This is the 1st affidavit
of Kevin James in this case
and it was made on August 12, 2016.

No. S-1510120
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, c. C-36, AS AMENDED

AND

IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*,
S.B.C. 2002, c. 57, AS AMENDED

AND

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
WALTER ENERGY CANADA HOLDINGS, INC.
AND THE OTHER PETITIONERS LISTED ON SCHEDULE "A"

AFFIDAVIT

I, **KEVIN JAMES**, Businessman, of 147 – 8400 Forest Grove Drive, Burnaby, British Columbia V5A 4B7, MAKE OATH AND SWEAR THAT:

1. I am a party in the within matter and as such have personal knowledge of the facts hereinafter deposed to, save and except where the same are stated to be based on information and belief, and where so stated I verily believe such matters to be true.

2. I am a professional geologist and was a founder of Western Canadian Coal Corporation, the predecessor holder of the properties at issue to Walter Energy Canada Holdings, Inc. (the "Company") which was incorporated as a public company in 1997. I was one of the first officers and directors of the Company.

3. In 1998 I identified a property known as Burnt River (also known as Brule) that we considered had coal mining potential. Myself and another director, David Fawcett, personally advanced funds and I obtained the coal licences in my name and carried out work relating to the same. I sold them to the Company at a price equivalent to out-of-pocket expenses.

4. In 1999 Mr. Fawcett and I identified another set of promising coal licences in what was called the West Brazion property. The Company did not have the funds to obtain the licences so I again obtained the licences which were registered in my wife's name and paid for by Mr. Fawcett and myself. In early 2000 we granted the Company an option to purchase these licences in exchange for our out-of-pocket expenses plus a 1% royalty on any coal produced from the property.

5. Mr. Fawcett and I identified a third group of promising coal properties in 1999 which are referred to as the Wolverine Group which comprised Mount Spieker, Perry Creek, and Hermann. Again, the Company lacked sufficient capital to acquire the licences. Eventually an agreement was reached whereby Mr. Fawcett and I gave up our right to acquire a separate royalty interest in the West Brazion licences if the Company exercised the option to acquire them. In return we received a 1% royalty in the coal produced from any of the West Brazion or Wolverine licences which 1% would be shared between us and one other investor as per our respective recognized contributions. Attached hereto as **Exhibit A** to this my affidavit is a true copy of a Royalty Sharing Agreement ("RSA") dated March 31, 2000 between David Fawcett, Kevin James and Mark Gibson (collectively the "Investors" therein) and Western Canadian Coal Corp. (the "Company" therein).

6. The document was prepared by the Company's solicitors.

7. On April 1, 2011 Walter Energy Canada Holdings, Inc. ("Walter Energy") acquired all of the outstanding common shares of Western Coal Corp. pursuant to an Arrangement Agreement approved by the Supreme Court of British Columbia on March 10 2011. This was made pursuant to the provisions of the *British Columbia Business Corporations Act*. The RSA was part of that plan.

8. Walter Energy paid me royalties pursuant to the RSA from the date they took over the mine.

9. I am a party to a Share Purchase Agreement dated October 31, 1997 which provides for payment of royalties relating to all coal sales from the Belcourt property. Attached hereto as **Exhibit B** to this my affidavit is a true copy of the original Share Purchase Agreement.

10. I have not been given a copy of the Belcourt Put Agreement for review or consideration.

11. The effect and enforcement of the RSA has been the subject of two cases in the British Columbia courts.

12. In 2006 the Company alleged that the directors had not complied with the *Company Act* disclosure requirements and sought, among other things, to set the agreement aside. The Company's claim was dismissed. Tysoe J. found the agreement to be fair and reasonable and that the amount of royalties was in the low range for similar transactions. Attached hereto as **Exhibit C** to this my affidavit is a true copy of the Reasons of Mr. Justice Tysoe. (*Western Canadian Coal Corp. v. Fawcett* [2006] B.C.J. No. 643).

13. In 2007 the Company then refused to pay Mr. Fawcett and me the full amount of royalties owing under the RSA on the basis that they claimed the payments were payment of a debt and included interest which had exceeded the criminal rate of interest. A claim had to be initiated to obtain the proper payment.

14. The chambers judge concluded that "......the royalty was not in substance a cost paid by [the Company] in order to receive credit. Rather, the royalty was the principal consideration flowing from [the Company] to the Investors for their contributions to

[the Company's] acquisition of the coal licence". Attached hereto as **Exhibit D** to this my affidavit is a true copy of the Reasons for Judgment (In Chambers) of Mr. Justice Pearlman. (*Fawcett v. Western Canadian Coal Corp.*, 2009 BCSC 446).

15. The Company appealed. All of the royalties owed to me under the RSA were found not to be interest and unaffected. A portion of Mr. Fawcett's payments were found to be affected by the interest provisions. Attached hereto as **Exhibit E** to this my affidavit is a true copy of the Decision of the Court of Appeal given February 11, 2010.

16. The third investor sold back his royalty rights under the RSA to the Company.

17. The amount of the royalty to be paid to me is approximately 0.219%. The amount of the royalty to be paid to Mr. Fawcett after the Court of Appeal decision is approximately 0.15% for a total interest to be paid to the two of us being approximately 0.37%.

18. The RSA also gives us rights associated with the coal licences themselves. The coal licences cannot be forfeit without our consent. If we do not consent then they are to be transferred to us 30 days prior to any such forfeit.

19. I am advised by my counsel, Heather L. Jones, and verily believe, that upon being advised of the proceedings herein Ms. Jones notified the Monitor that it was our position that the RSA provided me with an interest in the Wolverine property. Attached hereto as **Exhibit F** to this my affidavit is a true copy of an email from my counsel Ms. Jones to the Monitor and their acknowledgment of the same.

20. It was the intention at the time of the RSA that the 'investors' would have a right to the coal licences if they were to be forfeited.

21. The investors agreed to take a lower royalty amount over a longer period of time with an increased risk in both the potential for production and a longer time of production for the benefit of the Company.

22. I am further advised by Ms. Jones, and verily believe, that in or about June 9, 2016 she contacted the Monitor to ask about the attendance before the court that was scheduled for June 24, 2016, to obtain an update on the matter and to see if there was any information or issues regarding my RSA. Ms. Jones was told that a stay was being sought, materials would be delivered and it was not likely that her attendance would be necessary. No further information was provided regarding any consideration of my rights.

23. We received no other communication from the Monitor or their counsel prior to being served with the unfiled materials on Tuesday, August 9, 2016.

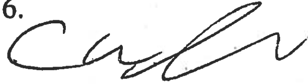
24. We have not been given a copy of the Pine Valley Mining Corporation royalty agreement which is being proposed to be assigned but believe that the enclosed is the agreement referred to which was an agreement that was part of a previous CCAA arrangement. Attached hereto as **Exhibit G** to this my affidavit is a true copy of what I understand to be the Pine Valley Mining Corporation royalty agreement.

25. We have received no explanation as to why the RSA is not being assumed.

26. We have not received a copy of the Belcourt Put Agreement for our review or consideration.

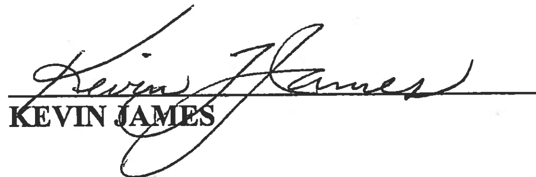
27. I am willing to enter into a Non-Disclosure Agreement regarding the confidential information relating to the matters at issue.

SWORN BEFORE ME at West Vancouver, British Columbia, this 12th day of August, 2016.



A commissioner for taking affidavits for British Columbia

CLAYTON R. WHITMAN
Barrister & Solicitor
1495 Marine Drive
West Vancouver, BC V7T 1B8
Tel: 604 922 8881



KEVIN JAMES

ROYALTY SHARING AGREEMENT

THIS AGREEMENT made this 31st day of March, 2000.

AMONG:

DAVID FAWCETT, businessman of 4920 Weaver Drive, Delta, British Columbia V4M 1R6

("Fawcett")

AND:

KEVIN JAMES, businessman of 147 - 8400 Forest Grove Drive, Burnaby, British Columbia V5A 4B7

("James")

AND:

MARK GIBSON, businessman of RR4 S107 C21, Summerland, British Columbia, V0H 1Z0

("Gibson")

(Fawcett, James, and Gibson are collectively referred to as the "Investors")

OF THE FIRST PART

AND:

WESTERN CANADIAN COAL CORP., a British Columbia company having an office at Suite 200, 580 Hornby Street, Vancouver, British Columbia, V6C 3B6

(the "Company")

OF THE SECOND PART

WHEREAS:

A. The Company has made application for and expects to become the beneficial owner of a 100% interest in and to certain coal interests in the West Brazion, Burnt River, Wolverine and Mount Spieker properties set out in Schedule "A" (collectively, the "Properties");

B. Each of the Investors have assisted the Company in acquiring and maintaining the Properties; and

This is Exhibit "A" referred to in the Affidavit of Kevin James sworn before me at West Vancouver in the Province of British Columbia this 12 day of August 2016.

A commissioner for taking Affidavits within the Province of British Columbia

This is Exhibit "17" referred to in the affidavit of David Fawcett sworn before me at Vancouver, BC this 19th day of January 2007

A Commissioner for taking Affidavits

C. The Company wishes to pay a royalty to the Investors for the Investors' contributions on the terms and conditions herein contained.

THIS AGREEMENT WITNESSES THAT in consideration of the payment by the Purchaser to the Vendors of $1.00 and other good and valuable consideration, receipt of which is hereby acknowledged, the parties mutually covenant and agree as follows:

1. INVESTMENT

1.1 Each of the Investors represent and warrant to the Company that they have advanced funds to the Company for the Properties as follows:

Investor:	Amount:
Fawcett	$32,500
James	$17,500
Gibson	$30,000

2. CONSIDERATION

2.1 As consideration for advancing the funds, the Company will pay a royalty (the "Royalty") of one percent (1%) of the price (FOBT at Port) for all product tonnes produced from the West Brazion, Mount Spieker and Wolverine coal properties on a quarterly basis to the Investors as set out in Schedule "2.1" attached hereto and forming a material part hereof.

3. THE COMPANY'S REPRESENTATIONS AND WARRANTIES

3.1 The Company represents and warrants to and covenants with the Investors as follows:

(a) the Company is a company duly incorporated, validly existing and in good standing under the laws of British Columbia;

(b) the Company has the power and authority to enter into this Agreement, and any agreement or instrument referred to in or contemplated by this Agreement, and to carry out the terms of this Agreement to the full extent;

(c) the Company is or will be the beneficial owner of all of the coal licenses comprising the Properties (the "Coal Licenses"), free and clear of all liens, charges and claims of others and no taxes or rentals are or will be due in respect of any thereof,

(d) the Coal Licenses comprising the Properties have been or will be duly and validly located and recorded pursuant to the laws in the jurisdiction in which the Properties are located and the Properties are in good standing with the mining recorder, or such other entity with jurisdiction over such matters, on the date of this Agreement; and

(e) to the best of its knowledge there is no claim or challenge against or to the ownership of or title to any of the coal licenses comprising the Properties, nor to the best of its knowledge is there any basis therefor and there are no outstanding agreements or options to acquire or purchase the Properties or any portion thereof, and no person has any royalty or other interest whatsoever in production from any of the coal licenses comprising the Properties.

3.2 The representations and warranties contained in paragraph 3.1 above are provided for the exclusive benefit of the Investors and any breach of any one or more thereof may be waived by the Investors in whole or in part at any time without prejudice to its rights in respect of any other breach of the same or any other representation or warranty and the representations and warranties contained in paragraph 3.1 shall survive the execution hereof.

4. COAL LICENSES

4.1 Upon the Coal Licences being granted and recorded under the Company's name, the Company will maintain the Coal Licenses in good standing with the mining recorder, or such other entity with jurisdiction over such matters.

4.2 In the event that any of the Coal Licenses comprising the Properties are not granted or the Company decides to cancel any applications prior to the Coal Licenses being granted, the Investors will be repaid proportionately immediately upon the funds being returned by the government.

4.3 Any forfeiture of the Coal Licenses shall be by mutual consent of the Parties to this Agreement, and such consent shall not be unreasonably withheld. In the event that the Company forfeits the Coal Licenses, the Company will assign the Coal Licenses to the Investors for a minimum period of 30 days prior to the date the forfeiture is to become effective.

5. ADDITIONAL FUNDING

5.1 In the event that the Company needs to apply for additional coal licenses and requires additional funds from the Investors, each of the Investors' percentage break down of the Royalty as set out in Schedule "2.1" will be adjusted proportionately.

6. REPAYMENT OF FUNDS

6.1 Within two years from the date of this Agreement, or upon the Company receiving adequate financing, to be reasonably determined by the Company, whichever date is earlier, the Company will pay back to the Investors all funds advanced by the Investors for the West Brazion, Wolverine and Mount Spieker properties.

6.2 The funds advanced for the Burnt River property have been repaid.

7. NOTICE

7.1 Each notice, demand or other communication required or permitted to be given under this Agreement shall be in writing and shall be sent by prepaid registered mail deposited in a Post Office in Canada addressed to the party entitled to receive the same, or delivered to such party, at the address for such party specified above. The date of receipt of such notice, demand or other communication shall be the date of delivery thereof if delivered, or, if given by registered mail as aforesaid, shall be deemed conclusively to be the third day after the same shall have been so mailed, except in the case of interruption of postal services for any reason whatsoever, in which case the date of receipt shall be the date on which the notice, demand or other communication is actually received by the addressee.

7.2 Either party may at any time and from time to time notify the other party in writing of a change of address and the new address to which notice shall be given to it thereafter until further change.

8. ASSIGNMENT

8.1 This Agreement may not be assigned without the written consent of all the parties, which consent shall not be unreasonably withheld

9. GENERAL

9.1 This Agreement will enure to the benefit of and be binding upon the parties and their respective successors, heirs, executives, administrators and permitted assigns.

9.2 Time will be of the essence of this Agreement.

9.3 This Agreement will be governed in accordance with the laws of the Province of British Columbia.

9.4 The terms and provisions herein contained constitute the entire agreement between the parties and will supersede all previous oral or written communications.

9.5 The parties hereto have not created a partnership and nothing contained in this Agreement will in any manner whatsoever constitute either party the partner, agent or legal representative of the other party, nor create any fiduciary relationship between them for any purpose whatsoever. Neither party will have any authority to act for, or to assume any obligations or responsibility on behalf of, the other party except as may be, from time to time, agreed upon in writing between the parties or as otherwise expressly provided.

9.6 The parties will promptly execute or cause to be executed all documents, deeds and other instruments of further assurance which may be reasonably necessary or advisable to carry out fully the intent of this Agreement.

9.7 This Agreement may be executed in counterparts, and if so executed, all such parts will be read as constituting one agreement in the same manner as if all parties executing this Agreement in counterparts were signatories to one copy of this Agreement.

IN WITNESS WHEREOF the parties have executed this Agreement as of the date first above written.

Signed, Sealed and Delivered by **DAVID FAWCETT** in the presence of:

KEVIN JAMES

Name

147-8400 Forest Grove Dr., Burnaby, B.C.

Address V5A 4B7

BUSINESSMAN

Occupation

DAVID FAWCETT

Signed, Sealed and Delivered by **KEVIN JAMES** in the presence of:

DAVID FAWCETT

Name

4920 WEAVER DR.

Address DELTA B.C. V4M 1R6

Occupation

KEVIN JAMES

Signed, Sealed and Delivered by **MARK GIBSON** in the presence of:

Name ROBERT G. MCMORRAN

105 TIMBERCREST PLACE

Address PORT MOODY, B.C. V3H 4U5

BUSINESSMAN

Occupation

MARK GIBSON

The Corporate Seal of **WESTERN CANADIAN COAL CORP.** was hereto affixed in the presence of:

c/s

Authorized Signatory

Authorized Signatory

[2539\210\royalty agmt2.doc]

Schedule "2.1"

The Royalty will be divided among the parties as follows:

David Fawcett	40.6%
Kevin James	21.9%
Mark Gibson	37.5%

Pat Ouellon has been asked to prepare formal agreement.

