CITATION: Graphic Packaging International Canada, ULC v. 2477621 Ontario Inc. et al., 2025 ONSC 7210
COURT FILE NO.: CV-19-00627534-0000
DATE: 20251224

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SUPERIOR COURT OF JUSTICE - ONTARIO

RE: GRAPHIC PACKAGING INTERNATIONAL CANADA, ULC, Plaintiff

AND:

2477621 ONTARIO INC. and TALISMAN CASUALTY INSURANCE COMPANY, LLC, Defendants

BEFORE: Akazaki J.

COUNSEL: Erika Anschuetz and Shanika Gordon, for the Plaintiff

Michael N. Bergman, for 2477621 Ontario Inc.

Kayla Kwinter and Gregory Hersen, for the Talisman Casualty Insurance Company LLC

HEARD: October 24, 2025

REASONS FOR JUDGMENT

OVERVIEW

[1] Despite the sale by Graphic Packaging International ("Graphic") of its Jonquière paper mill site to 2477621 Ontario Inc. ("247"), Québec environmental law required Graphic to complete full site rehabilitation, because Graphic had been the owner during the last few months of mill operations. Until the shutdown, the mill had spilled various pollutants into the subsurface and water table. The Agreement of Purchase and Sale ("APS") recognized this obligation, for the purpose of a land servitude permitting access to Graphic's consultants and contractors. The exceptions to this duty under the APS were demolition and removal of the mill structures. The APS carved out the demolition and removal to 247, because 247 was hoping to extract and sell the metal components of the building and equipment.

[2] Thus, Graphic owed a public liability for the cleanup of the whole site. 247 contracted to perform the demolition. The contract was silent on the salvage issue, but 247's scrap metal business incented its assumption of the demolition portion of site rehabilitation. 247 thus served as Graphic's demolition contractor.

[3] To secure the timeliness and completion of the demolition, the contract obligated 247 to obtain a performance bond naming Graphic as the owner. Time was of the essence for Graphic, because the demolition was the first stage of Graphic's cleanup. The APS required 247 to lodge with Graphic a full scope of work, including a draft plan for inclusion in Graphic's documentary submissions to the Québec Environment Ministry, within 30 days. It also required 247 to complete the demolition in 24 months.

[4] The 24 months came and went, and 247 had not provided the scope of work. Without a scope of work, 247 had not even hired a demolition firm to start the work. Instead, it devoted its efforts during the first year to salvaging and selling the high-value uncontaminated metals and equipment that it could dismantle from the site without extraction from rubble or decontamination. 247's plan to put off what it should have started proved disastrous, because 247 had failed to consider the severity of the winter conditions and the potential for theft if the salvage was stockpiled on site. 247 lost much of the time left during the second year, because of a police and workplace safety investigation, after a security contractor employee, allegedly involved in the thefts, died. 247 pleaded these issues in its defence and in mitigation of its contractual breaches, but they afforded it no legal excuses.

[5] 247's failure to demolish the building obstructed Graphic's ability to complete soil and water table characterization for the submission of a rehabilitation plan to the environment Ministry, because the building itself was the site's non-natural structure. This failure, in turn, caused the Ministry to ramp up pressure on Graphic, to prevent toxic mill by-products under the building from leaching further into the soil and water table. Before the 24 months were up, Graphic notified Talisman Casualty, the surety under the performance bond underwriting 247's demolition, of the missed 30-day deadline for submitting the scope of demolition work and of Graphic's concern that 247 would default on the demolition work because of the lack of time to complete it by the deadline.

[6] After the 24 months expired, Graphic declared 247 in default and notified Talisman. Talisman offered no assistance to push 247 to perform the work or to secure another contractor to start the demolition. Instead, the surety submitted to Graphic a request for production of a long list of largely irrelevant documents that telegraphed the surety's intention to renege on its performance bond. Graphic, now operating on three fronts as the party liable to clean up the site, finally secured 247's commitment to complete the demolition work. However, 247's start of work lacked urgency.

[7] 247 dragging its feet precipitated the Ministry to issue an order against Graphic to start the demolition. Graphic negotiated a brief reprieve of the start date, to allow Graphic to obtain an interlocutory court injunction authorizing it to retake possession of the site to demolish the mill and dispose of the debris. Still under pressure from the Ministry to complete the site rehabilitation, Graphic obtained a permanent injunction to allow its consultants and contractors to complete the cleanup of the whole site.

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[8] Graphic moved for summary judgment to enforce its claim against 247 for the expenses Graphic incurred to perform the work the APS required 247 to complete, and against Talisman for breach of the performance bond.

[9] Talisman sought an order dismissing Graphic's action, by way of a 'boomerang' summary judgment, on the ground that Graphic's failure to provide 247 a remediation plan and failure to provide Talisman an agreement to pay the balance of the contract price for the demolition separately prevented the triggering of the surety obligations.

[10] 247 sought an order dismissing the motion, on the grounds that the issues raised by Talisman require a trial, and because its counterclaim for the loss of opportunity to sell what remained of the metal salvaged during the demolition, requires a trial.

[11] The defendants attempted to change the venue of the suit to Québec, but Dunphy J. denied their motion on September 23, 2021, citing the contractual provisions in the APS and the bond choosing Ontario law and the non-exclusive attornment of the parties to the courts of Ontario.

[12] Before detailing my reasons for granting Graphic's summary judgment motion, I will provide the further background necessary to draw out the positions of the parties and the issues in dispute.

FURTHER BACKGROUND AND ISSUES

[13] There was no material dispute about the events precipitating Graphic's lawsuit. Indeed, Talisman expressed similar confidence that the suit could be summarily determined in its favour. Despite 247's reliance on its defence pleadings and its position regarding quantification of the damages and counterclaim, its evidence consisted chiefly of excuses for non-performance based on its textual interpretation of the APS.

[14] On February 5, 2015, Graphic acquired a paper mill in Jonquière, Québec. It proceeded to cease operations in July 2015 and engaged environmental consultants to conduct characterization studies on the site. On December 23, 2015, Graphic sold the site to 247, for the purchase price of $5 million. 247 was incorporated by the Bayshore Group, an Ontario business buying, demolishing, and flipping brownfield properties, and extracting and selling metal components from buildings.

[15] Brownfields are typically sold at a discount, or even for payment to the purchaser, in return for the purchaser's assumption of work needed to rehabilitate lands contaminated by industrial activity. The detailed background to Graphic's acquisition of the site as a cardboard manufacturer was not in evidence, but 247 was a brownfields site trader whose business was to acquire and restore such sites, extract and sell metal salvage, and to flip them for profit. The detailed economics of the commercial background for the APS and parties' interests in this site were not otherwise detailed in evidence,

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beyond the overarching motivations of Graphic to discharge its environmental liability as the last mill operator and of 247 to obtain the value of equipment and metal salvage.

[16] The APS required 247 to demolish the mill. Although the defendants urged the court to find that Graphic owed 247 duties such as the provision of a rehabilitation plan, closer review of the APS demonstrated that 247 owed various duties to facilitate Graphic's regulatory obligations to submit a consultant's rehabilitation plan and to complete the soil and groundwater cleanup – a public obligation that included the demolition. 247's demolition undertaking under the APS also included the safe removal of asbestos and the closure of the landfill. (The references to "landfill" in this case appeared to apply both to the restoration of the land on which the mill had been built, and to the disposal sites for the contaminated rubble.)

[17] The APS allowed 247 to hold back $750,000 to pay for the demolition, but it also required 247 to provide a $2 million performance bond. To enable Graphic's remedial work, the APS required 247 to register a servitude (the Civil Law analogue of an equitable easement) in favour of Graphic to permit it to complete the cleanup.

[18] The APS required 247 to complete demolition of the mill within 24 months or, if the "approved Rehabilitation Plan" required it, an earlier time. It also required 247 to submit, within 30 days (i.e., by January 22, 2016), a scope of work proposal for the demolition. In contrast, the APS did not stipulate a deadline for Graphic's soil and groundwater remediation, beyond a requirement that the work follow Québec environmental and nuclear safety laws, as well as the Rehabilitation Plan approved by the environment Ministry. The parties knew the property was contaminated because of the mill, as demonstrated in the preliminary characterization studies by Graphic's consultants.

[19] The discrepancy between the specific timeframes for 247's work and the absence of any for Graphic's contributed to the genesis of the litigation. Indeed, the interwoven defined terms of the APS make for some difficult reading. Drafting shortcomings aside, the rationale for putting the parties on separate tracks was the practical reality that the buildings and attached equipment stood on the soil into which the pollutants spilled and migrated over the years into the surrounding site. Removing the building from the land was the first stage of the site restoration. Graphic's interest in removing the environmental liability from its books was evident from the fact that it lost no time in initiating the regulatory review by the Québec environment Ministry, even before the deal with 247 closed.

[20] On January 26, 2016, Graphic filed with the regional Ministry office a progress characterization report revealing elevated levels of PCB's and sulfur in the soil and of metals, sulfur, and formaldehyde in the groundwater. In March, the Ministry asked Graphic to complete the characterization study and file a further report. The evidence about the parties' activities during the balance of 2016 and the first quarter of 2017 was rather thin. However, 247's principal stated in his affidavit his company's priority was

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salvage before the start of demolition and to defer the structural portion of the demolition until at least the second 12-month interval:

> 13. The process commenced with 247 conducting an auction of all remaining equipment on-site, a process that required approximately 12 to 18 months to complete. Upon completion of the auction and the removal equipment, 247 undertook asbestos removal as required under applicable environmental regulations.
>
> 14. The ultimate intent of 247 was to sell the Property upon the successful completion of the remediation process, with the expectation of generating a profit. Additionally, 247 intended to demolish the buildings and scrap any remaining unsold equipment to help cover the costs of the remediation work performed, while also securing a financial gain.

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[21] On May 24, 2016, 247 obtained a demolition permit, issued as no. 66023, from the City of Saguenay for work ending May 24, 2017. The permit stipulated that:

a) the demolition would leave the foundation in place, without excavation

b) demolished materials would be disposed of at a site authorized by the Ministry

c) metals were to be sold, and wood to be recycled or composted

d) the septic facility would be decommissioned

[22] In the summer of 2016, 247 applied for Ministry authorization of the landfill transfer. The Ministry requested documentation including a rehabilitation plan. Graphic advised 247 that the rehabilitation plan required input from 247 about the demolition, and that 247's scope of work proposal was long overdue. Both parties independently engaged in their respective activities during the 2016-17 period, but it appears 247 continued to focus on the salvage operation. Graphic complained that the buildings' unstable state hampered its environmental consultants' access to the site to complete sampling efforts.

[23] On April 20, 2017, Graphic wrote to 247 to express serious concerns about 247's commitment to honouring the demolition obligations and to document 247's failure to provide a scope of work proposal within the required 30 days. The letter referred to interactions between the parties earlier in 2017, but their importance to the issues in the action were unclear beyond documenting earlier attempts to push 247 to collaborate in the effort to clean up the site.

