Court of King's Bench of Alberta

Citation: CNOOC Petroleum North America ULC v 801 Seventh Inc, 2025 ABKB 145

2025 ABKB 145 (CanLII)

Date: 20250314
Docket: 1901 06261
Registry: Calgary

Between:

CNOOC Petroleum North America ULC

Plaintiff/Defendant by Counterclaim

- and -

801 Seventh Inc, OPTrust Office Inc, Centurion Holdings Ltd, Quantico Capital Corp, Westhills Development Corporation, Canadian Income Fund Group Inc, and Tokay Capital Corp

Defendants/Plaintiffs by Counterclaim

- and -

CNOOC Limited

Defendant by Counterclaim

Judgment
of the
Honourable Justice P.R. Jeffrey

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[1] This is a commercial lease case.

[2] The Plaintiff, a global oil and gas company (the "**Tenant**"), found some asbestos in the air distribution system of the office building that it rented (the "**Building**"). The owner of the Building (the "**Landlord**") did not deal with it as the Tenant believed their lease (the "**Lease**"[1]) and provincial law both required. The Tenant believed the Landlord was required to remove it all. The Tenant said so and proceeded to relocate its entire workforce out of its 33 floors in the Building so the Landlord could more easily remove the asbestos containing material ("**ACM**"), without risk of asbestos inhalation by the employees. Even before all the employees were out it became clear to the Tenant that the Landlord had no intention of removing all the ACM. The Tenant terminated the Lease and commenced this action to recover its losses.

[3] The Defendant Landlord says that before the asbestos was ever discovered, the Tenant was looking to get out of the Lease. Then it found a hint of asbestos, overreacted and, claiming to act to guard employee safety but really for ulterior purposes, rushed to terminate the Lease. The Tenant seized upon the discovery of an infinitesimally small trace of asbestos, devised an exit strategy, then wasted no time to leave and end the Lease. The Landlord also says the Tenant is wrong on exactly what was found, how much was found, in what form it was found, where it originated, if more could be expected in the future, and in any event what the Lease and law required of the Landlord in the circumstances. The Landlord counter claims for its losses from the Tenant's wrongful termination and non-payment of rent thereafter.

[4] Both parties also claim the other breached the duty of good faith performance of their Lease over the time between the asbestos discovery and the Lease termination.

[5] This case gives this Court its first opportunity to consider how Alberta legislation regulates asbestos in existing buildings.

[6] It also raises novel issues around the nascent duty to performing one's contract in good faith. First, the Court must consider how the implied duty may be affected when the contracting parties anticipate suing each other, and so act to protect their legal interests and position for the expected litigation. Throughout the time between the asbestos discovery and the Lease termination, one of the parties, and soon both, were in full on "pre-litigation" mode yet still bound by their contractual duties under the Lease. Second, the Court must consider whether a party that believes it has discovered a way to lawfully exit a contract, may breach its duty of good faith in the process of pouncing on that opportunity.

[7] The trial proceeded on issues of liability only; this decision does not quantify any resulting damages proven.

[1] Attached to this Judgment at Appendix A.

[8] I structure the remainder of this judgment under the following outline, each section commencing at the indicated paragraph number:

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1. Facts

[9] In this section are most of my findings of fact, though some are left to discussions of the specific issues to which they relate. For ease of reference, they are grouped under the following sub-headings, each commencing at the indicated paragraph number:

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Asbestos[2]

[10] Asbestos is a term that came to be used commercially for a group of naturally occurring, fibrous silicate minerals. Asbestos minerals became popular as a building material because of their ability to act as an excellent fire-retardant thermal insulator, and acoustic barrier, in architectural finishes such as cement board, caulking, residential attic insulation, floor tile, ceiling tile and in hundreds of other materials and products in building construction.

[11] Asbestos minerals fall into two groups or classes: serpentine asbestos and amphibole asbestos. Serpentine asbestos is curved in shape and softer than amphibole. Amphibole is straight. Of the two categories of asbestos, serpentine is the less dangerous to human health. It largely refers to the mineral chrysotile. Amphibole asbestos includes the minerals amosite, crocidolite, and fibrous forms of tremolite, anthophyllite, and actinolite. Not every amphibole mineral is asbestos.

[12] The minerals that form amphibole asbestos can either be "asbestiform" (i.e., fibrous) or "non-asbestiform" (i.e., non-fibrous). A fibrous amphibole is the concerning form of asbestos and what generally is being referred to by the term "asbestos". A non-fibrous amphibole is not what is generally meant by asbestos – instead, it is a "blocky" version of the mineral. Similarly, rectangular "cleavage fragments" result from larger amphiboles being crushed. They do not have the aspect ratio to qualify as asbestos fibres, the form targeted by regulation. They are not the extremely dangerous long, narrow, flexible, high tensile fibres.

[13] One consequence of the foregoing is that all asbestos falls into one of the designated mineral types, but not all particles of those mineral types are asbestos. They are asbestos when they are in the fibrous form. Therefore, for example, finding the mineral tremolite does not necessarily mean tremolite *asbestos* has been found. Whether the tremolite particle is asbestos requires further assessment as to its form.[3]

[14] When airborne, the fibrous form of silicate minerals is respirable and thereby dangerous to human health. Asbestos fibres are odorless, tasteless and incredibly small. They are invisible to the unaided eye, ranging in length usually from 0.1 to 10 micrometres (a "micrometre" being one millionth of a metre, also known as a "micron"), though can be multiples of that length. To be considered an asbestos fibre, its "aspect ratio" must be no less than 3:1. That is, the particle's length must be at least 3 times its diameter. Thus, their size is roughly 1/300th of a proportionately dimensioned human hair.

[15] Manufactured products containing asbestos range from highly friable forms (such as fibrous acoustical insulation) to non-friable forms (such as vinyl asbestos floor tile and, relevant to this dispute, duct mastic). Friability refers to the ease with which the dry product that contains the asbestos may be crumbled, pulverized, or reduced to powder by as little as hand pressure. There is no universal definition or standard of "friability". In general usage, though, the test to determine friability is whether, by ordinary hand pressure, the material containing asbestos can be crushed and pulverized resulting in particulate release.

[2] The descriptions of asbestos in these next paragraphs may differ from the statutory meaning(s) of the words used. More is said about those later in this judgment.

[3] For practical reasons, methods of analysis typically proceed in the reverse order, determining first whether a particle has the requisite form and then second whether any particle having the requisite form is asbestos.

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[16] Single asbestos fibres have high electromagnetic forces. As explained by Dr. Paustenbach, a board-certified toxicologist and industrial hygienist called as an expert by the Landlord, “they glomerate very quickly .... In other words, ... they just smash against each other and they don’t separate. And when enough of them smash against each other, they fall down.”

Health Effects of Asbestos

[17] Severe adverse health outcomes can result from exposure to asbestos fibres. Since the 1970s, Canadian jurisdictions have increasingly regulated, and in some circumstances prohibited, asbestos use.

[18] Asbestos exposure is one of the leading occupational causes of death. Asbestos fibre inhalation is causally linked to (1) fibrotic lung disease (asbestosis); (2) lung cancer; and (3) pleural mesothelioma – a cancer of the lining of the lungs. These are the adverse health effects of greatest concern.

[19] These diseases occur when asbestos is inhaled and “spear-like” asbestos fibres stick in the tissue of the lungs, leading over time to changes in the lining of the chest cavity. As the concentration of asbestos fibres increases and the duration of exposure is extended, the health risks associated with asbestos increases. Because of its biological persistence, its most harmful effects may first manifest years later – no less than 10 years later and sometimes as many as 40 or 50 years after exposure. The damage caused is irreversible and, over the passage of time, fatal.

[20] The degree of health hazard presented from asbestos fibres is a function of the concentration and duration of exposure to them, the type of asbestos involved, their morphology, and the condition of the receiving body. The latter affects whether any of the asbestos fibres one is exposed to are absorbed. For example, the cilia in a smoker’s lungs can be paralyzed or destroyed from the smoking and therefore less able to expel an asbestos fibre from the lungs before it lodges there.

[21] Serpentine asbestos does not present the same level of concern because, among other things, it does not have the same spear-like structure as the amphibole forms of asbestos minerals. At the other end of the spectrum, crocidolite asbestos, one of the amphibole forms, is the most potent. That is, exposure to it for much less time than exposure to other amphibole forms, *ceteris paribus*, is more likely fatal decades later.

[22] Longer asbestos fibres are more difficult to expel from the body than shorter ones. They are also more difficult for the body’s cells to engulf. Asbestos fibres longer than 40 microns are particularly dangerous while those under 5 microns pose little risk. Dr. Paustenbach says the ones under 5 microns pose no risk and cites numerous long accepted studies from over the last decades as proof.

[23] However, other relatively more recent studies, specifically in respect of asbestos sourced in Libby, Montana, which is the case here, suggest that by cutting off regulatory action at these common thresholds (around the length, diameter and aspect ratio of the particle), only one third of the harmful asbestos fibres observed will be addressed. Dr. Hart, a professor in the Department of Safety, Health and Industrial Hygiene at Montana Tech, called as an expert by the Tenant, agreed with the following comment of Dr. Weiss, a toxicologist at the U.S. Environmental Protection Agency, in his reported work in this area:

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> The likelihood that Libby amphibole fibre toxicity is confined strictly to fibres in the regulatory size fraction is neither toxicologically sound nor supported by the available health data from Libby.

[24] Dr. Loewen, a pulmonologist called as an expert by the Tenant, offered compelling evidence of the unique effects, the acutely pronounced adverse health outcomes, for some people exposed to the mineral forms of asbestos mined in Libby.

[25] More generally, longer amphibole asbestos fibres are less likely to be overcome by the body's defences. They can embed in the surfaces of the lungs and fester. Asbestos fibres under 5 microns in length are more easily engulfed and then "eaten" by macrophages in the lung or expelled from the lung by other healthy defence mechanisms. The asbestos fibres attracting the attention of the Alberta regulators are those over 5 microns in length, under 3 microns in diameter, and that are at least 3 times longer than their diameter.

[26] Asbestos cleavage fragments differ somewhat from asbestos fibres. Dr. Hart explained:

> As crystalline minerals grow, they may grow into an elongated form, and as the face or portion of that elongated form breaks off from the primary source, it is referred to as a 'cleavage fragment'.

[27] The US Occupational Safety and Health Administration has not expressly ruled out that cleavage fragments are carcinogenic but did not include them when they evaluated carcinogenic risk. I am not persuaded of any reason to treat them any differently than any other asbestos fibre of comparable shape, form, mineral type and exposure risk. Most often, it appears, they differ in shape and form, and therefore in exposure risk.

[28] Asbestos fibre width affects disease potential. Mesotheliomas occur more frequently after exposure to thin fibres than to thick fibres. The average width of amphibole asbestos is less than 0.5 microns. Libby amphiboles are most commonly 0.22 microns wide. They remain airborne and therefore respirable longer, *ceteris paribus*.

[29] Risk to human health increases with increased exposure to respirable asbestos fibres. There is a level of exposure to respirable asbestos below which we need not be concerned, but opinions differ on what that level is. Dr. Hart explained:

> [...] with mesothelioma specifically, the lower levels of exposure and intermittent exposures complicate the issue to where, in reality, there -- there most likely is a threshold. It's just we don't know what it is.

Methods of Asbestos Analysis

[30] The methods of laboratory testing for the presence, concentration and types of asbestos used in this case were primarily polarized light microscopy ("**PLM**"), phase contrast microscopy ("**PCM**"), and transmission electron microscopy ("**TEM**"). As their names suggest, each employs microscopes of differing types and magnifications to examine the particulate matter in a sample. The transmission electron microscope is the most powerful of the three. All three require trained analysts, introducing a risk of human error, or at least variability in identifying particular forms of silicate minerals.

[31] The bulk samples here were examined by PLM and TEM, most of the air samples by PCM and TEM. TEM may be qualitative TEM or quantitative TEM. The qualitative is best

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suited to determining the presence of asbestos fibres. The quantitative TEM is designed to determine their concentration.

[32] PLM assesses the optical properties of fibrous particles to distinguish those that are asbestos. It can detect whether asbestos is present and in concentrations in the .25 to 1 percent or greater range. It is not so useful for identifying the type of mineral asbestos.

[33] PCM enhances the contrasts in a sample by converting phase shifts in the light passing through the sample. Its magnification enables the identification of fibres down to 5 micrometres in length but cannot determine which among them, if any, are asbestos. PCM analysis counts all fibres that are 5 micrometres in length or longer and have an aspect ratio of 3 to 1 or greater.

[34] This accords with the *OHS Code* definition of "fibre":

> (a) a diameter equal to or less than 3 micrometres,
>
> (b) a length equal to or greater than 5 micrometres, and
>
> (c) a length to diameter ratio equal to or greater than 3 to 1

The latter criterion is its aspect ratio, mentioned above.

[35] Since the PCM method does not differentiate between asbestos fibres and other fibres (for example, wool, gypsum, or glass fibres), its report of total fibres in a sample does not necessarily mean a finding of an asbestos fibre.

[36] TEM transmits through the sample a beam of high-energy electrons which reveal the structures of solids within a sample. TEM can evaluate down to 20,000 times magnification (some sources say 10,000 times), can detect fibres at extremely low concentrations and can distinguish between bundles of fibres. TEM can detect asbestos fibres as short as half a micrometre. It enables the identification of asbestos present with greater precision, and its type, but estimating or "back calculating" (as one witness put it) the concentration of asbestos per unit area of a sample is less reliable.

[37] Moving between methods with a particular sample can create challenges. For example, once particles are identified by PCM as fibres, which may potentially be asbestos, the further step is taken to see if they are asbestos fibres via TEM. The analyst's challenge is to first find that same fibre or those same fibres that were spotted via PCM, now via TEM. The higher magnification and difficulty in pin-pointing individual particles by markers or other strategies present the challenge.

[38] Another example arises when moving a sample from qualitative TEM to quantitative TEM. Under qualitative TEM the analyst looks at an entire filter segment, whereas under quantitative TEM the analyst looks only at parts of the sample. Under qualitative TEM, one or more asbestos fibres may be observed. To then learn the concentration of asbestos fibre(s) the lab switches to quantitative TEM. But because the latter method looks only at select fields within the sample, the results may seem inconsistent. For example, as occurred in this case, Eco Abate's lab (Eco Abate was retained by the Tenant) found asbestos in 4 of the samples analyzed by qualitative TEM in July 2018. Eco Abate had the samples then analyzed by quantitative TEM and the result was the lab finding asbestos in only 1 of the 4 samples. It would be an error to then conclude the initial qualitative TEM finding of asbestos was mistaken, just because that asbestos did not appear in the subset of all the fields checked by quantitative TEM.

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[39] PCM analysis is less expensive than TEM, faster than TEM, and easier to deploy than TEM. So even though it is less useful for identifying whether any individual fibre being counted is asbestos or not it is commonly undertaken first, rather than sending all samples for the more expensive TEM analysis.

[40] When determining compliance with the *OHS Code* provisions around the concentrations of airborne asbestos (or any other harmful substance that is airborne), the measurements must be made by one of a list of prescribed analytical methods in section 20 of the *Code*:

> 20(1) If a person measures the airborne concentration of a harmful substance for the purposes of complying with the occupational exposure limits as required by this Code, the person must make the measurement in accordance with any one of
>
> (a) the NIOSH Manual of Analytical Methods, 4th Edition (August 1994), published by the United States Department of Health and Human Services, as amended up to and including the 2nd supplement (January 15, 1998),
>
> (b) Sampling and Analytical Methods published by the U.S. Occupational Safety and Health Administration,
>
> (c) Methods for the Determination of Hazardous Substances guidance published by the Health and Safety Executive of the United Kingdom,
>
> (d) EPA Test Methods published by the U.S. Environmental Protection Agency (EPA),
>
> (e) Workplace Air Contamination Sampling Guide published by the Institut de recherché Robert Sauvé en santé et en sécurité du travail (IRSST),
>
> (f) ISO Standards and Guides of Air Quality published by ISO Technical Committee TC146, or
>
> (h) repealed.
>
> ...
>
> 20(3) If the person is counting fibres, the person must apply NIOSH Method 7400, and only to particles that meet the size criteria for fibres.

The PCM method is "NIOSH Method 7400". Quantitative TEM is "NIOSH 7402". NIOSH stands for the US "National Institute for Occupational Safety and Health". Both methods advise to count fibres longer than 5 microns that also have an aspect ratio greater than 3:1.

[41] For issues in this case other than compliance with the *OHS Code*'s occupational exposure limit ("**OEL**") for airborne asbestos concentrations, the parties are not limited to just these listed methods. An example here is whether the Tenant's premises in the Building are "unfit for the Tenant's occupancy" for purposes of clause 17 of the Lease.

[42] There are standards and protocols also for the taking of samples sent for testing. For example, ASTM D6480 was said to be followed for wipe sampling. The primary disputes in this lawsuit are more about what the labs' results of the testing means than the process of collecting the samples leading to those results.

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The Parties

[43] Nexen Energy ULC ("**Nexen**") was an oil and gas exploration and production company.

[44] In 2013, CNOOC Limited acquired Nexen, which changed its name to CNOOC Petroleum North America ULC (in this decision "**CNOOC**" or the "**Tenant**"). CNOOC Limited holds its shares in the Tenant through a subsidiary, CNOOC International, and possibly additional entities interposed between the Tenant and CNOOC Limited. No detailed evidence was led on CNOOC Limited's corporate structure.

[45] Around that time, Nexen's core assets were UK operations in the North Sea, producing assets in the US offshore, the Long Lake oil sands facility near Fort McMurray, gas assets in northeastern BC, and an operation in Yemen. In addition to the Calgary head office, it maintained two offices in the UK: London and Aberdeen, two US offices: one for onshore and one for offshore, and three others in Canada: northeast BC, Fort McMurray, Alberta, and St. John's, NL for the east coast. It employed approximately 3200 employees across its enterprise. By 2017 its revenues approached $2 billion annually on production exceeding 300,000 barrels of oil equivalent a day.

[46] CNOOC continued operating under the Nexen brand until 2018. CNOOC is the wholly owned subsidiary of CNOOC Limited, which is headquartered in Beijing, China. Following the acquisition by CNOOC Limited, there was no change to Nexen's emphasis on health, safety and the environment – it was 'business as usual.' The Tenant maintained its own annual financial records from its parent CNOOC Limited.

[47] The Defendant Landlord, 801 Seventh Inc. (also "**801**") acquired the Building in July 2000. Soon after, Nexen became its largest tenant, contracting for approximately two thirds of its office space. Nexen moved into the Building in 2001 under the terms of its first lease.

[48] By the time CNOOC Limited acquired Nexen, the Landlord held legal title to the Building. The Landlord is co-owned by the other six Defendants in this action: OPTrust Office Inc. ("**OPTrust**"); Centurion Holdings Ltd. ("**Centurion**"); Quantico Capital Corp ("**Quantico**"); Westhills Development Corporation ("**Westhills**"); Canadian Income Fund Group Inc.; and Tokay Capital Corp. OPTrust holds 50% of the voting shares in 801. The other five co-owners each own 10% of the voting shares (all 6 owners of 801 are collectively referred to as the "**Beneficial Owners**" of 801).

[49] The Beneficial Owners entered into a co-owners' agreement respecting operation of the Building which defines OPTrust as one "co-owner" and the other five Beneficial Owners as the other "co-owner".

[50] The directors of the Landlord are Marcel Shoraka, an employee of OPTrust's parent company, a second employee of OPTrust's parent company, a director of Quantico, and Joseph Killi, the owner of Westhills. Those four, plus Marc Sardachuk, a director of Centurion, also serve as 801's officers. Mitch Brody, a representative of Quantico, was also a director at the time 801 purchased the Building.

[51] Killi serves as the appointed "voice" for the five 10% owners of 801. Shoraka serves as OPTrust's representative.

