IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Blizzard Uranium Corp v. Nathanson, Schacter & Thompson LLP*, 2026 BCSC 466

Date: 20260318
Docket: S186535
Registry: Vancouver

Between:

Blizzard Uranium Corp., Eros Resources Corp., and Blizzard Finance Corp.

Plaintiffs

And

Nathanson, Schacter & Thompson LLP and Murray Clemens

Defendants

Before: The Honourable Justice Branch

Reasons for Judgment

Counsel for the Plaintiffs:	H. Poulus, K.C. J. Ensom T. Latowsky K. Graham N. Hasegawa J. Stokes, Articled Student
Counsel for the Defendants:	C. Dennis, K.C. E. Aitken M. Ferreira
Place and Dates of Trial	Vancouver, B.C. October 1-4, 7-11, 15-18, 21-24, 28-31, November 1, 4-8, 2024, January 20-24, 27-29, February 26, September 8-12, and October 14-16, 2025
Place and Date of Judgment:	Vancouver, B.C. March 18, 2026

Table of Contents

I. INTRODUCTION

[1] This $20 million solicitor's negligence action has at its core an allegation that the defendant lawyer negligently advanced a claim for mining properties his clients did not own. On the lawyer's advice, the clients later agreed to forfeit the properties as part of a broader settlement, much to the chagrin of the actual beneficial owner.

[2] The clients seek compensation for damages arising from counsel's error in the pleading, primarily the amounts payable to the actual beneficial owner to secure his agreement to surrender his claims to facilitate release of the settlement funds.

[3] After a hard-fought proceeding lasting over 10 years, requiring 44 days of trial and over 900 pages of legal argument, I conclude that:

a) the plaintiffs' claim is well-founded, but

b) a 50% contributory negligence finding must be applied to a materially restricted scope of damages.

II. FACTUAL BACKGROUND

A. The Parties

[4] The defendant Nathanson, Schacter and Thompson LLP ("NST") is a limited liability law partnership. The defendant Murray Clemens, K.C., was a partner at NST at all material times.

[5] The first two plaintiffs, Blizzard Uranium Corp. ("Blizzard Uranium") and Eros Resources Corp. ("Eros"), were the defendants' clients (the "Clients"). Blizzard Uranium is a wholly owned subsidiary of Eros. The parent company Eros was known as Boss Power Corp. ("Boss") during the relevant period.

[6] The last plaintiff, Blizzard Finance Corp. ("Blizzard Finance"), is an assignee of the Clients' right to pursue a claim against the defendants.

[7] Although not a party, it is appropriate to note at the outset the role of Anthony Beruschi, a lawyer and mining entrepreneur. Mr. Beruschi was the true beneficial owner of the claims discussed above (the “B Claims”).

[8] The proper resolution of this matter requires a careful review of how Mr. Beruschi:

a) obtained the B Claims;

b) transferred legal title to Blizzard Uranium; and

c) finally, surrendered ownership of the B Claims to the Province in return for substantial compensation from the plaintiffs.

B. Mr. Beruschi Stakes the Blizzard Project

[9] The mining claims at issue are southeast of Kelowna, in an area known as the “Blizzard Project”.

[10] Uranium was discovered within the Blizzard Project in the 1970s. It was then extensively explored, resulting in a positive feasibility study in 1979. However, in 1980, the Province of British Columbia (the “Province”) imposed a seven-year moratorium on the exploration and development of uranium resource areas (the “Moratorium”). The Moratorium halted the development of the Blizzard Project.

[11] When the Moratorium expired, Mr. Beruschi began to take an interest in the Blizzard Project. Together with a partner, he began to stake the core claim area (referred to below as the “Blizzard 1” claim, or the “Schedule A Properties #1 Blizzard”). Over the years, Mr. Beruschi acquired his partner’s interest. He also took steps to become the beneficial owner of additional claims in the area. These additional properties included the “B Claims” at the epicentre of the present litigation.

[12] The map below shows the location of the various claims. The B Claims are noted as the “Schedule B Properties”:

C. Mr. Beruschi's Conversion Problem

[13] Traditionally, prospectors staked claims by physically entering upon the land and marking their claim with stakes. They would then go to the mining office and file the necessary papers to record their claim.

[14] In 2005, the Province migrated to an electronic staking system. The Province did not require immediate conversion of legacy claims to the new system. Nonetheless, Mr. Beruschi instructed his geologist to initiate the conversion process. The geologist did so incorrectly. Because the claims were not properly transferred to the new system, they remained unclaimed for several days. Another prospector, Adam Travis, noticed that the plots were unclaimed and staked them for himself.

[15] When Mr. Beruschi discovered the apparent loss of his claims, he took steps to recover them. He offered Mr. Travis an arrangement in exchange for Mr. Travis's relinquishment of his claims, but the parties were unable to reach an agreement. Mr. Travis was simultaneously negotiating to sell his newly acquired claims to other parties. Mr. Travis ultimately agreed to sell to Ron Netolitzky, an

experienced mining executive. Mr. Netolitzky's company, Santoy Resources Ltd. ("Santoy"), obtained Mr. Travis's interests.

[16] Mr. Beruschi lodged a protest with the Province to address his conversion problem. He also retained Barry Kirkham, K.C., to advance litigation. Through these efforts, he sought to establish that his legacy claims remained valid in their original form because the conversion had been ineffective.

D. Mr. Beruschi and Mr. Netolitzky Reach an Agreement

[17] While his protest was ongoing, Mr. Beruschi and Mr. Netolitzky entered negotiations to resolve the title issue.

[18] During their negotiations, Mr. Beruschi learned that the Province had accepted his position that his flawed conversion from the old to the new system was legally ineffective, thereby leaving his legacy claims intact. Nonetheless, Mr. Beruschi decided to proceed with his discussions with Mr. Netolitzky. He was looking forward to working with such an experienced and well-regarded mining executive.

[19] Mr. Beruschi and Mr. Netolitzky's discussions culminated in a Settlement Agreement dated December 31, 2005 (the "2005 Settlement"). Among other things, the 2005 Settlement provided that:

a) Mr. Beruschi would supply a publicly traded shell company (which became Boss);

b) Boss would divide its shares between Mr. Beruschi and Mr. Netolitzky;

c) Both parties would contribute to Boss any right they had to the "Blizzard 1 Claim"; and

d) Mr. Beruschi would also contribute 19 additional claims to Boss and be paid $1.2 million for them.[1]

[20] The Blizzard 1 Claim and the 19 additional claims were listed in Schedule A to the 2005 Settlement, and are referred to as the Schedule A claims on the above map. They collectively became known as the "A Claims".

[21] The 2005 Settlement also acknowledged that Mr. Beruschi owned 15 other claims, listed in the agreement's Schedule B, and thereafter known as the "B Claims".[2] In respect of the B Claims, Mr. Beruschi granted to Boss:

a) An option to purchase 51% of the B Claims, expiring on December 31, 2008 (the "Option") that Boss could exercise by (1) incurring at least $200,000 in exploration and development expenditures on the B Claims and (2) paying Mr. Beruschi $1 million in cash or Boss shares; and

b) a right of first refusal (the "ROFR") over the B Claims, expiring on June 1, 2009.

[22] Mr. Beruschi and Mr. Netolitzky then took steps to bring Mr. Travis into the fold. On July 27, 2006, Boss entered into an Asset Purchase and Sale Agreement (the "APSA") with Mr. Travis, Mr. Travis's company Cazador Resources Ltd. ("Cazador"), Santoy, and Mr. Beruschi, which generally followed the terms of the 2005 Settlement. The APSA also provided for the following royalty payments:

a) $0.50 per pound to Mr. Travis for uranium produced from the Blizzard 1 Claim;

b) $1.50 per pound to Mr. Beruschi for uranium produced from either the Blizzard 1 Claim or the other A Claims; and

c) $2.00 per pound to Mr. Beruschi for the B Claims, if the Option was exercised.

E. The Billingsley Problem

[23] Before the APSA closed, another error by Mr. Beruschi's geologist was discovered. This new problem resulted in the lapse of six claims: three A Claims (531754, 531750, and 531755) and three B Claims (531759, 531760, and 531762) (the "Excluded Claims"). Richard Billingsley, another professional prospector, staked them. Mr. Beruschi tried to negotiate a deal with Mr. Billingsley to buy back any rights Mr. Billingsley had to the Excluded Claims. When it came time to perform the alleged agreement, Mr. Billingsley declined to transfer the claims. Mr. Beruschi brought an action against Mr. Billingsley, to no avail.

[24] The need to manage the difficulty created by Mr. Billingsley's refusal to transfer title to the Excluded Claims resulted in the need to exclude them from the APSA.[3] There was an amended agreement, dated May 23, 2007 (the "Amendment Agreement"). The Amendment Agreement provided that:

a) Legal title to the A and B Claims, now excluding the Excluded Claims, could be transferred to Blizzard Uranium, Boss's wholly owned subsidiary;

b) Blizzard Uranium would hold the B Claims in trust for Mr. Beruschi;

c) The "Purchaser" Boss would cause Blizzard Uranium to maintain the B Claims in good standing and comply with Boss's obligations under the APSA, as follows:

> **2.1 Assignment.**
>
> The Purchaser may transfer or assign any or all of its rights and obligations under this Agreement to its wholly-owned subsidiary, [Blizzard Uranium], on or before the Closing Date provided that to the extent any interest in the Properties or the B Claims is transferred to or held by [Blizzard Uranium], the Purchaser shall cause Blizzard to comply with all obligations of the Purchaser under the Purchase Agreement and this Amendment Agreement relating to the Properties and the B. Claims, including, without limitation, in connection with the Option, the Beruschi Royalty, the Beruschi Option Royalty, the Santoy Royalty and the Travis Royalty. Without limiting the generality of the foregoing, the Purchaser may direct the Vendors to transfer the legal title and interest in and to the Properties and/or the B Claims directly to Blizzard on or before the Closing Date…
>
> **2.5 Pre-Closing Transfers of all or a portion of the Additional Blizzard Ground, the Hydraulic Lake Claims and the B Claims**
>
> …
>
> (h) The Purchaser shall maintain or cause [Blizzard Uranium] to maintain the Hydraulic Lake Claims and the Transferred B Claims in good standing with the mineral titles online registry and shall pay all costs, expenses and fees in connection therewith pending the transfer of the beneficial interests therein to the Purchaser.
>
> [Emphasis in original.]

d) 2 million of the Boss shares to be issued to Mr. Beruschi would be escrowed unless and until Mr. Beruschi could transfer the Excluded Claims (the "Escrow Shares"); and

e) Upon any future transfer of the Excluded Claims, the Escrow Shares would be delivered to Magic Dragon Ventures Ltd. (“Magic Dragon”), a company controlled by Mr. Beruschi.

F. The Trust Agreements Governing the B Claims

[25] As noted, the APSA contemplated trust arrangements. These were memorialized in four agreements, each entitled “Declaration of Bare Trust and Agency Agreement”. One was between Blizzard Uranium and Boss, and protected Boss’s equitable interest in the A Claims now legally held by Blizzard Uranium. The other three were between Blizzard Uranium and Mr. Beruschi covering the B Claims (the “Trust Agreements”). The Trust Agreements, two dated March 21, 2007, and one dated May 1, 2007, provide that:

a) “[Blizzard Uranium] shall hold and maintain the legal title to the Claims as nominee, agent and bare trustee for the sole benefit and account of [Mr. Beruschi] as principal and beneficial owner...” (s. 2(a));

b) “[Blizzard Uranium] has and will have no equitable or beneficial interest in the Claims, and acknowledges that [Mr. Beruschi] holds the equitable and beneficial interest in the Claims” (s. 2(b));

c) “any benefit, interest, profit or advantage arising out of or accruing from the Claims is and will continue to be a benefit, interest, profit or advantage of [Mr. Beruschi] and, if received by the [Blizzard Uranium], [Blizzard Uranium] shall hold such benefit, interest, profit or advantage for the sole use, benefit and advantage of [Mr. Beruschi] and [Blizzard Uranium] shall account to the [Mr. Beruschi] for any money or other consideration paid to or to the order of [Blizzard Uranium] in connection with the Claims as and when requested in writing by [Mr. Beruschi]” (s. 2(c));

d) “[Blizzard Uranium] will not deal with the Claims in any way or execute any instrument, document or encumbrance in respect of the Claims without the prior consent or direction of [Mr. Beruschi]” (s. 2(f)); and

e) “[Mr. Beruschi] shall indemnify and save harmless [Blizzard Uranium] against any and all liability, lost, cost, action, claim or expense resulting

> from [Blizzard Uranium's] holding of the legal title to or dealing with the Claims as directed by [Mr. Beruschi] from time to time, except to the extent that the same results from a dishonest, fraudulent or negligent act or omission of [Blizzard Uranium] or its employees or agent or if [Blizzard Uranium] breaches this Agreement" (s. 5).[4]

G. Boss's Efforts to Develop the Blizzard Project

[26] On September 28, 2007, Boss announced its board of directors (the "Board"), made up of Mr. Netolitzky as Chair, Douglas ("Doug") Brooks, Stuart ("Tookie") Angus (a long-time mining lawyer and investor), John Bowles (a retired CPA), and David Stone (a mining engineer), who was to serve as CEO. Randall ("Randy") Rogers, a geologist and former RCMP officer, was hired as Vice President, Corporate Development.

[27] In the spring of 2008, Boss submitted a Notice of Work (the "NOW") to the Province's Ministry of Energy, Mines and Petroleum Resources. Boss had to obtain approval of the NOW before it was permitted to do work. The NOW proposed that Boss would work on six of the seventeen A Claims it owned beneficially, being 512410, 516835, 516063, 512166, 415836, and 514145 (the "NOW Claims").

H. Potential Sale of the B Claims

[28] In about April 2008, Mr. Beruschi (according to his counsel's later 2012 correspondence) entered discussions to sell his B Claims to Ultra Resources Corp. ("Ultra"). Under the proposed terms, Ultra would acquire a 49% interest in the B Claims for $2 million. It was also agreed that, if Boss chose not to exercise the Option, Ultra would acquire 51% of the B Claims for $1.5 million. Ultra would pay an additional $600,000 if a positive feasibility study were conducted in the area. However, this alleged oral agreement did not close before the Province's mineral reserve described below was announced.

[29] At trial, Mr. Beruschi claimed that "it wasn't really a deal". However, Mr. Beruschi's counsel stated in 2012 that "[t]here is no stronger evidence of the value of the B Claims". Further, in an email to Mr. Netolitzky in April 2013, he represented that he "based most of my offers and negotiations, with Virginia/Anthem or Boss, on the market value of the deal I had with Ultra for the B

claims in April 2008. That valued the B claims at $4.1 million with Boss not exercising its option…”

I. The Mineral Reserve

[30] On April 24, 2008, the Chief Gold Commissioner established a mineral reserve by regulation under the *Mineral Tenure Act*, R.S.B.C. 1996, c. 292 [*MTA*]. It purported to deprive any newly filed claims of the right to mine uranium. A news release published that same day made it clear that the Province intended to ensure that all uranium deposits in BC remain undeveloped.

[31] In March 2009, the Province gave effect to this broader intention by enacting a regulation directing the Chief Inspector under the *Mines Act*, R.S.B.C. 1996, c. 293, not to issue any permits for exploration for uranium (the “Mineral Reserve”).

[32] The Mineral Reserve halted any possible development of the Blizzard Project.

J. Boss’s Investigation and Development of a Claim Against the Province

[33] Given the effect of the Mineral Reserve, the Clients decided to seek legal advice on their rights.

[34] The defendants were retained to advise the Board on its options. The defendants held themselves out as specialists in complex commercial litigation and the valuation of mineral claims. The defendants identified two options: (1) a constitutional challenge of the legislation creating the Mineral Reserve; and (2) a claim for compensation for the taking of Boss’s rights and interests.

[35] On August 19, 2008, Mr. Rogers, Mr. Netolitzky, and Mr. Angus met with the defendants and requested that the defendants proceed with researching and preparing a claim for compensation. To comply with this request, the defendants needed to determine which claims were taken from the Clients as a result of the Mineral Reserve. On August 20, 2008, Mr. Clemens emailed Mr. Rogers stating:

> Can you forward a copy of a typical mineral claim as currently registered as part of the Blizzard claim. In addition can you provide a narrative concerning the claim history of the Blizzard including when it was first claimed, by who and how the claims came to be held By [*sic*] Boss Power?

[36] In response to Mr. Clemens's request for information, Mr. Rogers wrote that same day to explain how the Clients came into possession of the various claims. This explanation included the following information regarding the B Claims:

> Hi Murray:
>
> The narrative of how we acquired the Blizzard is fairly complex, but let's try a couple of different versions of this for you.
>
> **A really short version culled from our MD&A's: …**
>
> … The Company also received an option to acquire a 51% interest in the Fuki and Haynes Lake Uranium Claims from this same vendor and has rights of first refusal over those claims for a set time period. In consideration for these acquisitions, options and rights, the Company paid $1,250,000.
>
> **A more detailed version appears in the "doc review.doc" file attached.** This summarizes all the various agreements that led to Boss acquiring the claims. It's quite convoluted, as there were other parties involved at the outset, and some agreements were complicated by one party or another failing to deliver what they were supposed to! At any rate, this is fairly thorough but perhaps more than you need, but may serve as a convenient reference to the various agreements that led us to the present ownership of the property.
>
> **Details about the location and the early history of the** claims etc. are captured in the Peter Christopher technical report as attached.
>
> There are a number of **mineral tenures** involved in the Boss Power Corp holdings, but the principal claim is tenure 512410 which virtually covers the entire orebody ("BLIZClaim.doc" attached)
>
> The complete list of the tenures involved is attached as "Blizzard Claim Status July 2nd 2008.xls" We have just paid assessment credits on the claims that are shown as coming due in August, so the list is just a bit out of date…
>
> Hope this meets your needs.
>
> [Emphasis in original.]