[24] In June 2017, Graphic informed the Ministry that the APS provided for demolition of the buildings by December 2017 and that inaction by 247 was affecting the completion of the characterization study the Ministry had requested in March. In August, Graphic wrote the Ministry that it would pursue 247's compliance with the demolition obligation. In response, on August 21, 2017, the Ministry issued a Notice of Non-Compliance for failing to file a separate characterization plan for the demolition. In

response to this notice, Graphic wrote the Ministry on September 21, 2017, to provide a plan of corrective measures for completion of the characterization study and for the demolition of the building. During this period, vandals and thieves entered the property to steal equipment and metal.

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[25] In the months leading to the December 2017 deadline for completion of the demolition, Graphic brought in the surety by notifying it of Graphic's intention to declare a contractor default, of 247's failure to deliver a scope of work for Graphic's approval, and of its concern that there was insufficient time for 247 to meet the deadline. I will recite the details of these interactions with Talisman in my analysis of the issues related to the performance bond.

[26] An April 17, 2018, letter from 247 to Graphic committing 247 to completion of its duties under the APS contained express or implied admissions of certain facts. The letter stated that 247:

a) has selected Tregon Demolition Inc. and Colling Haulage to demolish the buildings and transfer the debris to landfill

b) would submit to Graphic a scope of work proposal no later than May 2, 2018, including identification of the landfill sites

c) would contact the Ministry for guidance on the disposal of hazardous materials

d) would start demolition activities no later than June 4, 2018

[27] In his responding affidavit, 247's principal did not dispute that it had not provided the scope of work proposal and had not demolished the building within the 24-month timeframe. Instead, he asserted three points by way of excuse or mitigation. First, an incident involving the death of a security contractor employee triggered a six-month investigation by police and workplace safety authorities suspending work on the property between March and October 2017. Second, 247 asserted that it could not proceed with its work until Graphic obtained approval of a Rehabilitation Plan. Graphic was unable to submit the plan to the Ministry until April 2018. Third, 247 blamed severe winter weather conditions in 2016 and 2017.

[28] Neither the workplace accident nor the Québec winter were relevant to the failure to start demolition work for which 247 had not devised a scope of work and had not retained a contractor by the December 2017 completion date. The only explanation requiring a more detailed analysis by the court was the interpretation by 247 and Talisman that Graphic was in default of the APS requirement to obtain approval of a Rehabilitation Plan. Graphic's counsel observed that this justification for 247's failure to perform the demolition did not surface until after the litigation. That may be so, but its validity as a defence or excuse must be considered in the context of the contractual obligations, just as other issues raised by Graphic.

[29] Despite the prolific details of these events, Graphic's case is fundamentally a straightforward construction case. The contractor failed to perform the work. The surety declined the owner's declaration of contractor default. My reasons for concluding that Graphic's summary judgment motion must be granted follow the determination of these issues:

1) appropriateness of summary judgment
2) default under the APS, by Graphic or by 247
3) Talisman's duties under the performance bond
4) Graphic's damages
5) 247's counterclaim for improvident sale of metals

1) APPROPRIATENESS OF SUMMARY JUDGMENT

[30] Rule 20 of the *Rules of Civil Procedure* governs summary judgment motions. Rule 20.04(2)(a) requires the court to grant summary judgment, if it is satisfied there is no genuine issue requiring a trial. In *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 49, the Supreme Court of Canada held there will be no such genuine issue when the motion judge can (1) make the necessary findings of fact, (2) apply the law to the facts, and (3) be satisfied that the process is a proportionate, more expeditious, and less expensive means to achieve a just result compared to a full trial. *Hryniak* introduced a famous culture shift toward acceptance of evidence by affidavits and out-of-court cross-examination if a conventional trial is unlikely to contribute to the judge's better appreciation of a claim or a defence.

[31] The summary judgment process requires the court first to determine whether there *is* a genuine issue requiring trial, without resort to additional fact-finding powers under subrules (2.1) and (2.2): *Hryniak*, at para. 66. These additional fact-finding powers are the weighing of evidence, evaluating credibility of a deponent, drawing reasonable inferences, and the direction of a mini trial of limited *viva voce* evidence.

[32] Although there was no formal agreement to summary judgment under Rule 20.04(2)(b), Talisman's response to Graphic's motion was that there were no genuine issues requiring a trial as between them. Talisman relied on *Meridian Credit Union Limited v. Baig*, 2016 ONCA 150, 394 D.L.R. (4th) 601, at para. 17, leave to appeal refused, (2017) 46 C.B.R. (6th) 3 (S.C.C.), to support its submission that a 'boomerang' order should be granted dismissing the claim against Talisman on the performance bond. 247 demurred at both Graphic and Talisman's approaches, stating the factual record raised three issues requiring a trial:

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(1) the sequence of Graphic and 247's respective obligations to obtain approval of a Remediation Plan and to demolish the plant

(2) interpretation of the law of Québec

(3) the value of 247's counterclaim for the value of metals salvaged and sold by Graphic for less than the value that 247 could have realized

[33] On the first issue, 247 contradicted Talisman's position that no trial is required for the court to hold that Graphic's failure to finalize a Rehabilitation Plan was a contractual default preventing or frustrating 247's ability to demolish the building. 247 argued the evidence on this point had the potential to create a chicken-and-egg paradox. The contract required 247 to demolish the plant in a manner "consistent with the Rehabilitation Plan," but Graphic's chief complaint during the first two years of the contract was that 247's failure to demolish the plant impeded Graphic's environmental consultants from sampling the soil and groundwater to develop a plan for the Ministry's approval.

[34] As I will explain, the solution to the paradox is the application of the agreement, read plainly, grammatically, and in accordance with defined terms. The court should not consider the sequence of Graphic and 247's work organically without guidance from the agreement.

[35] The second issue raised by 247 was their submission that the interpretation of Québec law required expert evidence. This cannot be an issue requiring a trial, because the parties to the APS and the performance bond agreed to be governed by the law of Ontario. The law of Québec informed and controlled the facts relating to the parties' interaction with the Ministry and municipal building officials. This action involves no *lis* between the parties and the government of Québec. Indeed, Graphic's right to repossession of the property under Québec law for the purpose of completing the work 247 failed to perform was finally determined by the Superior Court of that province. The Ministry's enforcement of Québec environmental statutes, regulations, and administrative practices is not for this court to review judicially and does not require the testimony of foreign legal experts.

[36] I agree with 247's submission that the third issue of the value of the metals sold by Graphic and applied to the damages, if 247 had extracted and sold them, cannot be summarily decided based on the record before me. The economic or statistical evidence of international metal market fluctuations during the relevant intervals does not lend to adjudication by this court without the aid of expert evidence. However, the value of the metals salvaged by Graphic's contractor and sold by its metals dealer would only matter, if 247 had a legal basis for litigating the issue against Graphic. The legal basis for 247's counterclaim, *qua* cause of action, can be decided on this record. If 247 does have a cause of action, I can grant judgment in 247's favour and direct a reference to assess the quantum. If there is no cause of action, the court must dismiss the counterclaim.

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[37] 247's counterclaim is also problematic at a conceptual level, because its failure to perform the demolition and the loss of materials during its watch prejudiced Graphic's ability to defend the counterclaim. Without a baseline for comparing the salvage at three points in time – 247's acquisition, the period of inactivity and theft of materials, and Graphic's scramble to comply with the Ministry's cleanup order – 247's demand for a trial of the counterclaim is infeasible.

[38] The foregoing rationale can lead to the conclusion that the case is suitable for summary judgment, if Graphic and Talisman are correct about the absence of a need for a trial to resolve their dispute, and if the points raised by 247 do not genuinely raise issues requiring trial. With this framework for analysis, I will proceed to determine who was in default under the APS: Graphic or 247?

2) DEFAULT UNDER THE APS, BY GRAPHIC OR BY 247

[39] It seems obvious that 247 was in default under the demolition contract embedded in the APS, and that 247 has no defence. It did not perform the work within the allotted time. It cannot deny this breach, having sent a letter after the expiry of the deadline, promising to perform the work without further delay.

[40] After being sued, 247 asserted the defence that Graphic's failure to provide 247 a rehabilitation plan frustrated the latter's ability to start the demolition. In 247's view, Graphic's alleged breach, by failing to obtain Ministry approval of that plan, relieved 247 of its duty to demolish. Talisman aligns with 247 on this point by arguing that Graphic was disentitled from declaring 247's contractor default while Graphic was itself in contractual default. The issue can be resolved as a matter of contractual interpretation: whether the APS made a rehabilitation plan by Graphic a precondition of 247's obligation to demolish the plant.

[41] In s. 5.03 of the APS, 247 agreed to complete the demolition of the plant building "consistent with the Rehabilitation Plan" within the "Holdback Period," defined as the earliest of either December 23, 2017, or "such other period as may be required by the approved Rehabilitation Plan." 247 also agreed to submit for Graphic's approval a scope of work proposal for the demolition by January 28, 2016, with proposed timelines and estimated costs.

[42] This was the so-called chicken-and-egg conundrum raised by the defendants. Were it not for the qualifying words, "consistent with the Rehabilitation Plan," s. 5.03 left no room for doubt that 247 had to submit a scope of work proposal within 30 days and complete the demolition project within 24 months. The defendants argued that 247 could not perform the demolition without a Rehabilitation Plan.

[43] Graphic argued that it was unfair of the defendants to raise this interpretation after the 24 months had expired and the litigation erupted – essentially that an equitable estoppel barred the argument. Any appeal to equity must first be defined by a legal controversy, even where equity prevails over law: *N-Krypt International Corp. v. LeVasseur*, 2018

BCCA 20, 78 B.L.R. (5th) 1, at para. 27, leave to appeal refused, [2018] S.C.C.A. No. 90. It would be premature to estop the defendants' interpretation without testing its viability. The lateness of the argument does cast suspicion on it, but it should be tested to determine whether the contractual wording validates the defendants' point that, at least grammatically, "consistent with the Rehabilitation Plan" reads as if such a plan was a reference document for the demolition work.

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[44] Testing the defence interpretation of "consistent with the Rehabilitation Plan" requires holistic review of the APS, giving the words their ordinary and grammatical meaning, consistent with the surrounding circumstances: *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 47. However, the holistic approach requires priority of defined terms and phrases over ordinary use. To allow the ordinary meaning to prevail over the defined defeats the parties' agreement to specify their intention: *Sattva,* at paras. 114-115; and *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at para. 64.