Royalty Sharing Agreement

Present position with respect to cash and work contributed.

James

West Brazion:	$6,500
Burnt River:	$6,000
Work (Wolverine):	$5,000

Gibson

Mount Spieker:	$20,000
Wolverine:	$10,000

Fawcett

Wolverine:	$20,000
West Brazion:	$6,500
Burnt River:	$6,000

James:	$17,500	21.9 %
Fawcett:	$32,500	40.6 %
Gibson:	$30,000	37.5 %
	$80,000	

A royalty is to be paid to the investors for advancing the above funds. The royalty to be paid is 1 % of FOBT port price on all product tonnes produced from the West Brazion, Mount Spieker, and Wolverine properties, payable on a quarterly basis.

Should any of the coal licenses not be granted, or Western decides to cancel any applications before the licenses are granted, the investors will be repaid proportionately once the funds have been returned by the Government.

Should Western need to apply for additional coal licenses and require additional funds from investors, the break down of above percentages would be adjusted accordingly.

The funds are to be paid back to investors upon Western receiving adequate financing to advance the projects. The cash contribution for the Burnt River property was repaid at the time of the vend-in.

Agreed:

David Fawcett   Kevin James   David Austin   Mark Gibson

Date: ____________

ROYALTY SHARING

This is Exhibit F referred to in the affidavit of David Fawcett sworn before me at Vancouver, BC this 19th day of January, 2007

A Commissioner for taking Affidavits for British Columbia

SHARE PURCHASE AGREEMENT

THIS AGREEMENT made this 31st day of October, 1997.

BETWEEN:

DAVID FAWCETT, businessman of 4920 Weaver Drive, Delta, British Columbia V4M 1R6

("Fawcett")

AND:

KEVIN JAMES, businessman of 147 - 8400 Forest Grove Drive, Burnaby, British Columbia V5A 4B7

("James")

AND:

KINDER DEO, businessman of 1403 Harold Road, North Vancouver, British Columbia V7J 1W9

("Deo")

AND:

MAHMOUD AFSHARIAN, businessman of #2101 - 2203 Bellevue Avenue, West Vancouver, British Columbia V7V 1C5

("Afsharian")

AND:

ASHIA INVESTMENTS, a B.V.I. company of FL - 9490 Vaduz, P.O. Box 129 Heiligkreuz 6, Liechtenstein

("Ashia")

AND:

CONRAD SWANSON, businessman of 792 Seymour Blvd., North Vancouver, British Columbia V7J 2J6

("Swanson")

AND:

B cw

This is Exhibit "A" referred to in the Affidavit of Kevin James sworn before me at West Vancouver in the Province of British Columbia this 12 day of August 2016.

A commissioner for taking Affidavits within the Province of British Columbia

DAVID AUSTIN, businessman of 311 - 470 Granville Street, Vancouver, British Columbia V6C 1V5

("Austin")

(Fawcett, James, Deo, Afsharian, Ashia, Swanson, and Austin collectively referred to as the "Vendors")

OF THE FIRST PART

AND:

WESTERN CANADIAN COAL CORP., a British Columbia company having an office at Suite 311 - 470 Granville Street, Vancouver, British Columbia V6C 1V5

(the "Purchaser")

OF THE SECOND PART

WHEREAS:

A. The Vendors are the beneficial owners of all of the issued common shares (the "Shares") of Western Coal Corp. (the "Company"); and

B. The Vendors have agreed to sell and the Purchaser has agreed to purchase the Shares on the terms and conditions herein contained.

THIS AGREEMENT WITNESSES THAT in consideration of the payment by the Purchaser to the Vendors of $1.00 and other good and valuable consideration, receipt of which is hereby acknowledged, the parties mutually covenant and agree as follows:

1. SALE AND PURCHASE

1.1 The Vendors agree to sell and the Purchaser agrees to buy the Shares on the terms and conditions contained in this Agreement.

2. PURCHASE PRICE

2.1 The purchase price for the Shares will be the issuance of 4,250,000 common shares of the Purchaser (the "Purchase Price") to each of the Vendors on the date of closing as set out in Schedule "2.1" attached hereto and forming a material part hereof.

2.2 As additional consideration the Purchaser will pay a royalty of three quarters of one percent (0.75%) of the selling price (FOBT at Port, or at customer for Inland North American sales) for all coal sales from the properties (as defined herein) on an annual basis to the parties as set out in Schedule "2.2" attached hereto and forming a material part hereof.

3. VENDORS' REPRESENTATIONS AND WARRANTIES

3.1 The Vendors represent and warrant to and covenant with the Purchaser as follows:

(a) to the best of the Vendors' knowledge, the Company is a company duly incorporated under the laws of British Columbia and is a valid and subsisting company in good standing in the Office of the Registrar of Companies for British Columbia;

(b) to the best of the Vendors' knowledge, the Company is not in default under the *Securities Act* (British Columbia);

(c) to the best of the Vendors' knowledge, the Company carries on business only in British Columbia;

(d) to the best of the Vendors' knowledge, the Company is or will be at the closing the legal and beneficial owner of all of the coal interests (the "Property") which are more particularly described in Schedule "3.1(d)" attached hereto and forming a material part of this Agreement, free and clear of all liens, charges and claims of others, and no taxes or rentals are or will be at the closing due in respect of any thereof;

(e) to the best of the Vendors' knowledge, the coal interests comprised in the Property have been or will as at the closing be duly and validly located recorded pursuant to the laws of the jurisdiction in which the Property is situate and the Property is in good standing with the mining recorder, or such other entity with jurisdiction over such matters, on the date of this Agreement;

(f) to the best of the Vendors' knowledge, there is no adverse claim or challenge against or to the ownership of or title to any of the coal interests comprising the Property, nor to the knowledge of the Vendors is there any basis for any potential claim or challenge, and there are no outstanding agreements or options to acquire or purchase the Property or any portion thereof, and no person has any royalty, net profits or other interests whatsoever in production from any of the coal interests comprising the Property;

(g) to the best of the Vendors' knowledge, there are no restrictions on the exploitation of coal on the Property;

(h) to the best of the Vendors' knowledge, the authorized capital of the Company consists of 10,000 common shares without par value and only the Shares will be issued and outstanding at the date of closing;

(i) the Vendors own the Shares as the legal and beneficial owner thereof, free of all liens, claims, charges and encumbrances whatsoever;

(j) no person, firm or corporation has any agreement or option or a right capable of becoming an agreement for the purchase of the Shares or, to the best of the Vendors' knowledge, any other shares in the capital of the Company or any right capable of becoming an agreement for the purchase, subscription or issuance of any of the unissued shares in the capital of the Company;

(k) to the best of the Vendors' knowledge, the Company has corporate power to own the assets owned by it and to carry on the businesses carried on by it and is duly qualified to carry on business in British Columbia;

(l) to the best of the Vendors' knowledge, the Company holds all licences and permits as may be requisite for carrying on its business in the manner in which it has heretofore been carried on;

(m) no payments of any kind have been made or authorized to or on behalf of the Vendors or, to the Vendors' knowledge, to or on behalf of officers, directors, shareholders or employees of the Company or under any management agreements with the Company save and except in the ordinary course of business and at the regular rates of salary or management fees payable to them;

(n) to the best of the Vendors' knowledge, there is no basis for and there are no actions, suits, judgments, investigations or proceedings outstanding or pending or to the knowledge of the Company or the Vendors threatened against or affecting the Company at law or in equity or before or by any federal, provincial, state, municipal or other governmental department, commission, board, bureau or agency;

(o) to the best of the Vendors' knowledge, the Company is not in breach of any laws, ordinances, statutes, regulations, by-laws, orders or decrees to which it is subject or which apply to it;

(p) to the best of the Vendors' knowledge, the Company is not a party to any collective agreement with any labour union or other association of employees;

(q) to the best of the Vendors' knowledge, the Company has good and marketable title to all its properties and assets subject to no mortgage, pledge, deed of trust, lien, conditional sale agreement, encumbrance or charge;

(r) to the best of the Vendors' knowledge, the Company has not experienced nor is it aware of any occurrence or event which has had, or might reasonably be expected to have, a materially adverse affect on its business or the results of its operations;

(s) to the best of the Vendors' knowledge, all tax returns and reports of the Company required by law to be filed prior to the date hereof have been or will be filed prior to the time of closing and are or will be substantially true, complete and correct. All taxes and other government charges have been paid or accrued in the financial statements and balance sheet of the Company;

(t) to the best of the Vendors' knowledge, all material transactions of the Company have been promptly and properly recorded or filed in or with its respective books and records. The minute books of the Company contain all records of the meetings and proceedings of shareholders and directors thereof; and

(u) to the best of the Vendors' knowledge, the performance of this Agreement will not be in violation of the memorandum or articles of the Company or of any agreement to which the Vendors or the Company is a party and will not give any person or company any right to terminate or cancel any agreement or any right enjoyed by the Company and will not result in the creation or imposition

of any lien, encumbrance or restriction of any nature whatsoever in favour of a third party upon or against the assets of the Company.

3.2 The representations, warranties, covenants and agreements by the Vendors contained in this Agreement or any certificates or documents delivered pursuant to the provisions hereof or in connection with the transaction contemplated hereby will be true at and as of the time of closing as though such representations and warranties were made at and as of such time. Notwithstanding any investigations or enquiries made by the Purchaser prior to closing or the waiver of any condition by the Purchaser, the representations, warranties, covenants and agreements of the Vendors will survive the closing date and notwithstanding the closing of the purchase and sale herein provided for, will continue in full force and effect for a period of one year from the date hereof. In the event that any of the said representations and warranties are found to be incorrect or there is a breach of any covenant or agreement of the Vendors, which incorrectness or breach will result in any loss or damage sustained directly or indirectly by the Purchaser then the Vendors will pay the amount of such loss or damage to the Purchaser within 30 days of receiving notice thereof provided that the Purchaser will not be entitled to make any claim unless the loss or damage suffered will exceed the amount of $10,000 and the aggregate of all claims may not exceed the Purchase Price.

4. PURCHASER'S REPRESENTATIONS AND WARRANTIES

4.1 The Purchaser represents and warrants to and covenants with the Vendors as follows:

(a) the Purchaser is a company duly incorporated, validly existing and in good standing under the laws of British Columbia; and

(b) the Purchaser has the power and capacity to purchase the Shares and has full power and authority to enter into this Agreement, and any agreement or instrument referred to in or contemplated by this Agreement, and to carry out the terms of this Agreement to the full extent.

4.2 The representations, warranties, covenants and agreements by the Purchaser contained in this Agreement or any certificates or documents delivered pursuant to the provisions hereof or in connection with the transaction contemplated hereby will be true at and as of the time of closing as though such representations and warranties were made at and as of such time. Notwithstanding any investigations or enquiries made by the Vendors prior to closing or the waiver of any condition by the Vendors, the representations, warranties, covenants and agreements of the Purchaser will survive the closing date and notwithstanding the closing of the purchase and sale herein provided for, will continue in full force and effect for a period of one year from the date hereof.

5. **CLOSING**

5.1 At the closing, the Purchaser will deliver 4,250,000 common shares of the Purchaser to the Vendors as set out in Schedule "2.1" attached hereto and forming a material part hereof.

5.2 At the closing, the Vendors will deliver to the Purchaser, concurrent with the payment set out in sub-paragraph 5.1 above certificates representing the Shares, which certificates will be duly endorsed for transfer.

6. **NOTICE**

6.1 Each notice, demand or other communication required or permitted to be given under this Agreement shall be in writing and shall be sent by prepaid registered mail deposited in a Post Office in Canada addressed to the party entitled to receive the same, or delivered to such party, at the address for such party specified above. The date of receipt of such notice, demand or other communication shall be the date of delivery thereof if delivered, or, if given by registered mail as aforesaid, shall be deemed conclusively to be the third day after the same shall have been so mailed, except in the case of interruption of postal services for any reason whatsoever, in which case the date of receipt shall be the date on which the notice, demand or other communication is actually received by the addressee.

6.2 Either party may at any time and from time to time notify the other party in writing of a change of address and the new address to which notice shall be given to it thereafter until further change.

7. **ASSIGNMENT**

7.1 This Agreement may not be assigned by either party.

8. **GENERAL**

8.1 This Agreement will enure to the benefit of and be binding upon the parties and their respective successors, heirs, executives, administrators and permitted assigns.

8.2 Time will be of the essence of this Agreement.

8.3 This Agreement will be governed in accordance with the laws of the Province of British Columbia.

8.4 The terms and provisions herein contained constitute the entire agreement between the parties and will supersede all previous oral or written communications.

8.5 The parties hereto have not created a partnership and nothing contained in this Agreement will in any manner whatsoever constitute either party the partner, agent or legal representative of the other party, nor create any fiduciary relationship between them for any purpose whatsoever. Neither party will have any authority to act for, or to assume any obligations or responsibility on behalf of, the other party except as may

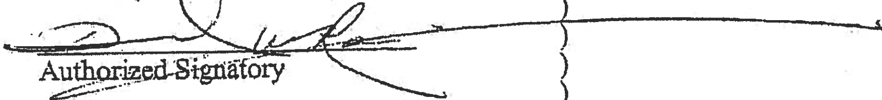
be, from time to time, agreed upon in writing between the parties or as otherwise expressly provided.

8.6 The parties will promptly execute or cause to be executed all documents, deeds and other instruments of further assurance which may be reasonably necessary or advisable to carry out fully the intent of this Agreement.

8.7 This Agreement may be executed in counterparts, and if so executed, all such parts will be read as constituting one agreement in the same manner as if all parties executing this Agreement in counterparts were signatories to one copy of this Agreement.

IN WITNESS WHEREOF the parties have executed this Agreement as of the date first above written.

