

In the Court of Appeal of Alberta

**Citation: Remington Development Corporation v Canadian Pacific Railway Company,
2025 ABCA 244**

Date: 20250702
Docket: 2201-0274AC
2201-0276AC
Registry: Calgary

Between:

Remington Development Corporation

Respondent/Cross-Appellant

- and -

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

Appellants/Cross-Respondents

The Court:

**The Honourable Justice Thomas W. Wakeling
The Honourable Justice Jolaine Antonio
The Honourable Justice Kevin Feth**

**Memorandum of Judgment of the Honourable Jolaine Antonio
and the Honourable Justice Kevin Feth**

**Concurring and Dissenting Memorandum of Judgment of the
Honourable Justice Thomas W. Wakeling**

Appeal from the Decisions by
The Honourable Justice A. Woolley
Dated the 20th day of October, 2022
(2022 ABKB 692, Docket: 0801 03152)

Dated the 30th day of August, 2023
(2023 ABKB 493, Docket: 0801 03152)

Dated on the 20th day of October, 2023
(2023 ABKB 591, Docket: 0801 03152)

Memorandum of Judgment

The Majority:

I. Introduction

[1] The respondent Remington Development Corporation (Remington) entered into three agreements to purchase contiguous parcels of land in downtown Calgary from the appellant Canadian Pacific Railway Company (CPR). Two of the transactions completed. The third did not. CPR asserted the land for that transaction was not surplus to its operational requirements and, therefore, the agreement did not require it to be sold. CPR sold the land instead to the appellant Alberta on different terms.

[2] The trial judge determined CPR breached the terms of its agreement with Remington by not proceeding with the sale of the third parcel of land. She also determined Alberta had induced that breach. Applying a lost profits analysis, she held CPR and Alberta jointly and severally liable to Remington for damages in the amount of \$165,166,431 plus interest. CPR and Alberta appeal that decision. Remington cross-appeals, arguing it should also be entitled to punitive damages.

[3] For the reasons that follow, the appeal is allowed, the cross-appeal is dismissed, and a new trial is ordered.

II. Background

[4] As early as 1996, CPR began exploring the potential real estate value of lands it owned along its main rail line through the southeastern part of downtown Calgary. In 2000, it engaged in discussions with Remington, an Alberta-based real estate development company, without result.

[5] In 2002, CPR again approached Remington about the land. It presented a consultant's report extolling the land's "outstanding development potential" for "a mix of residential and commercial uses". CPR also provided a property information summary that broke the land down into three parcels: the "Ninth Avenue Parcel" being an unsubdivided 5.56 acres located between 9th Avenue S.E. and the railway tracks; the "Tenth Avenue Parcel" being an unsubdivided 6.11 acres located between the railway tracks and 10th Avenue S.E.; and the "Former Interlink" parcel being 12.136 acres of already-subdivided land located primarily between 10th Avenue S.E. and 11th Avenue S.E. In November 2002, Remington and CPR entered into three agreements for the purchase and sale of the land: one for the Ninth Avenue lands, the second for the Tenth Avenue lands, and the third for the Interlink lands.

[6] The Interlink agreement and the Ninth Avenue agreement closed without incident. The Tenth Avenue agreement did not close. It is the subject of this appeal.

[7] The lands referenced in the Tenth Avenue and Interlink agreements differed somewhat as compared to the descriptions provided by CPR in the property information summaries. One change

moved a 1.116-acre block of land to the east of 6th Street S.E., referred to as Lot 4, from the Interlink parcel to the Tenth Avenue agreement. Unlike the rest of the land referenced in the Tenth Avenue agreement, the Lot 4 land was already subdivided.

[8] At the time of the agreements, the Tenth Avenue lands still had tracks and storage facilities on it, as part of CPR's B Yard. CPR continued using those facilities for maintenance, switching and shunting until it relocated B Yard in 2010-2011.

[9] Remington was aware that the Tenth Avenue lands were in active use and that the only lands that could be transferred under the Tenth Avenue agreement were those found by CPR, in its discretion, to be "surplus to its operational requirements". That awareness was expressed in article 2.02 of the agreement:

... The Purchaser acknowledges that the Existing Parcel is rail right-of-way lands and that the only portion of the Existing Parcel that the Vendor is capable of selling to the Purchaser is that portion of the Existing Parcel which the Vendor determines, in its discretion but in accordance with the *Railway Act*, to be surplus to its operational requirements...

"Existing Parcel" was defined to include four parcels of land: a large unsubdivided tract of land to the west of 6th Street S.E.; a small portion of 6th Street S.E.; and the two already-subdivided parcels of land to the east of 6th Street S.E. that made up Lot 4.

[10] CPR's ability to determine the lands to be transferred under the Tenth Avenue agreement was also referenced in other parts of the agreement:

- The opening paragraph described the lands to be transferred as the 5.22 acres identified in Schedule A, "or such greater or lesser area as determined in accordance with Article 6.05... (herein called the 'Subdivided Lands' or the 'Lands')".
- Article 6.05 stated CPR had until March 31, 2003 to determine "that it is lawfully entitled to make application to subdivide the Subdivided Lands from the Existing Parcel" and to determine "the boundaries of Subdivided Lands", failing which the agreement would be "null and void" and Remington would be entitled to its deposit back.
- Article 2.02 also referenced CPR's "determination of the area of the Lands in accordance with Article 6.05", requiring that upon that determination, CPR "shall cause the Alberta land surveyor preparing the tentative subdivision plan for the Lands to certify as to the number of acres" in each part of the lands.

- Article 6.08(c) reiterated CPR's discretion, stating, "the determination of the area of the Lands included in the tentative plan of subdivision shall be in the Vendor's absolute discretion as it relates to which portion of the Existing Parcel is surplus to the Vendor's existing railroad operations".

[11] Although Remington did not have a specific plan for developing the Ninth Avenue, Tenth Avenue and Interlink lands, it did plan on creating a comprehensive development.

[12] In October 2003, April 2004 and August 2004, CPR requested extensions of the deadline set out in article 6.05 of the Tenth Avenue agreement, asserting CPR had not yet been able "to determine that it [was] lawfully entitled to make application to subdivide the lands to be acquired". Remington agreed to the requested extensions.

[13] In November 2004, CPR applied through its consultant to the City of Calgary to subdivide approximately 5.1 acres of the unsubdivided portion of the Tenth Avenue lands – *i.e.*, not including the already subdivided Lot 4. The application stated it was "for Remington Development Corporation to acquire surplus railway lands for use with their adjacent lands after further designs are complete" and that "rail tracks, sheds and trailer" were "to be removed". CPR's manager of real estate and marketing told Remington's project manager at the time, "My only concern is that CP operations has not given final approval to remove all of the tracks to leave just four main line tracks". However, he noted that CPR's consultant had "confirmed that the plan could be amended if the final configuration had to be adjusted somewhat to allow for additional tracks".

[14] In December 2004, despite having submitted the subdivision application, CPR requested a further extension of the deadline set out in article 6.05, again asserting CPR had "not yet been able to determine that it is lawfully entitled to make application to subdivide the lands to be acquired... from the existing parcel". Remington agreed to the requested extension.

[15] In February and November 2005, CPR submitted two further revised subdivision applications in relation to the Tenth Avenue lands, each increasing somewhat the land included in the proposed subdivision. Neither included the already subdivided Lot 4 lands. Again, despite having submitted these revised subdivision applications, CPR continued to request extensions of the article 6.05 deadline, and Remington continued to agree to those extensions. The final extension was granted in June 2006, extending the deadline to June 15, 2007.

[16] Unbeknownst to Remington, by early fall 2006, Alberta had approached CPR about purchasing the Tenth Avenue lands for a higher price than Remington had agreed to pay. By the end of October 2006, CPR and Alberta had determined the basics of the transaction, including that CPR would be able to continue to use the lands for a period of time after the sale to Alberta.

[17] In November 2006, the City approved the subdivision application for the Tenth Avenue lands. CPR then told Remington it needed to put the subdivision application on hold to pursue unrelated matters of importance with the City.

[18] In early December 2006, Remington attended a meeting with CPR at its offices. A representative of Alberta was present. CPR advised Remington it had decided to sell the Tenth Avenue lands to Alberta. Remington objected, saying, “We have a contract”. CPR responded that in its view it had “an out”, referencing its discretion to declare the lands as surplus, and noting, “the lands are not surplused”. CPR’s representative told Remington to “get over it”.

[19] In April 2007, CPR and Alberta entered into two binding agreements relating to the Tenth Avenue lands.

[20] On June 5, 2007, Remington wrote to CPR inquiring whether it had been able to fulfil the requirements of article 6.05. If not, Remington stated, “we look forward to receiving an extension letter similar to that forwarded on June 15, 2006”.

[21] On June 15, 2007, the day the extension expired, CPR responded, advising Remington it had “determined that no portion of the Existing Parcel is currently surplus to [its] existing railroad operations nor is that situation to change in the immediate future”. It referenced the discretion described in article 6.08(c). It explained CPR “would have to have secured an alternate location to allow for the operations that are currently being carried out on the Existing Lands to be expediently carried on elsewhere” and that it had not done that. CPR stated it was not prepared to extend the article 6.05 deadline any further. It returned Remington’s deposit.

[22] The agreement between CPR and Alberta closed in December 2007.

[23] Remington filed a statement of claim against CPR for breaching the Tenth Avenue agreement. It later amended its statement of claim to add a claim against Alberta for inducing breach of contract.

[24] By reasons dated October 20, 2022, the trial judge held CPR had breached the Tenth Avenue agreement, Alberta had induced that breach, and CPR and Alberta were liable to Remington. The trial judge quantified damages by assessing lost profits, resulting in liability for \$163,707,836 plus pre-judgment interest, subject to resolution of land acquisition costs relating to Lot 4: ***Remington Development Corporation v Canadian Pacific Railway Company***, 2022 ABKB 692 [*Trial Decision 1*]. By subsequent reasons dated August 30, 2023, the trial judge resolved the land acquisition costs issue and adjusted Remington’s loss to \$165,166,431: ***Remington Development Corporation v Canadian Pacific Railway Company***, 2023 ABKB 493 [*Trial Decision 2*].

[25] CPR appeals, arguing the trial judge erred in concluding it had breached the Tenth Avenue agreement. Alberta appeals, arguing the trial judge erred in concluding it had induced CPR to breach the Tenth Avenue agreement. Both appellants argue the trial judge erred in assessing damages and interest.

[26] Remington cross-appeals, arguing the trial judge erred by not awarding it punitive damages.

III. CPR's appeal on liability: Breach of contract

A. Decision below

[27] The subdivision application process referred to in the provisions excerpted above – the opening paragraph, articles 2.02, 6.05 and 6.08(c) – suggested to the trial judge that “the land actually for sale to Remington” was to be determined in the following way (*Trial Decision 1* at para 75):

a) CPR determines in its absolute discretion how much land is surplus to its operational requirements (Article 2.02 and 6.08(c)); b) it surveys the land for preparation of a tentative subdivision plan based on that determination (Article 2.02); c) it brings the subdivision application, thereby showing that it has determined that it is lawfully entitled to make such an application (Article 6.05); d) the amount of land included in the subdivision application in Article 6.05 is the amount of land available for sale to Remington (Opening Paragraph).

Or, as explained later (*Trial Decision 1* at para 101):

CPR had the discretion to determine if, or how much of, the lands in the Existing Parcel were surplus to operational requirements. Once it had done so it would survey the lands for a tentative plan of subdivision and submit the subdivision application for approval. Doing so would conclude the exercise of its surplussing discretion, and Remington could move forward with that understanding to begin the process of developing the lands.

[28] Thus, on the trial judge's interpretation, the subdivision application was to be the ultimate determinant of the land to be sold and also the “process for communicating” that CPR had made its surplus decision: *Trial Decision 1* at para 76.

[29] She held the fact that “CPR participated in and authorized the original subdivision application... *prima facie* demonstrate[d] that the lands included in the first subdivision application had... been determined to be surplus to operating requirements by CPR and were available for sale to Remington once the subdivision approval had been granted”. She concluded, “Contractually, those lands were surplus”: *Trial Decision 1* at paras 125–126.

[30] CPR did not dispute it surveyed the land and submitted the subdivision applications. However, it maintained throughout that it had not determined any of the Tenth Avenue lands were surplus. It emphasized that it continued until 2010-2011 to use B Yard, located on the Tenth Avenue lands, for train maintenance, switching and shunting.

[31] The trial judge recognized the testimony of CPR’s witnesses in this regard raised “questions about the legitimacy” of her view that “the first subdivision application [was] an exercise of CPR’s contractual discretion to declare the 10th Ave Lands surplus”. She had concerns about the credibility of their testimony. So, she went on to review the documentary evidence to determine whether CPR had “in fact determined” the lands were surplus: *Trial Decision 1* at paras 129–130, 166–168, 239. The point of that review, she said, was “to assess whether it was plausible, in light of what had been said and done internally at CPR to that point, for someone in Real Estate to understand” that CPR had made that determination: *Trial Decision 1* at para 170. She concluded it was plausible. She held CPR “effectively” had determined B Yard was surplus by the time the first subdivision application was submitted: *Trial Decision 1* at paras 228, 232, 233. CPR’s communication in November 2004 that it had not yet finally approved removal of all the tracks, and its extension requests thereafter, did not “negate [its] intention to declare a portion of the 10th Ave Lands surplus, as evidenced by the November 2024 subdivision application”: *Trial Decision 1* at paras 234–252.

[32] Having determined that the first subdivision application defined the lands to be conveyed and evidenced the necessary surplus decision, the trial judge identified one remaining complexity: “what to do with” Lot 4. As outlined above, Lot 4 was part of the Existing Parcel as defined in the agreement, meaning it was part of the lands that could be conveyed if declared surplus. However, the trial judge noted it was “possible” Lot 4 was already subdivided. It was not included in any of the subdivision applications. The trial judge explained the problem: “if [Lot 4] was already subdivided, it could not be declared surplus” through the subdivision process she had identified. She reserved her decision “on whether [Lot 4] ought to be added to the 5.1 Acres of Subdivided Lands” addressed in the first subdivision application “as property that ought to have been sold to Remington”: *Trial Decision 1* at paras 106, 261–266.

[33] The trial judge concluded that as of November 2006, when the City approved the subdivision application, there should have been no uncertainty with respect to whether closing would occur. While various documents needed to be finalized, in her view, the agreement “could have closed in months if not weeks”: *Trial Decision 1* at para 270. Therefore, when CPR communicated in December 2006 that it no longer intended to be bound by the agreement, CPR breached the agreement. The trial judge explained, “the conditions had been substantively satisfied, and Remington was ready and able to perform, [so] CPR had no basis for walking away”: *Trial Decision 1* at paras 299–304.

[34] Months later, after receiving submissions on the Lot 4 issue, including confirmation that Lot 4 was already subdivided, the trial judge issued a second set of reasons. She found she was *functus officio* on questions about “the structure of the 10th Ave Agreement in relation to CPR’s discretion to declare the lands surplus”, because she had already decided those questions. She noted that this created “some complexity”, because the reserved Lot 4 issue also related “to the interpretation and application of the” agreement. Nevertheless, she was satisfied the Lot 4 issue was “discrete, and additive to the decided issues”: *Trial Decision 2* at paras 31, 32.

[35] The trial judge held it was clear the parties intended Lot 4 to be within the lands that could be sold under the Tenth Avenue agreement if declared surplus, but again identified the difficulty: the subdivision application process by which CPR was to make and communicate its surplus determination could not apply to lands already subdivided: *Trial Decision 2* at paras 67, 68, 71, 72. She concluded the parties had failed to draft a mechanism by which already-subdivided lands could be declared surplus: *Trial Decision 2* at paras 68, 77.

[36] “Without considering every provision of the 10th Ave Agreement,” the trial judge found two implied terms seemed “relatively obvious”. As such, she implied the language italicized below into articles 6.05 and 6.08(c) to allow already-subdivided lands to be included other than through the subdivision process (*Trial Decision 2* at paras 79, 80):

6.05 By March 31, 2003, the Vendor shall have determined that it is lawfully entitled to make application to subdivide the Subdivided Lands from the Existing Parcel and shall have made a determination of the boundaries of Subdivided Lands such that the depth of Lot 2 shall be no less than one hundred (100) feet *and such that, if the Vendor has determined that any previously subdivided lands within Lot 1 are surplus to existing railroad operations, then the boundaries of the Subdivided Lands shall include that part of Lot 1 previously subdivided.*

6.08(c) the determination of the area of the Lands included in the tentative plan of subdivision, *and the determination of the area of the Lands that have already been subdivided,* shall be in the Vendor's absolute discretion as it relates to which portion of the Existing Parcel is surplus to the Vendor's existing railroad operations;

[37] The trial judge then relied on her prior finding that CPR had, in fact, determined B Yard was surplus to its operational requirements prior to the first subdivision application to conclude Lot 4 was included in the lands CPR was obliged to transfer to Remington under the agreement: *Trial Decision 2* at para 83.

B. Submissions

[38] CPR argues the trial judge erred by interpreting the Tenth Avenue agreement without considering Lot 4. It says she needed to consider all the lands referenced in the agreement, not just the unsubdivided lands. Had she considered Lot 4, she would have realized a subdivision application could not be determinative of whether a surplus decision had been made, because Lot 4 was already subdivided. By deferring consideration of Lot 4 to her second decision, the trial judge could no longer alter her interpretation and was forced, instead, to imply terms to make the contract work. CPR also argues the trial judge improperly implied those terms, because she applied too low a standard, and the implied terms were never pled or articulated by Remington.

[39] CPR says the interpretation adopted by the trial judge resulted in commercial absurdities, including because it made the agreement impossible to perform. It emphasizes CPR was in no

position in 2006 to deliver vacant possession of the Tenth Avenue lands to Remington, as contractually mandated, since those lands were still being used for B Yard. It also highlights that the first subdivision application, which according to the trial judge's interpretation defined the lands to be conveyed, was for only 5.1 acres, whereas the third subdivision application approved by the City was for 7.4 acres.

[40] Remington says the Lot 4 decision was “only about filling in a line item to arrive at a damage award” and is no basis to attack the trial judge's interpretation of the Tenth Avenue agreement. It notes CPR did not raise Lot 4 at trial. Remington argues the trial judge applied the correct test for implying terms.

[41] Ultimately, Remington submits the trial judge accepted the interpretation advocated for by CPR at trial, that both a surplus determination and a subdivision approval were required, but simply found as a fact that both conditions were met. Remington says CPR's “real complaint” is about how the trial judge weighed the evidence, which is a matter that is owed deference on appeal.

C. Standard of review

[42] Contractual interpretation is generally treated as a question of mixed fact and law and reviewed on a deferential standard of palpable and overriding error. However, in the “rare” case where an extricable question of law is identified – such as the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor – those questions are reviewed for correctness: *Chemtrade Electrochem Inc v Superior Plus Corporation*, 2025 ABCA 31 at para 22; *Earthco Soil Mixtures Inc v Pine Valley Enterprises Inc*, 2024 SCC 20 at para 28; *Corner Brook (City) v Bailey*, 2021 SCC 29 at para 44; *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 at paras 50-54 [*Sattva*].

D. Analysis

[43] The goal of contractual interpretation is to determine the objective intent of the parties at the time of contracting. To do that, “a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract” [Emphasis added]: *Sattva* at paras 47, 49; *IFP Technologies (Canada) Inc v EnCana Midstream and Marketing*, 2017 ABCA 157 at para 79 [*IFP*].

[44] The trial judge recognized these principles: *Trial Decision 1* at para 50, 51. However, in our view, she failed to properly apply them.

[45] On the trial judge's interpretation, submission of a subdivision application was the ultimate determinant of the lands to be transferred under the Tenth Avenue agreement. It showed CPR had decided the subject lands were surplus and had determined it was lawfully entitled to apply for

subdivision; it defined the boundaries of the lands available for transfer; and it communicated CPR's decision: *Trial Decision 1* at paras 75, 101.

[46] After arriving at that interpretation, she noted that the "status" of Lot 4, "i.e. whether CPR was contractually obligated to sell that land to Remington", remained unclear because although it was not included in the subdivision application, it was "possible that [it] did not require subdivision": *Trial Decision 1* at paras 106, 115. She nonetheless concluded that even if Lot 4 were already subdivided, it would not affect her interpretation of the Tenth Avenue agreement, because the agreement had been "negotiated and drafted on the premise that all of the 10th Ave Lands needed to be subdivided prior to sale, so that Article 2.02, Article 6.05 and the Opening Paragraph could operate coherently for all of them": *Trial Decision 1* at para 263.

[47] She seems to have based the latter conclusion, at least in part, on an internal memo issued shortly before the execution of the Tenth Avenue agreement, in which a CPR employee described the Tenth Avenue lands as unsubdivided: *Trial Decision 1* at para 262. This evidence was not relevant to the interpretation of the agreement. The memo was incorrect because Lot 4 was already subdivided. But the doctrine of mistake was not argued and the subjective understanding of one party's employee does not inform what a reasonable person would objectively have understood from the words of the contract and the surrounding circumstances. Evidence of surrounding circumstances is "objective evidence of the background facts at the time of the execution of the contract", being "knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting", not evidence of one party's subjective intention or understanding: *Sattva* at paras 47–48, 57–59; *IFP* at paras 79, 83, 85, 87; *SA v Metro Vancouver Housing Corp*, 2019 SCC 4 at para 30; *Heritage Property Corporation v Triovest Inc*, 2025 ABCA 64 at para 14.

[48] The trial judge did not invite further submissions on how the surplus and subdivision conditions should be interpreted given her uncertainty around the status of Lot 4. Instead, she reserved and invited submissions on the discrete issue of whether Lot 4 "ought to be added... as property that ought to have been sold to Remington": *Trial Decision 1* at paras 260–266.

[49] The parties' further submissions clarified that Lot 4 had been previously subdivided. In *Trial Decision 2*, the trial judge accepted that "at the time they negotiated the 10th Ave Agreement both Remington and CPR knew that Lot 4 was subdivided." She considered whether she could reopen her interpretation of the contract in light of this information. She concluded she was *functus officio* on the issues that had been decided in *Trial Decision 1* and therefore was prohibited from reconsidering her interpretation of the Tenth Avenue agreement. It was only open to her to consider the discrete reserved issue: *Trial Decision 2* at paras 29–34, 38.

[50] This sequence of events meant that the trial judge failed to properly consider the contract as a whole, and in particular the fact that part of the Existing Parcel was already subdivided, when interpreting the Tenth Avenue agreement. In the circumstances of this case, the trial judge's error was not merely methodological; it had concrete effects.

[51] According to *Trial Decision 1*, the lands that were surplus and therefore conveyable were defined and communicated by the application for subdivision. Lot 4 did not require subdivision, so no subdivision application defined its boundaries. Yet according to *Trial Decision 2* it, too, was surplus and conveyable. In the result, a subdivision application was necessary and sufficient to make the majority of the lands surplus and conveyable, but was unnecessary for Lot 4. These seemingly contradictory decisions arose from a piecemeal consideration of the contract.

[52] The piecemeal approach left an important question unanswered: how could Lot 4, which was included as part of the Existing Parcel available for transfer, be transferred if the terms of the agreement, as interpreted by the trial judge, required a subdivision application to define the transferred lands?

[53] To address this conundrum, the trial judge implied terms. The terms she implied qualified the interpretation she had developed in her first decision so that it did not apply to Lot 4. She determined that, in the case of already-subdivided lands, a subdivision application was not necessary. To transfer those lands, it would be enough for CPR to simply “determine” those lands were “surplus to existing railroad operations”: *Trial Decision 2* at para 80.

[54] Implied terms may be inferred based on the presumed intention of the parties where the term is necessary to give “business efficacy” to the contract or where it otherwise meets the “officious bystander” test as a term which the parties would say, if asked, that they had obviously assumed: *AG Clark Holdings Ltd v HOOPP Realty Inc*, 2013 ABCA 101 at para 33; *MJB Enterprises Ltd v Defence Construction (1951) Ltd*, [1999] 1 SCR 619 at para 27, 170 DLR (4th) 577; *Canadian Pacific Hotels Ltd v Bank of Montreal*, [1987] 1 SCR 711 at 775, 40 DLR (4th) 385. The officious bystander test was articulated in *Shirlaw v Southern Foundries (1926) Ltd*, [1939] 2 KB 206 at 227 (CA) as follows:

... *Prima facie* that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common “Oh, of course!”

See also: *Benfield Corporate Risk Canada Limited v Beaufort International Insurance Inc*, 2013 ABCA 200 at para 106.

[55] The trial judge stated, “[b]usiness efficacy... is not... the reason to imply a term here”: *Trial Decision 2* at para 79. The trial judge also did not expressly assert reliance on the officious bystander test. Instead, she said “the point [was] to give effect to the clear intentions of CPR and Remington given the words of the contract they drafted” by implying two terms that “seem relatively obvious”: *Trial Decision 2* at para 80. “Relatively obvious” is not the legal standard for implying a term based on presumed intention. Though the trial judge referenced authorities on

implying contractual terms, she applied a different test with a lower standard. In so doing, she erred in law.

[56] The aim of giving effect to the parties' intentions, rather than to an erroneous recording of those intentions, would be relevant if this were a case of mistake and rectification: *Canada (Attorney General) v Fairmont Hotels Inc*, 2016 SCC 56 at para 12. But the doctrine of mistake and rectification formed no part of the parties' positions or of the trial judge's analysis. Further, it is notable that neither party proposed the terms she crafted: *Servus Credit Union Ltd v Crelogix Acceptance Corporation*, 2020 ABCA 220 at paras 39-41.

[57] Even apart from Lot 4, the interpretation reached in *Trial Decision 1* resulted in problems with the size and boundaries of the parcel to be conveyed. The trial judge stated the agreement did not "explicitly contemplate multiple surplus declarations, or multiple applications for subdivision". She determined the first subdivision application, which was for 5.1 acres, determined the lands to be transferred: *Trial Decision 1* at paras 106, 253–260, 324. However, the subdivision application the City ultimately approved was the third application involving 7.36 acres. At trial, Remington argued it was entitled to receive 7.36 acres. CPR appropriately queries how the parties could comply with their contractual obligation to transfer 5.1 acres when the subdivision approved by the City was for 7.36 acres.

[58] To summarize, the trial judge interpreted the Tenth Avenue agreement on the basis that all the potentially conveyable lands were unsubdivided lands. She concluded a subdivision application was the central mechanism for defining the lands to be conveyed. She separately considered how to apply that interpretation to already subdivided lands that did not need a subdivision application. The trial judge erred in law by failing to properly consider the contract as a whole. This piecemeal approach gave rise to a conflict: the lands defined as potentially conveyable included lands that were already subdivided, but the contract's central mechanism did not apply to those lands. To resolve this conflict, the trial judge resorted to implying terms by way of an erroneously relaxed test.

[59] Remington submits the trial judge's decision on Lot 4 is relevant only to how that land fits into the calculation of damages, not to the interpretation of the agreement. For the foregoing reasons, we cannot accept that position. The trial judge recognized the Lot 4 issue was related "to the interpretation and application of the 10th Ave Agreement": *Trial Decision 2* at para 32; see also para 58. While determination of whether Lot 4 was conveyed affects the damages calculation, consideration of Lot 4 was also required to properly interpret the agreement. If the Lot 4 issue did not affect the interpretation of the agreement, there would have been no reason for the trial judge to imply terms.

[60] Remington also emphasizes that, in addition to finding CPR had declared the lands to be surplus "in law" through the submission of the subdivision application, the trial judge also found CPR had declared the lands to be surplus "in fact". It submits CPR is asking this Court to reweigh the trial judge's factual findings in this regard and come to a different conclusion.

[61] The trial judge did review the evidence to determine whether CPR had “in fact determined the 10th Ave Lands were surplus to operational requirements”: *Trial Decision 1* at para 130. However, that analysis was coloured by her interpretation that the subdivision application was evidence of a surplus determination. For example, she reviewed trial evidence to see whether it showed no surplus decision “despite the application being made, and despite Articles 6.05 and 2.02 of the” agreement: *Trial Decision 1* at para 131. She described “the point” of her factual review as being “to assess whether it was plausible, in light of what had been said and done internally at CPR to that point, for someone in Real Estate to understand that they had a basis for taking the steps that would, contractually, declare the 10th Ave Lands surplus” and that “it was reasonable for someone in Real Estate to understand that CPR had determined that the 10th Ave Lands were surplus to operating requirements, so that the lands could be identified, surveyed and included in a tentative plan of subdivision”: *Trial Decision 1* at para 170. She held the fact that CPR had determined the lands were surplus explained “why the Real Estate group identified 5.1 acres of the lands, had them surveyed, included them in a tentative plan of subdivision, and authorized its agent IBI to submit the subdivision application to the City”: *Trial Decision 1* at para 233.

[62] The trial judge’s interpretation of the contract was the lens through which she viewed the evidence. It influenced her finding that CPR had made a surplus determination “in fact”. We cannot be satisfied she would have made the same finding absent her erroneous approach to interpreting the contract.

[63] Remington does not contest that only lands determined by CPR to be surplus could be transferred. Therefore, as the trial judge’s finding – both “in law” and “in fact” – that CPR had determined the subject lands were surplus was rooted in error, her conclusion that CPR breached the Tenth Avenue agreement cannot stand.

[64] The trial judge’s interpretive error leaves other issues unresolved. For instance, the trial judge did not consider whether, as a matter of contractual interpretation, the parties intended the surplus decision to be subjective from CPR’s perspective, or whether they intended it to be imputed from evidence and actions, including but perhaps not limited to the submission of a subdivision application. The trial judge did not expressly consider whether, in the context of the whole contract, the words “surplus to operational requirements” meant “will become surplus” or “are currently surplus”, and whether or how the contractual obligations to deliver vacant possession and to perform remediation might influence that interpretation. Given her conclusion that CPR had declared the lands surplus, the trial judge declined to address whether, if CPR had not declared the lands surplus, it was in breach of the duty to exercise contractual discretion in good faith: *Wastech Services Ltd v Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7.

[65] In the result, the above-described errors in law undermine the finding of CPR’s liability. Given the factual complexity of this matter, the factual findings that are tainted by legal error, the issues pled but not determined, and the unresolved questions described above – particularly those

which necessitate findings of fact and credibility – the matter must be returned to the Court of King’s Bench for a new trial.

IV. Alberta’s appeal on liability: Inducing breach of contract

[66] In light of our conclusion that a new trial is required on the question of whether CPR breached the Tenth Avenue agreement, the determination that Alberta is liable for inducing breach of contract cannot stand. If, following a new trial, it is determined that CPR did breach the agreement, whether Alberta is liable for inducing that breach – including whether it had the requisite intention – will need to be decided afresh.

V. Damages

[67] As the question of whether the contract was breached must be returned to the trial court, we need not determine the damages. However, if a breach is found on retrial, we wish to offer some guidance, particularly since the trial judge did not have the benefit of subsequent appellate authorities.

[68] In the court below, the assessment of compensatory damages was based on errors in principle – both in the application of remoteness and the methodology for measuring the damages. The magnitude of the damages award flowed from those errors. At a new trial, the damages must be reassessed with the benefit of the correct approach and the parties must be given an opportunity to call evidence and make arguments consistent with it.

A. Decision below

[69] Remington sought specific performance of the Tenth Avenue agreement. The trial judge concluded that the Tenth Avenue lands were an “exceptional” commercial property “for which specific performance would be the appropriate remedy” but Remington had communicated to CPR and Alberta that “it elected to pursue damages, not specific performance”, so only damages were available: *Trial Decision 1* at paras 476, 493.

[70] In assessing damages, the trial judge recognized that Remington was to be put in the position that it would have enjoyed but for the breach of contract: *Trial Decision 1* at paras 619 and 624. She found that when the Tenth Avenue agreement was formed in 2002, “Remington did not have a specific plan for developing the three parcels of land but did plan on developing them comprehensively”. Indeed, Remington “had no clear idea about what it was going to build there” at the time of contract, and its President testified to nothing more than “water fountain chatter” and “pie-in-the-sky” ideas: *Trial Decision 1* at paras 7, 97, 567.

[71] Remington nevertheless would have developed the lands “in the most profitable way possible based on market conditions at the time of development, including planning opportunities and constraints.” On this basis, “it was reasonably foreseeable that the development would be part

of a larger multi-use development across [Remington’s adjoining land] including low, mid and high-rise residential, and low-rise and high-rise office commercial buildings”: *Trial Decision 1* at para 590.

[72] The trial judge determined that Remington was entitled to compensation for “development losses”, including the lost profits that probably would have accrued from the development of the Tenth Avenue lands. However, Remington was not required to “demonstrate a singular head or type of damages as likely”. Consequently, lost profits in general were “a reasonably foreseeable type of damage at the time of contracting, a possibility that would be understood to arise naturally from the contract breach”: *Trial Decision 1* at paras 620-621, 628.

[73] The trial judge “calculated Remington’s damages based on lost profits, not land value” and relied on extensive expert evidence about a hypothetical multiple building commercial project for the lands – known as Rail Town - that was only in the early stages of concept design before the breach: *Trial Decision 1* at paras 632-633, 647, 661-674. She concluded that this project represented the highest and best use of the lands. Further, this approach assessed Remington’s losses for the inability to develop the lands, not for the value of a lost opportunity or lost chance to develop them. She acknowledged that “Remington’s loss calculation is necessarily hypothetical”: *Trial Decision 1* at para 632.