[45] The s. 1.01 definition of "Rehabilitation Plan" stated that it "shall have the meaning ascribed to it in Section 5.04." Although s. 1.03 contained the standard prohibition against interpreting headings beyond ease of reference, one cannot avoid noticing that s. 5.04 started with the heading "Servitudes." Section 5.04 did not obligate Graphic, as the Vendor, to perform any work. Rather, it expressed the parties' acknowledgement that after the transfer to 247, Graphic was the one liable by the provincial environmental laws to perform the environmental cleanup of the soil and groundwater.

[46] Reading s. 5.04, even without relying on the heading, it did not create a contractual duty on Graphic's part to perform the Rehabilitation Work for the benefit of 247. Rather, as between the parties to the APS, s. 5.04 required 247 to register a servitude permitting Graphic access to the property. The servitude was not to terminate until "the later to occur of" (i) the completion of the Rehabilitation Work and (ii) completion of the Demolition Activities. The section concluded with reference to Schedule "H" as the form of the "Deed of Servitude."

[47] The servitude provision clearly protected Graphic from an impossible situation in which 247 or a subsequent owner could bar access to Graphic's consultants and contractors before the entire site was cleaned up to the Ministry's satisfaction. In the context of this purpose, s. 5.04 described Graphic's responsibility for rehabilitation of "any soils and or groundwater at the Lands" in accordance with a Rehabilitation Plan:

> … in accordance with applicable Environmental Laws, nuclear safety Laws, and the rehabilitation plan approved by the Ministry of Sustainable Development, Environment and the Fight against Climate Change (the 'Rehabilitation Plan') as required by the *Environment Quality Act* and by the *Land Protection and Rehabilitation Regulation* (Chapter Q-2, r. 37 of Quebec regulations adopted under the *Environment Quality Act*).

[48] The meaning ascribed to the phrase “Rehabilitation Plan” in s. 5.04 was not tied to any specific timing of preparation or approval. For the purposes of the definition, the phrase also only applied to rehabilitation of the soil and groundwater. It did not apply to any structures to be demolished.

[49] I now return to s. 5.03 to determine how the defined phrase fit into 247’s demolition responsibilities. The scope of work to be provided within 30 days required, among other things, “such information regarding the management of demolition debris and Hazardous Substances as may be reasonably required for inclusion in the Rehabilitation Plan.” This clause clearly required 247, a dealer in brownfields, to know what should be included in the Rehabilitation Plan, for the demolition of the building. In the case of a Québec property, the contract required 247 either to prepare this information or hire a Québec consultant. The hiring of a consultant was then provided for in the next sentence, reserving to Graphic the right to approve the “environmental consultant retained by the Purchaser in connection with the demolition.”

[50] 247 had 30 days to provide for Graphic’s approval a plan for management of the demolition debris, for inclusion in the Rehabilitation Plan (as defined and capitalized). This meant 247 was responsible for the portion of the Rehabilitation Plan pertaining to the environmental elements of the demolition work. As a matter of sequence, 247 had to perform the demolition in a manner consistent with an approved Rehabilitation Plan before it was even submitted to the Ministry for approval. This order of events was neither unreasonable nor temporally illogical. It simply allocated the risk of Ministry disapproval of the demolition portion of the plan, and any practical consequences of same, to 247. It also reflected the practical necessity that the mill, as the source of the pollution, had to be removed from the site before Graphic’s environmental engineers could study the extent of the pollution.

[51] In undertaking the demolition, 247 further covenanted in s. 5.03 that:

> (a) it shall comply with the requirements of applicable laws, including, without limitation, Environmental Laws regulating the remediation, removal and disposal of Hazardous Substances; (b) it shall not bring upon the Lands any Hazardous Substance which, if it were to remain on or escape from the Lands, would contaminate the Lands or other property in which it came in contact with; and (c) it shall notify the Vendor of any sub- contractor or agent of the Purchaser who is engaged to perform demolition work of structures containing Hazardous Substances, including, without limitation, asbestos, which sub-contractor or agent shall be licensed in accordance with applicable law to perform such activities.

[52] My interpretation of s. 5.03 is also consistent with the process that Graphic had already initiated as the responsible owner of the mill at the time it stopped operating. As of the Effective Date of the APS, Graphic had already initiated the environmental review process with the Québec Environment Ministry by filing the preliminary site

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characterization study. The plain and ordinary reading of the phrase against this factual background would have been to construe the phrase, "consistent with the Rehabilitation Plan," to require 247 to complete the demolition in accordance with the information in the scope of work proposal intended to be included in the Rehabilitation Plan, once Graphic's contractors regained access to the site occupied by the mill structure.

[53] Because Graphic and 247's work had to be coordinated between independent timelines, the two-year window for completion of demolition and the absence of a timeframe for the completion of the full restoration of the land envisaged the staging of the work starting with building demolition before the Rehabilitation Plan could be completed. The contractual imposition of a 24-month window for 247's demolition work, contrasted with the absence of timing for Graphic's submission of a Rehabilitation Plan to the Ministry for approval, meant at the very least that the contract did not allow 247 to wait for anything from Graphic before starting its demolition of the mill.

[54] The Ministry later did require a separate rehabilitation plan for the demolition from Graphic. This did not mean that such a plan would ever have been required for the demolition of the buildings, if the building were demolished and the rubble hauled to an approved site, in accordance with the municipal permit. Rather, it was obvious from the Ministry's regulatory order that it required a separate rehabilitation plan, because the building had not yet been demolished. The demolition permit from the municipality was the only requirement 247 needed to complete the work before the December 2017 deadline. I also cannot allow subsequent regulatory conduct to construe the meaning of the APS wording.

[55] In the context of Graphic's obligations as the owner at the time the mill last operated, the Ministry's process contemplated Graphic as the primary responsible party for environmental issues related to decontamination of the entire site. 247's role was no different than that of a demolition contractor retained by an owner to enable the first stage of restoration of the property to its greenfield state, pending all studies and approvals. Unlike the development of a site requiring the readying of plans and contractors, its restoration is governed by the race to prevent the spread of the plume of contamination from under the building. That regulatory process, initiated by Graphic prior to the closing of the sale to 247, proceeded on a track defined by exigencies separate from the contractual track for 247 to submit a scope and complete the work within 24 months. The only potential intersection of the two timelines was the possibility that a *shorter* period could be required by the Ministry as part of the approval of the Rehabilitation Plan.

[56] The wording of s. 5.03, when read together with s. 5.04, thus recorded the mutual expectations of (a) the scope of work serving as the rehabilitation plan for the demolition as part of a general Rehabilitation Plan for the whole site and (b) the demolition being completed before the Rehabilitation Plan for the site would be approved and executed. Graphic could not have been in default of its obligations to 247 as alleged by 247 and Talisman. As of December 24, 2017, the only party in breach of the APS was 247. No trial is required to make that finding.

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3) TALISMAN'S DUTIES UNDER THE PERFORMANCE BOND

[57] To secure 247's undertaking to demolish the structures, the agreement required 247 to deposit a performance bond in the amount of $2,000,000. 247 satisfied that requirement by purchasing a bond.

[58] The bond, issued by Talisman on January 5, 2016, treated 247 as the Contractor, Graphic as the Owner, and Talisman as the Surety. 247 negotiated modifications to the standard wording to reflect its obligations under the APS. These modifications included:

a. Graphic was the Owner, and 247 was the Contractor

b. Coverage limited to the demolition of the building

c. Removal of the requirement of an owner termination of the construction contract as a condition for triggering the Surety's obligations

d. Choice of forum for legal proceedings to mirror the APS

e. Redefinition of "Balance of Contract Price" as "those monies due and payable to the Purchaser per the terms of the Purchase and Sale Agreement, Schedule 'C' and Section 2.05 Payment of the Purchase Price."

f. Duration of the bond to terminate upon the completion and acceptance of the demolition

[59] Subject to the above modifications, § 3 defined the events triggering Talisman's duties under the bond:

> § 3 If there is no Owner Default under the Construction Contract, the Surety's obligation under this Bond shall arise after
>
> .1 the Owner first provides notice to the Contractor and the Surety that the Owner is considering declaring a Contractor Default. Such notice shall indicate whether the Owner is requesting a conference among the Owner, Contractor and Surety to discuss the Contractor's performance. If the Owner does not request a conference, the Surety may, within five (5) business days after receipt of the Owner's notice, request such a conference. If the Surety timely requests a conference, the Owner shall attend. Unless the Owner agrees otherwise, any conference requested under this Section 3.1 shall be held within ten (10) business days of the Surety's receipt of the Owner's notice. If the Owner, the Contractor and the Surety agree, the Contractor shall be allowed

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> a reasonable time to perform the Construction Contract, but such an agreement shall not waive the Owner's right, if any, subsequently to declare a Contractor Default;
>
> .2 the Owner declares a Contractor Default, ~~terminates the Construction Contract~~ and notifies the Surety; and
>
> .3 the Owner has agreed to pay the Balance of the Contract Price in accordance with the terms of the Construction Contract to the Surety or to a contractor selected to perform the Construction Contract

[60] A performance bond is a form of surety agreement. Generally, a surety is a person who agrees to assume the risk of another person's default of an obligation. Before there is a material change of the obligation, the surety's consent is normally required before a claimant can rely on the obligor's default, unless the change reduces the risk of default: *Montreal Trust Co. of Canada v. Jaynell Inc*., (1993) 111 Sask. R. 178 (QB), at paras 37-47.

[61] The traditional form of such agreements is an agreement to guarantee a debt, a.k.a. guarantees by "accommodation sureties." Because of the nature of the risk, the law has narrowly construed the obligations in favour of sureties in accordance with the precise terms. The reason for this strict construction is that the guarantor was usually acting gratuitously.

[62] The commercialization of the agreements in the construction industry by insurers and bonding companies, a.k.a. "compensated sureties," created a market for premiums in return for performance bonds guaranteeing contractors' work and owners' payments. Canadian courts have treated performance bonds more liberally than debt guarantees, to refrain from discharging sureties of their obligations for technical non-compliance or failure to exhaust other remedies: *Citadel Assurance v. Johns-Manville Canada*, [1983] 1 S.C.R. 513, at pp. 521-527.

[63] Despite its similarity to insurance and the market presence of casualty insurers such as Talisman, a surety's obligation under a performance bond to guarantee completion of the underlying construction contract is not a form of insurance requiring the court to construe a performance bond strictly or leniently in favour of one party or another: *Western Surety Co. v. Lac La Ronge Indian Band*, 2004 SKCA 109, at para. 72. The differentiation of performance bonds and insurance relieves the bond issuer from rules of construction such as the *contra proferentum* rule used as a last resort to interpret ambiguities against insurers: *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co*., 2016 SCC 37, [2016] 2 S.C.R. 23, at para. 51. Nevertheless, the Supreme Court's admonition at p. 527 of *Citadel* that a construction that would "defeat the very purpose" of the bond mirrors that court's earlier statement in *Consolidated-Bathurst v. Mutual Boiler*, [1980] 1 S.C.R. 888, at p. 901, that the courts should avoid

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“an interpretation of an insurance contract that would enable an insurer to “pocket the premium without risk.”

