# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *H.R.S. Resources Corp. v. Thompson Creek Metals Company Inc.,* 2026 BCCA 6

Date: 20260113
Docket: CA50242

Between:

**H.R.S. Resources Corp.**

Appellant/
Respondent on Cross Appeal
(Plaintiff)

And

**Thompson Creek Metals Company Inc.**

Respondent/
Appellant on Cross Appeal
(Defendant)

Before: The Honourable Justice Griffin
The Honourable Justice Edelmann
The Honourable Justice Warren

On appeal from: An order of the Supreme Court of British Columbia, dated October 8, 2024 (*H.R.S. Resources Corp. v. Thompson Creek Metals Company Inc.*, 2024 BCSC 1847, Vancouver Docket S201711).

| | |
|---|---|
| Counsel for the Appellant/Respondent on Cross Appeal: | S.T. Robertson<br>N.P.R. Bond |
| Counsel for the Respondent/Appellant on Cross Appeal: | D. Brown<br>J.R. Buysen |
| Place and Date of Hearing: | Vancouver, British Columbia<br>October 9–10, 2025 |
| Place and Date of Judgment: | Vancouver, British Columbia<br>January 13, 2026 |

**Written Reasons by:**
The Honourable Justice Griffin

**Concurred in by:**
The Honourable Justice Edelmann
The Honourable Justice Warren

***Summary:***

*The appellant, HRS, the royalty holder, appeals from a summary trial judge's interpretation of a mining royalty agreement. The respondent, TCM, the mine operator and royalty payer, cross appeals.*

*Held: Appeal allowed, cross appeal dismissed.*

*The judge erred in his treatment of the expert accounting evidence, allowing it to overwhelm the terms of the royalty agreement. The reference to generally accepted accounting principles in the agreement did not incorporate the manner in which TCM reported revenues on its financial statements for a series of transactions. The judge erred in finding that TCM could treat the series of transactions as a single transaction for purposes of paying royalties and thereby discount to zero the revenues generated by actual sales of mineral products from the mine.*



**Reasons for Judgment of the Honourable Justice Griffin:**

## Introduction

[1] H.R.S. Resources Corp. ("HRS") appeals from a summary trial judge's determination of the amount of royalties owed to it by the respondent, Thompson Creek Metals Company Inc. ("TCM"), under a 1986 royalty agreement (the "Royalty Agreement").

[2] Under the Royalty Agreement, the mine owner and operator, now TCM, is to pay royalties to the royalty holder, now HRS, based on mineral production from the Mount Milligan Mine.

[3] If HRS succeeds, the royalties it is owed will be substantially larger than determined by the judge and will be based on the revenues generated by TCM selling minerals produced by the mine to parties known as offtakers, at market prices.

[4] TCM cross appeals. If TCM succeeds, the royalties it owes HRS will be substantially less than determined by the judge and will be based on a fixed price that is well below market value of the minerals, determined by a subsequent agreement that TCM entered into with a third party, Royal Gold Inc. ("Royal Gold").

[5] The case turns on the meaning of clause 7 in the Royalty Agreement:

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

[6] This clause refers to "Net Smelter Returns…determined in accordance with Schedule B" to the Royalty Agreement, and so the meaning of Schedule B is also at issue. Schedule B reads:

> Production Royalty
>
> 1. For the purposes of this Schedule and for determining the Production Royalty referred to in Clause 7 of the Agreement to which this Schedule is attached, the term Net Smelter Returns shall have the following meaning, have the following deductions, and commence on the following basis:
>
> a) Net Smelter returns for the purposes hereof shall mean any and all amounts returned from smelter to Optionee after deduction of smelting and refining charges and [*the word depreciation is deleted by hand and initialled*]. Net smelter returns shall apply to the sale or deemed sale of all ores produced from the Property or concentrates derived therefrom determined in accordance with generally accepted accounting principles consistently applied.
>
> b) If the ores or concentrates are treated at a smelter or refinery owned, operated or controlled by the Optionee or an affiliate of the Optionee, smelting and refining charges are to be equivalent to the prevailing rates charged by similar smelters and refineries in arm's length transactions for the treatment of like quantities and quality of ores and concentrates.
>
> c) For the purposes of this Schedule and Agreement and for determining the Net Smelter Return, the following shall apply:
>
> (i) The payment of Net Smelter Returns shall not commence until the said claims have been put into commercial production as hereinafter defined and according to the following schedule:
>
> a) Year one of commercial production - no payment of Net Smelter Returns.
>
> b) Year two of commercial production - no payment of Net Smelter Returns.
>
> c) Year three of commercial production - the payment of Net Smelter Returns shall commence and continue

each year thereafter as long as commercial production is maintained.

d) Net Smelter Returns shall be calculated by the Optionee at the end of the calendar quarter in which the ores or concentrates from the Property were sold or otherwise deemed disposed of and payment to the Optionor shall be made by the Optionee within 45 days after the end of each quarter.

2. "Commencement of Commercial Production" means

a) If a Mill is located on the Property, the last day of a period of 40 consecutive days in which, for not less than 30 days, such concentrator processed ore from the Property at 60% of its rated concentrating capacity, or

b) If no Mill is located on the Property, the last day of the first period of 30 consecutive days during which ore has been shipped from the Property on a reasonably regular basis for the purpose of earning revenues; but no period of time during which ore or concentrate is shipped from the Property for testing purposes, and no period of time during which milling operations are undertaken as initial tune-up, shall be taken into account in determining the date of Commencement of Commercial Production.

…

[Emphasis added.]

## Background

[7] The relevant background facts are not in dispute.

[8] In 1986, Lincoln Resources Inc. ("Lincoln"), a predecessor to TCM, acquired rights to four mining claims in the Mount Milligan area of British Columbia from Richard Haslinger Sr. (HRS's predecessor). In return, among other things Mr. Haslinger was promised a 2% production royalty on "Net Smelter Returns". I have set out the key terms in the introduction above.

[9] There were amendments to the Royalty Agreement in 1988, to provide for advance royalty payments and to extend the time for Lincoln to exercise the option to acquire the mining rights, but these amendments are not relevant to the issues between the parties.

[10] In 2010, TCM's predecessor, Terrane Metals Corp. ("Terrane"), entered into an agreement with Royal Gold (the "Streaming Agreement"). This agreement was amended several times from 2011 to 2016.