[37] Mr. Clemens understood that Mr. Rogers provided this information to help him understand the property that should be put at issue in any action against the Province. He read the email at the time.

[38] The email attached four documents:

a) An 8-page document titled: "Boss Power Corp.: Blizzard Property Document Review" (the "Document Review Memo"). The Document Review Memo included the following discussion of the B Claims:

> **The July 27th, 2006 Asset Purchase and Sale Agreement** between Santoy, Beruschi, Travis, Calzador and Boss Gold sold the interests of

> Santoy, Bersuchi [*sic*], and Travis in the Blizzard Claim to Boss…
>
> Beruschi warranted that he had control over the Schedule "B" Claims and that Boss would have right of first refusal on these until December 31st, 2007.
>
> The terms of the acquisition of the Schedule "B" Claims were:
>
> > Prior to December 31st, 2008 Boss could earn a 51% interest in the Schedule "B" Claims by expending $ 200,000 and payment of $ 1,000,000 or share equivalent and grant of a gross overriding royalty of $ 2.00/lb U3O8 to Beruschi. The Schedule "B" Claims would be returned to Beruschi with a 6 month assessment credit if the option terms were not met.
> >
> > Boss was granted a right of first refusal to acquire an interest in any or all of the Schedule "B" Claims until June 1st, 2009.
>
> …
>
> **The May 23rd, 2007 Amendment Agreement between Santoy, Beruschi, Travis, Calzador, and Boss Gold** addresses the failure of Beruschi to deliver certain of the Additional Blizzard Ground and Schedule "B" Claims owned by Richard Billingsley.
>
> The amendment provided that 2,000,000 of the shares payable to Beruschi would be held in escrow following expiry of the regulatory escrow period pending transfer of the Billingsley claims.
>
> There were some minor wording changes to the purchase agreement, and the agreement provides for the properties to be held in trust by Boss prior to the exercise of any option on the ground not already owned or optioned by Boss and Beruschi can ask for title for these claims to be returned to him. The payment terms of the $ 1,200,000 to Beruschi were amended.
>
> Boss agreed to maintain all the transferred Hydraulic Lake and Schedule "B" Claims in good standing …
>
> **ANALYSIS:**
>
> Boss can acquire a 51 % interest in all of the Schedule "B" Claims prior to December 31st, 2008 (excluding the Billingsley ground) by completing $ 200,000 in work commitments and payment of $ 1,000,000 in cash or share equivalent and grant of a gross overriding royalty of $ 2.00/lb U3O8 to Beruschi.
>
> Boss was granted a right of first refusal to acquire an unspecified interest in any or all of the Schedule "B" Claims (excluding the Billingsley ground) until June 1st, 2009.
>
> [Bold emphasis in original, underline emphasis added.]

b) A technical report authored by Peter Christopher, dated November 15, 2006 (the "Christopher Report"). The Christopher Report stated:

> Schedule B claims ("B Claims") occur in three groups, covering a total of 3452.258 hectares, which include the Fuki uranium deposit, the Haynes uranium deposit and extensions of the Hydraulic Lake deposit.

> For a period of 3 years from December 31, 2005, Boss has the right to earn 51% interest in B Claims subject to the following terms:
>
> Boss is responsible for minimum exploration and development expenditure of $200,000 over the 3 year period.
>
> Boss will pay to Beruschi or his nominee $1,000,000 in cash or shares before the end of the 3 year period.
>
> The B claims will be subject to a $2 per pound of uranium royalty in favour of Beruschi or his nominee.
>
> Any B Claims returned to Beruschi will be in good standing for a minimum period of 6 months from the date of the return of the claim or claims.
>
> For a period commencing January 1, 2008 to June 1, 2009 Boss shall have the first right of refusal to acquire an interest in any or all of the B Claims.
>
> [Emphasis added.]

c) A claims map (the “Map”); and

d) A spreadsheet entitled “BLIZZARD CLAIM STATUS JULY 2nd 2008” (the “Original Spreadsheet”), which showed Blizzard Uranium as the “Owner” of the A Claims and the B Claims.

[39] As to his level of appreciation of the contents of the attached Document Review Memo, Mr. Clemens’s evidence was somewhat confusing. He stated: “I don’t believe I read it other than seeing what it – what it was about”. But earlier in his testimony, while reviewing the August 2008 email from Mr. Rogers generally, Mr. Clemens said he “read it all.”

[40] Regarding the Christopher Report, there was also some confusion about the extent of his review. He stated, “I got interested in it … I got into it”. But when presented with the B Claims ownership information contained only seven paragraphs into the report, he claimed: “I probably wouldn’t have read that part. I -- I was more interested in the deposit -- you know, the economic value of the property and whether -- whether there was something in this that would deflate the compensation claim.”

[41] Mr. Clemens testified that he did not appreciate from these documents that Blizzard Uranium held the B Claims in trust for Mr. Beruschi. The plaintiffs note however, that this is different from asserting that he did not appreciate that

Blizzard Uranium held the B Claims in trust for someone other than Boss. This distinction becomes important for the legal analysis below.

[42] Mr. Clemens suggested at trial that these documents contained more detail than he needed or sought. Mr. Clemens says that his focus at the time was solely on the legal theory underpinning Boss's prospective claim. He says he was not focused on understanding the full extent of Boss's interest in any surrounding claims.

[43] On August 20, 2008, Mr. Rogers sent Mr. Clemens Boss's draft interim consolidated financial statements and draft management discussion and analysis. In relation to the B Claims, the documents again informed Mr. Clemens that:

> [Boss] also received an option to acquire a 51% interest in the Fuki and Haynes Lake Uranium Claims from this same vendor and has rights of first refusal over those claims for a set time period.

[44] Mr. Clemens accepts that he did rely on the information in these emails to satisfy himself as to the ownership of the mineral claims to be included in the action.

[45] On August 22, 2008, Mr. Clemens emailed Mr. Rogers stating:

> On review of the attachments I found the [Map] and see the details of the claims but what we need is a copy of at least one of the actual claim documents as recorded so that we can assess the precise property interest. Please call if you have any questions.
>
> [Emphasis added.]

[46] Mr. Rogers forwarded this inquiry to one of Boss's officers, Rupert Allen, who responded to Mr. Clemens as follows:

> You are correct – there is no "title document" as such. The only comfort beyond what is available on-line, is to have a lawyer do a title verification (which includes his "uninsured" additional statements to the effect that there are no claims or liens registered against the title […]).

[47] Mr. Clemens chose not to retain a mining lawyer to further verify ownership.

[48] On September 5, 2008, Mr. Clemens provided NST's conclusions on Boss's prospective claim against the Province to Boss. NST concluded that the Province had expropriated Boss's interests and that Boss had a right to compensation. NST

did not provide any specific advice at that time as to which mining claims should be included in any civil claim.

[49] On September 10, 2008, Boss replaced Dr. Stone as CEO with Mr. Rogers. Mr. Rogers was perceived as more familiar with the legal system, an advantage heading into a major lawsuit. Mr. Rogers was Boss's CEO and President from September 2008 until his death on March 26, 2013. He was the main point of contact for the defendants throughout his tenure. Mr. Clemens and Mr. Rogers developed a close working relationship.

[50] On September 22, 2008, Mr. Clemens emailed Mr. Rogers to inquire whether Blizzard Uranium held the mineral claims in trust for Boss:

> I see that Blizzard Uranium Corp is the registered owner of the claims. Is it a wholly owned sub of Boss. Does it hold the claims in trust for Boss?

[51] Mr. Rogers advised that he did not "believe there is a trust document of any sort" and asked Ms. Allan to assist. Ms. Allan similarly advised that she knew "of no trust document in place".

[52] That same day, Mr. Clemens emailed Mr. Rogers a first draft of a Statement of Claim that sought damages only for the expropriation of the six NOW Claims. The draft properly noted that Blizzard Uranium held those claims as an agent and in trust for Boss. In his covering email, Mr. Clemens wrote:

> You will note that I have included all of the mineral claims referenced in the notice of work but note that the companies MD&A only refers to one claim the "Blizzard I" claim. Please confirm that I have properly identified the correct claims.

[53] Somewhat surprisingly, Mr. Clemens asserted at trial that he did not consider it his role to identify the property for which compensation would be claimed.

[54] The next day, September 23, 2008, Mr. Rogers emailed Mr. Clemens further information to assist in developing the pleading. He advised that he had now located the trust agreement with Boss, which covered the 17 A Claims registered in Blizzard Uranium's name. Mr. Rogers also re-sent the Document Review Memo along with a new spreadsheet entitled "BLIZZARD CLAIM STATUS

22 09 2008" (the "Second Spreadsheet"). In his cover email (the "September 2008 Email") addressed to Mr. Clemens, Mr. Rogers wrote:

> The legal history of the Blizzard property is quite complex, and there were multiple agreements and amendments leading us to where we are now.
>
> Digging back through my old documents, I found my own summary of the various agreements (DOC REVIEW attached) which refers to a June 12th, 2007 Declaration of Bare Trust between Blizzard Uranium Corp and Boss Power Corp. (SCAN0003 attached)
>
> Boss is required to maintain the 17 claims held in trust:
>
> **Blizzard Tenure: 512410**
>
> **Additional Blizzard Tenure: 516063, 415836, 512166, 514145, 512167, 516867, 513224, 516835, 513226, 513234, 415504, 415509**
>
> **Hydraulic Lake Tenure: 414415, 414416, 414466, 414467**
>
> *From what I can see upon reviewing my notes, Boss currently holds these 17 claims pursuant to the Bare Trust Agreement and subject to payment of Travis, Beruschi and Sparton royalties and the Sparton compensation agreement of August 3rd, 2005*.
>
> The claim status list attached was updated this morning. *You will see the 17 bare trust claims, as well as a series of claims labelled "Schedule B."*
>
> *Boss can acquire a 51 % interest in all of the Schedule "B" Claims prior to December 31st, 2008 by completing $ 200,000 in work commitments and payment of $ 1,000,000 in cash or share equivalent and grant of a gross overriding royalty of $ 2.00/lb U3O8 to Beruschi*. Boss was granted a right of first refusal to acquire an unspecified interest in any or all of the Schedule "B" Claims (excluding the Billingsley ground) until June 1st, 2009.
>
> ***As of today, we don't own an interest in the schedule "B" Claims, but we maintain them on Mineral Titles Online.***
>
> **<u>As to the Draft Statement of Claim</u>:**
>
> *Para. 5 should be amended to reflect the 17 tenures, and perhaps use the phrase "comprising 17 mineral claims" as opposed to the "unit" which has a different connotation under the Mineral Tenure Act. I understand that your abbreviated list reflects only the six claims referenced in the Notice of Work application, but the Uranium and Thorium Reserve has impacted all of our 17 claims*.
>
> [Bold and underlined emphasis in original, italicized emphasis added.]

[55] Mr. Clemens reviewed Mr. Rogers's email and amended the draft statement of claim as instructed. When the clear disclosure of Boss's lack of beneficial ownership in the B Claims was put to him, he said "[l]ooking at these, yes, that's what they say". But Mr. Clemens asserts that he did not appreciate at that time that the B Claims were held in trust <u>for Mr. Beruschi</u>. Mr. Clemens also suggested

that he did not "closely" review the Document Review Memo as there was no reason to, but accepts he had received it and it was in his file.

[56] On September 24, 2008, Mr. Clemens emailed Mr. Rogers a revised draft claim. It did not include the B Claims; it included only the 17 claims that were legally held by Blizzard Uranium and equitably held by Boss.

[57] On September 25, 2008, Mr. Rogers responded that the pleading "looks fine". Mr. Clemens thanked him for his response. Mr. Rogers responded as follows:

> Hope you made sense out of my last message ... don't know if it would be a help or a hindrance for you to have the entire set of legal docs that surrounded the acquisition of the property ... it's a bit of a nightmare...

[58] On October 16, 2008, the defendants, on behalf of Boss and Blizzard Uranium, filed the writ and statement of claim (the "Initial SOC") against the Province in the Supreme Court of British Columbia in Action No. VLC-S-S087266 (the "Action"). The key components of the Initial SOC read:

> 5. Mineral claims, located in British Columbia, commonly known as the Blizzard Claims, bearing Mineral Tenure Record Numbers 512410, 516063, 415836, 512166, 514145, 512167, 516867, 513224, 516835, 513226, 513234, 415504, 415509, 414415, 414416, 414466, 414467 were recorded in the Mineral Titles Online Registry pursuant to the *Mineral Tenure Ac*t in the name of Blizzard [Uranium] (collectively the "Blizzard Claims").
>
> 6. Blizzard [Uranium] holds the Blizzard Claims as agent, and in trust, for Boss Power.
>
> 7. The plaintiffs were entitled to all those rights and benefits conveyed by the *Mineral Tenure Act* and its predecessor legislation regarding minerals, including all of the minerals situated vertically downward from and inside the boundaries of those claims, and the right to use, enter and occupy the surface of those claims for mining purposes.

[59] The Initial SOC did not include the B Claims held beneficially for Mr. Beruschi. The only claims included in the Initial SOC were claims that Boss owned equitably (the "Boss Equitably Held Claims" or "BEHC").

[60] On October 16, 2008, Mr. Rogers emailed Mr. Beruschi a copy of the Initial SOC.

[61] The defendants' retainer agreement was memorialized on October 21, 2008 (the "Retainer"). The defendants made it clear that they were entitled to charge a "fair and reasonable fee" at the conclusion of the matter, depending on the result and other factors.

K. The Expiry of the B Claims Option and ROFR

[62] Boss did not exercise the Option to acquire a 51% interest in the B Claims by the December 31, 2008 deadline.

[63] On February 23, 2009, Mr. Rogers emailed Mr. Netolitzky and advised that he had "spent the day once again going over the various purchase agreements, amendments, etc. related to the Blizzard Property". With respect to the B Claims, Mr. Rogers wrote:

> We have now blown by most of the dates by which we may have exercised an option to acquire the additional or Schedule "B" Ground and I have seen no compelling reason to do that. We do have until June 1st, 2009 in which we have a right of first refusal for the Schedule "B" ground should Beruschi find another buyer, but again the chances of that happening are slight.

[64] The ROFR never came into play before its expiry on June 1, 2009.

L. The B Claims' Inclusion in the Action

[65] The possibility of including the B Claims in the Action was first raised by the Clients' expert, Ellen Hodos.

[66] In September 2008, the defendants approached Ms. Hodos of Onstream Resource Managers, Inc. ("Onstream") to prepare a valuation of the claims involved in the Action (the "Onstream Report").

[67] On June 25, 2009, Mr. Rogers emailed Mr. Clemens with an update on the information he had provided Ms. Hodos. He wrote:

> The other agreements referred to by Christopher in his report (vic. p. 17) I believe Ellen has already .... that would be the original agreements between Travis, Cazador, Sparton, Santoy, Beruschi that are on the "PURCHASE OF BLIZZARD" folder on the DVD I sent her. The only thing she doesn't have, I believe, are the various quit claims and blind trust documents that issued out of the Beruschi- Santoy title dispute and ultimate resolution of that dispute. in any event that is all moot as the Asset and Purchase Agreement between Santoy and Beruschi et al put it to rest. The agreements and amendments are a quagmire to read thru, if

> she likes I have a capsule summary I wrote of how the purchase evolved that I can send along.

[68] On June 30, 2009, Mr. Clemens sent Mr. Rogers a draft instruction letter for Ms. Hodos and asked for comments. The draft requested that Ms. Hodos prepare a valuation only of the 17 BEHC claims then at issue, referencing their specific mineral tenure numbers.

[69] Later that day, Mr. Clemens's assistant sent Ms. Hodos the instruction letter. The instruction letter stated that: "There are no options, joint ventures, farm ins, royalties, back-end rights or similar payments relevant to this valuation."

[70] On July 9, 2009, Mr. Clemens sent Ms. Hodos the APSA without the schedules (Mr. Rogers had sent Mr. Clemens the APSA on March 26, 2009.) On July 22, 2009, Ms. Hodos emailed Mr. Clemens questions arising from her review of the APSA, including the following:

> The Agreement did not include either Map A2 or A3 (see Section 5.0, 5.1), and did not include Schedule B, (see Section 6). Apparently Schedule B claims are not included in the valuation, but to properly evaluate the Agreement in total, I would like to obtain these missing appendices. Schedules C and D are also not included and concern royalties.