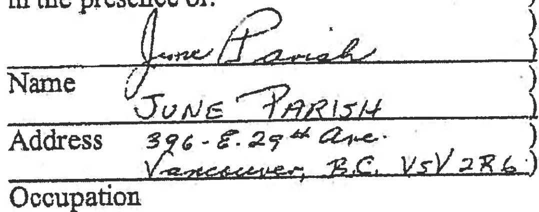
The Corporate Seal of
WESTERN CANADIAN COAL CORP.
was hereto affixed in the presence of: c/s



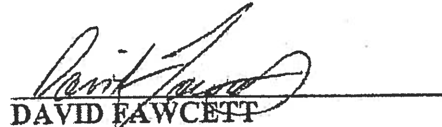
Authorized Signatory

Authorized Signatory

Signed, Sealed and Delivered by
DAVID FAWCETT
in the presence of:

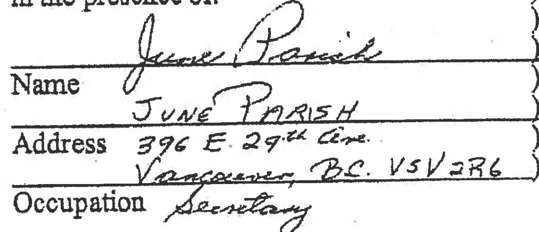


Name JUNE PARISH
Address 396 - E. 29th Ave.
Vancouver, B.C. V5V 2R6
Occupation

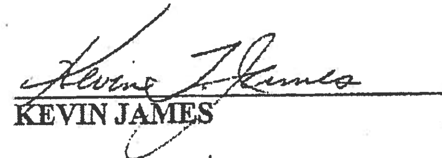


DAVID FAWCETT

Signed, Sealed and Delivered by
KEVIN JAMES
in the presence of:



Name JUNE PARISH
Address 396 E. 29th Ave.
Vancouver, B.C. V5V 2R6
Occupation Secretary



KEVIN JAMES

Signed, Sealed and Delivered by
KINDER DEO
in the presence of:

Conrad Swanson
Name
792 Seymour Blvd N.V.
Address
business
Occupation

KINDER DEO

Signed, Sealed and Delivered by
MAHMOUD AFSHARIAN
in the presence of:

NAVID AFSHARIAN
Name
2825 S.W. MARINE DR. VANCOUVER
Address
BUSINESSMAN
Occupation

MAHMOUD AFSHARIAN

Signed, Sealed and Delivered by
CONRAD SWANSON
in the presence of:

Dan Para
Name
105-3065 Primrose LN, COQ
Address
Consultant
Occupation

CONRAD SWANSON

Signed, Sealed and Delivered by
DAVID AUSTIN
in the presence of:

Dan Para
Name
105-3065 PRIMROSE LANE, COQ
Address
Consultant.
Occupation

DAVID AUSTIN

The Corporate Seal of
ASHIA INVESTMENTS
was hereto affixed in the presence of:

Authorized Signatory

Authorized Signatory

[2539\120\sh-agr4.doc]

Schedule "2.1"

Vendor:	common shares of the Purchaser to be received:
Kinder Deo	40,000
David Fawcett	1,017,500
Kevin James	1,017,500
Conrad Swanson	1,017,500
David Austin	1,017,500
Mahmoud Afsharian	40,000
Ashia Investments	100,000

Schedule "2.2"

The Royalty will be divided among the parties as follows:

David Fawcett	27.5%
Kevin James	27.5%
Conrad Swanson	22.5%
David Austin	22.5%

Schedule "3.1(d)"

Belcourt Properties

Property	Coal License	NTS Map Series	Block	Units
Red Deer	343944	931/09W	E	49, 50, 59, 60
Red Deer	336921	931/09W	E	27, 28, 37, 38
Red Deer	336922	931/09W	E	29, 30, 39, 40
Red Deer	353022	931/09W	E	7, 8, 17, 18
Red Deer	353023	931/10E	H	41, 42, 51, 52
Red Deer	353024	931/09W	E	5, 6, 15, 16
Holtslander	343945	931/09W	C	49, 50, 59, 60
Holtslander	356250	931/09W	C	29, 30, 39, 40
Holtslander	356251	931/09W	C	25, 26, 35, 36
Holtslander	356477	931/09W	C	27, 28, 37, 38
Holtslander	336923	931/09W	C	89, 90, 99, 100
Holtslander	336924	931/09W	C	69, 70, 79, 80
Huguenot	355843	931/080E	J	21, 22, 31, 32
Huguenot	355844	931/080E	J	41, 42, 51, 52
Huguenot	355846	931/080E	J	43, 44, 53, 54
Huguenot	355847	931/080E	I	29, 30, 39, 40
Omega	356640	931/080E	H	43, 44, 53, 54
Omega	356637	931/080E	H	63, 64, 73, 74
Omega	356639	931/080E	H	65, 66, 75, 76
Omega	356636	931/080E	H	85, 86, 95, 96
Omega	356635	931/080E	H	87, 88, 97, 98
Saxon East	355835	931/080E	A	85, 86, 95, 96
Saxon East	355836	931/080E	A	65, 66, 75, 76
Saxon East	355837	931/080E	A	41, 42, 51, 52
Saxon East	355838	931/080E	A	43, 44, 53, 54
Saxon East	355839	931/080E	A	63, 64, 73, 74
Saxon East	355840	931/080E	A	87, 88, 97, 98
Saxon East	355841	931/080E	A	89, 90, 99, 100
Saxon East	355842	931/080E	H	9, 10, 19, 20

This is Exhibit "C" referred to in the
Affidavit of Kevin James
sworn before me at West Vancouver
in the Province of British Columbia
this 12 day of August 2016.

A commissioner for taking Affidavits
within the Province of British Columbia

Case Name:

Western Canadian Coal Corp. v. Fawcett

Between
Western Canadian Coal Corp., petitioner, and
David Fawcett, Kevin James and Mark Gibson,
respondents

[2006] B.C.J. No. 643

2006 BCSC 463

149 A.C.W.S. (3d) 801

Vancouver Registry No. L050703

British Columbia Supreme Court
Vancouver, British Columbia

Tysoe J.
(In Chambers)

Oral judgment: February 24, 2006.
Released: March 28, 2006.

(51 paras.)

Corporations and associations law -- Corporations -- Contracts -- Directors -- Duties -- To inform shareholders -- Meetings -- Resolutions -- Royalty agreement entered into between corporation and two of its directors not unfair -- Technical non-compliance with Company Act provisions requiring directors to disclose interest in agreement at meeting were fault of corporation's lawyers, not grounds for setting aside agreement -- Company Act, ss. 120, 121, 125.

Petition by Western Canadian Coal to set aside agreement with Fawcett, James and Gibson based on lack of compliance with provisions of Company Act dealing with transactions in which directors have interest -- Fawcett, James and Austin incorporated Western in 1997 to raise funds to finance exploration and development of Belcourt coal property -- Mine on Belcourt determined not economically viable -- James and Fawcett each paid $6,000 from personal funds to acquire licences for Burnt River coal property -- Licences were transferred to subsidiary company of Western -- James and Fawcett also acquired West Brazion coal licences with personal funds, in name of James' wife

-- James and Fawcett found another group of promising properties -- Gibson provided $20,000 for Western to acquire licence for one of group of properties -- Western and Gibson entered into agreement providing $20,000 was advanced as loan convertible into 20 percent working interest, with **royalties** payable to Gibson for **coal** produced from property -- Western entered into agreement with James and Fawcett granting Western option to acquire West Brazion licences in exchange for reimbursing acquisition costs plus payment of one percent **royalty** on price of **coal** produced -- Most of evidence showed Austin suggested amount of **royalty** -- Gibson suggested pooling of contributions by James, Fawcett and Gibson in exchange for collective royalty -- Fawcett provided another $20,000 to obtain other properties in group -- New royalty agreement provided Western would pay James, Gibson and Fawcett **royalty** of one percent of price of **coal** produced from all properties, in proportion to respective advances, with additional credit given to James for work done to research and assess properties -- Austin discussed agreement with Western's solicitors, took position of disinterested director -- Western's consent to royalty sharing agreement was provided through resolutions, signed by Fawcett, James and Austin -- Fawcett and James signed only as directors but abstained from voting as they had interests in transaction -- Indebtedness of Western to Fawcett, James and Gibson removed from Western's balance sheet by way of issuance of shares -- Other shareholders applied to set aside royalty agreement -- Over time, royalties payable to Fawcett, James and Gibson became very high because of upturn in coal industry -- HELD: Petition dismissed -- Provisions of Company Act requiring directors to account for profits were not complied with -- No meeting of directors took place, at which Fawcett and James were required to disclose their interest in transaction -- Consent resolution not valid because all directors not entitled to vote on resolution -- Technical non-compliance was fault of Western's lawyers -- Court did not have discretion to correct non-compliance -- Royalty agreement was procedurally fair to Western, as uninterested director negotiated it and communicated with lawyers -- Royalty agreement was substantially fair to Western at time it was entered -- Subsequent upturn in coal industry and corresponding returns to Fawcett, James and Gibson did not render agreement unfair.

Statutes, Regulations and Rules Cited:

Business Corporations Act, S.B.C. 2002, c. 57, s. 148, s. 150, s. 150(2), s. 229, s. 229(1), s. 229(2)

Company Act, R.S.B.C. 1996, c. 62, s. 120, s. 121, s. 121(b), s. 121(c), s. 121(1), s. 122, s. 125(1), s. 125(3)

Criminal Code, s. 347

Counsel:

Counsel for the Petitioner: W.M. Everett, Q.C. and S.J. Gregory

Counsel for the Respondent, David Fawcett:
J.S. Forstrom

Counsel for the Respondent, Kevin James:
M.A. Clemens, Q.C.

Counsel for the Respondent, Mark Gibson:
H. Shapray, Q.C.

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1 **TYSOE J.** (orally):-- In or about the month of June 2000, the Petitioner and the Respondents entered into an agreement dated March 31, 2000 (the "Royalty Sharing Agreement" or the "Agreement") which provided that, among other things, the Petitioner would pay the Respondents a royalty of 1% of the price for all product tonnes produced from three sets of coal properties acquired by the Petitioner with the assistance of the Respondents. The Petitioner now applies to set aside the Royalty Sharing Agreement on the basis that there was a lack of compliance with the provisions of the ***Company Act***, R.S.B.C. 1996, c. 62, dealing with transactions in which directors have an interest.

2 The Petitioner was incorporated in 1997. Its founding directors were the Respondent, Kevin James and David Austin. The Respondent, David Fawcett, was its President, and became the third director in 1999. The Petitioner is a publicly traded company and it was initially intended that the Petitioner would raise public equity funds to finance the exploration and development of a coal property known as Belcourt. Mr. Fawcett had acquired the coal licence for the Belcourt property and had transferred it to a company which became a wholly owned subsidiary of the Petitioner. Public funds were raised for the purpose of exploring the Belcourt property, but it was ultimately determined that a mine on the property would not be economically viable.

3 In late 1998, Mr. James and Mr. Fawcett began looking for other properties having potential for development as coal mines. At the time and during the following 1 1/2 year period, the coal industry in British Columbia was depressed as a result of low coal prices. Established mining companies were declining to renew coal licences which they held. The Petitioner did not have funds of any significance that had not been dedicated to the Belcourt property. The Petitioner made inquiries about the prospect of raising funds by way of a public offering, but there was little or no investor appetite for coal exploration or development during this period.

4 In January 1999, Mr. James and Mr. Fawcett each paid $6,000 from their personal funds to acquire, in the name of Mr. James, the coal licences for a property known as Burnt River. It was decided by the Petitioner's three directors that the Petitioner would attempt to develop the Burnt River property and the licences were transferred from Mr. James to the Petitioner's subsidiary. Around that time Mr. James was paid the sum of $22,758.43, which included reimbursement of the $12,000 paid by Mr. James and Mr. Fawcett for the coal licences.

5 In November 1999, Mr. James and Mr. Fawcett identified a property known as West Brazion to be a potentially desirable acquisition. They acquired the coal licences for the property in the name of Mr. James' wife by using $13,000 of their personal funds in order to tie up the licences pending discussion among the Petitioner's directors as to whether the Petitioner wanted to acquire the licences. While those discussions were ongoing, Mr. James and Mr. Fawcett identified three other promising properties known as Mt. Spieker, Perry Creek and Hermann, and collectively called the Wolverine Group.

6 The Petitioner's directors were desirous of utilizing funds of third parties to acquire the coal licences for the Wolverine Group properties. A business associate of Mr. Austin, the Respondent, Mark Gibson, indicated a willingness to provide up to $35,000 for that purpose. It was ultimately agreed between the Petitioner and Mr. Gibson that he would provide the sum of $20,000 for the purpose of enabling the Petitioner to acquire the licence for the Mt. Spieker property.

7 The Petitioner and Mr. Gibson entered into an agreement dated as of January 28, 2000 (the "Gibson Agreement"), which contained the following provisions:

(a) the $20,000 advance was characterized as a loan, which was repayable on January 31, 2002;

(b) Mr. Gibson had the option of converting the loan into a 20% working interest in the Mt. Spieker property;

(c) Mr. Gibson was to be paid a royalty equal to $0.25 per product tonne on the first 2.5 million tonnes of product sold from the Mt. Spieker property; and

(d) the royalty right could be bought out by the Petitioner prior to a production decision on the basis of production of 500,000 tonnes a year for five years and a discount of 10%.

8 Discussions continued with respect to the acquisition of the licences for the West Brazion property by the Petitioner. It is agreed in or about February 2000 that the Petitioner would have the option of acquiring the licences from Messrs. James and Fawcett in exchange for reimbursing their acquisition costs plus the payment of a 1% **royalty** on the selling price of all **coal** produced from the West Brazion property. The Petitioner disputes this agreement on the basis that the consent resolution documenting the agreement is not contained in the Petitioner's minute book, but nothing turns on it other than to provide a possible explanation of the genesis of a 1% royalty. The preponderance of the evidence is that it was Mr. Austin who was the one who suggested the amount of a 1% royalty.

9 It also became known in February 2000 that the previous holder of the licences for the other two properties in the Wolverine Group, the Perry Creek and the Hermann properties, had not renewed the licences. The licences could be obtained at a cost of $30,000. Funds were required in this regard and Mr. Gibson indicated a willingness to advance a further sum of $10,000. Around the same time, Mr. Gibson raised a concern about his royalty being restricted to one property because he had no control over the order in which the various properties would be developed. Mr. Gibson suggested that there should be a pooling of the contributions of himself, Mr. Fawcett and Mr. James in respect of the various licences in exchange for a collective royalty.

10 Negotiations ensued between Mr. Gibson, Mr. Fawcett, Mr. James and Mr. Austin. Mr. Austin has deposed that he participated in the negotiations as the disinterested director of the Petitioner and discussed the matter with the Petitioner's solicitors, Devlin Jensen. It was orally agreed that in addition to the further $10,000 funding by Mr. Gibson, Mr. Fawcett would provide the additional $20,000 required to pay for the Perry Creek and Hermann licences. It was also agreed that a **royalty** of 1% of the price of **coal** produced from the West Brazion, Mt. Spieker and other Wolverine Group properties would be paid by the Petitioner to Messrs. James, Gibson and Fawcett in proportion to their respective advances to acquire the licences for these properties as well as the Burnt River property, plus an additional $5,000 credited to Mr. James as compensation for the research and assessment work he had done on the Wolverine Group properties.

11 The evidence indicates that this oral agreement was reached in February 2000, before Mr. Gibson advanced his further $10,000. The applications to acquire the Perry Creek and Hermann licences were made by Mr. James in February, March and April, 2000.

12 There is some doubt on the evidence whether the oral agreement had included the payment of a **royalty** from the **coal** produced from the Burnt River property. At some point Mr. Fawcett prepared a one page document summarizing the business terms of the oral agreement (which did not include a royalty in respect of the Burnt River property). Mr. Fawcett cannot recall with certainty when he prepared this document but he believes that he prepared it around the time of the oral agreement.

13 On June 15, 2000 Mr. Fawcett faxed the one page document to Devlin Jensen and requested the firm to prepare a formal agreement. Mr. Fawcett cannot recall the reason for the delay, but he believes that a need for formal documentation was identified during the preparation of the Petitioner's audited financial statements in the spring of 2000.

14 Devlin Jensen prepared the Royalty Sharing Agreement and consent resolutions of the Petitioner's three directors approving the Royalty Sharing Agreement. The parties to the Royalty Sharing Agreement were the Petitioner and Messrs. Fawcett, James and Gibson. Its relevant provisions included the following:

WHEREAS:

A. The company has made application for and expects to become the beneficial owner of 100% interest in and to certain coal interests in the West Brazion, Burnt River, Wolverine and Mount Spieker properties set out in Schedule "A" (collectively, the "Properties");

B. Each of the Investors have assisted the Company in acquiring and maintaining the Properties; and

C. The company wishes to pay a royalty to the Investors for the Investors' contributions on the terms and conditions herein contained.

1. **INVESTMENT**

1.1 Each of the Investors represent and warrant to the Company that they have advanced funds to the Company for the Properties as follows:

Investor	Amount
Fawcett	$32,500
James	$17,500

Gibson $30,000

2. CONSIDERATION

2.1 As consideration for advancing the funds, the Company will pay a royalty (the "Royalty") of one percent (1%) of the price (FOBT at Port) for all product tonnes produced from the West Brazion, Mount Spieker and Wolverine coal properties on a quarterly basis to the Investors as set out in Schedule "2.1" attached hereto and forming a material part hereof.