[74] The trial judge rejected the appellants’ argument that Remington’s recovery was limited to the “normal measure of damages” for real estate transactions, being the difference between the contract price and the market value of the lands at the time of assessment, which in these circumstances was the date of the breach in 2006. The appellants asserted that if the normal measure applied, the compensatory damages should have been \$3,886,117, calculated as the difference between the contractual purchase price and the appraised market value of the lands as of the breach. Instead, the trial judge found that the normal measure was but one possible outcome arising from the application of remoteness principles: *Trial Decision 1* at paras 619-621. Relying on extensive expert evidence about the project’s visioning, design, planning approval, construction, revenues, costs, absorption, and capitalization, and after making an uncertainty adjustment, she determined that CPR and Alberta were jointly liable for lost profit damages of \$165,166,431 (*Trial Decision 2* at para 122) plus interest of \$45,013,395.89. These damages were based on what she found was the reasonably foreseeable development of the property in keeping with its “peculiar and special value”, and plans drawn up in 2019 for the Rail Town “urban village”: *Trial Decision 1* at para 1161.

B. Submissions

[75] CPR and Alberta contend that the damages awarded, when compared to the value of the lands both at the time of contract and the date of the breach, are exorbitant and overcompensate Remington. The trial judge erred in finding that the normal measure of damages would “categorically exclude damages that were, objectively, reasonably foreseeable” namely, the “potential development of the land”: *Trial Decision 1* at paras 611, 619. The market value of the

lands recognized its nascent potential for commercial development. Only that modest potential was reasonably foreseeable. By deviating from the normal approach, CPR and Alberta became the guarantors of indeterminate profits, dependant on future and unpredictable market conditions and whatever development Remington could say was the “most profitable way possible” years after the fact.

[76] CPR and Alberta argue that the trial judge erred in principle by failing to distinguish between foreseeability (which addresses whether the type of loss is too remote for recovery) and the appropriate measure of damages (which quantifies the foreseeable type of loss). Absent special circumstances, the presumption is that the normal measure of damages applies. Remington did not rebut the presumption.

[77] CPR and Alberta also raise concerns about the trial judge’s approach to mitigation of damages, which allegedly undervalued the profits Remington earned in lieu of developing the Tenth Avenue lands. However, they acknowledge that this alleged error would have been avoided if the normal measure of damages had been used.

[78] Remington responds that the damages appeal is a disguised attack on the trial judge’s findings of fact and her exercise of discretion. The normal measure of damages only applies when “the land or its owner are fungible”, meaning the lands can be readily replaced with other property or anyone else buying the lands could do what the innocent purchaser would have done with them. In particular, because Remington owned adjacent property available for comprehensive development in combination with the Tenth Avenue lands, the lands had a unique value for Remington. The normal measure of damages is inadequate.

[79] Remington cross-appeals the trial judge’s decision not to award punitive damages, arguing that the appellants “self-serving conduct” was deserving of denunciatory sanction.

C. Analysis

[80] In assessing compensatory damages, the foundational compensation principle is that “[d]amages for breach of contract should, as far as money can do it, place the plaintiff in the same position as if the contract had been performed”: *Fidler v Sun Life Assurance Co of Canada*, 2006 SCC 30 at para 27, [2006] 2 SCR 3 [*Fidler*]. However, an innocent party is not entitled to unlimited compensation. Contract law has long been concerned with constraining the risk of indeterminate damages that unfairly burden the breaching party. Restraint is imposed both through remoteness principles and the method used for quantifying damages for foreseeable types of losses.

a) Remoteness

[81] Recovery is prohibited for unforeseen types of losses because “it would be unfair to require [a] defendant to pay such damages, when, if he had been aware of them, he might have declined the risk or made other arrangements”: Jason W Neyers et al, *Fridman’s The Law of Contract in*

Canada, 7th ed (Toronto: Thomson Reuters, 2024) at 934, quoting *Houweling Nurseries Ltd v Fisons Western Corp* (1988), 49 DLR (4th) 205 (BCCA) at 211, citing *Hadley v Baxendale* (1854), 9 Exch 341 at 355, 156 ER 145 [*Hadley*].

[82] Ever since *Hadley*, remoteness principles have operated through “a single and controlling test” that excludes recovery for those types of losses which are entirely speculative, or outside the reasonable contemplation of the parties: *Fidler* at paras 27, 29, 44, 55. Remoteness limits damages to those “arising naturally” in the ordinary course of events from a breach of the contract, or secondarily, those that were reasonably foreseeable to both parties at the time of contracting, considering any special circumstances actually known to them.

[83] *Hadley* specifically states at 354-355 that the damages recoverable from a breach of contract are:

... such as may fairly and reasonably be considered as either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. . . [I]f special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under the special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract.

See also *Fidler* at para 29; *Trial Decision 1* at para 513.

[84] In *Honda Canada Inc v Keays*, 2008 SCC 39 at para 56, [2008] 2 SCR 362, the Supreme Court again confirmed that as per *Hadley*, the first question to be asked in assessing damages is: “what was contemplated by the parties at the time of the formation of the contract, or, as stated in para. 44 of *Fidler*: [W]hat did the contract promise?”

[85] More recently, this Court described the *Hadley* foreseeability inquiry as one test with two branches: *Dow Chemical Canada ULC v NOVA Chemicals Corporation*, 2020 ABCA 320 at paras 57-59, 75. “The recoverable damages are those that would be in the reasonable contemplation of the parties at the time of contract. There is only one rule, but if ‘special circumstances’ have been communicated, then the damages within the parties’ contemplation would be wider.” This Court added that *Hadley* categorizes foreseeability through damages that are “naturally arising”, the first branch, and those that are “specially communicated”, the second branch, relying on

Victoria Laundry (Windsor) Ltd v Newman Industries Ltd, [1949] 2 KB 528 (CA) [*Victoria Laundry*], which clarified the *Hadley* test. Knowledge that is “specially communicated” necessarily includes unique actual knowledge not otherwise within the contemplation of the reasonably informed participant in the marketplace.

[86] The first branch of the *Hadley* test relies on objectively imputed knowledge and addresses the “ordinary case”, or the normal and usual circumstances, and is designed to encompass the “great multitude of cases”: *Hadley* at 354-355; The Honourable Justice James Edelman, *McGregor on Damages*, 20th ed (London: Sweet & Maxwell, 2018) at 8-161, 8-162. The second branch depends on the actual knowledge of the contracting parties about special circumstances outside the ordinary course of things to widen the losses for which they are liable: *Victoria Laundry* at 539-540.

[87] Actual knowledge alone is not sufficient to engage the second branch; an active element of acceptance is required. Special circumstances must be understood enough by the contracting parties such that they “impliedly undertook to bear any special loss referable to a breach in those special circumstances”. Consequently, the special circumstances must “have been brought home to the defendant at the time of the contract”: *Victoria Laundry* at 538; *Al Boom Wooden Pallets Factor v Jazz Forest Products (2004) Ltd*, 2016 BCCA 268 at paras 76-78.

[88] When assessing compensatory damages, the quantum (or extent of the loss) generally need not be foreseeable to be recoverable. However, pure economic losses (including lost profits) present unique challenges because of the risk of indeterminate damages. The characterization of the type of recoverable loss (e.g. development loss or lost profits *generally*) can affect the amount of loss that is recoverable. Further, categorizing these losses into different “types” can be difficult: *McGregor on Damages* at 8-192; *Fridman’s The Law of Contract* at 939. Overly expansive or vague categories of economic loss can expose a party to damages – in nature and magnitude – well beyond the ordinary commercial risks reasonably contemplated when the contract was formed.

[89] Constrained categories of recoverable economic loss are justified on commercial grounds: (1) given that breaches of contract claims can be expensive, society should not encourage generous measures for recovery; (2) some uncompensated losses are the “cost of doing business”, a risk assumed by those who engage in contractual relationships: Angela Swan, Jakub Adamski & Annie Y Na, *Canadian Contract Law*, 4th ed (Toronto: LexisNexis, 2018) at 6.27. The type of loss can distinguish between ordinary and exceptional business losses, including lost profits: *McGregor on Damages* at 8-193. However, the categories are not fixed: *Fridman’s The Law of Contract* at 938-939. For example, economic development losses can be divided between the nascent or unspecified development potential in a parcel of land and the lost profits flowing from the collapse of a crystallized development project specifically contemplated for that land. Categorization remains grounded in the objectives of remoteness principles.

[90] Remoteness therefore aims to limit the scope of liability for damages by ensuring that only the reasonably foreseeable consequences of a breach of contract are compensable. By avoiding an

overly broad application of liability, remoteness promotes fairness through predictable and proportional legal outcomes. It prevents the breaching party from being held responsible for damages that are too indirectly or unexpectedly linked to its actions, or that are disproportionately large compared to those actions. The type of loss caused by a breaching party must have been reasonably contemplated by that party when the contract was formed.

b) Normal measure of damages

[91] A “normal measure of damages” exists for various kinds of contractual breaches. If a party defaults under the contract, “the basic loss to the other party is the market value of the benefit of which he has been deprived through the breach. Put shortly, the claimant is entitled to compensation for the loss of the bargain”: *McGregor on Damages* at 4-002.

[92] For a failed real estate transaction, the normal measure of damages – the purchaser’s loss of the bargain – is the difference between the contract price and the value of the property on the proper date of assessment. The assessment date is usually the date of the breach or when the purchase was scheduled to close: *100 Main Street East Ltd v WB Sullivan Construction Ltd* (1978), 88 DLR (3d) 1 at 19-20, 20 OR (2d) 401 (ON CA), leave to appeal refused on October 10, 1978 (SCC); *921250 Alberta Ltd v 762910 Alberta Ltd*, 2003 ABQB 81 at paras 38-42, 334 AR 363. Using the date of the breach (frequently the closing date) to measure the damages is not an immutable rule, but the presumption is not easily displaced and the exception must be based on legal principle: *Rougemont Capital Inc v Computer Associates International Inc*, 2016 ONCA 847 at paras 50-52; *Akelius Canada Ltd v 2436196 Ontario Inc*, 2022 ONCA 259 at paras 22-27, leave to appeal refused [2022] SCCA No 183 (SCC).

[93] The normal measure represents the financial equivalent of the land itself – that is, the asset the purchaser would have obtained on the closing date but for the breach, including its development potential as reasonably known within the marketplace. This approach puts the purchaser in the same position it would have enjoyed had the contract been performed – the foundational compensation principle.

[94] The normal measure of damages for a real estate transaction where the parties contemplated development of the lands was discussed in *The Rosseau Group Inc v 2528061 Ontario Inc*, 2023 ONCA 814 [*Rosseau*], which was released after the trial decisions now under appeal. The facts in *Rosseau* are similar to this matter. The Rosseau Group, the purchaser, entered into an agreement with the vendor to purchase development lands. The purchase price was determined based on \$350,000 per acre of developable land, resulting in a total purchase price of \$6.6 million. When the purchase did not close, the Rosseau Group did not seek the normal measure of damages but instead pursued lost profits that would have been earned had it acquired the property and developed residential lots over the six years following closing. The Court of Appeal overturned this “exceptional measure of damages”, finding the trial judge erred in departing from the normal measure. A similar finding arose in *Preiano v Cirillo*, 2024 ONCA 206, leave to appeal refused

[2024] SCCA No 219 (SCC), in the context of a claim for specific performance of a real estate transaction.

[95] *Rosseau* divided the analysis of recoverable damages into two parts: first, the type of loss recoverable under the *Hadley* framework must be determined; second, if this type of loss is recoverable, the court must decide whether the normal measure of damages applies to compensate the loss. “Regardless of the branch of the remoteness test into which the loss of an opportunity to acquire lands that can be developed falls, the normal measure of damages should not be departed from unless the party seeking damages shows that that measure does not address that type of loss”: *Rosseau* at para 70.

[96] The Ontario Court of Appeal further held at paragraphs 63-65 that the normal measure is the presumptive approach for the innocent party’s damages and “is not to be easily displaced” because “commercial certainty is enhanced by a predictable damages methodology” and “an early, and predictable, date on which the innocent party’s damages are crystallized promotes efficient behaviour and reduces uncertainty and speculation”. Further, the market value best represents the financial equivalent of the property itself, which respects the compensation principle – restoring the innocent party to the position it would have enjoyed had the contract been performed, but no more.

[97] The Ontario Court of Appeal was satisfied that in the ordinary course, the “market’s perspective of the value of the current and potential uses and opportunities available to the land’s owner, including development” accurately value the property and that appraisal evidence can account for the property’s value based on the highest and best use: *Rosseau* at para 74. The normal measure should apply “unless the party seeking damages shows that that measure does not address that type of loss” such as where the “development value is ignored or excluded by the normal measure”: *Rosseau* at paras 70, 80. The normal measure might be inadequate where the market value of the land does not reflect a “special value” that other market participants could not extract because, for example, the innocent purchaser owned adjacent property that could be combined in a unique way with the land to be purchased, or because the purchaser had special development techniques unknown to the general market: *Rosseau* at para 70, footnote 4.

[98] We agree that the normal measure is the presumptive approach for the innocent party’s damages and is not easily displaced, for the policy reasons discussed in *Rosseau*. We also find that remoteness and the method of measuring the recoverable loss are interconnected for doctrinal reasons.

[99] Both the first branch of *Hadley* and the normal measure of damages operate on an objective assessment of the knowledge imputed to reasonable participants in the marketplace and the foreseeable risk of loss accepted by them. Remoteness principles, however, focus on the type of loss that is recoverable, so the analysis is at jeopardy of becoming an artificial exercise about how the loss is categorized rather than examining the nature of the loss that was “naturally arising” and the risk that was objectively accepted. The normal measure of damages, by focusing on reasonably

informed participants in the marketplace, reinforces that the foreseeable loss is generally constrained by commercially predictable and proportional outcomes, which advance fairness.

[100] The normal measure of damages is a presumption that may be rebutted where the market's knowledge of the property's value does not capture the parties' unique understanding of a special enhanced value and the acceptance of the resulting risk in the event of a breach of the contract. Accordingly, the normal measure might be rebutted where the second branch of *Hadley* is engaged, particularly where special circumstances known to and accepted by the parties might be unknown to the market and therefore outside the scope of any market appraisal. The innocent party, in seeking to rebut the presumption, must demonstrate that the normal measure of damages is deficient in assessing the foreseeable loss.

[101] The development value of a parcel of land poses challenges both in categorizing the type of loss and in determining whether to apply the normal measure of damages. Where a purchaser has lost the ability to develop the lands in a way that had crystallized between the parties when the contract was formed, the normal measure of damages might not account for the full extent of losses suffered. However, where the development opportunity was nascent (or unspecified) at formation, market value alone will generally account for the property's development potential (including contingencies) and the full extent of the loss suffered: The Honourable Justice Darla A Wilson et al, "Damages in Development: The Assessment of Damages in Breached Agreements of Purchase and Sale for Land Development and *The Rosseau Group Inc v 2528061 Ontario Inc*, 2023 ONCA 814", *Annual Review of Civil Litigation*, (Canada: Carswell, 2024). The focus of the inquiry is not to simply characterize the development potential as "nascent" or "crystallized" but instead, to determine the nature of the foreseeable loss objectively contemplated and accepted by the parties – either because of the market's knowledge, reflected in the normal measure, or the actual knowledge of the particular parties.

[102] An example of a crystalized development plan that invited exceptional damages for lost profits is found in *Performance Industries Ltd v Sylvan Lake Golf & Tennis Club Ltd*, 2002 SCC 19, [2002] 1 SCR 678 (affirming *Performance Industries Ltd v Sylvan Lake Golf & Tennis Club Ltd*, 2000 ABCA 116). The Supreme Court upheld an award of damages for lost profits where the plaintiff wanted to purchase a golf course and turn it into a residential development. Prior to the agreement, the plaintiff explained specific plans to the defendant, including pictures of what he envisioned. The Court rejected the normal measure of damages because the parties had contemplated a specific development, and the market value implicitly did not consider the expected profit from the residential development. Further, as noted at paragraph 73, the parties had "specifically contemplated" that the land would be developed into residential housing so the "losses flowing from the special circumstances known to the parties at the time they made their contract" were recoverable.

[103] The method of quantifying damages is a further mechanism for constraining indeterminate losses because the categorization of the type of loss might be insufficiently precise and create

unfairness. The normal measure of damages aligns with the imputation of knowledge contemplated under the first branch of *Hadley*. As noted, that approach to measuring damages may be rebutted by special circumstances showing that the market's knowledge is deficient – for example, by failing to capture an enhanced value (including for a specified development) known to the parties at the time of contracting.

[104] We need not decide whether the normal measure of damages could ever be rebutted where the first branch of *Hadley* is engaged. Conceivably, a property might be so unique that even the marketplace, with the benefit of full disclosure, cannot value the property because the data necessary for conventional appraisal techniques is unavailable. However, in this case, appraisal evidence was presented about the market value of the lands at the time of breach.

c) *Reasoning in the court below*

[105] The trial judge correctly acknowledged the two branches of the *Hadley* test, at paragraph 515 of *Trial Decision 1*:

In *Victoria Laundry* the Court explained that the first route to reasonable foreseeability relies on imputed or objective knowledge, the idea that “everyone, as a reasonable person, is taken to know the ‘ordinary course of things’ and consequently what loss is liable to result from a breach of the ordinary course”: *Victoria Laundry* at 1002. Reasonable foreseeability also arises, however, where a person has actual knowledge that a loss is likely to arise from breach in this particular case; this is the “second rule” that makes that additional type of loss recoverable: *Victoria Laundry* at 1003.

[106] After finding that Remington had no specific plans for the development of the Tenth Avenue lands when the contract was formed, and that no specific development plans were communicated to CPR at that time, the trial judge concluded that Remington's recoverable losses fell under the first branch of *Hadley* – the damages that a reasonable person would have expected to “arise naturally” from the breach: *Trial Decision 1* at paras 620-621. That finding impliedly rejected any “special circumstances” based on the parties' actual knowledge. Nevertheless, the trial judge awarded damages well beyond those that were reasonably foreseeable by knowledgeable participants in the marketplace.

[107] More specifically, the trial judge determined that because the agreement itself expressly referenced development, and the surrounding circumstances contemplated land development, significant profit losses for a specific kind of project were recoverable in the “ordinary course of things” under the first branch. At paragraph 621 of *Trial Decision 1*, she wrote:

In making this point I am in no way suggesting that development losses are ordinarily recoverable in land sale cases. Each case turns on its own facts. I agree with CPR that a farmer who sold land to a developer would not be liable for any

imaginable development in the event of a breach; most of the time the claim would be only for the difference in the value of the lands from the time of the contract to the date of breach. *This case is unusual*, however: the parties explicitly referenced development in the contract; CPR contracted for the benefit of some of the financial upside of development; the parties based the price of the land on an appraisal that contemplates commercial development as the highest and best use of the land; and, there is relevant and material evidence from or prior to 2002 about how the lands *could* be developed. It is the parties' agreement and the evidence about what was known about developing the lands, along with what Remington was and its business practices of 2002, which allows me to assess reasonable foreseeability through the first branch of the **Hadley** analysis. And it is that evidence which makes it reasonably foreseeable that, if CPR breached the 10th Ave Agreement, Remington would lose the profits associated with developing the 10th Ave Lands as part of a mixed-use development on the B Yard Lands, with a commercial focus. [Emphasis added]

[108] The trial judge correctly recognized that extraordinary development losses are not usually recoverable under the first branch of **Hadley**, and that at the time CPR and Remington entered into the Tenth Avenue agreement, each understood the lands were being purchased for future development but Remington had no formal or particular development plans, nor had any been “specially communicated” to CPR. The agreement spoke of a “tentative plan of subdivision” but little more, and the parties did not discuss anything akin to the evidence tendered at trial about a particular mixed-use development, including the detailed and expansive plans advanced by Remington’s experts. Specific contractual language about “the parties’ agreement” and what they knew about developing the land in unique ways might have been relevant in assessing whether these parties had actual knowledge of “special circumstances” under the second branch of **Hadley**, but the trial judge concluded that the first branch of **Hadley** applied. Consequently, no special circumstances were found. On these findings, lost profits from a specific and unique multi-building development had not crystalized as a type of foreseeable loss when the contract was formed.

[109] The damages awarded could not flow both in the “usual course” of the contract for unspecified development potential and be measured based on a specific plan developed years after the contract was signed, and which neither contracting party had actually planned, detailed or communicated. In our view, the trial judge erred in finding that the damages awarded “fairly and reasonably. . . aris[e] naturally” from a breach of the Tenth Avenue agreement itself: **Fidler** at paras 27, 29; **Hadley** at 354-355. The effect of using an overly expansive category of “development loss” or “lost profits” in general to characterize the type of recoverable loss was to extend the damages beyond those arising in the “ordinary course” of a commercial real estate transaction.

[110] The trial judge did not utilize the normal measure of damages as a presumption, so no analysis was undertaken about whether the presumption was rebutted. As Remington “did not have a specific plan for developing the three parcels”, no crystalized development plan was identified

at the time the contract was formed. A nascent development potential, even when supported by “pie-in-the-sky” ideas, will generally not be so “unusual” that the normal measure of damages is displaced.

[111] Remington argues that the normal measure of damages does not apply because it owned adjacent property available for comprehensive development in combination with the Tenth Avenue lands, so the lands had a unique value outside the market’s expectations. Relying on a footnote in *Rosseau*, Remington contends it could have developed the lands as an adjoining property owner in ways that other market participants could not, thereby extracting a “special value” that was unknown in the marketplace. The footnote refers to the ownership of adjoining land, combined in a unique way, as a situation where “the market value of the land – *may* not reflect the development value the disappointed purchaser has lost” (emphasis added). However, *Rosseau* did not assert that adjacent ownership with the potential for combined development invariably excludes the normal measure of damages; the example used was merely a situation where that might follow. Depending on the circumstances, an appraisal can account for ownership and combined development of adjoining property.

[112] Here, the trial judge had evidence of a land appraisal conducted by Altus Appraisal in 2006 (the year of the breach) which apparently valued the Tenth Avenue lands in combination with Remington’s adjoining properties. No analysis was undertaken to determine whether or how that appraisal evidence was deficient in assessing any special value from adjoining ownership or why such an appraisal would fail to capture the market value of the unspecified development potential in the parcel of land.

[113] The extraordinary damages awarded to Remington raise concerns about disproportionality when compared to a failed \$7.7 million real estate transaction. While proportionality does not guide the damages analysis, it can signal a departure from the expectations of reasonable commercial actors and the parties’ assumption of risks when the contract was formed. Awarding extraordinary damages that were not reasonably contemplated at the time of contracting could cause a chilling effect on the effective functioning of commercial real estate transactions in Alberta.

[114] In summary, even if this Court had upheld the trial finding of a breach of contract, we would have found errors in the approach taken to assess compensatory damages. The extraordinary compensatory damages ordered in this matter – lost profits from a specific and unique development - were not available in the ordinary course under the first branch of *Hadley*. Further, the trial analysis did not recognize or apply the normal measure of damages and did not address whether the presumptive measure – the difference between the contract price and the value of the lands at the date of the breach - was rebutted by her findings of fact.

[115] On the record before us, it is not obvious that the seemingly unprecedented compensatory damages awarded below could have resulted from a proper application of remoteness principles

and the correct method for measuring damages. The quantum of damages must be reassessed at the new trial if liability is found.

[116] In light of our other conclusions, we need not comment about mitigation, punitive damages, and prejudgment interest.

VI. Conclusion

[117] The appeal is allowed, the trial judgment and costs order are set aside, and a new trial is ordered in the Court of King’s Bench.

[118] If the parties are unable to agree on costs of the appeal, they may each provide written submissions within 45 days of this decision, not exceeding 6 pages in length.

Appeal heard on September 10, 2024

Memorandum filed at Calgary, Alberta
this 2nd day of July, 2025

Antonio J.A.

Feth J.A.

Wakeling, J.A. (concurring and dissenting):**I. Introduction**

[119] This is an important appeal, not because of the quantum of the award – over \$200 million – but because of the questions the appeal presents. It requires this Court to interpret a contract between sophisticated enterprises and revisit the common law’s most venerable civil damages case, *Hadley v. Baxendale*.¹

[120] Alberta and Canadian Pacific Railway Company appeal a judgment² holding Canadian Pacific liable for breach of a Calgary land-purchase agreement with Remington Development Corporation – the 10th Avenue Agreement – and Alberta liable for inducing Canadian Pacific’s breach of the 10th Avenue Agreement.³ It ordered Canadian Pacific and Alberta, jointly and severally, to pay Remington Development \$165,166,431 in damages for breach of contract, plus prejudgment interest of \$45,013,395.89.⁴

[121] The trial judge dismissed Remington Development’s claim for punitive damages.⁵ Remington Development has appealed this part of the judgment.⁶

[122] I would allow the appeals by Canadian Pacific and Alberta and dismiss Remington Development’s cross appeal.

II. Questions Presented**A. Breach of the 10th Avenue Agreement**

[123] Article 2.02 of the 10th Avenue Agreement reads as follows:⁷

The Purchaser acknowledges that the Existing Parcel is rail right-of-way lands and that the only portion of the Existing Parcel that the Vendor is capable of selling to the Purchaser is that portion of the Existing Parcel which the Vendor determines,

¹ [1854] EWHC Exch J70; 156 Eng. Rep. 145 (Ex. Ct.). See J. Edelman, *McGregor on Damages* 224 (22d ed. 2024) (“*Hadley v. Baxendale* [is] the most celebrated case in the field of contract damages”).

² Appeal Record 365.

³ *Remington Dev. Corp. v. Canadian Pac. Ry.*, 2022 ABKB 692.

⁴ Id. ¶ 1227 & 2023 ABKB 493, ¶ 122.

⁵ *Remington Dev. Corp. v. Canadian Pac. Ry.*, 2022 ABKB 692, ¶¶ 1207-09.

⁶ Appeal Record 380.

⁷ CPR’s Extracts of Key Evidence 8 (emphasis added).

in its discretion but in accordance with the *Railway Act*, to be surplus to its operational requirements.

[124] All of Canadian Pacific’s witnesses testified that Canadian Pacific never determined that the 10th Avenue Agreement lands were surplus to its operational requirements.⁸

[125] Canadian Pacific argued that because it never determined the 10th Avenue Agreement lands were “surplus to its operational requirements” the agreement came to an end on account of its own terms and that Canadian Pacific never breached it.

[126] Remington Development presented no evidence that Canadian Pacific either notified it in writing or orally that Canadian Pacific had determined under Article 2.02 that the 10th Avenue Agreement lands were “surplus to its operational requirements”.⁹

[127] Instead, the emails that passed between Canadian Pacific and Remington Development repeatedly stated that Canadian Pacific had not determined the lands were “surplus to its operational requirements”.¹⁰

[128] A June 15, 2007 letter from Canadian Pacific’s counsel to Remington Development confirmed that Canadian Pacific still used the 10th Avenue Agreement lands for railway operations and that his client “has determined that no portion of the Existing Parcel is currently surplus to the Vendor’s existing railroad operations nor is that situation to change in the immediate future”.¹¹

[129] Nonetheless, Justice Woolley held that Canadian Pacific had determined that the 10th Avenue Agreement lands were “surplus to its operational requirements”.¹²

⁸ *Remington Dev. Corp. v. Canadian Pac. Ry.*, 2022 ABKB 692, ¶ 166 (“All of the CPR witnesses maintained that the 10th Ave Lands were not surplus at the time that the parties entered into the 10th Ave Agreement and did not become surplus at any time prior to CPR entering into the contract with Remington. In their view, the 10th Ave Lands only became surplus when B Yard moved to Manchester in 2010-11”).

⁹ *Id.* ¶ 165 (“Neither party produced any documents from prior to 2004 explicitly stating whether CPR had determined that B Yard was surplus or not”).

¹⁰ *Id.* ¶ 110 (“In e-mails exchanged between CPR and Remington at the time of the [first tentative subdivision] application, Mike Hyder said that CPR had authorized IBI to submit the subdivision application on behalf of CPR but noted his ‘concern that CP operations has not given final approval to remove all of the tracks’”).

¹¹ CPR’s Extracts of Key Evidence 79.

¹² *Remington Dev. Corp. v. Canadian Pac. Ry.*, 2022 ABKB 692, ¶ 233 (“In sum, I am satisfied based on the evidence that CPR had taken the steps necessary to determine the 10th Ave Lands surplus to operational requirements prior to November 2004. That it had done so explains why the Real Estate group identified 5.1 acres of the lands, had them surveyed, included them in a tentative plan of subdivision, and authorized its agent IBI to submit the subdivision

[130] Justice Woolley found that Canadian Pacific’s submission on November 24, 2004 of a tentative application for subdivision approval evidenced a prior determination by Canadian Pacific that the 10th Avenue Agreement lands were surplus to its operations.¹³ The trial judge concluded that Canadian Pacific would not have submitted a tentative subdivision application had it not determined the 10th Avenue Agreement lands were “surplus to its operational requirements”.

[131] The trial judge acknowledged that Canadian Pacific “did not intend for the subdivision application to be a declaration that the lands were surplus”.¹⁴

[132] Was Justice Woolley’s determination that Canadian Pacific had determined under Article 2.02 that the 10th Avenue Agreement lands were “surplus to its operational requirements” clearly wrong?¹⁵

[133] Did Canadian Pacific breach the 10th Avenue Agreement?

B. Inducement of Breach of Contract

[134] If Justice Woolley’s decision that Canadian Pacific breached the 10th Avenue Agreement is upheld, did Alberta induce Canadian Pacific to breach the 10th Avenue Agreement?

C. Damages

[135] A defaulting promisor in a commercial contract is liable for such portion of the loss the promisor’s default has caused the complaining promisee that the defaulting promisor could have foreseen as the *probable* result of the promisor’s default had the parties addressed the issue at the time the commercial contract was made.¹⁶ A defaulting promisor’s ability to foresee is a function

application to the City. Real Estate did not do so for convenience while awaiting the surplus determination, but rather because doing so reflected the substance of the surplus determination that, internally, CPR had already made”).

¹³ Id. ¶ 234.

¹⁴ Id. ¶ 247.

¹⁵ The standard of review for contract interpretation, absent an extricable question of law, is palpable and overriding error. Was the original court’s interpretation of the text clearly wrong? *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, ¶¶ 50, 53 & 54; [2014] 2 S.C.R. 633, 658 & 660 per Rothstein, J. (“Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix. [I]t may be possible to identify an extricable question of law from within what was initially characterized as a question of mixed fact and law However, courts should be cautious in identifying extricable questions of law in disputes over contractual interpretation”).

¹⁶ *Fidler v. Sun Life Assur. Co. of Canada*, 2006 SCC 30, ¶ 54; [2006] 2 S.C.R. 3, 23 per McLachlin, C.J. & Abella, J. (“there is only one rule by which compensatory damages *for breach of contract* should be assessed: the rule in *Hadley v. Baxendale*”) (emphasis in original) & *Hadley v. Baxendale*, [1854] EWHC Exch J70; 156 Eng. Rep. 145 (Ex. Ct.).

of the information the defaulting purchaser actually had or should have had as a reasonable contracting party.

[136] Canadian Pacific must have known that Remington Development entered into the 10th Avenue Agreement for the purposes of acquiring ownership of the lands, securing the opportunity to develop the land, and deriving the revenue from doing so.

[137] Articles 2.04 and 6.03 of the 10th Avenue Agreement grant to Canadian Pacific “certain participation rights in the appreciation in the value of the Lands”. If the 10th Avenue Agreement lands appreciated in value at designated points, Canadian Pacific would benefit.

[138] But there was no evidence that Remington Development had, as of November 30, 2002, the date the parties entered into the 10th Avenue Agreement, formulated a *specific* plan. And Remington Development had not provided Canadian Pacific with a specific plan.¹⁷

[139] Randy Remington, the chief executive officer of Remington Development, acknowledged that Remington Development had no specific development plans when it entered into the 10th Avenue Agreement.¹⁸

[140] At that time Remington Development had no planning group¹⁹ and “had never built a high rise commercial building, a residential building or a large scale development project”.²⁰

[141] As of November 30, 2002, would the parties have reasonably foreseen that a probable consequence of Canadian Pacific’s breach of the 10th Avenue Agreement and its failure to convey legal title to the 10th Avenue Agreement lands would deprive Remington Development of legal title to the lands and its ability to develop the lands and derive revenue from the development or

¹⁷ *Remington Dev. Corp. v. Canadian Pac. Ry.*, 2022 ABKB 692, ¶ 606.

¹⁸ *Id.* ¶¶ 97, 99 & 573 (“At the time it entered into the contracts for the B Yard Lands, Remington had no clear idea about what it was going to build there, but it did plan on developing the lands as a comprehensive development. Remington did not have a specific plan in mind for the 10th Ave Lands but did plan on developing them. CPR emphasized the testimony of Mr. Mason, and in particular his reference to Remington’s plans being pie-in-the-sky. This evidence is not, however, inconsistent with what was said by Mr. Remington. Both Mr. Remington’s evidence and Mr. Mason’s is that they were acquiring a large piece of land for development, the specifics of which why had yet to determine. Mr. Mason’s evidence does not suggest that Remington would not develop the land, or that it would not act like the for-profit commercial developer it was and that CPR knew it to be: developing the land in accordance with market opportunities and constraints (including planning constraints). His evidence, and Mr. Remington’s evidence, is simply that, in 2002, they did not yet know what that would look like for the B Yard Lands”).