[52] The Landlord hired Century West Management Inc to manage the property. Century West and the Landlord are related corporations, Century West being connected also to

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Centurion. Century West is owned by Centurion, Quantico, and a second company owned by Killi. Sardachuk is the president of Century West. Brody is its vice-president.

The Building

[53] The Lease governs most of the rentable space of the Building, a premiere 37-story office tower in downtown Calgary that was constructed between 1979 and 1982.

[54] The Building is shaped unusually, as a modified right-angle triangle. Its longest wall, the hypotenuse of the modified triangle, is not square to the downtown street grid pattern but diagonal to it. That longest wall enjoys the best view, paralleling the angle of the Rocky Mountains to its southwest. When constructed, the Building was near the western perimeter of the downtown core, so that from virtually every floor the sight lines to the southwest all along that long diagonal wall were unobstructed, towards those magnificent Rockies. Along that wall there is only glass from floor to ceiling, accentuating the breathtaking vista. From the time of its completion the Building has been among the top tier office towers in Calgary, which at the time and to this day has abundant office towers, serving the largest number of corporate head offices of any city in western Canada.

[55] The ground floor of the Building is comprised of the main lobby and a large public garden court atrium that opens out onto an even larger landscaped park space with a water feature and sculptures. The Building has 339 underground parking stalls.

[56] Floor 2 contains commercial retail food court spaces, eating areas open to and looking out over the atrium area below, with a wide cascading open stairway between the floors. Floor 2 also offers access to the network of "+15" mezzanine walkways that connect the Building with most other buildings in downtown Calgary.

[57] Floor 3 includes the Building's +30 and mechanical services, including the air handling equipment serving the low-rise floors (Floors 3-19), including the external air intake and air-mixing equipment. The +15 across 7th Avenue SW Calgary connects the Building to the "Annex" on the corner to the north, also owned by 801. The Annex is a separate building architecturally similar to the Building but much shorter and with a smaller footprint. Its 3rd floor contains a conference centre that the Lease gave CNOOC rights to access.

[58] Floor 37 contains further mechanical equipment, including comparable air handling equipment serving the high-rise floors (Floors 20-37), and including the associated external air intake and air-mixing equipment.

[59] Under the Lease, the Tenant gained exclusive use of floors 4 through 36, virtually all the parking stalls and over 7,000 square feet of the Annex. Floor 4 housed the Tenant's IT infrastructure, data hub and operations centre. Floor 6 housed Canexus, which was a chemical division of Nexen that had been spun off as an independent entity. Floor 10 held a fitness centre that Nexen installed, designed to suppress both vibration and noise from its use. Floor 17 housed the Tenant's marketing department and provided a "unique storefront type of presence". On Floor 26, the Tenant had a room called the "Holo-Deck", intended to allow the Tenant's employees from across different disciplines to collaborate using the latest technology that would allow for a 360-degree view of a reservoir. On Floor 29, the Tenant had two videoconferencing rooms that it referred to as "telepresence rooms" and described as "state-of-the-art". Floor 36 was dedicated to the Tenant's executive offices. The Annex across the +15 walkway over 7th

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Avenue SW, had a theatre facility and an adjacent meeting room space. The other of CNOOC's floors were designed and used primarily as office spaces.

[60] The Building is a steel and concrete structure. Steel beams and columns form the skeleton of the Building. The horizontal interfaces separating the tower into floors are comprised of metal Q-decking (corrugated steel laid on top of metal beams throughout the structure) overlain by concrete. Hanging from the Q-decking is a T-bar ceiling tile grid system, which forms the suspended ceiling of the workspace of the floor below. The ceiling tiles are populated with inset light fixtures, vents and grills. The space between the ceiling tiles and the Q-decking forming the underside of the floor above (the "**Plenum**") is roughly 2 – 3½ feet high. The Plenum houses electrical cabling, metal ducting that carries air to vents in the ceiling tiles for new air supply into the office workspaces and corridors, "Variable Air Volume" boxes ("**VAV**" boxes) that control the proportion of hot or cold air supplied into the workspaces in response to thermostat controls within those workspaces, vertical posts running down through the ceiling tiles from which AV monitors and screens are suspended into offices, and other mechanical supports and systems.

[61] The undersides of the Q-decking, along with the adjacent supporting steel structure, were covered with a spray-applied fire-retardant coating (the "**SAF**") that had long since hardened. Overspray coated some adjacent surfaces. The materials comprising the SAF were combined in a wet slurry for application, which then cured to its present form. Its surface has a relatively smooth finish, though it is not perfectly flat. Its thickness varies location to location according to, likely, the vagaries of its application. The construction expectation was that a minimum thickness would be achieved over all the surfaces requiring the SAF.

[62] The SAF, though cementitious, is also friable. Cementitious means it cures like cement from the wet slurry to a dry solid, not that it is as hard as cement. The SAF is friable because merely applying hand pressure to a piece of the SAF held in the hand is enough to break it down, and for some of it to be pulverized. Because of this friable quality, once impacted or disturbed in some way, the SAF was no longer bound hard and intact. Whether from abrasion, bumping, being cut away, being pierced through by a screw or other fastener, rubbed, scraped, crushed, pulverized, indented or otherwise deformed in any way, or delaminated (by which I mean separating from its original surface attachment, which occurred in places for example from contact with leaking water) (collectively, the "**Disturbed SAF**")[4], once the SAF is disturbed it is susceptible to further deterioration.

[63] Ongoing building maintenance frequently necessitated activity in the Plenum spaces. VAV boxes connected to a thermostat in one room or office but controlling heating, cooling, and ventilation across a zone of offices or rooms, containing people with different preferences, required frequent adjustment somewhere in the Building. It was necessary to enter the Plenum to adjust the command unit of a VAV box. Similarly to relocate, reconfigure, or replace light troffers. Regular PC upgrades for employees and AV projector replacements about every 3 to 5 years also necessitated work in the Plenum spaces, as did water overflows and plumbing

[4] Later in this judgment I mention the assessments by consultants and experts of the condition of the SAF, from their personal observations. They use descriptors such as "good", "fair" and "poor" condition. Though each observer brings to those subjective assessments varying degrees of experience with such building materials, and perhaps expertise, none of those terms directly equate to my term: "Disturbed SAF". I use this term as a more objective, empirically verifiable descriptor for purposes of certain of my rulings. This note is to invite the reader to not necessarily conflate fair and/or poor condition SAF with Disturbed SAF.

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maintenance. Office reconfigurations on a floor, whether for a single or small number of offices, or larger scale densification of employees on any one floor, necessitated significant work in the Plenum. Every renovation, large or small, had implications for lighting and electrical and data connections, housed in the Plenum spaces.

[64] According to the Building's original construction materials specifications, the product used as the SAF was Monokote-5 ("**MK-5**"). It was produced by W. R. Grace & Co. and contained vermiculite that it mined near Libby, Montana. Vermiculite mined near Libby, Montana, it is now generally accepted, and is not in dispute in this trial, has a high probability of containing at least trace amounts of asbestos. Libby amphibole is a recognized "rather unique" amphibole mineral group comprised of winchite, 84 percent; richterite, 11 percent; and the rest mostly tremolite. One of the parties' consultants (WSP) said "Libby amphibole is defined as its own type of asbestiform mineral ...; however, it is most like Actinolite/Tremolite."

[65] At the time the Building was constructed, the SAF was not considered of concern. Prior to 2012, the Alberta Asbestos Abatement Manual (the "**Manual**"), published by the Government of Alberta to provide guidance about the management of asbestos in accordance with the province's occupational health and safety legislation, said that if there was less than 1% asbestos by dry weight in a material, and the likelihood of fibre release is low, the material may be handled as non-ACM. Some took this to mean in Alberta a product with less than 1% asbestos was not ACM. This was not found in the provincial legislation anywhere. The Manual has since clarified this, returning the focus to whether any ACM may release asbestos fibres. The version of the Manual published in 2019 (the "**2019 Manual**") confirms that even materials with under 1% would be considered ACM. Unlike many other jurisdictions that set a lower threshold for asbestos concentration in materials before they will be the subject of regulation, Alberta does not and, despite various wordings in the Manuals to the contrary, never has. The closest it comes, in the version of the *Occupational Health and Safety Code* in force during the period relevant to this action, is setting a lower threshold below which "a code of practice governing the storage, handling, use and disposal of" asbestos is not required: *Occupational Health and Safety Code*, Alta Reg 87/2009 ["***OHS Code***"], s. 26(1).

[66] Another product, "CAFCO 'Blaze-Shield' Type D C/F" ("**CAFCO**") that did not contain asbestos, was applied to other areas of the Building during its construction, where some thermal insulating properties were desired in addition to fire-retardant properties.

[67] The parties now agree that the Building's SAF contains some asbestos. The SAF is ACM. The parties disagree on, among other things, whether it releases asbestos fibres.

[68] The entire Plenum serves as the conduit for air vented out of the rented spaces. That stale air is drawn out of the occupiable spaces on each floor and flows towards, ultimately, one of the exits points from the Building. It gets there by passing horizontally through the Plenum between each of the floors, then traveling vertically through 4 columnar shafts around the perimeter of the Building (the "**Shafts**"). These Shafts run the height of the Building, top to bottom. From these Shafts the return air either exits the Building or recirculates back into the "fresh" air supply ducting for delivery back into the occupied spaces.

[69] The Building's air flow system operates in two halves — a high-rise system powering floors 20 to 36 and a low-rise system powering floors 4 to19. Fans on floors 37 and 3 push hot and cold air as needed into the two separate systems. Both those floors have air intake and exhaust. It is a "mixed-air system", meaning that some return air from the floors can get mixed

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with the new air supply, and recirculate back to the offices. This re-use of Building-temperature air saves on the cost of energy that would otherwise be required to heat or cool more of the fresh air drawn from outside the Building. The mix between outside and inside air depends on the outdoor air temperature and was described as follows:

> If it's minus 40, you're going to use more return air; if it's plus 30, you're going to be using lots of return air, so you don't have to re-cool something; and then the perfect day at 15 degrees, you could be a hundred percent outdoor air.

The external air drawn into the Building passes through filters.

[70] The 4 large vertical Shafts run the full height in 4 of the 8 outer corners of the Building (though not all the "corners" are 90-degree angle corners, because of the Building's unique shape alluded to earlier). These 4 vertical Shafts open on each floor to the Plenum spaces. This network of horizontal Plenums and inter-connected vertical Shafts carries the return air from out of the occupiable spaces of the Building and delivers it for exhausting out of the Building or to be recirculated with external air drawn into the Building, depending on the energy management objectives at the time.

[71] Within this network of open Plenums and Shafts run airtight metal ducting that carries the new air supply. This ductwork connects to air vents that deliver the supply air into individual office areas and other workspaces.

[72] Exhaust fans at the perimeter of the Building create a negative air pressure; as they expel used return air from the Building they draw the air within the Building from the Shafts, which in turn draws it from the Plenum spaces. Some of the air drawn from the Building may be recirculated with fresh air from outside the Building, into the air supply ducting and vents. But all that is not recirculated is exhausted outside the Building from one of the mechanical floors: at either the top, above floor 37, or near the base, at floor 3.

[73] This network of Plenums, Shafts, the supply air ducting running within the Plenums and Shafts, air supply vents, ceiling air return vents, and connected HVAC equipment, comprises the Building's "**air distribution system**" as mentioned in provincial legislation discussed later in this judgment.

[74] If not for the part of the return air that gets recirculated in with the fresh air supply, there would be no opportunity for any asbestos found in the SAF in the Plenum spaces, if it becomes airborne, to make its way into the occupied spaces of the Building. It would all exhaust out of the Building, none recirculating in with the fresh air supply. That supply air travels into the office spaces via the closed system of supply ducts and vents. The air within those supply ducts and vents does not mix with the return air in the Plenum spaces.

[75] Consequently, any loose respirable asbestos fibre finding its way into the Plenum that is then picked up into the return air running through that Plenum space is exhausted from the Building, unless it is diverted for mixing back into the fresh supply air and recirculated into the Building. Only then would it flow with the supply air into offices and other workspaces, by the closed system of air ducts and vents, for potential inhalation by the Building's occupants.[5]

[5] It crossed my mind during the trial that a simple solution for the parties, at least during the period of their investigations and negotiations around what else, if anything, needed to be done by the Landlord at the Building, would have been to just cease all recirculation of return air. Any airborne asbestos fibre in the Plenum SAF would

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[76] The SAF was spray-installed at the time the Building was constructed. Therefore, it is not found on the surface of anything that has been added into the Plenum after construction. Lots of things have been added. The Plenum spaces have been accessed many times since construction for maintenance, mechanical adjustments, and for new installations. Soon after acquisition of the Building by 801, the Plenum spaces were cleaned of accumulated dust and debris.

[77] Most work in the Plenum spaces necessitated some degree of contact with the SAF, each time likely causing some degree of damage or deformation to it, or perhaps leaving unfinished edges where a portion was scraped away or removed by other means. Sometimes the contact with the SAF was to bolt something new to the underside of the Q-decking or onto one of the beams, or to strap something to hang from a pipe, or to relocate a VAV box, or to relocate light fixtures as offices below are reconfigured or replaced by meeting rooms or exercise facilities, or to run new conduit for IT upgrades, and so on. The need to work within the Plenum somewhere in the Building was a relatively common occurrence. Some of those times, maybe all of them, a bit of the SAF would be contacted in some way.

[78] The "duct mastic" in the Building is also ACM. The duct mastic is an adhesive compound, used to seal and secure every connection of two pieces of the ducting that carries the air supply. The duct mastic is applied to the outside of the duct pieces, over each connection of pieces and extending on either side of that connection. It contains some asbestos. Therefore, asbestos is already present throughout the Building's air distribution system. The return air passes over it constantly. But the duct mastic does not release asbestos fibres. The Landlord must deal with it from time to time (by removing, enclosing or encapsulating ACM in the areas of its planned Plenum activity, prior to that Plenum activity commencing) dealing only with so much of the ACM as will be affected by the Plenum activity, as required by section 35 of the Alberta *OHS Code*.

[79] The Building also has ACM in the plaster in the area of the freight elevators and in the floor tile on the 3rd floor. In the case of the duct mastic, the freight elevator plaster and the floor tile, the asbestos is chrysotile. This is a serpentine, and less concerning, form of asbestos.

Hazardous Materials Surveys and Building Information

[80] Prior to the Tenant's initial entry into the Building in 2001, but for its benefit, the 17th floor was renovated by the then owner of the Building. It was first surveyed for ACM as part of the pre-renovation assessment, in advance of it being fit out for Nexen to occupy under that initial lease. The survey work was done by PHH Environmental Limited, retained on behalf of the previous owner's commercial leasing consultant. As part of that survey, the SAF was sampled and tested. In its report dated April 12, 2000, PHH concluded "Asbestos-containing materials were not identified." Page 4 of the report notes that SAF located above the ceiling throughout the office ring corridor was tested for asbestos; no ACM was identified.

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then be exhausted out of the Building, not recirculated into the offices with the other fresh supply air. I am sure there was a good reason, beyond just increased energy costs, why that did not happen. This option was not presented in the evidence, so I am not aware of its feasibility or efficacy. I have not considered this speculation further.

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[81] On becoming a tenant in the Building, Nexen gutted each floor, including a complete rebuild of the T-Bar ceiling grid. Nexen did no testing of its own for asbestos because it thought the initial lease clause regarding hazardous materials should protect it if there was any asbestos.

[82] In 2004, Jacques Whitford Environmental Limited ("**JWEL**") prepared a report for the Building owner. It was prepared in connection with OPTrust's due diligence in acquiring an interest in the Building. It contained an environmental assessment of the Building. It said there was no asbestos present. However, it also indicated that no comprehensive building ACM survey had been completed at the site. This report was not shared with the Tenant.

[83] At a "Nexen Tower Improvements Committee" meeting of both Landlord and Tenant on September 17, 2014, a project management consultant advised that there "may be some asbestos compound at certain elbow joints in the Plus-15 and main floor ductwork," referring to the duct mastic at those locations. The consultant advised that this type of asbestos was non-friable and not an HSE (Health, Safety & Environment) issue but suggested that if testing confirmed the presence of asbestos there would be additional construction costs associated with the work pre-construction to abate that material – meaning it would be removed prior to the planned construction, under controlled handling practices and worker protections, by trained abatement personnel.

[84] On October 1, 2014, that same consultant advised both the Landlord and Tenant, that a contractor would schedule testing of the elbows along the duct sealers to determine if asbestos was present. Ultimately five bulk samples of suspected ACM collected from floors 1 and 2 were sent for analysis, two of duct mastic and three of "spray fireproofing". The results reported chrysotile asbestos in the duct mastic and "none detected" in the SAF.

[85] The asbestos-containing duct mastic from the Main and Plus-15 levels of the Building was removed between December 9, 2014, and February 2, 2015.

[86] The Tenant's top representative on the committee said it was on Landlord space so of no concern to the Tenant. It did not insist on a pause so that it could undertake comprehensive testing of its premises. It did not anticipate Lease litigation and invoke privilege over related internal communications. It did not call into question the Landlord's earlier representations as to there being no asbestos in the Building in response to the RFP.

The Lease

[87] On February 8, 2013, Nexen issued a Request for Proposals to owners of large office towers in downtown Calgary, for its future commercial office space needs in Calgary after its lease of the Building expired (the "**RFP**"). Its lease was due to expire at the end of 2016. The RFP was sent also to the Landlord.

[88] The RFP asked those responding to:

> Please disclose any and all information regarding ... the presence and location of asbestos.

and to:

> Please confirm that the Landlord has taken any and all other actions that may be necessary to bring the Building and the Premises into full compliance with all relevant government code requirements, including but not limited to all

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> governmental requirements with respect to compliance with hazardous substances.

[89] On March 5, 2013, the Landlord responded. As part of its response, the Landlord referred to a Phase 1 Environmental Site Assessment conducted between May 26 and June 12, 2000, which reported in respect of asbestos:

> In 2001, the Landlord engaged Jacques Whitford Environment Limited to conduct a Phase 1 Environmental Site Assessment, which concluded that there was no evidence of environmental contamination associated with the Nexen Tower. The Executive Summary of this Environmental Site Assessment is included in Appendix "B", "Environmental Studies" attached to this RFP Response. ...

[90] That "Executive Summary" includes the following:

> Based on information gathered and on observations made during this investigation, the Phase 1 environmental site assessment has revealed no evidence of actual environmental contamination with the [Building].

Within the report was a table covering a broad range of potential concerns; the row for asbestos reported:

Potential Source of Contamination	Level of Environmental Contamination	Findings
...		
Asbestos	None	Not suspected based on the age of the buildings. A limited asbestos survey did not identify any asbestos-containing materials

[91] The Tenant asked no follow-up questions about asbestos.

[92] On December 30, 2013, 801 and CNOOC, which had acquired Nexen by this time, amended and restated their first lease, entering the new Lease,[6] now for all the Building's rentable office space, now for a term expiring December 31, 2031, and with new rental rates gradually escalating over the full term.

[93] On December 30, 2013:

i. the Tenant and the Landlord entered into the Lease. The expiry date of the original lease was extended to December 31, 2031, and CNOOC acquired rights to floors 4 through 36 of the Building, nearly all the rentable office space. The base rent under the Lease was on a "per square foot per annum" basis and varied over the extended term of the Lease. After December 31, 2016 (the end of the remaining term of the first lease), the premises were to be leased from January 1,

[6] A copy is attached as Appendix A to this Judgment.