6. REPAYMENT OF FUNDS

6.1 Within two years from the date of this Agreement, or upon the Company receiving adequate financing, to be reasonably determined by the Company, whichever date is earlier, the Company will pay back to the Investors all funds advanced by the Investors for the West Brazion, Wolverine and Mount Spieker properties.

6.2 The funds advanced for the Burnt River property have been repaid.

Schedule 2.1:

The Royalty will be divided among the parties as follows:

David Fawcett: 40.6%

Kevin James: 21.9%

Mark Gibson: 37.5%

15 The consent resolutions were dated as of March 31, 2000 and were signed by the Petitioner's three directors, including Messrs. Fawcett and James. The recitals of the resolutions stated that Messrs. Fawcett and James declared their interests in the transactions contemplated by the resolutions and abstained from voting on them, their signatures being provided only to comply with s. 125(3) of the ***Company Act***. The consent resolutions authorized the Petitioner to enter into an agreement whereby it would agree to pay a 1% **royalty** on all **coal** product produced from the West Brazion, Wolverine and Mt. Spieker properties as consideration for Messrs. James, Fawcett and Gibson having advanced funds to acquire and maintain these properties.

16 In the spring of 2000, Mr. Austin was able to make arrangements for private placement financing to assist the Petitioner in pursuing the exploration of its properties. Although the evidence is not entirely clear in this regard, it appears that it was a requirement of the private placement that the indebtedness owing to Messrs. Fawcett, James and Gibson be removed from the Petitioner's balance sheet. Arrangements were made to have this occur in July 2000 by way of the issuance of shares in the capital of the Petitioner to Messrs. Fawcett, James and Gibson on the basis of a price of $0.30 per share. This substitution of shares for indebtedness did not include the sum of $13,000 advanced by Messrs. Fawcett and James in respect of the West Brazion licences, which was not paid until May 2001 when the Petitioner exercised its option to acquire those licences from Messrs. Fawcett and James.

17 A question regarding the validity of the Royalty Sharing Agreement was raised within the Petitioner in July 2001. No steps to challenge it were taken at that time. In 2003, the Petitioner requested another law firm to consider whether the entering into of the Royalty Sharing Agreement was in compliance with the applicable securities regulatory policies. The law firm wrote a letter expressing the view that the policies of the Canadian Venture Exchange required the Exchange to accept the Royalty Sharing Agreement for filing and that it was likely the Exchange would require the Royalty Sharing Agreement to be approved by the Petitioner's shareholders. Devlin Jensen then requested the Exchange to accept the Royalty Sharing Agreement for filing but, despite an indication from the Exchange that there would not be a problem with approving it, the Petitioner instructed Devlin Jensen to withdraw the request.

18 The matter lay in abeyance until early 2005 when Mr. Fawcett requested the Petitioner to consent to an assignment of one-half of his share of the royalty under the Royalty Sharing Agreement to a third party. After considering the request in March 2005, the then directors of the Petitioner decided to instruct counsel to apply to court to have the Royalty Sharing Agreement set aside.

19 The fortunes of the B.C. coal industry and, the Petitioner's fortunes in particular, have improved dramatically in the past five years. I gather that the Burnt River property, which is not subject to the royalty pursuant to the Royalty Sharing Agreement, is now in production. Construction is underway at the Wolverine Group properties and the Petitioner estimates that it will produce 2.4 million tonnes of coal for the year commencing October 1, 2006. I infer from the affidavit evidence that the price of coal is currently in the range of $100 per tonne.

20 The issues that were raised by counsel's submissions on this application are as follows:

(a) was there a lack of compliance with the provisions of the ***Company Act*** dealing with transactions in which directors have an interest?

(b) if there was a lack of compliance, was there an irregularity which the court should correct pursuant to s. 229(1) of the ***Business Corporations Act***, S.B.C. 2002, c. 57?
(c) if there was a lack of compliance which is not rectified, was the Royalty Sharing Agreement unfair or unreasonable to the Petitioner? and
(d) if the pre-conditions set out in s. 150 of the ***Business Corporations Act*** have been satisfied, should the court exercise its discretion to set aside the Royalty Sharing Agreement or grant other relief to the Petitioner?

21 I have made reference to both the ***Company Act*** and the ***Business Corporations Act***. The ***Business Corporations Act*** came into force on March 29, 2004, replacing the ***Company Act***. It is necessary to look to the ***Company Act*** in order to determine whether there was compliance with the legislation in force at the time the parties entered into the Royalty Sharing Agreement. If there was a lack of compliance, it is necessary to look to the ***Business Corporations Act*** to determine the consequences, if any, of the non-compliance. The provision of the ***Business Corporations Act*** dealing with the consequences of non-compliance is similar, but not identical, to the corresponding provision in the ***Company Act***.

22 I will set out the relevant legislative provisions. The first three subsections of s. 120 of the ***Company Act*** read as follows:

> (1) Every director of a company who, in any way, directly or indirectly, is interested in a proposed contract or transaction with the company must disclose the nature and extent of the director's interest at a meeting of the directors.
> (2) The disclosure required by subsection (1) must be made
>
> > (a) at the meeting at which a proposed contract or transaction is first considered,
> > (b) if the director was not, at the time of the meeting referred to in paragraph (a), interested in a proposed contract or transaction, at the first meeting after the director becomes interested, or
> > (c) at the first meeting after the relevant facts come to the director's knowledge.
>
> (3) For the purpose of this section, a general notice in writing given by a director of a company to the other directors of the company to the effect that the director is a member, director or officer of a specified corporation, or that the director is a partner in, or owner of, a specified firm, and that the director has an interest in a specified corporation or firm, is a sufficient disclosure of interest to comply with this section.

23 Section 121(1) provided, in part, as follows:

> (1) Every director referred to in section 120(1) must account to the company for any profit made as a consequence of the company entering into or performing the proposed contract or transaction, unless
>
> > (a) he or she discloses his or her interest as required by section 120,

> (b) after his or her disclosure the proposed contract or transaction is approved by the directors, and
>
> (c) he or she abstains from voting on the approval of the proposed contract or transaction ... .

Section 121(1) also provided an exception to the requirement to account for profit if the contract or transaction was approved by a special resolution of the shareholders, but there was no such resolution in this case.

24 Subsections (1) and (3) of s. 125 provided as follows:

> (1) A resolution of the directors or of any committee of them may not be passed without a meeting, except as permitted by subsection (3).
>
> (3) Unless the articles provide otherwise, a resolution of the directors ... may be passed without a meeting if all the directors ... consent to the resolution in writing and the consent is filed with the minutes of proceedings of the directors ...

25 The ***Business Corporations Act*** uses the expression "disclosable interest" and it incorporates the requirements of the predecessor legislation. Section 148 imposes an obligation on directors and senior officers to account to the company for any profit resulting from a contract or transaction in which they hold a disclosable interest unless there is compliance with the requirements of the section. Section 150(2) provides as follows:

> (2) Unless a contract or transaction in which a director or senior officer has a disclosable interest has been approved in accordance with section 148(2), the court may, on an application by the company or by a director, senior officer, shareholder, or beneficial owner of shares of the company, make one or more of the following orders if the court determines that the contract or transaction was not fair and reasonable to the company:
>
> (a) enjoin the company from entering into the proposed contract or transaction;
>
> (b) order that the director or senior officer is liable to account for any profit that accrues to the director or senior officer under or as a result of the contract or transaction;
>
> (c) make any other order that the court considers appropriate.

26 Subsections (1) and (2) of s. 229 of the ***Business Corporations Act*** reads in part, as follows:

> (1) In this section, "corporate mistake" means an omission, defect, error or irregularity that has occurred in the conduct of the business or affairs of a company as a result of which
>
> ...
>
> (c) proceedings at or in connection with any of the following have been rendered ineffective:

(i) a meeting of shareholders;
(ii) a meeting of the directors or of a committee of directors;
(iii) any assembly purporting to be a meeting referred to in subparagraph (i) or (ii), or

(d) a consent resolution or records purporting to be a consent resolution have been rendered ineffective.

(2) Despite any other provision of this Act, the court, either on its own motion or on the application of any interested person, may make an order to correct or cause to be corrected, to negative or to modify or cause to be modified the consequences in law of a corporate mistake or to validate any act, matter or thing rendered or alleged to have been rendered invalid by or as a result of the corporate mistake, and may give ancillary or consequential directions it considers necessary.

27 In preparing the consent resolutions in question, Devlin Jensen apparently believed that there could be compliance with s. 120 of the ***Company Act*** by way of a consent resolution signed by the directors having an interest in the contract or transaction only for the purposes of meeting the criteria of a consent resolution as set out in s. 125(3) of the ***Company Act***. In my opinion, Devlin Jensen was mistaken in its belief.

28 Section 120 is clear that the disclosure of a director's interest in a proposed contract or transaction must be made at a meeting of directors unless it is given by a notice in writing under s-s. (3). In the present case, disclosure by Messrs. Fawcett and James was not made at a meeting of directors or by a notice under s-s. (3).

29 In addition, a resolution of the directors must be passed at a meeting of the directors unless it is a consent resolution under s. 125(3). There can only be a consent resolution if all directors consent to the resolution. If the directors having an interest in the proposed contract or transaction consent to the resolution, they cannot be considered to have abstained from voting. In my view, it is not possible to consent to a resolution under s. 125(3) while at the same time purporting to abstain from voting for the purpose of s. 121(1).

30 There are only two ways for directors to pass a resolution. The first way is for a majority of directors present at a meeting having a quorum to vote in favour of the resolution. The second way is for all of the directors to consent to the resolution. By consenting to the resolution, all of the directors are effectively voting in favour of the resolution and it is not necessary to put the resolution to a vote at a directors meeting. If, however, some of the directors are abstaining from voting, the resolution can only be passed at a meeting of directors. A consent resolution cannot be passed in that circumstance because not all of the directors of the company can signify their approval of the resolution by consenting to it.

31 I disagree with the submission of counsel for Mr. Gibson that it is possible to have a consent resolution under s. 125(3) in a circumstance where one or more directors may abstain or dissent. Subsection (3) of s. 125 does not merely require that all of the directors consent to the resolution being in writing. All of the directors must also consent to the resolution itself.

32 I also disagree with the submission of counsel for Mr. Fawcett that it was not necessary to have a meeting of the directors of the Petitioner. It may be that a director may not be required to disclose his or her interest in a proposed contract or transaction at a meeting of directors if a notice has been given under s. 120(3) or if full disclosure was made prior to the approval of the proposed contract or transaction (see ***Brian Mountford & Associates Ltd. v. Lucero Resource Corp.***, [1991] B.C.J. No. 194 (S.C.)). However, a meeting is required for the directors to approve the proposed contract or transaction because the directors having an interest in the matter are required to abstain from voting and cannot participate in a consent resolution.

33 The essence of the submissions made by the Respondents' counsel is that there was substantial compliance with the requirements of sections 120 and 121 of the ***Company Act***, or, in other words, there was compliance with the spirit of those provisions. Counsel say that such compliance should be sufficient. While I accept that there was compliance with the spirit of sections 120 and 121, I do not agree that it is sufficient.

34 As was observed by Madam Justice Ryan in ***Rhyolite Resourses Inc. v. CanQuest Resource Corporation,*** (1990) 50 B.L.R. 275 (B.C.S.C.), the common law provided that a director could not obtain a profit from a transaction with the company in which he or she had an interest unless the shareholders approved of the transaction after being informed of all material facts. Madam Justice Ryan went on to hold that the predecessors to sections 120, 121 and 122 of the ***Company Act*** superseded the common law. As a result, in my view, a director who sought the protection of sections 120 and 121 had to fully comply with the requirements of those sections. This conclusion is reinforced by the mandatory language of those sections. Section 120 set out a mandatory requirement of disclosure in a particular manner and s. 121 provided that a director must account for any profit unless there had been compliance with one of two specific procedures.

35 Counsel for Mr. Gibson made the submission that the court should correct any technical non-compliance pursuant to its powers under s. 229 of the ***Business Corporations Act***. In my view, those powers are not open to the court in these circumstances. In order for there to be a "corporate mistake" capable of correction, there must in the context of this case be an omission, defect, error or irregularity which results in either: (a) proceedings at a meeting of the directors being rendered ineffective, or (b) a consent resolution or records purporting to be a consent resolution being rendered ineffective. In this case, there was no meeting of the directors and the consent resolution was not rendered ineffective by an omission, defect, error or irregularity. In the latter regard, the consent resolution was not ineffective as a consent resolution but, rather, it simply did not satisfy the requirements of clauses (b) and (c) of s. 121 of the ***Company Act***. Section 229 of the ***Business Corporations Act*** does not give the court the ability to rectify non-compliance with s. 121 of the ***Company Act.***

36 I conclude that there was a lack of compliance with the requirements of sections 120 and 121 of the ***Company Act*** in respect of the Royalty Sharing Agreement and that the court does not have the ability to rectify the non-compliance. Hence, it is necessary to consider s. 150 of the ***Business Corporations Act***.

37 Under s. 150(2), it is first necessary to determine whether the contract in question was not fair and reasonable to the company. Although this point was not raised by any of the Respondents, a literal interpretation of the wording of s. 150(2) suggests that the threshold is for the court to determine that the contract was both unfair and unreasonable to the company. It is my view, which I assume is shared by counsel for the Respondents, that the word "and" in the phrase "fair and reasona-

ble" in s. 150(2) must be construed disjunctively. I say this because the same phrase is used in s. 150(1), which allows the court to order that a director or officer is not liable to account for profit if it determines that the contract or transaction was fair and reasonable to the company. It would not make sense for a court to be able to decline to make an order under s. 150(1) that a director is not liable to account for profit on the basis that it determined the contract or transaction was either unfair or unreasonable to a company, but to be unable to make an order under s. 150(2) that a director is liable to account for profit unless the contract or transaction was determined to be both unfair and unreasonable.

38 There is similarly no dispute between counsel that the fairness and reasonableness of a contract or transaction must be assessed from both a procedural and substantive perspective: see ***UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.*** (2002), 27 B.L.R. (3d) 53 (Ont. S.C.J.). There is a dispute between counsel, however, whether in addition to being procedurally fair, the contract or transaction must simply be substantively reasonable or must be both substantively fair and reasonable. In my opinion, this is a matter of semantics without any practical consequence in this case. If the Royalty Sharing Agreement is substantively reasonable, I have difficulty conceiving how it could be found to be substantively unfair.

39 In my opinion, the entering into of the Royalty Sharing Agreement was procedurally fair to the Petitioner. The Agreement was negotiated with Mr. Austin, the director who had no interest in it. He was in communication with the Petitioner's solicitors with respect to the transaction. Mr. Austin was fully aware of the nature and extent of the interests of Messrs. Fawcett and James in the Agreement. Although the oral agreement was reached in a relatively short period of time, this was necessary in order to acquire the expired licences for the Perry Creek and Hermann properties. There was no undue haste in documenting the oral agreement. Messrs. Fawcett and James left it entirely in the hands of the Petitioner's solicitors to prepare the Royalty Sharing Agreement and to take any other appropriate steps.

40 Counsel for the Petitioner relies on five matters to argue that there was an absence of procedural fairness. The evidence does not support his first and second contentions that there was no arm's length negotiation of the Royalty Sharing Agreement and that the Petitioner did not receive independent advice.

41 His third and fourth points are that the Respondents chose not to submit the Royalty Sharing Agreement to the shareholders of the Petitioner or to the Canadian Venture Exchange for approval. However, there is no legal requirement for approval by the shareholders or the Exchange, and there is no evidence that Devlin Jensen advised that it would have been necessary or advisable to obtain approval of the shareholders or the Exchange. In addition, the obligation to obtain approval from the Exchange was a condition of the Petitioner's listing agreement with the Exchange, and the obligation to obtain the approval lay with the Petitioner, not the Respondents. Further, the evidence indicates that the Exchange would likely have approved the Agreement without the requirement of obtaining shareholder approval.

