non-gaming revenue or Comps for the non-gaming amenities outsourced to private operators. They rely on:

- s. 2.2(a), which requires them to pay "1.7% of the aggregate Gross Revenues for all Agents of the Province in the applicable Preceding Fiscal Year";
- s. 1.1(f), the definition of "Agent of the Province", which includes OLG but excludes "any operator" that OLG "may hire to operate any gaming facility or to operate the conduct and [management] of such lottery schemes for or on behalf of the Province, OLG or such other agency of the Province"; and
- Schedule 1.1(nn), which provides that "Gross Revenues" means, in respect of an Agent of the Province, revenue reported on the audited Consolidated Financial Statements of that Agent of the Province but does not include revenues "received … [but] not retained to the final account of the Province, OLG or any such other Agent of the Province."

[49] This argument was carefully considered and, in my view, correctly rejected by the appeal judge and the majority of the arbitration panel. Both highlighted that Schedule 1.1(nn) expressly lists the three components of "Gross Revenues" as consisting of the revenues of an Agent of the Province generated from gaming revenue, non-gaming revenue, and Comps, even though Comps are not revenues received by OLG but are expenses. In other words, under the Agreement, revenue need not be received by OLG to be included as "Gross Revenues" for revenue sharing purposes. As the majority stated, and the appeal judge affirmed:

> Schedule 1.1(nn) provides that for the purposes of the [Agreement], Gross Revenues of OLG are made up of the [gaming revenue] as well as ancillary [non-gaming revenue] and Comps generated by the gaming conducted and managed by OLG as Agent of Ontario in 2008. These three components are the base on which the [First Nations Partnership] share of 1.7% annually is calculated for the term of the [Agreement]. Comps are included in the base, although they are not revenues received by OLG. That was the shared understanding of the parties in 2008. [Emphasis added.]

[50] The use of the year 2008 to determine the revenue and deemed revenue included as "Gross Revenues" arises from s. 2.4(c) of the Agreement, which requires OLG to calculate Gross Revenues "in accordance with the accounting practices and principles applied by OLG at the Effective Date", the date of the Agreement — February 19, 2008. The parties agree that, on February 19, 2008, OLG included both non-gaming revenue and Comps as part of "Gross Revenues", even though Comps were not received or retained by OLG. This date provided a

benchmark for, or "snapshot" of, what was included as part of Gross Revenues. As the majority of the arbitration panel explained:

> The reference in Schedule 1.1(nn) to what is reported in the "Segmented Information notes in the notes to, or as otherwise reported in, the audited Consolidated Financial Statements of that Agent of the Province" is a statement about the "snapshot" at the time the [Agreement] was made. That "snapshot" simply describes the components on which the payments owed to [the First Nations Partnership] are to be based. The words reflect the shared understanding of the parties in 2008, when the [Agreement] was made, of the sources of revenue to be shared with the First Nations.
>
> There is no language in Schedule 1.1(nn) nor any evidence of a shared intention of the parties in 2008, that this reference referred to what might appear in the audited Consolidated Financial Statements as they might be from time to time in future years.

[51] The appeal judge found this interpretation to be commercially reasonable — and Ontario and OLG's interpretation commercially unreasonable — because "[i]t would not be commercially reasonable to interpret the [Agreement] in a manner that allows OLG to turn off two of three revenue 'taps' because it can make a better deal in the private sector." I agree.

[52] The appeal judge also found the majority's interpretation was "purposive", and Ontario and OLG's interpretation to be "non-purposive and technical", because the majority considered the historical and relationship factors that underpinned the Agreement — to provide First Nations in Ontario with resources derived from

lottery schemes in Ontario conducted and managed by Ontario, directly or indirectly, to advance their economic growth and development. Again, I agree.

[53] I would add that it is inconceivable that the shared understanding of the parties when they entered the Agreement was that OLG, by outsourcing to private parties two of the three revenue sources in the definition of "Gross Revenues", could pay First Nations nothing on account of these sources. I say this for two reasons. First, First Nations had agreed to settle a $2 billion claim in exchange for the Agreement to obtain stable funding for their communities. Part of that stability arose from having three carefully defined and locked-in revenue sources. Second, when the parties agreed to the Agreement they did not contemplate that it was legally possible for OLG to outsource responsibility for its non-gaming amenities to private operators. The scenario of paying nothing for outsourced non-gaming amenities thus could not have been within the reasonable contemplation of the parties. As the appeal judge found:

> In 2008 when the [Agreement] was entered into, OLG did not contemplate that it could transfer responsibility for non-gaming amenities exclusively to private operators. It was only in 2011, as OLG conducted its strategic business review, that it concluded that OLG was permitted to fully outsource the provision of non-gaming amenities. This shift in OLG's operational model was presented to and approved by the provincial Cabinet.

[54] It follows that I would reject Ontario and OLG's argument that the definition of "Agent of the Province" makes clear that the revenue of private third-party

service providers to whom non-gaming amenities were outsourced after 2008 are excluded from “Gross Revenues”. As already noted, the parties did not contemplate the outsourcing of non-gaming amenities to be legally possible in 2008. Moreover, s. 10.10(b) of the Agreement confirms Ontario and OLG’s ongoing revenue-sharing obligations if the Province reorganizes how it conducts and manages gaming. Lastly, evidence in the record suggests that the reference to private third-party operators in the definition of “Agent of the Province” was directed at excluding the revenue of four private resort casinos that OLG operated through private operators at the time the Agreement was agreed to.