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2017, to December 31, 2021, at $33.00 per square foot per annum; from January 1, 2022, to December 31, 2026, at $34.75 per square foot per annum; from January 1, 2027, to December 31, 2031, at $36.75 per square foot per annum.

ii. CNOOC Limited executed an indemnity agreement respecting the Lease (the "**Lease Indemnity Agreement**"). Under this agreement, CNOOC Limited agreed to indemnify the Landlord for any and all losses, liabilities, damages, costs, expenses, actions, and causes of action incurred by the Landlord as a result of any failure by the Tenant to pay any rent or other sums payable under the Lease, and for any default by the Tenant to observe or perform any of its obligations under the Lease.

iii. the Beneficial Owners, the Landlord and the Tenant entered into an agreement in connection with the Lease (the "**Beneficial Owners Agreement**"). Under this agreement, the Beneficial Owners of the Building confirmed that the Landlord held title to the Building as bare trustee on behalf of the Beneficial Owners, and the Beneficial Owners consented to the Landlord leasing the premises to the Tenant. The Beneficial Owners also acknowledged, covenanted, and agreed with the Tenant that the agreements and covenants of the Landlord contained in the Lease in favour of the Tenant would bind the Beneficial Owners' interest in the Project and provide all remedies and rights arising from or relating thereto against the Beneficial Owners' interests therein.

[94] The Lease anticipated and permitted the Tenant to conduct renovations in the Building. It established a committee process involving representatives of both Landlord and Tenant to cooperate in such matters. In advance of some of those planned renovations the Tenant conducted a hazardous substances survey in the areas where the Building renovations would start. It was during this process that the asbestos at the heart of this case was found.

Tenant's Declining Fortunes

[95] In the years immediately following CNOOC Limited's acquisition of Nexen, the price of oil worldwide declined sharply, and with it CNOOC's economic fortunes. Cost reduction became a high priority of the Tenant's new owner.

[96] In 2015, the Tenant had begun planning an extensive renovation project that it called "Project Renaissance", that the parties addressed in their Lease by way of such things as inducements and advance approvals. Project Renaissance was initially designed to be a full-scale rebuild and renovation of the interior of all CNOOC floors. Among other things it would redo the flooring, add a large kitchen at the south end, and "gut... the entirety of the floors" to give them a refreshed look.

[97] To reduce cost, the project was scaled back in March 2016, to only renovate the lobbies and washrooms, as well as anything else specifically required on each floor as requested by different departments.

[98] In those early years after the acquisition also, the Tenant struggled in adjusting to its new owner's differing culture and management style. Fang Zhi, the acting CEO of the Tenant coming out of the acquisition, was looking for his leadership team to "step up". According to Quinn Wilson, "step up" was part of the company's cultural beliefs at the time and meant that:

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> ...you bring forward what it is you can contribute to our cost cutting issues 'cause we're losing money. Prices are poor; we're losing cash. ... You didn't wait until someone came and told you to reduce your budget, you should be proactive about it.

Since 2012, Quinn Wilson had been the Tenant's Executive Vice President of Human Resources & Corporate Administration. In that capacity he bore responsibility for the Lease. In 2017, he was already transitioning into the CEO role. He was the most senior employee onsite in Calgary; Fang was withdrawing geographically and practically. Wilson officially succeeded Fang as CEO in 2018. By then Fang was the Chairman and CEO of CNOOC International.

[99] The Tenant began using its CNOOC name more fully in place of the Nexen brand, though not until the spring of 2018. It came on the heels of a more concerted effort in 2017 to operationally integrate Nexen within CNOOC International. According to Wilson, the integration brought a change in leadership focus from "a Western knowledgeable leadership group to a much more Chinese national group."

[100] Over these years since the acquisition CNOOC also steadily reduced its head count.

[101] In 2017 the China-based CNOOC Limited pressed for further reductions in operating costs. CNOOC's attentions in Calgary were on vigilant restraint of "general and administrative" costs, trying to make all the business support functions as lean and as efficient as possible. This included looking at outsourcing opportunities and, importantly here, rent expense savings.

[102] On May 12, 2017, Fang asked Wilson to prepare a presentation on organizational matters for an upcoming visit from CNOOC Limited's President, Xu Keqiang. The presentation was to focus on the overall organizational evolution since Nexen's acquisition by CNOOC Limited, headcount movements, improvement in quality but reduction in quantity of senior leaders, the competitive compensation philosophy and practice, and a 47% headcount reduction. The executive summary of the finalized presentation indicates a 39% reduction in employee headcount and a 66% reduction in contractor headcount since the acquisition in 2013. The "Executive Leadership Team" reduced by 29% and the number of senior leaders reduced by 81%.

[103] On June 14, 2017, Wilson reported to members of the Tenant's Executive Leadership Team that the "Canadian Head Count" at the time was 1409, which still exceeded the target of 1000 set by President Xu of CNOOC Limited. The email also noted that the company was "on track to lose 100's of millions" in 2017. The company was expecting to have a very challenging financial year, with up to $200 million-plus in losses, due to the commodity price and the costs of projects it had undertaken.

[104] By June 2017, approximately 7 floors of the Building were completely unoccupied. By the fall of 2018 the head count was down to about 1,000. The Tenant did not require all 33 floors of space, at roughly 18,000 square feet per floor. It was locked-in to paying rent for between 7 to 9 full floors of unused space.

[105] Plus, CNOOC found itself paying rent rates far above the market. The Tenant was paying $33.00 per square foot per annum, plus operating costs, plus parkade costs for total rent expense at the Building of over $33,600,000 for 2017. The market base rates for such commercial office tower rental space had dropped markedly, to well below $9.00 per square foot, and sub-let space

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for still less, as low as $2 per square foot. The Tenant was on the wrong end of a very bad deal, locked in for another 14 years.

[106] On February 9, 2017, Wilson asked those reporting to him in an "Office Services" group to quietly investigate options to exit the Lease. He said he initiated "an actual project to get the quantitative and qualitative aspects covered" for conceivable ways of reducing and offsetting the head office rent costs. Some efforts were made to sub-let some of the Tenant's space in the Building, but ultimately without success.

[107] Some months later, on September 26, 2017, Patrick Jusseaume (a Team Leader in Office Services) responded with what he had been told by the Tenant's real estate brokerage, Cushman & Wakefield, that if CNOOC were to leave the Building, then the Landlord would sue for the entire rent payable over the remaining term of the Lease. Wilson was also told that the total amount was over a half a billion dollars.

Mid-2017 Survey for Hazardous Materials

[108] On August 11, 2016, in advance of the scaled down Project Renaissance renovations, the Tenant requested an "asbestos certificate" from the Landlord, to confirm that the Building did not contain asbestos. The Landlord advised the Tenant that it did not have an asbestos certificate but provided excerpts of various previous environmental site assessment reports. The Tenant proceeded with the Project after receiving that information.

[109] The Tenant retained RPC Group ("**RPC**") as its general contractor. The renovations were planned in 4 phases, with each phase encompassing renovations on eight floors at a time.

[110] On June 20, 2017, RPC conducted hazardous material testing on the Building's 36th floor in advance of demolition work associated with the Project. The testing found asbestos in the duct mastic as well as lead within the pipe wrap insulation.

[111] On June 30, 2017, Wilson was notified of these findings.

[112] The Tenant's approach to asbestos in the Building changed markedly in 2017. Wilson says the change resulted from being shaken out of its lip-service only "culture of complacency" towards safety. In 2017, two Nexen employees were tragically killed at one of its northern Alberta operations, in a safety related incident. The company failed to keep them safe, and Wilson took it personally. From that time on the Tenant placed employee safety as a top priority in fact, no longer just in hollow platitude. Evidence of contemporaneous activities bear this out. Two examples are, first, thereafter the Tenant started every employee town hall-type meeting with a focus on workplace safety, usually addressing common daily employee activities, and second, it hired an experienced senior executive that had a successful HSE career in the oil patch for one of the oil and gas majors, to bring fresh eyes to all Nexen's practices and to report directly to the CEO on how he could lead change.

[113] The Landlord does not doubt those changes occurred. It just doubts that the changes motivated the marked change in its approach when there was a report of asbestos in the duct mastic, this time asserting litigation privilege for expected Lease litigation. For that change in approach the Landlord has a different theory.

[114] RPC retained Environmental Renovations and Abatement Inc. ("**ERA**") to abate the duct mastic and the lead on the Building's 36th floor. In October 2017, as RPC and ERA prepared for

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the abatement on the 36th floor, an "environmental solutions" firm called Eco Abate Inc. ("**Eco Abate**") was retained to conduct air monitoring during the abatement and to conduct additional bulk sampling in connection with the Tenant's renovations.

[115] Eco Abate collected bulk samples and air samples. For the bulk sampling, Eco Abate removed a piece of the material to be tested, sealed it in a Ziploc bag, and delivered it to a laboratory to analyze for asbestos.

[116] Air sampling is conducted by collecting suspended particulate matter from a volume of air as it is drawn through a removable filter lining the inside of a holder in the shape of a very large thimble or capsule. This capsule is connected to a machine that sucks the air in from around the filter-lined capsule, drawing it into and then through the filter, trapping airborne matter in the mesh of the filter lining. The holes to the filter are in effect 0.8 micrometres in size for sampling intended for PCM analysis; 0.45 to 1.2 micrometres when intended for TEM analysis. The machine runs for a fixed period of time that is determined by the circumstances and the intended analytical method, after which the filter is removed from the capsule and sent to a laboratory for analysis, all under controlled conditions. The air monitoring machine could run for 30 minutes or for up to 8 hours (or more). After receiving the sample and following one or more of the standardized methods of analysis described above, the qualified lab then reports the results.

[117] In September 2017, Wilson inquired of Jusseaume around the possibility and feasibility of getting out of the Lease.

[118] On October 16, 2017, Wilson sent himself an email to capture his thoughts on matters that may warrant a mention to his China-based superiors. He said this was a common practice for him, to send notes or ideas or comments to himself via email, of a business or a personal nature. He included in this particular such email:

> 5) Building Reno's. Lead and asbestos approach and response. Ability to renegotiate the lease?

Wilson said he was wondering: "Okay. I understand there's a contract, but if we've got harmful materials, is that an opportunity?" By "renegotiate the lease" he said he meant:

> At this time, I don't know how pervasive it is, but on those floors where we've got the duct mastic, is – is there an opportunity there? Is that something that, you know – I'm assuming the costs are going to our landlord. If they're going for me, I definitely want cost reimbursement. So those are – those are the type of things, and beyond that, it's an idea.

[119] Wilson equated the email to his "musings at 6:04 in the morning." No one else previously suggested the idea of renegotiating the lease to him. However, he did state that shortly thereafter, perhaps even that very morning, he may have spoken with Alan O'Brien regarding the idea. O'Brien was the General Counsel and Senior Vice President at CNOOC.

[120] On October 21, 2017, Wilson was told that Eco Abate found more asbestos in the duct mastic on floors 27 to 29. That same day, his General Manager of Corporate Administration, Zong Tang, directed Sonny Sidhu, a CNOOC renovations contractor, to "keep this result within our team" and to refrain from sharing the results with Century West, saying "we need to do more tests on all hazard materials includes asbestos" [sic].

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[121] The Tenant formed an internal team (the "**Team**") comprised of Wilson himself, his most senior lawyer O'Brien, Jusseaume and a second lawyer, Armfield. At times it appears that Brittney Price (a Nexen communications employee) and Tang were also involved. The Team was formed with Lease litigation in mind because immediately, on October 24, 2017, the Team declared all their communications to be subject to litigation privilege. The Tenant contemplated litigation based on the duct mastic and lead pipe wrap.

[122] On October 23, 2017, Jusseaume sent an email to Sidhu and Tang notifying them that Robbie Armfield, an in-house lawyer at CNOOC, would be their legal resource.

[123] Four days later, the Tenant retained outside counsel and initiated still more hazardous materials testing within the Building.

Asbestos Discovery

[124] On November 8, 2017, Eco Abate sent a report to the Tenant that asbestos was found in the SAF (the "**Discovery**"). The cover letter to the report states (emphasis in original; citations omitted):

> Eco Abate performed sampling of spray applied insulation on various floors of the commercial building located at 801 7 Ave SW. The purpose of the sampling was to determine asbestos content in the material.
>
> Results indicate the spray applied insulation has a vermiculite component that is asbestos-containing (See Photograph #1 & 2). Due to the homogenous nature of the material, all sections of the material with a vermiculite component must be assumed asbestos-containing as per Section 5.6.4 of the Alberta Asbestos Abatement Manual (2012).
>
> It has been indicated that the space in which the material is present may also be used as a supply air return. As per Part 4, Section 34 of the Occupational Health and Safety Code (2009), asbestos must not be used in a location or form that could be released into the supply or return air system. Since the material is considered friable and may release fibres into the return air system, it is recommended that the material be removed.[7]

[125] RPC provided a separate report dated November 9, 2017, regarding the SAF. Its report noted that "Fire Spray Insulation" containing 25% vermiculite had been found within the Building. The composition of this SAF was 25% vermiculite, 20% cellulose, 5% glass, 50% non-fibrous material, and 0% asbestos. Based on photographs included in the report, the SAF appears to have been sampled from within the 8th floor ceiling Plenum and a structural beam above the ceiling on the 9th floor. The RPC report stated "[t]here is also a separate report from a 3rd party Ecobate [sic] Environmental Solutions that the spray insulation be removed."

[126] The Eco Abate report included results of bulk sample analyses performed on the SAF. The analyses were completed by EMSL Canada Inc. laboratories using PLM. Photograph #s 1 and 2 of the report show SAF on what appear to be structural beams located above the ceiling on the 31st and 29th floors. The raw data from EMSL attached to the report notes that one sample of "beige, fibrous, homogenous spray insultation" from a location on the 16th floor contained

[7] The reference to section 34 is an error. The section of the *OHS Code* that Eco Abate quotes is section 33.

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<1% tremolite asbestos. The composition of this sample was noted as 20% cellulose, 2% glass, 20% vermiculite, and 58% non-fibrous. There was only one other sample of SAF tested during these analyses, a sample of "tan, fibrous, homogenous" SAF from a location on the 10th floor. Its composition was 100% cellulose, so no asbestos was detected.

[127] The Tenant implemented its "Stop Work Authority" in respect of the pending renovations. They never resumed.

[128] On November 9, 2017, Eco Abate also advised the Tenant that it would perform "air-clearance sampling to confirm the building is fit for occupancy by unprotected workers". Air clearance sampling referred to the "air clearance criteria" in the Manual. It is 10% of the "occupational exposure limit" listed in a Table appended to the *OHS Code*, which I discuss in greater detail below. The air clearance criteria adds a measure of added precaution, for what concentrations of a hazardous substance OHS personnel will consider safe or tolerable for human exposure when they are applying the *OHS Code*. Eco Abate was telling the Tenant the pressing and immediate question to be answered is whether the Building is even safe to occupy given its latest findings and it undertook to answer that question expeditiously. It wrote that it expected to have "all floors completed by Sunday afternoon," which was three days hence, and would provide results daily.

[129] On November 9, 2017, Tang was notified that asbestos was found in the SAF on floors 7, 8, and 9 of the Building, and that Eco Abate recommended removing the insulation from the Building. Wilson was informed shortly thereafter.

[130] Jusseaume then notified the Landlord of hazardous substances found on floors 7, 8, and 9, saying it appeared to relate to construction materials in the Building, was detected while conducting pre-renovation testing, and that the Tenant had halted the renovation work.

[131] The Landlord felt the notice was very formal and had been told "the matter is with legal". The Landlord (Sardachuk) responded to Jusseaume's November 9 notice, affirming its interest in knowing more "as soon as more is known" and thereafter in discussing it with the Tenant. It advised that it may be interested in engaging their own consultants to do testing.

[132] This was passed to Wilson, who directed Jusseaume to "Please share all correspondence with him – with myself, Alan and Robbie. Share it with myself and the lawyers please." The first sentence of that instruction is ambiguous. It could be taken as an instruction that Jusseaume is to share with Sardachuk all their Team's correspondence. Or it could be taken as an instruction to share all his Sardachuk correspondence with the Team. The second sentence of the instruction makes it clear the latter was the intent, that all communications with Sardachuk were to be shared with the Team, as did the assertion of litigation privilege. The record is clear that the first interpretation did not happen; virtually nothing of any substance was shared with the Landlord, until March 14, 2018.

[133] CNOOC was not transparent with the Landlord about the information it was receiving about hazardous substances in the Landlord's Building. It did not provide further information to the Landlord "as this matter [was] further understood" as Jusseaume later assured Sardachuk.

Post-Discovery Secrecy

[134] On November 10, 2017, Scott Blake, principal of Eco Abate, notified Armfield and Sidhu of his test results for air samples taken on floors 8-17. They indicated that "the areas

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sampled are safe for occupancy by unprotected workers" and "[a]ll samples met occupational health and safety requirements for work environments (<0.01 fibres/cc)".

[135] The Tenant brought in Pinchin Ltd. to do more testing. It collected and tested 32 bulk samples on November 11 and 12, from "[s]teel decking/beams throughout Floors 4-35".

[136] On November 12, 2017, Blake emailed Armfield notifying him that the air monitoring conducted over the weekend indicated that "the occupied floors of the building meet occupational health and safety requirements for airborne fibre concentration (<0.01 fibres/cc)", and that "based on the sampling and observations ... the asbestos-containing insulation does not pose an immediate exposure risk to the occupants". This information was also forwarded to Sidhu, the renovations project manager. Eco Abate informed Sidhu that:

> Results of air monitoring met air clearance criteria guidelines in the Alberta Asbestos Abatement Manual (2012) and indicate the areas are safe for occupancy by unprotected workers as per regulations in the Occupational Health and Safety Code (2009).
>
> Based on the sampling results and observations, we can conclude that under normal operating conditions the asbestos-containing spray applied insulation behind the drop ceiling does not pose an immediate exposure risk to administrative staff within the building.
>
> [emphasis in original] [citations omitted]

[137] On November 16, 2017, Pinchin reported to the Tenant that no asbestos was detected in any of the 32 samples of SAF.

[138] It appears that the Tenant also had Eco Abate complete follow-up bulk sample testing of the SAF. On November 22, 2017, EMSL, at Eco Abate's request, performed additional analyses on three SAF samples collected from floors 33 though 35. The EMSL report notes that PLM was used. One sample of beige, fibrous, homogeneous spray insulation collected from "FLOOR 33: ROOM 33033" was found to contain <1% actinolite asbestos. The composition of this sample, and the other two samples analysed, was 20% cellulose, 3% glass, 20% vermiculite, and 57% non-fibrous (other). No asbestos was detected in the other two samples.

[139] By December 2017, word was out. CNOOC employees were asking questions about the Discovery.

[140] In December 2017, an employee emailed a CNOOC manager of HSE to inform him that there were people in the Building concerned about the asbestos that was found on the 36th floor. Jusseaume conferred with the Team and others and then replied stating, "low levels of asbestos and lead wrap" were discovered during a pre-construction review of the 36th floor, but that "[t]hese items do not pose a risk to staff".

[141] On December 6, 2017, Sardachuk sent an email to Killi expressing his frustration with the "cone of silence" treatment the Landlord was receiving with respect to the hazardous materials finding. Almost 4 weeks had passed since they were first notified of the hazardous materials, and Sardachuk felt they were entitled to know the results of the testing within a reasonable amount of time. He noted that the "cone of silence" treatment was atypical of their relationship with the Tenant and suspected that "someone in the background" may be trying to manufacture a crisis. Later that day, Sardachuk had a "lengthy, very friendly" phone call with

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Jusseaume. Sardachuk came away with the impression that "things are not that big of a deal for CNOOC but they are just trying to tie up some loose ends." By email Jusseaume assured him that the Landlord could expect further feedback within the next few days.

[142] In December 2017, Barton attempted some routine minor maintenance work in the Building. The Tenant "got upset" and insisted that everyone stay out of the Plenum.