[71] Mr. Clemens forwarded this request to Mr. Rogers. That same day, Mr. Rogers emailed Mr. Clemens responses to certain of Ms. Hodos' questions, as well as documents (including the APSA and the Amendment Agreement). This was the first time Mr. Clemens received the Amendment Agreement. Mr. Clemens suggests he did not review it. Mr. Clemens did forward the package to Ms. Hodos. The forwarded email included Mr. Rogers' suggestion to Mr. Clemens that it would be more efficient for Ms. Hodos to reach out directly to the parties to the Amendment Agreement, and provided contact details for Messrs. Netolitzky, Beruschi, and Travis for that purpose.

[72] On July 27, 2009, Mr. Clemens emailed Mr. Rogers advising that he had spoken with Ms. Hodos, who raised a "number of questions concerning title".

[73] On July 28, 2009, Mr. Rogers sent Mr. Clemens an email entitled "History of Blizzard Acquisition", in which Mr. Rogers wrote:

> Ellen may not be clear on the whole Blizzard acquisition history, and the fact pattern is quite convoluted.

> Abridging my narrative of how Boss acquired the property for her reference. Please advise Ellen that she may shamelessly plagiarize from this if it makes her work easier!...
>
> ...
>
> **The July 27th, 2006 Asset Purchase and Sale Agreement** between Santoy, Beruschi, Travis, Calzador and Boss Gold sold the interests of Santoy, Bersuchi [*sic*], and Travis in the Blizzard Claim to Boss…
>
> Beruschi warranted that he had control over the Schedule "B" Claims and that Boss would have right of first refusal on these until December 31st, 2007.
>
> The terms of the acquisition of the Schedule "B" Claims were:
>
> Prior to December 31st, 2008 Boss could earn a 51% interest in the Schedule "B" Claims by expending $ 200,000 and payment of $ 1,000,000 or share equivalent and grant of a gross overriding royalty of $ 2.00/lb U3O8 to Beruschi. The Schedule "B" Claims would be returned to Bersuchi [*sic*] with a 6 month assessment credit if the option terms were not met.
>
> Boss was granted a right of first refusal to acquire an interest in any or all of the Schedule "B" Claims until June 1st, 2009.
>
> [Bold emphasis in original, underline emphasis added.]

[74] Mr. Clemens read this at the time and, at trial, agreed that it confirmed information he had previously received that Boss owned the A Claims but not the B Claims. On July 29, 2009, Mr. Clemens forwarded Mr. Rogers' email to Ms. Hodos.

[75] On August 13, 2009, Mr. Rogers wrote to Mr. Clemens regarding Ms. Hodos:

> It seems in context [*sic*] of our discussions with her last night and on the site visit that she does not have a grasp of the acquisition documents...

[76] On November 2, 2009, Ms. Hodos emailed Mr. Clemens with further questions about how the claims were held. Mr. Clemens forwarded same through to Mr. Rogers. In response, on November 2, 2009, Mr. Rogers sent an updated spreadsheet with the computer file name "BLIZZARD CLAIM STATUS November 2, 2009" (the "Third Spreadsheet") to Mr. Clemens. As with the earlier spreadsheets, the spreadsheet showed Blizzard Uranium as the "Owner" of both the A and B Claims. It (again) did not specify whether that term meant legal or equitable ownership, or both. The Third Spreadsheet had the header "Boss Power

Corp. – Claims Schedule, Revised: August 20, 2009" at the top of the claims list. Earlier versions did not include this header.

[77] On November 2, 2009, Mr. Clemens forwarded Mr. Rogers' email with the Third Spreadsheet to Ms. Hodos.

[78] On November 3, 2009, Ms. Hodos emailed Mr. Clemens, noting that he was busy:

> Know you're in court today, but I have a question I need to clarify. Probably Randy knows the answer to this one.
>
> The engagement letter is very clear that I am only to value The Blizzard 1 claim, the so called [“]Additional Blizzard Ground" and the "Hydraulic Lake" claims. The valuation really relies upon the value of the deposit located on the Blizzard 1 claim, but the other aforementioned claims are important for exploration potential.
>
> Randy has sent me his claim list on two occasions. This list includes the "Fuki B List" which is owned by Boss Power and the "Haynes Lake B List", also owned by Boss and the "Hydraulic Lake B List" also owned by Boss. What is the reason that these other groups have been excluded?
>
> Some of them contain exploration potential and minor resources that provide upside to the Blizzard if it were to operate and their rights appear to have been extinguished too.
>
> [Emphasis added.]

[79] Later on November 3, 2009 (at 8:17 PM), Mr. Clemens instructed Ms. Hodos as follows:

> You should include all of the claims owned. I will revise the engagement letter which only referred to the claims for which a work permit was sought. The claim will be amended to include all of the claims. Trust this clears things up.
>
> [Emphasis added.]

[80] Mr. Clemens's suggestion that the original engagement letter dated June 30, 2009, only referred to the six NOW Claims for which a work permit was sought was incorrect. In fact, the engagement letter referred to all claims in the Action, i.e., all 17 Boss Equitably Held Claims. This illustrates confusion in Mr. Clemens's mind at the time about what was in and what was out of the pleading – confusion that eventually led to significant difficulties.

[81] On November 13, 2009, Mr. Clemens revised his instruction letter to Ms. Hodos to include the B Claims. The revised instruction letter read:

> I write in relation to your engagement to prepare a valuation of the above-noted mineral property.
>
> We write in respect of the standards and guidelines for valuation of mineral properties and in particular Cimval of February 2003.
>
> The relevant mineral properties are commonly known as the Blizzard Claims, are located in British Columbia and bear mineral tenure records numbers 512410, 516063, 415836, 512166, 514145, 512167, 516867, 513224, 516835, 513226,513234, 415504, 415509, 414415, 414416, 414466, 414467, 515979, 516882, 514144, 514148, 514938, 514146, 504391, 508805, 503121, 502074, 531779, 531780. Blizzard holds the Blizzard Claims as agent, and in trust, for Boss Power.

[82] The newly included B Claims were 515979, 516882, 514144, 514148, 514938, 514146, 504391, 508805, 503121, 502074, 531779, and 531780.

[83] There is evidence which suggests Mr. Clemens and Mr. Rogers likely spoke at least twice between November 3, 2009 (when Mr. Clemens advised Ms. Hodos that the pleading would be amended) and November 13, 2009 (when Mr. Clemens sent the proposed amended pleading to the Province).

[84] First, in his daytimer[5], Mr. Rogers recorded the following:

> November 10, 2009 – "…BPU Murray re valuation / Update RKN"[6]

[85] Second, on November 10, 2009, Mr. Rogers sent an email to Mr. Netolitzky conveying that he had a "long discussion" with Mr. Clemens the previous day concerning Ms. Hodos's valuation, and noting that Mr. Clemens "has the draft and is tweaking some of the legal aspects of it as well as incorporating some last minute input from me before sending it back to Onstream for a final re-write". Mr. Netolitzky testified in his discovery that he had no reason to doubt that Mr. Rogers had such a discussion with Mr. Clemens.[7]

[86] That said, Mr. Clemens does accept that he actually has no present recollection of a phone call in which Mr. Rogers instructed him to add the B Claims. However, he says that his standard practice was to discuss amendments such as this with his clients, and he knows of no reason why he would not have done so here.

[87] The defendants assert that, based on the evidence outlined above, it is more likely than not that there was a phone call on or about November 9 or 10,

2009, in which Mr. Rogers instructed Mr. Clemens to include the B Claims in the Action (the “Phone Call”). The defendants suggest that the “legal aspects” of the valuation referred to by Mr. Rogers in his November 10, 2009 email could only refer to aligning the pleading with Ms. Hodos’s valuation, i.e. by adding the B Claims.

[88] On November 13, 2009, Mr. Clemens drafted the amendment to the Initial SOC to include the B Claims. They were underlined in a revised paragraph 5. There was no change to paragraph 6, which described the claims as being held in trust for Boss. As noted below, this was a critical error.

[89] Mr. Clemens sent the draft to the Province and requested its consent to amend. There are no documents forwarding this draft to Mr. Rogers for comment.

[90] Onstream’s report was finalized and sent to Mr. Rogers in early December 2009, who noted no issue, even though the B Claims were reflected on the report's title page. He did note a typo in the report.

[91] Mr. Beruschi testified that he “might have glanced through [the Onstream Report], yes”, although that review may have only happened after he became a director of Boss in July 2010.

[92] On December 14, 2009, Mr. Rogers sent an email to Boss’s audit committee, reporting on whether Boss owed any further obligation to Mr. Beruschi regarding the B Claims. Mr. Rogers wrote:

> At our last Audit Committee meeting you requested that I review the Boss/Blizzard legal documents to determine if we owe any further obligation to Anthony Beruschi regarding the “B” Claims (i.e. those claims not acquired by Boss in the original agreements but subject to an option provision) or if we were required to give any notice regarding the option on those “B” Claims.
>
> …
>
> In the July 27th, 2006 Asset Purchase and Sale Agreement (between Santoy, Beruschi, Travis, Calzador and Boss Gold) Boss acquired the Blizzard, Additional Blizzard Ground and Hydraulic Lake Claims. Boss was given an option until December 31st, 2008 to acquire 51% interest in the “B” Claims and a right of first refusal from January 1st, 2009 to June 1st, 2009 should Beruschi wish to vend the “B” Claims to another party. There is no requirement for notice if we choose not to exercise the option or right of first refusal and the option date has now passed.

[93] Of concern, it was only months later, on March 23, 2010, that Mr. Clemens realized that the amended statement of claim including the B Claims, had never actually been filed. Mr. Clemens's assistant followed up with counsel for the Province to seek the Province's consent. The Province provided its consent the next day.

[94] On March 29, 2010, the defendants finally filed the amended statement of claim (the "Amended SOC") on behalf of the Clients. Paragraphs 5–7 of the Amended SOC read as follows with the amendments:

> 5. Mineral claims, located in British Columbia ,commonly known as the Blizzard Claims, bearing Mineral Tenure Record Numbers 512410, 516063, 415836, 512166, 514145, 512167, 516867, 513224, 516835, 513226, 513234, 415504, 415509, 414415, 414416, 414466, 414467, 515979, 516882, 514144, 514148, 514938, 514146, 504391, 508805, 503121, 502074, 531779, 531780, were recorded in the Mineral Titles Online Registry pursuant to the Mineral Tenure Act in the name of Blizzard (collectively the "Blizzard Claims").
>
> 6. Blizzard holds the Blizzard Claims as agent, and in trust, for Boss Power.
>
> 7. The plaintiffs were entitled to all those rights and benefits conveyed by the *Mineral Tenure Act* and its predecessor legislation regarding minerals, including all of the minerals situated vertically downward from and inside the boundaries of those claims, and the right to use, enter and occupy the surface of those claims for mining purposes.
>
> [Underlining in the original.]

[95] The new underlined claims are the B Claims. As discussed in greater detail below, the existing plea at paragraph 6 that Blizzard Uranium held the claims as "agent, and in trust, for Boss" became factually incorrect with the amendments. The B Claims were not held in trust for Boss. They were held for Mr. Beruschi.

[96] On March 30, 2010, Mr. Clemens's office sent the filed Amended SOC to Mr. Rogers. The defendants concede that "Mr. Clemens does not claim to have sent a draft of the Amended SOC to Mr. Rogers before filing". The defendants still attempt to suggest that Mr. Rogers likely received a copy of the Amended SOC before filing, but I do not see sufficient evidence to support such a factual finding. There is no record of such a transmittal. Mr. Rogers daytimer entry dated March 29, 2010, simply referring cryptically to a "new SOC" does not establish that he was ever given an unfiled version for approval, particularly given that the claim was filed that same day.

[97] Board members Messrs. Brooks, Bowles and Netolitzky received the Amended SOC on March 30, 2010.

[98] In its Response to the Amended SOC, filed September 17, 2010, the Province admitted the facts in paragraphs 5 and 6.

M. The Interregnum Between the Addition of the B Claims and the Settlement with the Province

1. Mr. Beruschi complains about his Escrow Shares and is added to the Board

[99] On April 28, 2010, Mr. Beruschi sent a without prejudice letter to Boss Power concerning his Escrow Shares, requesting that Boss Power immediately release the shares to Mr. Beruschi's company, Magic Dragon.

[100] On June 7, 2010, Mr. Rogers refused Mr. Beruschi's request that Boss contribute funds for an offer to buy back the Excluded Claims (the result of which would be that the Escrow Shares would be returned to Mr. Beruschi). Mr. Rogers advised that Boss would not release the Escrow Shares unless Mr. Beruschi delivered the Excluded Claims. Mr. Beruschi continued to push his point in correspondence on June 8 and 11, 2010.

[101] On June 15, 2010, Mr. Netolitzky advised that Boss would rely on its remedies to resolve the Escrow Shares matter (which remedies included the possibility of arbitration). On June 16, 2010, Mr. Beruschi sent another email that acknowledged the potential for arbitration. On June 17, 2010, Boss obtained legal advice from Fasken Martineau DuMoulin LLP ("Fasken") on Mr. Beruschi's demand. That advice was that Mr. Beruschi had no right to release of the Escrow Shares, a position that turned out to be correct.[8]

[102] On July 13, 2010, Mr. Beruschi was added to the Board.

2. The Claim is reviewed and amended again

[103] On July 30, 2010, Mr. Rogers recorded the following in his daytimer: "Vet amended SOC".[9]

[104] On August 5, 2010, Mr. Rogers swore an affidavit that exhibited a copy of the Amended SOC with the added B Claims underlined and the following paragraph unchanged. He raised no concerns.

[105] On August 16, 2010, Mr. Clemens provided Mr. Rogers a draft written argument for leave to further amend the pleading to add a claim for misfeasance in public office. It stated, “The plaintiffs are the recorded holders of 29 mineral claims located just south of Kelowna, British Columbia”. Mr. Rogers did not object to this language. The proposed pleading was attached and said likewise. The Province’s application response provided to Mr. Rogers the next day also stated likewise. No concerns were raised about the language. On August 30, 2010, the defendants filed the further amended pleading in the newly required form (the “NOCC”). The pleading with respect to the B Claims remained unchanged, except that they were shifted two paragraph numbers downwards from paragraphs 5 and 6 to paragraphs 7 and 8 of the pleading.[10] The B Claims were no longer underlined. On September 17, 2010, Mr. Clemens’s assistant sent Mr. Rogers a copy of the NOCC.

3. The Province’s summary trial application

[106] On October 28 and 29, 2010, a summary trial application by the Province was heard. Mr. Beruschi attended this hearing. Boss’s application response lists the 29 mineral tenure numbers, including the B Claims. It was provided to Mr. Rogers on or about October 23, 2010, and Mr. Rogers raised no concerns. The Clients’ draft written argument for the summary trial application was provided to Mr. Rogers on October 27, 2010, and states that Blizzard Uranium has at all times “owned mineral claims described in paragraph 7” of the NOCC in trust for Boss. Mr. Rogers responded that he had “no nits to pick”.

4. The discovery of Dr. Stone

[107] The Province conducted an examination for discovery of Dr. Stone on October 19, 2010. He prepared with Mr. Clemens, including by reviewing the NOCC. Dr. Stone confirmed on discovery that the claims in the NOCC were held for Boss’s benefit.

[108] The day after Dr. Stone’s discovery, he swore an affidavit that exhibited the NOCC. On October 19, 2010, Mr. Clemens circulated a draft of Dr. Stone’s

affidavit to Mr. Rogers for his review and comment. Mr. Rogers advised that he was vetting the draft affidavit. No issues regarding the NOCC were raised by Dr. Stone or Mr. Rogers.

5. Mr. Beruschi receives a current version of the pleading

[109] On October 26, 2010, Mr. Beruschi emailed Mr. Rogers requesting a copy of the "new statement of claim and defence". Mr. Rogers provided Mr. Beruschi with the NOCC and the Province's Response. Mr. Beruschi raised no issues.

6. The Province delivers its valuation report

[110] On November 9, 2010, the Province delivered its valuation report (the "Stephenson Report"). The report states (at p. 2) that, "[i]n 2005 and 2006, negotiations took place between a number of interested parties, the net result of which was that Boss acquired … an option to obtain a 51% interest in claims covering other uranium prospects in the Blizzard area (referred to as Schedule 'B' claims)". Mr. Clemens admits that he studied the Stephenson Report at the time.

[111] The Stephenson Report concluded that, on a discounted cash flow basis, the project would have had negative value in April 2008 and March 2009 but would have had some value to a purchaser as a speculative investment. While the report focused on the Blizzard 1 Claim, a cursory assessment of the additional A Claims and the B Claims estimated those claims' overall value at $0.2 to $0.4 million, after a 50% deduction for the "uncertain status of the option agreement over the B Claims". When adding this calculation to the Blizzard 1 Claim's value, the Stephenson Report concluded that the whole project had an estimated value of $3.5 to $5.6 million.

7. Trial preparations

[112] A trial of the Action against the Province was scheduled to commence on October 3, 2011. Much of that year was spent preparing for trial.

[113] On January 6, 2011, the defendants hosted a meeting for the Board to discuss the Action. Mr. Beruschi attended. No issues were raised about the B Claims.