42 The fifth point made by counsel for the Petitioner is that there was no independent opinion as to the fairness or the value of the Agreement. In the circumstances at the time, where the Petitioner had little in the way of financial resources and an independent director had negotiated the Agreement, it was not incumbent, in my view, to obtain an independent valuation. In addition, the value of the royalty was so speculative that it was probably incapable of a proper valuation at any reasonable cost. Indeed, I find it interesting that the Petitioner suggests that there should have been

an independent valuation at a time when the Petitioner did not have available financial resources while, on this application to set the Agreement aside, the Petitioner, having considerably more financial resources than it did in 2000, has not seen fit to place an independent valuation before the court.

43 I am also satisfied that the Royalty Sharing Agreement was substantively fair and reasonable to the Petitioner. The substantive fairness and reasonableness of the Royalty Sharing Agreement must be assessed at the time the parties reached their agreement. It is not appropriate to assess the substantive fairness and reasonableness of the Agreement on the basis of subsequent events. The Petitioner has not put any evidence before the court to demonstrate any substantive unfairness or unreasonableness, and relies primarily on events which have occurred since the parties reached their agreement.

44 Counsel are not in agreement regarding the party bearing the onus of proof under s. 150(2) of the ***Business Corporations Act***. I tend to agree with the position of counsel for the Petitioner that the onus lay with the Respondents but I need not decide the point because the Respondents have proved that the Royalty Sharing Agreement was substantively fair and reasonable to the Petitioner by providing the opinions of two experts. The first expert is Mr. Wetherup, a geologist and exploration manager in the mining industry. He opined that the arrangement comprised in the Agreement was consistent with Canadian mining industry practice, both from an economic perspective and from the perspective of the structure of the transactions. He also deposed that the amount of royalty under the Agreement is in the low range of royalty payments for similar transactions in the Canadian mining industry.

45 The second expert is Mr. Gordon, a corporate finance consultant, who held various positions with the Vancouver Stock Exchange and Canadian Venture Exchange. He opined that the transaction would have been considered within the norms of practice in the resource development industry in Canada. He pointed out that, although such royalty arrangements may ultimately prove to be very lucrative to the royalty holders in the relatively rare cases such as the present one where the company is able to develop or produce a mine, they are considered fair by the Exchange because of the contingent nature of the payment obligation and the fact that the transaction enables the shareholders of the company to participate in the value generated by development of the resource.

46 The Petitioner did not challenge the opinions of Messrs. Wetherup and Gordon by cross-examining them or introducing contrary opinions. Much of the Petitioner's argument on this issue was based on events which took place after the parties reached their agreement. For example, counsel for the Petitioner relies on the fact that most of the monies advanced by the Respondents were repaid by July 2000 when shares were issued to the Respondents for all but $13,000 of the advances. Counsel also relies on the fact that the Wolverine properties now appear likely to generate a royalty in the millions of dollars while ignoring the highly speculative nature of the transaction in 2000.

47 Similarly, counsel for the Petitioner relies on the fact that it now appears that the return on the Respondents' investments will exceed the criminal rate of interest under s. 347 of the ***Criminal Code***. The Petitioner has filed an expert opinion of an actuary, Mr. Karp, that a payment of $432,000 to the Respondents on January 1, 2007, would constitute a return in excess of 60% per annum and points to the fact that it is anticipated that a royalty payment in the range of $600,000 will become due under the Royalty Sharing Agreement on January 1, 2007. I am not persuaded by this submission for two reasons. First, the Royalty Sharing Agreement itself does not provide for

payment of a return in excess of 60% per annum and s. 347 will only become engaged when and if interest in excess of 60% per annum is paid. If that occurs, the Petitioner will then be entitled to pursue a remedy to limit the payments which it is obliged to make under the Agreement. Second, it is not clear from the evidence that the royalty payments will constitute interest within the meaning of s. 347. While it does appear that some of the advances were in the form of loans to the Petitioner, it also appears that some of the advances were made by Messrs. Fawcett and James to initially acquire the licences in their own names.

48 Counsel for the Petitioner also asserted that the Royalty Sharing Agreement was based on inflated contributions. In this regard, counsel points to the fact that Messrs. Fawcett and James had already been reimbursed for their $12,000 contribution to acquire the Burnt River licences and the fact that there was no notation in the Petitioner's financial records of $5,000 being due to Mr. James for his work in connection with the Wolverine Group properties. Although there was some confusion in the earlier stages of this proceeding resulting from faded memories, I am satisfied that there was no uncertainty with respect to the contributions made by the Respondents at the time the Royalty Sharing Agreement was entered into. It is apparent from the definition of the term "Properties" in the Agreement and the wording of paragraphs 6.1 and 6.2 of the Agreement that it was recognized at the time that Messrs. Fawcett and James had previously been reimbursed for their contribution to the Burnt River licences. The fact that the amount of $5,000 was not noted in the Petitioner's financial records does not mean that the work was not done or that the Petitioner was misled. The one page document prepared by Mr. Fawcett set out the business terms of the oral agreement (which was signed by Mr. Austin) reflected that $5,000 was being credited to Mr. James for his work in connection with the Wolverine Group properties.

49 The last of the submissions made by the Petitioner's counsel on this issue is that the Royalty Sharing Agreement was substantively unfair and unreasonable to the Petitioner because it was more lucrative than the royalty arrangement contained in the Gibson Agreement, which was superseded by the Royalty Sharing Agreement. Counsel relies essentially on the facts that the Gibson Agreement had a buyout provision, and that there was a maximum or a cap on the royalty under the Gibson Agreement in the amount of $625,000. However, this submission ignores the aspect of the Gibson Agreement entitling Mr. Gibson to convert the loan into a 20% working interest in the Mt. Spieker property. There is insufficient evidence before the court to enable me to properly compare the Gibson Agreement with the Royalty Sharing Agreement. In addition, while it may be that the Gibson Agreement is more advantageous to the Petitioner than the Royalty Sharing Agreement, it does not necessarily follow that the Royalty Sharing Agreement was substantively unfair or unreasonable to the Petitioner.

50 As I have not determined that the Royalty Sharing Agreement was not fair and reasonable to the Petitioner, there is no basis for me to make an order under s. 150(2) of the ***Business Corporations Act***. I add, however, that if I had concluded that the Royalty Sharing Agreement was unfair or unreasonable to the Petitioner, I would have declined to exercise my discretion under s. 150(2) in favour of the Petitioner for a combination of the following reasons:

1. Although I have concluded that there must have been technical compliance with the provisions of sections 120 and 121 of the ***Company Act***, I am satisfied that the only reason there was not technical compliance was the fault of the Petitioner's solicitors and that no fault lay with the Respondents. I have no doubt whatsoever that Mr. Austin had full knowledge of the nature

and extent of the interest of Messrs. Fawcett and James in the Royalty Sharing Agreement and that, if Devlin Jensen had given the advice that a meeting of directors was required to properly approve the Royalty Sharing Agreement, such a meeting would have taken place and the approval would have been given by Mr. Austin with Messrs. Fawcett and James disclosing their interest and abstaining from the vote. If such a meeting had taken place, the Petitioner could not have applied to set aside the Royalty Sharing Agreement under s. 150(2) of the ***Business Corporations Act*** even if it had been unfair or unreasonable. It would be inequitable, in my view, to allow the Petitioner to benefit from the mistake of its own solicitors.

2. The remedies sought by the Petitioner is to set aside the royalty aspect of the Royalty Sharing Agreement or, in the alternative, to have Messrs. Fawcett and James account for their profit. If I had determined that the Royalty Sharing Agreement was not fair and reasonable to the Petitioner, the order which I would have made in the circumstances of this case is an order that the Royalty Sharing Agreement be set aside to the extent that it was substantively unfair or unreasonable. In other words, I would have permitted the Royalty Sharing Agreement to stand to the extent that it was fair and reasonable. However, the Petitioner chose not to put any evidence before the court as to what type of agreement would have been fair and reasonable in the circumstances.

3. An issue regarding the Royalty Sharing Agreement was identified by the Petitioner in 2001. The Petitioner made the deliberate decision not to take any steps for a period of four years. The explanation provided for the delay was that there was no pressing need to resolve the issue as production from the properties was still some time away and it would have resulted in unnecessary litigation expense. While the Respondents were not able to point to any particular prejudice resulting from the delay, there is no doubt that memories have faded and the Respondents may have been able to recall information of assistance to them if there had not been a delay. In particular, it is possible that they may have been able to recall that there was actually a meeting of directors when the consent resolution relating to the Royalty Sharing Agreement was signed. In raising this possibility, I appreciate that not all meetings of persons who are directors of a company constitute directors meetings.

51 For these reasons, I dismiss the Petition. I make no order as to costs at this time and reserve the matter of costs to a further hearing if counsel so desire.

TYSOE J.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Fawcett v. Western Canadian Coal Corp.*, 2009 BCSC 446

Date: 20090401
Docket: S070436
Registry: Vancouver

2009 BCSC 446 (CanLII)

Between:

David Fawcett

Petitioner

And

Western Canadian Coal Corp., Kevin James and Mark Gibson

Respondents

Before: The Honourable Mr. Justice Pearlman

Reasons for Judgment (In Chambers)

Counsel for the petitioner	J.S. Forstrom
Counsel for the respondent Western Canadian Coal Corp.	W.M. Everett, Q.C.
Counsel f or the respondent Kevin James	G.B. Gomery
Counsel for the Respondent Mark Gibson	F. L. Lamer
Date and Place of Hearing:	September 15-18, 2008 Vancouver, B.C.

Introduction

[1] The petitioner, David Fawcett, applies for a declaration that the royalty provided for in the Royalty Sharing Agreement ("RSA") dated March 31, 2000 and

This is Exhibit "D" referred to in the
Affidavit of Kevin James
sworn before me at West Vancouver
in the Province of British Columbia
this 12 day of August 2016.

A commissioner for taking Affidavits
within the Province of British Columbia

made between Mr. Fawcett and the respondents, Kevin James, Mark Gibson and Western Canadian Coal Corp. ("Western") does not constitute "interest" within the meaning of s. 347 of the ***Criminal Code,*** R.S.C. 1985, Chap. C-46.

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[2] The petitioner is a businessman and was a founder of Western. Mr. Fawcett held the office of president of Western from its incorporation in 1997 until June, 2003. From September, 1999 through 2000, a critical period in this litigation, Mr. Fawcett was a director of Western, and had primary responsibility for the administrative management of the company.

[3] Western was incorporated to engage in the business of exploration and development of coal mining properties in British Columbia.

[4] The respondent, Kevin James, is a professional geologist. He was also a founder of Western and served as a director, with primary responsibility for geological and technical matters, at the time the RSA was negotiated.

[5] The third director of Western at the time the RSA was negotiated was David Austin. He was responsible for fundraising on behalf of Western.

[6] The respondent, Mark Gibson, is a retired businessman who, in 2000, became an investor in Western.

[7] Mr. Gibson brought a separate proceeding, ***Gibson v. Western Canadian Coal Corp. et al.***, Vancouver Registry No. S075135, for declaratory relief respecting the RSA similar to that sought by Mr. Fawcett. The two petitions were heard together.

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[8] I am advised by counsel that Western and Mr. Gibson have settled all of Mr. Gibson's claims arising in Vancouver Registry No. S075135, and that accordingly, no judgment need be rendered in the ***Gibson*** proceeding.

Issue

[9] Under s. 347(1) of the ***Code***, every one who receives payment of interest at a criminal rate commits an offence. Interest is charged at a criminal rate where the effective annual rate or interest exceeds sixty per cent on the credit advanced under an agreement or arrangement.

[10] Under s. 347(2), in order to constitute "interest", a charge must be "paid or payable for the advancing of credit under an agreement or arrangement".

[11] The central issue in this case is whether the royalty payable under the RSA, in substance, constitutes a cost incurred by Western in order to receive credit, and is therefore "interest" within the meaning of s. 347(2).

[12] The answer to this question turns upon the principles governing the application of s. 347 to commercial transactions, and the proper interpretation of the RSA.

Positions of the Parties

[13] The petitioner, supported by Mr. James, submits that in substance, the RSA is in agreement by which they, and Mr. Gibson, assisted Western in acquiring certain coal licenses in return for a shared royalty interest in those licenses. The petitioner

argues that any credit advanced by the investors was incidental to the substance of the transaction. According to Mr. Fawcett, the royalty, when viewed in the context of the RSA as a whole, and its factual matrix, is not a charge "paid or payable for the advancing of credit under an agreement or arrangement", and therefore does not constitute "interest" within the meaning of s. 347 of the ***Code***.

[14] Western submits that the terms of the RFA plainly and unambiguously provide for the grant of a royalty in consideration of the advance of funds in the amounts specified in the RSA. According to Western, the royalty is a charge paid in exchange for credit advanced to it by Mr. Fawcett, Mr. James and Mr. Gibson, and therefore constitutes "interest" within the meaning of s. 347 of the ***Code***. Western argues that in substance, the RSA was nothing more than a loan transaction, and that any further payment of royalties would result in Messrs. Fawcett, James and Gibson receiving interest at a criminal rate.

Background

[15] Western was incorporated in October 1997, as a publicly traded company to raise financing for the exploration and development of a group of coal licenses known collectively as the "Belcourt property". From 1997 to 2000 there was little international demand for coal. Prices were declining, the coal industry in British Columbia was in recession, and there was little investor interest in coal exploration or development. These factors, combined with a remote location and high transportation costs, ultimately led Western to conclude that the development of the Belcourt property was not economically viable.

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[16] Beginning in late 1998, Mr. Fawcett and Mr. James looked for other properties with development potential. In January 1999 Mr. James applied for and acquired coal licenses for the Burnt River property in his own name. Mr. Fawcett and Mr. James each paid one-half of the licence application expenses for the Burnt River licenses.

[17] In April 1999 Mr. James sold the Burnt River licenses to Western for $22,758.43, paid by Western on May 27, 1999. That sum included repayment of the application fees paid by each of Mr. Fawcett and Mr. James, as well as payment to Mr. James for geological work he had performed in researching and applying for the licenses.

[18] In October 1999 Mr. Fawcett and Mr. James identified the West Brazion licenses as another desirable coal exploration opportunity. They discussed with Mr. Austin whether Western should apply for these licenses. Although Western saw these licenses as attractive acquisitions, Western did not have the capital to acquire them.

[19] In November 1999, Mr. James and Mr. Fawcett applied for the West Brazion licenses in the name of Mr. James' spouse, Elizabeth James. The petitioner and Mr. James each contributed one-half of the application fees, which totalled about $13,000. They did so in order to tie up the licenses pending further discussions among Western's directors regarding the potential for acquisition of these licenses by Western.

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[20] The petitioner and Mr. Mr. James contend that in or about mid-February 2000, they granted an option to Western to acquire the West Brazion licenses in exchange for reimbursement of their out-of-pocket expenses for acquiring those licenses, and a one percent royalty on any coal produced from the West Brazion licenses. At that time, the application for those licenses, in the name of Elizabeth James, was still pending before the government of British Columbia.

[21] Western denies that it concluded an agreement with the petitioner and Mr. James for an option on the West Brazion licenses. However, the affidavit evidence of Mr. Fawcett and Mr. James that they negotiated an oral option agreement with Mr. Austin, on behalf of Western, is not contradicted. Mr. Austin swore an affidavit in an earlier proceeding among the same parties, ***Western Canadian Coal Corp. v. David Fawcett, Kevin James, Mark Gibson***, Vancouver Registry, No. L050703. His affidavit forms part of the Chambers Record on this application. Mr. Austin deposed that he negotiated an agreement with Mr. Fawcett and Mr. James by which they granted an option to Western to acquire the West Brazion licenses by reimbursing Mr. Fawcett and Mr. James for their out- of- pocket costs, and granting them a 1 percent royalty interest in any future production from those licenses. Mr. Austin also deposed that he believed that he proposed the royalty rate.