[64] More plainly put, an owner cannot resort to a surety to step into the shoes of a defaulting contractor without fulfilling the steps of first notifying the surety of their intention to declare a default and then by declaring a default. This process allows the surety the opportunity to confer with the parties and resolve the default, before having to escalate its next steps to hiring another contractor or to allow the owner to retain one. Talisman’s response to Graphic’s notices never got to these steps, because it never responded in good faith to Graphic’s notices and to the obvious predicament that 247 had created by its complete failure to honour its contractual commitments.

[65] The jurisprudence on the enforcement of performance bonds requires them to be treated as commercial instruments with value to the third-party beneficiary, in this case, Graphic. The very purpose of the bond is to provide relatively seamless performance in the event of default by a party to a construction contract. Various legal mechanisms, both private and statutory, recognize that delayed performance by either the owner/payor or the constructor/sub-contractor has outsized consequence beyond the immediate issue. It is the construction equivalent of a bank letter of credit in trade finance. The ultimate commercial backdrop to the product is that the parties receive little comfort, if technicalities or ambiguities relieved the bond issuer as substitute for the performer and allowed it to fall into the role of a second pocket in litigation.

[66] Talisman defended the action and the motion on four grounds:

> a) Graphic failed to satisfy the conditions precedent to Talisman’s obligation
>
> b) Graphic’s conduct prejudiced Talisman’s rights under the bond
>
> c) Graphic and 247 materially varied the bonded contract without Talisman’s knowledge or consent
>
> d) Graphic has failed to quantify or substantiate its claim

a) Conditions Precedent

[67] The conditions precedent triggering Talisman’s obligations under the bond consisted of an absence of default by Graphic under the APS and three positive steps under §§ 3.1, 3.2, and 3.3. I will consider these conditions in combined logical and chronological order, although the issues overlapped in the interaction among the parties.

Owner Default

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[68] The general condition of § 3 required the Owner, Graphic, not to be in default under the Construction Contract, in this instance the APS. Talisman's position at the hearing was that Graphic was in default under the agreement for having failed to produce a rehabilitation plan, and that 247 was not in default because it required the plan to perform the demolition. Talisman did not raise this issue until its coverage denial letter of July 14, 2019, two months prior to the start of litigation.

[69] Under § 14.4, the "Owner Default" was defined as "Failure of the Owner, which has not been remedied or waived, to pay the Contractor as required under the Construction Contract or to perform and complete or comply with the other material terms of the Construction Contract." Since Graphic had prepaid the first $750,000 through the holdback from the purchase price and 247's work had not started at the time of the default, the only default by Graphic on which Talisman could raise was a failure of some other performance obligation at that time Graphic initiated the notification process under § 3.

[70] In the July 14, 2019, letter from its coverage lawyer, Talisman objected that Graphic's failure to provide a rehabilitation plan to allow 247 to start its demolition work and failure to abide by regulatory requirements constituted breaches of the APS. I have already found that this argument cannot be supported by a reasonable interpretation of the contract, read contextually in accordance with its defined terms. Although Graphic owed a public duty under Québec law to remediate the lands, 247 had contracted with Graphic to provide the rehabilitation plan for the demolition. In addition to the fact that Graphic's public duties were not owed to 247, it had always been 247's failure to provide a scope of work and start demolition that delayed the sequencing of the overall site sampling and development of a rehabilitation plan.

[71] Graphic was therefore not in default. Talisman's late objection signalled its attempt to manufacture an excuse for its non-performance under the bond, in contemplation of this litigation.

§ 3.1 – Notice of consideration of default

[72] § 3.1 of the bond required Graphic to provide notice it was considering a contractor default by 247. Talisman does not dispute that Graphic issued such a notice on July 12, 2017. The notice did not specify the default. However, it attached two letters from Graphic to 247 clearly describing the default.

[73] § 14.3 defined "Contractor Default" as "Failure of the Owner, which has not been remedied or waived, to pay the Contractor as required under the Construction Contract or to perform and complete or comply with the other material terms of the Construction Contract."

[74] Graphic's April 20, 2017, letter to 247 stated that the failure to deliver a scope of work within the initial 30-day period constituted a breach of the APS. Pursuant to § 14.3, 247

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was in default of this obligation. The letter also expressed doubt that 247 could complete the demolition by December 23, 2017, because 247 had yet to provide the demolition scope and had not started demolition activities. The letter also followed up on an earlier request for reinstatement of electrical service to the site to permit drilling and to provide details of the persons appointed to provide safe access.

[75] A reasonable owner, whether residential, commercial, or industrial, would construe a contractor's failure to provide a scope of work as a failure to perform a material term of the contract. Indeed, the breach at the earliest stage could be construed as a refusal even to plan or prepare for the work, amounting to repudiation of the obligation.

[76] Graphic's July 12, 2017, letter to 247 stated that Graphic had received no response from 247 to the April letter. It stated that the failure to start demolition activities and to provide a scope amounted to repudiation of 247's obligations under the APS, and it expressed Graphic's intention to invoke its rights under the performance bond. Graphic's letter to Talisman of the same date, enclosing the letter to 247, requested a conference among Talisman, 247, and Graphic, to discuss the contractor's performance and asked that the conference occur within 10 days.

[77] Jeffrey Keast, the representative of Talisman, deposed in his affidavit that it was aware of the default of 247 in the provision of a scope of work. However, he did not mention Graphic's concern that 247 was likely about to default on the main demolition undertaking, because it had not started with less than six months left.

[78] The notices in these letters to Talisman complied with § 3.1 of the bond. They clearly expressed Graphic's intention to declare 247's default. The first default had already occurred, and it was reasonable for Graphic to notify the surety of the intention to declare the second default, because 247's delay left it practically no time for completion of demolition.

[79] As worded, § 3.1 did not require the default to have occurred. To construe the bond as requiring a default before a notification to the surety of an intention to declare a default would be contrary to the purpose of the bond in securing the timely performance of construction obligations. In most construction projects, performance delays by one contractor can result in owner defaults under contracts with other contractors. Although this was not a building project, the nature of 247's work impacted on Graphic's work to meet targets under environmental legislation and regulations. It was reasonable for Graphic to issue a notice of the potential default.

[80] § 3.1 clearly provided a mechanism for the parties to confer and attempt to resolve a potential default before it occurred. It also allowed the contractor to perform the demolition within a reasonable time even after default, without any agreement by Graphic to be construed as a waiver of the right to declare a default later. A fair reading of the last sentence of § 3.1 would be that a tripartite agreement to extend the time for performance did not waive Graphic's right to declare a default, in the event 247 failed to complete the work by the end of the extension.

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[81] There was no evidence of a response from Talisman to the July 12, 2017, notice, or that Talisman agreed to the conference requested by Graphic. The wording of § 3.1 required Graphic to attend such a conference if it had been requested by Talisman, but it contained no direct obligation by Talisman to attend one requested by Graphic. Nevertheless, the conference requested by Graphic had to occur within 10 days. I would interpret Talisman's failure to respond to the conference request as, at the very least, a waiver of an opportunity to cure the contractor default, realized or anticipated.

[82] § 3.1 was clearly intended to serve as a pre-claim mechanism for the benefit of Talisman to resolve a potential dispute. I find that Graphic had complied with the precondition under § 3.1 to provide notice of its intention to declare a default.

§ 3.2 – Notice of default

[83] § 3.2 required Graphic to declare the contract default and notify Talisman of same. On September 21, 2017, Graphic issued such a default, referring to the July 12, 2017, notice. In Talisman's responding affidavit, Mr. Keast objected to the notice on the basis that it did not identify or document the default. Apart from the fact that § 3.2 contained no requirement to provide such information in the notice, this position was utterly disingenuous, considering Graphic's earlier correspondence and Talisman's failure to respond to the request for a three-way conference under § 3.1.

[84] On October 6, 2017, Talisman's Vice-President of Risk Management wrote to Graphic to request various documents to verify the claim. However, the letter contained no indication that Graphic had failed to identify the default, undermining the above assertion in the Keast Affidavit. The letter, addressed "To whom it may concern," and worded in boilerplate, provided Graphic ten days to produce a long and broadly worded list of documentation and information consisting of or relative to:

1. agreements with 247 or its affiliates
2. agreements with any other entity
3. building or demolition permits
4. correspondence between the parties
5. information relating to Graphic's compliance site visits
6. property tax records
7. back taxes owed on the property
8. information pertaining to three companies

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9. bidding information
10. evidence of completed work
11. regarding the township and Hydro Québec
12. any security company on site
13. any subcontractors or materialmen on site
14. union activities on site
15. deed of transfer of the property
16. escrow agreements pertaining to the holdback
17. environmental reports
18. rehabilitation plan from 247
19. actions by Graphic to market the property
20. deed of sale
21. Graphic's certified articles and by-laws, board of director resolutions, and other corporate documents pertaining to the sale to 247
22. statement of adjustments
23. direction re funds
24. assignment and assumption agreements related to permitted encumbrances
25. such other documentation and assurances as contemplated herein
26. corporate information as in item 21 above, but from 247
27. purchase price
28. GST and QST applicable to the purchase of equipment
29. assumption agreements as in item 24 above, but from 247
30. the deed of servitude
31. repeat of item 25 above, but from 247

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[85] Any reasonable business in Graphic's shoes would have been infuriated by this response to the bond beneficiary's notice. On the cusp of the final quarter of a two-year window for completion of the demolition work, the contractor had not yet provided the scope of work that was promised to be delivered in the first 30 days. This, in turn, exposed Graphic to being sandwiched between 247's failure to demolish the plant and Graphic's regulatory timeline for remediation of the whole site's soil and groundwater. It was a simple yet dire situation.

[86] Instead of taking immediate proactive steps under § 5 to remedy 247's non-performance, Talisman adopted a snowblower approach to bury Graphic in a documents and data request resembling a documentary discovery request in litigation. Carthy J.A.'s statement about the conduct of a casualty insurer in *General Accident Assurance Co. v. Chrusz*, (1999) 45 O.R. (3d) 321 (C.A.), at para. 50, captures Talisman's initial response to Graphic's notification of contractor default under the bond:

> [A]n insurance company investigating a policy holder's fire is not, or should not be considered to be, in a state of anticipation of litigation. It may be that negotiations and even litigation will follow as to the extent of the loss but until something arises to give reality to litigation, the company should be seen as conducting itself in good faith in the service of the insured.

[87] The performance bond contained no provision entitling Talisman to make the document request. The bond contained no wording akin to the standard requirements of an insured in reporting a loss to an insurer. § 5 required Talisman to take prompt steps to remedy 247's default. Only § 5.4 allowed the surety an opportunity to investigate the amount of monetary compensation in lieu of performance, after waiving the right to perform the work or to arrange the surety's contractor to perform it.