[143] Shoraka was under the impression that they were waiting for more information from the Tenant's experts and should expect that information in the coming days. The Landlord decided to "put Stantec on standby" so that upon receipt of the information from the Tenant they could immediately move to analyze it themselves. The Landlord also put their corporate lawyer on standby to be ready to respond once they received the information (also, not the Landlord's trial counsel).

[144] Between December 2017 and March 2018, Sardachuk and Jusseaume communicated, but "further feedback" was not forthcoming. Sardachuk kept expecting to receive a report of the initial testing. The Tenant did not release that information until their meeting March 14, 2018. Jusseaume sent Sardachuk an email on November 29. Sardachuk replied the following day, among other things, asking for an in-person meeting. Jusseaume didn't respond. On December 6, Sardachuk called Jusseaume, and they spoke. Jusseaume then called Sardachuk the next day to inform him that they had found asbestos in the skim coat in the elevator lobbies. Jusseaume then sent an email to Sardachuk on December 19 informing him that they had discovered debris from disturbed SAF on top of the ceiling tiles in certain locations. Based on the telephone conversation at the beginning of December, Sardachuk believed that the Tenant would be providing additional information by the end of December. When he didn't hear anything, he set up a lunch with Jusseaume through Mark Barton, the Landlord's Chief Engineer for the Building, which then was bumped out to early February. That was the only time the two met face to face and the details of the original find were not provided for another month and a half.

[145] All the Eco Abate testing that would inform the report originally requested of it, was done by January 3, 2018. It demonstrated the Building was safe to work in.

[146] The Tenant asked Eco Abate to produce a Hazardous Material Assessment Report that addressed whether it was safe for people to occupy the Building long term. A first draft of Eco Abate's Hazardous Material Survey Report was sent to the Tenant on January 8, 2018. A second version of the report was sent to the Tenant on January 17, 2018.

[147] The drafts reported:

> Background air monitoring at 70 locations on floors 1 through 36 were all <0.01 f/cc (fibre per cubic centimeter, also expressed by some as: str/cm^3 meaning structures per cubic centimetre). Under the "Interpretation" heading, these results were described as "Below Exposure Limit", and "Meets OH&S Code". By "background" monitoring is meant air samples collected before there is activity in the area being monitored.
>
> "Direct Air Disturbance" testing (stirring up dust and debris in the vicinity) in the Plenums were also <0.01 f/cc. Under the "Interpretation" heading, these results were again described as "Below Exposure Limit", and "Meets OH&S Code".

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> The SAF was physically damaged in various locations throughout the building and that "[t]he damage has resulted in [SAF] debris being present on the top of select ceiling tiles and duct work in the ceiling space".
>
> The building is safe for occupancy despite the material located in the air systems.
>
> The spray debris presents an immediate exposure risk to maintenance staff that frequently access the ceiling space via lifting the ceiling tiles.

[148] In its summary letter dated January 17, 2018, accompanying its second draft, Eco Abate wrote (emphasis in original):

> Eco Abate confirmed through air sampling that the building is safe for occupancy by unprotected workers and administrative staff as described in Part 4, Section 31 of the OH&S Code.

[149] That comment suggests Blake concluded the Building was not in "an unsafe condition" (a phrase in that section 31) by reason of the potential for release of asbestos fibres and therefore in no need of correction. At trial he said that by that email he just meant that "they didn't have to evacuate the building immediately". He was not saying that there was no potential for release of asbestos fibres.

[150] Between January and March of 2018, Eco Abate's report underwent several revisions. A final version of the report was first provided to the Landlord at the parties' meeting on March 14, 2018. In the version of the summary letter accompanying the final version of the report provided to the Landlord, the language stating that the Building complied with section 31 of the *OHS Code* was dropped, and the revised language implied that the Building was not in fact in compliance with the *OHS Code*:

> During the process, Eco Abate confirmed through air monitoring that the building does not pose an immediate risk to staff within the building, however, corrective actions are required to address the potential future risk and to comply with OH&S Code requirements.

[151] In sum, two significant changes were made by Eco Abate to its conclusions in its earlier drafts. First, it removed its statements implying the Building was not in an unsafe condition. Second, it revised its statements that the Building is "safe for occupancy by unprotected workers" or "safe for occupancy," to statements that the conditions in the Building "do not pose an immediate risk to staff within the building."

[152] In his final version of the report, Eco Abate recommends that the SAF throughout the Plenum spaces and Shafts be removed to comply with sections 31 and 33 of the OHS Code.

[153] At trial, Eco Abate's principal acknowledged receiving comments on the draft from Armfield but denied that the Tenant directed that he change any recommendation in the report.

[154] As indicated above, in early February, Jusseaume, Sardachuk and Barton met over a lunch with the Landlord expecting to finally learn, and maybe even discuss, the status of the Tenant's investigation. All the Landlord came away from the meeting with was that CNOOC executives were discussing the matter, Jusseaume was not privy to those discussions, and that CNOOC planned to get back to them in the next couple of weeks, at latest by the end of February. That never happened. The Landlord considered having Stantec at the ready to conduct an independent investigation whenever they finally heard something and the freezeout lifted.

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[155] Eco Abate completed further sampling in late February 2018.

[156] On March 5, 2018, Sardachuk forwarded to Stantec a few historic environmental reports, including the 2000 JWEL Report, 2014 Pinchin Reports, and a November 2014 bulk sampling report from Pinchin for its review.

[157] Sometime prior to March 14, 2018, Wilson decided they "were going to leave" the Building and he "asked [his] team to look for other space." When describing his thinking at the time he added "We'll come back once it's clean."

[158] Included in a document attached to an email dated March 7, 2018, sent from Wilson's Executive Assistant to Fang (and copied to Wilson and two other executives who also reported to Fang), was a list of "High Priority Items Nexen 2018." On that list was the item "2018 Lease Negotiations" which said:

> Working with landlord to exit building. Move staff to safe real estate location and then manage commercial negotiations with the landlord.

The Tenant was not, in fact, working with the Landlord at the time. This was a forward-looking document of plans, not a report of past activities. The Tenant's intended strategy, however, subject to being overruled by Fang, was to first vacate the Building and then after that negotiate with the Landlord. It had already started looking for alternate rentable space.

[159] On March 9, 2018, Brody sent an email to Sardachuk setting out notes from a meeting he and Barton held with two representatives of C5+ Indoor Environmental Science and Technology. C5+ was familiar with the Building, having conducted a number of assessments and reports about it over the previous decade plus. In the email, Brody states that the advice given was that: (1) the SAF is friable; (2) it is located in the return air plenum and this air moves throughout the Building as it is remixed with supply air; (3) the limit of OH&S for an "air plenum" is 1.0% asbestos in the ACM; and (4) anything above this level will require removal by OH&S.

March 14, 2018, Meeting & the Tenant's Ultimatum

[160] More than four months after reporting the Discovery to the Landlord, the Tenant hosted the Landlord at a meeting. Upon arrival, and to its surprise, the Landlord encountered a Tenant team armed with lawyers. The Landlord participants (Shoraka, Sardachuk and Killi) considered turning around and leaving; they ultimately chose to remain to hopefully, at long last, learn about the 2017 report of asbestos in its Building.

[161] The Tenant proceeded through a prepared, detailed slide presentation, explaining that its pre-renovation survey for hazardous substances found asbestos in the Plenum spaces and its consultant, Eco Abate's, findings and recommendation.

[162] Eco Abate concluded the source of the reported asbestos was the SAF found above the ceiling tiles of each floor, that had been applied in slurry form to the underside of the Q-decking supporting the floor above, and associated surfaces, and had then hardened. This cementitious material contained asbestos, was in poor condition, was deteriorating and releasing asbestos fibres, and such fibrous debris was littered across innumerable ceiling tiles throughout the Building.

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[163] In its report on the testing, Eco Abate told the Tenant that provincial law required removal of all the SAF. In the short term, the Tenant said, it had been told the Building was safe to occupy. The Tenant said it was not prepared to remain in the Building in its present condition for another 14 years. The Tenant was not prepared to take chances with the health of its employees by delaying matters.

[164] A final version of Eco Abate's Hazardous Material Assessment Report was provided to the Landlord at the March 14 meeting. The Tenant said it expected the Landlord to keep the information confidential. Table 1 summarizes the "Asbestos Materials Identified", noting that the SAF contained actinolite/tremolite asbestos at <1% and that the "[p]ercentage of asbestos in the material differed based on location and application." Of the 71 samples of SAF, 8 contained <1% actinolite or tremolite asbestos. The remaining samples were "assumed to contain asbestos due to homogenous nature and positive testing results in other locations as described in Section 5.6.4 of the Alberta Asbestos Abatement Manual (2012)".

[165] Page 10 notes that after "PLM analysis positively identified asbestos fibres within the spray insulation material at a concentration of <1% ... TEM analysis of the material was conducted in an attempt to determine the specific concentration". Six samples of the SAF were sent for TEM analysis. The results of the TEM analysis "did not identify asbestos within the material", which Eco Abate attributed to "the smaller amount of sample analyzed and the inconsistent distribution of asbestos throughout the material". According to Eco Abate, "[t]he vermiculite material is not uniformly mixed into the spray insulation and thus analysis by TEM may have not been broad enough to accurately determine asbestos concentration".

[166] As stated above, the Report recommends that SAF throughout the Plenum spaces and Shafts be removed to comply with sections 31 and 33 of the *OHS Code*, requiring high risk asbestos abatement procedures, with priority given to SAF present in the air distribution system and damaged sections.

[167] Ultimately, Eco Abate concluded that the SAF did not pose an "immediate risk" to staff, but that corrective actions were required to address potential future risks and to comply with OH&S Code requirements. The specific corrective actions referred to were either removal, encapsulation, or enclosure of the SAF.

[168] In terms of the other ACMs in the Building, Eco Abate recommended that the plaster in freight elevator areas be enclosed with tile or drywall, that the duct mastic be left in place and only removed if it would be disturbed by a renovation, and that the floor tiles in the third-floor pantry (the only floor tiles identified as containing asbestos) be removed.

[169] At the March 14 meeting the Tenant then made it clear the Landlord had to remove all the SAF and that it could not do so while its employees were still in the Building (the "**Ultimatum**"). Wilson put it this way at trial: "The 'two key messages' were that (1) we need the Building fully abated; and (2) we won't be there while that is occurring."

Chronology After the Tenant's Ultimatum

[170] After the Ultimatum meeting ended, in the evening, Jusseaume sent to the Landlord a summary of the "messages delivered to you by Nexen at today's meeting". The summary stated that the Tenant viewed the presence of hazardous substances as "a material breach of the lease agreement and as grounds for terminating the lease" but that given their past relationship Nexen

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was willing to explore alternatives on a without prejudice basis. The summary also acknowledged that "the building does not pose an immediate danger" but stated that "corrective actions are required immediately because of the risk these materials pose". At trial Jusseaume acknowledged that he did not write the message, saying it had "more legal than he [understands]".

[171] Shoraka was shocked to receive a letter alleging that the Landlord was in breach of the Lease and that the Tenant felt they were entitled to terminate it. The Landlord immediately hired lawyers and experts to assist it.

[172] At no time after delivering the Ultimatum did the Tenant ever waver from it.

[173] After March 14, 2018, the Tenant permitted the Landlord back into its space in the Building, to independently inspect the Building for the alleged asbestos, but only under restrictions to protect its employees and under Blake's supervision.

[174] Over the months following the March 14 Ultimatum meeting, both parties embarked on their own testing, to the point where one of the trial experts observed that, next to the World Trade Centre following its destruction on "9/11", this Building became the most tested building in North America. The number of samples taken from the Building and sent for testing ran in the many thousands, spanning a 4½ year period under diverse conditions.

[175] On March 19, 2018, Jusseaume reported to Wilson on his searching for suitable alternative rental space for CNOOC in the relatively new Bow Tower at 500 Centre Street South, as a sub-lease from Cenovus Energy Inc. He informed Wilson he was "impressed with the Cenovus space" and that he saw no reason why they wouldn't be able to make it work if they needed to move. He also wrote, "I think we could be ready with a lease in hand within eight weeks". He added that "move planning will take about three months, as this is the shortest amount of time we could provide IT to move the data centre". Wilson advised him that the sub-lease "may become more permanent depending on our discussions."

[176] About March 25, 2018, Wilson sought financial authority from Fang to begin lease discussions with Cenovus. It wanted a short-term rental for "2 years and 3 x 1-year extensions" or "3 years with 2 x 1-year extensions". Soon after, CNOOC was discussing lease terms with Cenovus.

[177] On March 26, 2018, the Landlord retained WSP Canada to investigate the Building's SAF. WSP first reviewed past environmental reports that the Landlord had in its possession, including the Eco Abate report, and the Building specifications.

[178] One of the reports reviewed was the December 17, 2004, report by JWEL. It contains two bulk sample analyses of SAF samples taken from the 37th floor. Both samples indicated that there was no asbestos present.

[179] A second environmental assessment report was generated by Pinchin in 2014, in connection with the Landlord's refinancing of the Building. Pinchin did not conduct an asbestos survey as part of its testing. However, its report referred to prior analyses of the SAF conducted in 2000 that concluded no ACM was found. Pinchin concluded that, given the age of the Building, there was potential for friable and non-friable ACM to be present in the Building but was satisfied that this risk was reduced given the prior analyses and environmental assessments.

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[180] Based upon this information, WSP developed a work plan to better analyze the condition of the Building. WSP said more testing was required to make a proper assessment of the Building.

[181] The Landlord and Tenant met March 22, April 26, and June 7 to discuss asbestos in the Building and without prejudice matters. All further meetings to discuss a resolution were between only Wilson and Shoraka.

[182] Wilson regularly fielded employee questions at town hall meetings and floor-by-floor information sessions at which people would ask about the asbestos and what was being done about it. Updates were given quarterly. Wilson also hosted "leader sessions" on a monthly basis to provide updates for the leaders to disseminate to their groups.

[183] In all such internal communications the Tenant regularly advised its employees that the Building was safe for them to occupy. The Landlord identified 16 separate occasions in which there was a record of the Tenant having done so.

[184] Wilson said its air monitoring throughout 2018 was to "provide staff with some level of assurance that it was, indeed, a safe place for them to be in to conduct their work", adding that if it received a positive test, they would have immediately closed those floors or areas.

[185] On April 10, 2018, WSP completed the review of past assessments of the Building (the "**April 2018 WSP Peer Review"**). On April 10, 2018, Shoraka informed Wilson via email that WSP had reviewed existing environmental reports of the Building and the Building specifications and recommended further sampling and testing.

[186] Wilson thanked Shoraka for the update and emphasized the need to move quickly as the Tenant was already making alternate arrangements to exit the Building. He also stated that it was important to find out how long the restoration work would take and specifically whether it would take more than one year.

[187] WSP embarked on the further work it recommended.

[188] On April 11 Wilson sent Shoraka the following email (as written):

> Marcel,
>
> Thank you for the update. I do want to be clear on the issues;
>
> 1) We have external expert opinions on the condition of the building and it is beyond question that the building contains hazardous material throughout. That is a breach by the landlord of the lease.
>
> 2) We cannot be expected to accept risk to our people as hazardous material is dealt with or unnecessary disruption to our business
>
> 3) In our first meeting almost a month ago we offered to have a without prejudice conversation of other alternatives we could seek to maintain our relationship. We stressed at that meeting the need to move quickly as we were already making alternative arrangements to exit the building
>
> 4) A move out of the building will cause our business considerable business disruption and costs. However nothing is more important to us than the health and

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> safety of our people. In addition, we can rent space for less than the current rent and that allows you to more quickly deal with the hazardous material.
>
> 5) We do not know and it is very important to find out how long that work will take. Do you have an estimate and in particular is it more than a year?
>
> 6) Remaining in a building with Hazardous material that needs to be dealt with is untenable. We want to make commitments on alternative work space as we do not think the work required will allow us to meet our legal obligations to provide a safe environment or allow us to run a business without unacceptable disruption. Our employees are of course asking questions as they understand asbestos and lead have been found in the buildings.
>
> I suggest you and I have a call tomorrow to discuss next steps as I am concerned I may have no alternative but to sign another lease to safeguard our people and support our business.
>
> Best regards. Quinn

[189] About this messaging, Wilson said he was emphasizing to the Landlord that it was not a bluff; they were going to exit the Building so the required work could be immediately commenced. It had not already decided to leave for good. The Tenant was looking to hear back from the Landlord on its remediation plan.

[190] In May 2018, the Landlord instructed WSP to complete additional bulk sampling in the Building to verify Eco Abate's bulk sampling results.

[191] Beginning in May 2018, Eco Abate started weekly air monitoring sampling.

[192] On May 12, 2018, Eco Abate reported to the Tenant that two of the air samples from floors 8 and 36 that WSP had collected on the night prior had exceeded the OEL for fibrous particulate. Therefore, the samples had been sent off for further analysis to determine whether the fibres were asbestos. Jusseaume asked whether they should consider closing the Building. Eco Abate replied that a couple of things could have led to the high readings, and that it was fairly confident the Building was safe. The two air samples were taken within containment enclosures while WSP was bulk sampling. In other words, the samples were taken while the SAF was being disturbed and precautions were in place to trap airborne fibres within polyethylene walls.

[193] On May 31, 2018, Blake emailed Armfield and Jusseaume to notify them that chrysotile asbestos was detected in the air of the 6th floor. The sample had been collected during carpet cleaning on the Wednesday prior. The lab director at iATL (International Asbestos Testing Laboratories) reported to Blake that there were dozens of chrysotile structures in the sample, which would have indicated a very high concentration of asbestos in the air on the 6th floor. Blake recommended that the 6th floor be vacated until the airborne particulate had settled and the Tenant did so.

[194] On the same day, the Tenant told its employees (as written):

> In the Fall of 2017, as part of the Calgary building renovations we identified hazardous materials on the 36th Floor including asbestos and lead. We took a Safety First approach and immediately issued a Stop Work Authority on all

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> building construction. We then began discussions with our Landlord on how we will resolve the hazardous material within the building.
>
> Since issuing the Stop Work Authority we have continually monitored air quality on all floors within the building to ensure a safe work environment.
>
> Unfortunately as part of our continuous air quality testing we found a trace of asbestos on the sixth floor today. Any trace of asbestos is unacceptable - this has driven us to take immediate action.
>
> We are taking a Safety First approach and closing the floor immediately until further notice. As a sixth floor employee, if you are scheduled to work tomorrow, please plan to work remotely. We will update you with more information over the course of the weekend as to where you will report to on Monday morning.

[195] Later in the evening, Wilson forwarded the internal communication to Shoraka, stating "I wanted you to be aware of the memo below. This is quite unfortunate and we should discuss as part of our agenda next week."

[196] However, on June 4, 2018, Blake was informed in a letter by the lab director at iATL that there had been a mistake in reporting the results of the air sample from the 6th floor. The lab analyst had informed the lab director in an "off the cuff" conversation that he could see multiple fibres of asbestos in the sample. These reports were made without having validated the presence of chrysotile using proper analyses. It was a false positive. On June 4, Blake sent an email to the Tenant attaching the lab's letter describing the error.

[197] Blake informed Armfield of the error and apologized for the miscommunication. A few days later, Blake was called to a meeting with Armfield and Jusseaume to discuss the false positive. Wilson joined the meeting and questioned Blake about how the false positive could have occurred and what steps he was taking to ensure that there would not be another error. Wilson was angry at the start of the meeting, but Blake maintained that Wilson's anger was not directed at the test result ultimately being negative, but because of the false-positive itself and the miscommunication. Eco Abate switched analytical labs and began sending its samples to EMSL beginning in June of 2018.

[198] Wilson permitted Jusseaume to converse with OH&S, but only with caution, saying to him it was "...fine to share with OH&S. They haven't been very objective with our past investigations so I definitely wouldn't expect them to be objective in this situation". Wilson explained he was referring to his experience with Alberta OH&S following the workplace fatalities and that he was not keen on OH&S.