[55] I therefore see no error in how the appeal judge or the majority interpreted Ontario and OLG’s payment obligation under the Agreement.

(ii) ***Did the appeal judge fail to read the Agreement as a whole?***

[56] Second, Ontario and OLG assert that the appeal judge and the majority ignored other important terms of the Agreement — the non-derogation and final account clauses — and thus erred in law by failing to read the Agreement as a whole.

[57] *Non-derogation clause (s. 10.1)*. Ontario and OLG contend that the majority and appeal judge erred by ignoring the non-derogation clause. This provision preserves for Ontario and OLG full discretion and control over the conduct and management of OLG’s business, without guaranteeing a minimum level of

revenue, any obligation on Ontario or OLG to continue to operate any particular business, or any obligation to make additional payments to the First Nations Partnership for a reduction in revenue because of a business change (s. 10.1(b)(i)). Nor does the First Nations Partnership have any interest in any lottery scheme or any assets of Ontario or OLG (s. 10.1(b)(ii)). Ontario and OLG contend that nothing in the Agreement gives the First Nations Partnership a separate and ongoing right to receive a share of the revenue or value of Comps from non-gaming activities that OLG was operating in 2008, if OLG stops operating those businesses, receiving that revenue, or providing those Comps.

[58] I do not accept this submission. The majority expressly considered the non-derogation clause, concluding it contemplated that "there may be internal reorganizations of OLG but, notwithstanding that, the contractual rights of [the First Nations Partnership] remain intact." The majority noted that "no one contests OLG's right to modernize", but "that does not give it the right to shed its obligations to [the First Nations Partnership]… [M]odernization does not displace [the] payment obligation. It coexists with it. By ceasing to pay amounts equal to 1.7% annually of [non-gaming revenue] and Comps, OLG and Ontario have breached the [Agreement]." For his part, the appeal judge noted that Ontario and OLG repeated submissions "made before the arbitration panel that were considered and rejected by the majority who provided reasonable reasons for rejecting" them. I see no basis to impugn these conclusions or for this court to intervene.

[59] *Final account clause (s. 1(f) of Schedule 1.1(nn))*. The final account clause, which forms part of the definition of Gross Revenues, provides that "Gross Revenues shall not include any revenues received by the Province, OLG or any other Agent of the Province … to the extent that, such revenues so received are not retained to the final account of the Province, OLG or any such other Agent of the Province." Ontario and OLG say the majority wrongly determined that this provision was of no assistance, and thus disregarded it. They say this provision helps in interpreting the scope of Gross Revenues, which must be revenues received by OLG and Ontario. They claim OLG has never recognized, let alone retained, third-party revenues generated at outsourced sites, which are expressly excluded by s. 1(f) of Schedule 1.1(nn).

[60] I do not agree with this submission. At first instance, all parties agreed the final account clause did not apply here and both Ontario and OLG stated in argument that they did not rely on the clause. Ontario's counsel stated that the final account clause was "not an issue in this case because we are not relying on this 'received but not retained' clause to try to exclude revenue. We are not carving out or diverting using that provision." The majority accepted this view, noting "the parties agree [this clause] is of no assistance here, because it addresses revenues received by OLG but not retained. That is not this case." I agree. This case does not involve revenue being received by Ontario or OLG and then being diverted to third parties to avoid a payment obligation to the First Nations Partnership. There

was thus no need for the arbitrators or the appeal judge to consider this clause any further.

(iii) ***Did the appeal judge ignore the entire agreement clause and allow the extrinsic evidence to overwhelm the words of the Agreement?***

[61] Third, Ontario and OLG assert that the appeal judge and majority erred in law by admitting the pre-contractual negotiations into evidence — especially evidence of Ontario's negotiator, former Minister Bryant, to the effect that Ontario and OLG's diversion of the non-gaming revenue stream and the termination of the payment of an amount equal to Comps, two of the three revenue streams referred to in the Agreement, conflicted with the parties' shared understanding. Ontario and OLG also argue that an "entire agreement" clause, s. 1.10, precludes reliance on any pre-contractual warranty, representation, opinion, advice, or assertion of fact.

[62] I do not agree with this submission. An entire agreement clause alone does not prevent a court from considering admissible evidence of the surrounding circumstances at the time of contract formation. As already noted, the surrounding circumstances are relevant in interpreting a contract exactly because "words alone do not have an immutable or absolute meaning": *Sattva*, at para. 47. Relevant background and context are often essential to understand contractual language. I therefore agree with the following observations of Fraser C.J. for a majority of the Court of Appeal of Alberta in *IFP Technologies (Canada) v. EnCana Midstream*

and Marketing, 2017 ABCA 157, 53 Alta. L.R. (6th) 96, at para. 124, leave to appeal refused, [2017] S.C.C.A. No. 303:

> The mere existence of an "entire agreement" provision does not mean that the words chosen beyond that entire agreement provision admit of one interpretation only. The purpose of considering the surrounding circumstances is not to add to, contradict or vary the terms of the agreement but rather use them as an interpretive aid to determine the meaning of the words in dispute. Where parties have concluded an agreement and a court is left to sort out the parties' objective intentions, it cannot be prevented from considering the surrounding circumstances by a provision that is itself based on the assumption that the agreement is clear — when it is not.