[114] On March 24, 2011, NST filed an Amended Notice of Civil Claim (the "Amended NOCC"). The pleadings with respect to the B Claims remained unchanged and were not underlined. On March 25, 2011, Mr. Clemens's assistant sent the filed Amended NOCC to Mr. Rogers.

[115] On March 26, 2011, correspondence prepared by Mr. Rogers indicates that he sent a copy of the Amended NOCC to the Board, including Mr. Beruschi. Mr. Rogers was prepared to confirm this under oath in 2013. At trial, Mr. Beruschi denied receiving the Amended SOC from Mr. Rogers, although his response was somewhat equivocal ("I don't recall him sending it to me."). Mr. Beruschi did not produce his own personal records at trial. Given Mr. Rogers' careful attention to detail throughout, and Mr. Beruschi's credibility and reliability issues discussed below, I am prepared to find that Mr. Beruschi did receive the Amended NOCC at this time.

[116] On May 26, 2011, the Province obtained an expert report from Keith Spence (the "Spence Report"). Mr. Spence estimated the fair value of the pleaded claims at $8.7 million by applying a simple premium to Mr. Stephenson's earlier estimation, which was deemed to be thorough but overly conservative. Mr. Spence did not consider the independent value of the B Claims.

[117] On September 12, 2011, NST filed a Second Amended Notice of Civil Claim (the "Final NOCC"). The pleadings regarding the B Claims remained unchanged. Mr. Beruschi believes he received a copy of this pleading.

N. Settlement Discussions with the Province Heat Up as Trial Approaches

[118] On August 15, 2011, Mr. Clemens wrote to the Province's counsel, Ted Gouge, K.C. (now a retired Judge of the Provincial Court), with an offer to settle the Action for $42 million.

[119] On August 18, 2011, Mr. Gouge delivered a counteroffer. The counteroffer made two alternative proposals, described as follows:

> 1. The Province will purchase the mineral claims in issue from the plaintiffs at a price of $20 million. The plaintiffs will transfer the mineral claims to the Province, or a nominee, free and clear of all encumbrances, and will provide a comprehensive release and a consent dismissal order. The Province will pay costs, to be assessed at Scale "B" under Appendix "B" to the *Supreme Court Civil Rules*.

> 2. The Province will purchase the mineral claims in issue from the plaintiffs at fair market value (to be assessed as at April, 2008). Fair market value will be determined by a single arbitrator under the Commercial Arbitration Act. The plaintiffs will transfer the mineral claims to the Province, or a nominee, free and clear of all encumbrances, and will provide a comprehensive release and consent dismissal order. The Province will pay costs, to be assessed at Scale "B" under Appendix "B" to the Supreme Court Civil Rules.

[120] Mr. Rogers sent a copy of the Province's counteroffer to the Board. On August 19, 2011, Mr. Beruschi sent an email to the Board with comments on the Province's counteroffer. He wrote:

> There is also the matter of the settlement being a free and clear "purchase" of the property. Has anyone considered how this would be accomplished in light of Boss's obligations on the property to Mr. Travis, and to me, in connection with the original resolution of matters and specifically outstanding royalties? Mr. Travis no doubt will be difficult to deal with.

[121] On August 26, 2011, Mr. Rogers wrote to Mr. Clemens asking whether Boss actually needed to say that it would transfer title "free and clear of all encumbrances". Mr. Rogers' question was in response to a proposed term to that effect in Mr. Clemens's draft offer. Mr. Rogers explained that he was "[t]hinking of Sparton/Travis/Beruschi". In response, Mr. Clemens identified the importance of being able to warrant title in any settlement agreement:

> I will remove the reference to clear title but we are going to have to confront it at some point. Has anyone claimed an interest in the claims as opposed to the proceeds? We had better get some research done to enable you to warrant title in a settlement agreement.

[122] By "we", Mr. Clemens says he was not suggesting that NST would do that research. Rather, Mr. Clemens was asking and expecting that Mr. Rogers and Boss's management would do so.

[123] That same day, Mr. Clemens delivered another offer to the Province, this time on the following terms:

> 1. payment of the sum of $42 million on the basis of an expropriation of the plaintiffs' Canadian resource properties identified in the statement of claim;
>
> 2. abandonment of the mineral titles by our client as a result of the expropriation;
>
> 3. a consent dismissal of the above-noted action without costs to either party as if tried on the merits; and

> 4. delivery of a comprehensive Release by the plaintiffs in favour of the defendant.

[124] On September 12, 2011, Mr. Rogers was provided with the Final NOCC. No concerns were raised.

[125] On September 28, 2011, Mr. Rogers was sent Boss's draft opening statement for trial, which stated: "Boss Corp. is a public company and the beneficial owner and recorded holder of 29 mineral claims located just south of Kelowna, British Columbia." The referenced 29 claims must have included the B Claims. A revised draft to similar effect was provided on October 17, 2011. No concerns were forthcoming.

[126] That same day, the Province delivered a letter with an offer to settle on the following terms:

> 1. The Province will pay to the plaintiffs the sum of $20 million forthwith upon execution and delivery of the documents referred to below.
> 2. The plaintiffs will convey to a nominee of the Province good, safeholding and marketable title, free of encumbrances, to the mineral claims identified in the Notice of Civil Claim.
> 3. The parties will consent to an order that this action he dismissed, without costs, and that the order shall have the same effect as if pronounced after a trial of the action on its merits.
> 4. The plaintiffs will execute and deliver to the Province a comprehensive release of all claims arising out of any of the facts, matter and issues referred to the pleadings in the action.
>
> [Emphasis added.]

[127] Also on September 28, 2011, Mr. Clemens and Mr. Gouge met to discuss settlement. Mr. Clemens and Mr. Gouge agreed in principle that each would recommend to their clients a settlement on certain terms, as set out in a letter that Mr. Clemens delivered the next day. These terms were as follows:

> 1. Payment to our client, Boss Power Corp., of the sum of $30,000,000, plus taxable costs and disbursements to be calculated, on the basis of expropriation of the plaintiffs' Canadian Resource properties identified in the Statement of Claim;
> 2. abandonment of the mineral titles by our clients as a result of the expropriation;
> 3. a consent dismissal of the above-noted action without costs to either party as if tried on the merits; and

> 4. delivery of a comprehensive release by the plaintiffs in favour of the defendant in respect of the claims made in the Notice of Civil Claim.

[128] Mr. Rogers forwarded a copy of the Province's offer to the Board, including Mr. Beruschi, on September 29, 2011. That same day, there was a meeting at NST's office with the Board. Mr. Clemens attended, as did Mr. Beruschi. At that meeting, there is no dispute that Mr. Beruschi asked Mr. Clemens whether, notwithstanding any settlement with the Province, he could pursue a lawsuit with respect to his own claims. Mr. Beruschi says that Mr. Clemens advised him that he could. Mr. Clemens's testimony was subtly different, in that he said that Mr. Beruschi was advised that he would "be in the position of all other… rights holders to the extent that they had valuable claims".

[129] Mr. Rogers was going to be Boss's main witness at trial. Mr. Clemens met with Mr. Rogers several times in the weeks leading up to trial to prepare him. Mr. Rogers kept the Board apprised of their work, including on October 7, 2011, when he advised that Mr. Clemens was scheduled to spend a couple of days with him preparing his evidence. Mr. Clemens suggested at trial that he gave Mr. Rogers "homework" as part of this witness preparation: review the Final NOCC and confirm that Boss owned the mineral claims listed. Mr. Rogers allegedly affirmed that the pleading was correct.

[130] The plaintiffs challenge whether this discussion occurred. The first recorded mention of this conversation is in a later 2014 memo prepared by Hunter Litigation Chambers ("Hunter") for the Clients that states:

> Second, in the weeks leading up to trial (and, by extension, the settlement), NST asked Mr. Rogers to review and confirm the accuracy of the facts as set out in the Statement of Claim. Mr. Rogers did so and confirmed the facts to be accurately stated.

[131] I find that this memo, sourced as it was from information provided by Mr. Clemens, accurately describes what occurred. I do not find that Mr. Rogers was specifically asked to confirm that Boss equitably owned each of the listed mineral claims. Further, I reject any suggestion that Mr. Rogers was directed to the Error specifically and asked to specifically approve or ratify it.

[132] Given the ongoing settlement discussions, the original October 3, 2011 trial start date was moved to October 17, 2011, and then to October 19, 2011.

[133] Mr. Clemens accepts that up to the date of the settlement with the Province, he had no information that Boss had triggered the Option or the ROFR in order to become the equitable owners of the B Claims, and that he never learned anything to suggest that Boss had come to own an interest in the B Claims.

[134] On October 19, 2011, after delays created by the need to address Treasury Board approval, Mr. Gouge sent an email to Mr. Clemens which advised that he had instructions to accept the settlement offer set out in Mr. Clemens's letter of September 29, 2011, subject to the following:

> 1. In paragraph 2 of your letter, you refer to "abandonment" of the mineral claims. It is a condition of the Province's acceptance of the plaintiffs' offer that the plaintiffs will surrender the mineral claims or transfer them to the Province (at the Province's option).
> 2. Costs will be payable at Scale "B" under Appendix "B" to the Supreme Court Civil Rules. Disbursements will not exceed $500,000.
> 3. The release and consent dismissal order will be in the forms attached.
> 4. Prior to closing, you will provide copies of a directors' resolution from each plaintiff, approving the settlement and authorizing Mr. Rogers to execute a release in the form attached.
>
> [Emphasis added.]

[135] The form of release provided required the Clients to release the Province from, among other things, "any claim arising out of or in any way connected" with "any fact, matter, event, act or omission arising, occurring or existing before the date of execution of this release". Mr. Clemens forwarded Mr. Gouge's email and its attachments to Mr. Rogers. Mr. Rogers forwarded it to the Board and advised that "I can see nothing here that we did not ask for in our last discussion with the government." Mr. Beruschi reviewed Mr. Rogers's email. Mr. Rogers also called Mr. Beruschi to advise him of the Province's conditional acceptance of their $30 million offer. On behalf of the Board, Mr. Rogers instructed Mr. Clemens to accept the Province's conditions. Before trial commenced that day, Mr. Clemens accepted the terms. Boss thereby became entitled to $30 million but was obligated to deliver the 29 claims listed in its NOCC, including the B Claims (the "Settlement"). Detailed settlement documentation remained to be prepared.

O. Mr. Beruschi's Residual Ability to Sue over the B Claims, and the Identification of the B Claims Problem

[136] Mr. Clemens recalls meeting Mr. Beruschi on the street after the Settlement was agreed, and Mr. Beruschi asking him again about his ability to sue the Province for his own mineral claims. Mr. Clemens states that he gave him the same advice as previously.

[137] Later on October 19, 2011, Mr. Rogers and Mr. Beruschi exchanged emails about the Settlement. Mr. Beruschi again raised the prospect that new claims could be brought to seek compensation for other expropriated mineral claims in the area. In response to Mr. Beruschi's inquiry, Mr. Rogers wrote:

> I'm not sure about your comment about Boss commencing an action for the other uranium claims in the area …. We never did acquire the Schedule "B" Claims from you nor the Billingsley ground, so I'm not sure why we would sue for any of that? <u>You can go after them of course, as can Billingsley.</u>
>
> [Emphasis added.]

[138] On October 20, 2011, Mr. Rogers emailed Mr. Beruschi and wrote (in part):

> I understood that we had acquired the Sched "A" claims (except Billingsley's ground) and passed on the Sched "B" claims. There was [a] date that has come and gone at which we had to either act or lose the option. We paid $ 1,250,000 for the Sched "A", if I'm not mistaken.
>
> Either way the lawsuit right from the start has been for the main Blizzard Claim plus the Sched "A" claims that jointly were the entire land base of the company. The valuation was based on this package, as was the original statement of claim and amended claims. <u>We didn't sue for the value of the Sched "B" Claims and that's what I think you can and should still launch a lawsuit for.</u>
>
> [Emphasis added.]

[139] Later that day, Mr. Rogers wrote to Mr. Beruschi:

> File a suit on the Sched B claims, Anthony, you might scare the shit out of them if you say it is "Blizzard II".

[140] Mr. Beruschi responded:

> I have to be sure that I have the right to sue. I thought Boss had the right to sue. That's why I want to ensure that Boss doesn't sign away any other claims it has. I have to dig out the agreement unless you have it and can look at it, or the filing statement. I understood that Boss's claim was for only the Blizzard.

[141] Mr. Rogers responded:

> Probably best if we get Murray to clarify. I do recall that the original statement of claim covered the whole package, not just the main Blizzard claim…

[142] On October 20, 2011, Mr. Rogers sent Mr. Clemens an email raising a concern regarding the inclusion of the B Claims in the Settlement:

> As a result of Anthony's inquiry about what claims are involved in the settlement I'm having a problem resolving the claims we actually own versus the claims that appear in the original Statement of Claim from October 16th of 2008 and the Notice of Civil Claim of August 20th, 2010….
>
> **The Statement of Claim from October 2008 only lists these 17 claims, and these are the claims that Boss Power actually owns thru Blizzard Uranium Corp.**
>
> **The Civil Claim of 2010 lists 29 claims. I think that this list captures the 12 Schedule "B" claims that Boss Power Corp. did not acquire but Blizzard Uranium is holding in trust for Beruschi.**
>
> I'm not sure how the list grew from 17 to 29 claims, but I don't think I can sign away title to the Schedule "B" claims as we never acquired them from Beruschi.
>
> Can you look this over for me please and advise? We may need to ask the Province to amend the terms of settlement.
>
> [Emphasis in original.]

[143] I refer to the problem identified by Mr. Rogers in this email—that Boss did not have the power to "sign away title" to the B Claims because "Blizzard Uranium is holding [them] in trust for Beruschi"—as the "B Claims Problem".

[144] Mr. Clemens says that when he received this email, "I was confused. This hit me like a sledgehammer."

[145] Mr. Clemens responded to Mr. Rogers later that night:

> We amended to add the claims in March 2010. Copy of Amended Statement of Claim. This was based on my letter of instruction to Ellen also attached. The additional claims arose due to Ellen's review of the list of Boss claims which was a schedule in her report. I also recall that she made it clear the Beruschi did not deliver the claims so they were not included in the valuation. I will have a closer look at this on Saturday and will discuss it with you further then.
>
> [Emphasis added.]

[146] This report to Mr. Rogers was incorrect in two respects: (1) Mr. Beruschi was never obligated to deliver the B Claims, because Boss never exercised the

Option or the ROFR; and (2) Ms. Hodos did include the B Claims as part of her valuation. Again, I view this as evidence of (at best) some confusion on Mr. Clemens's part about what he had included in the pleading, why, and how.

[147] Mr. Beruschi began to express concern about the status of his B Claims. In emails between Mr. Beruschi and Mr. Rogers from October 19–21, 2011, Mr. Beruschi stated:

a) "The quit claim must be carefully reviewed to ensure it is limited to the Blizzard claim."

b) "Boss now can commence action against the Province for the expropriation of its other uranium assets in the area."

c) "Regarding the question of claims, I understood from speaking with Murray at the board meeting that our claim and payment was for the expropriation of the Blizzard. Murray specifically said that we had the right to sue for other matters after when I asked him specifically on the point."

d) "I understand that the "B claims" are still in good standing and that Boss moves them forward yearly."

P. Discussions with the Province about the B Claims Problem

[148] Mr. Clemens did not reach out to the Province about the B Claims Problem until October 28, 2011, when he sent Mr. Gouge a letter stating:

> The claim numbers which were added in the amended Statement of Claim filed March 29, 2010 - 515979, 516882, 514144, 514148, 514938, 514146, 504391, 508805, 503121, 502074, 531779, 531780 – were to be transferred to Boss pursuant to an agreement with Anthony Beruschi. As disclosed in the Onstream valuation report of November 13, 2009 at p. 65, Mr. Beruschi failed to deliver these claims. The valuation of the claims by Ms. Hodos excluded a consideration of any value for those claims. Mr. Stephenson in his report at page 26 observes "the net result of the agreements was that Boss acquired ownership of the Blizzard (Schedule A) claims, which cover the Blizzard and the Hydraulic Lake deposits, with an option to acquire a 51% interest in the Schedule B claims…". The failure by Berushi [*sic*] to transfer the claims is described at p.92 of the Book of Documents of the Province, which you recently provided.

[149] Mr. Clemens's assertion that Mr. Beruschi failed to deliver the B Claims was plainly incorrect: Mr. Beruschi had, in fact, transferred legal title to the B Claims to Blizzard Uranium as required. Beruschi retained beneficial ownership because Boss never exercised its Option or ROFR. Just two days earlier, Mr. Rogers had emailed Mr. Clemens the APSA and Amendment Agreement and reiterated that Boss had never exercised the Option to acquire the B Claims. Mr. Clemens accepted at trial that he had the means to know that his letter was incorrect.

[150] On November 23, 2011, Mr. Gouge sent an email stating that the records he had access to showed that Blizzard Uranium was the holder of all the claims listed in the Second Amended Notice of Civil Claim. He asked, "Is there some misunderstanding here?" Mr. Clemens responded as follows:

> Ted,
>
> Confusion but not a misunderstanding. I attach the asset purchase and sale agreement dated 29 July 2006 and Amendment Agreement of May 23 2007. The Option granted in 6.3 of the earlier agreement on the B Claims was not exercised. Under the amendment (recital F) the B Claims were held in trust by Boss pending the exercise (which never happened) so Boss could ensure that payments were made to maintain them. The [*sic*] continue to be held in trust but the option has expired and Boss no longer has an equitable interest in them.
>
> Murray
>
> [Emphasis added.]