[199] WSP completed some bulk sampling in the spring of 2018, on weekends and evenings on vacant floors.

[200] On June 19, 2018, WSP issued an Interim Spray Insulation Sampling and Testing Program report to the Landlord with the results of their bulk sampling work. WSP recommended completing a pilot scale abatement of the SAF in the Building. The Landlord shared WSP's preliminary results with CNOOC on June 20, 2018.

[201] The executive summary of that report states that "[a] total of 67 bulk samples were collected from the spray insulation and were analyzed via PLM analysis (400 x magnification) and TEM analysis (20,000 x magnification)" and that:

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> Two of the 67 samples of the friable spray insulation observed within the ceiling space of Floors 8 and 11 were found to contain <1% actinolite asbestos fibres via PLM laboratory methodology and 0.03% and 0.06% of non-regulated amphibole asbestos fibres via TEM laboratory methodology. As the material is heterogenous in nature, per the 2012 Alberta Asbestos Abatement Manual, the spray insulation should be treated as asbestos-containing.

[202] At the time the Landlord and Tenant were discussing the possibility of a pilot abatement program, and its scope, Sardachuk reached out to OH&S for comments on WSP's work. Daria Klimenko of WSP recommended that he speak with Matthew Rogerson, Director of Occupational Hygiene at Alberta OH&S.

[203] Unconnected to that Landlord initiative, an OH&S investigator paid a visit to the Building in July 2018 in response to a Tenant employee private complaint. The investigator spoke to Louis Auger, the Tenant's Vice President of Health, Safety, Security and Environment, and did a walk-through to understand the situation and the Tenant's response. The Tenant was given a Notice to Produce and provided OH&S with results of many of the bulk and air sampling results in the Building. Auger reported to Wilson that OH&S was pleased with the Tenant's steps, which included vacuuming debris, moving offices, air monitoring and communicating with employees. OH&S did not communicate further with Auger and no orders were issued. Auger did not ask about what should happen to the fireproofing in the Building.

[204] The Landlord spoke with Rogerson by telephone held July 9, 2018, the same day the Landlord and Tenant were interacting about whether the pilot abatement could proceed as wet or dry. It is unlikely that was discussed.

[205] On July 11, as a follow-up, WSP sent information about the Building to Rogerson, saying in part:

> We are consultants for the owners of the Nexen building, and, as requested in your telephone conversation with Marc Sardachuk on Monday, we have attached our letter summarizing our work to date, along with a copy of our draft report. ... For reference, we have also attached an excerpt of the original specification indicating the type of sprayed-on fireproofing to be used on the structural steel of the building, i.e., CAFCO BLAZE-SHIELD type DC/F.

[206] WSP's information on CAFCO comprising the SAF was learned from the Landlord and was not a complete picture. The Landlord's error went back to the time 801 purchased the Building and its then owner referred only to CAFCO as the fibrous thermal insulator, when both CAFCO and MK-5 were used in the Building, just listed in two different places in the construction materials binders the Landlord by now possessed. The MK-5 is known to contain asbestos; CAFCO is not.

[207] It appears, however, that at this time WSP operated under this misunderstanding of the Landlord. No one was able to inform Rogerson of the MK-5 in the Building materials when soliciting his views.

[208] Also, the Landlord had WSP refer only to its own testing results in discussions with Rogerson. It had the impression Rogerson wanted only summary information, plus the Tenant had stressed at the Ultimatum meeting that all the information it provided to the Landlord was not to be shared.

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[209] As a result, though, Rogerson was not aware of the added information offered by any of Eco Abate, Pinchin or RPC. WSP expressed concern to the Landlord that Rogerson would not be getting all the available information. The Landlord preferred to exclude it when scripting WSP's communications to Rogerson. It invited WSP to sign and send the communication it drafted, saying "if you're in agreement with our wording". It appears WSP agreed with what was drafted by the Landlord, though selective in content, under cover of that July 11 email excerpted above.

[210] Other than the late May false positive from iATL, up until July 2018, no asbestos was detected in the roughly 600 air samples taken by Eco Abate.

[211] In July, Blake advised the Tenant that Eco Abate would begin using the qualitative TEM analysis to test the air samples, being the more effective test for determining the presence of airborne asbestos. Eco Abate did so and continued through to the end of April 2019, on multiple floors and at periodic intervals. Over that time it took 2827 such air samples that were analyzed at EMSL by the qualitative TEM method.

[212] In July the Tenant engaged John MacDonald of Alberta Safety & Environmental Services ("**ASE**"), to assist it in determining what the potential is for exposure to SAF asbestos in the Building. To do so it commenced its own sampling program which it first analyzed by PCM and then sent off to EMSL Canada Inc. ("**EMSL**") for TEM analysis, the same lab Eco Abate had switched to.

[213] Of those over 2800 further air samples taken by Eco Abate, plus a few more taken by ASE, Eco Abate reported to the Tenant that 6 of them tested positive for asbestos fibres, starting with four samples taken on July 10, 12 and 13.

[214] The lab results for those four samples were reported on July 20. Eco Abate informed the Tenant that the EMSL lab detected "Libby Amphibole" by TEM, on one sample from each of floors 4, 25, 27 and 35. The Tenant closed off those floors.

[215] Armfield informed Sardachuk on July 22. Sardachuk requested that the results be shared with the Landlord so that it could incorporate the results into its analysis. Sardachuk received no response until September 26, 2018. This was unlike the Tenant, who normally quickly shared news that supported its theory of the Building's condition. I therefore find that most of the delay was an oversight not intentional.

[216] CNOOC Corporate Communications sent an email to "all employees in the Calgary tower" confirming that enhanced air quality monitoring had been conducted on floors 4, 25, 27 and 35 and that the results confirm that the Building continued to be a safe working environment; the results were "well below Occupational Health & Safety limits for exposure to any hazardous material".

[217] After qualitative TEM analyses indicated the presence of asbestos fibres in the air from floors 4, 25, 27, and 35, additional analysis of the 4 samples was conducted by quantitative TEM to determine the likely concentration of airborne asbestos. On July 22, 2018, the quantitative analyses indicated that in only 1 of the 4 samples was an asbestos fibre detected. The concentration of asbestos fibres in that one remaining positive sample was <0.0003 f/cc. The lab reported the asbestos fibre was tremolite.

[218] Blake advised CNOOC right away, on July 22, 2018, stating:

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> Results indicate the presence of Tremolite [asbestos] on one sample at a concentration of <0.0003 fibres/cc. This is well below the occupational exposure limit for asbestos and below the limit of detection for the method. A single fibre was found.
>
> This means that, based on these findings, no one in these rooms were [sic] over-exposed to asbestos according to the health and safely laws in Alberta.
>
> It does indicate that the asbestos fibres in the spray material have the potential to become airborne. We should get testing done during the work day to further confirm this.

[219] According to Blake, the conflicting test results for 3 of the 4 floors did not mean there was no airborne asbestos fibre. He suggested there was, it was just not detected by the analytical method used.

[220] On July 17, Wilson by email informed Jusseaume and a few others of the results of his meeting with Fang on the asbestos issue, which was one of several matters they discussed (as written):

> Meeting went very fast.
>
> He was adamant we need to move.
>
> I was very clear there is litigation coming and it could cost us 50-100 million or more.
>
> He doesn't care about that. He wants our people out and safe and the litigation will come and we will need to deal with it.
>
> This as the simplest, fastest approval of all I covered yesterday.
>
> We need to plan accordingly.
>
> We need the 22 high risk areas dealt with IMMEDIATELY
>
> And we need to get the contract done on the bow and then immediately request short term space as well to get as much population moved as quickly as possible.
>
> Speak with you all tomorrow.
>
> Thanks

[221] On July 18, 2018, Rogerson emailed Sardachuk stating that he had reviewed the material sent to him. He provided some comments. Among them was mention of the possibility of cross-contamination as a source of the asbestos due to the use of contaminated equipment during the SAF's initial application. This theory would likely not have been mentioned if he had been told MK-5 was used in the Building or if he had been provided the Eco Abate bulk sampling results.

[222] On July 19, 2018, a CNOOC HR leader sent an email to all CNOOC personnel, notifying them that they were being relocated to a new office since the company was closing off a number of areas in the Building where they had identified hazardous materials in the form of debris from Building insultation. The email assured recipients that the Building remained a safe working environment.

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[223] On July 21, 2018, the Tenant received test results from Eco Abate indicating that its regular air monitoring in the Building detected the presence of airborne asbestos fibres on 4 floors. In response to this information, the Tenant closed the affected floors and moved its employees to other areas of the Building.

[224] On July 22, 2018, Armfield received an email from ASE indicating that the daily air monitoring reports indicated all the areas were safe to be occupied by unprotected workers. Nevertheless, the Tenant proceeded with closing floors 4, 25, 27, and 35.

[225] In late July 2018, the Landlord wrote to the Tenant: "The landlord is fully committed to finding a solution. We are ready, willing, and able to solve this issue. We have previously communicated to you that if the decision is reached that the best course of action is for Nexen to vacate the building in whole or in part, we are prepared to work with Nexen to find and procure the temporary accommodations on Nexen's behalf". Wilson did not believe the Landlord was being truthful.

[226] WSP reported a bulk sample of "spray insulation on the side of the beam" which contained 0.14% by weight "Libby amphibole, non-asbestiform Libby amphibole". Since the reported weight includes non-asbestiform amphibole particles it overstates by an indeterminate amount the asbestos fibre concentration. It could be zero. For this reason I exclude the 0.14% concentration as a reliable measure of the concentration of asbestos in the sample.

[227] In addition, "[a] total of 109 air samples were collected during the Preliminary Spray Insulation Sampling and Testing Program", about which the report stated:

> All final air clearance samples and occupational air samples were below the applicable OEL criteria [i.e., 0.1 asbestos fibres per cubic centimeter (f/cc)]. Select samples analyzed using PCM analytical procedures identified elevated fibre concentrations. All samples with elevated fibre concentrations were submitted to the laboratory for TEM analysis and found to not contain asbestos fibres.

And later in the report:

> All ambient air and occupational samples submitted for TEM analysis did not contain asbestos fibres. As such, the elevated fibre concentrations are likely attributed to the presence of other non-asbestos fibres that were generated through the disturbance of ceiling tiles and/or the spray insulation/mineral wool. The samples with elevated fibre concentrations outside the assembled enclosures were detected during low-risk abatement activities only. Moderate-risk abatement procedures were determined to be an appropriate method to control dust when entering the ceiling space for any future sampling activities.
>
> ...
>
> Based on the background and ambient air monitoring results within the work areas investigated during this program, the asbestos-containing spray insulation does not pose an immediate risk to occupants of the building if left undisturbed and in good condition.

[228] Based on these results, WSP concluded that a pilot abatement program was required "to provide further delineation of the potential risks associated with spray insulation". WSP would

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monitor the air during the process. Among other things this would inform the parties on whether asbestos fibres might be released during any abatement undertaken under controlled conditions.

[229] On July 31, 2018, the Landlord and Tenant met again on a without-prejudice basis. It seems the Tenant didn't agree with a proposed pilot abatement but respected the Landlord's authority to proceed. At this time, the Landlord was planning a pilot abatement project on the 8th floor of the Building, undertaken by Renegade, an asbestos abatement contractor, under the direction of WSP.

[230] The Tenant wanted it done under dry conditions to better simulate typical disturbance activities. The Landlord was willing to do half one way and half the other, but in a telephone conversation between Sardachuk and Rogerson, Rogerson cautioned against doing it dry. Sardachuk said at trial that they learned it could be done dry, but:

> You would have to wear, basically, supply air, which would mean you would pretty much have to wear a tank on your back or have a -- have a hose out the door. That's what I recall was one of the conditions of doing a dry abatement, because it is highly irregular and very dangerous .... You never do a dry abatement unless you have electrical issues. That's what we found out later.

[231] The Landlord told the Tenant that OH&S advised against it. Ultimately the Tenant dropped the condition and agreed to allow the pilot abatement program to proceed as first proposed. The work took place over the August long weekend, August 4 – 6, 2018.

[232] WSP also conducted laboratory analysis to determine the barium concentration of the SAF to assess if the vermiculite came from Libby, Montana.

[233] By August 2018, Fang had passed the title of CEO to Wilson and carried on as President, CEO, and chair of CNOOC International without also being CEO of CNOOC.

[234] The Tenant came under renewed pressure to further cut costs. Fang urged Wilson to reduce headcount further. Wilson agreed to remove 15 percent more of his current office staff between August and December 1, 2018.

[235] On August 13, 2018, Wilson received an email from Shoraka detailing the results of air monitoring during the pilot abatement study. Shoraka stated that their specialized contractor was able to successfully abate a portion of the office area without incident or concern to the rest of the Building. He also stated that lab results from the containment setup, abatement, and clean-up operations had been received, and that air monitoring lab results (using TEM) indicated that no asbestos was detected. Shoraka expected to receive additional results later that week and said that their experts would prepare a report after receiving those results. He also stated that they would solicit feedback and advice from Alberta OH&S, saying "With the full benefit of laboratory results, expert reports and feedback from the authorities, we will prepare and present to you various solutions."

[236] Wilson forwarded Shoraka's email to members of his Team on August 13th. He set up a call among them to discuss: "(1) Lease status with Cenovus; (2) Board memo/meeting plans on sub-lease; (3) Messaging to landlord on our status; (4) Worst case scenario planning; (5) Work done between decision analysis team and Bruce; (6) Any updates from Eco Abate on the pilot abatement work done by the Landlord; and (7) Any other items that those on copy want to discuss."

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[237] Wilson responded to Shoraka's August 13 email on August 16, 2018. He thanked him and said that he looked forward to receiving the results, recommendations, and solutions and would be happy to meet during the first week of September. He requested that the results be sent prior to the first week of September so that CNOOC had time to consider it prior to meeting and emphasized that expedience was important as he expected to be in a position to "take alternate space" shortly. Wilson also indicated that CNOOC would be sending formal correspondence related to the Lease shortly, "that is outside the context of our without prejudice discussions."

[238] Later that afternoon, Wilson sent a follow up email, now more formally requesting the Landlord's "Architect's Opinion" on the duration of work to restore the asbestos containing SAF, pursuant to section 17(b) of the Lease. The attachment indicated that the Tenant believed "the deteriorating and damaged asbestos and lead located within the Leased Premises is clearly damage or destruction within the meaning of the Lease" and "[t]he corresponding abatement required in order to repair/restore the building should be conducted as soon as possible". It also indicated that "Nexen will not be responsible for any rent or other costs related to the building while it is being repaired" and that Nexen expected to be reimbursed for not being able to use several floors, offices, and meeting rooms due to the presence of hazardous materials. As described further in the discussion below of the Tenant's claim under clause 17 of the Lease, the Landlord did not respond to this request or follow-up requests, until December 2018.

[239] The Landlord did have some information it had received that was at least relevant to the request. In mid-August the Landlord had requested from Renegade a breakdown of 4 abatement options and high-level time estimates for each option. Shoraka said the request was entirely for internal information purposes. According to Killi, at this point, nothing was off the table in terms of what they were prepared to do with respect to abatement. One of the options envisioned a high-risk comprehensive removal of all SAF from the Building. The estimated duration for that option was 21 months. The Landlord did not communicate this or the other timelines to the Tenant. It is not clear if this 21 months is for only the removal or for the completion also of the restoration (replacement with a non-ACM fire retardant insulator) which is one of the two prerequisites to the Clause 17 termination right. This estimate may include removal and restoration of the SAF from the Shafts, which would not be necessary.

[240] On August 24, 2018, the Landlord shared with the Tenant a copy of WSP's draft assessment and risk evaluation final report (the "**Spray Insulation – Assessment and Risk Evaluation Program Report"**), which detailed its conclusions and recommendations following the pilot scale abatement.

[241] In effect, WSP concluded that 1) damaged SAF should be removed, 2) most SAF can remain, 3) the SAF needing to be removed can be safely removed while workers are in the Building, 4) an Asbestos Management Plan ("**AMP**") should be established, and its implementation should start with a condition assessment of the whole Building.

[242] In a letter August 24, 2018, to Wilson, Shoraka stated that the Landlord "would like to go above and beyond our minimum legal requirements and take immediate action to abate the materials" and proposed to:

> (1) strictly adhere to established protocols for general maintenance activities. These protocols have previously been agreed to but require ongoing and greater collaboration between the parties;

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> (2) commence immediate abatement of the materials on vacant floors using appropriate procedures as prescribed by OH&S;
>
> (3) initiate a plan and procedures to clean the entire above ceiling air plenum on each occupied floor using appropriate procedures as prescribed by OH&S;
>
> (4) develop a plan, in coordination with Nexen, to abate the fireproofing materials on the occupied floors in a timely matter as to ensure minimal business disruption to Nexen; and
>
> (5) develop a management and remediation plan to deal with other findings included in the various reports as expeditiously as possible.

[243] Wilson was not satisfied with this response. He wanted a project plan not "a suggestion that they might do something." He was frustrated. He said he was "trying to understand what do I do to keep my thousand people safe." He couldn't understand how two experts could take "pretty strongly different approaches" to the asbestos issue. Further, according to Wilson, he never received any details as to what the Landlord had done with OH&S, any further details as to a proposal, any costing or directions as to how the Landlord would conduct full abatement, or a management and remediation plan of any sort.

[244] A draft version of the WSP report, which included the results of the pilot-scale abatement project, was provided to the Tenant on August 24, 2018. Based on its findings, WSP reported:

> The bulk sampling conducted on the spray insulation confirms this material has low concentrations of asbestos (less than 0.1%), either attributed to contaminated tools/equipment used during the initial application or from the vermiculite itself. As such, the spray insulation is asbestos-containing and should be managed as such;
>
> According to a publication by Gunter, et al, any concentration ≥1,500 parts per million (ppm) of Barium signifies that the vermiculite is specific to the Libby Mine. Based on the laboratory results, the Barium concentrations within the two samples collected from Floor 11 and Floor 8 are 530 ppm and 770 ppm, respectively;[8]
>
> The air sampling during the pilot abatement did not reveal any airborne concentrations of asbestos fibres during the disturbance of the material. The spray insulation if left undisturbed and in good condition in exposed areas (i.e. ceiling systems with return air grids, or areas accessible by non-maintenance personnel) is not expected to pose a health risk to any tenants or occupants of the building. Spray insulation in poor condition in concealed areas (i.e. above ceiling tiles with no return air grid and within wall cavities) should not pose a risk to occupants of the building as long as the building system separating the two areas remains intact and in good condition;
>
> Based on the pilot scale abatement program completed, no exceedances of fibre concentrations (less than 10% of the OEL) were detected outside the high-risk

[8] While this indication that the vermiculite in the SAF is not, in fact, from Libby (if the Gunter publication is correct), the parties have agreed, and their experts also, that the SAF is MK-5, the vermiculite in which is commonly understood to have been mined in Libby and carry trace amounts of asbestos.

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> abatement enclosures during the removal of the asbestos-containing spray insulation. If proper abatement procedures in accordance with the 2012 Alberta Asbestos Abatement Manual are utilized for bulk removal of the spray insulation, the abatement should not pose any risk to the occupants of the building.
>
> An Asbestos Management Plan should be developed in accordance with 2012 Alberta Asbestos Abatement Manual and implemented to ensure adequate handling and/or removal/disposal of ACMs during future renovation and abatement activities as well as following established protocols for general maintenance activities.
>
> The asbestos-containing spray insulation can remain on site as long as it remains undisturbed and in good condition in exposed areas. A condition assessment should be conducted for the whole building to determine the condition of all the asbestos-containing materials and included in the Asbestos Inventory which should be part of Asbestos Management Plan. An annual assessment of the condition of the spray insulation (condition assessment) should be performed and damaged insulation should be removed in accordance with the Asbestos Management Plan.