[11] For ease of reference, when I refer to HRS I am referring also to its predecessors; likewise, when I refer to TCM I am referring to its predecessors and successors.

[12] Under the Streaming Agreement, Royal Gold provided a large cash deposit (initially US $311.5 million, later amended to US $781.5 million) (the "Deposit") in return for Terrane's (and later TCM's) commitment to providing refined gold to Royal Gold at a fixed price. The quantity of gold delivered to Royal Gold was based on a percentage of the gold derived from the mine. This quantity was initially 25% of refined gold and later amended to 52.25% in 2012.

[13] There were two components to the consideration Royal Gold paid for the refined gold under the Streaming Agreement: (1) a below-market fixed price of $435 per ounce paid upon delivery of the gold; and (2) a deferred revenue component that represented a prorated credit against the Deposit. The deferred revenue component would no longer apply once TCM earned the entire Deposit.

[14] In the final iteration of the Streaming Agreement, TCM agreed to provide Royal Gold with refined gold equivalent to 35% of the mine's total gold production at a fixed price per ounce (discounted from the market price) and refined copper equivalent to 18.75% of total copper production at 15% of the market price.

[15] It is important to note that the Streaming Agreement did not require TCM to transfer minerals derived from the mine itself. TCM could obtain the minerals it committed to sell Royal Gold on the open market, and this is what it did. The quantity of minerals it was to transfer to Royal Gold was based on a percentage of the mine's actual production, but the minerals delivered to Royal Gold were derived elsewhere.

[16] Beginning in 2011, Terrane and TCM entered into agreements with third parties known as offtakers ("Offtakers") who purchased mineral products from the mine. These agreements are referred to as Offtaker Agreements. Some of the Offtakers smelt and refine concentrate produced by the mine to produce refined gold, copper, and silver. Other Offtakers act as traders and sell the mine concentrate to subsequent purchasers who smelt and refine it.

[17] TCM's Form 10-K filed with the US Securities and Exchange Commission for the 2015 year-end indicates that to fulfill its obligations under the Streaming Agreement, TCM first sold copper and gold concentrate to Offtakers. TCM then purchased gold ounces in the market for delivery to Royal Gold based on a percentage of the gold ounces in the concentrate it sold to Offtakers.

[18] The mine achieved commercial production in 2014, and the first royalty payments were due to HRS in 2016.

[19] In 2016, TCM notified HRS by letter as to how it would calculate the royalties owed under the Royalty Agreement. At the time of the letter, the Streaming Agreement required TCM to provide Royal Gold with refined gold equivalent to 52.25% of the mine's gold production.

[20] TCM's letter distinguished between royalties for copper, silver, and gold. For copper and silver, TCM would recognize 100% of the revenue from sales to Offtakers at the appliable contractual price from the smelter or mark-to-market price for sales not yet finalized. For gold, it would divide the revenues into two categories. For 47.75% of the gold content, TCM would recognize 100% of the revenue from sales to Offtakers. For the remaining 52.25%, TCM would recognize the revenues from Royal Gold pursuant to the Streaming Agreement.

[21] In other words, TCM's position was that it could divide its gold sales to Offtakers into two categories to calculate the royalty payments:

a) For sales representing some 52.25% of the gold produced by the mine, TCM decided it could ignore, or discount to zero, the actual revenues it received

from Offtakers because of its secondary obligation to Royal Gold to subsequently sell gold to Royal Gold at a reduced price. TCM's rationale was that its revenues for royalty purposes were limited to the fixed price for gold that it would receive from Royal Gold under the Streaming Agreement, subject to gains or losses on TCM's commodity gold contracts used to hedge market gold price volatilities when fulfilling its delivery obligations ("hedging expenses"). In addition, TCM's initial position was also that it would pay royalties on an amount of deferred revenue each year, determined as a percentage of Royal Gold's Deposit.

b) For the balance of the gold produced by the mine, TCM recognized that it had to calculate its royalty based on 100% of the revenues received from Offtakers.

[22] As mentioned, the fixed price of gold under the Streaming Agreement was discounted and considerably less than the market price Offtakers paid to TCM. For example, TCM reported in its Form 10-K that on February 22, 2016, the closing market price for gold was $1,211 per ounce. Under the Streaming Agreement, the fixed price for the gold it delivered to Royal Gold was $435 per ounce.

[23] Initially in its annual financial statements, TCM treated a portion of the Deposit as "deferred revenue" (i.e., a prepaid stream of future income). TCM's treatment of the Deposit changed after Centerra Gold Inc. ("Centerra") acquired TCM in October 2016. As a result of the change in TCM's corporate ownership, TCM classified the Deposit as an asset and no longer recognized any portion of the initial Deposit paid by Royal Gold as "deferred revenue" in its financial statements.

[24] As of the date of the summary trial, TCM's position was that its royalty payments with respect to the amount of minerals it committed to provide to Royal Gold were limited to being based on the fixed price it obtained for those minerals under the Streaming Agreement, taking into account hedging expenses but excluding deferred revenue or any value related to the Deposit. TCM continued to

maintain the position that it could ignore the equivalent proportion of actual sales of mine products to Offtakers.

[25] HRS's position was that it should receive royalties based on 100% of the sales of mineral products from the mine to Offtakers. HRS's position was that TCM's subsequent Streaming Agreement obligations, which led TCM to buy and sell mineral products in the market, were irrelevant to the calculation of the royalty.

[26] The parties agreed that the issue of how to treat royalties on the sales of mineral products could be determined by summary trial application. Much of the evidence as to the background contracts was set out in an agreed statement of facts. The parties filed affidavits and tendered transcripts from the cross-examination of witnesses as evidence. In addition, TCM filed two expert reports. These experts were cross-examined, and the transcripts were provided to the judge.

**Summary Trial Judgment: 2024 BCSC 1847**

[27] Following an eight-day summary trial, the judge delivered reasons for judgment indexed as 2024 BCSC 1847 ("Reasons").

[28] The judge outlined the background facts in extensive detail. He understood that the issue before him was one of interpretation of the Royalty Agreement. He summarized the principles of contract interpretation as set out in *Sattva Capital Corp. v. Creston Moly Corp*, 2014 SCC 53 [*Sattva*], and related cases: Reasons at paras. 129–139.