[151] There are errors in this statement: (1) the B Claims were not held in trust by Boss, but by Blizzard Uranium, and (2) Boss never had an equitable interest in the B Claims, but rather only had the Option and the ROFR.

[152] On November 25, 2011, Mr. Gouge emailed Mr. Clemens with the Province's position on the inclusion of the B Claims, relying and emphasizing the plea in paragraph 6 that "Blizzard was the owner of the mineral claims listed in the notice of civil claim":

> In their notice of civil claim, the plaintiffs alleged that Blizzard was the owner of the mineral claims listed in the notice of civil claim and that Blizzard held those mineral claims as trustee for Boss. The Province admitted those allegations. Our settlement agreement provides that the plaintiffs will surrender the mineral claims or transfer them to the Province, at the Province's option. The Province has elected to require the plaintiffs to surrender the mineral claims, and takes the position that the plaintiffs are obligated so to do by the terms of settlement agreed. The settlement funds will not be paid unless and until all of the mineral claims listed in the notice of civil claim have been surrendered.

[153] On November 30, 2011, Mr. Rogers sent the Trust Agreements to Mr. Clemens.

[154] On December 3, 2011, Mr. Gouge reiterated that the Province required the B Claims to be surrendered as part of the settlement.

Q. The Alleged Paramount Investment Plan

[155] Mr. Beruschi testified that he and Mr. Netolitzky reached an agreement during this period that Boss would invest $25–27 million of the $30 million settlement in Paramount Resources Ltd. (“Paramount”) upon Boss’s receipt of the Settlement proceeds. There was a subsequent Board meeting on November 28, 2011. At trial, Mr. Beruschi said the following about whether there was any discussion of this proposed Paramount plan at this meeting:

> Q Did you tell the board that you had an agreement?
>
> A At [the November 28, 2011 board] meeting?
>
> Q Yes.
>
> A No, no, that’s not – that wasn’t the purpose of that meeting. That meeting was to go over other stuff, and, you know, I didn’t – I didn’t discuss, you know, Ron’s conversation with me. That’s for us to bring to the board at a later time, when we’ve got the 30 million. Ron and I would have then gone to the board and said, “Here’s what we believe we should be doing; here’s the investment we should make. Yea or nay?”, right, like not -- but that -- not for this meeting. It’s not – this is a – this was a meeting for something else, obviously.

[156] On December 21, 2011, Mr. Beruschi sent an email regarding the draft minutes of the November 28, 2011, board meeting. Mr. Beruschi wrote:

> There was general discussion led by Ron that more than about 5 million was too much to have in a company searching for projects. Ron also suggested that the company look to use its shareholders to find oil and gas projects that made sense.

[157] Mr. Beruschi’s comments were not incorporated into the final version of the minutes of this meeting.

R. Mr. Beruschi raises concerns about the B Claims Problem

[158] Mr. Beruschi testified that he only realized that the B Claims were included in the Final NOCC on December 14, 2011, after receiving correspondence to that

effect from Mr. Rogers. Mr. Rogers's correspondence, sent after consultation with Mr. Clemens, stated that the lawsuit was "not for an expropriation of any particular group of claims, but rather for the *de facto* expropriation of our interest in all of the claims by the refusal to process our Notice of Work and the misfeasance that was later added as a cause of action", and that the B Claims were "properly documented in later pleadings … as being held in trust for [Boss] by [Blizzard Uranium]." Given the language of paragraph 6, that statement was untrue.

[159] On December 19, 2011, Mr. Kirkham wrote to Mr. Clemens to advise that he had been retained to act for Mr. Beruschi with respect to the B Claims Problem. Mr. Kirkham wrote:

> I act for Anthony Beruschi in respect to beneficial ownership of the B claims. As you are well aware, Boss is the registered owner of those claims as bare trustee for my client. Boss held an option to acquire the B claims but did not exercise it and the option has lapsed. Boss's legal obligation is now to convey title back to my client.
>
> My client has been told by Boss that Boss must include delivery or abandonment of the B claims in order to effect the announced $30,000,000 with the Govt. My client has repeatedly asked Boss why this is so and has not received any satisfactory response. Very recently Mr. Rogers stated that Boss had included the B claims in its pleadings. If that is so, it makes it understandable why the Govt would demand they be included in the settlement. However that is the first my client has heard of the B claims being included in the pleadings.
>
> In order that I can properly advise my client could you please attend to the following:
>
> 1. Send me a copy of any pleading which references the B claims
>
> 2. Send me copies of every document that is relevant to the issue of what is included in the settlement.
>
> 3. Advise how Boss could possibly consider it had the right to make any claim in respect to the B claims, or include such claims in a settlement, without the knowledge or consent of my client.
>
> 4 Advise how Boss can now proceed with a settlement which includes the B claims, when such would be a clear breach of trust and conversion.
>
> We realize that matters are at a critical stage. As a director of Boss, my client would be entitled to the above information but Boss apparently has decided to keep him in the dark. That is not acceptable. We hope something can be worked out but we must be given complete disclosure forthwith. As there may be a board meeting this coming week, it is urgent that you respond forthwith.

[160] Mr. Clemens responded on the same date. In response to Mr. Kirkham's third question, he wrote:

> [Boss] had a right to claim for the interests it was entitled to acquire. The Valuation reports of the Plaintiffs and the Defendants identify the contingent interest in these properties but correctly note that they have insufficient value to affect the overall valuation. Mr. Beruschi was aware that the B claims were included in the pleadings and the reason has been recently discussed with him.

[161] Mr. Clemens's assertion that the reports "correctly note that they have insufficient value to affect the overall valuation" is questionable. None of the reports specifically segregates and analyzes the value of the B Claims.

[162] On December 20, 2011, Mr. Kirkham wrote to Mr. Clemens and advised that Boss had no right to advance a claim for the B Claims and no legal right to abandon the B Claims.

[163] Mr. Clemens recommended to Mr. Rogers that he continue to negotiate with Mr. Beruschi on the client's behalf. Mr. Rogers accepted that advice.

[164] On December 22, 2011, Mr. Rogers advised the Board that Mr. Clemens had concluded that the Board had not done anything wrong and that the Board did not need to retain counsel individually.

[165] After December 2011, Mr. Clemens continued to negotiate with Mr. Beruschi (or his counsel) on behalf of Boss and Blizzard Uranium for some time, notwithstanding the B Claims Problem.

S. The Holdback Proposal

[166] On February 14, 2012, Mr. Clemens wrote to Gordon Houston (who had replaced Mr. Gouge as counsel for the Province) with an offer to resolve the B Claims Problem. Mr. Clemens wrote:

> The statement of claim was amended March 29, 2010 to include additional claims numbered 575979, 516882, 514144, 514148, 514938, 514146, 504391, 508805, 503121, 502074, 51779, 531780 (the "Beruschi Claims"). They were, in fact, recorded in the Mineral Titles online registry in the name of Blizzard as agent for Boss, however, the beneficial interest was and continues to be held by Mr. Beruschi or corporations controlled by him (Tab 4).
>
> The ultimate pleading was a second amended notice of civil claim dated September 12, 2011 (Tab 5). The description of the mineral claims with the

> erroneously included Beruschi claims is set-out at paragraph 7.
>
> Shortly after the settlement offer was accepted, I became aware of the fact that Boss did not hold [a] beneficial interest in the Beruschi claims.

[167] Mr. Clemens's offer to set aside a portion of the $30 million in settlement funds (the "Settlement Funds") to address any claims Mr. Beruschi may bring in relation to the B Claims became known as the "Holdback Proposal". The Province rejected it on March 30, 2010.

[168] On May 4, 2012, Boss's representatives, along with Mr. Clemens, met with the Province. At the meeting, it was discussed that Boss intended to obtain a valuation of the B Claims to help identify a sum that could be set aside to fund any future claims, and that all interested parties could then attend a mediation to resolve the disputes, including the B Claims Problem. The Province indicated that it preferred to try mediation as a first-line solution. The defendants' position is that the Province did not outright reject the Holdback Proposal. But Mr. Clemens agreed that there was nothing "resembling a binding agreement".

[169] Mr. Clemens asked Harper Grey's Roderick Anderson, newly retained by Mr. Beruschi regarding the B Claims Problem, to request that Mr. Beruschi participate in mediation.

[170] Following Mr. Clemens's advice, Boss hired Dr. William Roscoe from Roscoe Postle Associates Inc. ("RPA"), a mining consultancy firm, to provide a valuation of the B Claims (the "RPA B Claims Valuation Report"). The RPA B Claims Valuation Report was intended for use in any mediation with Mr. Beruschi. The fees for the RPA B Claims Valuation Report were $20,921.65. RPA also prepared a report on the Excluded Claims for use in the Escrow Shares arbitration discussed below (the "RPA Excluded Claims Report"). The fees for the RPA Excluded Claims Report were $67,701.92.

[171] On May 24, 2012, Mr. Clemens left a voicemail for Mr. Beruschi's counsel that stated:

> So I hope [Mr. Beruschi's] not under a misapprehension of <u>what's going to happen</u>, um, because uh, we, you know we – time is running out. If we don't get this mediation done and things resolved then <u>we go to plan B is [*sic*] which is a payment out to Boss of a bulk of the settlement and holdback of the balance for the government to wait for Tony to sue it.</u>
>
> [Emphasis added.]

[172] On May 27, 2012, Mr. Anderson wrote to Mr. Clemens to advise that, without proper disclosure of the necessary information regarding the dealings between Boss and the Province, Mr. Beruschi would not be able to determine whether it was in his best interest to participate in a mediation to resolve the B Claims Problem.

[173] On May 28, 2012, Mr. Clemens wrote back to Mr. Anderson:

> In our meeting with the Province on May 4, 2012, the Province agreed that the settlement with Boss Power would be implemented. If Boss Power is unable to acquire the "B Claims" from Mr. Beruschi by way of a process that would involve the setting aside of a fund from the settlement monies to protect the Province from any claims that Mr. Beruschi may make with respect to the "B claims" with a payment of the balance to Boss. The funds set aside would be held until the expiration of the limitation period concerning claims by Mr. Beruschi or the resolution by litigation or settlement between the Province and Mr. Beruschi. Upon settlement the balance of the funds set aside would be paid to Boss. If no claim is made by the expiration of the limitation period, the funds set aside would be paid to Boss.
>
> [Emphasis added.]

[174] On May 28, 2012, Mr. Rogers is reported in unsigned Board Minutes as having stated as follows:

> Mr. Rogers reported on the Business of the Special Committee in which Mr. Rogers, Mr. Bowles and Murray Clemens met with representatives of the Province, expressed inability to reach settlement with the owner of the 'B' Claims and our preference to complete the settlement with the 'B' Claims severed. Our position is that the "B" Claims were included in the settlement as a mistake of fact on the part of both parties, and while the Province indicated they were in support of our efforts they preferred to have Boss Power attempt to negotiate a resolution or take it to mediation which would be supported by the Province. Should mediation be unsuccessful, the Province is prepared to pay the company a portion of the settlement in cash and place a portion of the settlement in trust against future claims by Mr. Beruschi. Any funds left over in the Beruschi trust account at the end of the limitation period would flow to the company.

[175] On June 6, 2012, Mr. Clemens wrote to Mr. Anderson:

> Given your client's refusal to respond to our client's proposal to mediate all disputes including a valuation of the "B Claims", we have assumed, as we said we would in our letter of May 28, 2012 that your client is not prepared to participate in a mediation. We have advised the Province accordingly and will proceed with a closing of a settlement without a transfer of the "B Claims"…
>
> [Emphasis added.]

[176] On June 29, 2012, following an exchange of offers, Mr. Clemens again wrote to Mr. Anderson and said:

> Boss has been keeping the Province up-to-date with the progress of negotiations and will advise the Province that they are at an end so that the settlement can be closed without the B claims, leaving Mr. Beruschi with his full right, title and interest in those claims, including the right to pursue his claims for compensation against the Province to the extent there are any.
>
> [Emphasis added.]

[177] On July 16, 2012, Mr. Clemens wrote to Mr. Anderson to reject Mr. Beruschi's latest offer. He wrote:

> I have also formally advised the Province that negotiations with Mr. Beruschi and Magic Dragon are now at an end so that we can proceed with closing the settlement subject to a holdback pending a claim by Mr. Beruschi or Magic Dragon with respect to the B Claims. A News Release will be issued by the company to disclose this fact.
>
> [Emphasis added.]

[178] Also on July 16, 2012, Mr. Clemens wrote to the Province's new lead counsel, Gareth Morley (now Justice Morley of this Court), to request that he obtain instructions to implement the Holdback Proposal. Mr. Clemens asserted that he understood that Deputy Minister Carr was "generally agreeable" to Boss's proposal to holdback $3 million of the proceeds in trust for any claims from Mr. Beruschi.

[179] On July 19, 2012, Mr. Beruschi resigned from the Board.

[180] On July 25, 2012, Mr. Morley advised Mr. Clemens that the Province would seek to enforce the Settlement by way of an interpleader application (the "Interpleader Application"), rather than agreeing to any Holdback Proposal. On August 27, 2012, Mr. Morley wrote that "the Province needs to know whether the settlement agreement it entered into in good faith can be performed or if the Boss Action must be tried on the merits".

T. The Escrow Shares Arbitration

[181] On June 6, 2012, Mr. Clemens sent a letter to Mr. Anderson enclosing a Notice to Arbitrate to resolve Mr. Beruschi's entitlement to the Escrow Shares (the "Arbitration" or "Escrow Shares Arbitration").

[182] In August 2012, Boss retained Andrew Nathanson of Fasken's Litigation Group ("Fasken Litigation") to act as its counsel in the Arbitration.

[183] In September 2012, Mr. Clemens, Mr. Rogers, and Mr. Netolitzky discussed a plan regarding the Arbitration. The plan was to have the Arbitration heard before addressing the B Claims Problem, so that Mr. Beruschi would be enticed to declare under oath that Mr. Billingsley's claims were worthless (which he would presumably do in order to argue that any escrow was no longer necessary, given that there was no longer a realistic threat of a successful claim by Mr. Billingsley). On September 5, 2012, in the context of a discussion about the proper valuation date, Mr. Clemens emailed Andrew Nathanson and Mr. Rogers stating that "the main object was to get Beruschi to put forward a valuation report on the A Claims as at the closing date to box him in on the B Claims." On September 25, 2012, Mr. Rogers described the benefit of having Mr. Beruschi box himself in as one of a "twofold" objective, along with the denial of responsibility for the Escrow Shares themselves.

[184] Even though Mr. Clemens was no longer formally acting for Boss in the Arbitration, Mr. Clemens and Mr. Nathanson did have interactions regarding strategy so that the Arbitration would be consistent with Boss's larger strategy in relation to Mr. Beruschi.

[185] On November 13, 2013, the chosen Escrow Shares Arbitration arbitrator Mary Ellen Boyd, formerly of this Court and at that time with the firm Singleton Urquhart, issued her award, ordering that the Escrow Shares be released to Boss rather than to Mr. Beruschi. She also ordered that Boss be awarded its costs. Mr. Nathanson anticipated that Boss would be entitled to a costs award of approximately $300,000. This right to costs was not pursued by Boss prior to the First Phase Resolution, defined and discussed below.

[186] Mr. Beruschi commenced a petition seeking leave to appeal the Arbitration decision, but he did not secure a hearing before the First Phase Resolution.

U. The Specific Performance Alternative

[187] On August 17, 2012, Julia Lawn, now Justice Lawn of this Court, but at the time a research lawyer at NST, provided a memorandum to Mr. Clemens

discussing the potential to resolve the B Claims Problem through rectification or specific performance (the “NST Research Memo”).

[188] The NST Research Memo included a factual overview. Mr. Clemens supplied the facts for this overview (the “Assumed Facts”). He also reviewed them to ensure they were satisfactory. He did so with the understanding that Boss would receive the NST Research Memo. But the following aspects of the Assumed Facts were incorrect or incomplete:

a) The Assumed Facts do not disclose that the language used in the pleading was inconsistent with documentation that Mr. Clemens had received in the past;

b) The Assumed Facts state that Mr. Beruschi was on the Board between 2008 and November 2009 (when the decision was made to add the B Claims), but he was not;

c) The Assumed Facts state that the Option over the B Claims lapsed because Mr. Beruschi failed to deliver the claims. In fact, the Option lapsed because Boss did not exercise it; and

d) The Assumed Facts state that Mr. Clemens realized the B Claims were included in the claim, but could not be delivered, about a week after the Settlement. In fact, Mr. Clemens learned of the problem the following day when he received the “sledgehammer” communication from Mr. Rogers.

[189] Based on the advice contained in the NST Research Memo, Boss instructed Mr. Clemens to pursue an application for specific performance of the Settlement with an abatement for the B Claims (the “Specific Performance Application”). Mr. Clemens advised Mr. Morley and the other interested parties of this intention in a letter on September 4, 2012.