[63] The relevant question, then, is whether the evidence considered by the majority was properly part of the surrounding circumstances. I again agree with Fraser C.J., that "[d]etermining what constitute properly surrounding circumstances is a question of fact": *IFP Technologies*, at para. 83; see also *Sattva*, at paras. 49-55, 58; *Corner Brook*, at para. 44; and *Kilitzoglou v. Curé*, 2018 ONCA 891, 143 O.R. (3d) 385, at para. 37. Such a question of fact is outside this court's jurisdiction, because the parties agreed to limit any appeals to questions of law or mixed fact and law: Agreement, s. 9.2.

[64] Even assuming, without deciding, that this is one of the "rare" or "uncommon" circumstances where a question of law can be extricated from the interpretation process (*Sattva*, at para. 55; *Corner Brook*, at para. 44), I see no error in how the surrounding circumstances were considered. These

circumstances helped to place the Agreement in its proper setting and understand the genesis of the transaction, the background, and the context. They included the parties' history of litigation over revenue sharing; their shared objective of locking-in three identified revenue streams to ensure stable, predictable, long-term funds for First Nations' communities; and Ontario's commitment not to convert revenues received to the final account of the Province into revenues that were not. Such evidence was admissible to show the parties' objective mutual intention and the background facts leading to the Agreement. In my view, the surrounding circumstances were not used to overwhelm the words of the agreement or to deviate from the text to create a new agreement: see *Sattva*, at para. 57.

[65] I therefore agree with the appeal judge, that "[w]hile the majority considered the surrounding circumstances, its interpretation of the [Agreement] was firmly rooted in the actual wording of the agreement". The surrounding circumstances or matrix of facts were not determinative in interpreting the Agreement one way or the other: see *Corner Brook*, at para. 57.

[66] To conclude, I see force in the submission of the First Nations Partnership that Ontario and OLG have presented a "matrix-free" case — one that ignores the circumstances leading to the Agreement and the parties' common objectives in entering this new long-term agreement to advance the growth and capacity of First Nations' communities. I am not inclined to adopt such a "matrix-free" approach.

(iv) ***Did the appeal judge err in awarding damages?***

[67] Finally, in the alternative, OLG submits that if the appeal judge was correct in holding that Ontario and OLG breached the Agreement, he failed to correct errors in the damages awarded. OLG says the majority's order that Ontario and OLG pay 1.7% of non-gaming revenue and Comps at all gaming facilities in Ontario is not compensatory but instead gives the First Nations Partnership a windfall — it puts it in a better position than it would have been in had the Agreement been performed, because modernization is projected to generate more revenue and therefore greater payments to the First Nations Partnership. OLG says the proper measure of damages is to put the First Nations Partnership in the position it would have been in but for the breach, based on OLG's reasonable expectations of lower projected revenue before modernization. On OLG's approach, the First Nations Partnership's damages should be zero.

[68] I do not accept this submission. In my view, the appeal judge appropriately affirmed the majority's damages order. Under the expectation measure of damages for contractual breach, the First Nations Partnership had a right to be put in the position it would have been in had the Agreement been performed: see *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43, [2002] 2 S.C.R. 601, at paras. 26-27; *Dasham Carriers Inc. v. Gerlach*, 2013 ONCA 707, 313 O.A.C. 95, at paras. 17, 28-30. Ontario and OLG breached the Agreement by failing to pay the First Nations Partnership the agreed upon 1.7% of gaming revenue, non-

gaming revenue, and Comps from gaming sites conducted and managed by OLG. The majority's award, as affirmed by the appeal judge, requires Ontario and OLG to pay exactly that amount.

[69] Such an award does not overcompensate the First Nations Partnership and gives it only what it bargained for under the Agreement. As the majority held, and the appeal judge affirmed: "[The First Nations Partnership] bargained for a percentage of [gaming revenue, non-gaming revenue], and Comps. If the value of any one of those 'streams' goes up or down, [the First Nations Partnership] is entitled to the increased benefit or required to suffer the loss that results. This is not a net benefit exercise." I see no error in that reasoning or conclusion.

[70] I would also reject OLG's claim that any damages should be limited to the value of non-gaming revenue and Comps that the First Nations Partnership would have received had OLG not modernized. OLG did not breach the Agreement through modernization. It breached the Agreement when it stopped paying the First Nations Partnership two of the three agreed upon types of revenue. I see no basis to intervene with the appeal judge's conclusion that the majority's award compensates for that breach.

Issue #3: Did the appeal judge err in applying the honour of the Crown?

[71] Finally, Ontario and OLG claim that the appeal judge erred in agreeing with the majority that the honour of the Crown was relevant to the interpretation of the Agreement.