[29] The judge accepted expert evidence from Dr. Graham Davis, a mineral economist, whose evidence was tendered by TCM, on the commercial matrix that would have been known to the parties at the time of the Royalty Agreement. Relying on this evidence, the judge found that the parties entering the Royalty Agreement:

a) Appreciated the "speculative and high-risk nature of mine development", as mines require substantial capital commitments and few projects reach commercial production: at paras. 33, 186;

b) Appreciated that mine owners and their respective interests often change many times and in many combinations: at para. 34;

c) Understood the industry use of the term “smelter returns” to refer to all revenues realized from the disposition of product obtained from the mine: at para. 186(g), (i),

d) Understood the different types of royalty agreements common in the mining industry, including different risk/reward profiles as between a net smelter return (NSR) royalty and a net profit interest (NPI) royalty: at para. 186(f) to (i);

e) Had no experience with streaming agreements, as this means of securing capital to bring a mine into commercial production had yet to emerge in the market: at para. 187.

[30] On the difference between a NSR royalty and a NPI royalty, the judge found that an NSR royalty is typically based on production revenues with few deductions and therefore at a lower rate, in the range of 2% to 2.5%. By contrast, an NPI royalty is tied to the net profit of the mine and mine operator and therefore commands a higher return rate of 10% to 20% of net profit.

[31] In this regard, the judge found, at para. 186:

> (g) With regard to NSR royalties, it was [*sic*] commonly recognized in the mineral extraction industry that such royalty arrangements were a form of “production royalty”, in which royalty payments would be paid as a percentage of the “returns” received by the mine operator for mineral products obtained or derived from the mine, with limited, specifically enumerated allowable deductions. The allowable deductions would be linked to production of mineral products, not the profitability of the operation or the profits of the mine operator.
>
> (h) The royalty rate for an NSR royalty was typically in the range of 2.0% to 2.5% of returns on production. This is considerably lower than the royalty rate in a typical NPI royalty arrangement, which was 10% to 20% of net profit. The lower rate of return associated with an NSR royalty is reflective of the lower volatility and lower risk profile associated with such an arrangement, by comparison to an NPI royalty in which the royalty holder's fortunes are tied to a much greater extent to the ultimate profitability of the mining operation.

> (i) It was also commonly understood in the mineral extraction industry that the concept of a "smelter return" royalty was not limited to returns from actual smelters. Rather, the phase "smelter returns" was understood within the mining industry to apply to all "returns" or "revenues" realized from the disposition of product, whether to an actual "smelter", or to some other kind purchaser. This could include a purchaser engaged in trading of mineral ores prior to smelting, or a purchaser that produces metals by means other than "smelting". In effect, the phrase "smelter returns" had become a term of art in the mining industry, with the word "smelter" being taken beyond its technical meaning, to apply to any purchaser of mineral products obtained from the mine.
>
> [Emphasis added.]

[32] The judge explained further that the language of this Royalty Agreement, understood in context, made it clear that the parties intended a revenue-based production royalty, not a profit-based royalty:

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

[33] As for the products to which the royalty was to apply, the judge held that the royalty was intended to capture any and all mineral products derived from the mine in whatever form, whether as minerals, ores, or concentrates: at para. 197. He further held that it was to apply to all revenues received by the owner from materials produced or derived from the mine: at para. 192. He held that the use of the word "returns" was synonymous with revenues received by Lincoln from the disposition of mineral products produced from the mine property: at paras. 200–202.

[34] The judge accepted that the "phenomenon of streaming agreements as a means of securing capital to bring a mining development into commercial production had yet to emerge" and was "entirely unknown" at the time of the Royalty Agreement: at para. 187.

[35] On appeal, no party takes issue with the above findings.

[36] Despite these findings, the judge considered the "substance of TCM's marketing arrangements with both the Offtakers and Royal Gold" and concluded that under the "combined operation" of these arrangements, TCM's revenues for the portion of gold and copper sold to Royal Gold were funds received from Royal Gold: at para. 231. The judge explained he reached this conclusion based on three factors: (1) the "totality" of the contractual arrangements in place between TCM, the Offtakers, and Royal Gold; (2) the "economic reality" of how TCM monetized its production of mineral products from the mine, noting that the Streaming Agreement was entered into for "sound business reasons"; and (3) the substance of the transactions "from an accounting perspective": at paras. 232–249 (emphasis added).

[37] The judge relied on the accounting evidence of Dr. Daniel Thornton, whose evidence was led by TCM, in support of his conclusion that the "substance" of TCM's arrangement with Royal Gold and the "combined operation" of the arrangements with Offtakers and Royal Gold ought to be considered when determining royalties. The judge relied on Dr. Thornton's opinion evidence for "the proper characterization of the Streaming Agreement, from the perspective of an accounting expert opining on GAAP": at para. 248. The judge accepted Dr. Thornton's opinion that the Streaming Agreement was properly characterized as a commodity sales agreement, as opposed to a financing agreement, based on its "substance" and its risk-reward profile: at para. 247.

[38] The judge concluded that TCM's expenses related to hedging activities were a "prudent business practice" and "not a separate line of business": at para. 254. He held that gains and losses arising from the hedging program and the "associated transaction costs" are properly considered in determining TCM's revenue, or returns,

in connection with the sale of refined metals to Royal Gold under the Streaming Agreement: at para. 257. While not permitted expenses, they are "all elements of TCM's revenue" and "fall into what is sometimes referred to as the 'revenue base'": at para. 257. Put simply, under GAAP they are smaller components in a "single transaction": at para. 257.

[39] The judge considered the issue of whether the Deposit ought to be considered as "deferred revenue" and therefore returns from smelter within the meaning of the Royalty Agreement. TCM first treated the Deposit in this manner until it was acquired by Centerra, after which TCM adopted new accounting practices and no longer treated the Deposit as deferred revenue. The judge held that a portion of the Deposit under the Streaming Agreement must continue to be treated as deferred revenue attracting the royalty obligation. This was in part because: (1) the language of the Royalty Agreement referred to GAAP being "consistently applied"; and (2) because clause 11 of the Royalty Agreement imposed an obligation on each party to act in good faith.

[40] Lastly, the judge rejected the argument that TCM had acted in a way that warranted punitive damages. The judge held that TCM did not breach its duty of honest contractual performance, as its communications with HRS concerning the status and calculation of the royalty payments were "transparent and forthright": at para. 289. Though the judge noted that TCM's post-decision to change the accounting treatment of the Deposit was inconsistent with its duty of good faith contractual performance, he found that it did not constitute reprehensible conduct that attracted punitive damages: at paras. 299, 303.