[190] Mr. Beruschi opposed the Specific Performance Application. His counsel, Mr. Anderson, asserted that such an application would constitute a breach of trust by Blizzard Uranium. He also advised that Mr. Beruschi had instructed him to apply to disqualify Mr. Clemens and NST as counsel “on the basis of a conflict of interest with respect to Mr. Beruschi”.

[191] The Specific Performance Application was never heard, but the concept was never formally abandoned prior to the First Phase Resolution.

V. The Proxy Fight

[192] Mr. Beruschi obtained Boss's shareholder list in February or March of 2012. He also sought to increase his shareholdings in Boss by demanding partial payment in shares as part of a settlement of the B Claims Problem.

[193] Beginning in March, Boss sought advice from Norton Rose Canada LLP ("NRF") on how to protect itself from a potential proxy fight. On March 13, 2012, Mr. Rogers wrote: "… it appears to me that regardless of where we end up with the settlement and the disposition of the 'B' Claims, the escrowed shares and the disputed royalties that we would be a prime target for one of our major shareholders to try to take over".

[194] Mr. Beruschi attended Boss's 2012 AGM on August 16, 2012, with several shareholders who were affiliates or allies of Mr. Beruschi. Mr. Beruschi asked Boss's CFO how many votes management had and was informed that they controlled 51% of the shares. Mr. Netolitzky deposed that he believed Mr. Beruschi was attempting to surprise management by voting to replace the existing Board through floor nominations.

[195] Mr. Beruschi took more formal steps towards seeking control of Boss on August 19, 2013, when Morning Star Resources Ltd. ("Morning Star") (a company controlled by Mr. Beruschi) announced its intention to propose its own slate of nominees for election to the Board at the 2013 AGM (the "Proxy Fight"). Morning Star's materials focused on the Board's failure to properly manage and resolve the issues delaying delivery of the Settlement Funds.

[196] Boss retained Fasken's solicitor group ("Fasken Solicitor") to assist with the Proxy Fight. Hunter was also retained, as was a public relations firm, Longview Communications Inc. ("Longview"). Mr. Clemens also had a limited role.

[197] On November 14, 2013, Boss held the contested AGM, and the existing Board prevailed.

W. The Interpleader Application

[198] On September 13, 2012, the Province circulated a draft Interpleader Application. The Province sought an order requiring it to deposit the $30 million Settlement Funds into court and requiring the other parties claiming an interest in the Funds to file a claim against the fund.

[199] There were various exchanges between the parties, the Province, Mr. Beruschi, and Mr. Travis in the months thereafter regarding this application. At one point, Boss reached the view that there had been a consent from all interested parties to terms that would allow the Interpleader Application to proceed by consent. The Interpleader Application was filed on February 8, 2013.

[200] Notably, the application provided that if the court concluded that the Settlement could not be given effect, the “action should proceed to trial”.

[201] On February 15, 2013, Mr. Clemens, on behalf of Boss, applied for an order directing that the terms of the Interpleader Application be entered as a consent order.

[202] Mr. Beruschi took the position that he had not come to terms with the other parties.

[203] On April 12, 2013, Mr. Justice Bowden dismissed the effort to determine the Interpleader Application. Justice Bowden found that Mr. Beruschi had not consented to it (the “Bowden Judgment”, reported at *Boss Power Corp. v. British Columbia*, 2013 BCSC 638). On April 15, 2013, Mr. Clemens advised the Board that they had an arguable appeal, but it was never advanced.

[204] The Bowden Judgement left open the possibility for the parties to bring the Interpleader Application back on later. The application remained alive through to the First Phase Resolution, defined below.

[205] On January 21, 2014, counsel for the Province wrote to the Supreme Court Scheduling Office to request a hearing before Bowden J. (who was now case managing the proceeding) in May 2014 to hear the Interpleader Application. Any May 2014 hearing presumably did not proceed because Boss and Mr. Beruschi had reached the First Phase Resolution by that time.

X. Hunter Opinion on the B Claims Problem

[206] In April 2013, Hunter was asked to provide advice on the B Claims Problem. Mr. Clemens understood that Boss was seeking Hunter's advice on how the B Claims came to be included in the Action and Settlement. Mr. Clemens was instructed to provide whatever information Hunter needed.

[207] On May 27, 2013, Mr. Clemens sent the NST Research Memo to Ken McEwan, K.C., with a covering letter. He did not advise of the errors outlined above. In the covering letter, Mr. Clemens wrote:

> I learned about this problem in a telephone call from Randy Rogers on October 25 or 26 while I was in an arbitration hearing. He told me that he was putting together the resolutions and recognized that the B claims were subject to a trust agreement in favour of Beruschi. I had not seen or heard of the trust agreement until that time.

[208] Mr. Clemens's statement that he only learned about the problem on October 25 or 26, 2011 was incorrect. Mr. Rogers alerted him to the problem on October 20.

[209] On September 30, 2013, Mr. Clemens emailed to Andrew Nathanson a copy of the NST Research Memo, again without corrections or clarifications. Mr. Clemens also sent Fasken a copy of his letter to Mr. McEwan dated May 27, 2013.

[210] On March 21, 2014, Mark Oulton at Hunter (now Mark Oulton, K.C., and a partner at the defendant NST) emailed Mr. Clemens stating:

> The Boss board has asked me to confirm a few matters surrounding the original addition of the B Claims to the Boss Action against the province. I am presently out of the country, but was wondering if you might have time for a brief chat prior to 3pm today. Alternatively, I can send you my questions (there are only one or two) by email, but I thought it more efficient to have a telephone call.

[211] The next day, Mr. Oulton had a call with Mr. Clemens. In that call:

a) Mr. Clemens told Mr. Oulton that, at the time the B Claims were added to the Amended SOC, Mr. Clemens was not aware that the B Claims were held in trust by Blizzard Uranium <u>for Mr. Beruschi</u>.

b) Mr. Clemens accepted that he had known that the B Claims were held in trust <u>for someone other than Boss</u>.

c) Mr. Oulton was not made aware that Mr. Clemens had a copy of the Document Review Memo discussed above. Indeed, Mr. Oulton was left with the mistaken impression that Mr. Clemens never saw the Document Review Memo.

d) Mr. Clemens informed Mr. Oulton that the amendments were "reviewed by Randy and approved by him". This was misleading. I have found that Mr. Rogers never saw the amendments before filing.

[212] Based on his conversation with Mr. Clemens, Mr. Oulton revised Hunter's memorandum to add that the defendants were not aware that the B Claims were held in trust for Mr. Beruschi and did not become aware of that fact until after the Settlement. Based on the facts as supplied by Mr. Clemens, Hunter concluded as follows in its letter provided March 25, 2014:

> Based on our review of the pertinent files and discussions with Mr. Clemens, the amendments to include the B Claims were approved by Mr. Rogers at the time the amendments were made.

Y. The Clients and Mr. Beruschi Continue to Negotiate

[213] When Mr. Beruschi learned that the Province demanded the B Claims to be transferred, he sought compensation before agreeing to do so. This set off months of difficult negotiations.

[214] These negotiations were initially led by Mr. Clemens. Mr. Beruschi's initial position, sent to Boss on December 21, 2011, was for him to release the B Claims to the Province on the payment of $2 million from Boss, split between cash and Boss shares. That offer also included provisions for the release of the Escrow Shares and Mr. Beruschi's royalty claims. Boss's offer in response, made on January 19, 2012, was to pay $400,000 for the B Claims, with the resolution of some of the Escrow Shares and the royalty claims.

[215] As discussions continued, Mr. Beruschi began to emphasize that Mr. Clemens, on behalf of Boss, had misled him by asserting that Boss had a Holdback agreement in place with the Province. This alleged misrepresentation hardened his negotiating position. Rather than focusing on the value of the uranium in the B Claims' ground, Mr. Beruschi also began to advance on a new basis for valuing his B Claims: if his agreement were the key to unlocking access

to $30 million, he argued that the price to be paid had to be based more on the value of that key rather than the value of the uranium in the ground. He took the position that the key was properly worth a substantial portion of the $30 million. His demands increased, rather than decreased, as this new damages theory solidified.

[216] On July 4, 2012, the last formal settlement offer Mr. Clemens delivered on Boss's behalf did not result in an agreement.

[217] On November 13, 2012, Mr. Beruschi offered to settle the B Claims Problem and his royalty entitlement for (1) $3.05 million and (2) the establishment of a new $400,000-funded corporation that would control any litigation claims in connection with the B Claims Problem. On November 23, 2012, Mr. Beruschi sent the following proposal:

> The Government's application for specific performance dramatically increases the value of the B claims. No longer is the value of the B claims limited to the 2008 market value – which is likely $4.1 million based on the Ultra deal that Doug Brooks was aware of in 2008 and the comparable $4.3 million Montoro deal 7 months prior to the expropriation.
>
> With the $30 million settlement directly in jeopardy the strategic/synergistic value of the B claims moves toward the difference between the $30.4 million settlement value and what Boss's case is now worth.
>
> A court won't allow Boss to profit from its breaches of trust. […]
>
> A lot has happened that has greatly hurt Boss's position since March/April when the settlement figures the offer below is based on were negotiated. Boss met with the Government in May in breach of trust to get a financial benefit. After that meeting Boss negotiated with threats based on a lie that it had a deal with the Government to close the settlement with a hold back for the B claims. Boss stated its position was much, much better than reality.
>
> Now, with the Government's application for specific performance, it is much worse. If Boss has to sue for specific performance to save the settlement, its position will become even worse.

[218] By 2013, Mr. Beruschi's asking price had risen to $4–5 million.

[219] By that year, Boss had three sets of lawyers and professional advisors advising and representing it in negotiations with Mr. Beruschi: Don Siemens (a businessman retained in May 2013 to act as an independent advisor to assist with negotiations), Fasken, and Hunter.

[220] On Hunter's advice, Boss issued an offer to Mr. Beruschi purportedly based solely on the value of the B Claims as mineral properties. Boss's September 23, 2013 $1.55 million offer was calculated based on the midpoint of the RPA B Claims Valuation Report figures that Boss obtained from RPA dated June 14, 2012 (which valued the B Claims between $1.4 and $1.7 million).

[221] Through at least September 6, 2013, Mr. Clemens continued to have conversations with Hunter about how to resolve matters with Mr. Beruschi. On February 13, 2013, for instance, Mr. Clemens directly recommended against a settlement proposal received from Mr. Beruschi.

[222] After all this counsel involvement, Mr. Netolitzky and Mr. Beruschi entered into direct negotiations. From December 9–12, 2013, Mr. Beruschi and Mr. Netolitzky exchanged emails with draft assumptions and terms for an eventual settlement. During that exchange, Mr. Beruschi demanded that Boss waive any frustration defence against Mr. Beruschi's claims for royalty payments related to the B Claims. Mr. Netolitzky rejected this demand. In response, Mr. Beruschi stated:

> This is the basic part of my reason for settling low — Boss gives up its defense that my royalty is frustrated as part of the consideration for my delivering the B claims. That means the whole royalty is claimable against the spin out, and subsequently against Clemens et al. Boss must continue with its defense of frustration against the other royalty holders. There is no loss of any kind for your side.

[223] Mr. Netolitzky and Mr. Beruschi ultimately reached a handshake deal for $3.6 million in cash to Mr. Beruschi and the creation of a new company that would control any litigation regarding the B Claims Problem and be responsible for any residual exposure to Mr. Beruschi. However, it took several months to negotiate the details of this first phase resolution.

Z. The First Phase Resolution

[224] On March 28, 2014, Boss reached a formal settlement with Mr. Beruschi (the "First Phase Resolution"), which allowed the Settlement with the Province to close. McKercher LLP ("McKercher") was retained to assist in negotiating and preparing this resolution.

[225] The First Phase Resolution was a compromise intended to accommodate several factors relevant to the valuation of Mr. Beruschi's agreement to transfer equitable ownership of the B Claims to the Province to allow the release of the Settlement Funds to Boss.

[226] The merits of pursuing a claim against the defendants were a major sticking point between Mr. Netolitzky and Mr. Beruschi. Mr. Beruschi thought Boss had a very valuable claim against the defendants. Mr. Netolitzky did not share that view, nor was he interested in pursuing litigation. As indicated below, the parties found an elegant way to allow shareholders who believed this claim was strong to obtain control of it.

[227] In terms of the appropriate price to pay Mr. Beruschi for his agreement to forego the B Claims, the parties again found a well-designed way to resolve that challenge by having Boss make a first order "down payment", while allowing Mr. Beruschi the right to continue to seek more from the new entity created to carry the claim against the defendants.

[228] As a result of the First Phase Resolution, the Clients finally received the Settlement Funds. As discussed below, the plaintiffs allege that the B Claims Problem delayed the receipt of the Settlement Funds from October 19, 2011 to May 30, 2014.

[229] Specifically, under the terms of the First Phase Resolution:

a) Boss would be split into two: "NetolitzkyCo" and "BeruschiCo". (BeruschiCo eventually became Blizzard Finance, and NetolitzkyCo continued as Boss);

b) $3.6 million of the Settlement Funds would be delivered to Mr. Beruschi;

c) Mr. Beruschi would permit the B Claims to be conveyed to the Province;

d) Blizzard Finance would inherit all residual liabilities to Mr. Beruschi in respect of all "Disputes", defined as follows:

> … claims, all outstanding matters, actions and allegations between the parties related to the Blizzard Settlement, the agreements pursuant to which Anthony Beruschi transferred legal title to the B Claims to a wholly owned subsidiary of Boss, the Beruschi Interests, the past conduct of the directors and officers of Boss, the operation of Boss, the

> arbitration between Magic Dragon Ventures Lid. and Boss with respect to: 2,000,000 escrowed Boss Shares (the "**Escrowed Boss Shares**") and all other disputes related lo the foregoing between Boss and its directors and the Beruschi Parties as described in the information circular with respect to a meeting of the shareholders of Boss prepared by Boss dated October 22, 2013 and the information circular with respect to a meeting of the shareholders of Boss prepared by Morning Star Resources Ltd. dated October 25, 2013, including claims or potential claims related to the foregoing, known or unknown, including potential claims addressed in various press releases issued by the parties and letters. and emails among the parties and/or their respective counsel prior to the date hereof.
>
> [Emphasis in original.]

e) Blizzard Finance also inherited the right to seek recovery in respect of the cost of resolving the Disputes from the defendants;

f) Blizzard Finance admitted liability in respect of the Disputes;

g) Mr. Beruschi and his companies released Boss and its directors from liability;

h) Boss's shareholders would vote on the resolution;

i) The entire arrangement would be subject to court approval (the "Arrangement");

j) Each individual shareholder would be allowed to elect whether to continue with Boss or Blizzard Finance;

k) Boss's available funds (including from the Settlement) would be divided between Boss and Blizzard Finance in accordance with the respective number of shares outstanding in each company after the transaction. Each company would receive about 32 cents per share;

l) Pursuant to the letter agreement dated March 28, 2014, executed by Mr. Beruschi and Morning Star (the "Letter Agreement"), there was terms requiring that "any legal proceedings between the parties that have been commenced will be withdrawn and terminated, with each party bearing their own costs", and that "Each of the parties shall be responsible for its own costs and charges incurred prior to the date of this Letter Agreement and all legal and accounting fees and

> disbursements relating to preparing the Transaction document or otherwise relating to the transactions contemplated herein"; and
>
> m) Pursuant to a formal assumption agreement dated January 23, 2015 (the "Assumption Agreement"), Mr. Beruschi, Morning Star and Beruschi would not pursue the Clients for any "claims, actions, cause of action, demands, suits and proceedings" respecting the parties' "Disputes", which included the Arbitration according to the Arrangement.

[230] On January 22, 2015, the Arrangement was approved by the Court.

[231] Boss, Blizzard Uranium, Blizzard Finance, and Mr. Beruschi (and his related companies) entered into a formal assignment agreement dated effective January 23, 2015 (the "Assignment Agreement''), pursuant to which Boss and Blizzard Uranium assigned to Blizzard Finance all claims against the defendants.

[232] On January 23, 2015, Magic Dragon's appeal of the Arbitration award was discontinued "without costs to any party".

[233] While the First Phase Resolution was being finalized, Boss also settled with Mr. Travis over his claim for the royalty he held in the Blizzard 1 Claim. This settlement provided that Boss would pay Mr. Travis $475,000. It was entered into on September 18, 2014. Mr. Travis's claims against Boss were dismissed by consent on October 27, 2014.

AA. The NST Final Bill and Taxation

[234] After the Settlement, and while Mr. Rogers was still alive, NST proposed billing a further $1 million beyond the accounts already rendered and paid prior to the Settlement. NST's last date bill had been dated February 28, 2013. The total billings up to that point were $269,000. NST continued to record time thereafter but did not send any further interim bills.