[72] The honour of the Crown is "a foundational principle of Aboriginal law and governs the relationship between the Crown and Aboriginal peoples": *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, [2018] 2 S.C.R. 765, at para. 21. It obliges servants of the Crown to "conduct themselves with honour when acting on behalf of the sovereign" with Aboriginal peoples: *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623, at para. 65. The ultimate purpose of the honour of the Crown is "the reconciliation of pre-existing Aboriginal societies with the assertion of Crown sovereignty": *Manitoba Métis Federation*, at para. 66; *R. v. Desautel*, 2021 SCC 17, 456 D.L.R. (4th) 1, at paras. 22, 30; and *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4, 443 D.L.R. (4th) 1, at paras. 22-24.

[73] Ontario and OLG claim the Agreement is a commercial agreement that does not engage the honour of the Crown. They note the Agreement expressly states it is not a treaty and does not create any treaty or fiduciary relationship between the Crown and Aboriginal peoples. They also contend the appeal judge erred by ruling

that the Agreement represented “the reconciliation of the constitutionally protected Aboriginal right of self-government, which includes jurisdiction over gaming, with the Crown’s sovereignty over gaming under the *Criminal Code*.” Ontario and OLG note that no such right has been recognized by a Canadian court or by the arbitration panel, nor was this issue meaningfully argued before the appeal judge.

[74] For its part, the First Nations Partnership says that neither the arbitration panel nor the appeal judge relied on the honour of the Crown in reaching their decisions. It asserts that because their observations on this point were expressly identified as *obiter dicta*, this ground of appeal should fail. However, if the court is inclined to address this point, it submits that the Agreement does engage the honour of the Crown, which is always at stake in the Crown’s dealings with Aboriginal peoples. It claims the Agreement is not merely a commercial agreement but a government-to-government agreement, forged in partnership and negotiated in solemn gatherings between the Crown and First Nations conducted in accordance with First Nations’ traditions. It submits that although First Nations have an inherent right to self-government, whether that right includes jurisdiction over gaming was not before the arbitration panel or appeal judge and is not in issue in this case. It says this important issue should not be decided without a full factual record and complete argument.

[75] I would decline to address the honour of the Crown on the facts of this case, for two reasons. First, both the majority of the arbitration panel and the appeal

judge expressly noted that their comments on the honour of the Crown were *obiter* and thus unnecessary for their rulings. A court should generally refrain from addressing a legal issue, and especially a constitutional issue, that is unnecessary to dispose of a case: *Phillips*, at paras. 6-9; *R. v. Drury*, 2020 ONCA 502, 391 C.C.C. (3d) 18, at para. 84. A policy of restraint is desirable because "unnecessary constitutional pronouncements may prejudice future cases, the implications of which have not been foreseen": *Phillips*, at para. 9.

[76] Second, as explained above, the appeal judge did not err in dismissing the appeals based on ordinary principles of contractual interpretation, without recourse to the honour of the Crown doctrine.

[77] Thus, quite apart from the honour of the Crown, I conclude the appeal judge made no reviewable error in dismissing the appeals based on ordinary principles of contractual interpretation.

CONCLUSION

[78] I would dismiss the appeals.

[79] If the parties cannot agree on costs of the appeals, the First Nations Partnership may file written submissions of up to three pages and a bill of costs within seven days of this decision. Ontario and OLG may each do likewise within a further seven days.

Released: September 1, 2021 "J.M.F."

“M. Jamal J.A.”
“I agree. Fairburn A.C.J.O.”
“I agree. P. Lauwers J.A.”

Appendix – Relevant Contractual Provisions

Gaming and Revenue Sharing and Financial Agreement ("Agreement")

Preamble:

WHEREAS the Province and First Nations in Ontario, acting through [the First Nations Partnership], have agreed to enter into this Gaming Revenue Sharing and Financial Agreement with the objective of advancing the growth and capacity of First Nations in Ontario in respect of community development, health, education, economic development and cultural development.

AND WHEREAS in furtherance of this objective it is the intention of the Province and First Nations in Ontario to maintain an on-going relationship for so long as the Province is involved directly, or indirectly through an Agent of the Province, in conducting and managing Lottery Schemes in Ontario.

NOW THEREFORE in consideration of the mutual covenants and agreements contained in this Agreement and other good and valuable consideration (the receipt and sufficiency of which are hereby acknowledged), the parties hereto agree, as follows: …

1.1 Definitions

(f) "Agent of the Province" means any agency of the Province, including OLG, that conducts and manages a lottery scheme under the authority of section 207(1)(a) of the *Criminal Code*, and includes the Province itself if the Province conducts or manages any such lottery scheme directly but, for greater certainty, does not include any operator that the Province, OLG or any other agency of the Province that conducts and manages such lottery schemes may hire to operate any gaming facility or to operate the conduct and manage of such lottery schemes for or on behalf of the Province, OLG or such other agency of the Province.

(nn) "Gross Revenues" has the meaning attributed to that term in Schedule 1.1(nn).

(rr) "Initial Term" has the meaning attributed to that term in section 8.1.

(bbb) "Lottery Scheme" means a lottery scheme conducted and managed by the Province or any Agent of the Province, under the authority of section 207(1)(a) of the *Criminal Code*.

(ccc) "Monthly Revenue Share Payment" or **"MRSP"** has the meaning attributed to that term in section 2.2(a).

(bbbb) "Province" means Her Majesty the Queen in right of Ontario.

(dddd) "Renewal Term" means the five year period commencing on the next date after the date of expiration of the Initial Term and ending on the date that is the 5th anniversary of the date of expiration of the Initial Term. ….