[41] The judge concluded:

> [305] To summarize the result:
>
> a) With respect to the share of Mount Milligan Mine production that TCM sells to Royal Gold under the Streaming Agreement, net smelter returns within the meaning of Schedule B, clause 1(a) of the Royalty Agreement are to be determined based on the payments TCM receives from Royal Gold.

> b) All transactions relating to TCM's hedging tied to the delivery of refined metals to Royal Gold are properly considered in determining net smelter returns under Schedule B, clause 1(a) of the Royalty Agreement.
>
> c) Deferred revenue associated with the Royal Gold deposit must be included in the determination of net smelter returns under Schedule B, clause 1(a), both before and after Centerra's acquisition of TCM; and
>
> d) HRS's claim for punitive damages is dismissed.



**Issues on Appeal**

[42] Both parties challenge the judge's conclusions. They collectively allege several errors of law, errors of fact, or of mixed law and fact.

[43] The central overarching question is whether the judge erred in his interpretation of the Royalty Agreement when considering the implications of the Streaming Agreement with Royal Gold.

[1] HRS's position on appeal is that the judge erred in holding that for the share of gold (and more recently other minerals) equal to that sold to Royal Gold, the NSR royalty must be determined based on the payments TCM receives from Royal Gold under the Streaming Agreement, not the revenue from sales to Offtakers. HRS submits that no interpretation of the Royalty Agreement can permit TCM to use its lower revenues from the Streaming Agreement, less hedging expenses, as a substitution for the revenues TCM receives from its sales of mineral products from the mine to Offtakers.

[2] TCM takes the position that the judge did not err in the manner asserted by HRS and properly based royalty payments on the Streaming Agreement revenues. However, TCM argues that the judge erred in treating the Deposit under the Streaming Agreement as deferred revenue for purposes of TCM's royalty obligation.

[44] HRS's position is that if it prevails on the appeal, the Streaming Agreement is irrelevant to the Royalty Agreement, and the cross appeal likewise becomes irrelevant and must be dismissed. However, if it does not prevail on the main appeal, HRS's position is that the cross appeal must still be dismissed. If the Streaming

Agreement is to be considered as generating returns for purposes of calculating the royalty due under the Royalty Agreement, then HRS says the Deposit must be considered as part of those returns.

**Standard of Review and Principles of Contractual Interpretation**

[45] The summary set out by Justice Tysoe in *AM Gold Inc. v. Kaizen Discovery Inc.*, 2022 BCCA 21, leave to appeal to SCC ref'd, 40111 (1 September 2022), references the principles of contractual interpretation and applicable standard of review:

> [50] There are four potential standards of review to be applied by the Court on this appeal in respect of the following:
>
> (a) questions of law;
>
> (b) findings of fact, including the drawing of inferences;
>
> (c) questions of mixed fact and law; and
>
> (d) interpretation of agreements.
>
> The leading authorities on these standards of review are *Housen v. Nikolaisen*, 2002 SCC 33, [*Housen*] and *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 [*Sattva*].
>
> [51] The standard of review to be applied to a question of law is one of correctness: *Housen* at para. 8.
>
> [52] The standard of review to be applied to a finding of fact (including inferences drawn by the trial judge) is whether the finding represents a palpable and overriding error: *Housen* at para. 10. An appellate court should interfere with a drawing of an inference by a trial judge only if it is clearly wrong or there is no evidence supporting the inference: *Housen* at para. 22.
>
> [53] The standard of review to be applied to a question of mixed fact and law is palpable and overriding error unless there is an extricable error in principle, in which case the standard to be applied to the extricable error in principle is correctness: *Housen* at para. 37.
>
> [54] As the interpretation of a contract involves the interpretation of the written word in the context of the factual matrix in order to determine the objective intentions of the parties, the standard of review is the same as the one to be applied to a question of mixed fact and law: *Sattva* at paras. 50 and 55. Appellate courts should be cautious in identifying extricable errors in the interpretation of contracts, and it should only occur rarely: *Sattva* at paras. 54–55.

[46] The above passage includes a summary of the principles enunciated by the Supreme Court of Canada in *Sattva*. *Sattva* was a case dealing with the scope of an

appeal from an arbitration decision and is a leading authority on principles that apply to contractual interpretation. It instructs us that:

> [47] Regarding the first development, the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at para. 27, *per* LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 64–65, *per* Cromwell J.). To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:
>
> > No contracts are made in a vacuum: there is always a setting in which they have to be placed.... In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.
> >
> > (*Reardon Smith Line*, at p. 574, *per* Lord Wilberforce)
>
> [48] The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement (see *Moore Realty Inc. v. Manitoba Motor League*, 2003 MBCA 71, 173 Man. R. (2d) 300, at para. 15, *per* Hamilton J.A.; see also Hall, at p. 22; and McCamus, at pp. 749–50). As stated by Lord Hoffmann in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98 (H.L.):
>
> > The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. [p. 115]
>
> [Emphasis added.]

[47] Most often questions of contractual interpretation are questions of mixed fact and law, given that the goal of contractual interpretation is to ascertain the objective intentions of the parties. However, an extricable error of law, while rare, will include "the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor": *Sattva* at paras. 53, 55.

[48] A summary of the relevant approach to reviewing a trial decision on contractual interpretation was also set out in *Chemtrade Electrochem Inc. v. Superior Plus Corporation*, 2025 ABCA 31, leave to appeal to SCC ref'd, 41732 (18 September 2025):

> [22] Applying legal principles of contractual interpretation to the words of a particular contract, viewed in light of the factual matrix, is generally treated as a question of mixed fact and law and reviewed on a deferential standard of palpable and overriding error: *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 at para. 50; *Ledcor Construction Ltd v Northbridge Indemnity Insurance Co*, 2016 SCC 37 at para. 21. If the trial judge applied incorrect principles in the interpretive exercise, failed to consider a required element of a legal test or failed to consider a relevant factor, those are extricable questions of law and lead to review on a correctness standard: *Sattva* at para. 53.
>
> [23] A palpable error is one that is obvious. An overriding error is one that had a material impact on the result. In the context of contractual interpretation, an interpretation that is unreasonable, or not reasonably available to the trial judge on the record, amounts to a palpable and overriding error: *IFP Technologies (Canada) Inc v EnCana Midstream and Marketing*, 2017 ABCA 157 at para. 64; *Montrose Hammond & Co v CIBC World Markets Inc*, 2020 ONCA 219 at paras. 8–9.