[245] As noted, WSP concluded that damaged SAF should be removed but that most SAF can remain, and that the SAF needing to be removed could be safely removed while workers are in the Building. Finally, it recommended an AMP be established and its implementation should start with a condition assessment of the whole Building.

[246] On August 27, 2018, Rogerson sent an email to Sardachuk, in contemplation of soon receiving WSP's final report and asked for comment, stating:

> As you may or may not know we do not approve work procedures or assess compliance with the Alberta OHS legislation outside of a formal inspection process. We can provide insight; however, I will not be able to provide you with a determination on your state of compliance.

[247] At its meeting on August 28, 2018, the CNOOC Board of Directors unanimously authorized the company to commit to a sub-lease with Cenovus at the Bow. According to the meeting minutes the Board was told:

> Asbestos air sampling, which Nexen continues to perform, has confirmed at all times air quality within limits set by the Alberta Occupational Health and Safety Code.

[248] The Board was aware that terminating the Lease was a possibility, if "something suitable" could not be negotiated with the Landlord, but it was deciding to relocate the employees for what it continued to hope would be the Landlord now removing all the SAF from the Building. The Board considered removing it all to be the right thing to do, regardless of whether the levels were below prescribed limits.

[249] No decision to terminate the Lease was made at this meeting. If the Tenant was not able to come to an agreement with the Landlord about abatement, then the Board believed that at some later meeting it would consider whether to terminate. That question never did come back to the Board for a formal decision. It appears it may have been mentioned at a December 2018

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Board meeting but not thereafter, and at no time for any prior Board approval. One Board member recalled the process as follows:

> I think when we left it in December, I think it was that I basically had -- from my perspective, signed off on -- I trusted Quinn [Wilson] was going to do the right thing. It was -- my understanding we either reach a deal or we don't, and if we don't, then we're going to terminate and we're going to move. And I told him that I was supportive of that.

[250] On August 31, Sardachuk sent Rogerson the August 2018 Draft WSP Final Report. Rogerson offered feedback. Sardachuk stated that they communicated by phone on September 4 and again on September 5, 2018. The second of those calls included WSP.

[251] Before WSP finalized its report, Sardachuk scripted for WSP a summary of the feedback from that telephone meeting for inclusion in the finalized version of WSP's report. Despite being told by Rogerson he can offer only "insight" and that he will not be providing "a determination on your state of compliance", the WSP Final Report includes the following:

> (1) OH&S is satisfied with the extensive scope of sampling, analysis, and testing;
>
> (2) based on the sampling and testing results, OH&S affirms the findings and recommendations of the report;
>
> (3) OH&S confirmed that the Building could be occupied while implementing the Asbestos Management Plan and executing the work protocols and any abatement work as recommended in the report;
>
> (4) OH&S confirmed that certain operational work above the ceiling tiles could be altered to use low risk or modified low risk procedures as long as appropriate air sampling procedures were incorporated; and
>
> (5) OH&S stated that, based on the WSP Report, the Building does not meet the definition of an unsafe building and is safe for occupancy as it pertains to the subject matter discussed in the report.

The Landlord knew that Rogerson had not even been to the Building and had just a limited portion of the information available, not any of the Eco Abate recent findings of airborne asbestos fibres in the Building.

[252] Rogerson was not provided a copy of the WSP final report, from which he could learn what had been attributed to him and how it had been represented as OH&S's official view.

[253] Under cross-examination, Sardachuk drew a distinction between a formal and an informal review and they were not getting a formal one. Even if true, the Landlord neglected to make that point in the words it had WSP include in its report, nor did it qualify them in any way when implying OH&S considered the Building to be compliant.

[254] On September 5, 2018, Wilson sent a letter to Shoraka stating that CNOOC would be withholding rent on a go forward basis in proportion to the areas rendered unfit for occupancy and again requested that the Landlord's Architect provide an opinion in accordance with section 17(b) of the Lease. The second to last paragraph recognizes that the Landlord is willing to completely remove all the SAF throughout the Plenum, or at least Wilson's belief the Landlord

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had now indicated it would but reaffirms that the Tenant is not prepared to stay in the Building while this is going on.

[255] This understanding changed on September 13 when it became clear to Wilson the Landlord would only vacuum loose debris. At trial Wilson explained how he felt the Landlord was now reneging on its earlier representation. He said he thought the Landlord to be disingenuous.

[256] A final version of WSP's "Spray Insulation – Assessment and Risk Evaluation Program" report, dated September 13, 2018, was provided to the Tenant on September 14, 2018. The final version of the report contained the following additional conclusions:

> The spray insulation with very low concentrations of asbestos was observed on beams, columns and concrete decking above ceiling systems (i.e. suspended tiles and drywall) and within wall cavities. It is also present on beams and columns in the 3rd floor mechanical room. Bulk sampling within the vertical air shaft, which runs the entire height of the building, did not identify trace concentrations of asbestos or vermiculite in any of the samples collected and analyzed. Access to the entire length of the vertical shaft cannot be accessed via all floors. Background air sampling conducted in the vertical air shaft did not identify elevated fibre concentrations above 10% of the OEL.
>
> The condition of the spray insulation throughout all the areas observed was varied and in some cases in poor condition (refer to Table 3 below for locations). Based on the laboratory results, background air samples collected within the areas with damaged spray insulation did not indicate elevated fibre concentrations (above 10% of the OEL) or any detectable concentration of asbestos. As such, it is expected that if the damaged spray insulation is left in its current state, it is not expected to give rise to elevated fibre concentrations (above 10% of the OEL).
>
> Asbestos has been identified in building materials other than spray insulation. These materials should also be included in an Asbestos Management Plan.
>
> This report was shared Alberta Ministry of Labour, Occupational Health and Safety ("**OH&S**"). OH&S has reviewed this report and is satisfied with the scope of work and affirms the findings and recommendations of this report.

[257] An addition to this final report, since the draft a few weeks prior, was information that suggested OH&S had been consulted and affirmed the findings and recommendations of the report.[9]

[258] On September 24, 2018, the Tenant signed a sub-lease for 290,000 square feet at the Bow Tower, significantly less than the 612,000 square feet at the Building. The sub-lease was for a 6-year term commencing May 1, 2019, with an option to terminate after three years.

[259] On September 26, 2018, the Tenant provided the Landlord with a Vent Debris Assessment Report prepared by Eco Abate.

[9] This statement about the views of OH&S is not accurate. Later I say more about this reporting of the interaction with Rogerson of OH&S as it is important for one of the allegations of breach of the duties of good faith.

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[260] On September 26, 2018, when Armfield provided the lab results to Sardachuk from the mid-July finding 4 asbestos fibres, he only provided the July 20 results of qualitative TEM analysis showing asbestos on 4 floors, not the additional July 22 results of the quantitative TEM analysis showing asbestos in just one of the 4 samples. The Tenant continued to assert that it had found asbestos on 4 floors, adopting Blake's view. Blake explained his view at trial:

> With the air samples, we were just trying to confirm that they didn't exceed the air-clearance criteria, so no immediate risk to somebody who was in that office at the time. But it doesn't change the fact that that's an unacceptable condition and an increased risk.

[261] On September 28, 2018, the Tenant wrote to the Landlord and advised that it recently signed a lease with Cenovus for some of its space in the Bow building and would be relocating their workforce during the fourth quarter of 2018. It wrote [emphasis added]:

> Consistent with our previous correspondence we have continued to pursue options to find alternative space for our workforce as the Nexen Tower poses unacceptable risks, including the short term potential risk prior to abatement activities, *and the absolute risks involved during abatement activities*.

A similar message is conveyed in the Tenant's September 5, 2018, letter to the Landlord and as far back as the Ultimatum meeting, as captured in the Tenant's key messages document, in which the Tenant states that it has begun making arrangements to vacate the Building and that "[t]he safest course of action would be to empty the building during removal work."

[262] A fifth positive test was found in late September from the Eco Abate air monitoring. Qualitative TEM analysis detected an asbestos fibre in a sample taken from a return air vent above the ceiling tiles on the 25th floor. Like 3 of the 4 in July, it also was identified as a Libby amphibole. Quantitative TEM on the same sample October 1st found the concentration at less than 0.0003 f/cc.

[263] Eco Abate reported to the Tenant that the quantitative TEM analysis confirmed "that amphibole asbestos fibres found in the air [did] not exceed the occupational exposure limit for asbestos, as defined in the Occupational Health and Safety Code, and [met] air clearance criteria found in the Alberta Asbestos Abatement Manual (2012)".

[264] This time Wilson notified the Landlord of the report, in early October.

[265] Eco Abate said there was a sixth positive test a few weeks later. During the cleanup of SAF debris from the vent grills on the 16th floor, it was said that air sampling by ASE returned another positive air test for asbestos. However, ASE first analyzed the sample by PCM, not qualitative TEM like the other five samples of Eco Abate in which was found an asbestos fibre. PCM can identify fibres but not whether the fibres are asbestos. ASE sent the sample on for quantitative TEM analysis and the EMSL lab reported no asbestos detected but a "non-regulated amphibole found". Nowhere does it say an "asbestos fibre" was found.

[266] The Landlord acknowledges the reported results of the 6 samples, but discounts them, saying 4 of them came down to just a single fibre, another came from an unoccupied area and the final arose during the Tenant's clean-up disturbance. In any event, it argues, "in no case was the OEL exceeded, or even approached."

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[267] I find 5 of the 6 samples that Eco Abate says tested positive for asbestos fibres each had an asbestos fibre in them. All the test results from the labs were admitted by the parties' agreement for the truth of their contents, including therefore the lab results for the 5 qualitative TEM tests. That does not preclude a party proving the contrary, but that has not occurred here on the first 5.

[268] The 6th sample, however, is not based upon a lab reporting an asbestos fibre found following qualitative TEM, like the first 5. For those 5, by qualitative TEM the EMSL lab discovered an asbestos fibre in each sample: 4 Libby amphiboles and one tremolite. Eco Abate's cover letter to the Tenant confirms this meant for each lab report on those 5 that an asbestos fibre was found. The subsequent quantitative TEM analysis then estimated the concentration of asbestos fibres in each sample. In the course of that process, EMSL found 1 tremolite fibre in the 4th sample, and nothing on numbers 1-3 and 5. As I explained above, that does not mean the qualitative TEM tests on those other 4 were incorrect when reporting there to be "Libby amphibole" asbestos fibres in each.

[269] Nothing like that exists for sample #6. For sample #6, there was no qualitative TEM. ASE gathered this 6th sample, not Eco Abate, and in the more accepted fashion first applied the PCM method of analysis. Reference is made to PCM testing, but the result of it was not explained. PCM magnification, again, only enables identification of fibres but not the type of fibres. None of whatever fibres may have been found on the 6th sample by PCM may have been an asbestos fibre because quantitative TEM testing of sample #6 reported: "Asbestos Type: None Detected", "Asbestos Fibres:" (blank), and "Asbestos % of Total: 0%." In the "Notes" column it said; "Non-regulated amphibole in a concentration of 0.0029 f/cc."

[270] I have no evidence from which to understand what "non-regulated amphibole" means when coming from EMSL, an Ontario lab. It could mean the particle observed was not one of the 6 Forms, all others therefore being "non-regulated" in many other jurisdictions (even though all forms are regulated in Alberta). Kennealy, of WSP retained by the Landlord, said nonregulated amphibole means its not one of the 6 Forms "in the US and other regions in Canada." It could mean it does not meet the criteria for "fibre" in Alberta (longer than 5 microns, a diameter no greater than 3 microns, and an aspect ratio of 3:1 or more). It could mean it falls below the lower threshold concentration in Ontario to be regulated. Clarke, an expert in Alberta occupational health and safety regulation and practices called by the Tenant, said it is used in the US to refer to concentrations below regulatory exposure limits. No doubt there are other equally plausible possibilities. No witness from EMSL testified about its reports.

[271] For the first 5 samples there were definitive findings of Libby amphibole and/or tremolite by qualitative TEM. Nothing of the sort exists for the 6th. I cannot infer it to be an asbestos fibre from nothing more than an unexplained reference in the Notes column of a quantitative TEM report to "non-regulated amphibole." In the circumstances I am not persuaded the 6th sample contained an asbestos fibre.

[272] I do not agree with the Landlord's discounting of all but one of the 6 sample results because, as I explained earlier, the difference between qualitative and quantitative TEM methodologies can result in the particle of interest counted under the qualitative analysis simply not appearing in the select locations on the sample targeted when applying the quantitative TEM analysis – the "holes" in the sample, as Blake put it, that are studied in a quantitative TEM analysis. The quantitative TEM result does not mean the qualitative TEM analysis was in error

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or that the asbestos fibre has disappeared between testing methods. It simply means the fibre observed in the qualitative TEM analysis was not in any of the spots in the sample that were targeted by the quantitative TEM analysis. Relatedly, I disagree with the Landlord's approach of relying on the results of the quantitative TEM analysis to reach a conclusion that the qualitative TEM analysis is designed to deliver.

[273] I also disagree with the Landlord that airborne asbestos in an unoccupied area, as with the 5th test, should not matter. Being found in an unoccupied area does not mean it may not later reach occupied air space, given how return air can be re-circulated with fresh supply air and pushed into occupied areas.

[274] On October 12, 2018, Shoraka emailed Wilson to inform him that the Landlord's experts inspected the 5 floors of concern and did not detect any OEL exceedances. At trial Wilson stated that he did not question the validity of the experts' findings, but he was not comfortable exposing his people "up to the maximum allowable OEL level". After getting a positive test, he was "not concerned about whether it's above the OEL level or not" he just knew that he had a positive test and he was not prepared to have his people in the Building.

[275] On October 24, 2018, the Landlord received a first draft of an AMP from WSP. It is designed to provide an up to date record of the location and extent of ACM in the Building, be updated regularly following each new encounter with ACM in the Building, establish procedures for monitoring the condition of ACM in the Building, and describe the required procedures "where an individual is likely to handle, deal with, disturb, or remove ACM within the Building."

[276] The Tenant started relocating from the Building to the Bow Tower in November 2018, despite the results of the Landlord's pilot abatement program suggesting the Building could be abated while occupied. By December 2018 nearly half had relocated. The last of the employees left the Building in April 2019.

[277] On November 16, 2018, the Landlord provided the draft AMP to Rogerson. His comments back included pointing out parts of the Manual that had been omitted, including from out of the legislation that a worker that has been exposed to asbestos must be informed of the health hazards.

[278] On November 21, 2018, the Landlord provided its completed AMP to the Tenant.[10] It confirmed for the Tenant that the Landlord had no intention of ever removing the SAF, content

[10] The AMP sets out procedures for periodically inspecting ACM, conducting work in areas near ACM, and responding to unplanned disturbances and to the discovery of damaged materials.
Any planned work, including both renovations and routine maintenance, taking place in an area near ACM would be subject to a pre-project review by the Facility Manager (Barton).
Work is classified as "Low Risk," "Moderate Risk," or "High Risk." These risk classifications incorporate the categories in the *Manual* and correspond to the risk that the activities will release asbestos fibres into the air. Safety procedures are set out for Low, Moderate, and High Risk work. Routine maintenance tasks that require access to the ceiling, such as adjusting a VAV box, would generally be a Low Risk procedure. It requires, among other things, that workers present in the area wear a NOISH-approved half-mask respirator, that polyethylene drop sheets be used to cover any flooring around the work area that could absorb dust, and that warning signs be placed at access points to the work area.
In the event of an unplanned disturbance of asbestos-containing materials, including a flood, pipe breakage, or ceiling collapse, the incident must be reported to the Facility Manager, the area must be cleared of personnel and isolated (either by closing the door or installing a barrier), and the ventilation system serving the affected area must be shut

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to expose the Tenant's employees to the risk of adverse health impacts. At no time did the Landlord include the Tenant in any of its interactions with Rogerson or share its written communications that it had with Rogerson, with the Tenant.

[279] The AMP defines ACM as:

> A material that contains greater than 0.1% asbestos by dry weight as per Alberta Regulation and is used to refer to the vastly different types of such material.

The AMP defines "asbestos" as:

> A mineral fiber. The fibrous form of mineral silicates belonging to rock-forming minerals of the serpentine group (chrysotile) and the amphibole group (actinolite, amosite, anthophyllite, crocidolite, tremolite) or any mixture containing one or more of these minerals.

[280] Wilson reviewed the AMP he was sent and when he understood it was saying there would be no abatement until at or before demolition, he found it unacceptable.

[281] With the delivery of the AMP, the Landlord took back control of its Building. The Landlord asked the Tenant to discontinue its consultants' activities because henceforth everything had to be coordinated under the AMP, including testing which was to be coordinated by Landlord. The parties then agreed the Tenant could continue conducting air monitoring. The Tenant did not share those results with the Landlord until disclosed within the pre-trial process.

[282] In December 2018, Wilson received his final approved 2019 budget, which required him to cut further including, among other things, his General & Administrative Expenses budget by nearly 50%.

[283] On December 6, 2018, the Tenant advised the Landlord that it disagreed with the AMP. Among many other comments, the Tenant reiterated its position throughout, that the asbestos in the SAF could not be managed in place. According to the Tenant, all ACM had to be removed. The Tenant also said the AMP ignored the requirements under sections 31 and 33 of the *OHS Code* which, it said, both required the removal of ACM in an air distribution system that could release asbestos fibres.

[284] On January 4, 2019, Sardachuk emailed Jusseaume to advise that the Landlord would be undertaking a number of initiatives set out in the AMP starting the week of January 14, 2019. The work was to be conducted during off business hours and on weekends on floors that were currently unoccupied by the Tenant's employees. It entailed the removal of spray insulation debris visible in ceiling vents as part of an inspection and mapping of the condition of the spray insultation in the ceiling spaces throughout the tower.

[285] On January 9, 2019, Armfield responded on behalf of the Tenant and respectfully requested that the Landlord defer the proposed abatement work until the Tenant had fully

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down. Minor water leaks would not trigger the emergency procedures. Shutting off the ventilation system to a certain area would require that the ventilation system be shut off to half the Building.
The AMP also sets out procedures for those accessing ceiling and wall cavity spaces near ACM. Work may take place when the area is occupied if the ACM are observed to be in good condition, and the work is not taking place in the direct vicinity of the ACM or generate vibrations that may disturb it.
If disturbed ACM are discovered during maintenance, the Facility Manager must be notified immediately and access to the area restricted until the necessary abatement work has been completed.

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vacated the Building. It requested, “don't even vacuum on the weekends until we are gone.” Armfield estimated that this would be in Q2 of 2019. In the email, Armfield questioned “why the Landlord would take abatement actions that pose potential risks to our staff when it has the opportunity to wait a short amount of time and eliminate the risk altogether”.

[286] On January 10, 2019, Renegade was engaged to conduct the remediation work outlined in stage 1 of the AMP, which was vacuuming the loose debris above the ceiling tiles.

[287] On January 11, 2019, Sardachuk responded saying that it was the Landlord’s strong preference to proceed with the abatement work as there was no health and safety justification to delay the work; it was to occur outside of normal business hours and on empty floors.

[288] On January 17, 2019, Armfield responded and reiterated the Tenant’s request to defer the abatement work until the staff had fully vacated the Building to eliminate unreasonable risk to staff.

[289] On January 22, 2019, the Landlord reluctantly agreed to defer work that went beyond the ongoing air sampling. Once finally underway in the second half of 2019, just cleaning up the debris in the ceiling space ultimately took a team of 50 workers about 4 months, “picking up the debris, vacuuming, wet wiping, cleaning up the ductwork, that kind of thing, any loose debris, any dust.”