[21] I find that Mr. Fawcett and Mr. James did make an oral agreement with Western, on the terms and for the consideration they allege, to grant Western an option to acquire the West Brazion licences. However, as Mr. Fawcett and Mr. James both acknowledged when cross examined on their affidavits, no written option agreement was ever signed by the parties. On or about February 16, 2000,

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Western's solicitor prepared a consent resolution to authorize the company to enter into the West Brazion option agreement. That resolution, which required the signatures of all three directors, was never signed by Mr. Fawcett. In the result, Messrs. Fawcett, James and Western did not conclude an enforceable option for the West Brazion licenses. The relevance of these events to this proceeding is that they show that in February 2000, Western was interested in acquiring the interests of Mr. Fawcett and Mr. James in the West Brazion coal properties.

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[22] The discussions respecting the option for the West Brazion licences occurred at or about the same time that Messrs. Fawcett, James, and Gibson were engaged in the negotiations with Western that culminated in the RSA. As I discuss below, ultimately British Columbia granted the West Brazion licenses to Mrs. James, and she assigned them to Western.

[23] In late 1999 and early 2000 Mr. James and Mr. Fawcett identified three other promising coal properties at Mount Spieker, Perry Creek, and Hermann, collectively known as the Wolverine licenses.

[24] Mr. Fawcett and Mr. James had discussions with Mr. Austin about whether Western should acquire the Wolverine licenses. Western lacked sufficient capital to pay the licensing fees and was unable to raise financing for this purpose.

[25] In late January 2000, Mr. Austin identified Mr. Gibson as an investor prepared to assist Western in acquiring the Mount Spieker licenses. Mr. Gibson agreed to invest $20,000 to pay for Western's application for the Mount Spieker group of licenses. Mr. Gibson and Western entered into an agreement in writing dated

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January 28, 2000, in which Mr. Gibson's advance was described as a loan, repayable on January 31, 2002. Mr. Gibson acquired an option to convert his investment into a 20% working interest in the Mount Spieker property, and was to be paid a royalty equal to 25 cents per product tonne on the first 2.5 million tonnes of product sold from the Mount Spieker property. Western had the right to buy out the royalty prior to a production decision, at a price based on production of 500,000 tonnes a year for five years, and a discount of 10 per cent.

[26] On February 2, 2000 Western applied for the Mount Spieker coal licenses.

[27] The coal licenses for the Perry Creek and Hermann properties became available in February 2000 after the previous holder of those licenses failed to renew them. In order to acquire those licenses, Western needed an additional $30,000.

[28] There were further discussions among Messrs. Fawcett, James, Austin and Gibson regarding the terms upon which additional money might be provided to Western to fund the applications for the Perry Creek and Hermann licenses.

[29] Mr. Gibson was prepared to contribute $10,000. However, he was concerned that his royalty was restricted under his existing agreement with Western to the Mount Spieker property. He had no control over the order in which the various coal properties might be developed. Mr. Gibson proposed that his contributions and those of Mr. Fawcett and Mr. James should be pooled in respect of the various licenses in exchange for a shared royalty.

[30] In February 2000, the parties orally agreed that Mr. Fawcett and Mr. Gibson would, respectively, provide a further $20,000 and $10,000 to Western to fund its applications for the Perry Creek and Hermann licenses. The parties also agreed that Western would pay a royalty of 1% of the price of coal produced from the West Brazion, Mount Spieker, Perry Creek and Hermann properties to Messrs. Fawcett, James and Gibson. The shared royalty would be allocated among the three investors in proportion to the amounts they had contributed toward the acquisition of all of the coal licenses, including the Burnt River property. An additional $5,000 was credited to Mr. James as compensation for work he performed to identify and assess the Wolverine properties.

[31] In or about February, 2000, Mr. Fawcett prepared a one-page "term sheet" summarizing the business terms of the oral agreement. In the term sheet, the respective contributions of the three investors are described as follows:

Present position with respect to cash and work contributed.

James		Gibson		Fawcett	
West Brazion:	$6,500	Mount Spieker:	$20,000	Wolverine:	$20,000
Burnt River:	$6,000	Wolverine:	$10,000	West Brazion:	$ 6,500
Work(Wolverine)	$5,000			Burnt River:	$6,000

James:	$17,500	21.9%
Fawcett	$32,500	40.6%
Gibson:	$30,000	37.5%
	$80,000	

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[32] Mr. Fawcett later faxed this document to Western's solicitor, Mr. Patrick Devlin, who in June 2000 prepared the RSA, together with consent resolutions of Western's three directors approving the RSA. Each of the three directors signed the consent resolutions, which authorized Western to enter into an agreement by which it agreed to pay a 1% royalty on all coal produced from the West Brazion, Wolverine and Mount Spieker properties, payable on a quarterly basis in arrears, as consideration for Messrs. James, Fawcett and Gibson having "advanced funds" to Western to acquire and maintain those properties.

[33] When the parties signed the RSA, none of the West Brazion, Mount Spieker or Wolverine coal licenses had issued. Western's liability to pay the royalty provided under the RSA remained contingent upon the successful development of a producing coal mine on one or more of the properties that it sought to acquire.

[34] The relevant provisions of the RSA are as follows:

> **WHEREAS:**
>
> A. The Company has made application for and expects to become the beneficial owner of a 100% interest in and to certain coal interests in the West Brazion, Burnt River, Wolverine and Mount Spieker properties set out in Schedule "A" (collectively, the "Properties"),
>
> B. Each of the Investors have assisted the Company in acquiring and maintaining the Properties; and
>
> C. The Company wishes to pay a royalty to the Investors for the Investors' contributions on the terms and conditions herein contained.
>
> **THIS AGREEMENT WITNESSETH THAT** in consideration of the payment by the Purchaser to the Vendors of $1.00 and other good and valuable consideration, receipt of which is hereby acknowledged, the parties mutually covenant and agree as follows:

1. INVESTMENT

1.1 Each of the Investors represent and warrant to the Company that they have advanced funds to the Company for the Properties as follows:

Investor	Amount
Fawcett	**$32,500**
James	**$17,500**
Gibson	**$30,000**

2. CONSIDERATION

2.1 As consideration for advancing the funds, the Company will pay a royalty (the "Royalty") of one percent (1%) of the price (FOBT at Port) for all product tonnes produced from the West Brazion, Mount Spieker and Wolverine coal properties on a quarterly basis to the Investors as set out in Schedule "2.1" attached hereto and forming a material part hereof.

. . .

4. COAL LICENSES

4.1 Upon the Coal Licences being granted and recorded under the Company's name, the Company will maintain the Coal Licenses in good standing with the mining recorder, or such other entity with jurisdiction over such matters.

4.2 In the event that any of the Coal Licenses comprising the Properties are not granted or the Company decides to cancel any applications prior to the Coal Licenses being granted, the Investors will be repaid proportionately immediately upon the funds being returned by the government.

4.3 Any forfeiture of the Coal Licenses shall be by mutual consent of the Parties to this Agreement, and such consent shall not be unreasonably withheld. In the event that the Company forfeits the Coal Licenses, the Company will assign the Coal Licenses to the Investors for a minimum period of 30 days prior to the date the forfeiture is to become effective.

. . .

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6. REPAYMENT OF FUNDS

6.1 Within two years from the date of this Agreement, or upon the Company receiving adequate financing, to be reasonably determined by the Company, whichever date is earlier, the Company will pay back to the Investors all funds advanced by the Investors for the West Brazion, Wolverine and Mount Spieker properties.

6.2 The funds advanced for the Burnt River property have been repaid.

...

9. GENERAL

...

9.4 The terms and provisions herein contained constitute the entire agreement between the parties and will supersede all previous oral or written communications.

Schedule "2.1"

The Royalty will be divided among the parties as follows:

David Fawcett	40.6%
Kevin James	21.9%
Mark Gibson	37.5%

[35] In May 2000, Western negotiated new private placement financing with an investor who required that various liabilities recorded on the company's balance sheet be settled on a shares for debt basis. As a consequence, on June 19, 2000 the directors of Western approved an agreement to issue shares to Messrs. Fawcett, James and Gibson in substitution for certain debts owed by Western to each of the investors. Pursuant to this "shares for debt" settlement, Mr. Fawcett received, on July 11, 2000, 116,667 shares in Western for a total value of $35,000 in settlement

of his advance of $20,000 for the Wolverine coal licenses, and outstanding consulting fees of $15,000.

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[36] As part of the shares for debt settlement, Mr. James received on July 11, 2000, 50,000 shares in Western, for a total value of $15,000, in settlement of outstanding consulting fees of $15,000.

[37] Mr. Gibson received on July 11, 2000, as part of the shares for debt settlement, 100,000 shares in Western for a total value of $30,000, in settlement of the $30,000 he had advanced to Western to assist with its acquisition of the Wolverine Coal licenses.

[38] The substitution of shares for indebtedness did not include the $13,000 paid by Mr. Fawcett and Mr. James for the acquisition of the West Brazion licenses.

[39] On August 11, 2000, the West Brazion licenses were granted to Elizabeth James, who assigned them to Western on November 20, 2000.

[40] The coal licenses for Perry Creek, Mount Spieker and Hermann were granted to Western on August 11, October 30 and December 18, 2000, respectively.

[41] On May 28, 2001 Western paid $6,500 to each of Mr. James and Mr. Fawcett to reimburse them for the expenses they had incurred in acquiring the West Brazion licenses.

[42] On March 21, 2005 Western applied to this court pursuant to s. 150(2) of the ***Business Corporations Act***, S.B.C. 2002, c. 57, for an order setting aside the RSA

on grounds that the directors of the company in 2000 had failed to comply with the provisions of the ***Company Act***, R.S.B.C. 1996, c. 62, then in force respecting disclosure of their interests in the RSA, and that the RSA was not fair and reasonable to Western.

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[43] On February 24, 2006 Mr. Justice Tysoe dismissed Western's petition. Although Tysoe J. found that there was a lack of compliance with the disclosure requirements ss. 120 and 121 of the ***Company Act***, he concluded that the RSA was both procedurally and substantively fair and reasonable to Western: ***Western Canadian Coal Corp. v. Fawcett***, 2006 BCSC 463 at paras. 36-50.

[44] In finding that the RSA was substantively fair and reasonable, Tysoe J accepted the expert evidence adduced before him that the royalty arrangement under the RSA was consistent with Canadian mining industry practice, and was at the low end of the range for similar transactions: ***Western Canadian Coal Corp.,*** at para. 45.

[45] One of the grounds on which Western argued that the RSA was substantively unfair and unreasonable was the potential for the royalty payments under the RSA to exceed the criminal rate of interest under s. 347 of the ***Criminal Code***. Mr. Justice Tysoe addressed that submission at para. 47 of his reasons for judgment in ***Western Canadian Coal Corp.***:

> 47. Similarly, counsel for the Petitioner relies on the fact that it now appears that the return on the Respondents' Investments will exceed the criminal rate of interest under s. 347 of the *Criminal Code*. The Petitioner has filed an expert opinion of an actuary, Mr. Karp, that a payment of $432,000 to the Respondents on January 1, 2007, would

constitute a return in excess of 60% per annum and points to the fact that it is anticipated that a royalty payment in the range of $600,000 will become due under the Royalty Sharing Agreement on January 1, 2007. I am not persuaded by this submission for two reasons. First, the Royalty Sharing Agreement itself does not provide for payments of a return in excess of 60% per annum and s. 347 will only become engaged when and if interest in excess of 60% per annum is paid. If that occurs, the Petitioner will then be entitled to pursue a remedy to limit the payments which it is obliged to make under the Agreement. Second, it is not clear from the evidence that the royalty payments will constitute interest within the meaning of s. 347. While it does appear that some of the advances were in the form of loans to the Petitioner, it also appears that some of the advances were made by Messrs. Fawcett and James to initially acquire the licences in their own names.

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[46] In addressing a submission by Western that the investors had inflated their contributions under the RSA, Tysoe, J said this at para. 48:

48. Counsel for the Petitioner also asserted that the Royalty Sharing Agreement was based on inflated contributions. In this regard, counsel points to the fact that Messrs. Fawcett and James had already been reimbursed for their $12,000 contribution to acquire the Burnt River licences and the fact that there was no notation in the Petitioner's financial records of $5,000 being due to Mr. James for his work in connection with the Wolverine Group properties. Although there was some confusion in the earlier stages of this proceeding resulting from faded memories, I am satisfied that there was no uncertainty with respect to the contributions made by the Respondents at the time the Royalty Sharing Agreement was entered into. It is apparent from the definition of the term "Properties" in the Agreement and the wording of paragraphs 6.1 and 6.2 of the Agreement that it was recognized at the time that Messrs. Fawcett and James had previously been reimbursed for their contribution to the Burnt River licenses. The fact that the amount of $5,000 was not noted in the Petitioner's financial records does not mean that the work was not done or that the Petitioner was misled. The one page document prepared by Mr. Fawcett set out the business terms of the oral agreement (which was signed by Mr. Austin) reflected that $5,000 was being credited to Mr. James for his work in connection with the Wolverine Group properties.

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[47] Western appealed from the order of Tysoe J. dismissing its petition, but later abandoned the appeal.

[48] Western commenced production of coal from licenses subject to the RSA in late 2006 and paid to Mr. Fawcett, Mr. James and Mr. Gibson, the royalties due to them for the company's fiscal quarter ending December 31, 2006.

[49] On March 30, 2007, Western advised Mr. Fawcett that the royalty accruing to him from production in the first quarter of 2007 under the RSA was $164,045.26. However, Western only paid Mr. Fawcett $22,605. Western took the position that the royalty payments it made resulted in Mr. Fawcett receiving an effective annual rate of interest of 60%, and that it would be contrary to s. 347 of the ***Criminal Code*** for Mr. Fawcett to receive any further royalty payment. On the same basis, although Mr. James' proportionate share of the royalty for the first quarter of 2007 under the RSA was $88,487.47, Western, on March 30, 2007, only paid to him $32, 492.00. Western made no royalty payment to Mr. Gibson for the first quarter of 2007, and made no further royalty payments to any of Messrs. Fawcett, James or Gibson after March 30, 2007.

[50] Mr. Fawcett responded by bringing this petition.

[51] The relevant provisions of s. 347 of the ***Criminal Code*** are as follows:

> **Criminal interest rate – s. 347(1)**
>
> **347.**(1) Despite any other Act of Parliament, every one who enters into an agreement or arrangement to receive interest at a criminal rate, or receives a payment or partial payment of interest at a criminal rate, is

(a) guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) guilty of an offence punishable on summary conviction and liable to a fine not exceeding $25,000 or to imprisonment for a term not exceeding six months or to both.

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Definitions – s. 347(2)

(2) In this section,

"credit advanced"

"credit advanced" means the aggregate of the money and the monetary value of any goods, services or benefits actually advanced or to be advanced under any agreement or arrangement minus the aggregate of any required deposit balance and any fee, fine, penalty, commission and other similar charge or expense directly or indirectly incurred under the original or any collateral agreement or arrangement;

"criminal rate"

"criminal rate" means an effective annual rate of interest calculated in accordance with generally accepted actuarial practices and principles that exceeds sixty per cent on the credit advanced under an agreement or arrangement;

...

"interest"

"interest" means the aggregate of all charges and expenses, whether in the form of a fee, fine, penalty, commission or other similar charge or expense or in any other form, paid or payable for the advancing of credit under an agreement or arrangement, by or on behalf of the person to whom the credit is or is to be advanced, irrespective of the person to whom any such charges and expenses are or are to be paid or payable, but does not include any repayment of credit advanced or any insurance charge, official fee, overdraft charge, required deposit balance or, in the case of a mortgage transaction, any amount required to be paid on account of property taxes;

...