¹⁹ *Id.* ¶ 569.

²⁰ *Id.* ¶ 603.

sell it? Was anything more concrete than this reasonably foreseeable as a probable consequence of a breach on the part of Canadian Pacific?

[142] Given the fact that Remington Development had no specific development plans when it entered into the 10th Avenue Agreement, would it have been reasonable for Canadian Pacific to foresee as probable that Remington Development would construct on the 10th Avenue Agreement lands low-rise and high-rise commercial buildings, a finding Justice Woolley made?

[143] Is Remington Development entitled to punitive damages?

III. Brief Answers

A. Breach of the 10th Avenue Agreement

[144] Article 2.02²¹ of the 10th Avenue Agreement clearly and unequivocally states that Canadian Pacific may only sell to Remington Development lands that it, in its discretion, has determined are “surplus to its operational requirements”.

[145] Canadian Pacific, and Canadian Pacific alone, must decide whether the 10th Avenue Agreement lands are “surplus to its operational requirements”.

[146] The evidence indisputably demonstrates that Canadian Pacific never made such a determination.²²

[147] Justice Woolley’s holding that Canadian Pacific’s subdivision application relating to the 10th Avenue Agreement lands is evidence of a prior determination by Canadian Pacific that the lands are “surplus to its operational requirements” is clearly wrong.²³ It, in effect, deleted the most important provision of the 10th Avenue Agreement. The trial judge gave the 10th Avenue Agreement a meaning it could not possibly bear. An official interpreter of legal text can never do this.²⁴

²¹ See also Article 6.08 of the 10th Avenue Agreement (“the determination of the area of the Lands included in the tentative plan of subdivision shall be in the Vendor’s *absolute* discretion as it relates to which portion of the Existing Parcel is surplus to the Vendor’s existing railroad operations”) (emphasis added). CPR’s Extracts of Key Evidence 11.

²² *Remington Dev. Corp. v. Canadian Pac. Ry.*, 2022 ABKB 692, ¶ 165 (“Neither party produced any documents from prior to 2004 explicitly stating whether CPR had determined that B Yard was surplus or not”).

²³ *Id.* ¶ 233.

²⁴ *The King v. Tran*, 2024 ABCA 241, ¶ 24 (“legal text can never be given a meaning it cannot possibly bear”); *Abbas v Esurance Ins. Co. of Canada*, 2023 ABCA 36, ¶ 50; 477 D.L.R. 4th 613, 645 per Watson & Wakeling, J.J.A. (“it is a cardinal sin for an adjudicator to give a text a meaning it cannot possibly bear”); *Zuk v. Alberta Dental Ass’n &*

[148] There is no reason to conclude that Canadian Pacific must have made an Article 2.02 determination before it submitted a subdivision application to the development authority. An applicant for subdivision approval can always withdraw its application before the subdivision authority approves it or choose not to file it with the Registrar of Land Titles if the subdivision authority approves it. There is nothing in the *Railway Act*²⁵ or the *Municipal Government Act*²⁶ that supports the trial judge’s position.

[149] The Canadian Pacific officers who authorized the filing of the subdivision application must have been satisfied that the company’s operations group would, within a relatively short time, conclude that the 10th Avenue Agreement lands were “surplus to its operational requirements”.²⁷ If Canadian Pacific made a determination the land was “surplus to its operational requirements” subsequent to the date it filed its subdivision application, any delay in securing the subdivision

College, 2018 ABCA 270, ¶ 159; 426 D.L.R. 4th 496, 539 (“Words must not be given meanings they cannot possibly bear”); *Lenz v. Sculptoreanu*, 2016 ABCA 111, ¶ 4; 399 D.L.R. 4th 1, 6 (“A contrary interpretation would give the text an implausible meaning. A court may never do this”); *Jones v Director of Public Prosecutions*, [1962] A.C. 635, 662 (H.L. 1961) per Lord Reid (“It is a cardinal principle applicable to all kinds of statutes that you may not for any reason attach to a statutory provision a meaning which the words cannot reasonably bear”); *Bourne v. Norwich Crematorium Ltd.*, [1967] 2 All E.R. 576, 578 (Ch.) per Stamp J. (“In my judgment it would be a distortion of the English language to describe the living or the dead as goods or materials. ... [O]ne must not ... distort that which has to be construed and give it a meaning ... one does not think it can possibly bear”); *SZTAL v. Minister for Immigration and Border Protection*, [2017] HCA 34, ¶ 94; 347 A.L.R. 405, 429 per Edelman, J. (“where a statute employs a term in its ordinary sense, there can be no warrant for the extension of the meaning beyond its ordinary sense”) & *Newcastle City Council v. GIO General Ltd.*, [1997] HCA 53; 191 C.L.R. 85, 113 per McHugh, J. (“If the legislature uses language which covers only one state of affairs, a court cannot legitimately construe the words of the section in a tortured and unrealistic manner to cover another set of circumstances”). See A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 31 (2012) (“A fundamental rule of textual interpretation is that neither a word nor a sentence may be given a meaning that it cannot bear. Without the concept of permissible meanings, there is no such thing as faithful interpretation of legal texts”); R. Sullivan, *The Construction of Statutes* 191 (7th ed. 2022) (“the interpretation ultimately adopted must be one that the words of the text can reasonably bear”) & H. Hart & A. Sachs, *The Legal Process: Basic Problems in the Making and Application of Law* 1374 (1994) (“a court should ... not give the words [in a statute] ... a meaning they will not bear”).

²⁵ R.S.C. 1985, c. R-3.

²⁶ R.S.A. 2000, c. M-26, Part 17, Div. 7.

²⁷ *Remington Dev. Corp. v. Canadian Pac. Ry.*, 2022 ABKB 692, ¶¶ 82, 87 & 181 (“at the time the parties entered into the contract CPR appears to have anticipated the surplus decision being made relatively quickly, and the language of both Article 7 and Article 6.05 is consistent with that expectation. [B]y 2002 there was reason to believe that CPR was in the process of moving B Yard from its downtown location and that, in the relatively near future, it would be declaring all of the B Yard Lands surplus. In sum, at the time the parties entered into the 10th Ave Agreement, CPR had begun to take steps to declare the 10th Ave Lands surplus, and anticipated that the lands would be determined to be surplus in the near future, but had not yet declared the lands to be surplus”). See also *id.* ¶ 138 (“Mr. Nimmo testified that some tension existed between Real Estate and Operations on the issue of surplus: Operations generally wanted to hold on to land, while Real Estate wanted to sell the land and to obtain cash for underused or unused assets”).

approval would not be attributable to the unanticipated extended time Canadian Pacific needed to determine its operational requirements.²⁸

[150] It follows that Justice Woolley’s finding that Canadian Pacific breached the 10th Avenue Agreement is clearly wrong.²⁹

B. Inducement of Breach of Contract

[151] Because Canadian Pacific did not breach the 10th Avenue Agreement, it follows that Alberta did not induce Canadian Pacific to breach the 10th Avenue Agreement.

C. Damages

[152] While the determination that Canadian Pacific did not breach the 10th Avenue Agreement relieves me of the need to review Justice Woolley’s damage award, I do so because the issues are important and the parties have provided the Court with excellent written and oral submissions.

²⁸ A review of the *Municipal Government Act*, R.S.A. 2000, c. M-26, Part 7, Divs. 7 & 10, as it was on November 30, 2002, makes it obvious that several actors can contribute to the delay in the subdivision approval process. First, the applicant has to draft a proposed plan of subdivision. *Id.* s. 653(1). Some applications will be more complex than others. The application in this case would be near the complicated end of the scale. Second, the subdivision authority has a number of tasks to perform when it receives a subdivision application. It may have to give notice and a copy of the application to third parties. *Id.* s. 653(3) & (4). The subdivision authority must review the subdivision application and satisfy itself that the proposed subdivision conforms to any statutory plan or land use bylaws. *Id.* s. 654(1). It must consider whether it is appropriate to impose any conditions, such as, entering into an agreement with the municipality “to construct or pay for the construction of a road required to give access to the subdivision”. *Id.* s. 655(1). One would expect that the applicant would do its best to ensure that its interests are taken into account before the development authority makes up its mind on the nature of the conditions. Third, the development authority must make a decision on the subdivision application. *Id.* s. 656(1). Fourth, if the applicant is dissatisfied with the subdivision authority’s decision, it may appeal to the subdivision and development appeal board. *Id.* s. 678 (2)(b). A further appeal lies to be Court of Appeal. *Id.* s. 688(1). Fifth, if the applicant does not appeal or if the applicant contests some of the conditions the subdivision authority imposed unsuccessfully on appeal, the applicant must submit an application that complies with the conditions imposed by the development authority, the subdivision and development appeal board or the Court of Appeal for the purpose of securing the endorsement of the subdivision authority. *Id.* ss. 657(2) & 682(1). Sixth, if the subdivision authority endorses the plan of subdivision, the applicant has one year after the date on which it is enforced to register it in a land titles office. *Id.* s. 657(5). If the application does not register the endorsed plan of subdivision, the endorsement is void. *Id.*

²⁹ The standard of review for contract interpretation, absent an extricable question of law, is palpable and overriding error. Was the original court’s interpretation of the text clearly wrong? *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, ¶¶ 50, 53 & 54; [2014] 2 S.C.R. 633, 658 & 660 per Rothstein, J. (“Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix. [I]t may be possible to identify an extricable question of law from within what was initially characterized as a question of mixed fact and law However, courts should be cautious in identifying extricable questions of law in disputes over contractual interpretation”).

[153] A defaulting promisor in a commercial contract is liable for such portion of the loss that the promisor's default has caused the complaining promisee that the defaulting promisor could have foreseen as the *probable* result of the promisor's default had the parties addressed the issue at the time the commercial contract was made. The defaulting promisor is fixed with the knowledge it either had or should have had as an objective contracting party.

[154] I am satisfied that Canadian Pacific, acting reasonably, should have foreseen, as of the November 30, 2002, date the 10th Avenue Agreement came into force, that there were three probable consequences of its breach that could adversely affect Remington Development's interests. First, Canadian Pacific must have foreseen that its breach would deprive Remington Development of ownership of the 10th Avenue Agreement lands. Second, not being the owner, Remington Development could not develop or sell the lands. Third, if Remington Development could not develop or sell the lands, it would not be able to generate any revenue from the development or derive a benefit if the lands increased in value. Each of these consequences would be adverse to Remington Development's interests.

[155] Article 2.04³⁰ supports this finding. This provision entitled Canadian Pacific to a share in the enhanced value of the 10th Avenue Agreement lands after the sale. The Participation Agreement contemplates that Remington Development could either develop or resell the lands.³¹

[156] These conclusions would have served as the foundation for a damage award in the amount of either the difference between the market price of the 10th Avenue Agreement lands as of December 4, 2006, the date Canadian Pacific informed Remington Development that it would not sell the 10th Avenue Agreement lands to Remington Development, and the purchase price, or nominal damages attributable to a finding that Remington Development was deprived of the opportunity to develop the lands.

[157] But I am convinced that Canadian Pacific, given the information available to it on November 30, 2002, the date it accepted the offer to purchase, could not reasonably have foreseen that it was *probable* Remington Development would have undertaken any *specific* development projects and that, consequently, loss of revenue from such projects was a probable consequence of

³⁰ 10th Avenue Agreement, Art. 2.04 ("In addition to the Purchase Price, the parties acknowledge that the Purchaser shall provide, as additional consideration for the sale of the Lands to the Vendor, participation in the appreciation of the Lands as contemplated by the Participation Encumbrance contemplated in Article 6.03 hereof"). CPR's Extracts of Key Evidence 8.

³¹ CPR's Extracts of Key Evidence 38.

its breach. And even if the degree of certainty test³² was much lower, I would have come to the same conclusion.

[158] Remington Development led no evidence that it, as of November 30, 2002, communicated the existence of any specific development plans to Canadian Pacific.³³ Mr. Remington admitted that Remington Development had no specific development plans when it entered into the 10th Avenue Agreement.³⁴ The trial judge expressly found that Remington Development had no “concrete development plans” for the 10th Avenue Agreement lands³⁵ and “did not provide CPR with a specific plan”.³⁶

[159] Nor is there any evidence Remington Development produced any specific plans in the period leading up to the December 4, 2006 meeting, the time the trial judge concluded Canadian Pacific breached the 10th Avenue Agreement, that had their roots in anything that occurred before November 30, 2002.

[160] The damage award, based as it is on specific developments that were never foreseen on November 30, 2002, can only be characterized as the product of rampant speculation. It must be set aside.

³² It is helpful to think of degrees of certainty. The top end of the scale consists of a very high degree of certainty – from 80 to 100%. The next stage represents a high degree of certainty – over 50% to 79%. The bottom half of the scale has three segments. At the bottom end is an extremely low degree of certainty. This segment captures remote occurrences. It recognizes that anything can happen. It ends at 10%. The second section represents a low degree of certainty. This covers a range from 11 to 35%. The third segment of the bottom half of the scale is reserved for a moderate degree of certainty – 36 to 50%. *Can v. Calgary Police Service*, 2014 ABCA 322, ¶¶ 130-32; 315 C.C.C. 3d 337, 402-04 per Wakeling, J.A.

³³ *Remington Dev. Corp. v. Canadian Pac. Ry.*, 2022 ABCA 692, ¶ 606 (“Remington did not provide CPR with a specific plan”).

³⁴ *Id.* ¶ 566 & 573 (“In questioning prior to trial, Mr Remington acknowledged that at the time they entered into the 10th Ave Agreement they had no formal plan for development of the B Yard Lands. . . . CPR emphasized the testimony of Mr. Mason, and in particular his reference to Remington’s plans being pie-in-the-sky. This evidence is not, however, inconsistent with what was said by Mr. Remington. Both Mr. Remington’s evidence and Mr. Mason’s is that they were acquiring a large piece of land for development, the specifics of which they had yet to determine. Mr. Mason’s evidence does not suggest that Remington would not develop the land, or that it would not act like the for-profit commercial developer it was and that CPR knew it to be: developing the land in accordance with market opportunities and constraints (including planning constraints). His evidence, and Mr. Remington’s evidence, is simply that, in 2002, they did not yet know what that would look like for the B Yard Lands”).

³⁵ *Id.* ¶¶ 572 & 575 (“[Remington Development] had not created or imagined specific development plans for the B Yard Lands but did intend to develop them comprehensively. . . . Mr. Mason was questioned by CPR in the course of this litigation, and his questioning was introduced as evidence at trial. On the issue of whether Remington had concrete development plans for the 10th Ave lands, I accept Mr. Mason’s questioning evidence that it did not”).

³⁶ *Id.* ¶¶ 575 & 606.

[161] Having found that Canadian Pacific did not breach the 10th Avenue Agreement, I am relieved of the obligation to consider Remington Development's claim for punitive damages.

IV. Statement of Facts

A. Canadian Pacific and Remington Development Entered into a Series of Land-Purchase Agreements

[162] On November 30, 2002 Remington Development, a real estate development company, entered into three land-purchase agreements with Canadian Pacific – three adjacent parcels of land in Canadian Pacific's east Calgary downtown railyard.³⁷

[163] Remington Development did not have a specific development plan when it entered into these three agreements.³⁸ But it did “plan on developing them comprehensively”.³⁹

[164] The first agreement – the 9th Avenue Agreement – relates to the most northerly of the three contiguous parcels. It covered 5.56 acres.⁴⁰ Canadian Pacific removed numerous spur lines on this parcel before November 30, 2002. The 9th Avenue Agreement contained a number of conditions, including a condition related to obtaining subdivision approval.⁴¹

[165] The second agreement – the 10th Avenue Agreement⁴² – and the contract that formed the basis of the dispute at trial related to the central segment of the three. The south side of Canadian Pacific's mainline is the northern boundary of this parcel. Canadian Pacific called this “B Yard”. B Yard was roughly 140 feet in depth and covered three city blocks. It was “in the range of 5.22 acres”.⁴³ As of November 30, 2002 Canadian Pacific used this land as a rail yard.⁴⁴ It had several active spur lines. Canadian Pacific used these spur tracks for storage, maintenance and shunting of rail cars until 2010 and 2011.⁴⁵ The railway was actively developing relocation plans when the parties signed the 10th Avenue Agreement. Remington Development was aware of the fact that Canadian Pacific used the 10th Avenue Agreement lands for this purpose when it signed the 10th

³⁷ Id. ¶¶ 2 & 3. See CPR's Extracts of Key Evidence 23-26 & 32-33.

³⁸ *Remington Dev. Corp. v. Canadian Pac. Ry.*, 2022 ABKB 692, ¶¶ 7 & 41.

³⁹ Id.

⁴⁰ Id. ¶ 3. See CPR's Extracts of Key Evidence 33.

⁴¹ *Remington Dev. Corp. v. Canadian Pac. Ry.*, 2022 ABKB 692, ¶ 3. See CPR's Extracts of Key Evidence 36.

⁴² CPR's Extracts of Key Evidence 7.

⁴³ *Remington Dev. Corp. v. Canadian Pac. Ry.*, 2022 ABKB 692, ¶¶ 4 & 81.

⁴⁴ Id. ¶ 4.

⁴⁵ Id. ¶¶ 10 & 45.

Avenue Agreement.⁴⁶ It must have been aware that Canadian Pacific continued to do so while Remington Development had an interest in the land.

[166] Some of the relevant parts of the 10th Avenue Agreement are set out below:⁴⁷

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

....

2.02 ... The Purchaser acknowledges that the Existing Parcel is rail right-of-way lands and that the only portion of the Existing Parcel that the Vendor is capable of selling to the Purchaser is that portion of the Existing Parcel which the Vendor determines, in its discretion but in accordance with the *Railway Act*, to be surplus to its operational requirements. Upon the Vendor’s determination of the area of the Lands in accordance with Article 6.05 hereof, the Vendor shall cause the Alberta land surveyor preparing the tentative subdivision plan for the Lands to certify as to the number of acres and fractions thereof correct to three (3) decimal places contained in each of Lot 1 and Lot 2 and the Purchase Price shall be adjusted

....

6.03 By December 10, 2002, the Vendor and the Purchaser shall have agreed upon the form and substance of a participation agreement and encumbrance whereby the Purchaser shall grant to the Vendor certain participation rights in the appreciation in value of the Lands after Closing

....

6.05 By March 31, 2003, the Vendor shall have obtained approval to a tentative plan of subdivision which will subdivide the Subdivided Lands from the Existing

⁴⁶ Id. ¶ 86.

⁴⁷ CPR’s Extracts of Key Evidence 7-26 (emphasis in original deleted).

Parcel and both the Vendor and the Purchaser shall be satisfied as to the conditions of such tentative subdivision plan approval In the event that the application for tentative subdivision plan approval has been made in a timely fashion and has been diligently pursued but the subdivision approving authority has not made a decision regarding the approval thereof ... , then either party shall have the unilateral ability to extend the date for satisfaction of this condition from March 31, 2004 to September 30, 2004.

[167] The third agreement – the Interlink Agreement⁴⁸ – related to 11.011 acres of land that formed the southern segment of the three parcels.⁴⁹

[168] Neither the 9th Avenue Agreement nor the Interlinks Agreement contained a provision comparable to Article 2.02 of the 10th Avenue Agreement.⁵⁰

[169] Each of the agreements sets a purchase price that Remington Development would pay at closing.⁵¹

B. Remington Development and Canadian Pacific Entered into a Participation Agreement and Encumbrance on December 17, 2002

[170] As contemplated by Article 6.03 of the 10th Avenue Agreement, the parties entered into a Participation Agreement and Encumbrance on December 17, 2002.⁵²

[171] This document contemplated that Remington Development would either develop the 10th Avenue Agreement lands or sell all or a portion of them.⁵³

C. Both the Interlink and the 9th Avenue Agreements Closed Without Incident

[172] In early 2003 the Interlink Agreement closed.⁵⁴

⁴⁸ *Remington Dev. Corp. v. Canadian Pac. Ry.*, 2022 ABKB 692, ¶ 5. See CPR’s Extracts of Key Evidence 27.

⁴⁹ CPR’s Extracts of Key Evidence 27.

⁵⁰ *Remington Dev. Corp. v. Canadian Pac. Ry.*, 2022 ABKB 692, ¶¶ 3 & 80.

⁵¹ *Id.* ¶ 6. CPR’s Extracts of Key Evidence 8, 27-28 & 33-34.

⁵² CPR’s Extracts of Key Evidence 38.

⁵³ *Remington Dev. Corp. v. Canadian Pac. Ry.*, 2022 ABKB 692, ¶ 614 (“By virtue of the Participation Agreement, when Remington applied for a development permit on the lands CPR would receive 50% of the increased value of the lands at that time. That increase in value would take into account the market effect on the land of the proposed development, while also not requiring CPR to take on any risks of the development”).

⁵⁴ *Id.* ¶ 9. See Transcript of Proceedings 230:12-3 & 337:9-10.

[173] In April 2003 the 9th Avenue Agreement lands were subdivided.⁵⁵ An amending agreement dated December 31, 2004 allowed Canadian Pacific to keep approximately one acre for “railway purposes”.⁵⁶

[174] In May 2005 the 9th Avenue Agreement closed.⁵⁷

D. Canadian Pacific Submitted a Series of Applications To Subdivide the 10th Avenue Agreement Lands to the City of Calgary

[175] The 10th Avenue Agreement set March 31, 2004 as the date by which Canadian Pacific must obtain “approval of a *tentative* plan of subdivision” with the provision that this date, at the option of either Canadian Pacific or Remington Development, could be extended to September 30, 2004.⁵⁸

[176] Canadian Pacific did not submit its first subdivision application to the City until November 24, 2004. As of November 24, 2004 the end date for subdivision approval was December 15, 2004.⁵⁹ The parties subsequently extended the end date several more times.⁶⁰ The subdivision application described the lands as “vacant, except for rail car storage” and identified the proposed use of the land as “commercial and high rise”.⁶¹

[177] In emails Canadian Pacific and Remington Development exchanged at the time Canadian Pacific submitted the subdivision application, Mike Hyder, Canadian Pacific’s manager of real

⁵⁵ *Remington Dev. Corp. v. Canadian Pac. Ry.*, 2022 ABKB 692, ¶ 9.

⁵⁶ *Id.*

⁵⁷ *Id.* See Transcript of Proceedings 230:15-20.

⁵⁸ Art. 6.06 (“By March 31, 2004 the Vendor shall have obtained approval of a tentative plan of subdivision which will subdivide the Subdivided Lands from the Existing Parcel... . In the event that the application for tentative subdivision approving authority has not been made in a timely fashion and has been diligently pursued but the subdivision approving authority has not made a decision regarding the approval thereof or such a decision has been appealed, then either party shall have the unilateral ability to extend the date for satisfaction of their conditions from March 31, 2004 to September 30, 2004”) (emphasis added). CPR’s Extracts of Key Evidence 10.

⁵⁹ *Remington Dev. Corp. v. Canadian Pac. Ry.*, 2022 ABKB 692, ¶¶ 11, 108, 125, 225. See Transcript of Proceedings 397:38-39, 402:5-10 & 597:32-34. CPR’s Extracts of Key Evidence 135.

⁶⁰ CPR’s Extracts of Key Evidence 136-38.

⁶¹ *Remington Dev. Corp. v. Canadian Pac. Ry.*, 2022 ABKB 692, ¶ 109. See also *Id.* ¶¶ 120 & 138 (“Mr. Cooper, Remington’s Senior Vice-President, Land and Construction, described the e-mail from Mr. Hyder, in which Mr. Hyder noted that the Operations department (“Operations”) had not given final approval with respect to how many tracks were being removed, as consistent with what Mr. Hyder had advised him of previously. Mr. Nimmo testified that some tension existed between Real Estate and Operations on the issue of surplus: Operations generally wanted to hold on to land, while Real Estate wanted to sell the land to obtain cash for underused or unused assets”).

estate and marketing, stated that Canadian Pacific had authorized its agent to submit the subdivision application. Mr. Hyder informed Remington Development that operations “had not given final approval to remove all of the tracks”, but that its agent had advised that the plan could be amended if necessary.⁶²

[178] In February 2005 Canadian Pacific revised the subdivision application.⁶³ This application added a small piece of land relating to construction of the 4th Street underpass. The trial judge found it arose out of an exchange with the City of Calgary to facilitate development of the land.⁶⁴

[179] On November 24, 2005 Canadian Pacific made its third and final subdivision application.⁶⁵ This application increased the land submitted for subdivision.⁶⁶

[180] On November 3, 2006 Calgary’s subdivision authority approved the application.⁶⁷

[181] As of November 3, 2006 the contractual end date for subdivision approval was June 15, 2007.⁶⁸

E. Alberta Approached Canadian Pacific

[182] Sometime in the spring or summer of 2006, unbeknownst to Remington Development, Alberta became interested in the 10th Avenue lands.⁶⁹ The province was contemplating a high-speed rail link between Calgary and Edmonton and believed the 10th Avenue lands might be part of this project.⁷⁰

⁶² Id. ¶ 110 (“In emails exchanged between CPR and Remington at the time of the [first tentative plan of subdivision] application, Mike Hyder said that CPR had authorized IBI to submit the subdivision application on behalf of CPR but noted his ‘concern that CP operations has not given final approval to remove all of the tracks’”). See CPR’s Extracts of Key Evidence 132.

⁶³ *Remington Dev. Corp. v. Canadian Pac. Ry.*, 2022 ABKB 692, ¶¶ 11 & 111. See Transcript of Proceedings 398:3-4 & 404:35-36.

⁶⁴ *Remington Dev. Corp. v. Canadian Pac. Ry.*, 2022 ABKB 692, ¶¶ 11, 111 & 222. See Transcript of Proceedings 904:18-29, 1405:17-35 & 1487:5-9.

⁶⁵ *Remington Dev. Corp. v. Canadian Pac. Ry.*, 2022 ABKB 692, ¶¶ 11 & 112. See Transcript of Proceedings 398:6-8.

⁶⁶ *Remington Dev. Corp. v. Canadian Pac. Ry.*, 2022 ABKB 692, ¶ 113.

⁶⁷ Id. ¶¶ 12, 269 & 272.

⁶⁸ Id. ¶ 13. See also CPR’s Extract of Key Evidence 138 & Transcript of Proceedings 239:6-7, 422:39-41 & 1326:14-20.

⁶⁹ *Remington Dev. Corp. v. Canadian Pac. Ry.*, 2022 ABKB 692, ¶¶ 15 & 273.

⁷⁰ Id. ¶ 15.

[183] In July 2006 Alberta commissioned an appraisal of the 10th Avenue lands, the 9th Avenue lands and the Interlink lands.⁷¹

[184] By September 2006 Alberta and Canadian Pacific were actively negotiating the terms of a land-purchase agreement.⁷²

[185] On October 24, 2006 Gary Brownlee, a commercial realtor Alberta retained to assist with the purchase, spent an hour reviewing a draft memorandum of understanding between Canadian Pacific and Alberta.⁷³ By the end of October 2006, “the negotiations between CPR and the Province had ... progressed to the point that the parties had ironed out the basics of the transaction”.⁷⁴

[186] On November 7, 2006⁷⁵ Canadian Pacific, with the assistance of someone from Remington Development, sent a letter to the City, indicating that Canadian Pacific was in discussions with another party to purchase some of the lands. According to John Walsh, Canadian Pacific’s vice-president real estate, this was done “to create a sense of urgency”⁷⁶ to encourage the City to reach a decision on the subdivision application. The trial judge accepted that this was at least part of Canadian Pacific’s goal, but she also noted that it was “equally if not more important” to Canadian Pacific to “[put] the brakes on the subdivision application while Canadian Pacific was in the process of finalizing the transaction with the Province”.⁷⁷

[187] By December 3, 2006 Alberta and Canadian Pacific had a “substantive framework for their proposed transaction and were exchanging draft memoranda of understanding”.⁷⁸

F. Canadian Pacific Informed Remington Development That It Had Decided to Sell the 10th Avenue Agreement Lands to the Province

⁷¹ Id. ¶¶ 15 & 274. See CPR’s Extracts of Key Evidence 143-72.

⁷² *Remington Dev. Corp. v. Canadian Pac. Ry.*, 2022 ABKB 692, ¶¶ 15 & 275. See Transcripts of Proceedings 1677:27-31, 1678:13-18, 1680:6-17, 1682:36-1683:18, 1684:20-29 & 1686:17-39.

⁷³ Transcript of Proceedings 1686:17-21. An undated draft of a memorandum of understanding between the Province and Canadian Pacific was also included in the Province’s extracts. Alberta’s Extracts of Key Evidence 25-29. While unexecuted and undated, the signature line has a placeholder year of 2006.

⁷⁴ *Remington Dev. Corp. v. Canadian Pac. Ry.*, 2022 ABKB 692, ¶ 282.

⁷⁵ Id. ¶¶ 12, 269 & 272.

⁷⁶ Id. ¶ 284.

⁷⁷ Id. ¶ 283.

⁷⁸ Id. ¶ 291. See also id. ¶ 16.

[188] On December 4, 2006 Mr. Remington and other Remington Development representatives met with senior Canadian Pacific officers – Messrs. Walsh and Hyder – and Mr. Brownlee to discuss the 10th Avenue Agreement. Mr. Walsh informed Mr. Remington that Canadian Pacific had not determined that the 10th Avenue Agreement lands were “surplus to its operations” and that it could not sell the lands to Remington Development. Mr. Remington was “angry and upset”.⁷⁹ He told Mr. Walsh that they had a contract. Mr. Walsh told him to “[g]et over it”.⁸⁰

[189] Mr. Remington and the other Remington Development representatives left the December 4, 2006 meeting with the understanding that the Province might not require all the 10th Avenue Agreement lands and would be willing to sell the unneeded segment to Remington Development.⁸¹

[190] In the period immediately following the December 4, 2006 meeting, Remington Development did not inform Canadian Pacific that Remington Development took the position Canadian Pacific had breached the 10th Avenue Agreement.⁸²

[191] In a letter dated June 15, 2007, counsel for Canadian Pacific informed Remington Development that, as of June 15, 2007, Canadian Pacific still used the 10th Avenue Agreement lands for its railway operations: “Canadian Pacific Railway Company has determined that no portion of the Existing Parcel is currently surplus to the Vendor’s existing railroad operations nor is that situation to change in the future”.⁸³

[192] On June 18, 2007 Canadian Pacific returned Remington Development’s deposit. Remington Development accepted the return of its deposit.⁸⁴

[193] On April 9, 2007 Canadian Pacific and Alberta entered into an agreement for the sale of the 10th Avenue Agreement lands.⁸⁵ It closed on December 15, 2007.⁸⁶

G. Remington Development Sued Canadian Pacific and Alberta

⁷⁹ Id. ¶ 20.

⁸⁰ Id. ¶¶ 19-20, 39, 294, 403-404 & 1205. See also Transcript of Proceedings 593:41-594:5, 914:11-30 & 2987:14-16.

⁸¹ Id. ¶ 21.

⁸² Id. ¶ 22.

⁸³ Alberta’s Extracts of Key Evidence 79.

⁸⁴ *Remington Dev. Corp. v. Canadian Pac. Ry.*, 2022 ABKB 692, ¶¶ 24, 303 & 428-29; Transcript of Proceedings 269:16-28, 1244:35-1245:2 & 2984:3-8.

⁸⁵ *Remington Dev. Corp. v. Canadian Pac. Ry.*, 2022 ABKB 692, ¶ 23.

⁸⁶ Id. ¶ 26. See Alberta’s Extracts of Key Evidence 39 & 52.

[194] On March 29, 2008 Remington Development filed a statement of claim against Canadian Pacific alleging breach of the 10th Avenue Agreement.⁸⁷

[195] On July 21, 2009 it amended the statement of claim by adding Alberta as a defendant.⁸⁸

[196] By the time this matter proceeded to trial, Remington Development sought specific performance or a declaration that Remington was entitled to specific performance of the 10th Avenue Agreement,⁸⁹ damages in excess of \$300 million,⁹⁰ punitive damages in the amount of \$1 million,⁹¹ interest and costs.⁹²

H. The Trial Judge Held That Canadian Pacific Breached the 10th Avenue Agreement

[197] Justice Woolley held that Canadian Pacific breached the 10th Avenue Agreement.

1. The Parties' Arguments

[198] Canadian Pacific⁹³ relied on Article 2.02 of the 10th Avenue Agreement: “The Purchaser acknowledges that the Existing Parcel is rail right-of-way lands and that the only portion of the Existing Parcel that the Vendor is capable of selling to the Purchaser is that portion of the Existing Parcel which the Vendor determines, in its discretion but in accordance with the *Railway Act*, to be surplus to its operational requirements”.

[199] The corporate defendant asserted that Article 2.02 gave “it absolute discretion to determine whether the 10th Avenue Lands were surplus to operational requirements”.⁹⁴

[200] Canadian Pacific argued that it had no obligation to sell the 10th Avenue Agreement lands to Remington Development unless it made a determination under Article 2.02 that the 10th Avenue Agreement lands were “surplus to its operational requirements”.