## Analysis

[49] Respectfully, the judge made a palpable and overriding error in concluding that the Streaming Agreement was part of the same "combined operation" as sales to Offtakers for royalty purposes under the Royalty Agreement. His analysis was based on the following premise: the sales of mineral products from the mine to Offtakers and the sales of minerals purchased on the open market to Royal Gold pursuant to the Streaming Agreement were to be treated under the Royalty Agreement as a single transaction. He effectively presumed that the Royalty Agreement anticipated treating multiple different transactions as a single one for purposes of calculating royalties, and this led the judge to ignore the revenues from what he considered to be related Offtaker sales.

[50] This was clearly wrong. The source of the judge's error was his misapplication of the accounting evidence. This error appears to have led him to make findings inconsistent with the language of the Royalty Agreement and with his

earlier findings as to the commercial matrix at the time the Royalty Agreement was made. It led the judge to find support for this accounting theory in individual words in the Royalty Agreement devoid of their context and to incorrectly emphasize the post-contractual evidence of TCM's commercial circumstances.

### Misapplying the Accounting Evidence on GAAP

[51] As mentioned, the source of the judge's errors was his misapplication of the accounting evidence of Dr. Thornton. The judge focused on the words "generally accepted accounting principles" ("GAAP") divorced from the context of the Royalty Agreement and contrary to the factual matrix that existed when the Royalty Agreement was executed. The judge allowed the accounting evidence regarding how to treat revenue from Royal Gold in TCM's financial statements to overwhelm the terms of the Royalty Agreement.

[52] Schedule B to the Royalty Agreement referred to GAAP in a limited context. The reference to GAAP appears in clause 1(a) as follows:

> Production Royalty
>
> 1. For the purposes of this Schedule and for determining the Production Royalty referred to in Clause 7 of the Agreement to which this Schedule is attached, the term Net Smelter Returns shall have the following meaning, have the following deductions, and commence on the following basis:
>
>  a) Net Smelter returns for the purposes hereof shall mean any and all amounts returned from smelter to Optionee after deduction of smelting and refining charges and [*the word depreciation is deleted by hand and initialled*]. Net smelter returns shall apply to the sale or deemed sale of all ores produced from the Property or concentrates derived therefrom determined in accordance with generally accepted accounting principles consistently applied.
>
> [Emphasis added.]

[53] TCM's counsel retained Dr. Thornton to prepare an expert report opining on how TCM should treat Royal Gold revenue from the Streaming Agreement under GAAP and under related international accounting standards known as International Financial Reporting Standards ("IFRS").

[54] The first point to note is that the question to the accounting expert was how TCM should treat revenue generated under the Streaming Agreement with Royal Gold in accordance with GAAP, not how to treat revenue from sales to Offtakers.

[55] More specifically, Dr. Thornton gave no opinion evidence on whether revenue from sales to Offtakers could be ignored as royalty-generating revenue under the Royalty Agreement. I do not suggest that this latter opinion would have been admissible; rather, I am illustrating that the accountant was asked a narrow question of limited relevance.

[56] Dr. Thornton explained that in his opinion, compliance with GAAP only pertains to how revenue is recognized in financial statements. As he put it in his report, “only financial statements can comply (or not comply) with GAAP”.

[57] While the judge referred to this aspect of Dr. Thornton’s opinion at para. 170 of the Reasons, respectfully, he did not appreciate its significance. He found that it meant that the parties “agreed to extend GAAP beyond its intended purposes”: Reasons at para. 172. By his reasoning, the judge seemed to find that the parties agreed to adopt an accountant’s view of GAAP standards applicable to the preparation of TCM’s financial statements as determining the question of what revenue would be subject to royalties under the Royalty Agreement. I do not see a basis for this finding in the evidence or the language of the Royalty Agreement.

[58] Dr. Thornton explained that financial statements prepared in accordance with GAAP are intended to provide reliable information to present and potential investors and creditors to assist them in their evaluation of the enterprise’s economic performance. This means they do not necessarily reflect the legal form of every transaction or every event.

[59] While the judge alluded to this evidence at para. 104 of the Reasons, in my view, he also did not recognize its significance. It is significant because the purpose and use of GAAP in financial statements is very different from the context of the purpose and use of GAAP in the Royalty Agreement.

[60] It is trite that not every reference to GAAP in a contract has the same meaning. The meaning of the words must be taken from the context of the contract as a whole, the commercial matrix at the time of the contract's formation, and the nature of the relationship of the parties: *Sattva* at paras. 47–48.

[61] For example, in *Close v. Weigh West Marine Resort Inc.*, 2009 BCCA 216, which concerned a contract for the sale of a business, the parties' contract expressly stated that financial statements would be prepared and calculations "will be made in accordance with generally accepted accounting principles": *Close* at para. 5. The issue was whether the closing financial statements were prepared in accordance with GAAP.

[62] In contrast with the agreement at issue in *Close*, here the context of the Royalty Agreement is not the sale of a business, nor is GAAP used in reference to the preparation of financial statements.

[63] As another example, in *Lake Louise Limited Partnership v. Canad Corp. of Manitoba Ltd.*, 2014 MBCA 61, leave to appeal to SCC ref'd, 36058 (26 March 2015) [*Lake Louise*], the parties were joint venturers who constructed and operated two hotels with video lottery terminals. They had a dispute over the sharing of revenues from these hotels as a result of an increase in the management fee charged by the defendant-respondent. The management fees were based on a percentage of gross revenues. The issue was the role of GAAP in determining gross revenues. The Court found that the trial judge erred in considering the accountants' evidence to assist him in the interpretation of the contract: *Lake Louise* at para. 38. However, the Court determined that GAAP did apply to the determination of gross revenues and that expert accounting evidence could assist in understanding how GAAP would treat some of the revenues in dispute: at para. 48.

[64] *Lake Louise* is not a helpful precedent for the present case. The context of the reference to GAAP was different from the present case, both contractually and in terms of the commercial matrix surrounding the parties' agreements. *Lake Louise* involved a profit-sharing agreement, not a royalty agreement. The parties' contract in

*Lake Louise* contained a stand-alone clause that provided that all calculations were to be made in accordance with GAAP unless otherwise expressly provided. Further, the parties' arrangements provided that the defendant-respondent would prepare financial statements, which were shared with the co-owner.