[235] The proposed $1 million final fee was reduced before payment. In his letter of April 17, 2014, to Mr. Netolitzky, Mr. Clemens summarized the discussions that resulted in this reduction:

> In our meeting Mr. Nathanson and I discussed with you the fact that when the action was concluded we advised Mr. Rogers that we considered a fair fee in this instance would be the sum of $1,000,000 which would include all

> unbilled time to that date (approximately $170,000). Due to issues concerning the B Claims, the closing of the settlement has been delayed and our unbilled fees have escalated to approximately $310,000. Irwin and I discussed with you the facts which were considered both at the time that we set our fee with Mr. Rogers and our current considerations and proposed that the final fee of $800,000 in respect of all fees plus disbursements which are currently under $500. We understand that you consider this to be a fair fee and will be recommending it to the Board.

[236] The defendants' final bill for $800,000 was sent to the Clients on May 30, 2014, by which point the unbilled time had increased to $321,000. It was paid from the Settlement Funds upon receipt.

[237] In September 2014, after the limited three-month period for seeking a review, Blizzard Finance became aware that the defendants' bill had been paid. It asked Boss to take out an appointment to review the respondent's accounts pursuant to the provisions of the March 2014 letter agreement. Boss did so.

[238] In the taxation proceeding, Mr. Clemens swore a March 19, 2015, affidavit that included these statements:

a) "At no time prior to the settlement which [Mr. Clemens] negotiated on behalf of Boss Power and Blizzard Uranium with the Province of British Columbia did [he] know that the B claims were held by Boss Power in trust for Beruschi"; and

b) "The inclusion of these claims was based on instructions received from Randy Rogers…".

[239] In his evidence at trial, Mr. Clemens admitted that both those statements were incorrect. In relation to the latter statement, his evidence was that he didn't actually remember receiving instructions from Randy Rogers.

[240] The defendants argued that the taxation was time-barred. On December 30, 2014, the Registrar directed that Blizzard Finance must apply for an extension of time. It did so. On May 1, 2015, Mr. Justice McEwan dismissed the application to extend the time: *Nathanson, Schachter & Thompson LLP v. Boss Power Corp.*, 2015 BCSC 702. However, this decision was overturned on appeal, and the Registrar was directed to perform a taxation: 2016 BCCA 1. As of this judgment, this review has not yet taken place.

BB. The Second Phase Resolution between Blizzard Finance and Mr. Beruschi

[241] Pursuant to the First Phase Resolution:

a) Mr. Beruschi acquired control of 68% of Blizzard Finance;

b) Blizzard Finance assumed Boss's residual obligations to Mr. Beruschi; and

c) Blizzard Finance obtained control of the decision whether to advance a claim against the defendants.

[242] Blizzard Finance's newly appointed board of directors included James ("Jim") Boyce and Raymond Roland. They were appointed pursuant to Mr. Beruschi's control position. He knew them personally. They were experienced businesspeople who were financially independent of Mr. Beruschi. They were among the largest shareholders in Blizzard Finance aside from Mr. Beruschi himself. Mr. Boyce and Mr. Roland held shares representing about 6% of the company.

[243] Mr. Beruschi and Blizzard Finance's board recognized that the task of resolving his residual claims put them on opposite sides of the bargaining table. Given that Mr. Beruschi was the majority shareholder, this raised a potential conflict of interest. The solution adopted was for Mr. Beruschi to formally agree not to exercise his shareholder rights to nominate or elect directors of the company until the issues were resolved (the "Independence Agreement"). The Independence Agreement was concluded on January 5, 2015, extended on May 31, 2019, and amended again on August 31, 2020, ensuring that it remained in force until the parties resolved their dispute.

[244] The Independence Agreement included scenarios which would end its operation, including:

a) a disagreement between the directors Messrs. Boyce and Roland;

b) a settlement of Mr. Beruschi's underlying claims in the current litigation;

c) any litigation against Blizzard Finance by its directors or third parties;

d) the appointment of a new director not consented to by Mr. Beruschi;

e) Blizzard Finance's insolvency;

f) the failure to file required financial statements for a period of over 45 days;

g) the death of Mr. Boyce or Mr. Roland, unless they were replaced by one of two pre-designated alternate directors; and

h) the issuance of any Blizzard Finance shares or stock options not consented to by Mr. Beruschi.

[245] On April 14, 2015, Blizzard Finance and Mr. Beruschi entered into an Appraisal and Cooperation Agreement (the "Appraisal Agreement"), whereby:

a) Blizzard Finance agreed to toll the limitation periods applicable to Mr. Beruschi's claims;

b) Mr. Beruschi agreed not to commence litigation against Blizzard Finance until after the value of the B Claims and his royalty was decided in accordance with an agreed process;

c) Mr. Beruschi agreed to assist Blizzard Finance in the pursuit of the present proceeding against the defendants; and

d) the parties agreed on a process to determine the compensation due to Mr. Beruschi for the B Claims Problem and his royalty.

[246] On April 14, 2015, the parties entered into a letter agreement regarding a $1,200,000 payment payable under the Appraisal Agreement, which deferred payment until 31 days after Mr. Beruschi's formal written demand for the funds.

[247] From 2015 to 2020, Blizzard Finance and Mr. Beruschi made periodic attempts to negotiate a resolution of the Disputes but were unable to do so. During this period, Mr. Beruschi explored other business opportunities. From the Blizzard Finance board of directors' perspective, this served the interests of its shareholders, as Blizzard Finance would be the payor. As long as the issues

remained unresolved, Blizzard Finance had cash in the bank that they could continue to invest.

[248] One of Mr. Beruschi's claims against Blizzard Finance was for legal fees he incurred in relation to the various disputes discussed above. By May 10, 2021, Mr. Beruschi claimed as follows:

a) Two matters from Harper Grey LLP ("Harper Grey"), being:

   a. $220,257.37 incurred as part of the retainer by Mr. Beruschi from May 2012 to December 2013 in relation to disputes arising from the B Claims;

   b. $208,789.47 incurred as part of the retainer by Magic Dragon from October 2012 to December 2013 in relation to the Arbitration (this amount was negotiated down from an initial billed amount of $286,189.13, was later reduced by an interim payment by Blizzard of $180,000, and was eventually satisfied with a final payment of $28,897.47 pursuant to the Second Phase Resolution[11]);

b) $490,531.03 from Sangra Moller LLP, retained by Mr. Beruschi from July 2013 to November 2013 in relation to the Proxy Fight (This amount was taxed. $100,000 was paid back to Blizzard Finance under a settlement);

c) Various amounts billed by Owen Bird Law Corporation ("Owen Bird"), being:

   a. $107,673.89 for work by Paul Brackstone, retained by Mr. Beruschi from September 2013 to March 2014 in relation to the Proxy Fight and other B Claims Problem work and negotiations through to the First Phase Resolution;

   b. $23,406.36 for work by Rose-Mary Liu Basham K.C., retained by Mr. Beruschi from December 2012 to March 2013 in relation to the Interpleader and other matters regarding Mr. Beruschi's disputes with Boss; and

c. $37,937.95 for work by Barry Kirkham, K.C. and Rod Anderson, retained by Mr. Beruschi from December 2011 to July 2012 in relation to his disputes with Boss regarding the B Claims.

[249] Mr. Beruschi's counsel, Mr. Brackstone, delivered a comprehensive demand to Blizzard Finance on May 10, 2021, stating:

> Boss needed the B Claims to complete the settlement with the Province, or Boss would lose the settlement and face an expensive trial with a much worse outcome. Based on the above, Boss' breaches of trust and fiduciary duties resulted in a very substantial premium for itself in the range of $21,000,000 -$26,000,000. This figure ignores the costs and risk Boss and Blizzard Uranium would have faced if they had to proceed with the litigation against the Province. Taking all of these factors together my clients are prepared to accept $16,000,000, or about 2/3 of the benefit Boss obtained, on account of the loss of the B Claims due to the breaches of trust and fiduciary duty. After applying the initial $3,600,000 payment on account of the B Claims this results in $12,400,000 payable to my clients.
>
> As you are also likely aware, those breaches of trust lead to various steps and procedures between Boss and my client aimed at addressing the problems arising from Boss' breach of trust, including the Magic Dragon arbitration, the proxy battle, the interpleader application and other steps including the ultimate resolution of the mechanics and terms of completing the settlement between Boss and the Province.
>
> Pursuant to the Letter Agreement Blizzard Finance subsequently executed an assumption agreement pursuant to which it unconditionally assumed responsibility and acknowledged itself responsible to my clients for all matters pertaining to the Disputes. Blizzard Finance waived all defences, counterclaims and set-offs in respect of the Disputes.

[250] The letter ends with a demand that Mr. Beruschi be paid a further $14,468,140.72, plus certain other amounts to be assessed (the "2021 Demand").

[251] On October 21, 2021, Mr. Brackstone sent a letter demanding approximately $1 million in legal fees as a condition precedent to proceeding with an arbitration. Blizzard Finance refused to accept that condition. The parties returned to negotiations.

[252] The most difficult issue preventing the resolution of the matters between Mr. Beruschi and Blizzard Finance was the appropriate level of compensation for foregoing the B Claims. To help resolve this issue, in August 2022 Blizzard Finance sought Mr. Angus's advice. As noted, Mr. Angus was a mining lawyer who later became a mining entrepreneur. Further, he served as a director of Boss for approximately a year in 2007–2008 and continued to advise Boss thereafter.

Blizzard Finance believed he was in a good position to assess the appropriate amount that should be paid to Mr. Beruschi.

[253] Mr. Angus was having health problems over the summer of 2022 (he eventually passed away in March 2023). Nonetheless, Blizzard Finance decided to proceed with seeking his advice.

[254] Mr. Boyce accepted that in securing Mr. Angus' advice, he was creating a paper trail to suggest that some objectivity was brought to bear by Blizzard Finance in settling Mr. Beruschi's claim.

[255] On August 12, 2022, Mr. Angus advised Blizzard Finance that it would be justified in paying up to one-half of the $30 million at issue, or $15 million. His justifications were similar to those made in Blizzard Finance's August 14, 2020 reply filed in the present proceeding.

[256] After receiving Mr. Angus's email, Mr. Roland wrote to Mr. Boyce, "I would think we need more than this, like #s." Mr. Boyce replied, commenting that Mr. Angus's recommendation that Mr. Beruschi share equally in the settlement proceeds was "pretty strong". On cross-examination, Mr. Boyce agreed that his reference to "pretty strong" reflected his conversation with Mr. Roland about how much they could obtain from Mr. Angus in writing to ensure the Blizzard Finance board had sufficient advice and that the settlement process with Mr. Beruschi would be reasonable. This led to a call with Mr. Angus, during which they asked whether they could obtain more from him in writing. He was reluctant to do so because he was not proficient with computers. Mr. Boyce offered to draft the report email himself and send it to Mr. Angus for review, which he did the evening of August 12, 2022.

[257] Mr. Angus replied to Mr. Boyce on August 19, 2022, saying that "I confirm our discussion that in the negotiation with Tony you are justified in making the initial offer in that range with the ability to go higher to secure his agreement." Mr. Roland emailed Mr. Boyce asking, "Where does this leave us, Jim?" Mr. Boyce's response was as follows: "I'm isolating at home, call me anytime to discuss. I think this is all we are going to get out of Tookie."

[258] Blizzard Finance continued its discussions with Mr. Beruschi with Mr. Angus's guidance in view.

[259] On October 12, 2022, after three further counteroffers, a settlement was finally reached with Mr. Beruschi (the "Second Stage Resolution"). This occurred on the eve of a scheduled trial date in the present proceeding.

[260] Pursuant to the terms of the Second Stage Resolution, Blizzard Finance agreed to compensate Mr. Beruschi and his companies, Morning Star and Magic Dragon as follows:

a) $5,750,000 on account of the B Claims;

b) $909,369.45 with respect to legal fees for which Mr. Beruschi was still out of pocket;

c) $475,000 on account of royalties relating to the Blizzard Claims and other royalties owed by Boss to Mr. Beruschi and his companies (the "Royalty Payment");

d) 2 million common shares to Magic Dragon at a deemed price of $0.01 per share in the capital stock of Blizzard Finance (the "Share Issuance"), as compensation for Magic Dragon's loss of the use of the Escrow Shares, or, in the event the Share Issuance was not completed within three years, a payment to Magic Dragon of $644,000;

e) $28,897.47 to Magic Dragon (in addition to the prior payment by Blizzard Finance of $180,000, together being $208,897.47) on account of the remaining legal fees of Harper Grey incurred for the Arbitration; and

f) pre-settlement and post-settlement interest.

[261] Payments were to be made in five instalments. The first installment was due on November 15, 2022, during what would have been the last week of a scheduled trial in this matter. The remaining four payments were due annually through September 30, 2026.

[262] These new payments were in addition to the approximately $1,015,000[12] Blizzard Finance had already paid to Mr. Beruschi, and were on top of the $3.6 million paid by Boss as part of the First Phase Resolution.

[263] On October 24, 2022, Mr. Boyce delivered Mr. Beruschi a cheque for $28,897.47 payable to Magic Dragon in accordance with the commitment noted above.

[264] Blizzard Finance has not made any of the other payments to Mr. Beruschi under the Second Phase Resolution, despite several deadlines having passed. On November 15, 2022, the parties to the Second Phase Resolution agreed to defer further payments for at least six months.

[265] After the October 17, 2022 trial date was adjourned due to the lack of a judge, Blizzard Finance and Mr. Beruschi entered into a new agreement to postpone the payment date. It did not specify a new date. Mr. Beruschi explained that he was content to agree to this, given that he expected another company in which Blizzard Finance was a large shareholder to take off, and he did not want Blizzard Finance to pay him in shares before the company had realized this potential additional value. From his perspective, Mr. Boyce explained that Blizzard Finance was always willing to retain the cash and defer its obligation to pay. In March 2023, Blizzard Finance and Mr. Beruschi entered into a new agreement (backdated to November 15, 2022) to defer the first installment payment to November 15, 2024.

[266] The March 31, 2023 unaudited financial statements of Blizzard Finance reflect a liability to Mr. Beruschi of $7.2 million, which represents the net amount owing to Mr. Beruschi. Blizzard Finance says that it can and will pay the remaining amounts to Mr. Beruschi when the parties decide that it makes business sense to do so. The statements appear to reflect that Blizzard Finance has the resources to make the payment when required to do so.

CC. Fees Incurred By the Plaintiffs

[267] Beyond the payments to Mr. Beruschi, the plaintiffs seek to recover the fees they paid to the following firms after the B Claims Problem was revealed:

a) NST: The $800,000 in reduced fees paid after the Settlement.

b) NRF: The $50,997.52 in fees paid in relation to the threatened proxy battle in 2012.

c) RPA: The fees for RPA's B Claim Valuation Report of $20,921.65 and the fees for the Excluded Claims Report of $67,701.92.

d) McKercher: The $341,555.64 in fees incurred. These were for advice on settlement discussions between Boss and Mr. Beruschi and his companies, as well as fees incurred for settling Boss' disputes with other royalty holders, namely Anthem Resources Incorporated, Sparton Resources Inc., Cazador, and Mr. Travis.

e) Hunter: The $172,535.92 in fees paid for assessment of the potential claim against the defendants, the advice on the Proxy Fight, and general advice on the dispute over the B Claims.

f) Fasken Litigation Group: The $308,274.65 in fees incurred in relation to the Escrow Shares Arbitration.

g) Fasken Solicitor Group: The $788,848 in fees incurred for advice on various matters.

h) Singleton: The $31,368.53 paid to the arbitrator for the Escrow Shares Arbitration.

i) Longview: The $282,854.11 in fees incurred relating to the proxy fight.

DD. The Claim Against the Defendants

[268] The plaintiffs launched this claim against the defendants on March 24, 2016. The claim was amended on July 7, 2022, and further amended on September 26, 2024 (the "Claim").

1. The Pleading

[269] The Claim makes the following liability pleas:

> 20. On March 29, 2010, Mr. Clemens and NST filed an amended statement of claim in the Blizzard Action. The amended statement of claim added the B Claims to the action against the Province. Specifically, it pleaded that Blizzard Uranium held the B Claims as agent, and in trust, for Eros (the "Error").
>
> 21. The Error resulted from Mr. Clemens relying on his unassisted recollection and failing to verify his unassisted recollection by consulting with his clients or the documents that were in his possession. Doing so would have readily disclosed the Error.

22. Mr. Clemens and NST filed the amended statement of claim without instructions from Eros or Blizzard Uranium. Mr. Clemens and NST also never expressly advised Eros or Blizzard Uranium, either before the amended statement of claim was filed or thereafter, that the B Claims had been added.

…

26. Mr. Clemens was advised about the Error, and that Eros and Blizzard Uranium could not complete the settlement, on the day the Blizzard Settlement was reached. As a result of that advice, Mr. Clemens came under a duty to:

a. promptly advise Eros and Blizzard Uranium of the Error;

b. recommend that Eros and Blizzard Uranium obtain independent legal advice; and

c. advise Eros and Blizzard Uranium that he may no longer be able to act for them.

27. Mr. Clemens took none of those actions.

28. Upon learning of the Error, Mr. Clemens also made no immediate effort to correct the consequences of the Error with the Province.

…

30. As the result of the Error and its consequences, some of Eros' shareholders wanted Eros and Blizzard Uranium to make claims against NST and Mr. Clemens for negligence, breach of contract and breach of fiduciary duty.