⁸⁷ *Remington Dev. Corp. v. Canadian Pac. Ry.*, 2022 ABKB 692, ¶ 27. See CPR’s Extracts of Key Evidence 220.

⁸⁸ Alberta’s Extracts of Key Evidence 162.

⁸⁹ Appeal Record 40. Fourth Amended Statement of Claim, ¶¶ 33(a)-(b).

⁹⁰ Id. ¶¶ 33(c)-(d).

⁹¹ Id. ¶ 33(e).

⁹² Id. ¶¶ 33(f)-(g).

⁹³ *Remington Dev. Corp. v. Canadian Pac. Ry.*, 2022 ABKB 692, ¶ 45.

⁹⁴ Id.

[201] The corporate defendant maintained that it never made such a determination.

[202] Canadian Pacific emphasized that it had never notified Remington Development either in writing or orally that it had determined that the 10th Avenue Agreement lands were “surplus to its operational requirements”. The trial judge found as a fact that Canadian Pacific never notified Remington Development of such a determination.⁹⁵

[203] Remington Development argued that Article 2.02 did not require an express determination on the part of Canadian Pacific that the 10th Avenue Agreement lands were “surplus to its operational requirements”.⁹⁶ It asserted that the 10th Avenue Agreement characterized the November 24, 2004 tentative subdivision application by Canadian Pacific under Article 6.06 and other provisions of the 10th Avenue Agreement to be evidence of a surplus declaration under Article 2.02.

2. Justice Woolley’s Analysis

a. Canadian Pacific Breached the 10th Avenue Agreement

[204] Justice Woolley carefully reviewed the entire 10th Avenue Agreement, as well as the 9th Avenue and Interlink agreements.⁹⁷

[205] The trial judge held that Canadian Pacific had no obligation to sell any of the 10th Avenue Agreement lands to Remington Development.⁹⁸ But Justice Woolley also concluded that the “surplussing decision had a deadline and, by virtue of the subdivision application, a process for communicating that it had made that decision. Remington would not remain in uncertainty indefinitely”.⁹⁹

[206] The trial judge concluded that as of November 30, 2002, the date Canadian Pacific accepted Remington Development’s offer to purchase, Canadian Pacific and Remington Development contemplated that Canadian Pacific would promptly decide whether the 10th Avenue Agreement

⁹⁵ Id. ¶ 165 (“Neither party produced any documents prior to 2004 explicitly stating whether CPR had determined that the B Yard was surplus or not”).

⁹⁶ Id. ¶ 47.

⁹⁷ Id. ¶¶ 60-69.

⁹⁸ Id. ¶ 76.

⁹⁹ Id.

lands were surplus or not.¹⁰⁰ Articles 6.05 and 7.01, which are set out below, support this conclusion:¹⁰¹

6.05 By March 31, 2003, the Vendor shall have determined that it is lawfully entitled to make application to subdivide the Subdivided Lands from the Existing Parcel

....

7.01 The Purchaser acknowledges that the Lands are presently part of the Existing Parcel. Upon acceptance of this Offer by the Vendor, the Vendor shall *forthwith* apply for the subdivision of the Lands from the Existing Parcel.

[207] So, she held, does a statement Canadian Pacific made in a September 2002 document entitled “East Calgary CPR Yard Property Information”:¹⁰²

The parcel is encumbered by several (4 or 5) active spur tracks used by CPR for storage, maintenance, and shunting of rail cars. An alternative location for these activities must be found and the tracks relocated prior to development of this site. CPR has advised that a tentative schedule for this is the end of 2003.

[208] The trial judge understood that the 10th Avenue Agreement lands, as of November 30, 2002, “were used as an active switching and rail yard. They contained tracks and storage facilities used for maintenance, cleaning train cars, switching and shunting rail cars to build trains, and to service CPR customers”.¹⁰³ Justice Woolley held that “Remington [Development] knew that CPR actively used the 10th Ave Lands at the time the 10th Ave Agreement was signed”.¹⁰⁴

[209] Justice Woolley also held that Canadian Pacific continued to use the 10th Avenue Agreement lands for its railway operations until 2011.¹⁰⁵

¹⁰⁰ Id. ¶¶ 82 & 87.

¹⁰¹ CPR’s Extracts of Key Evidence 10 & 11 (emphasis added).

¹⁰² Id. 57.

¹⁰³ *Remington Dev. Corp. v. Canadian Pac. Ry.*, 2022 ABKB 692, ¶ 86.

¹⁰⁴ Id.

¹⁰⁵ Id. ¶ 127.

[210] Justice Woolley held that Canadian Pacific must have determined that the 10th Avenue Agreement lands were surplus under Article 2.02 before it submitted its November 24, 2004 application for a tentative subdivision plan:¹⁰⁶

The contemporaneous documentary evidence shows that CPR participated in and authorized the original subdivision application with respect to the 10th Ave Lands. Specifically, in November 2004, CPR gave a surveyor the dimensions of land for surveying, and participated in the creation of a tentative plan of subdivision to be submitted to the City for approval

This evidence *prima facie* demonstrates that the lands included in the first subdivision application had, in accordance with Articles 2.02, 6.05 and 6.08(c), been determined to be surplus to operating requirements by CPR and were available for sale to Remington once the subdivision approval had been granted. Contractually, those lands were surplus.

[211] The trial judge did not explain why this must be the case. It is not self-evident why this is so.

[212] But Justice Woolley did acknowledge that this finding was inconsistent with the facts testified to by Canadian Pacific witnesses that were not contradicted by any other witnesses:¹⁰⁷

Mr. Hyder’s testimony was that the subdivision application process ought not to be understood in that way; he said that the parties knew the application was being submitted on a tentative basis, and for convenience only. Similarly the other CPR witnesses firmly and consistently maintained that in 2004 and subsequently the 10th Ave Lands had not been declared surplus. They emphasized that at all times the B Yard lands were used for operational requirements and until the City paid for the move of B Yard to Manchester as part of the 4th Street SE underpass construction, no suitable alternative to B Yard existed.

[213] In addition, Remington Development never produced any document it claimed constituted a determination by Canadian Pacific that the 10th Avenue Agreement lands were “surplus to operational requirements”.¹⁰⁸

¹⁰⁶ Id. ¶¶ 125-26. See also ¶¶ 106, 228 & 233.

¹⁰⁷ Id. ¶ 127.

¹⁰⁸ Id. ¶ 165 (“Neither party produced any documents from prior to 2004 explicitly stating whether CPR had determined that B Yard was surplus or not”).

b. Alberta Induced Canadian Pacific’s Breach of the 10th Avenue Agreement

[214] Justice Woolley’s conclusion that Canadian Pacific breached the 10th Avenue Agreement required her to consider the claim that Alberta induced Canadian Pacific’s breach of the 10th Avenue Agreement.

[215] The trial judge determined that “had the Province not approached CPR, CPR would have closed the ... [10th Avenue Agreement] with Remington”.¹⁰⁹

[216] Justice Woolley found that Alberta never saw the 10th Avenue Agreement and did not have actual knowledge of its terms.¹¹⁰

[217] But Justice Woolley went on to find that Alberta was wilfully blind to the fact that its agreement with Canadian Pacific would result in a breach of the 10th Avenue Agreement between Canadian Pacific and Remington Development.¹¹¹

[218] She did so for three reasons.

[219] First, Remington Developments had registered a caveat on the 10th Avenue lands.¹¹² The caveat disclosed the existence of the 10th Avenue Agreement.¹¹³

[220] Second, Mr. Brownlee, Alberta’s representative, never asked Remington Development about its understanding of Canadian Pacific’s obligation to Remington Development under the 10th Avenue Agreement.¹¹⁴

[221] Third, Canadian Pacific had not represented to Mr. Brownlee that it had clear title to the 10th Avenue Agreement lands or that the 10th Avenue Agreement had expired.¹¹⁵

¹⁰⁹ Id. ¶ 344.

¹¹⁰ Id. ¶ 345.

¹¹¹ Id. ¶ 379.

¹¹² Id. ¶¶ 380-82.

¹¹³ Id. ¶ 347.

¹¹⁴ Id. ¶ 383.

¹¹⁵ Id. ¶ 384-85.

c. Justice Woolley Awarded Remington Development Damages for Lost Profits and Prejudgment Interest

[222] Remington Development sought specific performance of the 10th Avenue Agreement. The trial judge dismissed this claim. Justice Woolley held that Remington Development accepted Canadian Pacific’s repudiation of the 10th Avenue Agreement.¹¹⁶

[223] At trial, Canadian Pacific argued that the normal measure of damages for a failed land sale transaction applied to determine the damages it owed to Remington Development.¹¹⁷ It took the position that it should not be liable for lost profits unless Remington Development “specifically” informed it of this potential loss at the time of contracting.¹¹⁸

[224] Justice Woolley considered whether Remington Development was eligible for damages for lost development opportunity – \$322 million¹¹⁹ – or the difference in the value of the 10th Avenue Agreement between November 30, 2002 and December 4, 2006.¹²⁰

[225] Justice Woolley proceeded on the basis that the law required her to consider the type of loss that was reasonably foreseeable as probable¹²¹ when Canadian Pacific and Remington Development entered into the 10th Avenue Agreement on November 30, 2002. She focused on what the evidence suggested was “within the reasonable contemplation of the parties in 2002 and ... in the reasonable contemplation of CPR”.¹²²

[226] The trial judge made two distinct conclusions about what the parties could reasonably have foreseen as the probable consequences of a breach by Canadian Pacific of the 10th Avenue Agreement, as of the date of entering into the agreement. One was general in nature, the other specific.

¹¹⁶ Id. ¶ 510.

¹¹⁷ Id. ¶ 618.

¹¹⁸ Id. ¶¶ 612 & 618.

¹¹⁹ Id. ¶ 660 (“Remington’s lost profits, unadjusted \$322,700,000”).

¹²⁰ Id. ¶ 469.

¹²¹ Id. ¶ 603 (“The Participation Agreement identifies possibilities other than development, including that Remington will sell the land; in that case, can development be said to be ‘probable’”) (emphasis added). See also id. ¶ 622 (“CPR also submits that a plaintiff having plans that amount to ‘development in the air’ is not sufficient; the information available must provide the defendant with a ‘meaningful understanding that the *probable* result of the breach will be the claim that is being presented to the Court’. I agree with the second half of this framing”) (emphasis added).

¹²² Id. ¶ 533.

[227] Here is the general conclusion:¹²³

Based on this documentation, I am satisfied that it was reasonably foreseeable at the time of the 10th Ave Agreement that Remington would develop the 10th Ave Lands and that it would develop them in the most profitable way possible based on market conditions at the time of development, including planning opportunities and constraints.

[228] Now the specific conclusion:¹²⁴

[I]t was reasonably foreseeable that that development would be part of a larger multi-use development across the B Yard including low, mid and high-rise residential, and low-rise and high-rise office commercial buildings. It was probable that at least 50% of the B Yard Lands would be used for non-residential purposes, and that in general the focus of the B Yard Lands development would be on commercial uses as the highest and best use of the lands, specifically “commercial/office uses oriented to downtown service providers”. The 10th Ave Lands would be part of that commercial development, given the restrictions against using those lands for residential purposes.

[229] The specific conclusion allowed the trial judge to find that “the loss reasonably foreseeable in relation to a breach of the 10th Avenue Agreement was Remington’s loss of the ability to construct the part of that development on the 10th Ave Lands and, as well, the disruption of the larger development opportunities for the B Yard lands caused by losing the 10th Ave Lands”.¹²⁵

[230] In reaching this specific conclusion, the trial judge placed little or no weight on her finding that Remington Development had no specific development plans when Canadian Pacific accepted the offer to purchase and provided no development plan to Canadian Pacific before November 30, 2002.

¹²³ Id. ¶ 590.

¹²⁴ Id. See also id. ¶ 601 (“As a whole, this evidence satisfies me that it was reasonably foreseeable in late 2002 that Remington would develop the 10th Ave Lands based on current market and planning conditions. It was reasonably foreseeable that it would create a multi-use development across the B Yard lands including low, mid, and high-rise residential, and low-rise and high-rise office commercial buildings, but with a focus on commercial development, particularly on the 10th Ave Lands”).

¹²⁵ Id. ¶ 591.

[231] Mr. Remington admitted that his business had no specific development plan as of November 30, 2002.¹²⁶

[232] Justice Woolley expressly stated that Remington Development had no “concrete development plan”¹²⁷ and “did not provide CPR with a specific plan”.¹²⁸

[233] The trial judge awarded damages for loss of development opportunity¹²⁹ in the amount of \$163,707,836.¹³⁰ In a subsequent decision she increased the damages to \$165,166,431.¹³¹

d. The Trial Judge Dismissed Remington Development’s Claims for Punitive Damages

[234] Remington Development argued that the conduct of Canadian Pacific and Alberta showed a “blatant disregard for ... [Canadian Pacific’s] contractual obligations”, which would warrant an award of punitive damages.¹³²

¹²⁶ Id. ¶¶ 566 & 575 (“In questioning prior to trial, Mr Remington acknowledged that at the time they entered into the 10th Ave Agreement they had no formal plan for development of the B Yard Lands. CPR emphasized the testimony of Mr. Mason, and in particular his reference to Remington’s plans being pie-in-the-sky. This evidence is not, however, inconsistent with what was said by Mr. Remington. Both Mr. Remington’s evidence and Mr. Mason’s is that they were acquiring a large piece of land for development, the specifics of which why had yet to determine. Mr. Mason’s evidence does not suggest that Remington would not develop the land, or that it would not act like the for-profit commercial developer it was and that CPR knew it to be: developing the land in accordance with market opportunities and constraints (including planning constraints). It is evidence, and Mr. Remington’s evidence, is simply that, in 2002, they did not yet know what that would look like for the B Yard Lands”).

¹²⁷ Id. ¶¶ 572 & 575 (“[Remington Development] had not created or imagined specific development plans for the B Yard Lands but did intend to develop them comprehensively. Mr. Mason was questioned by CPR in the course of litigation, and his questioning was introduced as evidence at trial. On the issue of whether Remington had concrete development plans for the 10th Ave lands, I accept Mr. Mason’s questioning evidence that it did not”).

¹²⁸ Id. ¶ 606.

¹²⁹ Id. ¶ 591.

¹³⁰ Id. ¶ 660. This amount reflected a thirty percent deduction for the “uncertainty” of Remington Development’s development plans, a five percent deduction for “uncertainty re revenues”, an \$11.35 million deduction for recoverable operating costs, nearly \$4 million for ENMAX transmission line removal, a further \$1.7 million to acquire the air rights to the 10th Avenue Agreement lands, \$29 million in mitigation, and a line item for an adjustment of land acquisition costs, in an amount “TBD”. The \$29 million line item for mitigation later formed the basis for Remington Development’s “slip” application: *Remington Dev. Corp. v. Canadian Pac. Ry.*, 2023 ABKB 493.

¹³¹ *Remington Dev. Corp. v. Canadian Pac. Ry.*, 2023 ABKB 493, ¶ 122.

¹³² *Remington Dev. Corp. v. Canadian Pac. Ry.*, 2022 ABKB 692, ¶ 1209.

[235] Justice Woolley disagreed.¹³³ While Alberta and Canadian Pacific had behaved unlawfully – CPR breached the 10th Avenue Agreement and Alberta induced Canadian Pacific to breach the 10th Avenue Agreement – the conduct was not aimed at harming Remington Development. The trial judge noted that “[t]hey did not think about ... [Remington] one way or another, even when they should have”.¹³⁴

3. The Appeals

[236] On November 17, 2022 Canadian Pacific and Alberta filed their notice of appeal. They amended their notice of appeal twice.¹³⁵

[237] Canadian Pacific appealed on the basis that the trial judge erred in concluding that Canadian Pacific had breached the contract and in her award of damages.

[238] Alberta appealed on the basis that the trial judge erred in finding Alberta liable for the tort of inducing breach of contract.

[239] On November 25, 2022 Remington Development filed its notice of cross appeal.¹³⁶ Remington Development argued that the trial judge erred in dismissing its claim for punitive damages. The notice was amended to add a claim related to the “slip” in the trial judge’s October 20, 2022 decision.¹³⁷

V. Key Contract Provisions

[240] The relevant parts of the 10th Avenue Agreement read as follows:¹³⁸

REMINGTON DEVELOPMENT CORPORATION (herein called the “Purchaser”) hereby offers to purchase a portion of those certain lands and premises of the Vendor [Canadian Pacific Railway Company] situated in the City of Calgary, in the Province of Alberta, consisting of 5.22 acres, or such greater or lesser area as determined in accordance with Article 6.05 hereof, which portion is heavily outlined in red on Schedule “A” attached hereto and shaded or hatched on such sketch plan as referenced in Schedule “B” (herein called the “Subdivided Lands”

¹³³ Id. ¶ 1207. Appeal Record 39. Fourth Amended Statement of Claim, ¶¶ 25-28.

¹³⁴ *Remington Dev. Corp. v. Canadian Pac. Ry.*, 2022 ABKB 692, ¶ 1208.

¹³⁵ They filed an Amended Civil Notice of Appeal on September 26, 2023 and a Second Amended Civil Notice of Appeal on November 15 and 21, 2023. Appeal Record 369 & 375.

¹³⁶ Civil Notice of Cross Appeal filed November 25, 2022.

¹³⁷ Amended Civil Notice of Cross Appeal filed September 26, 2023. Appeal Record 380.

¹³⁸ CPR’s Extracts of Key Evidence 7-26 (emphasis in original deleted).

or the “Lands”) and which Lands are within those existing parcels of land legally described as set forth in Schedule “B” attached hereto (collectively, the “Existing Parcel”), on the terms and conditions herein set forth.

....

2.01 Subject to the provisions of Article 2.02, the purchase price for the Lands shall be the sum of \$3,285,000.00, exclusive of applicable GST (herein called the “Purchase Price”)

2.02 ... The Purchaser acknowledges that the Existing Parcel is rail right-of-way lands and that the only portion of the Existing Parcel that the Vendor is capable of selling to the Purchaser is that portion of the Existing Parcel which the Vendor determines, in its discretion but in accordance with the *Railway Act*, to be surplus to its operational requirements. Upon the Vendor’s determination of the area of the Lands in accordance with Article 6.05 hereof, the Vendor shall cause the Alberta land surveyor preparing the tentative subdivision plan for the Lands to certify as to the number of acres and fractions thereof correct to three (3) decimal places contained in each of Lot 1 and Lot 2 and the Purchase Price shall be adjusted

....

2.04 In addition to the Purchase Price, the parties acknowledge that the Purchase shall provide, as additional consideration for the sale of the Lands to it by the Vendor, participation in the appreciation of the Lands as contemplated in the Participation Encumbrance contemplated in Article 6.03 hereof.

....

3.01 The closing date of the purchase and sale transaction herein shall take place within 30 days following the removal of all of the conditions outlined in Article 5 and Article 6 hereof and receipt by the Vendor of the tentative plan of subdivision and all ancillary documentation such that the plan is in registerable form or sooner by mutual agreement of the parties.

....

6.03 By December 10, 2002 the Vendor and Purchaser shall have agreed upon the form and substance of a participation agreement and encumbrance whereby the Purchaser shall grant to the Vendor certain participation rights in the appreciation of the value of the Lands after closing and charge the Lands as security for the obligation to make such appreciation payment

....

6.05 By March 31, 2003, the Vendor shall have determined that it is lawfully entitled to make application to subdivide the Subdivided Lands from the Existing Parcel and shall have made a determination of the boundaries of Subdivided Lands such that the depth of Lot 2 shall be no less than one hundred (100) feet.

....

6.06 By March 31, 2004, the Vendor shall have obtained approval to a tentative plan of subdivision which will subdivide the Subdivided Lands from the Existing Parcel and both the Vendor and the Purchaser shall be satisfied as to the conditions of such tentative subdivision plan approval In the event that the application for tentative subdivision plan approval has been made in a timely fashion and has been diligently pursued but the subdivision approving authority has not made a decision regarding the approval thereof or such a decision has been appealed, then either party shall have the unilateral ability to extend the date for satisfaction of this condition from March 31, 2004 to September 30, 2004.

....

13.01 All notices, requests or demands to or upon the parties shall be in writing and shall be required to be hand delivered, sent via courier or facsimile transmission to

....

16.04 Subject to Article 16.06 hereof, the Vendor covenants and agrees that on or before December 31, 2004, the remedial site clean-up of the Lands shall be complete, which remediation shall include the following:

....

(b) all railway tracks and railway ties have been removed from the Lands;

(c) all existing buildings/facilities on the Lands have been demolished and removed from the Lands (including foundations)... .

VI. Analysis

A. The Trial Judge Was Clearly Wrong in Adjudging That Canadian Pacific Breached the 10th Avenue Agreement

1. Overview

[241] Justice Woolley rejected Canadian Pacific’s argument that Article 2.02 of the 10th Avenue Agreement meant that Canadian Pacific had no obligation to sell the 10th Avenue Agreement lands to Remington Development until Canadian Pacific made an express determination that the 10th Avenue Agreement lands were “surplus to its operational requirements” and communicated the existence of this determination to Remington Development in writing.

[242] The trial judge adopted a completely different interpretation. She held that conduct of Canadian Pacific subsequent to the date of the 10th Avenue Agreement could be evidence that Canadian Pacific had determined that the 10th Avenue Agreement lands were “surplus to its operational requirements” – notwithstanding the fact that Canadian Pacific had made no such determination and had not informed Remington Development, either in writing or orally, of this critical fact.

[243] This approach allowed Justice Woolley to catalogue Canadian Pacific’s November 24, 2004 subdivision application as evidence that Canadian Pacific made a prior determination that the 10th Avenue Agreement lands were surplus to its operational requirements.¹³⁹

[244] Justice Woolley’s interpretation – Canadian Pacific can be held to have made the Article 2.02 determination even though it never did – in effect, erases the key words of Article 2.02.

[245] The trial judge has rewritten the parties’ 10th Avenue Agreement and given the text a meaning it cannot plausibly bear.

[246] An adjudicator can never do this.¹⁴⁰

¹³⁹ *Remington Dev. Corp. v. Canadian Pac. Ry.*, 2022 ABKB 692, ¶ 166.

¹⁴⁰ *The King v. Tran*, 2024 ABCA 241, ¶ 24 (“legal text can never be given a meaning it cannot possibly bear”); *Abbas v Esurance Ins. Co. of Canada*, 2023 ABCA 36, ¶ 50; 477 D.L.R. 4th 613, 645 per Watson & Wakeling, J.J.A. (“it is a cardinal sin for an adjudicator to give a text a meaning it cannot possibly bear”); *Zuk v. Alberta Dental Ass’n & College*, 2018 ABCA 270, ¶ 159; 426 D.L.R. 4th 496, 539 (“Words must not be given meanings they cannot possibly bear”); *Lenz v. Sculptoreanu*, 2016 ABCA 111, ¶ 4; 399 D.L.R. 4th 1, 6 (“A contrary interpretation would give the text an implausible meaning. A court may never do this”); *Jones v Director of Public Prosecutions*, [1962] A.C. 635, 662 (H.L. 1961) per Lord Reid (“It is a cardinal principle applicable to all kinds of statutes that you may not for any reason attach to a statutory provision a meaning which the words cannot reasonably bear”); *Bourne v. Norwich Crematorium Ltd.*, [1967] 2 All E.R. 576, 578 (Ch.) per Stamp J. (“In my judgment it would be a distortion of the English language to describe the living or the dead as goods or materials. ... [O]ne must not ... distort that which has to be construed and give it a meaning ... one does not think it can possibly bear”); *SZTAL v. Minister for Immigration and Border Protection*, [2017] HCA 34, ¶ 94; 347 A.L.R. 405, 429 per Edelman, J. (“where a statute employs a term in its ordinary sense, there can be no warrant for the extension of the meaning beyond its ordinary sense”) & *Newcastle City Council v. GIO General Ltd.*, [1997] HCA 53; 191 C.L.R. 85, 113 per McHugh, J. (“If the legislature uses language which covers only one state of affairs, a court cannot legitimately construe the words of the section in a

[247] I am satisfied that Article 2.02 supports only one plausible meaning. Canadian Pacific is not obliged to sell the 10th Avenue Agreement lands to Remington Development until it determines, in its sole discretion, that the lands are “surplus to its operational requirements” and communicates this determination to Remington Development.

[248] While I do not have to decide whether Canadian Pacific must communicate this determination in writing to Remington Development, I am of the view that other articles in the 10th Avenue Agreement provide strong support for this interpretation.

[249] I conclude that Justice Woolley’s interpretation of Article 2.02 is clearly wrong and must be set aside.

[250] Even if I am wrong, and conduct following the date of the 10th Avenue Agreement can be examined, the fact that Canadian Pacific filed a subdivision application is not evidence that Canadian Pacific has made an Article 2.02 determination. The application itself is only evidence that the parties expected Canadian Pacific would, within a relatively short period, determine that the 10th Avenue Agreement lands were “surplus to its operational requirements”.¹⁴¹ Canadian Pacific would not have made the application had it not believed it would in due course determine that the 10th Avenue Agreement lands were “surplus to its operational requirements” and had it not expected that the ultimate endorsement of the application for subdivision would be of value to it. The subdivision application process is both expensive and time consuming.¹⁴² A subdivision applicant can withdraw its application at any time and even if the subdivision authority endorses it, the endorsed subdivision plan has no legal effect until it is filed with a land titles office.¹⁴³

[251] In addition, the reasonable person asking what Article 2.02 meant *when it was made*¹⁴⁴ would never conclude that a subsequent application for subdivision approval would, by itself, be

tortured and unrealistic manner to cover another set of circumstances”). See A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 31 (2012) (“A fundamental rule of textual interpretation is that neither a word nor a sentence may be given a meaning that it cannot bear. Without the concept of permissible meanings, there is no such thing as faithful interpretation of legal texts”); R. Sullivan, *The Construction of Statutes* 191 (7th ed. 2022) (“the interpretation ultimately adopted must be one that the words of the text can reasonably bear”) & H. Hart & A. Sachs, *The Legal Process: Basic Problems in the Making and Application of Law* 1374 (1994) (“a court should ... not give the words [in a statute] ... a meaning they will not bear”).

¹⁴¹ *Remington Dev. Corp. v. Canadian Pac. Ry.*, 2022 ABKB 692 ¶ 82 (“at the time the parties entered into the contract CPR appears to have anticipated the surplus decision being made relatively quickly, and the language of both Article 7 and Article 6.05 is consistent with that expectation”).

¹⁴² *Id.* ¶ 12 (“After extensive conversations and consultations, on November 3, 2006, the City signed the paperwork approving the subdivision application for the 10th Ave Lands”).

¹⁴³ *Municipal Government Act*, R.S.A. 2000, c. M-26, s. 657(5).

¹⁴⁴ *Alexis v. Alberta*, 2020 ABCA 188, ¶ 47; 8 Alta. L.R. 7th 314, 335-36 per Wakeling & Greckol, J.J.A (“A permissible meaning is one that a reasonable reader who uses the language correctly would give the text at the time

evidence that Canadian Pacific had made a surplus determination under Article 2.02. The objective interpreter would wonder what the relevance of a subsequent application for subdivision approval would be when interpreting Article 2.02.

[252] It is obvious that one of the reasons Canadian Pacific filed the subdivision application was to expedite the process.¹⁴⁵

[253] An objective interpreter would react very negatively to a suggestion that sophisticated parties like Canadian Pacific and Remington Development would use such an indirect way to make the most important point in the 10th Avenue Agreement – Canadian Pacific will not sell the 10th Avenue Agreement lands to Remington Development until it determines that the lands are “surplus to its operational requirements”. The reasonable reader would ask – do drafters representing sophisticated parties like Canadian Pacific and Remington Development hide elephants in mouseholes?¹⁴⁶ And the answer must surely be “no”.

2. The Fundamental Principles of Contract Interpretation

[254] There are six basic principles for the interpretation of legal text.¹⁴⁷

[255] They are easy to state and readily understandable.¹⁴⁸

of its production”), leave to appeal ref’d, [2020] 3 S.C.R. xii & *Perka v. The Queen*, [1984] 2 S.C.R. 232, 264 per Dickson, J. (“The doctrine of *contemporanea expositio* is well established in our law”).

¹⁴⁵ The trial judge’s contrary finding is a palpable and overriding error.

¹⁴⁶ *Whitman v. American Trucking Ass’ns*, 531 U.S. 457, 468 (2001) per Scalia, J. (“Congress ... does not ... hide elephants in mouseholes”).

¹⁴⁷ *Equus Rea Ltd. v. Alberta Utilities Comm’n*, 2023 ABCA 142, ¶ 61 (“The governing principles of statutory interpretation are straightforward and provide clear directions to adjudicators”); *Abbas v. Esurance Ins. Co. of Canada*, 2023 ABCA 36, ¶ 48; 477 D.L.R. 4th 613, 643 per Watson & Wakeling, J.J. A. (“The governing principles of statutory interpretation are straightforward and not contentious”); *Vujicic v. Estate of MacEachern*, 2022 ABCA 263, ¶ 62; 26 C.C.L.I. 6th 182, 217 per Wakeling, J.A. (“The proper approach to interpreting legislative provisions is not contentious in common law states”); *Alexis v. Alberta*, 2020 ABCA 188, ¶ 42; 8 Alta. L.R. 7th 314, 333 per Wakeling & Greckol, J.J. A. (“The basic approach to a statutory interpretation problem is easy to state”), leave to appeal ref’d, [2020] 3 S.C.R. xii & *Masterton Homes Pty. Ltd. v. Palm Assets Pty. Ltd.*, [2008] NSWSC 274, ¶ 23 per Einstein, J. (“The principles concerning the construction of written agreements are reasonably well known”).

¹⁴⁸ *Equus Rea Ltd. v. Alberta Utilities Comm’n*, 2023 ABCA 142, ¶ 61 (“The governing principles of statutory interpretation are straightforward and provide clear direction to adjudicators”) & *Alexis v. Alberta*, 2020 ABCA 188, ¶ 42; 8 Alta. L. R. 7th 314, 333 per Wakeling & Greckol, J.J.A. (“The basic approach to a statutory interpretation problem is easy to state”), leave to appeal ref’d, [2020] 3 S.C.R. xii.

a. Context

[256] First, as “[c]ontext is a primary determinant of meaning”,¹⁴⁹ an adjudicator must be cognizant of the context – aware of the events that the contracting parties were familiar with or reasonably ought to have been familiar with at the time the contract was made.¹⁵⁰ “No contracts are made in a vacuum: there is always a setting in which they have to be placed”.¹⁵¹

¹⁴⁹ A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012).

¹⁵⁰ *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, ¶¶ 58 & 60; [2014] 2 S.C.R. 633, 661-62 per Rothstein, J. (“[an adjudicator] may consider ... objective evidence of the background facts at the time of the execution of the contract ... that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. ... Such evidence ... is used as an interpretive aid for determining the meaning of the written words chosen by the parties, not to change or overrule the meaning of those words”); *Sealy (Western) Ltd. v. Upholsterers’ Int’l Union of North America*, 20 L.A.C. 3d 45, 48 (Wakeling 1985) (“[the parties] expect ... [the adjudicator] to be familiar with the realities of the workplace”) & *Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen*, [1976] 1 W.L.R. 989, 995-96 (H.L.) per Lord Wilberforce (“The nature of what is legitimate to have regard to is usually described as ‘the surrounding circumstances’ In a commercial contract ... the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating”). See also G. Hall, *Canadian Contractual Interpretation Law* 12 (3d ed. 2016) (“Evidence of the factual matrix is always admissible, even where the words of a contract are unambiguous”) & J. McCamus, *The Law of Contracts* 751 (2d ed. 2012) (“Evidence concerning the surrounding circumstances of the transaction is always admissible. Indeed, when the words of the agreement are viewed in the light cast by the surrounding circumstances, ambiguity, sometimes referred to as a ‘latent’ ambiguity, may be uncovered”).

¹⁵¹ *Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen*, [1976] 1 W.L.R. 989, 995 (H.L.) per Lord Wilberforce.