[65] Here, the paragraph introducing clause 1(a) of Schedule B to the Royalty Agreement suggests that the language that follows is intended to explain three concepts joined by the word "and": the meaning of NSR; deductions from revenues that are encompassed in that meaning; and the commencement date. Following this introduction, clause 1(a) lists specific deductions: (1) smelting and refining charges; and (2) transportation costs. The word "depreciation" was one of the listed deductions but was struck out by the parties.

[66] The factual matrix that existed at the time the parties entered into the Royalty Agreement was that neither party knew whether the mine would achieve commercial production, and both parties recognized that there could be changes in mine operators over time as the mine was developed.

[67] Also, the industry deliberately distinguished royalties based on revenues from sales of mine products, such as NSR, from royalties based on net profits, such as NPI, which have significantly different royalty rates: Reasons at para. 186(f)–(i).

[68] The higher royalty rates for NPI royalties recognized the fact that the royalty holder's returns were subject to the overall profitability of the mine operator. An NPI royalty would necessarily take into account a broader range of the mine operator's revenues and expenses than an NSR royalty would.

[69] In contrast, an NSR royalty would make the royalty earner less vulnerable to decisions by the mine operator and its accountants, as it would specify what deductions could be made from the sales revenues.

[70] The first part of the clause 1(a) in Schedule B therefore is consistent with the parties' understanding and intentions at the time they entered into the Royalty Agreement that NSR would mean gross revenues from sale of mineral products from

the mine less only the identified deductions. To the extent GAAP is referenced, it is limited by this context.

[71] This is a very different approach to revenue from the approach taken to report the mine operator's revenues in financial statements governed by GAAP, as described by Dr. Thornton.

[72] Dr. Thornton's report was lengthy and contained several opinions related to how TCM could report revenue from the Royal Gold Streaming Agreement on its financial statements to comply with GAAP. The report included accounting opinions that: the "substance" of the Streaming Agreement was a commodity sale agreement as opposed to a financing agreement; hedging expenses incurred by TCM could be treated as deductions decreasing the amount of Streaming Agreement revenue reported on TCM's financial statements; and the Deposit paid by Royal Gold could properly be treated on the financial statements under Centerra's accounting standards, IFRS, as not being deferred revenue. The judge rejected the last opinion and held that a portion of the Deposit should be treated as deferred revenue, which is the subject of TCM's cross appeal.

[73] The judge accepted the first two opinions of Dr. Thornton, but these opinions are unhelpful to the interpretation of the Royalty Agreement. Dr. Thornton's opinion that the Streaming Agreement could be characterized as a "commodity sales" agreement for purposes of reporting revenue on TCM's financial statements does not answer the question of what transactions and revenues are captured by the Royalty Agreement.

[74] Further, Dr. Thornton's opinion that hedging expenses could be deducted when reporting revenue from Royal Gold on TCM's financial statements was equally unhelpful to the task of interpreting the Royalty Agreement, other than to affirm that such an approach was at odds with the Royalty Agreement itself.

[75] It was clear from the language of the Royalty Agreement that the deductions were limited to those identified in clause 1(a) of Schedule B, consistent with the

known approach to NSR royalties in the industry at the time of the Royalty Agreement's formation. Accepting Dr. Thornton's application of GAAP for the purpose of reporting revenue on financial statements as applicable to recognition of revenue under the Royalty Agreement would expand the permissible deductions and effectively convert the NSR royalty to an NPI royalty or some hybrid of it. Such an approach fails to respect the full context of the Royalty Agreement's language referring to NSR and expressly limiting deductions. It also changes the relationship of the parties to the Royalty Agreement to one in which the royalty holder is dependant on the mine operator's internal accounting choices.

[76] I return to the point that the reference to GAAP must be understood in the context of the Royalty Agreement, which is a different context from that understood by an accountant tasked with preparing a company's financial statements.

[77] In my view, the judge failed to appreciate that Dr. Thornton's extensive opinions reinforced the conclusion that the parties could not have intended for the reference to GAAP in the context of the Royalty Agreement to have the same meaning as it would have for an accountant preparing financial statements. Not only did the purpose for the use of these standards differ, but the standards as described by Dr. Thornton contradicted the wider context of the Royalty Agreement.

[78] The judge erred in allowing the accountant's treatment of revenue in TCM's financial statements to influence the interpretation of the Royalty Agreement. The judge referred to the "combined operation" of the Offtaker Agreements and Streaming Agreement, the "substance of the transactions in issue from an accounting perspective", and the "sum total of TCM's contractual obligations" to support his conclusion that the revenue from sales to Offtakers could be ignored and replaced with revenues received from Royal Gold net of hedging expenses: Reasons at paras. 231–233.

[79] The judge's treatment of the "substance" of the multiple transactions as a single transaction, the transaction with Royal Gold under the Streaming Agreement, is not supported by legal authority, the Offtaker contracts, or by the language of the

Royalty Agreement itself. Rather, it is an accounting concept derived from Dr. Thornton's opinions on how TCM should treat revenue from Royal Gold on its financial statements.

[80] Dr. Thornton's opinion in relation to GAAP standards applicable to financial statements was that TCM's sales of gold output to Offtakers "spawns an amount due to Royal Gold", which TCM satisfies by purchasing gold on the open market for delivery to Royal Gold. Dr. Thornton described TCM's transaction with Royal Gold as "the last component of a series of separately identifiable components of a single transaction reflecting the substance of the transaction for accounting purposes". This lengthy description used to justify how TCM reports revenue on its financial statements takes one a long distance from the language of the Royalty Agreement.

[81] There is no language in the Royalty Agreement that would capture subsequent transactions by TCM in its operations which did not involve the sale of mineral products produced from the mine property.

[82] There is also no language in the Royalty Agreement to suggest the royalty holder agreed to additional deductions from sales revenues such as hedging expenses. The royalty holder also did not agree that the mine operator would have discretion to decide that some sales of mineral products derived from the mine property could be excluded from the royalty calculations.

[83] The judge's approach of treating TCM's sales of mine products to Offtakers and subsequent transaction with Royal Gold as a "combined operation" failed to appreciate that the sales to Offtakers were complete contractual transactions, separate from the transactions under the Streaming Agreement.

[84] The judge erroneously stated, at para. 55 of the Reasons, that "at least some of the Offtaker Agreements also recognize TCM's continuing interest in the proportion of refined metals to be sold to Royal Gold under the Streaming Agreement" and that some Offtakers took title subject to an obligation to deliver a percentage of minerals in the concentrate to Royal Gold.