1.10 Entire Agreement

This agreement and the Closing Agreement constitute the entire agreement between the parties pertaining to the subject matters herein. There are no warranties, conditions, or representations (including any that may be implied by statute) and there are no agreements in connection with such subject matters except as specifically set forth or referred to in this Agreement and the Closing Agreement. No reliance is placed on any warranty, representation, opinion, advice or assertion of fact made either prior to, contemporaneous with, or after entering into this Agreement, or any amendment or supplement thereto, by any party to this Agreement or its partners, directors, officers, employees or agents, to any other party to this Agreement or its partners, directors, officers, employees or agents, except to the extent that the same has been reduced to writing and included as a term of this Agreement, and none of the parties to this Agreement has been induced to enter into this Agreement or any amendment or supplement by reason of any such warranty, representation, opinion, advice or assertion of fact. Accordingly, there shall be no liability, either in tort or in contract, assessed in relation to any such warranty, representation, opinion, advice or assertion of fact, except to the extent contemplated above. …

2.2 Monthly Gaming Revenue Share Payments

(a) Commencing with Fiscal Year 2012, and in each Fiscal Year thereafter during the Initial Term and the Renewal Term, the Province shall pay, or cause an Agent of the Province to pay, to [the First Nations Partnership], 12 monthly payments (the monthly payments payable each month by the Province, or any Agent of the Province, being hereinafter collectively referred to as a **"Monthly Revenue Share Payment"** or **"MRSP"**), each MRSP being in the aggregate equal to one-twelfth of 1.7% of the aggregate Gross Revenues for all Agents of the Province in the applicable Preceding Fiscal Year. …

(d) Upon delivery of the Unaudited Gross Revenues Statement in accordance with section 2.2(c)(i) and the Audited Gross Revenues Statement pursuant to

section 2.2(c)(ii), OLG shall, and the Province shall cause each other Agent of the Province, to make, at the request of [the First Nations Partnership], the respective finance personnel of OLG or that Agent of the Province, including, in the case of the Audited Gross Revenues Statement, their respective independent auditors, as applicable, available to [the First Nations Partnership] and [the First Nations Partnership's] accounting advisors, within the 20 day period referred to in section 2.2(f), to discuss in good faith such statements of OLG or of that Agent of the Province, as the case maybe. …

2.4 Changes in Accounting Procedures

(a) In the event that during the course of any Fiscal Year there has been a change in any applicable accounting practice or principle of the Province, OLG or any other Agent of the Province, which change affects the determination of Gross Revenues, the Province, OLG or such other Agent of the Province shall deliver a written notice of such change to [the First Nations Partnership] in sufficient detail in order for [the First Nations Partnership] to understand such change. For the purposes of this section 2.4, a **"change in any applicable accounting practice or principle"** shall mean any change in any accounting practice or principle related to the recognition of Gross Revenues by the Province or OLG from those accounting practices or principles applied by the Province or OLG in respect of the recognition of Gross Revenues from the Lottery Schemes conducted and managed by OLG at the Effective Date, as reported in the Consolidated Financial Statements of OLG. For greater certainty, a change in any applicable accounting practice or principle does not include the determination of any accounting practice or principle that may be applied by the Province, OLG or any other Agent of the Province to any new Lottery Schemes that the Province, OLG or any other Agent of the Province may commence to conduct and manage from and after the Effective Date, which determination of accounting practices and principles applicable to such new Lottery Schemes commenced after the Effective Date shall be at the sole discretion of the Province, OLG or such other Agent of the Province, as the case may be. …

2.5 Provincial Levies, including Taxes and WIN Contributions

(a) Subject to sections 2.5(b) and 2.5(c), the Province affirms and agrees that the receipt by [the First Nations Partnership] or the [First Nations Partnership] Partners of all or any portion of the $201 Million Payment or any Monthly Revenue Share Payments shall not be reduced by any Levy of the Province or any agency of the Province with the jurisdiction and power to impose such a charge acting under the authority of the Province, including the WIN Contribution. If it is determined that any Levy of the Province becomes payable by [the First

Nations Partnership] or any [First Nations Partnership] Partner on the receipt by [the First Nations Partnership] or such [First Nations Partnership] Partner of all or any portion of the $201 Million Payment or any Monthly Revenue Share Payments, and [the First Nations Partnership] and/or such [First Nations Partnership] Partners have complied with their obligation to pay such Levy and no remission is available to them, then the Province shall pay to [the First Nations Partnership] or such [First Nations Partnership] Partners an amount equivalent to the Levy of the Province so paid by each of [the First Nations Partnership] or such [First Nations Partnership] Partners respectively.

(b) The Province and [the First Nations Partnership] acknowledge and agree that the affirmation and agreement of the Province set out in section 2.5(a) does not apply to any Levy of an Authority related directly or indirectly to any right, title or interest in and to, or any use, expenditure, investment or application of, the $201 Million Payment or the Monthly Revenue Share Payments after receipt thereof by [the First Nations Partnership] or the [First Nations Partnership] Partners or to any income, revenue or appreciation of value received or realized by [the First Nations Partnership] and/or [a First Nations Partnership] Partner directly or indirectly related to or derived from the use, expenditure, investment or application of the $201 Million Payment or the Monthly Revenue Share Payments after the receipt thereof by [the First Nations Partnership] or [a First Nations Partnership] Partner, including such Levies of any Authority imposed on, measured by or referred to as, income, land transfer, sales, goods and services, use, consumption, capital, value added, excise, stamp, withholding, business, wealth, estate, franchising, property, development, occupancy, employer benefit, payroll, workers compensation, health, social services, education or social securities taxes.