[257] The entire contract is also part of the context.¹⁵² “It is a fundamental precept that contractual interpretation requires an examination of a contract as a whole, not just a consideration of the specific words in dispute”.¹⁵³

b. Purpose of the Contract

[258] Second, a reader must search for the purpose or purposes that account for the contract. Some contracts may contain express purpose provisions. The absence of a purpose statement forces the adjudicator to scour the text for hints as to its underlying purpose. One always exists.¹⁵⁴

c. Ordinary Meaning of the Contract Text

[259] Third, an adjudicator must focus on the *text*.¹⁵⁵ “The interpretation of a written contractual provision must always be grounded in the text”.¹⁵⁶

¹⁵² *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, ¶¶ 47 & 57; [2014] 2 S.C.R. 633, 657 & 661 per Rothstein, J. (“a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract”); *Tercon Contractors Ltd. v. British Columbia*, 2010 SCC 4, ¶ 64; [2010] 1 S.C.R. 69, 99 per Cromwell, J. (“words of one provision must not be read in isolation but should be considered in harmony with the rest of the contract and in light of its purposes and commercial context”); *Unifor, Local 707A v. SMS Equipment Inc.*, 2017 ABCA 81, ¶ 75; 47 Alta. L.R. 6th 28, 53 per Wakeling, J.A. (“It is always necessary to review the entire document, whether it is unilateral, bilateral or multilateral in nature in order to give meaning to a part of it”); *Sealy (Western) Ltd. v. Upholsterers’ Int’l Union of North America*, 20 L.A.C. 3d 45, 45 (Wakeling 1985) (“[the parties] expect ... [the adjudicator] to be familiar with the entire contents of the collective agreement”) & *Zurich Ins. (Singapore) Pte. Ltd. v. B-Gold Interior Design & Construction Pte. Ltd.*, [2008] SGCA 27, ¶ 131; [2008] 3 S.L.R. 1029, 1095 per Rajah, J.A. (“the exercise is one based on the *whole* contract or an *holistic approach*. Courts are not excessively focused upon a particular word, phrase, sentence, or clause. Rather the emphasis is on the document ... as a whole”) (emphasis in original).

¹⁵³ G. Hall, *Canadian Contractual Interpretation Law* 16 (3d ed. 2016).

¹⁵⁴ *Equus Rea Ltd. v. Alberta Utilities Comm’n*, 2023 ABCA 142, ¶ 63 (“Purpose precedes selection of text”).

¹⁵⁵ *Commissions des droits de la personne et des droits de la jeunesse v. Directrice de la protection de la jeunesse du CISSS A*, 2024 SCC 43, ¶ 28 per Wagner, C.J. (“The starting point in an interpretive exercise is the text of the provisions. In the absence of statutory definitions, what should be focused on is the grammatical and ordinary meaning of the text”) & *CIFG Special Assets Capital 1 Ltd. v. Koon*, [2017] SGCA 70, ¶ 19 per Menon C.J. (“The starting point is that one looks to the text that the parties have used”). See *Wood v. Capita Ins. Services Ltd.*, [2017] UKSC 24, ¶ 13; [2017] A.C. 1173, 1180 per Lord Hodge (“Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement”).

¹⁵⁶ *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, ¶ 57; [2014] 2 S.C.R. 633, 661 per Rothstein, J. See *Regina v. Secretary of State for the Environment, Transport and the Regions, ex p. Spath Holme Ltd.*, [2001] 2 A.C.

[260] A reader “must ask what the plain and ordinary meaning of the contested text is”.¹⁵⁷

[261] What meaning would a reasonable reader who uses the language correctly give the text *when it was made*?¹⁵⁸

349, 396 (H.L. 2000) per Lord Nicholls (“Statutory interpretation is an exercise which requires the court to identify the meaning borne by the *words* in question in the particular context”) (emphasis added) & *Black-Clawson Int’l Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G.*, [1975] A.C. 591, 613 (H.L.) per Lord Reid (“We are seeking the meaning of the *words* which Parliament used. We are seeking not what Parliament meant but the true meaning of what they said”) (emphasis added). See J. Edelman, *McGregor on Damages* 31 (21st ed. 2021) (“The starting point ... in every case of construction of contracts ... is the terms of the contract itself”).

¹⁵⁷ *Abbas v. Esurance Ins. Co. of Canada*, 2023 ABCA 36, ¶ 50; 477 D.L.R. 4th 613, 644 per Watson & Wakeling, J.J.A.; *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, ¶ 10; [2005] 2 S.C.R. 601, 610 per McLachlin, C.J. & Major, J. (“When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process”); *The Queen v. Secretary of State for the Environment, Transport and the Regions, ex p. Spath Holme Ltd.*, [2001] 2 A.C. 349, 397 (H.L. 2000) per Lord Nicholls (“an appropriate starting point is that language is to be taken to bear its ordinary meaning in the general context of the statute”) & *Saville v. Virginia Ry. & Power Co.*, 114 Va. 444, 453; 76 S.E. 954, 957 (Sup. Ct. 1913) per Keith, P. (“It is our duty to ... give ... [the legislative words] their usual and ordinary signification”). See also A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 69 (2012) (“Words are to be understood in their ordinary, everyday meanings – unless the context indicates that they bear a technical sense”) & Kirby, “Towards a Grand Theory of Interpretation: The Case of Statutes and Contracts”, 24 *Statute L. Rev.* 95, 99 (2003) (“Whether in a written contract or an Act of Parliament, the proper approach to the task of interpretation is to attempt to read the words as they would be understood in everyday life, where words and sentences are the commonplace of human communication”).

¹⁵⁸ *Alexis v. Alberta*, 2020 ABCA 188, ¶ 47; 8 Alta. L.R. 7th 314, 335-36 per Wakeling & Greckol, J.J.A. (“A permissible meaning is one that a reasonable reader who uses the language correctly would give the text at the time of its production”), leave to appeal ref’d, [2020] 3 S.C.R. xii & *Perka v. The Queen*, [1984] 2 S.C.R. 232, 264 per Dickson, J. (“The doctrine of *contemporanea expositio* is well established in our law”).

[262] A reasonable reader will refer to reputable dictionaries.¹⁵⁹ Reputable dictionaries collect the ordinary meanings a community assigns to words.¹⁶⁰ “[A]uthoritative dictionaries ... record a range of potential meanings from which the court must select the most suitable for the context”.¹⁶¹

d. Text Can Never Be Given a Meaning It Cannot Possibly Bear

[263] Fourth, an adjudicator may *never* give text a meaning it “cannot possibly bear”.¹⁶² No principle of interpretation is more important than this.¹⁶³

¹⁵⁹ *Landry v Rocky View County Subdivision and Dev. Appeal Bd.*, 2025 ABCA 34, ¶ 66 per Wakeling, J.A. (“Reputable dictionaries provide invaluable assistance to adjudicators”); *Humphreys v. Trebilcock*, 2017 ABCA 116, ¶ 113; [2017] 7 W.W.R. 343, 377 (“authoritative dictionaries ... record a range of potential meanings from which the court must select the most suitable for the context”), leave to appeal ref’d, [2017] 2 S.C.R. vii; *Lay v. Lay*, 2019 ABCA 21, ¶ 63; [2019] 2 W.W.R. 254, 275 per Wakeling, J.A. (“Dictionaries compile the ordinary meaning of words that those who use a language correctly understand words to have”), leave to appeal ref’d, [2019] 2 S.C.R. xi & *Cozens v. Brutus*, [1973] A.C. 854, 861 (H.L. 1972) per Lord Reid (“When considering the meaning of a word one often goes to a dictionary”).

¹⁶⁰ *Alexis v. Alberta*, 2020 ABCA 188, ¶ 48; 8 Alta. L.R. 7th 314, 337 per Wakeling & Greckol, J.J.A. (“Reference must be had to reputable dictionaries to discover the ordinary meaning of words”), leave to appeal ref’d, [2020] 3 S.C.R. xii; *Lay v. Lay*, 2019 ABCA 21, ¶ 63 [2019] 2 W.W.R. 254, 275 per Wakeling, J.A. (“Dictionaries compile the ordinary meaning of words that those who use a language correctly understand words to have”), leave to appeal ref’d, [2019] 2 S.C.R. xi & *Cozens v. Brutus*, [1973] A.C. 854, 861 (H.L. 1972) per Lord Reid (“When considering the meaning of a word one often goes to a dictionary”).

¹⁶¹ *Humphreys v. Trebilcock*, 2017 ABCA 116, ¶ 113; [2017] 7 W.W.R. 343, 377, leave to appeal ref’d, [2017] 2 S.C.R. vii. See also J. Keyes & W. Gordon, *Drafting, Interpreting and Applying Legislation* 81 (2023) (“dictionaries ... provide possible meanings”).

¹⁶² *The King v. Tran*, 2024 ABCA 241, ¶ 24 (“legal text can never be given a meaning it cannot possibly bear”); *Zuk v. Alberta Dental Ass’n & College*, 2018 ABCA 270, ¶ 159; 426 D.L.R. 4th 496, 539 (“Words must not be given meanings they cannot possibly bear”); *Lenz v. Sculptoreanu*, 2016 ABCA 111, ¶ 4; 399 D.L.R. 4th 1, 6 (“A contrary interpretation would give the text an implausible meaning. A court may never do this”); *The Queen v. Kalanj*, [1989] 1 S.C.R. 1594, 1609 per McIntyre, J. (“Section 11 [of the *Charter*] affords its protection after an accused is charged with an offence. The specific language of s. 11 should not be ignored and the meaning of the word ‘charged’ should not be twisted in an attempt to extend the operation of the section into the pre-charge period”) & *CIFG Special Assets Capital I Ltd. v. Koon*, [2017] SGCA 70, ¶ 19 per Menon, C.J. (“In general, the meaning ascribed to the terms of the contract must be one the expressions used by the parties can reasonably bear”). See A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 31 (2012) (“A fundamental rule of textual interpretation is that neither a word nor a sentence may be given a meaning that it cannot bear. Without the concept of permissible meanings, there is no such thing as faithful interpretation of legal texts”).

¹⁶³ *Abbas v. Esurance Ins. Co. of Canada*, 2023 ABCA 36, ¶ 50; 477 D.L.R. 4th 613, 645 per Watson & Wakeling, J.J.A. (“It goes without saying that is a cardinal sin for an adjudicator to give text a meaning it cannot possibly bear”); *Jones v. Director of Public Prosecution*, [1962] A.C. 635, 662 (H.L. 1961) per Lord Reid (“It is a cardinal principle ... that you may not for any reason attach to a statutory provision a meaning which the words of that provision cannot reasonably bear”) & *Bourne v. Norwich Crematorium Ltd.*, [1967] 2 All E.R. 576, 578 (Ch.) per Stamp, J. (“In my judgment it would be a distortion of the English language to describe the living or the dead as goods or materials. ...

[264] A court that does this, in effect, amends the text. If the text is part of a statute, the court, by amending the text, exceeds the authority assigned by the state’s constitution to the judicial branch and invades the legislative domain.¹⁶⁴ If the text is part of a contract, the court deprives the parties of the right to make their own contract.¹⁶⁵

[265] A reader who gives text a meaning it cannot possibly bear introduces the possibility that *any* meaning can be attributed to the text. Certainty is lost. So is the integrity of the interpretive process.

e. The Text Must Be Given Its Clear and Unequivocal Meaning

[266] Fifth, interpreters must give legal text its clear and unequivocal meaning.¹⁶⁶

[O]ne must not ... distort that which has to be construed and give it a meaning ... one does not think it can possibly bear”).

¹⁶⁴ *Brophy v Manitoba*, [1895] A.C. 202, 215 (P.C.) (Can.) per Lord Herschell (“The function of a tribunal is limited to construing the words employed; it is not justified in forcing into them a meaning which they cannot reasonably bear. Its duty is to interpret, *not to enact*”) (emphasis added) & *Higgon v O’Dea*, [1962] W.A.R. 140, 146 (Sup. Ct. 1961) per Hale, J (“where the language is clear and susceptible of only one meaning it is not permissible for the court in effect to legislate by refusing to accept the plain meaning of the words used by Parliament”).

¹⁶⁵ *Co-operative Wholesale Soc’y v. National Westminster Bank Plc*, [1995] 1 E.G.L.R. 97, 99 (C.A. 1994) per Hoffman, L.J. (“one can[not] rewrite the language which the parties have used”).

¹⁶⁶ *Equus Rea Ltd v. Alberta Utilities Comm’n*, 2023 ABCA 142, ¶ 69 (“if the text bears only one plausible meaning, the inquiry ends. It does not matter what the court thinks of the consequences enforcement entails or the consequential deleterious abridgment of the perceived purpose of the enactment”); *Abbas v. Esurance Ins. Co. of Canada*, 2023 ABCA 36, ¶ 51; 477 D.L.R. 4th 613, 645 per Watson & Wakeling, J.J.A. (“If the text supports only one plausible meaning, the inquiry is complete”); *Alexis v. Alberta*, 2020 ABCA 188, ¶ 49; 8 Alta. L.R. 7th 314, 337 per Wakeling & Greckol, J.J.A. (“If the statutory text supports only one plausible or permissible meaning, the inquiry is complete. In this scenario there is no need to take into account the enactment’s purpose”), leave to appeal ref’d, [2020] 3 S.C.R. xii; *The Queen v. McIntosh*, [1995] 1 S.C.R. 686, 697 & 704 per Lamer, C.J. (“where no ambiguity arises on the face of a statutory provision, then its clear words should be given effect. [W]here, by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the legislature, it must be enforced however harsh or absurd or contrary to common sense the result may be”); *Black-Clawson Int’l Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G.*, [1975] A.C. 591, 613 (H.L.) per Lord Reid (“In the comparatively few cases where the words of a statutory provision are only capable of having one meaning, that is an end of the matter and no further inquiry is permissible”); *Peppers Hotel Management Pty Ltd. v. Hotel Capital Partners Ltd.*, [2004] NSWCA 114, ¶ 69 per McColl, J.A. (“If the words used [in a written contract] are unambiguous the court must give effect to them, notwithstanding that the result may appear capricious or unreasonable”); *Amalgamated Soc’y of Engineers v. Adelaide Steamship Co.*, [1920] HCA 54; 28 C.L.R. 129, 162 per Higgins, J. (“when we find what the language means, in its ordinary and natural sense, it is our duty to obey that meaning, even if we think the result to be inconvenient or impolitic or improbable”); *Crilly v. T & J Farrington Ltd.*, [2001] IESC 60, ¶ 81; [2001] 3 I.R. 251, 295 per Murray, J. (“when the meaning of the statute is clear and definite and open to one interpretation only in the context of the statute as a whole, that is the meaning to be attributed to it”); *Connecticut National Bank v. Germain*, 503 U.S. 249, 254 (1992) per Thomas, J. (“When the words of a statute are unambiguous, then, this first canon is also the last:

[267] If the text supports only one plausible meaning, that is the meaning an adjudicator must give it.

[268] A determination to that effect ends the inquiry – it does not matter what doubts the court has about the wisdom of the result.¹⁶⁷

[269] Nor can the surrounding circumstances cause an adjudicator to ignore a text’s clear and unequivocal meaning.¹⁶⁸

f. If the Text Supports More Than One Plausible Meaning an Adjudicator Must Select the Meaning that Produces a Sensible Commercial Result

[270] Sixth, if the text supports more than one plausible meaning, which is often the case,¹⁶⁹ the adjudicator “must select the option that best advances the purpose that accounts for the text”.¹⁷⁰

‘judicial inquiry is complete’”) & *Temple v. City of Petersburg*, 182 Va. 418, 423; 29 S.E. 2d 357, 358 (Sup. Ct. 1944) per Gregory, J. (“If the language of a statute is plain and unambiguous, and its meaning perfectly clear and definite, effect must be given to it regardless of what courts think of its wisdom or policy”).

¹⁶⁷ *The Queen v. McIntosh*, [1995] 1 S.C.R. 686, 704 per Lamer, C.J. (“where, by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the legislature, it must be enforced however harsh or absurd or contrary to common sense the result may be The fact that a provision gives rise to absurd results is not ... sufficient to declare it ambiguous and then embark upon a broad-ranging interpretive analysis”) & *The Queen v. Estabrooks Pontiac Buick Ltd.*, 144 D.L.R. 3d 21, 28 (N.B.C.A. 1982) per La Forest, J.A. (“the duty of the courts is to give effect to ... the words of the statute. And however reprehensible the result may appear, it is our duty if the words are clear to give them effect”).

¹⁶⁸ *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, ¶ 57; [2014] 2 S.C.R. 633, 661 per Rothstein, J. (“While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement”).

¹⁶⁹ *Black-Clawson Int’l Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G.*, [1975] A.C. 591, 613 (H.L.) per Lord Reid (“In the comparatively few cases where the words of a statutory provision are only capable of having one meaning, that is the end of the matter and no further inquiry is permissible”).

¹⁷⁰ *Humphreys v. Trebilcock*, 2017 ABCA 116, ¶ 109; [2017] 7 W.W.R. 343, 376, leave to appeal ref’d, [2017] 2 S.C.R. vii. See *Co-operative Wholesale Soc’y Ltd. v. National Westminster Bank Plc*, [1995] 1 E.G.L.R. 97, 99 (C.A. 1994) per Hoffman, L.J. (“one can [not] rewrite the language which the parties have used in order to make the contract conform to business common sense. But language is a very flexible instrument and, if it is capable of more than one construction, once chooses that which is most likely to give effect to the commercial purpose of the agreement”); *Rainy Sky SA v. Kookmin Bank*, [2011] UKSC 50, ¶ 21; [2011] 1 W.L.R. 2900, 2908 per Lord Clarke (“If there are two possible constructions [of a commercial contract], the court is entitled to prefer the construction which is consistent with business common sense and to reject the other”); *Masterton Homes Pty. Ltd. v. Palm Assets Pty. Ltd.*, [2008] NSWSC 274, ¶ 26 per Einstein, J. (“where the language of an Agreement is ambiguous or susceptible of more than one meaning the factual matrix including the context and surrounding circumstances, its aim, object or commercial purpose may be taken into account in the construction of an agreement”); *McBratney v. McBratney*, 59 S.C.R. 550, 561 (1919) per Duff, J. (“where you have rival constructions of which the language of the statute is capable

Adjudicators interpreting commercial contracts, when faced with ambiguous terms, must select the option that produces “a sensible commercial result”.¹⁷¹

you must resort to the object or principle of the statute if the object or the principle of it can be collected from its language; ... then the construction which best gives effect to the governing intention or principle ought to prevail”); *Celgene Corp. v. Canada*, 2011 SCC 1, ¶ 21; [2011] 1 S.C.R. 3, 13 per Abella, J. (“The words, if clear, will dominate; if not, they yield to an interpretation that best meets the overriding purpose of the statute”); *King v. Burwell*, 576 U.S. 473, 510 (2015) per Scalia, J. (“Statutory design and purpose matter only to the extent they help clarify an otherwise ambiguous provision”) & *Citizens Bank of Bryan v. First State Bank*, 580 S.W. 2d 344, 348 (Tex. Sup. Ct. 1979) per Steakley, J. (“a statute is to be construed with reference to its manifest object, and if the language is susceptible of two constructions, one of which will carry out and the other defeat such manifest object, it should receive the former construction”).

¹⁷¹ *Consolidated-Bathurst Export Ltd. v. Mutual Boiler & Machinery Ins. Co.*, [1980] 1 S.C.R. 888, 901 (1979) per Estey, J. (“[courts] favour ... an interpretation ... which promotes a sensible commercial result. It is trite to observe that an interpretation of an ambiguous contractual provision which would render the endeavour on the part of the insured to obtain insurance protection nugatory, should be avoided”). See *Resolute FP Canada Inc. v. Ontario*, 2019 SCC 60, ¶¶ 79 & 144; [2019] 4 S.C.R. 394, 430-31 & 459 per Côté & Brown, JJ. (“contractual interpretation ... requires courts to consider the principle of commercial reasonableness and efficacy. Contracts ought ... to be interpreted in ‘accordance with sound commercial principles and good business sense’ Given, then, the choice between an interpretation that allows the contract to function in furtherance of its commercial purpose and one that does not, it is generally the former interpretation that should prevail”); *Wood v. Capita Ins. Services Ltd.*, [2017] UKSC 24, ¶ 11; [2017] A.C. 1173, 1179 per Lord Hodge (“where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense”); *Rainy Sky SA v. Kookmin Bank*, [2011] UKSC 50, ¶ 21; [2011] 1 W.L.R. 2900, 2908 per Lord Clarke (“If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other”); *Mount Braw Mining Pty. Ltd. v. Wright Prospecting Pty. Ltd.*, [2015] HCA 37, ¶ 51; 256 C.L.R. 104, 117 per French, C.J. & Nettle & Gordon, JJ. (“a commercial contract should be construed so as to avoid it ‘making commercial nonsense or working commercial inconvenience’”); *McCann v. Switzerland Ins. Australia Ltd.*, [2000] HCA 65, ¶ 22; 203 C.L.R. 579, 587 per Gleeson, C.J. (“A policy of insurance ... is a commercial contract and should be given a businesslike interpretation”); *Sealy (Western) Ltd. v. Upholsterers’ Int’l Union of North America Local 34*, 20 L.A.C. 3d 45, 52 (Wakeling 1985) (“the union’s position that ... [the collective agreement] enables the company to compel only one employee to work overtime [is] extremely impractical. An assembly line process makes it highly unlikely that such a right would ever be invoked. Why would the employer press for a provision which would not bestow a benefit? It might just as well agree that overtime was voluntary for everybody”) & *Dow Chemical Canada ULC v. NOVA Chemicals Corp.*, 2020 ABCA 320, ¶ 40 per Slatter & Khullar, JJ. A. (“The idea that E3 would be operated to achieve its full capacity is commercially reasonable. If the Co-owners have an ethane cracker that was designed to be one of the most efficient in the world, and there was sufficient demand for the ethylene, why would the Co-owners not operate it at its full capacity?”). See also G. Hall, *Canadian Contractual Interpretation Law* 55 (3d ed. 2016) (“It is a fundamental precept of the law of contractual interpretation that commercial contracts must be interpreted in accordance with sound commercial principles and good business sense”) & J. McCamus, *The Law of Contracts* 763 (2d ed. 2012) (“In choosing between possible constructions of an agreement, courts will avoid an interpretation that produces a commercial result that is considered unreasonable”).

g. Contract Interpretation Is An Objective Exercise

[271] The exposition of these six basic principles makes it obvious contract interpretation is an objective exercise.¹⁷² “[A] court must ask what a reasonable person familiar with the context that produced this agreement – in a commercial case, a reasonable business person – would conclude the contested term means”.¹⁷³

¹⁷² *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, ¶ 49; [2014] 2 S.C.R. 633, 658 per Rothstein, J. (“the goal of ... [contract interpretation] is to ascertain the objective intent of the parties”); *Re Lubberts Estate*, 2014 ABCA 216, n. 21; [2014] 10 W.W.R. 41, n. 21 per Wakeling J.A. (“An objective analysis ... is adopted when attributing meaning to contractual terms which are the product of ... choices made by more than one person”); *Composite Technologies Inc. v. Shawcor Ltd.*, 2017 ABCA 160, ¶ 105; [2017] 8 W.W.R. 427, 465-66 (“a contract is the work product of more than one actor. A contract is a bilateral or multilateral act. ... [B]ecause of this, the process of interpretation must utilize an objective orientation, as opposed to a subjective one”); *Wood v. Capita Ins. Services Ltd.*, [2017] UKSC 24, ¶ 10; [2017] A.C. 1173, 1179 per Lord Hodge (“The court’s task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement”); *Arnold v Britton*, [2015] UKSC 36, ¶ 77; [2015] A.C. 1619, 1640 per Lord Hodge (“The role of the construct, the reasonable person, is to ascertain objectively, and with the benefit of the relevant background knowledge, the meaning of the words which the parties used”); *Toll (FGCT) Pty. Ltd. v. Alpapharm Pty. Ltd.*, [2004] HCA 52, ¶ 40; 219 C.L.R. 165, 179 per Gleeson, C.J. & Gummow, Hayne, Callinan, & Heydon, JJ. (“This court ... has recently reaffirmed the principle of objectivity by which the rights and liabilities of the parties to a contract are determined. ... What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe. ... The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean”). See also G. Hall, *Canadian Contractual Interpretation Law* 50 (3d ed. 2016) (“It is a fundamental precept of the law of contractual interpretation that the exercise is objective rather than subjective”); J. McCamus, *The Law of Contracts* 746 (2d ed. 2012) (“Inescapably the process of construction or interpretation of agreements must have an objective component, enabling the interpreter to attribute meaning to the agreement even in the absence of ‘true intentions’”); S. Waddams, *The Law of Contracts* 97 (8th ed. 2022) (“The principal function of the law of contracts is to protect reasonable expectations engendered by promises”) & A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 30 (2012) (“Objective meaning is what we are after”) (emphasis deleted).

¹⁷³ *Knelsen Sand and Gravel Ltd. v. Harco Enterprises Ltd.*, 2021 ABCA 385, ¶ 126; 77 C.P.C. 8th 243, 281. See *Mount Bruce Mining Pty Ltd. v. Wright Prospecting Pty Ltd.*, [2015] HCA 37, ¶ 47; 256 C.L.R. 104, 116 per French, C.J. & Nettle & Gaudron, JJ. (“In determining the meaning of the terms of a commercial contract, it is necessary to ask what a reasonable business person would have understood those terms to mean”) & *Rainy Sky SA v. Kookmin Bank*, [2011] UKSC 50, ¶ 14; [2011] 1 W.L.R. 2900, 2907 per Lord Clarke (“the relevant reasonable person is one who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract”).

[272] A party’s subjective intention is irrelevant.¹⁷⁴ It makes no sense to “ask what each of the contracting parties intended the contract text to mean. This orientation could produce as many different interpretations as there are contracting parties”.¹⁷⁵

¹⁷⁴ *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, ¶ 59; [2014] 2 S.C.R. 633, 662 per Rothstein, J. (“The parol evidence rule precludes admission of evidence ... of the subjective intention of the parties”); *Composite Technologies Inc. v. Shawcor Ltd.*, 2017 ABCA 160, ¶ 105; [2017] 8 W.W.R. 427, 465-66 (“A contract is a bilateral or multilateral act. ... [B]ecause of this, the process of interpretation must utilize an objective orientation, as opposed to a subjective one”); *Marley v Rawlings*, [2014] UKSC 2, ¶ 19; [2015] A.C. 129, 144 (H.L.) per Lord Neuberger (“When interpreting a contract, the court ... [must ignore] subjective evidence of any party’s intention”); *Rainy Sky SA v. Kookmin Bank*, [2011] UKSC 50, ¶ 19; [2011] 1 W.L.R. 2900, 2908 per Lord Clarke (“[the jurisprudence] stresse[s] the irrelevance of the parties’ subjective intentions”); *Rickman v. Carstairs*, 110 Eng. Rep. 931, 935 (K.B. 1833) per Denman, C.J. (“The question in ... cases of construction of written instruments is, not what was the intention of the parties, but what is the meaning of the words they have used”); *Toll (FGCT) Pty. Ltd. v. Alphapharm Pty. Ltd.*, [2004] HCA 52, ¶ 40; 219 C.L.R. 165, 179 per Gleeson, C.J. & Gummow, Hayne, Callinan & Heydon, JJ. (“This court ... has recently reaffirmed the principle of objectivity by which the rights and liabilities of the parties to a contract are determined. It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations”) & *Eustis Mining Co. v. Beer, Sondheimer & Co.*, 239 F. 976, 984 (S.D. N.Y. 1917) per Hand, J. (“It makes not the least difference whether a promisor actually intends that meaning which the law will impose upon his words. The whole House of Bishops might satisfy us that he had intended something else, and it would make not a particle of difference in his obligation”). See also K. Lewison, *The Interpretation of Contracts* 2 (8th ed. 2024) (“In carrying out its [interpretation] task, the court must disregard the parties’ subjective intention”).

¹⁷⁵ *Composite Technologies Inc. v. Shawcor Ltd.*, 2017 ABCA 160, ¶ 105; [2017] 8 W.W.R. 427, 466. See A. Swan, J. Adamski & A. Na, *Canadian Contract Law* 681 (4th ed. 2018) (“a contract always has at least two parties and their expectations or assumptions are almost certain to differ on some aspects of their arrangement”); A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 391-92 (2012) (“Two parties, each represented by counsel, want to reach an important deal. One party’s lawyer prepares the first draft of the contract, which favors that lawyer’s client in all sorts of ways. On receiving the draft, the other lawyer revises the document to eliminate the lopsided provisions, to insert others, and to change the wording of many others. After much negotiation, they agree on final language – but only after compromises that leave some provisions purposely vague. For example, one side wanted a right to terminate within 45 days after the occurrence of a specified event; the other wanted that right to exist only within 5 days after the occurrence. Finally they fell back on the language ‘within a reasonable time after the occurrence’. The lawyer on one side privately told the client that a court would probably say that 30 days would be commercially reasonable; the other lawyer privately told the client that a court would probably say that 48 hours would be commercially reasonable (a week at the outside). So the parties signed, each believing that if a dispute arose, his view would carry the day”) & *L/3 Communications/Spar Aerospace Ltd. v. Int’l Ass’n of Machinists and Aerospace Workers*, 127 L.A.C. 4th 225, 247-48 (Wakeling, Q.C. 2004) (“A review of collective agreements shows that there are some important subjects which are regularly dealt with at a very abstract level and that some predictable fact patterns are not resolved. Discipline is a good example. Thousands of arbitral awards document the forms of alleged misconduct which have been presented to arbitrators. These cases would lead prudent negotiators to conclude that some employees may fail to report for work without a reasonable explanation, leave work early, report for work late, work in an incompetent manner, or act in a disrespectful manner. Yet very few collective agreements specifically state that the employer may terminate an employee who engages in misconduct of these forms. Why? The parties invariably agree that an employer may terminate the employment relationship for cause and accept this abstract standard as sufficient because they know that the arbitration process will provide a case-by-case determination they are prepared to abide by. They decline to provide more detailed rules either because they cannot agree on the outcome of particular issues or they are

not satisfied that a consensus on a less abstract set of rules is of sufficient importance to warrant devoting the necessary time to the task”).

[273] The objective approach has been endorsed by the common law courts in the United Kingdom,¹⁷⁶ the United States,¹⁷⁷ Australia,¹⁷⁸ New Zealand,¹⁷⁹ Ireland,¹⁸⁰ Singapore,¹⁸¹ and Hong Kong.¹⁸²

¹⁷⁶ *Wood v. Capita Ins. Services Ltd.*, [2017] UKSC 24, ¶ 10; [2017] A.C. 1173, 1179 per Lord Hodge (“The court’s task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning”) & *Rickman v. Carstairs*, 110 Eng. Rep. 931, 935 (K.B. 1833) per Denman, C.J. (“in ... cases of construction of written instruments [the question] is, not what was the intention of the parties, but what is the meaning of the words they have used”).

¹⁷⁷ De Sloovere, “Textual Interpretation of Statutes” 11 N.Y.U.L.Q. Rev. 538, 541 (1934) (“the demand for certainty and predictability requires an objective basis for interpretation which can be attained only (1) by a faithful reliance upon the natural or reasonable meanings of language; (2) by choosing always a meaning that the text will sensibly bear by the fair use of language; and (3) by employing a thoroughly worked out but rational method for choosing among the several possible meanings”).

¹⁷⁸ *Mount Bruce Mining Pty Ltd. v. Wright Prospecting Pty Ltd.*, [2015] HCA 37, ¶¶ 46 & 47; 256 C.L.R. 104, 116 per French, C.J. & Nettle & Gordon, JJ. (“The rights and liabilities of parties under ... a contract are determined objectively, by reference to its text, context (the entire text of the contract ...) and purpose. In determining the meaning of the terms of a commercial contract, it is necessary to ask what a reasonable businessperson would have understood those terms to mean”) & *Toll (FGCT) Pty Ltd. v. Alphapharm Pty Ltd.*, [2004] HCA 52, ¶ 40; 219 C.L.R. 165, 176 per Gleeson, C.J. & Gummow, Hayne, Callinan & Heydon, JJ. (“What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe”).

¹⁷⁹ *Firm PI 1 Ltd. v. Zurich Australian Ins. Ltd.*, 2014 NZSC 147, ¶ 60; [2015] 1 N.Z.L.R. 432, 453 per McGrath, Glazebrook & Arnold, JJ. (“the proper approach [to contractual interpretation] is an objective one, the aim being to ascertain ‘the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract’)”) & *Bathurst Resources Ltd. v. L & M Coal Holdings Ltd.*, [2021] NZSC 85, ¶ 46; [2021] 1 N.Z.L.R. 696, 718-19 (“The objective approach as articulated in *Firm PI* is one grounded in the policy objectives ...: the desirability of providing the certainty needed to facilitate the efficient conduct of commerce; of holding people to the bargains they make; and of supporting access to justice through the efficient and just conduct of proceedings. Giving primacy to the written words of the agreement accords with the policy of providing commercial certainty. It also recognises that since the written contract contains the words the parties chose to record their agreement, the language used to do so has to be important. But by allowing a contextual reading of those words, the *Firm PI* approach recognises both that words have to be read in context and that the promotion of commercial certainty should not be allowed to defeat what the parties actually meant by the words in which they recorded their agreement. The objective approach to this contextual assessment is a legal construct designed as the best way of reliably determining the true agreement as recorded in the words of the contract. It rejects the parties’ subjective evidence of intent as irrelevant to what both parties meant and as generally unreliable. Rather, the court (embodying the reasonable person) assesses the evidence reasonably available to both (or all) of the parties at the point of contract which could bear upon the meaning of those words. Overall, this is a test which best supports the aim of the efficient and just conduct of proceedings”).