[88] On October 24, 2017, Graphic's general counsel wrote to Talisman and 247 stating that it required more than ten days to provide all the documentation and information Talisman had requested.

[89] On March 9, 2018, Graphic provided some of the requested documents and confirmed that 247 had indeed failed to perform the demolition by December 23, 2017. As a result, Graphic made its formal declaration of 247's contractor default under the bond. Because time was of the essence, Graphic informed Talisman and 247 that it had started the process of seeking bids from other contractors to perform the work. Contrary to the representation in Graphic's letter, the solicitation of bids from other contractors was one of the bond issuer's remedial options under § 5, namely § 5.3. Because almost three months had already elapsed since 247's default, it would have been hard to fault Graphic for taking the initiative, because Talisman had not taken any remedial actions under § 5.

[90] The correspondence between Graphic and Talisman left no doubt that Graphic had complied with § 3.2 in declaring 247 in default of both the duty to provide a scope of

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work and to complete the demolition work with the 24-month period after the inception of the APS.

[91] Because Graphic had declared and notified Talisman of these defaults, that left Talisman with one last argument that its surety obligation remained untriggered.

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§ 3.3 – Agreement to pay Balance of the Contract Price

[92] Talisman responded to the March 8, 2018, letter from Graphic on March 23, 2018. In Talisman's response, Mr. Keast advised Graphic that the surety's obligations had not been triggered, because Graphic had yet to inform Talisman, under § 3.3, that Graphic agreed "to pay the Balance of the Contract Price in accordance with the terms of the Construction Contract to the Surety or to a contractor selected to perform the Construction Contract." He then required Graphic to advise whether it agreed to pay to Talisman the "Balance of the Contract Price" as it relates to the demolition work covered under the bond. Graphic did not respond to this request until August 21, 2018. In the meantime, supervening events appeared to raise hope that 247 would finally fulfil its obligations.

[93] In a letter dated May 25, 2018, Graphic informed Talisman that 247 had now prepared a draft demolition plan, although it had not met the Ministry's requirements. Graphic had arranged a meeting with Ministry officials on May 28, 2018, to address these requirements. Graphic then advised Talisman that, if the Ministry did not approve 247's plan, Graphic would be required to proceed with the demolition. Graphic had spearheaded these developments, in parallel to its dealings with Talisman, in response to a March 12, 2018, letter from the Ministry to Graphic following the regulator's receipt of an updated characterization study report, dated February 27, 2018. The Ministry accepted Graphic's submission that the completion of the study required demolition of the buildings and required Graphic to apply for approval of a demolition plan by April 20, 2018.

[94] 247's demolition plan emerged after it sent Graphic a letter dated April 17, 2018, containing an irrevocable commitment to complete the demolition. The letter identified the contractors retained by 247 to perform the work and committed 247 to provide the scope of work by May 2, 2018, to obtain updated municipal permits and guidance from the Ministry, and finally to start the demolition by June 4, 2018. On April 20, 2018, Graphic agreed to the terms of this commitment letter, without waiving its rights under the original APS and under the performance bond. This letter left no doubt that 247 understood that it was its obligation to prepare the demolition plan in consultation with the Ministry, and that it was not waiting for a Rehabilitation Plan from Graphic to start and sequence the work to completion.

[95] In its letter dated May 2, 2018, the Ministry had rejected the 247 demolition plan, because 247, not Graphic, prepared the demolition plan: "Les documents préparés par

2477621 Ontario Inc. ne sont pas considérés dans l'analyse de ce dossier." The Ministry required Graphic to provide Graphic's cheque for $1,329 for the administrative fee, a board resolution authorizing the demolition plan, and a statutory declaration by an authorized representative of Graphic. Essentially, the Ministry expressed its willingness to consider 247's plan as Graphic's, once the administrative formalities were in place binding Graphic to the process. The Ministry then asked for 11 categories of additional information, including:

1. The demolition plan must be signed by an accredited professional.
2. Because there was no characterization study in sectors of the building that were inaccessible, Graphic had to provide either of:
    a. Confirmation that demolition would proceed only in sectors that have been characterized, to be followed by an application for approval of a rehabilitation plan for demolition of remaining sectors; or
    b. A step-by-step sequencing of demolition starting with characterized sectors of the building, characterization of materials during demolition, a sampling methodology for inaccessible areas, and reporting of results to the Ministry.
3. Details of methods for cleaning various surfaces and building components, as well as prevention of spills and migration of contaminants; as detailed step-by-step.
4. A staging calendar for the various phases.

[96] On June 6, 2018, the Ministry approved Graphic's demolition plan, as adapted from 247's. On June 7, 2018, 247 obtained a new municipal demolition permit as the current site owner. In his affidavit 247's principal, Chiara Joanovits, confirmed that the issuance of the permit "confirmed that all necessary approvals and compliance requirements had been met" for the demolition to proceed. On July 3, 2018, the Ministry issued a notice of its intention to issue a remediation order requiring Graphic to proceed with the demolition by July 23, 2018.

[97] On July 13, 2018, Graphic wrote to Talisman and 247. In that letter, Graphic summarized the recent developments arising from 247's commitment to start the work and the meetings with Ministry officials, including the issuance of the July 3, 2018, notice from the Ministry. Contrary to the commitment by 247, it did not start the work. Graphic advised Talisman and 247 that if the Ministry's work order should issue, "we will need to select a demolition contractor within a very short period of time." For its part, Graphic through its lawyers notified the Ministry of the difficulties of completing the work on property it no longer owned and of the impossibility of starting work during Québec's statutory two-week holiday in the construction industry. Graphic requested the start date for the work to be amended to August 6, 2018. On July 25, 2018, the

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Ministry amended the start to that date. The order was not transmitted to Graphic until July 26, 2018. On July 27, 2018, Graphic transmitted the amended order with the August 6, 2018, deadline to 247.

[98] On August 1, 2018, Graphic served notice on Talisman and 247 that, because of the severe consequences to Graphic if the August 6 date was missed, it had hired a demolition contractor to be on site as of that deadline. This notice prompted 247's response that the presence of stakeholder representatives on site sufficed as the start of demolition activities. In context, the court can draw the natural inference that 247 was still dragging its feet. In its lawyer's letter of August 21, 2018, Graphic put 247 and Talisman on notice that the Ministry was dissatisfied by the lack of progress by 247 in performing the demolition and that Graphic was arranging for its contractor to be on site on August 27, 2018, to begin the demolition. Graphic had waited to this point to address the issue under § 3.3 regarding the payment of the Balance of the Contract Price (italics mine):

> As our client had indicated in the August 1st Letter, it has engaged a demolition contractor. It is currently making arrangements for its contractor to be on site on August 27, 2018 to begin work. Again, as you have not provided any substantive response to our client's prior correspondence on this topic (including the recent emails on which you were copied) nor given it any specific indication that Talisman will not elect to proceed under Section 5.3 of the Bond or seek to obtain your own bids or proposals, Graphic can only assume that you are in agreement with its proposed course of action. *With respect to Section 3.3 of the Bond, the 'Balance of the Contract Price' is nil per the terms of the Purchase and Sale Agreement. As a result, there is no amount to be paid by Graphic in accordance with the terms of the Construction Contract.*

[99] On August 24, 2018, Talisman wrote back to Graphic's lawyer alleging that 247 was, in fact, taking "significant action" to demolish the mill and that "it has diligently moved forward." The letter concluded by stating that Graphic had consented to the current efforts by 247 in performing the contract.

[100] Supported by representations by the Ministry that it was not satisfied by these activities, Graphic obtained an interlocutory injunction on September 18, 2018, from the Québec Superior Court permitting Graphic and its contractors to take over the site and to carry out the demolition work in accordance with the plan approved by the Ministry.

[101] In 247's responding affidavit, Chiara Joanovits stated that "disputes arose between the parties during the summer of 2018" leading to Graphic's application for an interlocutory injunction. He asserted that Graphic "unlawfully restricted access to the Property, thereby preventing 247 … from proceeding with any ongoing demolition or salvage work." He complained that Graphic hired a metal salvage company to sell the metals from the property at lower than market value and had no legal right to do so. He also complained that Graphic did not consult 247 regarding the cost of remediation

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work and had not credited 247 with $1.2 million that 247 had already incurred to perform the demolition work.

[102] On March 15, 2019, Talisman issued a notice to Graphic provisionally declining liability under the bond, unless Graphic provided the items listed in its October 6, 2017, documents and information request within 10 days. On April 30, 2019, lawyers for Graphic provided a USB stick to Talisman containing records and information responding to the request. Talisman appears to have acknowledged the sufficiency of the belated response. However, Talisman considered conditions imposed by Graphic on sharing of information with 247 to have prejudiced Talisman's ability to investigate the claim. Talisman was unaware of the status of the demolition, because Graphic had taken over the Jonquière site to take over the demolition work and had not provided updates to Talisman.

[103] On July 24, 2019, in a letter from its coverage lawyer, Nicolas Gagnon, Talisman formally declined liability under the bond. From the contents of this letter, I draw the inference that it stated Talisman's position after having received independent legal advice from Mr. Gagnon. Mr. Gagnon stated that Graphic had been in default under the APS by failing to provide 247 with the rehabilitation plan, failing to register a notice of contamination in the Land Register, attempting to force 247 to demolish the plant prematurely before issuance of an approved rehabilitation plan, and wrongfully removing 247 from the property on November 21, 2018.

[104] Mr. Gagnon's letter stated that, in the event Graphic was not in default, it had still failed to satisfy two conditions to benefit from the bond, namely the failure to declare 247 in default, at least in a proper or sufficient manner, and a deficiency in the satisfaction of § 3.3 of the bond. In the event Graphic had fulfilled the conditions for Talisman's liability, the letter outlined the following reasons to excuse Talisman from liability on the grounds of prejudice:

a. taking over the site with Graphic's own contractors, without Talisman's knowledge or acceptance

b. obtaining an injunction without notice to Talisman, thereby preventing Talisman from remedying the default

c. withholding information from Talisman necessary to investigate the claim

d. failing to provide Talisman with bids

e. refusing to meet with 247 and Talisman

f. hiring demolition contractors without Talisman's consent and at excessive and unjustified rates

g. selling 247's property

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[105] I have already found that Graphic was not in default and had properly declared 247's default. I will deal with the various allegations that Graphic had proceeded precipitously in my analysis of the separate defence issues. It falls on me now to analyse Talisman's stated grounds for declining liability under § 3.3 for Graphic's failure to agree to pay the Balance of the Contract Price to Talisman.

[106] In its lawyer's letter dated August 21, 2018, Graphic stated that the Balance of the Contract Price was nil, with the result that Graphic was not required to agree to payment.