31. [From] the time he learned about the Error, Mr. Clemens embarked on a course of action that was calculated to (and did):

a. obscure the fact that there had been an Error;

b. obscure his responsibility for the Error; and

c. attribute responsibility for the Error to Eros, Blizzard Uranium and others.

…

34. At all times after the defendants realized that the inclusion of the B Claims in the Blizzard Action and the Blizzard Settlement prejudiced Eros and Blizzard Uranium, Mr. Clemens and NST were in a conflict of interest. Specifically, Mr. Clemens and NST faced professional liability claims from Eros and Blizzard Uranium, including claims for contribution or indemnity from their directors and derivative claims from their shareholders, in respect of the inclusion of the B Claims in the Blizzard Action and the Blizzard Settlement.

…

41. The defendants breached their duty of care, their contractual duties, and their fiduciary duties. Particulars of those breaches include:

a. Including the B Claims in the Blizzard Action and the Blizzard Settlement:

i. without instructions;

ii. when they knew or ought to have known that neither Eros nor Blizzard Uranium were the beneficial owners of the B Claims; and

iii. when they knew or ought to have known that Mr. Beruschi was the beneficial owner of the B Claims;

iv. without any, or, in the alternative, any adequate investigation into the beneficial ownership of the B Claims;

b. Failing to take immediate steps to have the B Claims removed from the Blizzard Settlement;

c. Engaging in a course of conduct that was intended to, and did, mislead Eros and Blizzard Uranium about how the B Claims came to be included in the amended statement of claim and the Blizzard Settlement as well as Mr. Clemens' and NST's role in that regard;

d. Continuing to act for Eros and Blizzard Uranium while in a conflict of interest.

[270] In terms of Boss's damages, the plaintiffs plead that due to the B Claims Problem, Boss:

a) had to pay Mr. Beruschi $3.6 million;

b) was kept from the $30 million Settlement amount for over two years; and

c) incurred various fees outlined above.

[271] In terms of Blizzard Finance's losses, the plaintiffs seek recovery for the amounts it has paid or is contractually bound to pay to Mr. Beruschi flowing from the B Claims Problem.

2. The Road to Trial

[272] The discovery of Mr. Clemens in the present action took place on May 21, 2021. As noted, Mr. Clemens asserts that it was not until these discoveries that he realized there were materials in his firm's file bearing on the ownership of the B Claims.

[273] A five-week trial was initially set for August 16, 2021, but the plaintiffs sought and obtained an adjournment in June 2021. The plaintiffs relied, in part, on the status of settlement discussions between Blizzard Finance and Mr. Beruschi. Mr. Poulus advised the Court at the time that there had been an agreement to arbitrate the disputes between Mr. Beruschi and the plaintiffs, whose resolution

would help crystallize the issues for trial. Mr. Poulus stated the following to the Court: “I’m instructed that there is now an agreement between Beruschi and Blizzard that they will resolve these matters by arbitration.” The defendants contend that Mr. Poulus overstated the status of the agreement to arbitrate in support of the adjournment, given that an arbitration never proceeded. Mr. Poulus states that he simply represented to the Court what he had been told by his clients. The plaintiffs also relied on the need to obtain an expert report on the standard of care to support the adjournment. An adjournment was granted, and trial was rescheduled to October 17, 2022.

[274] In the lead-up to this new trial date, the defendants filed an application, returnable on the first day of trial, to strike part of Blizzard Finance’s claim as a sanction for Blizzard Finance’s failure to produce documents per an earlier court order. The defendants were then advised of the Second Phase Resolution on October 12, 2022, one clear business day before the first anticipated day of trial. The trial was adjourned again due to the unavailability of a judge. The trial eventually commenced before me on October 1, 2024.

3. The Conduct of the Trial

[275] The 44-day trial was extremely hard-fought. The heavily contested nature is illustrated by the many evidentiary rulings I had to issue throughout the trial, including the following published decisions:

a) *Blizzard Uranium Corp. v. Nathanson, Schachter & Thompson LLP*, 2024 BCSC 2163, denying an application by the plaintiffs to adduce evidence of Paramount’s historical stock price;

b) *Blizzard Uranium Corp. v. Nathanson, Schachter & Thompson LLP*, 2024 BCSC 2168, allowing an application by the plaintiffs to treat Mr. Oulton as an adverse witness;

c) *Blizzard Uranium Corp. v. Nathanson, Schachter & Thompson LLP*, 2024 BCSC 2169, allowing the plaintiffs to adduce, for limited purposes, an email between Mr. Boyce and Mr. Angus discussing the monetary amount to be paid to Mr. Beruschi for the Second Phase Resolution;

d) *Blizzard Uranium Corp. v. Nathanson, Schachter & Thompson LLP*, 2024 BCSC 2170, allowing the defendants to introduce into evidence affidavits sworn by Mr. Beruschi in his family law proceeding (which decision expanded into the so-called "Sealing Order Problem", discussed below);

e) *Blizzard Uranium Corp. v. Nathanson, Schachter & Thompson LLP*, 2024 BCSC 2197, allowing the plaintiffs to adduce the expert report of Mr. Ferris, but with certain amendments; and

f) *Blizzard Uranium Corp. v. Nathanson, Schachter & Thompson LLP*, 2025 BCSC 310, vacating the decision in 2024 BCSC 2170 given the Sealing Order Problem.

4. The Sealing Order Problem

[276] I had to issue and then withdraw an evidentiary decision regarding the use of material from Mr. Beruschi's historical family law proceeding. The timeline of events relevant to this issue is as follows:

a) January 9, 2009: Justice Martinson issues an order in Mr. Beruschi's family law matter, at the request of Mr. Beruschi's child's mother, Jennifer Muller, that the file be sealed (the "Sealing Order"). The parties never entered Martinson J.'s order.

b) July 20, 2009: Justice Brown lifts the Sealing Order on the first day of trial in the family proceeding. Mr. Beruschi is present. Justice Brown notes that the general protection for family law matters will remain available.

c) 2019: Mr. Beruschi files several affidavits in the family law matter in response to an application by Ms. Muller for retroactive child support. Mr. Beruschi files an Affidavit #3 on May 3, 2019 ("Family Affidavit #3") and an Affidavit #5 on August 19, 2019 ("Family Affidavit #5"; collectively, the "Family Affidavits"). He does not file them in accordance with the instructions in the expired Martinson J. order.

d) October 24, 2024 (Day 17 of the present trial): Defendants' counsel puts Family Affidavit #3 to Mr. Beruschi in cross-examination. Mr. Beruschi makes no mention of a possible sealing order. Plaintiffs' counsel objects to the affidavit being put to Mr. Beruschi on the basis that it was not listed in the defendants' non-privileged list. Mr. Beruschi stands down.

e) October 28, 2024 (Day 18): The parties return on Monday morning for argument on the plaintiffs' listing objection. The Court advises it will provide reasons the next morning.

f) October 29, 2024 (Day 19): Before the Court can provide its reasons on the plaintiffs' listing objection, plaintiffs' counsel advises of an order in the family proceeding that references the Sealing Order. The Court stands down for the morning to allow the parties to make further inquiries.

g) October 31, 2024 (Day 21): The Court hears argument about the use of the family affidavits in light of the supposed Sealing Order. The Court was not advised that the Sealing Order was lifted on the first day of the family trial. The Court directs the defendants to file an application on notice to Mr. Beruschi and Ms. Muller, returnable November 6, 2024.

h) November 5, 2024 (Day 24): Blizzard Finance and Mr. Beruschi file application responses opposing the defendants' use of the family affidavits on the basis that a sealing order is in place. Mr. Beruschi and Ms. Muller swear affidavits in support of Mr. Beruschi's application response. Mr. Beruschi deposes that he believed the family proceeding was always subject to a "comprehensive sealing order" after the Sealing Order was made in January 2009.

i) November 6–7, 2024 (Days 25–26): The parties argue the application. Mr. Beruschi is represented by Owen Bird, counsel in the 2009 trial in the family proceeding (albeit a different lawyer at Owen Bird).

j) November 8, 2024 (Day 27): The Court permits the defendants to cross-examine Mr. Beruschi on redacted versions of the Family Affidavits.

k) December 17, 2024: The Court issues a memorandum to the parties advising that it has independently discovered that the Sealing Order was, in fact, lifted on the first day of trial in June 2009.

l) January 20–21, 2025 (Days 28–29): The parties attend for the continuation of the trial. The Court issued its decision vacating the earlier ruling. Blizzard Finance reopens its case and recalls Mr. Beruschi to explain the circumstances of the Sealing Order. Mr. Beruschi testified that he believed the file was sealed when he swore his November 5, 2024, affidavit in this proceeding.

5. The Experts

[277] The parties obtained expert reports from two of BC's most highly regarded litigators: Craig Ferris, K.C., and Daniel Bennett, K.C.

a) Craig Ferris, K.C.

[278] The plaintiffs retained Mr. Ferris. Mr. Ferris holds a Bachelor of Arts and a Bachelor of Laws from the University of British Columbia. He was called to the bar in British Columbia in 1991. Since then, he has practiced commercial and business litigation at Lawson Lundell LLP. He was named a Queen's Counsel in 2014. In addition, he has been involved with the Law Society of British Columbia, serving as a Non-Bencher Member of the Discipline Committee from 2010 to 2012, a Bencher from 2013 to 2020, and President in 2020. Accordingly, he has extensive experience in the standard of care of a commercial litigator in Vancouver, both through his own practice and through his regulatory work.

[279] His key conclusions were as follows:

> 1. From approximately 2008 to 2014, the standard of care for a commercial litigation lawyer practicing in British Columbia required a lawyer to:
>
> a. Obtain the client's consent prior to amending a Notice of Civil Claim in the British Columbia Supreme Court in order to, among other things, verify that the proposed amendments are factually accurate, especially in circumstances where the lawyer has already been advised that the client did not own certain assets.
>
> b. Ensure the client obtains a full explanation of the terms of any settlement proposal made by or to the client, including the obligations a client will be required to perform if a settlement is achieved.

2. From approximately 2008 to 2014, the standard of care for a lawyer practicing commercial litigation in British Columbia included the following obligations:

> a. When, in connection with a matter for which a lawyer is responsible, a lawyer discovers an error or omission that is or may be damaging to the client and that cannot be rectified readily, the lawyer must (a) promptly inform the client of the error or omission without admitting legal liability; (b) recommend that the client obtain independent legal advice concerning the matter, including any rights the client may have arising from the error or omission; and (c) advise the client of the possibility that, in the circumstances, the lawyer may no longer be able to act for the client.
>
> b. The lawyer in informing the client of an alleged or potential error or omission must comply with his or her duty of honesty and candour (to inform the client of all information known to the lawyer that may affect the interests of the client in the matter) as well as his or her overarching duty of loyalty. These professional obligations require a lawyer in these circumstances to inform the client, or the independent lawyer retained by such client, of all factual circumstances that may affect a client's interests including, but not limited to, factual circumstances surrounding an alleged or potential error made by counsel. These duties are not impaired by the obligations the lawyer owes to its insurer/indemnitor…

Discussion

Question 1(a)

In my opinion, from approximately 2008 to 2014, the standard of care for a commercial litigation lawyer practicing in British Columbia required a lawyer to obtain the client's approval prior to amending a Notice of Civil Claim in the British Columbia Supreme Court in order to, among other things, verify that the proposed amendments were factually accurate, especially in circumstances where the lawyer has been already been advised that certain assets were not owned by the client…

Based on my experience, it is my opinion that prior to amending a Notice of Civil Claim, client instructions are required and that a commercial litigation lawyer in British Columbia during the relevant time period will not have complied with the standard of care if they have proceeded to amend a Notice of Civil Claim without the instructions of their client.

In addition, it is my opinion that the standard of care requires that a commercial litigation lawyer in British Columbia during the relevant time verify key factual pleadings with the client. This obligation is particularly important where the lawyer is in possession of contrary information regarding the key factual pleadings. In my view, in order to protect the interests of the client, to be skilful and careful as well as to consult with the client on all matters of doubt, the lawyer in these circumstances is required to inquire of the client with respect to the contradictory information to ensure a mistake or an oversight is not being made…

Having been provided with this information, Mr. Clemens had sufficient knowledge to be on an enquiry to be careful with respect to the B Claims. In order to comply with his obligation to be skilful and careful, as well as to consult with his client on all areas of doubt, he had an obligation to clarify

the issue of the ownership of the B Claims with his client before filing the First Amended NOCC.

I am instructed Mr. Clemens did not clarify the issue of the ownership of the B Claims with his client before filing the First Amended NOCC. He could have prevented the harm to the client arising from his conduct had he prior to a resolution of the proceeding, either by way of settlement or judgment, directed his client to confirm the accuracy of the paragraphs in the First Amended NOCC pleading the ownership of the B Claims. None of the facts that I have been instructed to assume suggest he did so. Instead, the client appears to have been provided with copies of the First Amended NOCC on various occasions without reference to the pleadings regarding ownership of the B Claims, other than the underlining of amendments required when a pleading is amended under the *Rules of Court*.

In my opinion, during the relevant time period, a commercial litigation lawyer in British Columbia had a duty to inform a client on relevant matters and to warn of risks that accompany a proposed course of action. This is required so a client can make an informed judgment on issues in the litigation.

Expanding the list of mineral tenures beneficially owned by Boss in the Amended NOCC was a significant and material pleading in this proceeding. In order for the client to have decided to instruct Mr. Clemens to do so, or for the client to be able to suggest that the Amended NOCC was wrong after it was filed, the client needed to be properly informed by Mr. Clemens concerning the pleading and to be warned of the consequences if this pleading was wrong.

In my opinion, the standard of care of a reasonably prudent lawyer required the lawyer to obtain instructions prior to filing the First Amended NOCC and to inform the client as to the nature of the amended pleadings providing sufficient information concerning the risks of such pleadings so that the client was able to provide an informed decision, including whether the information proposed to be pleaded is factually correct or ought to be verified through other means.

Question 1(b)

In my opinion, from approximately 2008 to 2014, the standard of care for a commercial litigation lawyer practicing in British Columbia required a lawyer to ensure the client obtains a full explanation of the terms of any settlement proposal made by or to the client, including the obligations a client will be required to perform if a settlement is achieved.

…

Question 2(a)

…

At this point, Mr. Clemens has been advised of a potential error in the settlement with the Province. From the assumed facts, Mr. Clemens took steps to determine whether the potential error could be rectified readily, both by seeking clarification from Boss but also by seeking concessions from the Province. Neither course of action readily rectified this potential error. By no later than December 3, 2011, Mr. Clemens knew that the Province would not amend the settlement to remove the B Claims and that

> the B Claims were included in the First Amended NOCC due to a potential error.
>
> In my opinion, by that point, the standard of care for a lawyer practicing civil litigation in British Columbia required the lawyer to: (a) promptly inform the client of the potential error or omission without admitting legal liability; (b) recommend that the client obtain independent legal advice concerning the matter, including any rights the client may have arising from the error or omission; and (c) advise the client of the possibility that, in the circumstances, the lawyer may no longer be able to act for the client.
>
> **Question 2(b)**
>
> From approximately 2008 to 2014, the standard of care for a lawyer practicing commercial litigation in British Columbia required a lawyer in informing the client of an alleged or potential error or omission, to comply with his or her duty of honesty and candour (to inform the client of all information known to the lawyer that may affect the interests of the client in the matter) as well as his or her overarching duty of loyalty. These professional obligations required a lawyer to inform the client, or the independent lawyer retained by such client, of all factual circumstances that may affect a client's interests including, but not limited to, factual circumstances surrounding an alleged or potential error made by counsel. These duties are not impaired by the obligations the lawyer owes to its insurer/indemnitor.
>
> …
>
> … As noted above, in my opinion, the standard of care required the lawyer to inform the client, or the independent lawyer retained by such client, of all factual circumstances that may affect a client's interests including, but not limited to, factual circumstances surrounding an alleged or potential error made by counsel. The lawyer is to do so while at the same time not admitting liability.

[280] In cross-examination, Mr. Ferris confirmed that his assumed facts did not include the fact that Mr. Rogers confirmed the accuracy of the amended pleading as part of his trial preparation. Mr. Ferris admitted that "would have been an important fact" and "would have materially altered things". I address below whether this has any material effect on my ability to rely on his opinion.

b) Daniel Bennett, K.C.

[281] The defendants retained Mr. Bennett. He has a Bachelor of Commerce and a Bachelor of Laws from the University of British Columbia. He was called to the bar in British Columbia in 1988. Since then, he has practiced commercial and administrative litigation. He obtained his Queen's Counsel designation in 2013. He is an adjunct professor at the University of British Columbia

[282] Mr. Bennett's key conclusions were as follows:

Summary of opinion.

In my opinion, the standard of care of the reasonably competent and dilige nt lawyer practicing in Vancouver in or about the years 2008 to 2012 (hereafter referred to as a “reasonably prudent lawyer”) in the circumstances of this matter would not require the lawyer to back check, double check or further investigate the information provided by the client regarding its ownership interests, including the Added Claims that were first listed in the amended Statement of Claim located at **Tab 17** of the Index of Documents (NST00000340). In addition, the standard of care of a reasonably prudent lawyer did not require the lawyer to take any additional steps such as reviewing corres