¹⁸⁰ *Analog Devices BV v. Zurich Ins. Co.*, [2002] IESC 1; [2002] I.R. 272, 294 per Fennelly J. (“Insofar as Irish law is concerned, a contract is to be interpreted objectively in accordance with the meaning of the words the parties have used”) & *Headfort Arms Ltd. v. Zurich Ins. Plc.*, [2021] IEHC 608, ¶ 38 per McDonald, J. (“the principles [of

3. Application of the Basic Principles for the Interpretation of Contracts to the 10th Avenue Agreement

a. Context

i. Background Facts

[274] This part records the facts that Canadian Pacific and Remington Development were either familiar with or reasonably ought to have been familiar with as of November 30, 2002, the date the 10th Avenue Agreement came into force.¹⁸³

[275] Canadian Pacific runs a railroad. Before and after November 30, 2002 the railway used the 10th Avenue Agreement lands for this purpose. Canadian Pacific could not sell the 10th Avenue Agreement lands to Remington Development until the company determined that they were surplus to its operational requirements.

contractual interpretation] can be restated as follows: (a) The process of interpretation of a written contract is *entirely objective*. ... (b) Instead, the court is required to interpret the written contract by reference to the meaning which the contract would convey to a reasonable person having all the background knowledge which would have been reasonably available to the parties at the time of conclusion of the contract; (c) The court, therefore, looks not solely at the words used in the contract but also the relevant context (both factual and legal) at the time the contract was put in place (e) A distinction is to be made between the meaning which a contractual document would convey to a reasonable person and the meaning of the individual words used in the document if considered in isolation. ... [T]he meaning of words is a matter of dictionaries and grammar. However, in order to ascertain the meaning of words used in a contract, it is necessary to consider the contract as a whole ... (g) As O'Donnell J. made clear ..., in interpreting a contract, it is wrong to focus purely on the terms in dispute. Any contract must be read as a whole and it would be wrong to approach the interpretation of a contract solely through the prism of the dispute before the court") (emphasis added).

¹⁸¹ *Edwards Jason Glenn v. Australia and New Zealand Banking Group Ltd.*, [2012] SGHC 61, ¶ 33 per Kwang, J. ("The interpretation of a contract is an objective exercise); *Zurich Ins. (Singapore) Pte. Ltd. v. B-Gold Interior Design & Const. Pte. Ltd.*, [2008] SGCA 27, ¶ 131; [2008] 3 S.L.R. 1029, 1095 per Rajah, J.A. ("First, the aim of the exercise of construction of a contract ... is to ascertain the meaning which it would convey to a reasonable business person. ... Secondly, the *objective principle* is therefore critical in defining the approach the courts will take. They are concerned usually with the expressed intentions of a person, not his or her actual intentions. ... Thirdly, the exercise is one based on the *whole contract* or an *holistic approach*. Courts are not excessively focused upon a particular word, phrase, sentence, or clause. Rather the emphasis is on the document ... as a whole") (emphasis in original).

¹⁸² *Jumbo King Ltd. v. Faithful Properties Ltd.*, [1999] HKCFA 38, ¶ 59; [1999] 2 H.K.C.F.A.R. 279, 296 per Lord Hoffman, N.P.J. ("The construction of a document ... is an attempt to discover what a reasonable person would have understood the parties to mean").

¹⁸³ *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, ¶ 58; [2014] 2 S.C.R. 633, 661-62 per Rothstein, J. ("[an adjudicator] may consider ... objective evidence of the background facts at the time of the execution of the contract ... that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting").

[276] Several parts of the 10th Avenue Agreement confirm that Canadian Pacific and Remington Developments were both aware of the fact that Remington Developments was in the land development business and presented the offer to purchase the 10th Avenue Agreement lands because it had reason to believe it could profitably develop the lands.¹⁸⁴

[277] The name of the purchaser – Remington Development Corporation – is itself compelling evidence about the nature of the purchaser’s business.

[278] Article 2.04 contemplates that the parties will negotiate, within a stipulated period, a term that bestows a benefit on Canadian Pacific if the value of the 10th Avenue Agreement lands appreciates after closing. Article 6.03¹⁸⁵ reads as follows:

By December 10, 2002, the Vendor and the Purchaser shall have agreed upon the form and substance of a participation agreement and encumbrance whereby the Purchaser shall grant to the Vendor certain participation rights in the appreciation in the value of the Lands after Closing and to charge the Lands as security for the obligations to make such appreciation payment.

This participation agreement, in effect, increases the purchase price of the 10th Avenue Agreement lands.¹⁸⁶ This is not the type of provision one would expect if the purchaser was not a developer and the parties did not expect the purchaser to develop the land.

[279] Both parties were aware of the fact that the 10th Avenue Agreement lands were part of Canadian Pacific’s east downtown Calgary yard and that there were four or five spur lines in use for storage, maintenance, and shunting of rail cars.¹⁸⁷ Article 2.02 expressly declares that Canadian Pacific currently uses the 10th Avenue Agreement lands for operational purposes – “The Purchaser acknowledges that the Existing Parcel is rail right-of-way lands”.¹⁸⁸

¹⁸⁴ *Remington Dev. Corp. v. Canadian Pac. Ry.*, 2022 ABKB 692, ¶ 95.

¹⁸⁵ CPR’s Extracts of Key Evidence 10.

¹⁸⁶ 10th Avenue Agreement, Art. 2.04 (“In addition to the Purchase Price, the parties acknowledge that the Purchaser shall provide, as additional consideration for the sale of the Lands to it by the Vendor, participation in the appreciation of the Lands as contemplated in Article 6.03 hereof”). CPR’s Extracts of Key Evidence 8.

¹⁸⁷ *Remington Dev. Corp. v. Canadian Pac. Ry.*, 2022 ABKB 692, ¶ 86 (“In 2002, and through the end of the 10th Ave Agreement, the 10th Ave Lands were used as an active switching and rail yard. They contained tracks and storage facilities used for maintenance, cleaning train cars, switching and shunting rail cars to build trains, and to service CPR customers. Remington knew that CPR actively used the 10th Ave Lands at the time the 10th Ave Agreement was signed”).

¹⁸⁸ CPR’s Extracts of Key Evidence 8.

[280] Article 6.08(c) also confirms this fundamental fact:¹⁸⁹ “[T]he determination of the area of the Lands included in the tentative plan of subdivision shall be in the Vendor’s absolute discretion as it relates to which portion of the Existing Parcel is surplus to the Vendor’s existing railroad operations”.

[281] It must also have been obvious to both parties that at the time they entered into the 10th Avenue Agreement Canadian Pacific intended to remove these spur lines as soon as possible. In September 2002 Canadian Pacific prepared a document entitled “East Downtown Calgary CPR Yard Property Information” that it distributed to Remington Development.¹⁹⁰ This document stated that “CPR has ... a tentative schedule [to remove the spur lines by] the end of 2003”.¹⁹¹

[282] In addition, Canadian Pacific and Remington Development must have appreciated that the 10th Avenue Agreement lands needed to be subdivided to maximize their value to the purchaser. Both Remington Development and Canadian Pacific had to have understood that the existing legal title by which Canadian Pacific held the land would not be suitable for the purchaser’s business plans and that the 10th Avenue Agreement lands would need to be subdivided. Article 7.01 reflects this joint understanding:¹⁹²

The Purchaser acknowledges that the Lands are presently part of the Existing Parcel. Upon acceptance of this Offer by the Vendor, the Vendor shall forthwith apply for the subdivision of the Lands from the Existing Parcel. To the extent that the Purchaser desires that the existing land use designation for the Existing Parcel be amended as to the Subdivided Lands, then the Purchaser shall be responsible for making the application for such land use redesignation at its sole labour and expense.

ii. The Three Agreements

[283] I have carefully reviewed the entire 10th Avenue Agreement, the 9th Avenue Agreement, and the Interlink Agreement.

¹⁸⁹ Id. 11.

¹⁹⁰ *Remington Dev. Corp. v. Canadian Pac. Ry.*, 2022 ABKB 692, ¶ 557 (“In September 2002, CPR prepared the property information summary. This document was provided to Mr. Remington. It set out information about each of the 9th Ave, 10th Ave and Interlink Lands. It provided information about the planning context and development opportunities on the lands”).

¹⁹¹ CPR’s Extracts of Key Evidence 57.

¹⁹² Id. 11.

[284] In addition to the provisions of the 10th Avenue Agreement already referred to in this part, I have found it helpful to consider other provisions.

[285] Article 3.01¹⁹³ indicates that the closing date is determined, in part, by the existence of stipulated milestones – removal of conditions set out in Articles 5 and 6 and the receipt by Canadian Pacific of stipulated documents. After the last of these identified milestones has occurred, the closing date must take place within thirty days. Why did Article 3.01 not list the occurrence of a determination by Canadian Pacific that the land is “surplus to its operational requirements” as one of the events that must occur before the thirty-day trigger can be activated? This strikes me as the greatest obstacle to the closing. The best answer is that the parties expected Canadian Pacific to make this determination shortly after November 30, 2002. Article 16.04 supports this conclusion. Article 16.04 required Canadian Pacific to complete its remedial clean-up on the 10th Avenue Agreement lands before December 31, 2004. To meet this target date, Canadian Pacific would have had to make a surplus determination long before December 31, 2004. In addition, the document Canadian Pacific prepared in September 2002 and delivered to Remington Development – “East Downtown Calgary CPR Yard Property Information” – stated that Canadian Pacific had tentatively scheduled a relocation of the tracks by “the end of 2003”.¹⁹⁴

[286] Article 4.01 grants Remington Development “access to the Lands while the Lands are under contract” for certain purposes. Remington Development requires “prior written consent of the Vendor ... in the event that the Purchaser desires to do any invasive testing on the Lands”. The stipulation requiring Canadian Pacific’s “prior written consent” assumes that Remington Development has given Canadian Pacific notice of its decision to conduct invasive testing. Does Remington Development have to give Canadian Pacific notice of its decision to conduct noninvasive testing before it enters the land? One would think so. Canadian Pacific is carrying on an active railway business on the lands and it would make sense that Remington Development have the right of entry only after it gives Canadian Pacific notice and Canadian Pacific gives its consent.

[287] How does Remington Development give notice?

[288] Article 13.01 states that “[a]ll notices ... shall be in writing and shall be required to be hand delivered”.

¹⁹³ Id. 9. (“The closing date of the purchase and sale transaction herein shall take place within 30 days following the removal of all of the conditions outlined in Article 5 and Article 6 hereof and receipt by the Vendor of the tentative plan of subdivision and all ancillary documentation such that the plan is in registerable form or sooner by mutual agreement of the parties (herein called the ‘Closing Date’ or the ‘Closing’”).

¹⁹⁴ Id. 57.

[289] If the communication from Remington Development to Canadian Pacific does not constitute a “notice” at the very least, Remington Development had to inform Canadian Pacific orally of its desire to conduct invasive testing.

[290] Articles 4.01 and 13.01 support my conclusion that an Article 2.02 determination has not been made until Canadian Pacific notifies Remington Development that a determination has been made. The best interpretation is that this important determination must be communicated to Remington Development in writing.

[291] Articles 5 and 6¹⁹⁵ list the conditions that must be satisfied before the 10th Avenue Agreement obliges the parties to finalize the sale. These articles do not mention the condition recorded in Article 2.02 that “the Existing Parcel is rail right-of-way lands and that the only portion of the Existing Parcel that the Vendor is capable of selling to the Purchaser is that portion of the Existing Parcel which the Vendor determines, in its discretion but in accordance with the *Railway Act* to be surplus to its operational requirements”. This is odd. I think the answer for this conundrum is the same as I gave for the missing feature in Article 3.01.

[292] Article 7.01¹⁹⁶ mandates that Canadian Pacific, upon acceptance of the offer to purchase, must “*forthwith* apply for the subdivision of the Lands from the Existing Parcel”. Why “*forthwith*”? Again, the parties must have been satisfied to a high degree of certainty that Canadian Pacific would within a short period of time following November 30, 2002 determine the 10th Avenue Agreement lands to be “surplus to its operational requirements”. Otherwise, this provision makes no sense. I also note that the adjective “temporary” does not appear in Article 7.01, as it does in other provisions dealing with the subdivision application.¹⁹⁷

[293] Article 8.01 declares that Remington Development “shall be entitled to vacant possession of the Lands on the Closing Date, subject to the rights of any tenants whose leases shall be accepted by the Purchaser as a permitted encumbrance as contemplated by Article 6.04 hereof”.

[294] Article 16.04 records a commitment by Canadian Pacific that “on or before December 31, 2004 all railway tracks and railway ties [shall] have been removed from the Lands” and “all existing buildings/facilities on the Lands [shall] have been demolished and removed from the Lands (including foundations)”.

¹⁹⁵ CPR’s Extracts of Key Evidence 9 & 10.

¹⁹⁶ *Id.* 11.

¹⁹⁷ E.g., 10th Avenue Agreement, Arts. 3.01, 6.06 & 6.08(c).

[295] These provisions lead to the conclusion that Article 2.02 is a stand-alone provision and that Canadian Pacific must have made a surplus determination before the 10th Avenue Agreement takes full effect and Canadian Pacific is obliged to sell the land to Remington Development.

b. Purpose of the 10th Avenue Agreement

[296] “Purpose precedes selection of text”.¹⁹⁸

[297] A review of the 10th Avenue Agreement discloses that the purpose of the agreement is the sale of the land by Canadian Pacific to Remington Development so that Remington Development may develop the land for commercial purposes and both may profit from this undertaking. Article 2.04 is solid evidence that the purpose of the 10th Avenue Agreement is to generate a profit from the sale and development of the 10th Avenue Agreement lands for both Canadian Pacific and Remington Development: “In addition to the Purchase Price, the parties acknowledge that the Purchaser shall provide, as additional consideration for the sale of the Lands to it by the Vendor, participation in the appreciation of the Lands as contemplated in the Participation Encumbrance contemplated in Article 6.03 hereof”.

c. Ordinary Meaning of the Text

[298] “The interpretation of a written contractual provision must always be grounded in the text”.¹⁹⁹

[299] This principle forces an adjudicator to ask two related questions.

[300] First, what is the ordinary meaning of the contested text?²⁰⁰

[301] Second, what meaning would a reasonable reader who uses the language correctly give the text when it was made?²⁰¹

[302] There can be no doubt about the ordinary meaning of the second sentence of Article 2.02. Article 2.02 clearly states that Canadian Pacific agrees to sell to Remington Development only the portion of the rail right-of-way lands that it alone determines, are “surplus to its operational

¹⁹⁸ *Equus Rea Ltd. v. Alberta Utilities Comm’n*, 2023 ABCA 142, ¶ 63.

¹⁹⁹ *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, ¶ 57; [2014] 2 S.C.R. 633, 661 per Rothstein, J.

²⁰⁰ *Commissions des droits de la personne et des droits de la jeunesse v. Directrice de la protection de la jeunesse du CISSS A*, 2024 SCC 43, ¶ 28 per Wagner, C.J. (“The starting point in an interpretive exercise is the text of the provisions. ... [W]hat should be focused on is the grammatical and ordinary meaning of the text”).

²⁰¹ *Alexis v. Alberta*, 2020 ABCA 188, ¶ 47; 8 Alta. L.R. 7th 314, 335-36 per Wakeling & Greckol, J.J.A (“A permissible meaning is one that a reasonable reader who uses the language correctly would give the text at the time of its production”), leave to appeal ref’d, [2020] 3 S.C.R. xii.

requirements”. Article 2.02 does not explain why Canadian Pacific is not capable of selling the land that is not surplus to its operational requirements. Is it because of internal Canadian Pacific policy or the *Railway Act*?²⁰² It does not matter. What is important is that Remington Development acknowledges that Canadian Pacific will not sell any of the 10th Avenue Agreement lands to Remington Development until Canadian Pacific determines that the lands are “surplus to its operational requirements”.

[303] Remington Development accepted the risk, however slight it probably thought it was, that Canadian Pacific would not make a determination and the 10th Avenue Agreement would never close.

[304] The parties do not differ over the meaning of the words “the Existing Parcel is rail right-of-way lands”. These nine words indisputably declare a fact – the 10th Avenue Agreement lands are rail right-of-way lands. This may be important. The Parliament of Canada, under section 92(10)(a) of the *Constitution Act, 1867*,²⁰³ has jurisdiction over “Railways ... extending beyond the Limits of the Province”. Canadian Pacific’s railway is such a railway. Accordingly, the province’s *Municipal Government Act*²⁰⁴ may not apply to a federal railway’s property that is integral to its railway operations.²⁰⁵

[305] It is also obvious that Canadian Pacific is solely responsible for making the “surplus to operational requirements” determination. It must do so “in accordance with the *Railway Act*”. Appellate counsel did not address the requirements under the *Railway Act*.²⁰⁶ Canadian Pacific has the right to make this determination “in its discretion”.

[306] Article 2.02 indisputably states that it is the vendor – Canadian Pacific – that must determine whether the 10th Avenue Agreement lands are “surplus to its operational requirements”. The phrase “in its discretion” makes it obvious that Canadian Pacific’s decision is critical. Article 2.02 does not assign this task to the purchaser – Remington Development – or a third party – an arbitrator.

²⁰² R.S.C. 1985, c. R-3.

²⁰³ 30 & 31 Vict., c. 3 (U.K.).

²⁰⁴ R.S.A. 2000, c. M-26.

²⁰⁵ *United Transportation Union v. Central W. Ry.*, [1990] 3 S.C.R. 1112, 1119 per Dickson, C.J. (“The issue in this appeal is whether the provincial or federal government has jurisdiction, for the purposes of labour relations, over a 105 mile railway line situated wholly within the province of Alberta. The answer turns on whether the railway can be seen as a federal work or undertaking under s. 92(10)(a) of the *Constitution Act, 1867*, or is integral to such a work or undertaking, so as to bring it within federal jurisdiction, and hence make applicable the provisions of the *Canada Labour Code*”).

²⁰⁶ R.S.C. 1985, c. R-3.

[307] It is also important to note that the verb “determine” captures a process marked by careful deliberation and a fixed assessment. According to The American Heritage Dictionary of the English Language, “determine” means “[t]o establish or ascertain definitely, as after consideration, investigation, or calculation”.²⁰⁷

[308] This definition supports the conclusion that Canadian Pacific does not make a determination under Article 2.02 until it has carefully considered the question of “surplus to its operational requirement” and made a final decision.

[309] I am satisfied that Justice Woolley’s conclusion that Canadian Pacific’s November 24, 2004 subdivision application manifested the existence of a prior determination by Canadian Pacific under Article 2.02 that the 10th Avenue Agreement lands were “surplus to its operations” is without any textual support. The trial judge did not offer an explanation for this finding. In the absence of a statement in the November 24, 2004 subdivision application that Canadian Pacific has determined that the 10th Avenue Agreement lands are “surplus to its operational requirements”, I fail to see any merit in the trial judge’s conclusion.

[310] Canadian Pacific’s November 24, 2004 application for subdivision approval is evidence of nothing more than the fact that the Canadian Pacific officers who authorized the application believed that Canadian Pacific’s operations group would, while the 10th Avenue Agreement was still in effect, give its approval to sell the 10th Avenue Agreement lands because they were “surplus to its operational requirements”.

[311] It is obvious that Canadian Pacific filed the November 24, 2004 subdivision application even though the company had made no determination that the 10th Avenue Agreement lands were “surplus to its operational requirements” in order to expedite the subdivision approval process.²⁰⁸

[312] My review of the 10th Avenue Agreement supports the conclusion that Canadian Pacific is not bound to sell the 10th Avenue Agreement lands to Remington Development until it makes a determination that the lands are “surplus to its operational requirements”.²⁰⁹

[313] I fail to see how Canadian Pacific can be said to have made this pivotal determination just because it filed a subdivision application on November 24, 2004 when at that time and for roughly seven years afterwards Canadian Pacific continued to use the lands for its railway business. Four of five spur lines that were in regular use. No objective reader could come to the conclusion that these lands were surplus to Canadian Pacific’s operational requirements in light of this fact.

²⁰⁷ The American Heritage Dictionary of the English Language 494 (5th ed. 2016).

²⁰⁸ The trial judge’s contrary conclusion is palpable and overriding error.

²⁰⁹ 10th Avenue Agreement, Art. 2.02. CPR’s Extracts of Key Evidence 8.

d. Text Can Never Be Given A Meaning It Cannot Bear

[314] It is a fundamental principle of statutory interpretation that an adjudicator may never give text a meaning it “cannot possibly bear”.²¹⁰

[315] Justice Woolley did.

[316] The trial judge’s interpretation, in effect, deleted the second sentence of Article 2.02 from the agreement. In doing so, the trial judge made a major change to the 10th Avenue Agreement – she rewrote it.

[317] Adjudicators can neither delete nor add terms to a commercial contract.²¹¹

²¹⁰ *The King v. Tran*, 2024 ABCA 241, ¶ 24 (“legal text can never be given a meaning it cannot possibly bear”); *Abbas v Esurance Ins. Co. of Canada*, 2023 ABCA 36, ¶ 50; 477 D.L.R. 4th 613, 645 per Watson & Wakeling, JJ.A. (“it is a cardinal sin for an adjudicator to give a text a meaning it cannot possibly bear”); *Zuk v. Alberta Dental Ass’n & College*, 2018 ABCA 270, ¶ 159; 426 D.L.R. 4th 496, 539 (“Words must not be given meanings they cannot possibly bear”); *Lenz v. Sculptoreanu*, 2016 ABCA 111, ¶ 4; 399 D.L.R. 4th 1, 6 (“A contrary interpretation would give the text an implausible meaning. A court may never do this”); *Jones v Director of Public Prosecutions*, [1962] A.C. 635, 662 (H.L. 1961) per Lord Reid (“It is a cardinal principle applicable to all kinds of statutes that you may not for any reason attach to a statutory provision a meaning which the words cannot reasonably bear”); *Bourne v. Norwich Crematorium Ltd.*, [1967] 2 All E.R. 576, 578 (Ch.) per Stamp J. (“In my judgment it would be a distortion of the English language to describe the living or the dead as goods or materials. ... [O]ne must not ... distort that which has to be construed and give it a meaning ... one does not think it can possibly bear”); *SZTAL v. Minister for Immigration and Border Protection*, [2017] HCA 34, ¶ 94; 347 A.L.R. 405, 429 per Edelman, J. (“where a statute employs a term in its ordinary sense, there can be no warrant for the extension of the meaning beyond its ordinary sense”) & *Newcastle City Council v. GIO General Ltd.*, [1997] HCA 53; 191 C.L.R. 85, 113 per McHugh, J. (“If the legislature uses language which covers only one state of affairs, a court cannot legitimately construe the words of the section in a tortured and unrealistic manner to cover another set of circumstances”). See A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 31 (2012) (“A fundamental rule of textual interpretation is that neither a word nor a sentence may be given a meaning that it cannot bear. Without the concept of permissible meanings, there is no such thing as faithful interpretation of legal texts”); R. Sullivan, *The Construction of Statutes* 191 (7th ed. 2022) (“the interpretation ultimately adopted must be one that the words of the text can reasonably bear”) & H. Hart & A. Sachs, *The Legal Process: Basic Problems in the Making and Application of Law* 1374 (1994) (“a court should ... not give the words [in a statute] ... a meaning they will not bear”).

²¹¹ *Dow Chem. Canada ULC v. NOVA Chemicals Corp.*, 2020 ABCA 320, ¶ 89 per Slatter & Khullar, JJ. A. (“This interpretation of the exclusion clause, in the factual matrix, is not one that can reasonably be sustained, and it reflects palpable and overriding error. It would mean that Nova would not only be liable for damages caused by Wilful Misconduct or Gross Negligence, but also for any operational error that accrued to the ultimate benefit of Nova”).

e. More Than One Plausible Meaning

[318] If the text of the contract supports more than one plausible meaning, the adjudicator must select the option that produces “a reasonable commercial result”.²¹²

[319] If I am wrong and the text of the 10th Avenue Agreement supports two plausible meanings – the one I have adopted and the one Justice Woolley favored – I have no hesitation in concluding that the option I have embraced produces a “reasonable commercial result” and the option that Justice Woolley adopted does not.

[320] The interpretation that I favor is based on the ordinary meaning of the text of Article 2.02. It is the reading that a reasonable reader who uses the language correctly would adopt. An interpretation that is based on the text promotes certainty. Parties to commercial contracts value certainty. They do not like surprises and unanticipated adverse consequences.

[321] The interpretation that appealed to the trial judge is not one that would appeal to business people. If Canadian Pacific knew that filing a subdivision application would be treated as if it were an Article 2.02 determination, it would never have filed the subdivision application when it did. Canadian Pacific would have waited until its operations group delivered to the real estate group a written statement that the 10th Avenue Agreement lands were surplus to its operational requirements. This would have meant that the subdivision approval process would have ended at a much later time than would have been the case if Canadian Pacific could have filed the subdivision application to expediate the process without any adverse business consequence.

4. Conclusion

[322] The trial judge’s interpretation of Article 2.02 is clearly wrong and must be set aside.²¹³

²¹² *Consolidated Bathurst Export Ltd. v. Mutual Boiler & Machinery Ins. Co.*, [1980] 1 S.C.R. 888, 901 (1979) per Estey, J. (“[courts] favour ... an interpretation ... which promotes a sensible commercial result”). See also *Resolute FP Canada Inc. v. Ontario*, 2019 SCC 60, ¶ 79; [2019] 4 S.C.R. 394, 430 per Côté & Brown, JJ. (“contractual interpretation ... requires courts to consider the principle of commercial reasonableness and efficacy”).

²¹³ An appeal court may set aside a trial court’s interpretation of a contract that is clearly wrong. The standard of review for an extricable error of law is one of correctness. *Housen v. Nikolaisen*, 2002 SCC 33, ¶ 8; [2002] 2 S.C.R. 235, 247 per Iacobucci & Major, JJ. (“the standard of review on a question of law is that of correctness”); *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, ¶ 50, 53; [2014] 2 S.C.R. 633, 658-70 per Rothstein, J. (“Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix. [I]t may be possible to identify an extricable question of law from within what was initially characterized as a question of mixed fact and law Legal errors made in the course of contractual interpretation include ‘the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor’”). Appellate courts must be cautious in identifying extricable questions of law for review. *Sattva Capital Corp.*

B. Alberta Did Not Induce Canadian Pacific To Breach the 10th Avenue Agreement and Is Not Liable for the Tort of Inducing Breach of Contract

[323] Alberta did not induce Canadian Pacific to breach the 10th Avenue Agreement because Canadian Pacific did not breach the 10th Avenue Agreement. This is one of the seven essential elements for the tort of inducing breach of contract.²¹⁴

[324] Remington Development has not made out the claim of inducing breach of contract against Alberta.

[325] Alberta’s appeal must therefore be allowed.

C. The Damages Award Must Be Set Aside

1. Introduction

[326] The determination that Canadian Pacific did not breach the 10th Avenue Agreement makes it unnecessary to determine whether the damage award of \$165,166,431 and prejudgment interest of \$45,013,395.89 can survive appellate review.

v. Creston Moly Corp., 2014 SCC 53, ¶ 54; [2014] 2 S.C.R. 633, 660, per Rothstein, J. (“courts should be cautious in identifying extricable questions of law in disputes over contractual interpretation”); *Housen v. Nikolaisen*, 2002 SCC 33, ¶ 36; [2002] 2 S.C.R. 235, 262 per Iacobucci & Major JJ. (“Where the legal principle is not readily extricable, then the matter is one of ‘mixed law and fact’ and is subject to a more stringent standard. The general rule ... is that, where the issue on appeal involves the trial judge’s interpretation of evidence as a whole, it should not be overturned absent palpable and overriding error”). A true extricable question of law will be “rare”. *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, ¶ 55; [2014] 2 S.C.R. 633, 660-61 per Rothstein, J. (“The close relationship between the selection and application of principles of contractual interpretation and the construction ultimately given to the instrument means that the circumstances in which a question of law can be extricated from the interpretation process will be rare”) and “uncommon”. *City of Corner Brook v. Mary Bailey*, 2021 SCC 29, ¶ 44; [2021] 2 S.C.R. 540, 563 per Rowe, J. (“The circumstances in which a question of law can be extracted will be uncommon”). To set aside the findings of the trial judge that CPR breached, we must be of the opinion that she has made a rare and uncommon error – one on an extricable question of law – or that her interpretation of the 10th Avenue Agreement was clearly wrong.

²¹⁴ *369413 Alberta Ltd. v. Pocklington*, 2000 ABCA 307, ¶ 13; 88 Alta. L.R. 3d 209, 215-16 per Fruman J.A. (“In order to find that a defendant intentionally induced a breach of contract, seven elements must be established: i) the existence of a contract; ii) knowledge or awareness by the defendant of the contract; iii) a breach of the contract by a contracting party; iv) the defendant induced the breach; v) the defendant, by his conduct, intended to cause the breach; vi) the defendant acted without justification; and vii) the plaintiff suffered damages”) & *Brae Centre Ltd. v. 1044807 Alberta Ltd.*, 2008 ABCA 397, ¶ 19; 99 Alta. L.R. 4th 41, 47 (“To find that a defendant intentionally induced a breach of contract, six elements must be established: (i) the existence of a contract (ii) the defendant intended to cause a breach of the contract (iii) knowledge by the defendant of the contract (iv) the defendant’s conduct induced the breach (v) damage (vi) lack of justification for the defendant’s conduct”).

[327] But I will. This is an important issue and able counsel have presented excellent oral and written submissions.

[328] Had I concluded that Canadian Pacific breached the 10th Avenue Agreement, I would have set aside the award of \$165,166,431 on the grounds that it was based on an incorrect legal foundation.²¹⁵

2. Governing Damages Principles

[329] The starting point in assessing damages to which the complaining promisee²¹⁶ is entitled for breach of contract is this: damages should place the complaining promisee – the nonbreaching party to the contract – in the same position the complaining promisee would have been in had the promisor not breached the contract and caused the events for which the complaining promisee seeks compensation.²¹⁷

²¹⁵ *Nance v. British Columbia Electric R. Co.*, [1951] 3 D.L.R. 705, 713 (P.C.) per Viscount Simon (“before the Appellate Court can properly intervene, it must be satisfied either that the Judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage”).

²¹⁶ The American Law Institute’s Restatement (Second) of the Law of Contracts (1981) sometimes refers to the complaining promisee as the “injured party”. E.g., Restatement (Second) of Contracts § 350(1) (“Except as stated in Subsection (2), damages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation”).

²¹⁷ *Robinson v. Harman*, 154 Eng. Rep. 363, 365 (Ex. 1848) per Parke, B (“The next question is, what damages is the plaintiff entitled to recover [for breach of contract]? The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed”); *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30, ¶¶ 27 & 44; [2006] 2 S.C.R. 3, 13 & 19 per McLachlin, C.J. & Abella, J. (“Damages for breach of contract should, as far as money can do it, place the plaintiff in the same position as if the contract had been performed. The aim of compensatory damages is to restore the wronged party to the position he or she would have been in had the contract not been broken”); *Asamera Oil Corp. Ltd. v. Sea Oil & General Corp.*, [1979] 1 S.C.R. 633, 645 (1978) per Estey, J. (“Losses recoverable in an action arising out of the non-performance of a contractual obligation are limited to those which will put the injured party in the same position as he would have been in had the wrongdoer performed what he promised”); *Wertheim v. Chicoutimi Pulp Co.*, [1911] A.C. 301, 307 (P.C. 1910) (Que.) per Lord Atkinson (“the party complaining should, so far as it can be done by money, be placed in the same position as he would have been in if the contract had been performed”); *Riggall v. Thompson*, [2010] QCA 144, ¶ 26 per Fraser, J.A. (“The broad principle is that an award of damages for breach of contract is designed to put the innocent party in the position that party would have been in had the defaulting party performed the contract”); *Goodstein Const. Corp. v. City of New York*, 604 N.E. 2d 1356, 1360 (N.Y. Ct. App. 1992) per Hancock, J. (“Contract damages are ordinarily intended to give the injured party the benefit of the bargain by awarding a sum of money that will, to the extent possible, put that party in as good a position as it would have been in had the contract been performed”) & *Richly Bright Int’l Ltd. v. De Monsa Inv. Ltd.*, 2015 HKCFA 36, ¶ 15; [2015] 18 H.K.C.F.A.R. 232, 242 per Ribeiro & Fok, PJJ. (“The object of an award of damages for breach of contract is compensatory. It aims to place the innocent party, so far as a monetary award can do so, in

[330] Suppose A contacts BC Co. and books a driver to pick her up at her Edmonton residence at 5 a.m. on March 1, 2025 and drive her to the Edmonton International Airport for a fee of \$75. A is a regular customer of BC Co. A had purchased for \$1000 a nonrefundable ticket from an airline to fly her from Edmonton to New York, departing Edmonton at 8 a.m. A was a sports memorabilia dealer. She had decided to participate in a New York auction starting at 5 p.m. eastern standard time. Bidders had to be physically present. Her strategy was to bid up to US \$1 million for a Wayne Gretzky rookie card. A did not inform the person from BC Co. with whom she spoke why she wanted to go to the airport. No BC Co. driver appears at A's residence by 5:15 a.m. A uses her Uber app and an Uber driver appears at 5:30 a.m. and drives her to the airport for a charge of \$150. A catches her 8 a.m. flight, arrives at the auction on time, and is the successful bidder for the Wayne Gretzky rookie card. After the purchaser's fee is added, A has spent US \$1 million to acquire the card. What does BC Co. need to do to place A in the position she would have been in had BC Co. not breached its agreement with A? If BC Co. paid A \$75, the difference between the cost of the two rides to the airport, A would not be out of pocket for the cost of the ride to the airport. A acted appropriately in contacting a Uber driver. This was a reasonable response that reduced her losses attributable to BC Co.'s breach of contract.²¹⁸

[331] The sole pursuit of this starting-point principle would ensure that the complaining promisee receives "a complete indemnity for all loss de facto resulting from a particular breach".²¹⁹ It

the same position as if the contract had been performed in accordance with its terms"). See also Restatement (Second) of Contracts § 347, Comment (1981) ("Contract damages are ordinarily based on the injured party's expectation interest, and are intended to give him the benefit of his bargain by awarding him a sum of money that will, to the extent possible, put him in as good a position as he would have been in had the contract been performed"); A. Swan, J. Adamski & A. Na, *Canadian Contract Law* 409 (4th ed. 2018) ("The basic remedy for breach of contract is that the plaintiff, i.e., the innocent party is to be compensated for the loss caused by the breach"); P. Perell, *Remedies and the Sale of Land* 183 (2d ed. 1998) ("In contract, the general goal of an award of damages is to use money to put the innocent party in the same position as it would have been if the contract [had] been performed") & J. Edelman, *McGregor on Damages* 193 (21st ed. 2021) ("The starting point in resolving a problem as to the measure of damages for breach of contract is the rule that the claimant is entitled to be placed, so far as money can do it, in the same position as if the contract [had] been performed").