[107] At the hearing, Talisman construed Graphic's position on § 3.3 to mean that Graphic refused to agree to pay the Balance of the Contract Price, and that Graphic had provided no calculation or other supporting information to substantiate this assertion. In Mr. Gagnon's July 24, 2019, coverage declination letter, Talisman had taken the position that Graphic had agreed to pay the balance but had prejudiced Talisman's right to payment by defeating 247's ability to recover salvage. For ease of reading, I have substituted the legal labels in that letter with the names of the relevant parties and have italicized the most important part:

> *Pursuant to paragraph 3.3 of the Bond, Graphic has agreed to pay the balance of the Contract price to Talisman; however, in this instance, the balance of the Contract price is deemed to be the balance of salvageable assets, which would be sold to defray or eliminate the cost of demolition*; Graphic has not made these assets available and, without notifying Talisman, it entered into contract with another firm to sell 247's property, namely the materials owned by 247. This action prejudiced Talisman's right by not providing Talisman the balance of the Contract price. The permanent injunction order does not grant Graphic ownership of 247's property and therefore, Graphic's contract with another firm to sell 247's property without notifying Talisman prejudiced Talisman's rights.

[108] On cross-examination, Talisman's representative could not recall any other correspondence in which Talisman communicated this interpretation of "Balance of the Contract Price" to Graphic. In its answer to the ensuing undertaking, Talisman confirmed that there was none. The question appeared immaterial, because the interpretation found no support in the contractual wording of the bond or the APS.

[109] It was 247, according to Mr. Joanovits, evidence on behalf of 247, who had originally budgeted for the demolition costs to be less than the anticipated proceeds from the sale of the salvageable materials. This evidence did not help in the interpretation of the bond, but it did explain 247's focus on salvaging and reselling the metals instead of fulfilling its obligation to scope, plan, and complete the demolition work. The economics of the property flip, from 247's perspective, was to pay for the demolition out of the proceeds of the salvage.

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[110] The points made by Mr. Gagnon and Mr. Joanovits appear to have reflected 247's expectations for financing the demolition costs beyond the holdback. This interpretation of the facts favours Graphic's response that the balance was nil, beyond the obvious point that 247's inaction forced Graphic to obtain an injunction and perform the demolition itself, because any financial obligation of Graphic's was capped by the holdback. Nevertheless, this evidence cannot determine the issue, without reviewing what the bond and the APS had to say about it.

[111] Under § 14.1 of the bond, the standard definition of the "Balance of the Contract Price" reflected the typical role of the surety to step in and rectify the non-performance. The bond secures the owner's interest through timely completion of the work for the contract price. Thus, if a contractor walked off the project before completion, the surety would assume the duty to complete the work in return for the owner's payment of the balance of the contract price, including amounts for incomplete portion of the work. Without such a commitment from the owner, the bond could result in a windfall and associated moral hazard. The standard definition therefore provided (italics mine in both quotations):

> The total amount *payable* by the Owner to the Contractor under the Construction Contract after all proper adjustments have been made, including allowance to the Contractor of any amounts received or to be received by the Owner in settlement of insurance or other claims for damages to which the Contractor is entitled, reduced by all valid and proper payments made to or on behalf of the Contractor under the Construction Contract.

[112] A rider to the bond issued by Talisman replaced this standard wording with the following, to suit the terms and purposes of the APS:

> "Balance of the Contract Price" shall mean those monies *due and payable* to the Purchaser per the terms of the Purchase and Sale Agreement, Schedule "C" and Section 2.05 Payment of the Purchase Price.

[113] The standard definition referred to the total amount payable under the contract, whereas the issued bond referred to monies due and payable to 247 per the terms of Schedule "C" and s. 2.05. The modification adding "due and" is ambiguous, in that it can be a more certain way of expressing what Graphic must pay, both presently due and payable in the future; or it can refer only to amounts that are presently due. As I previously observed, performance bonds are not insurance policies and do not attract strict construction against the bond issuer. Talisman is entitled to have the terms of its bond interpreted contextually against the backdrop of the whole document, including defined terms. The specific intent behind the substituted wording therefore requires the court to turn to Schedule "C" and s. 2.05, to determine what was "due and payable" to 247 when Graphic notified Talisman of the default, and whether Graphic's response to the issue was insufficient to trigger the surety's obligations under § 5.

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[114] Schedule "C" of the APS provided (italics mine):

Purchaser's Work

> The Purchaser shall:
>
> (a) *remove all asbestos and asbestos-containing materials from the Property* and shall be reimbursed by the Vendor for actual costs up to $500,000 and 50% of actual costs above $500,000, up to a maximum total amount between the parties of $1,800,000, with any amount in excess of $1,800,000 being the sole responsibility of the Purchaser (for greater certainty, the Purchaser may be reimbursed by the Vendor for up to a maximum amount of $1,150,000 in accordance with the foregoing); and
>
> (b) *with respect to the landfill that is part of lot 4-688-317, take all actions necessary for the capping, closure, and correcting of the slope of the sides* and shall be reimbursed by the Vendor for actual costs up to $400,000 with any amount in excess of $400,000 being reimbursed by the Vendor in the Vendor's discretion, acting reasonably, having regard to the scope of the closure actions agreed to by the parties herein.

[115] The APS, under s. 1.01, para. (ee), defined "Purchaser's Work" as "the work described on Schedule 'C'" and included it as a subset of "Demolition Activities," defined in para. (d) thus (italics mine):

> (d) "Demolition Activities" means all actions taken by, or at the direction of, the Purchaser to decommission, demolish, dismantle, remove and/or dispose of the Buildings and Equipment at the Lands and all actions taken by the Purchaser in furtherance of such work, *including, without limitation, the Purchaser's Work*

[116] As previously mentioned, s. 5.03 set out 247's duty to complete the "Demolition Activities" within 24 months. Therefore, considering Schedule "C," the "Balance of the Contract Price" did not mean the cost of the demolition but, rather, only that part of the demolition consisting of asbestos removal and restoration of landfill. Section 5.03 also required 247 to provide for Graphic's approval, the scope of work including the Purchaser's Work. This requirement provided a cost control mechanism before 247's work started.

[117] Section 2.05 of the APS provided for the operation of the $750,000 holdback, as defined in para. 1.01(n), for the Purchaser's Work. The introductory parts of that section provided for the determination of the "Purchaser's Work Amount" in accordance with Graphic's duty under s. 3.03 to reimburse 247, which in turn referred to Schedule "C." The procedure for determining the Purchaser's Work Amount started with 247's issuance three days after the Holdback Period (effectively, the 24-month

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completion period) of a statement of the amount reimbursable to 247 for the Purchaser's Work and subject to a reciprocating objection and arbitration provision.

[118] Once the Purchaser's Work Amount was to be determined under s. 2.05, the following settlement mechanism applied (reformatted for ease of reading):

> If the Purchaser's Work Amount, as finally determined pursuant to this Section 2.05:
>
> > (a) is less than the Holdback Amount, the Purchaser shall pay by wire transfer of immediately available funds to or to the order of the Vendor an amount equal to the difference between the Holdback Amount and the Purchaser's Work Amount and the Purchaser shall retain the balance of the Holdback Amount which shall be applied and set off against the Purchaser's Work Amount; and
> >
> > (b) is greater than the Holdback Amount, the Purchaser shall retain the entire Holdback Amount which shall be applied and set-off against the Purchaser's Work Amount.

[119] Schedule "C" and s. 2.05 contained a potential contradiction. Schedule "C" contemplated up to $1,550,000 in reimbursement for actual costs incurred by 247 for asbestos removal and landfill restoration. Section 2.05 allowed 247 to apply the $750,000 holdback toward the reimbursement for these actual costs. Because s. 2.05 governed the purchase price for the property, including the holdback, I do not construe it as a cap nullifying the potential reimbursement beyond the holdback. Such an interpretation could negate the additional amounts contemplated in Schedule "C." At its highest, in favour of Graphic, s. 2.05 memorialized the parties' contemplation that the asbestos and landfill work could be performed for under $750,000.

[120] I pause here to observe that the definition of "Purchaser's Work," restricted to a portion of the demolition covered by Talisman's bond, did not make sense as a contract-specific substitute for the standard definition of "Balance of the Contract Price." The standard definition referred to the total payable under the construction contract. Talisman's reliance on § 3.3 appears to have followed the company's expectation of how the bond operates, rather than how it was worded as amended. The lack of equivalence between "Purchaser's Work" and the demolition work covered by the bond did not render § 3.3 incomprehensible, as in the case of the badly drafted insurance clause in *AXA Insurance (Canada) v. Ani-Wall Concrete Forming Inc*., 2008 ONCA 563, 91 O.R. (3d) 481, at paras. 28-30. However, I paraphrase the words of Moldaver J.A. (as he then was) in stating that it is not the court's function to rewrite the bond in the manner Talisman expected.

[121] The APS provided a complete process for accounting for amounts due and payable, either by 247 to Graphic if the asbestos and landfill work cost less than $750,000, or

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by Graphic to 247 if the amount of reimbursement according to Schedule "C" exceeded that holdback figure. The process contemplated that 247 would complete the asbestos removal and landfill work by the end of the 24-month Holdback Period and issue a statement within 3 days of such completion. Reading s. 2.05, s. 3.03, Schedule "C," and the relevant definitions harmoniously, the APS required 247 to provide a scope of work for approval that included the Purchaser's Work, to complete the entire demolition within 24 months, and to provide a statement of the amount for reimbursement by Graphic within 3 days after the expiry of the 24 months. The amount due and payable would be determined at that point, either by settlement or by simple arbitration.

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[122] Another feature of the interaction between the bond and the APS appears from the stated contract amount of $2,000,000 in the description of the contract. Talisman urged the court to accept that figure as the limit of its liability under the bond. Unlike insurance limits or a bond in other contexts, this figure is a statement of the parties' expectations of the outside value of the construction agreement. Because 247 was in default of its obligations from the start, it was in no position to request an amendment of the figure and pay Talisman additional amounts for any increased risk. In the absence of such opportunity on Talisman's part to charge an additional fee or to decline liability because of the change in risk, I agree with Talisman's position that $2,000,000 is the maximum extent of its liability under the bond, not because it operated as a contractual limit, but rather because it was the outside value of the contract Talisman undertook to perform if 247 defaulted. This may appear to be a distinction without a practical difference, but it is important to state the rationale for limiting Talisman's liability.

[123] Graphic stated its position that nothing was due and payable, only after the Ministry determined 247's minimal work on site to be unacceptable. Talisman disputed this information in every aspect, to the point of extolling the diligence of 247's compliance with the APS. However, the Québec Superior Court finally determined this issue by granting a permanent injunction on June 17, 2019, authorizing Graphic access to complete the work, when it recognized the default of 247 under the APS and the Ministry's regulatory finding of breach of the order against Graphic: "insatisfaction exprimée par la Ministre responsable du MDDELCC quant aux activités qui ont lieu sur le site depuis l'ordonnance de la Ministre."