[85] In fact, title to mining products sold to Offtakers was free and clear, without any obligation on their part to deliver mineral products to Royal Gold.

[86] Once TCM sold mineral products from the mine to Offtakers, that transaction was complete. To put it another way, there was no subset of sales to Offtakers that could then be traced in minerals transferred by TCM to Royal Gold. Nor were the same mineral products sold twice. Rather, the entire “pie” of sales of mine products to Offtakers was used as part of a mathematical formula by which TCM calculated its separate obligations to Royal Gold. The Offtakers were not parties to TCM’s separate transaction with Royal Gold.

[87] Dr. Thornton’s evidence could not and did not overcome the illogical approach of treating some sales of mineral products to Offtakers as generating royalties under the terms of the Royalty Agreement while treating other sales of mineral products to Offtakers as not generating royalties under the Royalty Agreement.

[88] One of the benefits of an NSR royalty is its simplicity, which provides certainty for the party receiving the royalty payments and avoids the uncertainty of the many accounting adjustments that a mine operator might make when determining a net profit-based or NPI royalty. The Royalty Agreement by its language was clearly intended to capture all sales of minerals derived from the mine, which would capture all sales to Offtakers, with limited and specific deductions from the revenues thereby generated.

[89] I realize that in the above analysis I have not defined what purpose was served by reference to GAAP in clause 1(a) of Schedule B to the Royalty Agreement. HRS advances a theory of its limited purpose in certain hypothetical situations. In my view, it would be unhelpful *obiter* for us to opine on hypothetical situations that are not before us. What this Court is being asked to decide is whether the judge erred in his interpretation of the Royalty Agreement.

[90] I am of the view that the judge did so err, by adopting Dr. Thornton's approach to the reporting of revenue from Royal Gold in TCM's financial statements as determining the interpretation of the Royalty Agreement. He in effect read new words into the Royalty Agreement, as though it read "net smelter returns will be determined based on revenues reported by the mine operator on its financial statements prepared in accordance with GAAP". He allowed this interpretation to override the clear language of the Royalty Agreement.

[91] The language of the Royalty Agreement is clear that it applies to mineral products derived from the mine property and sold to third parties. Its language can lead to no other conclusion than it applied to all sales of mineral products produced from the property and sold to Offtakers. In finding that it did not apply to some of the sales of mineral products to Offtakers, the judge made a palpable and overriding error.

**Focus on Words in the Royalty Agreement Devoid of Context**

[92] As an aspect of the judge's overriding error in misapplying the accounting evidence, the judge interpreted the words "attributable to" and the reference to "generally accepted accounting principles" out of the context of the Royalty Agreement and the factual matrix at the time the agreement was made.

[93] Words in a contract must be interpreted in context of the entire contract. As held in *Sattva*:

> [64] I accept that a fundamental principle of contractual interpretation is that a contract must be construed as a whole (McCamus, at pp. 761–62; and Hall, at p. 15). If the arbitrator did not take the "maximum amount" proviso into account, as alleged by Creston, then he did not construe the Agreement as a whole because he ignored a specific and relevant provision of the Agreement. This is a question of law that would be extricable from a finding of mixed fact and law.

[94] I have already addressed the error in treating the reference to GAAP in the Royalty Agreement as equivalent to how it would be used in the preparation of financial statements.

[95] The judge also erred in his focus on the words “attributable to” in clause 7 of the Royalty Agreement. For ease of reference, I will repeat the terms of clause 7:

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

[96] The judge found that the delivery of mineral products from TCM to Royal Gold under the Streaming Agreement was “attributable to” production from the mine: Reasons at para. 239. The judge found that because these sales “are a function of the metal content in the concentrate actually produced by Mount Milligan Mine”, their returns originate from mineral products from the mine and therefore are contemplated by clause 7 the Royalty Agreement: at para. 249.

[97] He made this finding despite knowing that the mineral products sold to Royal Gold were derived on the open market, not derived from the mine.

[98] I return to the language of the Royalty Agreement. Under clause 7 of the Royalty Agreement, the royalties are generated on the “production of ores and mineral products from the Mining Lands”. Clause 1(a) of Schedule B to the Royalty Agreement provides that NSR, on which the royalty is based, applies to “the sale or deemed sale of all ores produced from the Property or concentrates derived therefrom”. The context of the Royalty Agreement confirms that royalties are paid on sales of mineral products derived from the mine. Other revenues earned by a mine operator might be relevant in the context of an NPI-based royalty but were not relevant to this Royalty Agreement.

[99] The judge erred in his focus on the words “attributable to”, which he treated as meaning the products sold did not have to be derived from the mine on the property. This interpretation emphasized one word out of context of the rest of the Royalty Agreement. Further, this interpretation undermined and contradicted the

Royalty Agreement, as the judge relied on the word to exclude a significant portion of the revenues from mineral products produced from the mine on the property and sold to Offtakers.

[100] Even if one could interpret the words “attributable to” in the Royalty Agreement as encompassing minerals purchased elsewhere and sold by TCM under the Streaming Agreement (an interpretation that, in my view, is not supported by the context), that approach does not justify ignoring the actual revenues received from the sales of mine products to Offtakers. It simply would result in two streams of revenues generating royalties: first, revenues from the sales of mineral products to Offtakers; and second, the subsequent sale of gold obtained on the open market and sold under the Streaming Agreement to Royal Gold.

[101] In my view, the incorrect interpretation of the words “attributable to” flows from the judge’s misapplication of the accountant’s evidence. He relied on the words “attributable to” in clause 7 of the Royalty Agreement as being broad enough to encompass the Streaming Agreement, finding that for the portion of the minerals delivered to Royal Gold, TCM’s revenue or returns are “in essence” the funds it receives from Royal Gold: at paras. 231–232. The accountant’s evidence was the source of the judge’s findings that this was “the totality of the contractual arrangements” and the “economic reality” and “the substance of the transactions from an accounting perspective”: para. 232.

[102] Contrary to the judge’s approach, the language of the Royalty Agreement permits no interpretation that would exclude the revenues generated from the sales to Offtakers of mineral products derived from the mine property simply because the mine operator, TCM, chose to use those sales to calculate a separate obligation to a third party.

**Errors in Considering the Commercial Matrix**

[103] In my view, the judge’s misapplication of the accountant’s evidence also led him to place incorrect emphasis on evidence of TCM’s post-contractual commercial circumstances.