[290] The Landlord filed an Originating Application on 4 March 2019, seeking the following relief (the “**Declaratory Proceeding**”)[11]:

> (a) A declaration that the Landlord’s obligations under the Lease to remove any of the asbestos containing spray insulation may be satisfied by compliance with the AMP and, in the event that an order or directive concerning such material may be made in the future by OH&S, by compliance with any such order or directive;
>
> (b) A declaration that the Premises have not been rendered unfit for occupancy;
>
> (c) A declaration that, unless and until the Premises are shown to have been rendered unfit for occupancy, the Respondent has no entitlement to withhold any part of its rent pursuant to subsection 17(a) of the Lease;
>
> (d) A declaration that the presence of traces of the said spray insulation is not an “event” by which the Project has been “damaged or destroyed”, and it is not “the happening of ... destruction or damage” pursuant to Section 17 of the Lease;
>
> (e) Costs of this action; and
>
> (f) Such further and other relief as to the Court may seem appropriate.

[291] On 5 March 2019 (at 2:10 AM), Shoraka sent an email to Wilson informing him about the Declaratory Proceeding:

> I would like to let you know personally that earlier today we have filed an Originating Application in the Courts of Alberta. Essentially, we are seeking the Courts’ assistance in settling our apparent differences of opinion on the interpretation of certain contractual matters contained in the Lease. We have not

[11] A copy is attached as Appendix C to this Judgment.

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> heard from you since our letter in December, and I hope you understand that we are left with little choice but to ask for the Courts to rule on this for us. We hope to settle our differences through dialogue and negotiations and our efforts in this regard will not change.

Shoraka then proposed another without-prejudice meeting.

[292] Wilson did not respond to what he understood the Landlord's intentions to be in relation to the Declaratory Proceeding. He was relying on his lawyers to handle it. He focused instead on the offer of further negotiation.

[293] The Landlord says in its argument that it intended to perform anything in the Lease that the Court in the Declaratory Proceeding determined was its obligation. The Originating Application does not say that expressly, nor did the Shoraka email. At no place does he say expressly that the Landlord will proceed with whatever else the Court determines the Lease requires it to do.

[294] I find nevertheless that it was the Landlord's intention to perform whatever the Court may have declared. Both Shoraka and Killi testified that it was the Landlord's intention; in neither case was that point in their evidence shaken in cross-examination, or even challenged. Before filing the Declaratory Proceeding, the Landlord obtained cost estimates for the removal of all asbestos-containing materials in the Building. While the requested outcomes of the Declaratory Proceeding would be declarations only, without further coercive or consequential relief, they would have had great practical effect in resolving a live controversy, determining the parties' rights and avoiding either of them breaching the Lease.[12]

[295] I have no doubt that the Landlord intended to do more if the Court so ruled. It was highly motivated economically to do so. It intended to do its best to persuade the Court to interpret the Lease its way but, if it failed, it intended to remedy any deficiencies the Court might declare and maintain the Lease in force.

[296] In the spring of 2019, the Landlord ended its arrangement with WSP and switched to Western Health & Safety ("**WHS**"). The Tenant believes the Landlord switched from WSP to WHS because it did not like WSP's conclusions. The Landlord said it made the change primarily because WHS had better local testing capabilities.

[297] Throughout March, April, and into early May, the Landlord and Tenant met to discuss the Declaratory Proceeding and to try to still work out their differences. On March 18, 2019, the Landlord agreed to adjourn the scheduled hearing date for the Declaratory Proceeding and to meet with the Tenant in April on a without-prejudice basis. On April 4, 2019, the parties met for without-prejudice discussions. They had a further phone call on April 8, 2019.

[298] The lawyers disagreed on the sufficiency procedurally of the Declaratory Proceeding for the Parties' needs. On April 25, 2019, the Tenant's counsel wrote to the Landlord's counsel, saying in part:

> If the parties are unable to reach resolution and litigation is required, an originating application process will be inadequate given the substantial facts in

[12] See in these respects: *Ontario (Attorney General) v Restoule*, 2024 SCC 27, at paras 279 & 281; *SA v Metro Vancouver Housing Corp*, 2019 SCC 4, at para 61; and Justice Malcolm Rowe and Diane Shnier, "The Limits of the Declaratory Judgment" (2022) 67:3 McGill L J 295 at p 327.

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> dispute between the parties. ... CNOOC will require production of documents, full discovery and expert reports in order to seek relief, including but not limited to damages for fraudulent or negligent breach of the Landlord's representation that there were no hazardous substances in the leased premises.

[299] From the time of its first report on the hazardous materials survey, provided to the Landlord at the March 14, 2018, Ultimatum meeting, to the end of its sampling work in April 2019, Eco Abate consistently recommended removal of all the SAF based on its interpretation of the *OHS Code*.

[300] The parties agreed in late April to meet on May 2, 2019, with settlement proposals. On April 29, 2019, there were discussions within the Tenant's Cash Management Team pertaining to the May rent payment. Wilson explained that if some progress was made at the May 2nd meeting and the Parties were progressing towards a solution, then the May rent payment was to be triggered. The May 2, 2019, meeting was held on a without-prejudice basis and did not lead to a resolution. The May rent was never paid.

[301] That day, after the meeting, Wilson sent a memorandum to the Tenant's Board recommending that the Lease be terminated. The Board supported that recommendation. No one having authority over Wilson told him to terminate the Lease.

[302] On May 3, 2019, Wilson as CEO for CNOOC signed and sent a letter to representatives of the Landlord, notifying it that the Tenant was terminating the Lease (the "**Termination Letter**").

[303] The operative words in the Termination Letter are:

> CNOOC terminates on the basis that your conduct constitutes fundamental and/or anticipatory breach of numerous provisions of the Lease, including breach of the covenant with respect to hazardous substances and breach of the covenant of quiet enjoyment. CNOOC elects to accept your repudiation, terminating the Lease.
>
> In the alternative, section 17(b) of the Lease grants CNOOC a right to terminate the Lease when the building is unfit for occupancy and the underlying cause may not be remedied within a year. Over 1 year has elapsed since the asbestos was discovered, and CNOOC hereby elects to terminate the Lease.

[304] Wilson concluded his Termination Letter with the following:

> I am of course disappointed in this outcome but must prioritize the health and safety of CNOOC's employees.

[305] The next day the Tenant commenced this action.

[306] On May 22, 2019, the parties stayed the Declaratory Proceeding.

Post-Termination Testing & Events

[307] After termination of the Lease, Sardachuk asked WHS to conduct a survey in the Building "to delineate the contamination of potentially asbestos-contaminated ceiling tiles within the [Building]". The purpose "was to conduct a floor-by-floor assessment to identify

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areas with potentially asbestos-containing [SAF] debris accumulation for inventory purposes". During this survey, WHS collected bulk and air samples.

[308] The air samples were collected May 15, 2019. The results were reported to the Landlord June 20, 2019. Close to 150 air samples were collected. Very small amounts of fibres were found in some, but no TEM analysis was undertaken, so it is not known if any of the fibres were asbestos fibres.

[309] 122 bulk samples of the Plenum debris were taken, 3 of which were sent for testing. None contained asbestos. The Landlord had others taken from every floor to save as reference samples for possible further analysis.

[310] An additional 15 air samples were collected on June 3, 2019, during an inspection of SAF debris, and reported to the Landlord on July 7, 2019. None of the air samples were above the 0.01 f/cc air clearance criteria.

[311] From August to December 2019, WHS coordinated and supervised the removal of SAF debris from the Plenum spaces on floors 4-36. Based on this duration, the Tenant suggests removal of all SAF and then its restoration after would take more than one year.

[312] During the vacuuming, WHS collected and analyzed over 1600 more air samples. The Building was vacant and the air distribution system off. The Landlord was assessing fibre concentration during disturbance events. All samples but one were below the OEL if they contained asbestos. The exception was 0.12 f/cc. Of all that were under the OEL, only 10 were above the air clearance criteria, ranging from 0.02 to 0.05 f/cc, again, if they contained asbestos. These were tested only by PCM so we do not know if any of the fibres detected were asbestos fibres.

[313] During this time, WHS also conducted a condition assessment of the entire Building. WHS considered most to be in good condition.

[314] The parties acknowledge that numerous other buildings in Alberta have some type of ACM and that in the circumstances of at least some of them, managing the ACM in place may be the recommended approach. They disagree on whether that is appropriate for the Building. They disagree strongly on whether friable ACMs in an air distribution system are typically, or ever, managed in place.

[315] The parties' experts spoke about many other buildings in Alberta and what is being done in them. The buildings that were constructed between the 1960s and the 1980s had friable materials with asbestos content typically between 20% and 80%.

[316] The evidence proves on balance that two of the many buildings debated by the parties' experts have friable ACMs in their return-air plenums being managed in place: the Western Union building and the JJ Bowlen building (both downtown Calgary). Another, where OH&S had (and may still have) its offices, the Elveden Centre (also downtown Calgary), has had ACM in the return-air plenum. It operated under an asbestos management plan for some 20 years, over which time the ACM has largely been all removed. As parts of the building became vacant, before re-letting the space it was first remediated.

[317] But these buildings, like all the others debated by the parties, came without sufficient further details from which I could reliably compare them with the Building, such as whether any (with one exception I mention below) were ordered to remove their ACM or did so voluntarily,

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whether any were exempted from the provincial requirements of the day, or addressed matters under different provincial requirements than today, what form of asbestos was involved, what concentrations of asbestos were involved, in what condition was their ACM, relatedly whether the ACM released asbestos fibres, how friable was the ACM, and just what tipped the scale between managing in place and incurring the exposure risk created by removal activities, and so on. In the absence of such information, I am unable to draw any reliable conclusions for the Building at issue here.

[318] The exception referred to above, to whether ACM removal was voluntary or ordered, and was the "Rosehaven Care Centre" building, where the owner refused to remove friable ACM from its air distribution system. Apparently OH&S intervened to mandate it do so under section 33 of the *OHS Code*. However no other of its circumstances were provided.

[319] The Court received six microscopy expert reports pertaining to the presence and concentration of asbestos in the Building. Two reports were from Dr. Compton (an expert for CNOOC), two reports were from Dr. Millette (an expert for CNOOC), and two reports were from both Drs. Lee and Sanchez combined (experts for the Landlord). The CNOOC experts are collectively referred to as "**MVA**". The Landlord experts are collectively referred to as "**RJLG**".

[320] MVA gave directions for further sampling and analyzed bulk samples of the SAF, samples debris dust, and air samples. Dust was collected from Plenum surfaces for MVA by wipe, microvac, and surface lift sampling. The samples were taken, prepared for analysis, and analyzed by TEM in accordance with ASTM D6480.[13]

[321] ASE collected air samples for MVA in February 2020 and December 2021 when the Plenum spaces were entered either to simulate SAF delamination or to simulate its removal by a worker. For the delamination simulation, a perimeter containment area was established and material from the SAF was scraped and allowed to fall on surrounding light fixtures and ceiling tiles.

[322] An additional personal sample was collected during the set-up of the containment. "Personal samples" are samples collected in an air monitoring capsule worn by the worker, usually in the lapel area. This air drawn through the capsule would come from the same general area as the air the worker inhales.

[323] MVA used the ISO 10312 method to analyze the air samples gathered by ASE. Dr. Millette acknowledged that air samples in occupational settings would normally be analyzed using the NIOSH 7400 (PCM) method followed by the NIOSH 7402 (TEM) method. MVA initially used the NIOSH 7400 method for air analyses but found that an abundance of gypsum fibres interfered with the counting results. Therefore, they elected to use the ISO 10312 method, which includes a step where gypsum fibres are dissolved in water before counting takes places.

[324] However, ISO 10312 says to count any fibre longer than 0.5 microns with an aspect ratio greater than 5:1, differing from the NIOSH 7400 protocol and the *OHS Code* dimensions, MVA tried to achieve a result comparable to NIOSH by only counting fibres longer than 5 microns and

[13] American Society for Testing and Materials International, "Standard Test Method for Wipe Sampling of Surfaces, Indirect Preparation, and Analysis for Asbestos Structure Number Concentration by Transmission Electron Microscopy" (2017).

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having no less than a 3:1 aspect ratio. MVA refers to these results as "ISO 10312 '**PCME**' f/cc", meaning PCM Equivalent.

[325] RJLG grouped and reviewed the samples the Landlord chose to include in the AMP (which was not all that were available), creating some sub-sets of the data for repeat analysis. They also initiated a few additional samples under conditions not represented in the existing data sets.

[326] RJLG re-tested 281 of the dustiest air samples among the record of prior samples kept in the AMP, using TEM. It found 12,000 non-asbestos fibres, three non-asbestos amphiboles (including "cummingtonite"), and one winchite asbestos particle (collected from inside the work area).

[327] Dr. Steffey, a statistical design and analysis expert called by the Tenant, cautioned the Court about reliance on the RJLG non-randomized sample sets. The caution is valid, but the RJLG group selected samples for re-testing that if anything would bias towards over-estimating true concentrations. Also, the larger the number of samples in total the less concern this deficiency in method becomes as the higher will be the confidence in the resulting conclusion probabilities, as Dr. Paustenbach observed.

[328] RJLG noted that a great number of air samples were collected during Building sampling, cleaning, and abatement activities. The background sample fibre counts were below 2 fibres per analysis (essentially clean, it says), but the samples collected during cleaning/abatement activities averaged 30 fibres per analysis. RJLG analyzed 122 samples with the highest fibre counts (unless those samples were unavailable) by TEM and found only 1 asbestos fibre consistent with amphibole from Libby, Montana. RJLG suggests that the results (0.0000003 f/cc) are lower than those found in any other public building they are aware of and are comparable to outdoor rural air. This approach of selecting for further testing just the samples with the highest fibre counts, brought its own degree of conservatism in the search for asbestos fibres among all the samples testing positive for fibres of all kinds. The samples with the highest counts for all fibres should be the ones more likely to contain asbestos fibres.

[329] RJLG arranged for air samples to be taken from both outside the Building and near the Bow River. It also sampled from an air-intake filter in the Building. This was done from March 24 to 26, 2022. When analyzing the samples, the RJLG followed techniques in matrix reduction and density separation that differed from techniques used on samples from within the Building.

[330] Amphiboles were found in all three background sample locations. RJLG found hornblende, tremolite, winchite, and amosite amphiboles, and a single fibre of grunerite asbestos (similar to amosite but with elevated lead). RJLG suggests therefore that amphiboles in the Building could be coming from outside.

[331] The RJLG described these amphiboles as non-asbestiform:

> Further, in analysis of both filtered particulates drawn from outside the Building, and in sediments near the Bow River in Calgary ... we found non-asbestiform winchite/richterite present in the ambient environment ...

[332] They analyzed dust from a filter collected for Dr. Sanchez of outside ambient air. They said another amphibole observed in this sample from outside of the Building was non-asbestos tremolite, for it contained no sodium or potassium.

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[333] Therefore, the particles RJLG identified in outdoor air testing, they said, were not asbestos fibres. They were cleavage fragments with similar mineral compositions to asbestos but were not asbestos fibres.

[334] However, the RJLG compared these fragments to other amphibole fragments found in the Building to suggest that MVA had misidentified cleavage fragments as asbestos and to further suggest that the amphibole cleavage fragments found in the Building may be coming from a source other than the SAF. They say even though the dimensions of these particles fit within the counting criteria, they are actually cleavage fragments, not asbestos, and they may come from outside.

[335] RJLG say the quality of the air inside the Building is the same as outside, insofar as respirable asbestos is concerned. They say the concentration of airborne asbestos fibres in the Building is no higher than background levels outside the Building.

[336] Dr. Hart cautioned the Court against agreeing with the Landlord's desired conclusion from the samples coming from outside the Building because the air sampled outside the Building may have come from within the Building. I agree that insufficient information was presented about the proximity of the air monitoring equipment immediately outside the Building to the return air exhaust points or the wind flow directions and velocities over the time of the sampling, from which I could discount or rule out the possibility of the monitoring capturing air being expelled from the Building. However, this does not affect the outdoor air monitoring distant from the Building.

[337] MVA and RJLG disagreed over whether the simulations of various Building activities were in fact representative of the conditions that were intended to be simulated, over the utility of the results of sampling when the Building was empty, and over the acceptability both scientifically and as a matter of regulatory policy of the many novel assessment methods employed by RJLG that each seemed to narrow further what constitutes an asbestos particle or fibre or structure or fragment.

[338] Dr. Millette stated that the primary difference of opinion between himself and RJLG is whether amphibole fibres present in the Building air are asbestos or not. This disagreement is rooted in how each group of experts classifies and counts amphibole asbestos fibres. Both say the other did not follow appropriate methods in conducting their analysis.

[339] MVA argues that RJLG has under-estimated amphibole asbestos fibres in their counts by applying additional techniques that go beyond standard protocols (i.e., additional "sieves") to distinguish between asbestiform and non-asbestiform amphiboles. The RJLG argues that Dr. Millette and Dr. Compton have over-estimated asbestos fibres in their counts by: (1) including particles smaller than 5 microns in length with a 3:1 aspect ratio, and (2) failing to use additional analytical techniques, such as diffraction patterns, to confirm whether or not the fibres they identified are asbestiform. Both criticisms have merit depending upon the purpose for which their opinion is to be used. Where the purpose of the opinion is to inform the Court in applying the statutory regime, employing additional analytical techniques that are not listed among the prescribed methods in the statute or that report results against different statutory for asbestos fibres than are set in the statute, do the opposite. However, where the purpose of the opinion is to inform the Court on the actual health risks within the Building or on the Building's possible unfitness for the Tenant's occupancy, additional techniques embraced as reliable by the larger community of such experts are welcomed and should be used when available. I was satisfied on

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that for some but not all the additional sieves RJLG employed. After deliberating I was also left with a doubt from noticing how each new sieve filtered out more samples from being an asbestos fibre but never considered whether if the new sieve was the only technique available, other samples that were already excluded under a previous sieve would be added back in to the pool considered to be asbestos fibres.

[340] The experts of the two sides disagreed over innumerable other and ancillary issues, some seeming to originate from other contexts, both academic and previous litigation. Other than the disputes I address in the next section of these facts or address in the remainder of the judgment, resolving all these 'peripheral at best' nuanced disputes has not become necessary to determine the issues in this case. I do not intend to resolve them.[14]

[341] As counsel for the Landlord observed in final argument:

> The point has been noted that last Thursday, my friend submitted that ultimately, other than the evidence of OH&S experts, much of this detailed expert evidence is ultimately not necessary to resolve this case given the straightforward statutory regime in place.
>
> ...
>
> Now, as you've heard, we agree with CNOOC's submission or admission that the Court doesn't actually need to go down the microscope to resolve this case.

[342] Both sets of experts agree that:

1. The SAF is MK-5.

2. The SAF is friable.

3. The SAF contains between 0.0002% and 0.038% dry weight asbestos.[15]

[343] Dr. Lee observed only one asbestos fibre in all the TEM air samples analyzed by Eco Abate, WSP, WHS, or RJLG. He compared that to Dr. Compton's results, who found two amphibole asbestos fibres in the last sets of air samples: (1) one was found in a sealed containment during a test of manual disturbance in the SAF; and (2) one was a personal sample taken during the SAF removal (but may have been below 5 microns in length).

[344] The RJLG reminded the Court that even assuming MVA's counts are correct, "all of the area samples [they analyzed] meet the Alberta clearance level of 0.01 f/cc for fibres longer than 5 [micrometres]".

[14] This should not be construed as the Court thinking the parties adduced superfluous expert evidence. Good counsel provide the Court with the evidence it may need for any of the multiple roads it may travel down in deciding a case. Going into a trial, counsel need to present the necessary evidence for all those possible roads. Going in, counsel do not know which of the array of possible evidence will be the needed evidence. Counsel do their clients and the Court a disservice presenting only the evidence to equip the Court for the road they think the Court may choose to follow, perhaps failing to adduce the evidence their client needs the Court to have.

[15] For the reasons I provide above in para 226, I have not set the upper limit at 0.14% but accept the experts from both sides on the concentration of asbestos in the SAF.