²¹⁸ S. Waddams, *The Law of Contracts* 536 (8th ed. 2022) ("the plaintiff cannot recover for losses that could reasonably have been avoided"); J. Edelman, *McGregor on Damages* 223 (21st ed. 2021) ("the claimant must take all reasonable steps to mitigate their loss consequent upon the defendant's wrong and cannot recover damages for any such loss which they failed, through unreasonable action or inaction to avoid. Put shortly, the claimant cannot recover for reasonably avoidable loss"); E. Farnsworth, *Contracts* 778-79 (4th ed. 2004) ("A court ordinarily will not compensate an injured party for loss that that party could have avoided by making efforts appropriate, in the eyes of the court, to the circumstances. ... The economic justification of such a rule is plain, for it encourages the injured party to act so as to minimize the wasteful results of breach") & Restatement (Second) of Contracts § 350 (1981) ("(1) Except as stated in Subsection (2), damages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation. (2) The injured party is not precluded from recovery by the rule stated in Subsection (1) to the extent that he has made reasonable but unsuccessful efforts to avoid loss").

²¹⁹ *Victoria Laundry (Windsor) Ltd. v. Newman Indus. Ltd.*, [1949] 2 K.B. 528, 539 (C.A.) per Asquith L.J.

obviously protects the complaining promisee from any loss. This is, as a rule, desirable. The first hypothetical illustrates this.

[332] But consideration of no other factors may result in holding the defaulting promisor responsible for consequences neither the defaulting promisor nor the complaining promisee acting reasonably could have contemplated at the time the agreement was made as likely to occur as a result of the defaulting promisor's breach.²²⁰ This would be unfair and unjust.²²¹

[333] Suppose no Uber driver was available to drive A to the airport until 6 a.m. and A arrived at the airport too late to catch her 8 a.m. flight. There was no other flight leaving Edmonton that A could have taken to arrive in New York on time for the 5 p.m. auction. A was not at the auction when the Wayne Gretzky rookie card came up for sale. D purchases the Wayne Gretzky rookie card for US \$900,000 and sells it fifteen months later to E for US \$2 million. What are A's damages? Is BC Co. obliged only to pay A \$75, the difference between the Uber premium rate of \$150 and the agreed-upon BC Co. rate of \$75? This is a consequence of BC Co.'s breach of contract that BC Co. acting reasonably would have foreseen at the time the contract was made as almost certain to occur if BC Co. breached its promise to drive A to the airport at a designated time. Is BC Co. also responsible for the \$1000 nonrefundable ticket? Had BC Co. considered, at the time A booked her airport trip, the probable consequences of its failure to drive A to the airport on time, acting reasonably, it would have concluded that A booked a ride to the airport because she had paid for a flight. But BC Co. would have had no reason to conclude that A was on a flight to New York. It would have been just as reasonable to conclude that A had booked a flight to Calgary. If the consequence of a contract breach for which the complaining promisee seeks compensation

²²⁰ Id. ("This purpose, if relentlessly pursued, would provide [the complaining promisee] for all loss de facto resulting from a particular breach, however impossible, however unpredictable. This in contract at least, is recognized as too harsh a rule"); *Koufos v. C. Czarnikow Ltd.*, [1969] 1 A.C. 350, 414 (H.L.) per Lord Pearce ("But so wide a principle might be too harsh on a contract-breaker ... [and make] him liable for a claim of unforeseen and fortuitous circumstances") & *De Monsa Investments Ltd. v. Richly Bright Int'l Ltd.*, [2015] HKCFA 36, ¶ 15; 18 HKCFA 232, 242 per Ribeiro & Fok, JJ. ("This basic principle [for an award of damages] could, however, if applied without any constraint, result in a defendant being made liable for all losses caused by a particular breach regardless of the improbability or remoteness of any item of loss").

²²¹ *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc.*, 2008 SCC 54, ¶ 64; [2008] 3 S.C.R. 79, 106 per Abella J. ("The principles of remoteness 'imposes on damage awards reasonable limits which are required by fairness'"); Restatement (Second) of Contracts § 351 (1981) ("A court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing, recovery only for loss incurred in reliance, or otherwise, if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation"); *Houweling Nurseries Ltd. v. Fisons Western Corp.*, 49 D.L.R. 4th 205, 211 (B.C.C.A 1988) per McLachlin J.A. ("The effect of the doctrine of remoteness is to exclude losses which it is established were caused by the breach of contract, but which were not reasonably foreseeable when the contract was made. The rationale for this exclusion is that it would be unfair to require the defendant to pay such damages, when, if he had been aware of them, he might have declined the risk or made other arrangements") & *D.W. Matheson & Sons Contracting Ltd. v. Canada*, 2000 NSCA 44, ¶ 69; 187 N.S.R. 2d 62, 80 per Cromwell J.A. ("The starting point ... is recognition that remoteness imposes on damage awards reasonable limits which are required by fairness").

must be at least more probable than not, BC Co. would not be obliged to pay A \$1000. BC Co. would be responsible only for nominal damages for breach of contract. There is another issue. Would a damage award of \$1000 not constitute disproportionate compensation?²²² Would it be fair to give A for her \$75 payment to BC Co. not only the prospect of a ride to the airport but a travel cancellation insurance policy, in effect?

[334] Would A's position improve if the person she spoke to when she booked the transportation with BC Co. was its president and sole shareholder and director and she told him that she was a sports memorabilia dealer, had booked a flight to New York, and planned to bid on a rare Wayne Gretzky rookie card that she expected to quickly appreciate in value? Maybe. BC Co. would now know that a probable consequence of its failure, and that of an alternate service provider, to drive her to the airport on time would be her missing her flight to New York and being unable to bid on the rare Wayne Gretzky rookie card and profit from a rise in its market value. But would it be just to hold BC Co. responsible for the cost of A's airfare - \$1000 – and her lost profit – US \$1 million – when its charge for driving A to the airport was only \$75. Would damages of \$1000 or US \$1 million not constitute disproportionate compensation? Probably. If A had told BC Co. when she booked her ride that she would hold the company responsible for the lost airfare and profit if BC Co. breached its agreement, BC Co. would have probably asked her to agree that BC Co. would have to pay only \$100 if BC Co. breached its promise. If A would not agree, BC Co. would have told her that its fee for the trip would be \$500. This would allow BC Co. to retain three drivers to ensure that A made it to the airport on time. If A did not accept this offer, BC Co. would not drive her to the airport.

[335] These examples demonstrate that, while a defendant's breach of contract may cause the losses the plaintiff incurred, compelling reasons may exist to deny making the promisor liable for all these losses.²²³ As a result, the complaining promisee will not be able to recover from the promisor all the losses the promisee incurred.

²²² Restatement (Second) of Contracts § 351, Comment f (1981) (“Other limitations on damages. It is not always in the interest of justice to require the party in breach to pay damages for all of the foreseeable loss that he has caused. There are unusual instances in which it appears from the circumstances either that the parties assumed that one of them would not bear the risk of a particular loss or that, although there was no such assumption, it would be unjust to put the risk on that party. One such circumstance is an extreme disproportion between the loss and the price charged by the party whose liability for that loss is in question. The fact that the price is relatively small suggests that it was not intended to cover the risk of such liability. Another such circumstance is an informality of dealing, including the absence of a detailed written contract, which indicates that there was no careful attempt to allocate all of the risks”).

²²³ Both common law and civil law jurisdictions impose limitations on the losses that a breaching party can be liable for. One legal scholar traced the history of remoteness in contractual damages cases to Roman Law K. Barnett, “Reflections on the Principles of Remoteness in Contract in Comparative Law” 37 Int'l. J. Semiotics L. 1587, 1590-91(2024) (“Under the *actio empti* (the action allowing a buyer in a contract of sale to recover losses for breach from the seller) consequential loss was recoverable, but ... there were attempts to limit this However, it is impossible to say whether there was a definite rule of remoteness, even in that particular category of contract, because the texts

[336] *Hadley v. Baxendale*²²⁴ is the seminal case²²⁵ in the common law world on the principle of remoteness in commercial contracts. It recognized that some losses the defaulting promisor's breach have caused are so unpredictable it would be unfair and unjust to hold the defaulting

conflict... . [The Roman jurist] Ulpian seemed to suggest that the rule operated differently where the seller has knowledge... . The reasoning behind these limitations seems to have been a desire for greater certainty and coherence in the law, as well as a sense that moderation required some certain limit upon liability”).

²²⁴ [1854] EWHC Exch J70; 156 Eng. Rep. 145 (Ex. Ct.). See also *British Columbia Saw-Mill Co. v. Nettleship*, 3 L.R.C.P. 499, 506 & 509 (Ct. Common Pleas 1868) per Bovil C.J. (“[The defendant] is not to be made liable for damages beyond what may fairly be presumed to have been contemplated by the parties at the time of entering into the contract. It must be something which could have been foreseen and reasonably expected, and to which ... [the defendant] has assented expressly or impliedly by entering into the contract”) & per Willes J (“To my mind, that leads to the inevitable conclusion that the mere fact of knowledge cannot increase the liability. The knowledge must be brought home to the party sought to be charged, under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it”); *Victoria Laundry (Windsor) Ltd. v. Newman Indus. Ltd.*, [1949] K.B. 528, 539-40 (C.A.) per Asquith L.J. (“What propositions applicable to the present case emerge from the authorities as a whole, including those analysed above? We think they include the following: -- (1.) It is well settled that the governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed This purpose, if relentlessly pursued, would provide him with a complete indemnity for all loss de facto resulting from a particular breach, however improbable, however unpredictable. This, in contract at least is recognized as too harsh a rule. Hence, (2.) In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach. (3.) What was at that time reasonably so foreseeable depends on the knowledge then possessed by the parties or, at all events, by the party who later commits the breach. (4.) For this purpose, knowledge ‘possessed’ is one of two kinds; one imputed, the other actual. Everyone, as a reasonable person, is taken to know the ‘ordinary course of things’ and consequently what loss is liable to result from a breach of the contract in that ordinary course. ... But to this knowledge, which a contract-breaker is assumed to possess whether he actually possesses it or not, there may have to be added in a particular case knowledge which he actually possess, of special circumstances outside the ‘ordinary course of things’ of such a kind that a breach in those special circumstances would be liable to cause more loss. Such a case attracts the operation of the ‘second rule’ [set out in *Hadley v. Baxendale*] so as to make additional loss also recoverable. (5.) In order to make the contract-breaker liable under either rule it is not necessary that he should actually have asked himself what loss is liable to result from a breach. As has often been pointed out, parties at the time of contracting contemplate not the breach of the contract, but its performance. It suffices that, if he had considered the question, he would as a reasonable man have concluded that the loss in question was liable to result (6.) Nor, finally, to make a particular loss recoverable, need it be proved that upon a given state of knowledge the defendant could, as a reasonable man, foresee that a breach must necessarily result in that loss. It is enough if he could foresee it was likely so to result. It is indeed enough ... if the loss (or some factor without which it would not have occurred) is a ‘serious possibility’ or a ‘real danger.’ For short, we have used the word ‘liable’ to result. Possibly the colloquialism ‘on the cards’ indicates the shade of meaning with some approach to accuracy”).

²²⁵ J. Edelman, McGregor on Damages 224 (22d ed. 2024) (“*Hadley v. Baxendale* [is] the most celebrated case in the field of contract damages”). For a thorough account of the state of the law before *Hadley v. Baxendale* and an analysis of the merits of *Hadley v. Baxendale* see J. Edelman & L. Bourke, “FW Guest Memorial Lecture 2017 *Hadley v. Baxendale*”, 15 *Otago L. Rev.* 199 (2018).

promisor responsible for them. A law holding a defaulting promisor for losses of this nature would adversely effect the business community.²²⁶

[337] Hadley and his partners were millers. They used a steam engine to power the machines that ground corn into meal. The steam engine's crankshaft broke. The plaintiffs were unable to carry on business until the crankshaft was replaced. The manufacturer could not make a new shaft without having the broken crankshaft at its premises to serve as a pattern. The plaintiffs entered into an agreement with the defendant, a common carrier, to deliver the broken crankshaft to the manufacturer the day after the plaintiffs delivered it to the defendant. The plaintiff informed the defendant that the plaintiff was a miller and that it had a broken crankshaft. Baron Alderson did not proceed on the basis that the miller told the common carrier that his mill was completely shut down because it could not operate without the crankshaft.²²⁷ On account of the defendant's neglect, the defendant failed to deliver the broken crankshaft on the date promised. The plaintiffs' mill was out of commission longer than it would have been had the defendant delivered the broken crankshaft to the manufacture when it had promised. As a result, the plaintiffs had to purchase from other millers the products the plaintiffs had undertaken to supply their customers in the period the mill was out of commission. The plaintiff sued for the profits they would have earned had the defendant not breached the contract to transport the plaintiffs' crankshaft.

[338] Counsel for the defendant argued that the promisor cannot be held responsible for all the losses the promisee suffers as a result of the promisor's breach:²²⁸

[I]t is clear that complete compensation is not to be awarded; for instance, the non-payment of a bill of exchange might lead to the utter ruin of the holder, and yet such damage could not be considered as necessarily resulting from the breach of contract, so as to entitle the party aggrieved to recover in respect of it. Take the case of the breach of a contract to supply a rick-cloth, whereby and in consequence of

²²⁶ *Victoria Laundry (Windsor) Ltd. v. Newman Indus. Ltd.*, [1949] 2 K.B. 528, 539 (C.A.) per Asquith, L.J. ("It is well settled that the governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed This purpose, if relentlessly pursued, would provide him with a complete indemnity for all loss de facto resulting from a particular breach, however improbable, however, unpredictable. This, in contract at least, is recognized as too harsh a rule").

²²⁷ *Id.* 537 ("The head-note is definitely misleading in so far as it says that the defendant's clerk, who attended at the office, was told that the mill was stopped and that the shaft must be delivered immediately. . . . If the Court of Exchequer had accepted these facts as established, the court must, one would suppose, have decided the case the other way around. . . . But it is reasonably plain from Alderson B's judgment that the court rejected this evidence, for on page 355 he says: 'We find that the only circumstances have communicated by the plaintiffs to the defendants at the time when the contract was made were that the article to be carried was the broken shaft of a mill and that the plaintiffs were the millers of that mill'").

²²⁸ *Hadley v. Baxendale*, [1854] EWHC Exch. J70; 156 Eng. Rep. 145, 149.

bad weather, the hay, being unprotected, is spoiled, that damage could not be recoverable.

[339] Baron Alderson stated the governing principles for determining which of the losses attributable to a breach of contract a complaining promisee may recover and which of the losses the complaining promisee must bear:²²⁹

Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the *probable* result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would *ordinarily* follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them.

[340] These principles can be consolidated into one concept without altering in any way the test Baron Alderson formulated for identifying remoteness:²³⁰ A defaulting promisor in a commercial

²²⁹ Id. 151 (emphasis added).

²³⁰ See *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30, ¶¶ 54-55; [2006] 2 S.C.R. 3, 23 (“It follows that there is only one rule by which compensatory damages for breach of contract should be assessed: the rule in *Hadley v. Baxendale*. The *Hadley* test unites all forms of contractual damages under a single principle. ... In all cases, these results are based on what was in the reasonable contemplation of the parties at the time of contract formation. ... Where losses arise from the breach of contract itself, damages will be determined according to what was in the reasonable contemplation of the parties at the time of contract formation”) (emphasis in original deleted); *Victoria Laundry (Windsor) Ltd. v. Newman Indus. Ltd.*, [1949] 2 K.B. 528, 539 (C.A.) per Asquith, L.J. (“In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach”); *Koufos v. C. Czarnikow Ltd.*, [1969] 1 A.C. 350, 385 (H.L. 1967) per Lord Reid (“The crucial question is whether, on the information available to the defendant when the contract was made, he should, or the reasonable man in his position would, have realised that such loss was sufficiently *likely to result* from the breach of contract to make it proper to hold that the loss flowed naturally from the breach or

contract is liable for such portion of the loss the promisor's default has caused the complaining promisee that the defaulting promisor could have reasonably foreseen²³¹ as the probable result²³² of the promisor's future default had they addressed the issue at the time the contract was made. "The question is not what was foreseeable at the time of the breach, but what was foreseeable at the time of contracting".²³³

[341] This means that any event that the complaining promisee asserts was caused by the promisor's breach of contract and that the complaining promisee relies on in advancing a damage claim must have been reasonably foreseen by the defaulting promisor at the time the parties entered into the agreement as a probable consequence of the promisor's future breach of contract.

[342] If the complaining promisee provided the promisor with information about the consequences of breach by the promisor, this additional information would increase the consequences that would be reasonably foreseeable as probable.²³⁴

that loss of that kind should have been within his contemplation") (emphasis added); *Jackson v. Royal Bank of Scotland plc*, [2005] UKHL 3, ¶ 48; [2005] 1 W.L.R. 377, 391 per Lord Walker ("The common ground of the two limbs is what the contract-breaker knew or must be taken to have known, so as to bring the loss within the reasonable contemplation of the parties"); *Sempra Metals Ltd. v. Inland Revenue Comm'rs*, [2007] UKHL 34, ¶ 215; [2008] 1 A.C. 561, 643 per Lord Mance ("The two limbs of *Hadley v. Baxendale*, are the practical expression of a single principle (inspired by the civil law) that parties should only be liable for damages which were when they contracted within their contemplation in the event of a breach") & *Baltic Shipping Co. v. Dillon*, [1993] HCA 4; 176 C.L.R. 344, 368 per Brennan, J. ("These rules have been merged in a single principle"). See also J. Cassels & E. Adjin-Tettey, *Remedies: The Law of Damages* 394 (3d ed. 2014) ("it is simpler to formulate the principle [set out in *Hadley v. Baxendale*] as one rule: that the damages must be within the reasonable contemplation of the parties at the time of contract").

²³¹ This is an objective test. E. Farnsworth, *Contracts* 795 (4th ed. 2004) ("foreseeability has an objective character. When one makes a contract one takes the risk not only of those consequences that one actually did foresee, but also of those that one ought reasonably to have foreseen").

²³² A "probable result" is one that is more likely than not to occur. In mathematical terms this is a degree of probability in excess of fifty percent. E. Farnsworth, *Contracts* 795 (4th ed. 2004) ("the loss need only have been foreseeable as a probable, as opposed to a necessary or certain, result of the breach"). It is helpful to think of degrees of certainty on a scale. The top end consists of a very high degree of certainty – from 80 to 100%. The next stage represents a high degree of certainty – over 50% to 79%. The bottom half of the scale has three segments. At the bottom end is an extremely low degree of certainty. This segment captures remote probabilities. It recognizes that anything can happen. It ends at 10%. The second section represents a low degree of certainty. This covers a range from 11 to 35%. The third segment of the bottom half of the scale is reserved for a moderate degree of certainty – 36 to 50%. *Can v. Calgary Police Service*, 2014 ABCA 322, ¶¶ 130-32; 315 C.C.C. 3d 337, 402-04 per Wakeling, J.A.

²³³ E. Farnsworth, *Contracts* 795 (4th ed. 2004).

²³⁴ *Hadley v. Baxendale*, [1854] EWHC Exch. J70; 156 Eng. Rep. 145, 151 per Alderson, B. ("Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these

[343] There can be no doubt that a consequence arising in “the usual course of things” – Baron Alderson’s language – would be a consequence that the parties would have reasonably foreseen as a probable result of the promisor’s breach. The same is also true if the complaining promisee communicated sufficient information to the defaulting promisor that the consequence of the promisor’s breach may be characterized as objectively foreseeable by the defaulting promisor as a probable consequence. In this scenario, the complaining promisee would have to prove that the defaulting promisor had actual knowledge of the special circumstances. Baron Alderson used the phrase “which would ordinarily follow” to describe this outcome. A result that is a probable consequence or would ordinarily follow utilizes the same degree of certainty. A result that is a probable consequence or which would ordinarily follow are results that are more likely than not to occur.

[344] Baron Alderson held that the trial judge erred in allowing the jury to take into account the plaintiffs’ lost profits.²³⁵ This was not a special case of the kind he described – the plaintiff had not communicated enough information about the consequences associated with late delivery by the carrier to the manufacturer to support the conclusion that the common carrier would have contemplated the shut down of the mill and lost profits as the *probable* result of the carrier’s breach of contract.²³⁶ The plaintiff had not provided enough information to cause the defendant to understand that the mill was shut down solely because of the broken crankshaft.

[345] In 1949 – *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.*²³⁷ – the English Court of Appeal reexamined Baron Alderson’s *Hadley v. Baxendale* judgment. This time the Court sided with the complaining promisee and awarded Victoria Laundry damages for some of its lost profits.

special circumstances so known and communicated”); *Victoria Laundry (Windsor) Ltd. v. Newman Indus. Ltd.*, [1949] 2 K.B. 528, 539 (C.A.) per Asquith, C.J. (“(2.) In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contact reasonably foreseeable as liable to result from the breach. (3.) What was at the time reasonably so foreseeable depends on the knowledge then possessed by the parties or, at all events, by the party who later commits the breach. (4.) For this purpose, knowledge ‘possessed’ is of two kinds; one imputed, the other actual. ... But to this knowledge, which a contract-breaker is assumed to possess ... there may have to be added in a particular case knowledge which he actually possesses, of special circumstances outside the ‘ordinary course of things’ of such a kind that a breach in those special circumstances would be liable to cause more loss. Such a case attracts the operation of the ‘second rule’ so as to make additional loss also recoverable”) & *Dow Chemical Canada v. NOVA Chemicals Corp.*, 2020 ABCA 320, ¶ 57 per Slatter & Khullar, J.J.A. (“The recoverable damages are those that would be in the reasonable contemplation of the parties at the time of contract. There is only one rule, but if ‘special circumstances’ have been communicated, then the damages within the parties’ reasonable contemplation would be wider”).

²³⁵ *Hadley v. Baxendale*, [1854] EWHC Exch. J70; 156 Eng. Rep. 145, 151-52 (Ex. Ct. 1854).

²³⁶ E. Farnsworth, *Contracts* 793 (4th ed. 2004) (“The court must have assumed that the miller had communicated to the carrier only the circumstance ‘that the article to be carried was the broken shaft of a mill, and that the plaintiffs were the millers of the mill’”).

²³⁷ [1949] 2 K.B. 528 (C.A.).

The defaulting promisor – an engineering company²³⁸ – understood how the plaintiff’s business operated and must have appreciated that the plaintiffs would lose revenue if the boiler the defendant promised to remove from its facility and sell to the plaintiff by a specified date was delivered late.²³⁹ It is obvious that the consequences of the defendant’s breach were those the defendant, objectively assessed, would have appreciated were inevitable – 100% certainty. The defendant delivered the boiler “some twenty odd weeks after the time fixed by the contract for delivery”.²⁴⁰ At trial the defendant admitted that it knew the plaintiff carried on a laundry and dyeing business and that the plaintiff required the boiler for its business as soon as possible, no later than the contract delivery date.

[346] Lord Justice Asquith, writing for the Court of Appeal, revisited the very issues that Baron Alderson addressed in *Hadley v. Baxendale*. He considered what degree of certainty a consequence of breach of contract must have before the defaulting promisor can be held responsible for it. The appeal judge said this: “It suffices that, if he had considered the ... question, he would as a reasonable man have concluded that the loss in question was *liable* to result”.²⁴¹ “Liable”, in this context, according to The Oxford English Dictionary means “likely”.²⁴² The appeal judge confirmed that this was the degree of certainty he had in mind:²⁴³

[T]o make a particular loss recoverable ... it [need not] be proved that upon a given state of knowledge the defendant could, as a reasonable man, foresee that a breach must necessarily result in that loss. It is enough if he could foresee that it was *likely* so to result. It is indeed enough ... if the loss .. is a “serious possibility” or a “real danger”. For short, we have used the word “liable” to result. Possibly the colloquialism “on the cards” indicates the shade of meaning with some approach to accuracy.

[347] While Lord Justice Asquith chose not to endorse the concept of a “probable” consequence of a defaulting promisor’s breach, the criterion that Baron Alderson selected, it is arguable that the

²³⁸ Id. 540.

²³⁹ Id. 534 & 541.

²⁴⁰ Id. 533.

²⁴¹ Id. 540 (emphasis added).

²⁴² 8 The Oxford English Dictionary 879 (2d ed. 1989) (“liable 3.c. dial and U.S. Likely ... 1901 Merwin & Webster Calumet ‘K’ xi. 198 He’s liable to call our men out tonight, ain’t he?”). See also Black’s Law Dictionary 1097 (12th ed. B. Garner chief-ed. 2024) (“likely to be affected by a particular type of problem”) & The American Heritage Dictionary of the English Language 1011 (5th ed. 2016) (“Likely – often used with reference to an unfavourable outcome: People who are sleep-deprived are liable to make mistakes”).

²⁴³ *Victoria Laundry (Windsor) Ltd. v. Newman Indus. Ltd.*, [1949] 2 K.B. 528, 540 (C.A.). See also id. 543 (“But the true criterion is surely not what was bound ‘necessarily’ to result but what was *likely* or *liable* to do so”) (emphasis added).

degree of certainty he proposed – “likely to result” – is exactly the same. Both mean a degree of certainty in excess of fifty per cent – more likely than not to occur. “If one asks whether a horse is likely to win a race, and the answer is yes, the person who asked the question naturally understands that the chances of the horse’s winning are greater than those of its losing”.²⁴⁴ In mathematical terms, this is 50.01%.

[348] The Court of Appeal allowed the appeal and directed an official reference to consider an appropriate damage award. Its judgment made it clear that an appropriate award would reflect the revenue lost by the delay in the normal course of business and not take into account “particularly lucrative contracts”, unless the plaintiff expressly disclosed to the defendant the prospects of the plaintiff securing these contracts and the forecast profits.²⁴⁵

[349] In 1967 the House of Lords, in *Koufos v. C. Czarnikow Ltd.*,²⁴⁶ subjected Lord Justice Asquith’s opinion to the same scrutiny he visited upon Baron Alderson’s judgment.

[350] Lord Reid adopted a degree-of-certainty test that may be different than the degree-of-certainty tests that appealed to Baron Alderson and Lord Justice Asquith:²⁴⁷

The crucial question is whether, on the information available to the defendant when the contract was made, he should, or the reasonable man in his position would, have realized that such loss was *sufficiently likely* to result from the breach of contract to make it proper to hold that the loss flowed naturally from the breach or that loss of that kind should have been within his contemplation.

....

²⁴⁴ *United States v. Powell*, 761 F.2d 1227, 1233 (8th Cir. en banc 1985) per Arnold, Cir. J. See also *Bail Reform Act of 1984*, Pub. L. No. 98-473, § 203(a) (codified 18 U.S.C. § 3143(b) (2002)) (“(1) Except as provided in paragraph (2), the judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless the judicial officer finds – (A) by clear and convincing evidence that the person is not *likely* to flee or pose a danger to the safety of any person or the community if released ... and (B) that the appeal is not for the purpose of delay and raises a substantial question of law or fact *likely* to result in – (i) reversal”) & *United States v. Powell*, 761 F.2d 1227, 1233 (8th Cir. en banc 1985) per Arnold, Cir. J. (“We hold, therefore, that in order to satisfy this part of the test for bail pending appeal, a defendant will have to show that the substantial question presented ... will more probably than not ... lead to a reversal or an order for new trial”). For a detailed discussion of the American federal law on bail pending appeal see *The Queen v. Watts*, 2016 ABCA 139, n. 14; [2016] 9 W.W.R. 631, n. 14 (chambers) per Wakeling, J.A.

²⁴⁵ *Victoria Laundry (Windsor) Ltd. v. Newman Indus. Ltd.*, [1949] 2 K.B. 528, 543 (C.A.)

²⁴⁶ [1969] 1 A.C. 350 (1967).

²⁴⁷ *Id.* 385 & 388 (emphasis added).

I would agree ... that it is generally sufficient that the event would have appeared to the defendant as not unlikely to occur. It is hardly even possible in this matter to assess probability with any degree of mathematical accuracy. But I do not find ... any warrant for regarding as within the contemplation of the parties any event which could not have appeared to the defendant, had he thought about it, to have a *very substantial degree of probability*.

[351] Lord Reid must have believed that his degree-of-certainty test was largely comparable to the more-likely-than-not test because he expressly described a formulation that increased the scope of consequences for which a contract-breaker was responsible to be ill-advised:²⁴⁸ “From the limited knowledge I have of commercial affairs I would not expect such an extension to be welcomed by the business community and from the legal point of view I can find little or nothing to recommend it”.

[352] Lord Morris approved Lord Asquith’s degree-of-certainty criteria²⁴⁹ with one exception. He rejected the “on the cards”²⁵⁰ version.

[353] While Lord Hodson accepted that the ‘probable’ criteria Baron Alderson adopted meant “something is more likely to happen than not”,²⁵¹ he did not appear comfortable with the concept, describing it as having a “narrow” meaning.²⁵² He preferred Lord Justice Asquith’s formulation – “liable to result”.²⁵³

[354] So did Lord Pearce.²⁵⁴

[355] Lord Upjohn expressed a preference for a consequence that is a “real danger” or a “serious possibility”.²⁵⁵ He did not indicate in mathematical terms what degree of certainty this represents.

²⁴⁸ Id. 390.

²⁴⁹ Id. 399.

²⁵⁰ Id.

²⁵¹ Id. 410.

²⁵² Id.

²⁵³ Id. 410-11 (“This may be a colourless expression but I do not find it possible to improve on it”).

²⁵⁴ Id. 415 (“Accordingly in my opinion the expressions used in the *Victoria Laundry* case were right. I do not however accept the colloquialism ‘on the cards’ as being a useful test”).

²⁵⁵ Id. 425 (“I am content to adopt the test as a ‘real danger’ or a ‘serious possibility’. There may be a shade of difference between these two phrases but the assessment of damages is not an exact science I do not think that the application of that test would have led to a different result in *Hadley v. Baxendale*. I cannot see why Pickfords [the common carrier] in the absence of express mention should have contemplated as a real danger or serious possibility that work at the factory would be brought to a halt while the shaft was away”).

[356] Was there a consensus?

[357] A good argument can be made that the House of Lords did not require that a consequence of a breach of contract be more likely than not to occur before a contract-breaker could be held responsible for it. It could be something less, assuming that is the meaning of “real danger” or “serious possibility”. The failure of their Lordships to attach a mathematical formula to their test makes it impossible to state with confidence how much less certainty they endorsed.

[358] Obviously, there is a correlation between the size of the disparity between 50.01% and whatever degree of certainty the others tests introduce and the likelihood a defaulting promisor will be held liable for the consequences of its breach. The greater the disparity the greater the likelihood the defaulting promisor will be held responsible for the consequence of the contract breach.

[359] I suspect that the disparity is not so large that the adoption of the House of Lord’s test, whatever it is, as opposed to that adopted by Baron Alderson or Lord Justice Asquith, will effect the outcome of a case very often. In the end, a court will apply a remoteness test that accords with its basic understanding of whether it is fair and just to hold the contract-breaker responsible for the loss the complaining promisee claims as damages. Most of the time the proper result is obvious.

[360] In any event, *Hadley v. Baxendale* is the law in Canada.²⁵⁶

[361] The Supreme Court of Canada endorsed *Hadley v. Baxendale*²⁵⁷ as the leading case on the remoteness issue in *Fidler v. Sun Life Assurance Co. of Canada*.²⁵⁸

[362] The Court reproduced Baron Alderson’s classic statement and emphasized this part of it:²⁵⁹ “from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the *probable* result of the breach of it”.

²⁵⁶ *Fidler v. Sun Life Assur. Co. of Canada*, 2006 SCC 30, ¶ 54; [2006] 2 S.C.R. 3, 23 per McLachlin, C.J. & Abella, J. (“there is only one rule by which compensatory damages *for breach of contract* should be assessed: the rule in *Hadley v. Baxendale*”) (emphasis in original).