Proof of effective annual rate – s. 347(4)

> (4) In any proceedings under this section, a certificate of a Fellow of the Canadian Institute of Actuaries stating that he has calculated the effective annual rate of interest on any credit advanced under an agreement or arrangement and setting out the calculations and the information on which they are based is, in the absence of evidence to the contrary, proof of the effective annual rate without proof of the signature or official character of the person appearing to have signed the certificate.

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[52] Section 347(1) creates two offences. First, it is an offence for anyone to enter into an agreement or arrangement to receive interest at a criminal rate. Whether an agreement violates this provision, which was formerly s. 347(1)(a) of the ***Code***, is determined at the time the agreement is made. There is no violation of this provision where the agreement permits, rather than requires, the payment of interest at a criminal rate: ***Degelder Construction Co. v. Dancorp Developments Ltd.***, [1998] 3 S.C.R. 90 at para. 34.

[53] Because the RSA does not require payment of interest at a criminal rate, this provision of s. 347(1) is not engaged in this case.

[54] The second offence created by s. 347(1) is the receipt of a payment or partial payment of interest at a criminal rate. In ***Degelder***, at para. 34, the court held that this provision, which was formerly s. 347(1)(b), should be broadly construed, and that the question of whether an interest payment violates s. 347(1)(b) is to be determined at the time payment is received.

[55] The leading case on the interpretation of s. 347(1)(b) of the ***Code*** is ***Garland v. The Consumers' Gas Co. Ltd.***, [1998] 3 S.C.R. 112. In that case, the Supreme Court of Canada held that a late payment penalty levied by the respondent gas

utility, and calculated at 5% of the unpaid monthly gas charge, constituted a deferral of payment of a specified amount of money owed for gas services. As such, the late penalty payment was an "interest" charge within the meaning of s. 347. The late payment penalty was therefore subject to the prohibition against receiving interest at a criminal rate.

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[56] In ***Garland,*** the Supreme Court of Canada stated principles respecting the interpretation and application of s. 347, which I summarize below:

> (a) Although s. 347 was enacted to assist in the prosecution of loan sharks, it is clear from the language of the section that it was designed to have a much broader application. Section 347 is most often applied to commercial transactions in civil actions, where borrowers assert the doctrine of illegality in an attempt to avoid or recover interest payments. (paras. 24, 25);
>
> (b) The substance, rather than the form of a charge or expense determines whether it is governed by s. 347. (para. 28);
>
> (c) In order to constitute "interest" under s. 347 a charge must be "paid or payable for the advancing of credit under an agreement or arrangement". (para. 30);
>
> (d) The term "credit advanced" is broadly defined in s. 347(2) and includes not only money, but also the monetary value of any goods, services or benefits advanced, or to be advanced, under an agreement or arrangement. (para. 34);
>
> (e) Under s. 347(2) "an advance" of "the monetary value of any goods, services or benefits" means a deferral of payment. "A debt is deferred – and credit extended – when an agreement or arrangement permits a debtor to pay later than the time at which payment would otherwise have been due.... The substance of such "credit" is a determined amount of money which is payable over time." (para. 35);
>
> (f) Section 347 regulates the relationship between creditors and debtors rather than the relationship between commercial actors in the ordinary course of business. (para. 37);
>
> (g) In order for the deferral of the debt to constitute "credit advanced" there must be "a specified amount owing, and that amount

must actually be due in the absence of an arrangement permitting later payment". (para. 39)

[57] The court in ***Garland*** concluded its analysis of s. 347 on this cautionary note, at para. 52:

> It should be noted however that s. 347 is a deeply problematic law. Some of its terms are most comfortably understood in the narrow context of street-level loan sharking, while others compel a much broader application. The two facets of the statute do not comfortably co-exist. The Court is aware that the present decision may have the effect of increasing the importance of s. 347 in some consumer and commercial transactions. Given the interpretive difficulties inherent in the provision and the volume of civil litigation which it has already spawned, it is with some reluctance that we are legally driven to this conclusion. However, the plain terms of s. 347 must govern its application. If the section is to be given a more directed focus, it lies with Parliament, not the courts, to take the required remedial action.

[58] In ***Canadian Deposit Insurance Corp. v. Canadian Commercial Bank***, [1992] 3 S.C.R. 558 at p. 588, Justice Iacobucci discussed the court's analytical approach where a hybrid transaction involved elements of both debt and equity investment. Iacobucci, J stated that the court must search for the substance of the transaction, and "should not too easily be distracted by aspects which are, in reality, only incidental or secondary in nature to the main thrust of the agreement."

[59] A leading British Columbia case is ***Boyd v. International Utility Structures Inc.***, 2002 BCCA 438, 216 D.L.R. (4th) 139. There, Dr. Boyd lent monies to a manufacturer under a loan agreement, which provided for repayment of the debt, with interest. He also made a royalty agreement with the manufacturer. The Court of Appeal examined the entire relationship, and concluded that in substance, Dr. Boyd

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was a lender, rather than an equity investor. In concluding that Dr. Boyd was a creditor, the court at para.32 observed that his only investment was the money he had advanced, which had been repaid to him with interest. The royalty was expressly given as further consideration for the loan. The court also referred to the "entire agreement" clauses in each of the loan and royalty agreements which provided that the two contracts embodied the entire agreement between the parties, and superseded all prior agreements. In ***Boyd*** at para. 33, the court found that the nature of the royalty was more like interest than a share of profits because, like interest on a loan, it was a charge payable on gross revenue, rather than a distribution of net profits. Finally, the court emphasized, at para. 36, that the question of whether a particular payment is "interest" within the meaning of s. 347(2) will be determined by the circumstances of each case.

[60] Bearing the principles from these authorities in mind, I turn now to the interpretation of the RSA.

Interpretation of the RSA

Principles of Interpretation of Commercial Contracts

[61] The RSA must also be interpreted in accordance with the principles of contract interpretation applicable to commercial agreements. The goal is to discover the objective intension of the parties at the time they made the contract. The most significant tool is the language of the agreement, which must be read in the context of the surrounding circumstances, or factual matrix, prevalent and known to the parties at the time the agreement was made: ***Gilchrist v. Western Star Trucks***

Inc., 2000 BCCA 70 at para. 17. The court will seek an interpretation, from the whole of the contract, that promotes or advances the true intent of the parties at the time they entered into the contract: ***Consolidated Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Company***, [1980] 1 S.C.R. 888 at 901.

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[62] Evidence of the subjective intentions of the parties or of pre-contractual negotiations is not relevant or admissible on the construction of the contract: ***Cadinha v. Chemar Corp.***, [1995] B.C.J. No. 775 (S.C.) at para. 3.

[63] The first stage of the inquiry is to ascertain whether the words of the contract, read in the context of the whole of the contract, and the factual matrix, are capable of bearing only one reasonable meaning. If the words of the contract, viewed objectively, are ambiguous, in the sense that they may bear two or more reasonable interpretations, then the court may consider extrinsic evidence: ***Gilchrist*** at paras. 17 - 18; ***Eli Lilly & Co. v. Novopharm Ltd.,*** [1998] 2 S.C.R. 129 at paras. 54-55.

[64] Where the question of interpretation relates to consideration, extrinsic evidence is admissible to prove the actual consideration where no consideration, or nominal consideration is stated in the contract; where the consideration is ambiguous; or where substantial consideration is stated, but additional consideration exists. However, the additional consideration must not be inconsistent with the terms of the written contract: ***Pao On v. Lau Yiu***, [1979] 3 All E.R. 65 (P.C.) at p. 631; ***Turner v. Forwood***, [1951] 1 All E.R. 746 (C.A.); ***Cadinha v. Chamer Corp.***, [1995] B.C.J. No. 755 at paras. 12-13.

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[65] Finally, while the interpretation of the language of the contract may be informed by the factual matrix, the words of the contract must not be "overwhelmed by a contextual analysis": ***Black Swan Gold Mines Ltd. v. Goldbelt Resosurces Ltd.*** (1996), 25 B.C.L.R. (3d) 285 at para. 19 (C.A.); ***0746727 B.C. Ltd. v. Cushman & Wakefield LePage Inc.***, [2008] B.C.J. No. 641 at para. 18.

The Language of the Contract

[66] The central question is whether the royalty under the RSA is consideration payable by Western for credit received from Messrs. Fawcett, James and Gibson.

[67] The parties called the agreement a "Royalty Sharing Agreement". With one exception, throughout the RSA, the petitioner, Mr. James and Mr. Gibson, are collectively referred to as the "Investors", and Western is referred to as the "Company". The one exception is in the opening paragraph of the RSA, immediately following the recitals, where Western is referred to as the "Purchaser", and Messrs. Fawcett, James and Gibson are described as the "Vendors". That paragraph states that "in consideration of the payment by the Purchaser to the Vendors of $1.00 and other good and valuable consideration … the parties mutually covenant and agree" on the terms and conditions as set out in the body of the RSA.

[68] The recitals state that Western expects to become the beneficial owner of a 100% interest in certain coal interests in the West Brazion, Burnt River, Wolverine and Mount Spieker properties, collectively defined as the "Properties", that each of the Investors have assisted the company in acquiring and maintaining the

Properties, and that the company wishes to pay a royalty to the Investors for their "contributions" on the terms and conditions contained in the RSA.

[69] The petitioner submits that the recitals support his contention that the "contributions" for which the investors were to receive a royalty under the RSA were not limited to the amounts they advanced to Western, but included all of the assistance they provided to Western in acquiring and maintaining the "Properties" as defined in the RSA.

[70] Western argues that in the construction of a contract, the recitals are subordinate to the operative provisions. Consequently, if the operative part of the contract is clear, then it will be treated as expressing the intention of the parties and will prevail over any contrary intention suggested by the recitals: ***Monarch Timber Exporters Ltd. et al. v. Bell et al,*** (1963), 41 D.L.R. (2d) 535 (B.C.C.A.) at para. 18, aff'd, [1964] S.C.R. 374.

[71] By paragraph 1.1 of the RSA, each of the Investors warranted that "they have advanced funds to the Company for the Properties". The amounts shown in paragraph 1.1 for each Investor are $32,500 for Mr. Fawcett, $17,500 for Mr. James, and $30,000 for Mr. Gibson, for a total of $80,000.

[72] Paragraph 2.1 states that "as consideration for advancing the funds", Western will pay a royalty of 1% of the price of all production from the West Brazion, Mount Spieker and Wolverine coal properties on a quarterly basis to the Investors, as set out in Schedule 2.1 to the RSA. Under Schedule 2.1, the proportionate shares of

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the Investors are 40.6% for Mr. Fawcett, 21.9% for Mr. James, and $37.5% for Mr. Gibson.

[73] The amounts said to be "advanced" by each of the Investors in paragraph 1.1, and the proportionate shares of each Investor in the royalty as set out in Schedule 2.1 correspond to the respective contributions of cash and work of each of Mr. Fawcett, Mr. James and Mr. Gibson as set out in Mr. Fawcett's term sheet, to which I have previously referred at para. 31 of these reasons.

[74] By paragraph 4.2 of the RSA, the parties addressed what would happen in the event that any of the coal licenses comprising the Properties were not granted, or if the company cancelled any of the applications before the coal licenses were issued. In that event, the investors were to be "repaid proportionately immediately upon the funds being returned by the government".

[75] This provision had no application to the Burnt River licenses, which Western had already acquired from Mr. James. However, if any of the West Brazion, Mount Spieker or Wolverine coal licenses were not granted, then each Investor would share, in the proportions set out in Schedule 2.1, in any funds returned to Western by the government, whether or not he had "advanced funds" for those particular licenses.

[76] Under paragraph 6.1, Western agreed to pay back "all funds advanced by the Investors for the West Brazion, Wolverine and Mount Spieker properties" within two years from the date of the RSA, or upon the company receiving adequate funding, whichever occurred first.

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[77] Paragraph 6.2 of the RSA provided that the "funds advanced" for Burnt River had been repaid.

[78] In the case of Burnt River, no Investor made any loan to Western. Mr. James had acquired the Burnt River coal licenses and Western had purchased them from him the year before the parties executed the RSA. In the case of West Brazion, it will be recalled that Messrs. Fawcett and James had each paid $6,500 for the license fees, and had applied for those coal licenses in November 1999 in the name of Mrs. James.

[79] Paragraph 9.4 states that the terms and provisions of the RSA "constitute the entire agreement between the parties and will supersede all previous oral or written communications." An entire agreement clause precludes a party to the contract from asserting that any promise or assurance made during the course of negotiations, which is not reflected in the contract, has binding force as a collateral warranty. As Lightman J. held in ***Inntrepreneur Pub Co. v. East Crown Ltd.***, [2000] 41 EG 209; [2000] 3 EGLR 31 (Ch. Div.), the operation of the entire agreement clause deprives what would otherwise constitute a collateral warranty of legal effect.

[80] However, notwithstanding the entire agreement clause in the RSA, it remains necessary to construe the words of the contract relating to consideration for the royalty in the context of the RSA as a whole, and the factual matrix known to the parties at the time of contracting, in order to determine the meaning of the words in dispute.

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[81] Paragraphs 1.1 and 2.1 of the RSA when read in the context of the contract as a whole are ambiguous, in the sense that they are capable of more than one reasonable meaning. One possible meaning of paragraph 1.1, which refers to the Investors having "advanced funds" in the total amount of $80,000, and paragraph 2.1, which describes the royalty as consideration for "advancing the funds", is that the royalty is paid in consideration for loans from the investors to Western in the total amount of $80,000, to be repaid pursuant to paragraph 6.1 not later than two years after March 31, 2000, the effective date of the RSA.

[82] However, the nature of the funds advanced is not specified. None of the funds advanced are described anywhere in the RSA as a loan, nor is there any express provision for payment of interest on the funds advanced for the West Brazion, Wolverine and Mount Spieker properties during the period of up to two years within which the RSA contemplated repayment of those funds.

[83] An "advance" is not necessarily a loan. In ***London Financial Association v. Kelk*** (1884) 26 Ch. Div. 107, Bacon, V.C. held at p. 136:

> The words "advancing" and "lending" may each have a different signification; money may be "advanced" without being "lent"; the relation of borrower and lender does not exist in a great variety of the transactions that are distinctly authorized.

[84] *Black's Law Dictionary,* 7th Edition, defines "advance" as:

> **Advance**, n. **1.** The furnishing of money or goods before any consideration is received in return. **2.** The money or goods furnished.

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[85] The phrase "funds advanced" in paragraph 6.1 includes payments made by Mr. Fawcett and Mr. James directly to the government for the West Brazion license applications. That phrase is repeated in paragraph 6.2 in reference to the Burnt River property. Thus "funds advanced" may also be read to include moneys which were not loaned or advanced to Western, but were expended by Investors to acquire assets that, in the case of Burnt River, had already been transferred to Western, or in the case of West Brazion, Investors intended to transfer or assign to Western.

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[86] Because the language of paragraphs 1.1 and 2.1 is ambiguous, I may consider the language of the recitals in construing the RSA, and may also have regard to extrinsic evidence, including the factual matrix.

[87] Recitals B and C refer to each of the Investors having assisted Western in acquiring and maintaining the Properties, and to Western's wish to pay a royalty to the Investors for their "contributions".

[88] Read with the recitals and in the context of the RSA as a whole, paragraph 1.1 which sets out the amounts of funds "advanced" by each Investor, may be interpreted as a statement of the respective contributions made by each Investor toward Western's acquisition of the various coal licenses. On this reading, paragraph 1.1 serves to establish the basis for the proportionate sharing among the Investors of the royalty payable pursuant to paragraph 2.1.

Factual Matrix

[89] It is also necessary to consider the language of the RSA in the context of the factual matrix. The surrounding circumstances known to the parties at the time when they made the RSA may be briefly stated.