[104] As *Sattva* holds, the surrounding circumstances of a contract remain an important consideration in the contractual interpretation exercise: *Sattva* at para. 47. However, that factual matrix is at the time of the contract formation. As held in *Sattva*:

> [58] The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract (*King*, at paras. 66 and 70), that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. Subject to these requirements and the parol evidence rule discussed below, this includes, in the words of Lord Hoffmann, "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man" (*Investors Compensation Scheme*, at p. 114). Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.
>
> [Emphasis added.]

### ***Subsequent Prudent Business Decisions Do Not Detract from the Royalty Agreement***

[105] The judge erred in giving weight to TCM's prudent business decisions made after the Royalty Agreement was executed as informing his interpretation of the Royalty Agreement. This approach indirectly considered the commercial matrix at the time the subsequent Streaming Agreement was entered into rather than at the time of the Royalty Agreement, which is inconsistent with principles of contractual interpretation mentioned above.

[106] For example, the judge repeatedly referred to the commercial soundness of TCM's decision to enter into the Streaming Agreement and to use hedging arrangements to support its gold purchases for delivery to Royal Gold, describing the decision as "sound", "*bona fide*", and "prudent": Reasons at paras. 242, 244, 254. He emphasized that the Streaming Agreement served the royalty holder's economic interests as well as TCM's because it helped bring the mine into production: at para. 242.

[107] It appears that the judge was influenced by the fact that the royalty holder and the mine operator's interests were aligned at the time they executed the Royalty Agreement: they both would benefit if the mine was brought into production, as he noted at para. 243. However, the alignment of interests is not helpful to the analysis. A party selling their mining claims for a revenue-based NSR royalty will always benefit from the mine operator's success in extracting minerals from the claims and selling them.

[108] The post-contractual challenges faced by the mine operator that might cause it to enter into secondary agreements and obligations are not relevant, given the judge's earlier findings that when the parties executed the Royalty Agreement, they clearly understood the difference between a revenue-based NSR royalty and a net profit-based NPI royalty. A proper understanding of this commercial context meant that whatever steps a subsequent mine operator took later to try to make the mine profitable were irrelevant to the calculation of the NSR royalties, other than direct sales of mineral products derived from the mine.

[109] The judge was understandably sympathetic to the challenges faced by a mine operator in bringing a mine into production. However, it was always open to TCM to approach the royalty holder in the years after the Royalty Agreement's formation, to either amend or enter into a new type of royalty agreement that would substitute royalties based on revenues from sales of mineral products produced by the mine, to royalties that accounted for the Streaming Agreement or were based on net profits.

[110] Instead, TCM entered into the Streaming Agreement with full knowledge of the pre-existing terms of the Royalty Agreement and without any attempt to renegotiate with HRS for any relief from that agreement. As such, it is not relevant to the interpretation and application of the Royalty Agreement's terms to say TCM made a prudent business decision when it entered into the Streaming Agreement.

***The Sales to Offtakers Were Not Unforeseen***

[111] The judge also emphasized that sales to Offtakers were "post-contract events that were not part of the factual matrix known to the parties at the time the contract

was formed": at para. 228. He seemed to equate this finding to the undisputed evidence that the phenomenon of streaming agreements had not yet emerged at the time of the Royalty Agreement and so were not part of the factual matrix known by the parties: at para. 187. This appears to be the judge's only direct explanation for rejecting HRS's argument that the Royalty Agreement applied to all sales to Offtakers.

[112] The judge was clearly wrong to the extent he dismissed the Offtaker Agreements as unforeseen at the time of the Royalty Agreement. This failed to give credit to his earlier findings regarding the relevant commercial matrix and to the express language of the Royalty Agreement.

[113] In his earlier findings, the judge acknowledged that at the time of the Royalty Agreement, it was commonly understood in the mining industry that "smelter returns" was a term of art meaning revenues from sales of any mineral products obtained from the mine: at para. 186(i).

[114] The Royalty Agreement by its terms expressly envisioned "sales" of mineral products "from" the mine, which directly captures the sales to Offtakers.

[115] Again, clause 7 of the Royalty Agreement referred to 2% royalty on Net Smelter Returns "attributable to production of ores and mineral products <u>from the Mining Lands</u> by Lincoln determined in accordance with Schedule 'B' hereto" (my emphasis). Schedule B expressly stated that "[n]et smelter returns shall apply to the <u>sale</u> or deemed sale of all ores <u>produced from the Property</u> or concentrates derived therefrom". Clause 2 of Schedule B links the commencement of royalty payments to the commencement of the mine's commercial production.

[116] All sales to Offtakers were sales of mineral products obtained from the mine, so the associated revenues were the type of transactions clearly anticipated by the parties at the time they entered into the Royalty Agreement, as transactions that would generate royalties.

[117] The judge's reasoning failed to grapple with the fact that all sales of mineral products from the mine to Offtakers fell clearly within the language of the Royalty Agreement and was consistent with the parties' objective intentions. Importantly, as I have already pointed out, a central flaw in the judge's logic is that the judge did not (and could not) explain how a consistent interpretation of the Royalty Agreement could result in some sales to Offtakers generating royalties but not others.

[118] Again, there is nothing in the Royalty Agreement or in the nature of the sales to Offtakers that would justify ignoring some of the sales.

## Cross Appeal

[119] In my view, the revenues generated by TCM by selling minerals obtained on the open market to Royal Gold under the Streaming Agreement are irrelevant to the calculation of royalties due to HRS under the Royalty Agreement. HRS is entitled to royalties on all the revenues generated by TCM's sales of mineral products derived from the mine to Offtakers. This means that the cross appeal must be dismissed.

## Disposition

[120] The appeal is allowed, and the cross appeal dismissed.

[121] TCM must pay HRS royalties calculated based on the revenues TCM received from all the sales of mine products to Offtakers, without any deductions or recalculations based on the Streaming Agreement or hedging expenses. Interest on these royalties will follow, pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c. 79. If parties are unable to agree on the quantum of the same, they are at liberty to return to the trial court for a damages assessment.

[122] While HRS has sought an additional direction regarding future calculation of royalties, in my view, that is not appropriate given that contractual arrangements can

change in the future. The parties can govern their existing contractual relationship with this judgment in mind.

"The Honourable Justice Griffin"

I AGREE:

"The Honourable Justice Edelmann"

I AGREE:

"The Honourable Justice Warren"