[124] It was within the reasonable contemplation of the parties to the amended wording of the bond that, if 247 had started but not completed the work within the 24-month period, either 247 or Graphic, as subrogee, could have invoked the s. 2.05 process to issue a statement of any amount Graphic owed, after applying the holdback. The scope of work would have provided a basis for Graphic to undertake payment to Talisman, with the overage being the responsibility of Talisman as surety of the contract. Neither Talisman nor Graphic could contemplate that 247 never intended to start the demolition work until it found a market for the salvageable metal. In August 2018, Graphic's statement that nothing was due and payable under the APS would have been correct on either interpretation of the phrase, "due and payable," because the process for setting a price was frustrated by the coincidence of inaction of 247 and Talisman and of the regulatory

compliance order forcing Graphic to obtain the injunction and start the demolition with its own contractor.

[125] The position communicated by Graphic's lawyer that there was no Balance of the Contract Price could falter because of the positive obligation of Graphic to agree to something, however incapable of being determined, because of the phrasing, "the Owner has agreed to pay." § 3.3 required an agreement to pay the balance to the surety "or to a contractor selected to perform the Construction Contract." The passive use of "selected" and the absence of defining terms left the meaning open. It could have meant the contractor "selected" by the surety with the owner's concurrence under § 5.3. The grammatical construction is much more strained if it meant the surety's contractors under § 5.2 if the surety assumed responsibility for completing the project.

[126] § 5.4.1 further contemplates that the surety can waive its right to complete the contract or to obtain a new contractor, in which case the waiver triggers compensation to the owner. Although the formula is hardly clear, it reads like a way for the surety to wash its hands of the file by investigating and appraising the value of the remaining work and paying the owner:

> .1 After investigation, determine the amount for which it may be liable to the Owner and, as soon as practicable after the amount is determined, make payment to the Owner

[127] Absent clear wording locking the § 3.3 wording, "a contractor selected to perform," into a specific meaning, the court's duty is to construe the ordinary and grammatical meaning to include a contractor selected by the owner, i.e., Graphic. A restriction of the meaning to one chosen by the surety or through one of the processes in § 5 would run counter to the intentionally open-ended phrase using the word "selected" in the passive voice.

[128] 247's frustration of a mechanism for determining the Balance of the Contract Price and the open meaning of "a contractor selected to perform" do not yield alternative meanings. The meanings are complementary, in that Graphic can hire a contractor and thereby agree to pay it for the completion of the work – in this instance, virtually all of it. Instead of coming to Graphic's aid and electing an option under the four options under § 5 after it clearly knew 247 had not even started the contracted work, Talisman threw obstacles in Graphic's way and eventually denied liability altogether. Rather than honouring its obligations under the bond, it chose inaction, obstruction, and ultimately an illogical statement of denial of liability tying § 3.3 to 247's desire to pay for the demolition out of salvage sales.

[129] I therefore construe the letter of August 21, 2018, from Graphic's lawyer notifying Talisman and 247 that Graphic had hired a demolition contractor, as Graphic's agreement to pay the "Balance of the Contract Price" to a contractor selected to perform the construction contract. The demolition work included the "Purchaser's Work" as described in Schedule "C" and s. 2.05 of the APS.

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b) Graphic's Conduct

[130] Talisman argued that, even if the circumstances triggered its obligations under the bond, Graphic's conduct prejudiced Talisman's rights under the bond when Graphic:

a) failed to comply with the information and documents request for 19 months

b) solicited bids from contractors without Talisman's knowledge or consent

c) retained a contractor to complete the work, without Talisman's knowledge or consent

d) obtained injunctions without Talisman's knowledge or consent, thereby altering the construction contract with 247

e) agreeing with 247 to extend the time for performance

f) removed salvageable materials from the site, prejudicing Talisman's ability to recover amounts it might have paid under the Bond

[131] I can address these points in point form:

a. The bond contained no right on the part of the surety to ask for the information or obtain the documents in its request. It contained a right to a meeting before the declaration of default, and Talisman did not even respond to Graphic's request for one.

b. Graphic did not engage in the bidding process or hire the demolition contractor until it had exhausted its options to compel 247 to perform the work, even under the renewed commitment.

c. The Ministry was breathing down Graphic's neck as the party responsible for the rehabilitation of the entire site. Talisman's history of tardy or counterproductive response and failure to exercise its right to hire a contractor with Graphic's consent meant Graphic reasonably proceeded to hire the demolition contractor.

d. I need not explain why Graphic would need to obtain a court injunction to enter and take possession of the site, to perform the work ordered by the Ministry.

e. The agreement with 247 did not prejudice Talisman. In fact, Talisman advocated how 247 was performing diligently because of the letter agreement.

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f. If recoupment of salvage was part of Talisman's plan to set off liability under the bond, Talisman made no overture to Graphic undertaking to take over the salvage part of the operation.

[132] I therefore reject Talisman's argument that Graphic's conduct in any way impeded Talisman from honouring its obligations under the performance bond.

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c) Variation of Bonded Contract

[133] Talisman argued that, by providing 247 with periods of grace and by accepting 247's April 2018 commitment letter, Graphic varied the contract without Talisman's consent. It relied on a line of authority that material variations of the construction contract, unless unsubstantial or beneficial to the surety, operates to discharge the surety's obligation. *Doe et al. v. Canadian Surety Co*., [1937] SCR 1, at p. 3; *New Look Restoration Ltd. v. Osgoode Developments Ltd*., 1992 CarswellOnt 883, at para. 41; and *Marigold Holdings Ltd. v. Norem Construction Ltd*., (1988) 60 Alta. L.R. (2d) 289 (QB), at p. 41.

[134] It is trite law that a change that imposes additional risk on a surety should discharge the surety from its obligations under a performance bond. It is no different from a debtor who renegotiates a loan to one attracting higher risk of default, without securing the guarantor's consent. All the cases cited by Talisman refer to materiality of the change. In support of the discharge argument, the court in *Marigold* pointed out at para. 121, that the surety's obligations extend beyond insuring payment for "whatever went wrong" and was primarily one of remedying the default. The risk of contractor default the surety undertook to backstop, cannot change.

[135] Allowing the contractor more time to perform the work, even past the deadline for completion, cannot prejudice the surety. By providing timely notice of 247's breach of the obligation to provide a scope of work and anticipatory notice of Graphic's intention to declare a default under the demolition agreement, Graphic provided Talisman with ample opportunity to engage with 247 and to make plans to substitute 247 with one of Talisman's choosing. Graphic exhibited extraordinary reserve by not suing 247 and Talisman right after it served notice following the 24-month period of 247's failure even to start the work and Talisman did nothing to intervene. The only change Graphic permitted was to reduce Talisman's risk of 247's default and to increase Graphic's risk of regulatory sanctions under Québec environmental law.

[136] There is no merit to Talisman's argument that Graphic varied the contractor's obligation under the APS beyond allowing 247 the opportunity to perform the work before the Ministry brought down the hammer and ordered Graphic to complete it.

4) GRAPHIC'S DAMAGES

[137] The contractual face value of Talisman's bond was $2 million. However, the cost of the demolition far exceeded the limits of the bond.

[138] In the overall landscape of the parties positions and arguments, the $2 million value amounted to a contractual limit on Talisman's liability.

[139] On February 18, 2019, Graphic signed a contract with a contractor called Demolition Plus to perform 247's work, at a contract price of $5,403,825. Graphic expanded the scope of work in March 2019 to include abatement plans and other aspects of environmental control. These changes raised the contract price to $6,538,628. The work is now complete, subject to regulatory requirements to monitor surface and groundwater. Graphic has introduced invoices supporting its overall costs of $6,672,713.45.

[140] Graphic did not realize a profit on the metal salvage. Instead, it incurred a loss of $2,215,529.17. The APS was silent on the issue of salvage. However, the costs Graphic incurred for extraction, sorting, transportation and disposal related to the scrap metal were part of 247's obligations under its demolition undertaking. Thus, the net sales of $2,286,585.55 fell well short of the costs of $4,502,114.72.

[141] To date, 247 has not repaid the $750,000 holdback earmarked for the "Purchaser's Work" component of the demolition. Because of 247's breach of the demolition obligation, this amount must be added to 247's liability for damages but not to Talisman's.

[142] I must now turn to the issue raised by both defendants: If they are liable to Graphic in breach of contract, the invoices submitted by Graphic for the demolition work must be scrutinized in a damages trial. Because this is a breach of contract case, the question is whether measure of damages is the amount spent by the party not in breach to pay for the work that the defaulting party failed or refused to complete.

[143] § 6 of the bond provided for the surety's default for failing to proceed promptly with available options under § 5:

> § 6 If the Surety does not proceed as provided in Section 5 with reasonable promptness, the Surety shall be deemed to be in default on this Bond seven days after receipt of an additional written notice from the Owner to the Surety demanding that the Surety perform its obligations under this Bond, and the Owner shall be entitled to enforce any remedy available to the Owner. If the Surety proceeds as provided in Section 5.4, and the Owner refuses the payment or the Surety has denied liability, in whole or in part, without further notice the Owner shall be entitled to enforce any remedy available to the Owner.

[144] This provision consisted of two parts. The first part should apply, because each of the notice letters issued by Graphic called on Talisman to assist, starting with the initial

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request for a conference. The second part also applies, because Talisman ultimately proceeded under § 5.4.2 by denying liability.

[145] In the context of liability insurance, a reasonable settlement of a claim is a foreseeable consequence of an insurer's breach of contract by a wrongful refusal to defend a lawsuit: *Jon Picken Ltd. v. Guardian Insurance Co. of Canada*, (1993) 17 C.C.L.I. (2d) 167 (ON CA), at para. 16, adopting *Cansulex Ltd. v. Reed Stenhouse Ltd*., (1986) 70 B.C.L.R. 273 (BC SC), at p. 53. Although frequently raised in insurance coverage cases, the award of damages measured by the cost of a reasonable settlement is rooted in contract law. In *Jon Picken*, the Court of Appeal upheld a summary judgment for the amount paid to settle a claim the liability insurer refused to defend. At para. 16, the court held:

> [A] reasonable settlement can be viewed as a foreseeable consequence of the appellant's breach of contract by its wrongful refusal to defend the Knoch estate action. This was the effect of the judgment in *Cansulex Ltd. v. Reed Stenhouse Ltd.*, [1986] I.L.R. 1-2090 (B.C. S.C.). We agree with the approach taken by McEachern C.J. in that case. We do not hold that any settlement is reasonably foreseeable. For the purposes of this case we need go no further than to say that this settlement (the reasonableness of which is not in issue), made on the advice of counsel, is a reasonably foreseeable con-sequence of the appellant's breach of its duty to defend the respondents, Jon Picken Limited and Jon Picken.