(c) [The First Nations Partnership] acknowledges that the Federal Government of Canada, or any agent or Authority of the Federal Government of Canada, may be obliged to apply a Levy of the Province or any Levy created by an agency of the Province with the jurisdiction and power to impose such a charge acting under the authority of the Province to the receipt by [the First Nations Partnership] or [First Nations Partnership] Partners of all or any portion of the $201 Million Payment or any Monthly Revenue Share Payments. In such event, and provided that [the First Nations Partnership] or the [First Nations Partnership] Partners have complied with their obligation to pay such Levy and no remission is available to them, then the Province shall pay to [the First Nations Partnership] or such [First Nations Partnership] Partners an amount equivalent to such Levy of the Province paid by each of [the First Nations Partnership] or such [First Nations Partnership] Partners respectively.

2.6 OLG Board Membership

[The First Nations Partnership] shall have the right to have a representative of [the First Nations Partnership] appointed by the Province as a member of the board of directors of OLG in accordance with and pursuant to the procedures of the Province for making such appointments. Any nominee of [the First Nations Partnership] must comply with the criteria established for service as a member of the board of directors of OLG. [The First Nations Partnership] shall require any appointee that subsequently ceases to comply with such approved criteria to resign immediately, failing which the Province shall be entitled to terminate such appointee as a member of the board of directors of OLG. …

8.1 Initial Term

The initial term (the "Initial Term") of this Agreement shall commence upon the Effective Date and shall include all days up to but not including the date that is the 20th anniversary of the Effective Date, unless terminated earlier.

8.2 Renewal Term

Commencing on the date that is one year prior to the commencement date of the Renewal Term, [the First Nations Partnership] and the Province shall negotiate in good faith what amendments, if any, should be made to this Agreement (as may have been amended from time to time during the Initial Term) for the Renewal Term. If [the First Nations Partnership] and the Province cannot agree on what amendments, if any, should be made to this Agreement for the Renewal Term, then this Agreement shall continue in force and effect, unamended, during the Renewal Term, unless terminated earlier. ….

9.2 Dispute Resolution

In the event that an acceptable resolution of the Dispute is not achieved pursuant to section 9.1 and the party giving notice wishes to resolve the matter, then the matter shall be referred for determination in accordance with Schedule 9.2, which sets out the sole and exclusive procedure for the resolution of such Disputes. The award of any arbitration shall be appealable by the parties to the appropriate Ontario court on questions of law, or questions of mixed fact and law, including, without limitation, matters of process and procedure. The Arbitrators, as part of their award, may award costs of the arbitration, in their discretion, having regard to the success achieved, the good faith of the parties, the encouragement of good faith discussions to resolve matters and other relevant factors. …

10.1 Non-derogation

(a) Nothing expressed or implied in this Agreement shall be construed so as to affect in any manner the jurisdiction of the Province to conduct and manage, and to control, licence, administer and regulate in the Province of Ontario, the conduct and management of activities pursuant to section 207 of the *Criminal Code.*

(b) Nothing expressed or implied in this Agreement shall:

(i) oblige the Province or OLG or any other Agent of the Province to conduct and manage or to continue to conduct and manage or provide for the operation of any lottery scheme or any other activity or any facility, including any casinos;

(ii) create any interest in favour of the First Nations in Ontario, [the First Nations Partnership's predecessor], [the First Nations Partnership], any [First Nations Partnership's predecessor] Partner, any [First Nations Partnership] Partner or the Chiefs of Ontario in or to any Lottery Schemes or in or to any assets of the Province or of OLG or any other Agent of the Province, including any casinos, casino assets or other lottery or gaming related assets; or

(iii) limit the right of the Province or OLG or any other Agent of the Province to conduct and manage activities under section 207 of the *Criminal Code* in their sole and absolute discretion in accordance with Applicable Laws.

(c) Nothing in this Agreement shall abrogate or derogate from the application and operation of Section 35 of the *Constitution Act, 1982* to or in respect of aboriginal or treaty rights.

(d) Subject to the terms of section 6.2 of this Agreement and the Closing Agreement, nothing in this Agreement, including any of the payments required under this Agreement, shall adversely affect, diminish or derogate from any policy, program or statutory entitlement or benefit funded or provided by the Province to which any one or more [First Nations Partnership's predecessor] Partner, [First Nations Partnership] Partner, or any member of [a First Nations Partnership's predecessor] Partner or [a First Nations Partnership] Partner, was entitled at the Effective Date. For the purposes of this section 10.1(d), a policy, program or statutory entitlement or benefit is not adversely affected where a negative effect or reduction of expenditure is based primarily on reasons other than the receipt of funds under this Agreement or the [First Nations Partnership Partnership] Agreement.