[90] From 1997 through 2000 the British Columbia coal industry was in recession, international demand for coal was weak, and prices were falling. There was little investor interest in the exploration and development of new coal mines.

[91] In this environment, although there were opportunities to apply for coal licenses for properties where established mining companies were not renewing their licenses, Western lacked the capital to do so.

[92] In order to acquire coal licenses for properties with development potential, Western needed the assistance of Messrs. Fawcett, James and Gibson.

[93] Mr. Fawcett and Mr. James identified properties with development potential at Burnt River, West Brazion and Wolverine. In January 1999 Mr. James acquired the Burnt River coal licenses in his own name. Later that year he sold them to Western for a price, paid in full by Western in May 1999, which included reimbursement to Mr. Fawcett and Mr. James of $6000.00 each for application fees paid to the government for those licences.

[94] In November, 1999, Mr. James and Mr. Fawcett applied for the West Brazion licenses in the name of Mrs. James. They each contributed one-half of the

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application fees for those licenses, which totalled approximately $13,000. By mid-February 2000, Western was interested in acquiring the West Brazion licenses.

[95] On January 28, 2000, Mr. Gibson entered into a written agreement with Western by which he agreed to invest $20,000 to pay for Western's application for the Mount Spieker group of coal licenses. Mr. Gibson's agreement with Western included a royalty restricted to the Mount Spieker property. Because Mr. Gibson had no control of the order in which the various properties in which Western was interested might be developed, he proposed to Western that his contributions, and those of Mr. Fawcett and Mr. James, should be pooled in exchange for a royalty in which they would all share in proportion to their various contributions.

[96] At the time they negotiated the RSA, Western, and Messrs. Fawcett, James and Gibson were all aware of the respective contributions made by each of the investors to the acquisition of the various coal licenses. In particular, the parties knew that Mr. James had transferred the Burnt River coal licenses to Western in 1999 and that both Mr. Fawcett and Mr. James had been reimbursed for the application fees for those licenses. The parties were also aware that Mr. James had performed geological assessment work in connection with the Wolverine properties.

[97] Messrs. Fawcett, James and Gibson and Western negotiated an oral royalty sharing agreement in February 2000, which was subsequently reduced to writing as the RSA, and executed in June 2000.

[98] At the time the parties made the RSA, the government of British Columbia had not issued any of the West Brazion, Mount Spieker or Wolverine coal licenses.

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The Consideration for the Royalty

[99] When one reads the words of paragraphs 1.1 and 2.1 in the context of the circumstances known to the parties when they made the RSA, it becomes apparent that when the parties agreed that Western would pay the royalty in consideration of the Investors "advancing the funds", they did not intend to restrict the consideration for the royalty to any credit advanced to Western by the Investors. The amounts contributed by each Investor as set out in paragraph 1.1 also included money expended, and in the case of Mr. James, work performed, in transactions which did not involve a loan by the Investors or a deferral of payment by Western.

[100] In order to determine whether in substance the royalty is a charge payable by Western for credit advanced by the Investors, and therefore constitutes interest within the meaning of s. 247(2) of the ***Code,*** it is necessary to examine the particular contributions which comprised the "advanced funds" attributed to each investor in paragraph 1.1. Those contributions are identified in Mr. Fawcett's term sheet, which captured the business terms of the oral royalty sharing agreement negotiated by the parties in February 2000, and served as the basis for preparation of the RSA.

[101] Mr. James' contribution of $17,500 consisted of $6,500 for West Brazion, $6,000 for Burnt River and $5,000 for work related to Wolverine. Mr. Gibson's contribution of $30,000 consisted of $20,000 for Mount Spieker and $10,000 for Wolverine. Mr. Fawcett's contribution of $32,500 consisted of $20,000 for Wolverine, $6,500 for West Brazion and $6,000 for Burnt River.

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[102] I have already found that the contributions of Mr. James and Mr. Fawcett for Burnt River did not constitute credit. In 1999, Western had purchased the Burnt River coal licenses from Mr. James and paid to him a purchase price which included reimbursement of $12,000 for license application fees, which Messrs. James and Fawcett had previously paid to the government.

[103] The $5,000 allocated to Mr. James for Wolverine was compensation for research and assessment work he performed in connection with the Wolverine properties. This amount formed part of the sum of $17,500, which determined Mr. James' proportionate share of the royalty. It was only after Western had asserted that receipt by the investors of the royalty would violate s. 347 of the ***Code*** that the company tendered payment to Mr. James for the Wolverine work. In late December 2006, when Western made the first royalty payment to Mr. James, it added the sum of $5,000 to Mr. James' proportionate share of the royalty, as payment for the Wolverine work. Mr. James refused to accept payment of the $5,000 on the basis that sum was not owed to him. The services which Mr. James had provided to Western for the Wolverine properties were recognized and compensated through his proportionate share of the royalty. The $5,000 attributed to the Wolverine work formed part of the consideration provided by Mr. James to Western in exchange for his share of the royalty, but involved no advance by him of credit to Western.

[104] At the time the parties made the RSA, Messrs. Fawcett and James had not loaned any money and did not advance any credit to Western in relation to the West Brazion property. The RSA contemplated the acquisition by Western of the West Brazion property. However, Western's acquisition of that property, and its obligation

to pay back $6,500 both to Mr. Fawcett and to Mr. James, was contingent upon the government issuing the coal licenses to Mrs. James, and her assignment of those licenses to the company. Those events did not occur until November 2000. At that point, after Western had acquired the West Brazion property, it was obliged to repay $6,500 to both Mr. Fawcett and Mr. James within two years of the date of the RSA under paragraph 6.1, as "funds advanced" by those Investors for the West Brazion property. In essence, Western, in consideration for its acquisition of the interests of Messrs. Fawcett and James in West Brazion, agreed to pay the royalty and to reimburse those Investors for the application costs they had previously incurred.

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[105] The language of the introductory paragraph to the RSA, which describes Western as the "Purchaser" and refers to Messrs. Fawcett, James and Gibson as the "Vendors", must be given its plain, ordinary meaning, unless to do so would result in an absurdity. This language is consistent with the reality of the transaction governed by the RSA. The terms "Purchaser" and "Vendors" reflect the intention of the parties that Western would acquire potentially valuable coal properties, including West Brazion, for "$1 and other good and valuable consideration". That consideration included payment by Western to the Investors of the shared royalty.

[106] Mr. Gibson had advanced $20,000 to Western in January 2000 to fund Western's application for the Mount Spieker licenses. Mr. Gibson acquired an option to convert his loan into a 20% working interest when the licenses were granted. Western also agreed to pay a royalty to him from coal produced from the Mount Spieker property. Mr. Gibson advanced the $20,000 and Western applied for the Mount Spieker licenses on February 2, 2000, before the parties made the RSA.

[107] By the RSA, Western and the investors agreed to a new royalty that would apply to the West Brazion, Mount Spieker and Wolverine properties, in which all of the investors would share in proportion to their total contributions, in the percentages set out in Schedule 2.1.

[108] By paragraph 9.4, the parties agreed that the terms and provisions of the RSA constituted their entire agreement and superseded all previous oral or written communications. Upon entering into the RSA, the Investors relinquished any rights they each had with respect to particular coal properties in exchange for their shared interest in the royalty payable under the RSA.

[109] Thus, Mr. Gibson gave up his option to acquire a 20% working interest in the Mount Spieker licenses and his former royalty interest in the Mount Spieker properties in exchange for the new shared royalty.

[110] The consideration provided by the investors in return for the shared royalty also included Mr. Fawcett's agreement to advance a further $20,000 to Western to pay for its license applications for the Wolverine group, and Mr. Gibson's agreement to advance a further $10,000 to Western for the same purpose.

[111] Finally, by virtue of paragraph 4.2 of the RSA; Messrs. Fawcett, James and Gibson agreed to share proportionately their respective interests in any part of the moneys which they had contributed and which might be returned by the government to Western if any of the West Brazion, Mount Spieker and Wolverine license applications were withdrawn or not granted.

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[112] Western's objective in making the RSA was in part, to obtain from Messrs. Fawcett and Gibson an advance of funds that it required in order to apply for the Wolverine coal licenses at Perry Creek and Hermann. However, as the petitioner submits, the RSA, and the benefits it provided to Western, depended upon each investor agreeing to share their interests. Their agreement to do so constituted further consideration to Western for granting the shared royalty.

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[113] To adopt Justice Iacobucci's phrase in ***CDIC v. Can. Commercial Bank***, *supra*, the RSA was a hybrid transaction. In addition to making provision in paragraph 6.1 for the advance of some credit to Western, the RSA also involved the acquisition by Western of the Investors' interests in certain coal licenses, the provision of additional funds to Western to assist it in acquiring the Wolverine licenses, and the agreement of the Investors to pool their interests and to accept a royalty they would share in proportion to their respective contributions. The RSA also had elements of a speculative investment. At the time when Messrs. Fawcett, James and Gibson entered into the RSA, they had no assurance that their contributions to Western's acquisition of the West Brazion, Mount Spieker and Wolverine licenses would result in payment of the royalty provided in paragraph 2.1 of the RSA. Their receipt of the royalty was contingent upon Western first acquiring the coal licenses, and then successfully developing a producing coal mine.

Advance of "Credit" Under the RSA

[114] To determine whether the royalty under the RSA is "paid or payable for the advancing of credit under an agreement", it is necessary to analyze the terms of the

RSA to identify the extent to which the Investors granted a deferral of time for payment by Western of specific debt obligations arising under the RSA: ***Garland v. Consumers' Gas Co.***, [1998] 3 S.C.R. 112 at paras. 33, 37-39.

[115] For the deferral of a debt to constitute "credit advanced" under s. 347 of the ***Criminal Code***, there must be a specified amount owing and that amount must actually be due in the absence of an agreement permitting later payment: ***Garland***, para. 39. The royalty must in substance be a cost incurred by Western in order to receive credit.

[116] The only funds which the Investors advanced to Western at the time the parties made the RSA were the $20,000 which Mr. Fawcett contributed, and the $10,000 which Mr. Gibson provided, to enable Western to apply for the Perry Creek and Hermann coal licenses.

[117] Paragraph 6.1 provides that within two years from the date of the RSA, or upon Western receiving adequate financing, whichever occurs first, Western will pay back to the Investors "all funds advanced … for the West Brazion, Wolverine and Mount Spieker properties". This is a provision for the extension of credit by the Investors to Western. The amounts potentially repayable under para. 6.1 exclude the contributions of Messrs. James and Fawcett for Burnt River. Nor in my view do they include the work performed by Mr. James for Wolverine. I have already found that Mr. James extended no credit to Western in connection with that work. The funds potentially repayable to the Investors under paragraph 6.1 therefore do not

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correspond with the amounts identified as "advanced funds" in paragraph 1.1 of the RSA, which total $80,000.

[118] Western's obligation to repay any part of the "funds advanced" for the West Brazion, Wolverine, and Mount Spieker properties under paragraph 6.1 was, at the time when the parties made the RSA, contingent upon it obtaining those licenses. All of the license applications were still pending when the parties executed the RSA in June 2000. Under paragraph 4.2, if any of the coal licenses were not granted, or if Western withdrew any of the applications, the Investors were to be repaid proportionately upon the government returning the license application fees to Western. If a coal license was not granted, or an application was withdrawn by Western, the amount advanced by an Investor to Western for that license would not be repaid to the Investor under paragraph 6.1. Instead Western, upon receipt of the refunded application fees, was required to repay those fees to the Investors proportionately under paragraph 4.2 of the RSA.

[119] As counsel for the petitioner submits, this provision served to preserve the shared interest of the Investors, not only in the royalty, but also in the pooled value of their contributions toward Western's acquisition of the coal licenses.

[120] Paragraph 6.1 of the RSA does reveal an intention to extend the credit to Western. However, the deferral of time for payment applied only to part of the $80,000 of "advanced funds" described in paragraph 1.1 of the RSA. Of that amount, only $50,000 consisted of money actually paid by Investors to Western either before or at the time the parties made the RSA. Mr. Gibson paid a total of

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$30,000 and Mr. Fawcett paid $20,000 to Western for application fees for the Mount Spieker and Wolverine licenses.

[121] Until the Mount Spieker and Wolverine licenses issued to Western, the company had no more than a contingent obligation to repay any part of the $50,000 advanced by Messrs. Fawcett and Gibson under paragraph 6.1 of the RSA. If the government rejected the license applications, or Western withdrew them, then Western's repayment obligation was governed by paragraph 4.2, which mandated the proportionate sharing of the application fee refund among the Investors.

[122] The Mount Spieker and Wolverine licenses did not issue to Western until the late summer and fall of 2000. By July 11, 2000, Western had implemented the shares for debt settlement. Both Mr. Fawcett and Mr. Gibson received shares in Western, extinguishing of any debt obligation related to their advance of funds for the Mount Spieker and Wolverine license applications. In the result, there was, at most, an extension of credit under paragraph 6.1 for moneys advanced for the Mount Spieker and Wolverine license applications from March 31, 2000, the effective date of the RSA, to July 11, 2000.

[123] However, Western's obligation to repay these funds under paragraph 6.1 was contingent upon the province granting the licenses. Because Western settled any liability to repay the funds used for the Mount Spieker and Wolverine license applications by issuing shares before those licenses were granted, it is at least arguable that no credit was ever advanced by the Investors to Western with respect

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to the $50,000 that Messrs. Fawcett and Gibson provided to Western for the Mount Spieker and Wolverine license applications.

[124] Similarly, Western's obligation to reimburse Messrs. Fawcett and James for the $13,000 that they had paid for West Brazion license application fees was a contingent liability when the RSA was made. However, that liability became a debt subject to the credit provisions of paragraph 6.1 of the RSA when Messrs. Fawcett and James, through Mrs. James, assigned the West Brazion coal licenses to Western on November 20, 2000. There was an extension of credit to Western for reimbursement of the moneys which Messrs. Fawcett and James paid for the West Brazion license applications from November 20, 2000 until May 28, 2001 when Western reimbursed $6,500 to each of Mr. James and Mr. Fawcett.

[125] The agreement of the Investors to advance credit to Western was incidental to the main purpose of the RSA. In substance, the RSA was an agreement by which the Investors assisted Western in acquiring potentially valuable coal licenses in consideration for a shared royalty interest in those licenses. The royalty was not in substance a cost paid by Western in order to receive credit. Rather, the royalty was the principal consideration flowing from Western to the Investors for their contributions to Western's acquisition of the coal licenses. The Investors' contributions included their agreement to pool their interests, the transfer of the West Brazion the coal licenses, the provision of funds to enable Western to apply for coal licenses, the payment of coal license application fees, and work relating to the assessment of the Wolverine properties.

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[126] When the Investors contributed funds to assist Western in acquiring coal licenses, they were taking the risk that the properties might never go into production. Although they stood to earn a handsome return in the event that Western was able to develop producing coal mines, they had no assurance that any of the properties would go into production. This case is distinguishable from ***Boyd v. International Utility Structures Inc.*** 2002 BCCA 438, where there was no consideration for the royalty other than the loan, and where the royalty was expressly stated to be in furtherance of the loan.

[127] Here, although the royalty under the RSA is payable on all production, the Investors, at the time they entered into the RSA, were taking the risk that Western might not develop any of the coal licenses.

Conclusion

[128] I have found that in substance, the royalty under the RSA is not a cost incurred by Western to receive credit. I therefore grant the declaration sought by the petitioner that the royalty provided for in the Royalty Sharing Agreement dated March 31, 2000 and made between Mr. Fawcett and the respondents, Kevin James, Mark Gibson and Western, does not constitute "interest" within the meaning of s. 347 of the ***Criminal Code,*** R.S.C. 1985 Chapter-46.

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Costs

[129] The costs of this proceeding will follow the event.

Pearlman J.

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