[146] In *Cansulex*, at para. 150, McEachern C.J. stated:

> The liability of Cansulex has never been determined judicially and the insurers should not be condemned to pay any amount except in accordance with their policy obligations unless the law provides otherwise. On the other hand, the law would fit Mr. Bumble's characterization if, after a denial of coverage, Cansulex is required to prove itself liable to Bibby in order to recover a reasonable amount paid to buy peace when it has spent 33 days and over $2,000,000 in a foreign court asserting the opposite.

[147] Graphic paying contractors to complete work that 247 failed to perform is not the same as settling a liability claim. One is payment of the full cost of the work, whereas the other is a product of risk management weighing litigation risk against a third-party claimant's ability to prove liability and damages. The point both courts made, however, is that it does not lie in the mouth of the party in breach of contract to quarrel with the innocent party over the cost to the plaintiff of making up for the breach, provided the cost is reasonable. Just as a defendant to a lawsuit that an insurer has refused to defend must settle the claim prudently, Graphic has every reason both to comply with the regulatory order to the Ministry's satisfaction and to pay the least amount for the work. Both 247 and the surety having left Graphic to pay out of pocket for work for which it never budgeted in the APS. Neither defendant pointed to a reason to question the

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invoiced charges. They could not simply rely on the court's trial delays to put off liability to compensate Graphic for the cost of the demolition services.

[148] Subrule 20.02(2) provides that, in response to affidavit material or other evidence supporting a motion for summary judgment, a responding party may not rest on pleaded allegations or denials. The respondent must set out, in affidavit or other evidence, specific facts showing that there is a genuine issue requiring a trial.

[149] Neither defendant introduced evidence contesting the demolition invoices or seriously cross-examine Graphic's affiant on the issue. The only contestation was Talisman's argument that Graphic had failed to particularize or segregate the calculation of demolition costs evidenced by the invoices from the environmental consultants, demolition contractor, and salvage company. On my review of the source documentation, introduced as business records, there was nothing there except what one would except in documentation supporting a claim for damages at trial or presented by an insured to an insurance adjuster in an insurance claim. The contractors' services and charges were plainly stated. The respondents to the motion did not identify any calculation error or factual discrepancy between Graphic's presentation of damages and the data in the business records.

[150] 247 is therefore liable to Graphic in breach of contract for $6,672,713.45, plus $750,000 for the wrongly withheld holdback from the purchase price. Talisman's liability to Graphic, concurrent with 247's, is limited to $2,000,000. I will not determine whether Talisman is entitled to reimbursement from 247 for any amount paid to Graphic, because the issue between the defendants was not before me.

247'S COUNTERCLAIM FOR IMPROVIDENT SALE OF METALS

[151] Pursuant to the interlocutory and permanent injunctions obtained by Graphic, it carried out the demolition and rehabilitation of the buildings and appurtenant site in accordance with the rehabilitation plan approved by the Ministry. 247 has counterclaimed for the value of the salvageable metals left on the site at the time of Graphic's possession under the court orders, on the basis that it represented a form of conversion of property rightly belonging to 247. Graphic submitted that the counterclaim should be dismissed, because the claim for the metals is subsumed in the credit for the sold salvage in the cost of remediating the property and mitigating the overall loss.

[152] 247 had intended to generate a profit from the salvage, to help cover the cost of the demolition and remediation and potentially to secure a financial gain. Going into the purchase, 247 had estimated the value of the salvage at $7 million. During 247's salvage operation, it hauled non-contaminated material offsite and stockpiled contaminated material onsite. After the interruption of the salvage operation in 2018, it reassessed the remaining value at $5 million. Local vandals and thieves were stealing several thousand dollars' worth of material, such that 247's estimate downgraded

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further to $4 million by the time the first injunction dispossessed it of the site. As stated previously, Graphic's salvage contractor recouped $2,286,585.55 in net sales, but this amount fell well short of the disposal costs of $4,502,114.72.

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[153] Graphic pointed out that 247 had not produced any accounting of the alleged $3 million representing the combined 247 salvage and thefts lowering its estimate of value left on site in Graphic's care. In fairness to 247, the salvage proceeds during its operations belonged to it. However, the question remains how 247 intends to assert a counterclaim for the difference between the $4 million estimate and the $2,286,585.55 value extracted by Graphic and credited toward damage mitigation. It may have made sense for Graphic to characterize the $4,502,114.72 in disposal costs as a set-off. However, in isolating the value of the counterclaim before any set-off, the court must consider whether 247's approximate figure of $3.7 million represents a viable claim to be assessed at a trial.

[154] 247's figures were round figures and bald assertions of value. Graphic produced evidence that its agent had sold the scrap metal in accordance with the market price set by the American Metal Market, and that much of it was unsellable because of contamination by lead paint. It also pointed to the admissions by 247 that the higher-value uncontaminated metals had already been sold by 247 or stolen under 247's supervision.

[155] In isolation, the argument presented in the counterclaim represents an accounting of imponderable factors in which the evidence is either unattainable or withheld by 247. Graphic has accounted for its recovery of the value of the metals and has deducted it as a set-off from its claim for damages. Ultimately, the interlocutory injunction permitted and authorized Graphic to execute the demolition and remediation of the site, including the disposal and elimination of contaminated rubble, including what it salvaged and sold.

[156] Had 247 performed its demolition work in accordance with the APS, 247 could have found out for itself whether the remaining materials after the initial salvage of clean materials was worth as much as $4 million. Instead, it prioritized the salvage operation. Its priority, whether motivated to fund the demolition or to make a profit, did not matter. What mattered was its failure to perform its contractual obligation to demolish the mill.

[157] The counterclaim can be addressed without the need for a trial. The APS is silent about 247's extraction of the metals. It simply required 247 to carry out the demolition and work on landfill. Had it carried out the demolition work as required, 247 was at liberty to extract the remaining scrap metal of value from the rubble and use the proceeds as it pleased. After breaching the agreement by trying to strip and sell the metals from the equipment and other readily extracted parts of the facility prior to demolition, it temporarily lost possession while Graphic exercised its rights under the court order to complete the work under the Ministry mandate. Can 247 lay claim to title in the salvageable metals in the building demolished by Graphic and disposed of as ordered by the provincial authority?

[158] As a matter of property law, title to personal property such as a commodity cannot be traced into other property into which it is incorporated. In *Clough Mill Ltd. v. Martin*, [1984] 3 All ER 961, at pp. 988-89, Goff L.J. explained why the claim of suppliers of resin incorporated into chipboard could not be traceable into a debtor's estate in a receivership. Nevertheless, 247 had every right to sell the salvageable metals that it did extract and sell while the mill buildings were under its dominion. The question here is whether Graphic was required to account for the value of materials that it did or could have extracted from the buildings it had to demolish after 247 failed to perform that work.

[159] *Kokomo Investment Company v. Dominion Harvester Company*, (1918), 43 D.L.R. 198, 14 Alta LR 27 (C.A.), the owner of industrial property sold it to a purchaser on condition that the latter install machinery in the factory and operate it as a going concern. Pursuant to the sale agreement, breach of the condition would trigger the purchaser's obligation to reconvey the land, building, and fixtures back to the vendor. With consent of the parties, the purchaser installed shell-making machinery as part of the war effort instead of the originally contemplated equipment. After fire destroyed the building and part of the shell-making machinery, the transferee removed the remains of the equipment and repaired it for use in another factory. The Alberta Court of Appeal held that the transferor was entitled to a reconveyance of the land but not to the machinery removed from the site.

[160] The majority opinion of Stuart J., at p. 37, denied the original owner's right to the machinery as part of the reconveyance, because the machinery did not amount to fixtures, even though some of it may have been nailed to the floors. The concurrent opinion of Beck J., at pp. 39-40, stated further that the plaintiff was not entitled to the machinery, and the issue did not turn on the question of whether they were fixtures. He relied on a similar case in *Appleby v. Myers* (1867), L.R. 2 C.P. 651, in which the suit for the removed equipment was rejected because the default triggered by the building fire created only a right to reconveyance of the land so far as it remained.

[161] *Kokomo* is instructive, because contract law ultimately determined the outcome, not property law. Here, the injunction authorized Graphic to repossess the site for the purpose of carrying out the demolition work after 247 defaulted on the obligation. Graphic hired contractors to demolish the mill. As part of the environmental disposal of the debris, it hired other contractors to dispose of and sell the salvageable materials. 247's claim for damages based on its proprietary claim to scrap metal embedded in the demolished structure and on criticism of Graphic's salvage efforts cannot be based on ownership of the materials extractable from the building rubble, because the materials were all embedded or part of the buildings that 247 had left behind after its own salvage efforts.

[162] The court order and Ministry order mandated Graphic to demolish and remove the buildings, including the salvageable components. While salvage is a reasonable and prudent mitigation measure in the demolition, the only party interested in the salvage as distinct from the demolition was 247. It relinquished the opportunity to extract the

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alleged remaining value, by dragging its heels much longer than the contractual deadline for completing the demolition. 247 offered no evidence that its efforts, after selling off the premium metals itself or having it stolen, would have been more economically sound than Graphic's. Had Graphic demolished the buildings and disposed of the rubble without salvaging any metal, no legal principle entitled 247 to lay claim to it in the absence of a provision in the contract or in the court order obligating Graphic to preserve the metal for 247's benefit.

[163] The record made it clear that an inventory and a valuation of available salvage, from the time of 247's acquisition of the site, to the time of unknown losses to thieves and vandals on 247's watch, were impossible to set a baseline for comparison with the value obtained by Graphic's salvage contractors. 247 having fatally prejudiced Graphic's ability to defend the counterclaim at trial, its demand that the counterclaim requires a trial is a hollow attempt to delay the final resolution of the proceedings. It was reasonable for Graphic to hire a specialist firm to deal with the salvage. Bald assertions that 247 could have extracted more value from the salvage do not amount to evidence warranting a trial of the counterclaim.

[164] 247's counterclaim for the value of the metals in the building demolished by Graphic pursuant to the court order cannot succeed. No trial is therefore required to determine Graphic's liability or to assess the value of the claim. The counterclaim by 247 against Graphic is hereby dismissed.

CONCLUSION

[165] Summary judgment will therefore issue in favour of Graphic against 247 for breach of contract, for $6,672,713.45, plus $750,000 for the wrongly withheld holdback from the purchase price.

[166] Talisman is liable to Graphic under the performance bond, concurrent with 247's, but limited to $2,000,000.

[167] 247's counterclaim for damages related to Graphic's inadequate recovery of salvage is dismissed.

[168] I encourage the parties to settle the issue of costs. If they are unable to resolve the costs by January 30, 2026, counsel may approach by judicial assistant by email with a schedule for exchange of bills of costs and submissions.

Akazaki J.

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Date: December 24, 2025

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