(e) Nothing contained in this Agreement shall:

(i) be deemed or construed or interpreted to constitute any form of business relationship or to constitute any party hereto a partner, joint venturer or any other form of business associate of the other;

(ii) constitute any party hereto the agent or legal representative of any other party hereto;

(iii) create any fiduciary or other similar relationship between any of the parties; or

(iv) be deemed to constitute any kind of treaty or treaty relationship between the Province and First Nations in Ontario within the meaning of Section 35 of the *Constitution Act, 1982*. …

10.10 Assignment

(b) [The First Nations Partnership] acknowledges and agrees that the Province may cause an internal reorganization of the Government of Ontario or Agents of the Province that may affect OLG and other Agents of the Province and may result in the assignment by OLG of its rights and obligations under this Agreement to another Agent of the Province or to the Province. The Province acknowledges that, notwithstanding any such internal reorganization of the Government of Ontario or any Agent of the Province, including OLG, Her Majesty the Queen in Right of the Province of Ontario and any Agent of the Province that replaces OLG, shall remain bound by the obligations and agreements and shall be entitled to the rights, remedies and benefits of the Province or OLG, as the case may be, under this Agreement.

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SCHEDULE 1.1(nn)

GROSS REVENUES

1. For purposes of this Agreement, “Gross Revenues” means, in respect of an Agent of the Province (including OLG), the revenues of that Agent of the Province, before the deduction of promotional allowances, as reported in the Segmented Information notes in the notes to, or as otherwise reported in, the

audited Consolidated Financial Statements of that Agent of the Province and generated from the following:

(a) Lotteries, including on-line games, sports games, instant games and bingo gaming;

(b) Slot machines and table games at casinos and racetracks; and

(c) Non-gaming activities ancillary to the conduct and management of Lottery Schemes, including hotel, food, beverage and other services, including the retail value of accommodation, food and beverage services and other services provided to gaming patrons on a complimentary basis.

Notwithstanding the foregoing and for greater certainty:

(d) Gross Revenues generated from lotteries, slot machines and table games and non-gaming activities as set out above shall, for the purposes of this Agreement, be determined in accordance with the OLG revenue recognition accounting practices and principles set out in section 2 of this Schedule 1.1(nn) notwithstanding any changes from and after the date of this Agreement in such accounting practices or principles by OLG or any other Agent of the Province, provided that If any particular accounting practice or principle is not addressed in section 2 of this Schedule 1.1(nn), that accounting practice or principle applied by OLG as at March 15, 2006 shall be used.

(e) Gross Revenues shall include any revenues generated front the conduct and management of any Lottery Scheme in existence as of March 15, 2006 and any Lottery Scheme which is a new product offering for the Province or any Agent of the Province (for the purposes of this Schedule 1.1(nn), a “New Lottery Scheme”) that comes into existence from and after March 15, 2006, which revenues generated from such New Lottery Scheme shall be determined in accordance with the accounting practices and principles applied to such New Lottery Scheme in the sole discretion of the Province, OLG or any other Agent of the Province, as the ease may be, at the time such New Lottery Scheme comes into existence.

(f) Gross Revenues shall not include any revenues received by the Province, OLG or any other Agent of the Province from the conduct and management of the Lottery Scheme, including such conduct and management at any gaming facility if, and to the extent that, such revenues so received are not retained to the final account of the Province, OLG or any such other Agent of the Province.

2. Revenue from lottery games, for which results are determined based on a draw, is recognized when the draw takes place. Revenue for future draws is deferred and recognized when the draw takes place. Revenue from instant games is recognized when the ticket is activated for play by the retailer. Revenue from sports wagering games and bingo gaming is recognized when the ticket is sold to the consumer. Tickets issued as a result of the redemption of free ticket prizes are not recorded as revenue.

Gaming revenue from slot and table game operations represents the net win from gaming activities, which is the difference between amounts earned through gaming wagers less the payouts from those wagers.

Non-gaming revenue includes revenue from hotel, food and beverage, entertainment centre and other services and is recognized at the time the services are rendered to patrons. This also includes the retail value of accommodations, food and beverage and other services provided to patrons on a complimentary basis.

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SCHEDULE 9.2

DISPUTE RESOLUTION

DEFINITIONS

1. In this Schedule 9.2:

(a) **“Arbitrators”** means the panel of three arbitrators appointed pursuant to paragraphs 6 and 7;

(b) **“Chair”** means the chair appointed pursuant to paragraph 7;

(c) **“Claimant”** means a Party that commences a dispute resolution pursuant to paragraph 4;

(d) **“Disputes”** has the meaning attributed to such term in section 9.1 of the Agreement;

(e) **“Party”** means a party to a Dispute;

(f) **“paragraph”** means a paragraph of this Schedule 9.2; and

(g) **“Respondent”** means a Party who is not the Claimant, and the term “Respondents” shall, where there is only one Respondent, refer to that Respondent.

GENERAL

2. All Disputes which are to be determined according to the terms of this Schedule 9.2 pursuant to section 9.2 of the Agreement shall be arbitrated in accordance with the provisions of the *Arbitration Act, 1991*, S.O. 1991, c. 17 (the “Arbitration Act”) except to the extent that those provisions are expressly modified by the provisions of the Agreement and this Schedule 9.2.