²⁵⁷ [1854] EWHC J70; 156 Eng. Rep. 145 (Ex. Ct.).

²⁵⁸ 2006 SCC 30; [2006] 2 S.C.R. 3.

²⁵⁹ *Id.* at ¶ 29, [2006] 2 S.C.R. at 14 (emphasis added).

[363] Nothing in the other parts of the Court’s opinion suggests that it did not consider it fundamental to ask if the consequence of the breach for which the complaining promisee seeks damages is the probable result of the breach – assessed objectively.²⁶⁰

[364] The following passage is solid evidence that the Court’s understanding of the ratio of *Hadley v. Baxendale* is as I have stated it:²⁶¹

Principle suggests that as long as the promise in relation to state of mind is part of the bargain in the reasonable contemplation of the contracting parties, mental distress damages arising from its breach are recoverable. This is to state neither more nor less than the rule in *Hadley v. Baxendale*.

[365] The Supreme Court did not even mention *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.*²⁶² or *Koufos v. C. Czarnikow Ltd.*²⁶³.

[366] Holding a defaulting promisor liable for consequences caused by the defaulting promisor’s breach that are more likely to occur than not and declining to do so if the consequences are less likely to occur introduces a bright-line test and makes good sense.²⁶⁴

²⁶⁰ See Restatement (Second) of Contracts § 351, Comment a (“It is enough ... that the loss was foreseen as a probable, as distinguished from a necessary, result of his breach. Furthermore, the party in breach need not have made a ‘tacit agreement’ to be liable for the loss. Nor must he have had the loss in mind when making to contract, for the test is an objective one based on what he had reason to foresee”).

²⁶¹ *Id.* at ¶ 48, [2006] 2 S.C.R. at 21.

²⁶² [1949] 2 K.B. 528 (C.A.).

²⁶³ [1969] 1 A.C. 350 (H.L. 1967).

²⁶⁴ *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, ¶ 19; [2008] 2 S.C.R. 114, 123-24 (the Court upheld an appellate court decision denying the plaintiff damages related to major depression, phobia, and anxiety in addition to a loss of business revenue that was caused by the defendant delivering to the plaintiff’s home a bottle of water with a dead fly in it because these events were not reasonably foreseeable).

[367] *Hadley v. Baxendale* remains the governing test for remoteness in the common law world – the United Kingdom,²⁶⁵ the United States of America,²⁶⁶ Ireland,²⁶⁷ Australia,²⁶⁸ New Zealand,²⁶⁹, Hong Kong,²⁷⁰ Singapore,²⁷¹ and South Africa.²⁷²

²⁶⁵ *Jackson v. Royal Bank of Scotland plc*, [2005] UKHL 3, ¶ 26; [2005] 1 W.L.R. 377, 385 per Lord Hope (“The aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as *likely to result* from the breach”) (emphasis added).

²⁶⁶ Restatement (Second) of Contracts § 351 (1981) (“Loss may be foreseeable as a *probable* result of a breach because it follows from the breach (a) in the ordinary course of events, or (b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know. ... A court may limit damages for foreseeable loss by excluding recovery for loss of profits ... or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation. ... A contracting party is generally expected to take account of those risks that are foreseeable at the time he makes the contract. He is not, however, liable in the event of breach for loss that he did not at the time of contracting have reason to foresee as a *probable* result of such a breach. The mere circumstance that some loss was foreseeable, or even that some loss of the same general kind was foreseeable, will not suffice if the loss that actually occurred was not foreseeable. It is enough, however, that the loss was foreseeable as a *probable ... result of his breach*”) (emphasis added); *Ner Tamid Congregation of North Town v. Krivoruchko*, 660 F. Supp. 2d 927, 929 (Dist. Ct. 2009) per Cole, M.J. (“The question in such cases, as in other breach of contract cases, is whether additional damages may be said to have arisen from the breach and were within the reasonable contemplation of the contracting parties”); *Sheppard v. Fagan*, 418 N.E. 2d 876, 879 (App. Ct. 1981) per Jiganti, J. (“We agree that a proper measure of the element of damages for the real estate itself is the difference between the contract price and the market price on the date of the breach. However, there is nothing ... to suggest that this is the only element of damages. The general rule on contract damages is that they are recoverable as they may fairly and reasonably be considered to have arisen naturally from the breach of the contract itself, or such as may be reasonably be supposed to have been in the contemplation of the parties as they made the contract”); *Goodstein Const. Corp v. City of New York*, 80 N.Y. 2d 366, 374 (Ct. App. 1992) per Hancock, J. (“Under the accepted rule of *Hadley v. Baxendale ... it must be shown ‘that the particular damages were fairly within the contemplation of the parties to the contract at the time it was made’*. ... [U]nder the rule of *Hadley v. Baxendale*, loss of profits based on fulfillment of the terms of the contract being negotiated [in this case] could not have been reasonably contemplated as damages for a breach of the agreement to negotiate those very contractual terms”); *Kenford Co. v. County of Erie*, 537 N.E. 2d 176, 176 (N.Y. Ct. App. 1989) per Mollen, J. (“Thus, the constant refrain which flows throughout the legion of breach of contract cases dating back to the leading case of *Hadley v. Baxendale ... provides that damages which may be recovered by a party for breach of contract are restricted to those damages which were reasonably foreseen or contemplated by the parties during their negotiations or at the time the contract was executed. The evident purpose of this well-accepted principle of contract law is to limit the liability for unassumed risks of one entering into a contract and, thus, diminish the risk for business enterprise*”) & *Kerr S.S. Co. v. Radio Corp. of America*, 245 N.Y. 284, 288; 157 N.E. 140, 141 (Ct. App. 1927) per Cardozo, C.J. (“The settled doctrine of this court confines the liability of a telegraph company for failure to transmit a message within the limits of the rule in *Hadley v. Baxendale*”), cert. denied, 275 U.S. 557 (1927).

²⁶⁷ *Hanrahan v. Minister for Agriculture, Fisheries and Food*, [2010] IEHC 442, ¶ 11 per McMahon, J. (“It is well established that a plaintiff may recover such damages for a breach of contract ‘as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things’ or ‘such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the *probable* result of the breach of it’. This test was set out in *Hadley v Baxendale ... and has been approved in numerous Irish decisions*”), aff’d, [2017] IESC 66 (emphasis added).

²⁶⁸ *Elisha v. Vision Australia Ltd.*, [2024] HCA 50, ¶ 126 per Jagot, J. (“The rule in *Hadley v Baxendale* continues to govern questions of remoteness of damage for breach of contract”); *Commonwealth of Australia v. Amann Aviation Pty. Ltd.*, [1991] HCA 54, ¶ 51; 174 C.L.R. 64, 91 per Mason, C.J. & Dawson, J (“the rule that the defendant is not liable in damages for not doing that which he or she has not promised to do is necessarily subject to the rule in *Hadley v. Baxendale*. According to Alderson B.’s renowned formulation, the plaintiff is entitled to recover such damages as arise naturally, that is, according to the usual course of things, from the breach, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach. It is now accepted that this is the statement of a single principle and that its application may depend on the degree of relevant knowledge possessed by the defendant in the particular case”) & 174 C.L.R. at 98 per Brennan, J. (“The rule in *Hadley v. Baxendale* prescribes the condition on which damages can be awarded in respect of a loss sustained by reason of a breach of contract”); *123 259 932 Pty Ltd. v. Cessnock City Council*, [2023] NSWCA 21, ¶¶ 146-47, 149 per Brereton, J.A. (“it is plain that the proper application of *Hadley v Baxendale* as a control on remoteness of damage ... is whether, when the contract was made, it was within the reasonable contemplation of the parties In *Amann Aviation*, the rule in *Hadley v Baxendale* played a rather different role: its second limb was relied on to show that a defendant’s liability could extend beyond damages for not doing that which he or she was contractually bound to do.The loss incurred ... [by the appellant in this case] is ... reasonably to be supposed to have been in the contemplation of both parties when the contract was made, within the second limb of *Hadley v Baxendale*”); *Chief Executive Officer (Housing) v. Young*, [2022] NTCA 1, ¶ 55 (“Damages for discomfort and loss of enjoyment are not generally recoverable for breach of contract because they are considered to be too remote. The rule is based on the assumption that in the application of the second limb in *Hadley v Baxendale*, disappointment or distress flowing from the breach of contract would not have been in the contemplation of the parties, at the time they made the contract, as a likely result of breach”); *Exelby, Exelby & Cradex Pty Ltd. v. Tuite, Tuite & Wenmar Stockfeeds Pty Ltd.*, [1994] QCA 506, ¶ 58 per Dowsett, J. (“In the present case, we are concerned with a claim in contract. The appropriate measure of damages is that prescribed in *Hadley v. Baxendale* ... as explained in *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.*”); *Riggall v. Thompson*, [2010] QCA 144, ¶ 26 per Fraser, J.A. (“The broad principle is that an award of damages for breach of contract is designed to put the innocent party in the position that party would have been in had the defaulting party performed the contract; the party who sustains loss as a result of a breach of contract is, ‘so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.’ That principle is qualified by the principles concerning remoteness of damage established in *Hadley v Baxendale* and developed in later decisions”); *Leeda Projects Pty. Ltd. v. Zeng*, [2020] VSCA 192, ¶ 136 per McLeish, J.A. (“As explained in *Hadley v Baxendale*, this means that the damages that are awarded are such as may fairly and reasonably be considered as arising from the breach according to the usual course of things (the ‘first limb’ of the rule) or such as may reasonably be supposed to have been in the contemplation of both parties, when they made the contract, as a probable result of breaching it (the ‘second limb’”).

²⁶⁹ *Clarkson v. Whangamata Metal Supplies Ltd.*, [2007] NZCA 590, ¶ 25; [2008] 3 N.Z.L.R. 31, 36 (C.A.) per O’Regan, J. (“the ordinary rules as to remoteness of damages in breach of contract cases from *Hadley v. Baxendale* apply to claims for interest as damages”).

²⁷⁰ *De Monsa Inv. Ltd. v. Richly Bright Int’l Ltd.*, [2015] HKCFA 232, ¶ 109; 18 HKCFAR 232, 267-68 per Ribeiro & Fok, JJ. (the court applied *Hadley v. Baxendale* principles).

²⁷¹ *Wingcrown Inv. Pte Ltd. v. Ram*, [2023] SGHC 1, ¶ 55 per See Kee Oon, J. (“Financing costs which the plaintiff might have had to incur for the construction of the Development should be within the objective reasonable contemplation of the parties, and would fall within the first limb of the well-settled remoteness principle in *Hadley v. Baxendale* Indeed, the defendant conceded ... that the need for such financing would not have come as a surprise to him”); *Robertson Quay Inv. Pte Ltd. v. Steen Consultants Pte Ltd.*, [2008] SGCA 8, ¶¶ 82 & 91; [2008] 2 S.L.R. (R.) 623, 672 & 677 (C.A.) (“if the contracting parties, having had the opportunity to communicate with each other in advance, had actual (as opposed to imputed) knowledge of the special circumstances which resulted in the

[368] It would be unfair and unjust to make the defaulting promisor responsible through a damage award for the harm a contract breach caused the innocent promisee if the likelihood the event complained of was the product of a contract breach that was not probable – less than fifty percent.

[369] It is desirable to state the principles governing remoteness with sufficient clarity that both promisors and promisees have an opportunity to catalogue with an acceptable degree of certainty the rights and obligations they have if a promise is not fulfilled and the consequences caused by the default have to be dealt with. This increases the likelihood that the contracting parties will be in a better position to assess the true costs associated with their promises and what the true costs of the bargain are for both contracting parties.²⁷³

[370] The business community likes certainty.²⁷⁴ It wants to know the consequences for which a contract-breaker is responsible. It prefers bright-line tests. The more-likely-than-not standard

‘extraordinary’ or ‘non-natural’ damage, then it is neither unjust nor unfair to hold the contract-breaker liable in damages for such damages. If, armed with such actual knowledge, the contracting parties do not make express provision in their contract for what is to happen in the event of a breach of that contract resulting in ‘extraordinary’ or ‘non-natural’ damage, then they must be taken to have agreed that should such damage occur, the contract-breaker would be liable for such damage. [W]e are of the view that third-party financing of the costs of construction in large commercial construction projects is inevitable ... and, accordingly, the parties to such a project, as reasonable people, must be imputed with the knowledge that a delay in completion would certainly give rise to additional financing costs. Consequently, we do not see why, in principle, additional interest incurred in large, commercial construction projects as a result of late completion should not, in principle, be recoverable under the first limb of [*Hadley v. Baxendale*]” (emphasis removed) & *PPG Indus. (Singapore) Pte Ltd. v. Compact Metal Indus. Ltd.*, 2013 SGCA 23, ¶ 14 per Leong, J.A. (“The *second* limb of the rule in *Hadley* applies, of course, in the situation of extraordinary or non-natural damage. In order, therefore, to fix the defendant with liability for the damage or loss arising in this particular regard, *actual* knowledge on the part of the defendant must be shown”) (emphasis in original).

²⁷² *Freddy Hirsch Group (Pty) Ltd. v. Chickenland (Pty) Ltd.* [2011] 2 ZASCA 22, ¶ 27 per Ponnar, J.A. (referring to the decision of Nienaber, J.A. in *Thoroughbred Breeders’ Ass’n v. Price Waterhouse*, [2001] 4 All S.A. 161 (Sup. Ct. App.), which affirmed the role of *Hadley v. Baxendale* in South Africa).

²⁷³ See *Kerr S.S. Co. v. Radio Corp. of America*, 245 N.Y. 284, 291; 157 N.E. 140, 142 (Ct. App. 1927) per Cardozo, C.J. (“The [telegraph] companies have regulated their rates upon the bases of [the doctrine’s] ... continuance. They have omitted precautions they might have thought it necessary to adopt if the hazard of the business was to be indefinitely increased. Nor is the doctrine without other foundations in utility and justice. Much may be said in favor of the social policy of a rule whereby the companies have been relieved of liabilities that might otherwise be crushing. The sender can protect himself by insurance in one form or another if the risk of non-delivery or error appears to be too great”), cert. denied, 275 U.S. 557 (1927).

²⁷⁴ Bertolini, “Releasing the Unknown: Theoretical and Evidentiary Challenges in Interpreting the Release of Unanticipated Claims”, 48 *Queen’s L.J.* 61, 61-63 (2023) (“Typically, in a release agreement, the *releasor* agrees to discharge the releasee from one or more claims identified in the releasing instrument, while the *releasee* seeks to obtain protection against subsequent assertions of the released claims by the releasor. It enables private parties to achieve a final definition of their mutual relationship (finality), thereby promoting legal certainty. It allows parties to allocate the risk associated with future claims, thereby pricing their transactions more accurately. By facilitating the final contractual resolution of disputes, the release reduces litigation costs and encourages judicial efficiency. These

qualifies as a bright-line test. Measures that increase the range of consequences for which a contract-breaker is responsible by the use of ambiguous criteria introduce uncertainty and are to be eschewed. Making businesses responsible for consequences of contract breaches that are likely to occupy the bottom half of the certainty scale impairs businesses' ability to adopt appropriate ameliorative measures.

[371] Sophisticated businesses can adopt strategies to allocate risk in the manner they are prepared to accept if they know what obligations the common law imposes on them.²⁷⁵ They can draft exclusion clauses²⁷⁶ that reallocate the risks the common law imposes on them in a manner that is acceptable to them.²⁷⁷ It makes no sense for a contracting party to press for exclusion provisions that cover events for which the common law does not hold a contract-breaker responsible.²⁷⁸

D. Application of the Governing Damage Principles

[372] The key inquiry is this: would Canadian Pacific, acting reasonably, have foreseen, when it signed the 10th Avenue Agreement, that an event Remington Development relies on in support of its damage claim was a probable consequence of a future contract breach?

[373] I do not question the correctness of Justice Woolley's decision²⁷⁹ that Canadian Pacific, acting reasonably, when it signed the 10th Avenue Agreement must have foreseen as a probable consequence of a future breach by Canadian Pacific of the 10th Avenue Agreement that its failure to convey legal title to the 10th Avenue Agreement lands to Remington Development would deprive Remington Development of legal title to the lands. Without legal title, Remington

beneficial effects occur only to the extent that the releasing instrument clearly defines the scope of the claims being released") (emphasis in original).

²⁷⁵ *Dow Chemicals Canada ULC v. NOVA Chemicals Corp.*, 2020 ABCA 320, ¶ 73 per Slatter & Khullar, JJ. ("The very purpose of an exclusion clause is to allocate risks and limit obligations").

²⁷⁶ Damages characterized as indirect or consequential are often the subject of exclusion-of-liability claims. E.g., *id.* ¶ 44.

²⁷⁷ Kangles, Rogers, Allidina, & Harris, "Risk Allocation Provisions in Energy Industry Agreements: Are We Getting It Right?", 49 *Alta. L. Rev.* 339, 340-41 (2011) ("parties include additional risk allocation provisions in their agreements. ... in order to provide greater certainty and to order their commercial affairs by allocating risk in a manner different from that which would otherwise be provided by law. The goal of negotiating a risk allocation regime within a contract ... is to arrive at a mutually agreed upon risk and liability sharing regime, having regard to the sometimes conflicting notions of fairness (or perceived fairness), industry standards, practicality, availability of insurance or other risk mitigation measures, and business efficacy").

²⁷⁸ *Dow Chemicals Canada ULC v. NOVA Chemicals Corp.*, 2020 ABCA 320, ¶ 71 per Slatter & Khullar, JJ.A. ("If the damages were not recoverable at common law anyway, there would be no need to exclude them").

²⁷⁹ *Remington Dev. Corp. v. Canadian Pac. Ry.*, 2022 ABKB 692, ¶ 590.

Development could not develop the lands and generate revenue from the development or sell the 10th Avenue Agreement lands.

[374] But I cannot accept that Remington Development is entitled to damages associated with any *specific* type of building on the 10th Avenue Agreement lands. As of November 30, 2002, Canadian Pacific had no information that would have caused it, acting reasonably, to conclude that it was probable Remington Development would have constructed any *specific* type of building on the lands and that a future breach of contract by Canadian Pacific that prevented Remington Development from securing legal title to the 10th Avenue Agreement lands would have deprived Remington Development of the opportunity to derive revenue from these undertakings. Remington Development itself had no specific plans as of November 30, 2002.²⁸⁰ As result, it never provided Canadian Pacific with any specific plans for the development of the 10th Avenue Agreement lands.²⁸¹ If Remington Development had no specific plans, it is impossible to conclude that Canadian Pacific had knowledge of nonexistent specific building plans. This is telling.²⁸²

[375] Justice Woolley concluded that “no developer would have had a specific plan or, if they had, that plan would have required continual amendment after consultation with the City and other stakeholders, and in response to market conditions”.²⁸³

[376] This does not lead me to conclude that because no developer would have developed a specific plan for this property that Remington Development should not suffer the consequences for its failure to do so. The correct conclusion is that damages for specific projects ought not to be awarded, regardless of who the developer is, if at the time the land sale agreement was executed the developer did not provide the seller with a specific development plan.

[377] The existence of specific development plans would have made a difference.²⁸⁴

²⁸⁰ Id. ¶¶ 572, 603 & 606. (“[Remington Development] had not created or imagined *specific* development plans for the B Yard Lands but it did intent to develop them comprehensively. . . . [Remington Developments] did not provide CPR with a specific plan for the lands. . . . Remington did not provide CPR with a specific plan”).

²⁸¹ Id. ¶ 606.

²⁸² See Restatement (Second) of Contracts § 351, Comment a (1981) (“A contracting party is generally expected to take account of these risks that are foreseeable at the time he makes the contract. . . . The mere circumstances that some loss was foreseeable, or even that some loss of the same general kind was foreseeable, will not suffice if the loss that actually occurred was not foreseeable”).

²⁸³ *Remington Dev. Corp. v. Canadian Pac. Ry.*, 2022 ABKB 692, ¶ 606.

²⁸⁴ See *Performance Indus. Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, ¶¶ 72 & 73; [2002] 1 S.C.R. 678, 708, per Binnie, J. (“The appellants argue that damages should be limited to the difference between the market value of the land and the option price of \$400,000. They say compensatory damages should not include the ‘reasonably expected profit’ from a 58-lot housing development. The finding of fact is, however, that the parties specifically contemplated (even on O’Connor’s evidence) that the optioned land would be put to the use of residential housing.

[378] The damage award under appeal is based on a development plan that never existed as of November 30, 2002 and is the product of rampant speculation.²⁸⁵ I would set it aside.

Damages for breach of the contract, as rectified, therefore must include losses flowing from the special circumstances known to the parties at the time they made their contract”), aff’g, 185 D.L.R. 4th 269, 276 (Alta. C.A. 2000); *Cottril v. Steyning*, [1966] 1 W.L.R. 753, 756-57 (Q.B. 1962) per Elwes, J. (“There cannot be the slightest doubt here that the defendants knew what the plaintiff’s intentions were, and knew exactly how he intended to pursue them. I accordingly direct, on the basis of reasonable probability, that the damages should be assessed on the footing ... that the plaintiff would have been able to proceed with his plan to turn the hotel into flats and build six dwelling houses, and that such building and alterations would have been completed within 18 months of May 10”); *New Horizon Inv. Ltd. v. Montroyal Estates Ltd.*, 26 R.P.R. 268 (B.C. Sup. Ct. 1982) (The court awarded damages for lost profits to a developer when the vendor knew that the developer would service the land for fifty-seven lots); *Robertson Quay Inv. Pte Ltd. v. Steen Consultants Pte Ltd.*, [2008] SGCA 8, ¶¶ 82 & 91; [2008] 2 S.L.R. (R.) 623, 672 & 677 (C.A.) (“if the contracting parties, having had the opportunity to communicate with each other in advance, had actual (as opposed to imputed) knowledge of the special circumstances which resulted in the ‘extraordinary’ or ‘non-natural’ damage, then it is neither unjust nor unfair to hold the contract-breaker liable in damages for such damages. If, armed with such actual knowledge, the contracting parties do not make express provision in their contract for what is to happen in the event of a breach of that contract resulting in ‘extraordinary’ or ‘non-natural’ damage, then they must be taken to have agreed that should such damage occur, the contract-breaker would be liable for such damage. [W]e are of the view that third-party financing of the costs of construction in large commercial construction projects is inevitable ... and, accordingly, the parties to such a project, as reasonable people, must be imputed with the knowledge that a delay in completion would certainly give rise to additional financing costs. Consequently, we do not see why, in principle, additional interest incurred in large, commercial construction projects as a result of late completion should not, in principle, be recoverable under the first limb of [*Hadley v. Baxendale*]”) (emphasis removed) & *PPG Indus. (Singapore) Pte Ltd. v. Compact Metal Indus. Ltd.*, 2013 SGCA 23, ¶ 14 per Leong, J.A. (“The *second* limb of the rule in *Hadley* applies, of course, in the situation of extraordinary or non-natural damage. In order, therefore, to fix the defendant with liability for the damage or loss arising in this particular regard, *actual* knowledge on the part of the defendant must be shown”) (emphasis in original). In order to determine the period during which the defaulting promisor is responsible for loss of profits one must ask what period would the parties when making the contract, approaching the issue objectively, have selected as the probable consequence of the contract breach. *Jackson v. Royal Bank of Scotland plc*, [2005] UKHL 3, ¶ 36; [2005] 1 W.L.R. 377, 388 per Lord Hope (“if no cut-off point is provided by the contract, there is no arbitrary limit that can be set to the amount of the damages once the test of remoteness according to one or other of the rules in *Hadley v Baxendale* has been satisfied”).

²⁸⁵ See *The Schooner Lively*, 15 F. Cas. 631, 634-35 (C.C.D. Mass. 1812) per Story, Cir. J. (“Independent however of all authority, I am satisfied upon principle, that an allowance of damages upon the basis of a calculation of profits, is inadmissible. The rule would be in the highest degree unfavorable to the interests of the community. The subject would be involved in utter uncertainty. The calculation would proceed upon contingencies, and would require a knowledge of foreign markets, to an exactness in point of time and value [I]t would be a calculation upon conjecture, and not upon facts”) & *Goodstein Constr. Corp. v. City of New York*, 604 N.E. 2d 1356, 1361 (N.Y. Ct. App. 1992) per Hancock, J. (“There is, moreover, a further reason for rejecting plaintiff’s loss of profits damages claim even assuming hypothetically that the letter agreements could somehow provide the theoretical predicate for such damages. Under the accepted rule of *Hadley v Baxendale* ... , it must be shown ‘that the particular damages were fairly within the contemplation of the parties to the contract at the time it was made’... . The letter agreements under which plaintiff makes its claim, it must be noted, were terminable by the City, and the ... [land disposition agreement], had its terms ultimately been accepted by the ... [Department of Housing Preservation and Development], was subject to various layers of governmental approval before it could be binding, including approval by the Board of Estimate. The City argues that under the rule of *Hadley v Baxendale*, loss of profits based on fulfillment of the terms of the contract

[379] A damage award that reflected the difference between the purchase price of the 10th Avenue Agreement lands and the market value of the lands on the date the trial judge determined Canadian Pacific breached the 10th Avenue Agreement²⁸⁶ or some other date that takes into account when Remington Development abandoned its specific performance claim²⁸⁷ or nominal damages for the lost opportunity to develop in a general sense, whatever that might be, would have been appropriate. It would be difficult to prove damages associated with a lost opportunity to develop something unknown.

[380] If I am wrong and Canadian Pacific acting reasonably should have foreseen as a probable consequence of its breach the events on which Remington Development relies in advancing its damages claim, additional issues arise. Would it be just to limit the damages to which Remington Development is entitled to avoid granting the plaintiff disproportionate compensation?²⁸⁸ Should a court invoke the disproportionate compensation concept if the contracting parties are sophisticated, have retained counsel to protect their interests, or have agreed to a detailed contract?²⁸⁹ Should the

being negotiated could not have been reasonably contemplated as damages for a breach of the agreement to negotiate those very contractual terms. We agree. As the City points out, to allow plaintiff loss of anticipated profits of some \$800,000,000, based on the hypothesized successful completion of the proposed improvements in sites 5B and 5C, would have the anomalous effect of holding the City responsible as guarantor, under a proposed ... [land disposition agreement], to which neither party had agreed, for the profits from projected improvements which plaintiff would never have to construct”).

²⁸⁶ E.g., *Rosseau Group Inc. v. 2528061 Ontario Inc.*, 2023 ONCA 814, ¶¶ 62 & 89 per Zarnett, J.A. (“The normal measure of damages for a failed real estate purchase is the difference between the contract price and the market value of the land on the ‘assessment date’. The assessment date is usually the date on which the purchase was scheduled to close. Although the court may set a later date if the party seeking damages satisfies certain criteria, the presumption is that damages are to be assessed as of the date of the breach. The trial judge erred in not using the normal measure of damages”) & *Abellan v. Lavelo Property Management, LLC*, 948 F. 3d. 820, 832 (7th Cir. 2020) per Hamilton, Cir. J. (“Ordinarily, in an action for breach of a real estate sales contract, damages are measured by ‘the difference between the fair market value of the real estate on the day of the breach and the sale price contracted for by the purchasers’”).

²⁸⁷ *Bethel United Church of Jesus Christ Apostolic of Edmonton v. North Pac. Properties Ltd.*, 2022 ABCA 224, ¶ 23; [2023] 3 W.W.R. 27, 34 (“North Pacific’s damage claim must be assessed as of the date it abandoned its specific performance claim. Damages are the difference between the value of forty-one acres of the Bethel United Church land on November 13, 2014 and the purchase price of the land”).

²⁸⁸ Restatement (Second) of Contracts § 351(3) (1981) (“A court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation”).

²⁸⁹ *M.M. Silta Inc. v. Cleveland-Cliffs, Inc.*, 561 F. Supp. 2d 1052, 1058-59 (D. Minn. 2008) per Davis, J. (“This Court is hesitant to adopt § 351 [of the Restatement (Second) of Contracts] with respect to this case as the contract at issue was entered into between two experienced commercial entities”), aff’d, 572 F. 3d 532, 539-40 (8th Cir. 2009) per Wollman, J. (“Courts have primarily applied section 351(3) to limit consequential, as opposed to direct damages. ... When the risks were ... or should have been anticipated, courts generally will not interfere simply because the damages are disproportionate to the contract price. ... [The defendant] ... is a sophisticated commercial entity that entered into hundreds of contracts like the one here. Its agent, DeVaney, had worked in the mining industry for thirty years, and DeVaney’s prior experience as a manager of purchasing was directly relevant to the task of liquidating the mine.

court use the disproportionality concept to allocate risk in a manner not agreed to by the parties in their contract?²⁹⁰

[381] I am content to flag these issues. They can be resolved another day.

E. Remington Development’s Cross Appeal Relating to Its Claims for Punitive Damages Must Be Dismissed

[382] The finding that Canadian Pacific did not breach the 10th Avenue Agreement relieves me of the need to review Remington Development’s cross appeal arguing that it is entitled to punitive damages. It also compels me to dismiss it.

Accordingly, we cannot say that the district court abused its discretion in refusing to limit the damages”) & *Robertson Quay Inv. Pte Ltd. v. Steen Consultants Pte Ltd.*, [2008] SGCA 8, ¶¶ 82 & 91; [2008] 2 S.L.R. (R.) 623, 672 & 677 (C.A.) (“if the contracting parties, having had the opportunity to communicate with each other in advance, had actual (as opposed to imputed) knowledge of the special circumstances which resulted in the ‘extraordinary’ or ‘non-natural’ damage, then it is neither unjust nor unfair to hold the contract-breaker liable in damages for such damages. If, armed with such actual knowledge, the contracting parties do not make express provision in their contract for what is to happen in the event of a breach of that contract resulting in ‘extraordinary’ or ‘non-natural’ damage, then they must be taken to have agreed that should such damage occur, the contract-breaker would be liable for such damage. ... [W]e are of the view that third-party financing of the costs of construction in large commercial construction projects is inevitable ... and, accordingly, the parties to such a project, as reasonable people, must be imputed with the knowledge that a delay in completion would certainly give rise to additional financing costs. Consequently, we do not see why, in principle, additional interest incurred in large, commercial construction projects as a result of late completion should not, in principle, be recoverable under the first limb of [*Hadley v. Baxendale*]”) (emphasis removed).

²⁹⁰ See *International Ore & Fertilizer Corp. v. SGS Cent. Serv. Inc.*, 743 F. Supp. 250, 257-58 (S.D. N.Y. 1990) per Tenney, J. (“Interore paid SGS fifty dollars per hold or one-hundred fifty dollars to perform the cleanliness inspection [of the ship’s holds] in Tampa, and seeks damages of \$2,400,000 [for losses attributable to contaminated fertilizer caused by storage in unclean holds]. In a case very similar to the one at bar ... , plaintiff sought damages in the amount of \$547,688 on a contract price of \$220, a ratio of approximately 2,500 to one. The Second Circuit explained that if ... [the defendant] intended to assume so great a risk, it would have charged substantially more for its services. Alternatively, it would have turned down the plaintiff’s offer, rather than risk so much for so little. In this case, the disparity between the contract price and the damages is even greater. Plaintiff seeks damages of \$2,400,000 on a contract price of \$150, a ratio of 16,000 to one. ... In addition, the parties reached their agreement over the phone, and plaintiff simply confirmed it with a one-page telex. The telex ... is devoid of any mention of liability. The low contract price and informal dealings between the parties indicates that they did not attempt to allocate all of the risks. Therefore, the court is justified in allocating them fairly. Accordingly, it finds that plaintiff should not recover compensatory damages on the contract”), *aff’d* on other grounds, 38 F. 3d 1279, 1285 (2d Cir. 1994) per Winter, J. (“SGS is a professional organization that issues formal certificates essential to commerce that inspections have been properly done. It is fully aware that a negligent inspection may cause the loss of entire cargo. That is why parties to sales of goods to be transported by sea require such certificates. ... We see no reason whatsoever, therefore, why SGS is not liable for Intercore’s consequential damages as a result of its breach”).

[383] But I make this observation – punitive damages should not be awarded in the absence of an actionable wrong – a tort – independent of the breach of contract.²⁹¹

VII. Conclusion

[384] I would allow the appeals by Canadian Pacific and Alberta and dismiss the cross appeal of Remington Development.

[385] Counsel’s written and oral submissions were excellent. Their arguments clarified the issues and persuasively presented their client’s positions.

Appeal heard on September 10, 2024

Memorandum signed at Edmonton, Alberta
this 27th day of June, 2025

Memorandum filed at Calgary, Alberta
this 2nd day of July, 2025

Wakeling J.A.

²⁹¹ Restatement (Second) of Contracts § 355 (1981) (“Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable”) & *Vorvis v. Ins. Corp. of British Columbia*, [1989] 1 S.C.R. 1085, 1106 per McIntyre, J. (“The only basis for the imposition of such punishment [in the form of punitive damages] must be a finding of the commission of an actionable wrong which caused the injury complained of by the plaintiff”). See generally Harrington, “‘A Lawless Science’: Punitive Damages for Breach of Contract in Canada”, 69 Sup. Ct. L. Rev. 2d 185 (2015).

Appearances:

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M.D. Mysak (no appearance)

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G. Appelt, KC (no appearance)

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K.L. Lambert

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