3. No individual shall be appointed to arbitrate a Dispute pursuant to this Schedule 9.2 unless he or she agrees in writing to be bound by the provisions of this Schedule 9.2.

COMMENCEMENT OF DISPUTE RESOLUTION

4. A Party may commence a dispute resolution as Claimant by delivering a written notice of arbitration (the “Notice of Arbitration”) to each of the Respondents.

5. The Notice of Arbitration shall include in the text or in one or more attachments:

(a) the full names, descriptions and addresses of the Parties;

(b) a demand that the Dispute be referred to arbitration pursuant to this Schedule 9.2;

(c) a general description of the Dispute;

(d) the relief or remedy sought; and

(e) the name of the person the Claimant nominates as an arbitrator.

6. The arbitrator nominated by the Claimant shall be independent of each Party and shall not be or have been in the employ of or on contract with the Claimant at any time and shall be qualified by education and experience to determine the subject matter of the Dispute. Such qualified arbitrator nominated by the Claimant shall be one of the panel of Arbitrators who will resolve the Dispute.

Within 20 days of the date of receipt by the Respondent of the Notice of the Arbitration, the Respondents shall by notice to the Claimant, jointly appoint a second arbitrator to serve on the panel of Arbitrators who will resolve the Dispute, and the arbitrator nominated by the Respondents shall also be independent of each Party and shall not be or have been in the employ of or on contract with any respondent at any time and shall be qualified by education and experience to determine the subject matter of the Dispute.

7. Within 10 days of the appointment of the second arbitrator by the Respondents, the appointees of the Claimant and Respondents shall, by notice to the Parties, appoint a third and final arbitrator to act as chair of the Arbitrators, failing which a chair shall be appointed by a judge of the Superior Court of Justice of Ontario on the application of any Party on notice to all the other Parties. Such chair shall be independent of each Party and shall riot be or have been in the employ of or on contract with any Party at any time and shall be qualified by education and experience to determine the subject matter of the Dispute.

8. Subject to the Arbitration Act, the Agreement and this Schedule 9.2, the Arbitrators may conduct the arbitration in such manner as the Arbitrators consider appropriate.

PLEADINGS

9. The following shall apply to the arbitration of any Dispute:

(a) within 10 days of the appointment of the three Arbitrators, the Claimant shall deliver to all the Respondents and the Arbitrators a written statement (the “Statement”) concerning the Dispute setting forth, with particularity, the Claimant’s position with respect to the Dispute and the material facts upon which the Claimant intends to rely;

(b) within 15 days after the delivery of the Statement, each Respondent shall deliver to the Claimant and the Arbitrators a written response (an “Answer”) to the Statement setting forth, with particularity, the Respondent’s position on the Dispute and the material facts upon which the Respondent intends to rely;

(c) if any Respondent fails to deliver an Answer within the time limit in paragraph 9 (b), that Respondent shall be deemed to have waived any right to provide an Answer to the Statement and the arbitration may continue without further notice to that Respondent;

(d) within 10 days after the earlier of: (i) the day all Answers have been delivered, and (ii) the 15th day referred to in paragraph 9(b), the Claimant may deliver to all the Respondents and the Arbitrators a written reply (a “Reply”) to the Answer of each Respondent, setting forth, with particularity, the Claimant’s response, if any, to the Answer;

(e) within the time limit in paragraph 9(b), a Respondent may also deliver to the Claimant, each other Respondent and the Arbitrators a counter-statement (a “Counter-Statement”) setting forth, with particularity, any additional Dispute for the Arbitrators to decide. Within 15 days of the delivery of a Counter-Statement, the Claimant shall deliver to each Respondent and the Arbitrators an Answer to the Counter-Statement. If the Claimant fails to deliver an Answer to the Counter-Statement within such 15-day period, the Claimant shall be deemed to have waived any right to provide an Answer to the Counter-Statement. Within 10 days after the delivery of an Answer to the Counter-Statement, the Respondents may deliver to the Claimant and the Arbitrators a Reply to such Answer. Any Dispute submitted to arbitration in accordance with this paragraph 9(e) shall be governed by, and dealt with as if it were the subject of a Statement in accordance with, this Schedule 9.2, except that it shall be decided by the Arbitrators already appointed, and shall be determined by the Arbitrators accordingly; and

(f) the time limits referred to in paragraphs 9(a) to 9(f) may be extended by the Chair for such period not to exceed an aggregate of 30 days for such reasons as the Arbitrators in the Arbitrators’ discretion may determine upon application in writing made to the Arbitrators by the Claimant or any Respondent on notice to each other Party to the arbitration, either before or within five days after the expiry of the relevant time limits and, in the event that the other Party or Parties wishes to oppose the application, the other Party or Parties shall be given an opportunity to make submissions on the application.

The Parties to the Agreement have set the time limits in this paragraph 9 after due consideration of the amount of time necessary to complete each step and it is their express desire that no extension of any time limit shall be granted except in extraordinary circumstances, the onus for the proof of the existence of which lies on the Party seeking an extension.

CASE CONFERENCES

10. Within 10 days of the appointment of the three Arbitrators, the Chair shall convene a case conference for the determination of any preliminary or interlocutory matter or to provide for planning and scheduling of the arbitration or to determine the timing or desirability of expert reports.