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Conclusions on Probative Facts in Dispute

[345] No asbestos in the Shafts. CAFCO, not MK-5, was used in the Shafts. This is the more likely conclusion based on colour differences between the two locations and testing results of the samples from the Shafts showing zero asbestos. The Shafts were tested both before and after termination; no asbestos was found. CAFCO was not used in the Plenum spaces, other than possibly to patch the SAF. Mention was made of a location or two in a Plenum space where a patching of SAF was different in colour.

[346] The SAF throughout the Building's Plenum spaces contains asbestos. MK-5 contains Libby vermiculite which has been found to bring along with it, in fluctuating amounts, amphibole asbestos. Testing found it in the bulk samples. Testing found it in the debris samples. Both are ACM for *OHS Code* purposes, regardless of concentration.

[347] However, the concentration of asbestos in the bulk and debris samples in which asbestos was found is extraordinarily low, ranging from 0.0002% to 0.038% by dry weight. This concentration is far below the cut-off level in use in many other jurisdictions, before further action is required with respect to ACM in such a building.[16]

[348] The probability is very high that the concentration of asbestos never exceeds 0.038% anywhere in the SAF or, if it does exceed that concentration, it will not be by very much. In the great majority of bulk and debris SAF sampled there was no asbestos detected at all. To illustrate, finding a % weight of asbestos of 0.005 in 8 tests out of 200, and zero % weight in the other 192, does not mean it is probable that all the SAF has an asbestos % weight of 0.005. Only 4% of the Building could be reasonably predicted to have a % weight of 0.005 in this hypothetical. If, as in this case, that extremely low amount of asbestos that was found (0.005%) was spread equally across all SAF instead of variably deposited and aggregated in the small minority of 8 samples there would be, to borrow Dr. Paustenbach's phrase, "virtually no" asbestos in the material at all.

[349] Given the total number of samples taken, the overwhelming majority of which contain no asbestos, the 0.038% is truly an upper outlier. There is virtually no asbestos in the SAF.

[350] Airborne asbestos fibres have been found in the Building. The extensive testing in total (not just ECO Abate's 10 months of over 2800 samples for TEM analysis, following its 600 earlier on, but also all the WSP, ASE and WHS sampling), over 4 years and 33 floors of Building space, yielded 9 airborne asbestos fibres.

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[16] Alberta has never had such a minimum, but for many years it had other ways of avoiding virtually non-existent amounts of asbestos not requiring needless action. For example, from 1981 to 2005 in the *Alberta Building Code* it was up to a government official to determine if the potential release of asbestos fibres in a building with so little asbestos in its materials was an unsafe condition. That government official was first a "Director" and then an "authority having jurisdiction" involved in the decision (1981). Between 1997 and 2005, the authority having jurisdiction was defined as a "safety codes officer". These government officials enjoyed a discretion to determine whether any further action was required according to the specific circumstances they faced, because an unsafe condition was not automatic upon *any* potential, no matter how remote, for the release of a single asbestos fibre. Instead, "unsafe condition" was a defined term, enabling them to only require action in conditions that they concluded could endanger the life, liberty or health of persons in the building. They could be expected to exercise their discretion reasonably, according to the circumstances. With the *OHS Code* in 2003, the onus shifted off government to make such determinations. The wording replacing that approach is one of the main reasons these parties ended up in litigation and is discussed in section 5. a. of this judgment.

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[351] Five are from Eco Abate's sampling for qualitative TEM analysis.

[352] One is the particle in the MVA data that Dr. Sanchez conceded could be an asbestos fibre, for it exhibited the composition of amphibole asbestos, was longer than 5 micrometres, and had an aspect ratio greater than 3:1. His further analysis left him unable to determine with any confidence that it was or was not asbestiform. In accordance with the precautionary principle[17] I count it as an asbestos fibre for determining concentration under section 20 of the *OHS Code*.

[353] Another is the one Libby amphibole asbestos fibre from within containment during WSP's ceiling space cleaning project, found by Dr. Lee.

[354] The last two are the two amphibole asbestos fibres Dr. Compton found in later sets of air samples: one was found in a sealed containment during a manual disturbance of the SAF and the second was in a personal sample during the SAF removal.

[355] I recognize there may be some double counting within those 9 findings and further that at least the latter three were during disturbance events. Compliance with proper asbestos handling procedures will prevent any human exposure paths in those situations in future. Nevertheless, I prefer to err on the side of inclusion. At these infinitesimally small concentrations, the difference of a fibre or two is truly immaterial. But if the objective is to determine whether the SAF may release asbestos fibres, rather than to determine its potential concentration, these results should be counted.

[356] The airborne asbestos is not from outside the Building. I am not persuaded the 9 fibres came from outside the Building. Concentrations of airborne asbestos fibres inside the Building being approximately the same as outside (background) levels does not mean outside air is the source of the inside air asbestos. The differences in forms of asbestos observed are a stronger indication that outside air is not the source of the inside airborne asbestos. There was only a slight overlap of forms of asbestos found between the set of five found inside the Building and the ones found outside the Building, though I recognize this could be attributable to the samples being analyzed at different labs and therefore by different analysts.

[357] Also relevant is the significant intake air filtration system at the Building. The C5+ Report of September 28, 2007, on indoor air quality[18] states, at pages 2, 8 and 9:

> In the Nexen Building, the primary system of removing contaminants in the respirable particle size ranges, from the outside air, prior to delivery to the tenant spaces, are understood to be AAF DriPak 2000, MERV[19] 14 rated bag filters, at

[17] The precautionary principle should be engaged when applying laws that legislators intend to protect human health and the environment in the face of risks to them that cannot be demonstrated with scientific certainty. That is the case here with this particle. The precautionary principle emerged in international environmental law and has since been recognized as both part of Canadian customary law (*114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40) and as having a role in the interpretation of domestic legislation (*Castonguay Blasting Ltd v Ontario (Environment)*, 2013 SCC 52). It also when consequences, like environmental impacts, cannot be determined with scientific certainty and there it can sustain preventative and protective legislation: *Castonguay*, at paras 16 – 21.

[18] This Report concluded the Building filtration was operating at a somewhat reduced performance efficiency, below design. I have no evidence whether it changed since then. For the times relevant to this case, it may be better or worse.

[19] Minimum Efficiency Reporting Value determined using ASHRAE Standard 52.2.

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> supply air fans on the 3rd floor and 37th floor. Based upon available information, each bag filter is understood to specify removal of between 70% and 80% of all particles having a diameter of between 0.3 and 0.5 microns, between 80% and 91% of all particles having a diameter of between 0.5 and 1.0 micron, between 91% and 100% of all particles having a diameter of between 1.0 and 5.0 microns and 100% of all particles having a diameter of >5.0 microns.
>
> *... [there then follows a discussion of, among other things, measurements to determine the performance efficiency of the Building's actual filtration of intake air] ...*
>
> It is therefore the belief that the filtration systems are ... removing between 67% and 70% of the airborne particulate prior to delivery to the tenant space.

This, combined with the proximity of ACM in the Plenum spaces, persuade me that the airborne asbestos found inside the Building did not originate from outside the Building.

[358] No one suggested the airborne asbestos fibres originated from the duct mastic, the freight elevator plaster, or the 3rd floor pantry floor tile. The only other known sources of asbestos in the Building could be the undisturbed SAF or the Disturbed SAF, or both.

[359] The forms of asbestos in the 5 air samples found by Eco Abate between July and September 2018 (1 tremolite and 4 Libby amphiboles) are all forms associated with vermiculite mined in Libby Montana. Vermiculite mined in Libby Montana was a component in the MK-5 comprising the SAF. The proximity of the 5 air samples to the Plenum SAF makes it the far more likely source. The bulk sampling conducted in the Building identified 3 forms of asbestos: "actinolite or tremolite" (Eco Abate), actinolite (WSP) and winchite (MVA). Again, these reasonably match the forms of asbestos fibres found in the samples of the Building's air.

[360] The undisturbed SAF does not release asbestos fibres. No direct evidence was presented of the undisturbed SAF releasing asbestos fibres. This is not surprising given the size of the fibres, the rarity of them, and the impracticability of recording such direct evidence for presentation in Court, at least with known technology.

[361] Determining the source of the airborne asbestos fibres must be a conclusion made by inference from the available evidence. The Tenant asks me to infer that all the SAF is deteriorating and releasing asbestos fibres.

[362] Undisturbed SAF exhibits no signs of such deterioration. One expert described the SAF as "like new;" another as "not degrading." It remains hardened throughout its volume, not just on its surface. It continues to adhere tightly to the surfaces to which it was applied. It shows little sign of aging, or of failure, weakening, decay, cracking, chipping, collapse, delamination, decline, degradation, degeneration or erosion. Except the areas where it has been impacted by some external force (disturbed in some way, including by water leakage), the SAF remains firmly bonded and intact. I find that it has not released asbestos fibres into the air when it has not been disturbed and that it will not release asbestos fibres into the air unless disturbed.

[363] The results from the extensive number of air samples taken after Building vacancy further militate in favour of the inference that, on its own, the SAF does not release fibres of any kind. Two years after cleaning, with no other Plenum activity since, minimal to no debris was observed on the surfaces beneath the SAF and no measurable concentration of asbestos in the

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dust. RJLG analyzed 25 surface lift samples by 2 methods and found no free amphibole asbestos fibres on the surfaces.

[364] The airborne asbestos fibres found all came from the Disturbed SAF. I find persuasive the substantial expert evidence from both parties that any release of asbestos fibres in the Building comes from the already deteriorated SAF, the poor condition SAF (that is, some of the Disturbed SAF). That fibres may release only from Disturbed SAF not from the undisturbed SAF is the more plausible conclusion from all the evidence. The Landlord's witnesses Jones and Fillion both acknowledged that if damaged or disturbed, the SAF may release fibres. WSP and others considered the SAF to pose no risk of fibre release if it was undisturbed.

[365] For the Disturbed SAF, some external force has been applied to the SAF and because it is friable, it has broken down to some degree or in some way. Only after such disturbance, I find, is there any possibility of an asbestos fibre being released over the remaining term of the Lease. None is released from undisturbed SAF. It is, I find, from the Disturbed SAF only that a rare further single asbestos fibre may be released.

[366] From the outside air samples Dr. Sanchez concludes the inside airborne asbestos fibres did not come from the SAF. For the reasons given above, I am not persuaded that outdoor air is the source of the airborne asbestos fibres found within the Building's air.

[367] Fortunately, release of more asbestos fibres is unlikely. WSP sampled the air during the pilot abatement project. It analyzed by TEM all the air samples that by PCM indicated a fibre concentration greater than 0.01 f/cc (the air clearance level). It did so to determine whether airborne asbestos was present. No asbestos was detected.

[368] I agree with the RJLG's conclusion that finding no asbestos in the air during a pilot abatement project is a good indication asbestos release is unlikely: "This means that under worst case conditions and high PCM fibre counts, no asbestos fibers were airborne". A few have been found, so another is theoretically possible. I cannot put the possibility any stronger on this evidence.

[369] By the time of the Ultimatum no asbestos fibre had been found. By the time the Tenant began relocating from the Building, only 5 had been found. By the time of Lease termination, still only 5 had been found. The others were found post termination; at least 3 of those were during disturbance events.

[370] Concentration of airborne asbestos during Building occupancy. I find the concentration of airborne asbestos fibres in the Building during its occupancy, between July 2018 and the date of Lease termination, before removal of any SAF debris and before any protection from exposed or poor condition Disturbed SAF, to be no greater than 0.0000005 f/cc.

[371] I determine this as the concentration (i) taking only the data most favourable to the Tenant, (ii) using only data that keeps as many variables constant as possible, and (iii) rounding numbers in the direction most favourable to the Tenant.

[372] The data most favourable to the Tenant are the 2827 Eco Abate samples analyzed by qualitative TEM between July 2018 and April 2019, both months inclusive. The qualitative TEM analysis is the most likely to detect asbestos fibres. This data set of over 2800 TEM samples are samples taken when the Building had at least some occupants and most of them were taken went it was in active use. Active use is when asbestos fibres are more likely to be airborne, said Dr. Hart.

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[373] Variables are held constant by using only this data set since all the air monitoring samples in it were taken by a single sampling firm (Eco Abate), all conducted by the same one person, or at most the same two persons. All the lab analyses were conducted by the same lab (EMSL).

[374] Rounding numbers favourably to the Tenant refers to using for the calculation the highest concentration found by the lab when re-analyzing the 5 positive samples by quantitative TEM (0.0003 f/cc), not adjusting for lower concentrations in the set of 5 and not adjusting for the lab describing the estimated concentrations as "less than" the 0.0003 f/cc. The rounding done was favourable to the Tenant also by my rounding down to the even number 2800 as the denominator in my calculation, not the higher 2827. The higher the "n" in the denominator, the lower will be the resulting concentration.

[375] I determined the overall concentration in the Building at the indicated time interval by first dividing 2800 by 5 (equaling 560), recognizing that in the full data set there was one fibre observed on average for every 560 samples. The highest concentration reported by the lab for any of the 5 samples containing an asbestos fibre was 0.0003 f/cc. That concentration spread equally over the allocable portion of all the samples (560) for that concentration from 1 of the 5, is determined by dividing the 0.0003 by 560. The result is an overall concentration of 0.0000005 f/cc in the Building.

[376] By this simple math, and for the reasons given, I find this represents the highest concentration of airborne asbestos fibres anywhere in the Building, during occupancy, if the 5 fibres found were spread evenly over the span of 10 months, 33 floors and 2800 samples.

[377] This is 1/180th of Dr. Hart's reference concentration ("**RfC**")[20] for Libby amphiboles (0.00009 f/cc), which itself is far more stringent because of the uniquely harmful nature of Libby amphiboles, which she places at 1/1000th of the Alberta and the US OEL of 0.1 f/cc.

[378] In any event, I am also persuaded by Dr Paustenbach's analysis and reasons that (i) the Building's air sample concentration is at "basically background" levels. He determined the "time weighted average concentration" of airborne asbestos fibres to be 0.000016 f/cc. And (ii) in the Building the ACM and asbestos fibres pose no health and safety risk. At no time prior to Termination was the Building unsafe to work in by reason of the presence of asbestos.

[379] I find the Building was safe and will continue to be safe. The mere presence of asbestos in a building material does not in and of itself present a health risk.

[380] There is no persuasive evidence that the virtually non-existent asbestos in the SAF will release any unsafe concentration of respirable fibres from the SAF, disturbed or undisturbed. I find no health or safety risk to Building occupants in the future. There is no health reason it cannot be managed in place until renovation, alteration or demolition.

2. The Law on Lease Interpretation

[381] The Tenant says that it was entitled to terminate the Lease on three grounds: First, the Tenant says it had the express right to terminate the Lease and that the right was triggered. Second, the Tenant says that the Landlord breached several provisions of the Lease, which

[20] The RfC was described by Dr. Hart as the amount "that can be inhaled by a person (including sensitive sub-groups) for a lifetime without experiencing adverse health effects".

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individually or collectively constituted a fundamental breach of the Lease. Finally, the Tenant says that the Landlord evinced an intention not to be bound by the terms of the Lease, which constituted an anticipatory breach of the Lease. The Landlord says that the Tenant's termination right was not triggered and that it was the Tenant—not the Landlord—that breached the Lease. Determining the outcome of this dispute requires the Court to determine how the various provisions of the Lease, correctly understood, apply to the facts.

[382] The interpretation of commercial leases follows the same principles as the interpretation of any other contract.

[383] The goal of contractual interpretation is to ascertain the objective intent of the parties: *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 at para 49.

[384] Interpreting a contract is a "a practical, common-sense" exercise "not dominated by technical rules of construction": *Sattva* at para 47. The court "must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract": *Sattva* at para 47.

[385] Interpreting contracts as a whole entails, among other things, that an individual provision in a contract should be interpreted in the context of the contract as a whole: *Sattva* at para 47; *ATCO Electric Limited v Alberta (Energy and Utilities Board)*, 2004 ABCA 215 at para 77; and further that an individual sentence within a provision should not be interpreted in isolation: *Amberber v IBM Canada Ltd*, 2018 ONCA 571 at para 59. The court's focus is on determining the meaning of the contract and its terms, not the meaning of specific words in the contract: *Sattva* at para 48, quoting *Investors Compensation Scheme Ltd v West Bromwich Building Society*, [1998] 1 All ER 98 at 115 (HL).

[386] Relatedly, a contract should be interpreted to give meaning to all the terms in the contract and to avoid inconsistency between those terms: *BG Checo International Ltd v British Columbia Hydro and Power Authority*, [1993] 1 SCR 12 at 23–24; *369413 Alberta Ltd v Pocklington*, 2000 ABCA 307 at para 19. Where there are apparent inconsistencies between different terms in a contract, the court will attempt to find an interpretation that reasonably gives meaning to each of the terms in question: *BG Checo* at 23–24.

[387] Clear and specific statements prevail over general terms: *Douez v Facebook, Inc*, 2017 SCC 33 at para 46; *BG Checo* at 24.

[388] The principle of *expressio unius*—according to which the absence of a certain item in a list of items expressly mentioned is presumed to reflect an intention by the parties to exclude that absent item—is only of limited relevance in contractual interpretation, and (to repeat) the focus of the analysis should be on the intentions of the contracting parties: *Turgeon v Dominion Bank*, [1930] SCR 67 at 70–71; *Benfield Corporate Risk Canada Limited v Beaufort International Insurance Inc*, 2013 ABCA 200 at para 47; Geoff R Hall, *Canadian Contractual Interpretation*, 4th ed (Toronto: LexisNexis, 2020) at §3.13.3.

[389] If parties use or expressly define a word in a manner that is inconsistent with the ordinary meaning of that word, then the word should be given a meaning that is based on the usage or express definition of the parties and not on the ordinary meaning: *JEKE Enterprises Ltd v Northmont Resort Properties Ltd*, 2017 BCCA 38 at para 54; *Friedrick v Kelturn Drywall Ltd*, 2024 SKCA 54 at paras 36–37.

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[390] If parties use a legal term of art, then the parties are presumed to have intended to adopt the legal meaning of that term, absent evidence to the contrary: *IFP Technologies (Canada) Inc v EnCana Midstream and Marketing*, 2017 ABCA 157 at paras 60–62; *Rosenberg et al v Securtek Monitoring Solutions Inc*, 2021 MBCA 100 at paras 98–99. The strength of this presumption will depend, however, among other things, on the sophistication of the parties and on the extent to which the term has a consistent legal meaning; the focus of the analysis remains on the intentions of the parties: *Earthco Soil Mixtures Inc v Pine Valley Enterprises Inc*, 2024 SCC 20 at paras 84–87.

[391] Contracts are to be interpreted "in accordance with sound commercial principles and good business sense": *Resolute FP Canada Inc v Ontario (Attorney General)*, 2019 SCC 60 at para 79; see also, *IFP* at para 88. Courts assume those that enter into commercial contracts intend for those contracts to "work": *Resolute* at para 142, citing *Humphries v Lufkin Industries Canada Ltd*, 2011 ABCA 366 at para 15. The courts choose the interpretation that furthers the commercial purpose: *Resolute* at para 144, citing *Humphries* at para 15. Unrealistic or commercially unreasonable interpretations should be rejected: *IFP* at para 88.

[392] "[A] court must ask what a reasonable person familiar with the context that produced this agreement – in a commercial case, the reasonable business person – would conclude the contested term means": *Knelsen Sand & Gravel Ltd v Harco Enterprises Ltd*, 2021 ABCA 385 at para 126.

Surrounding Circumstances

[393] Surrounding circumstances assist the Court in determining the *objective* intention of the parties, not their *subjective* intention; they allow the Court to ensure that the "written words of the contract are not looked at in isolation or divorced from the background context against which the words were chosen": *IFP* at para 81.

[394] Surrounding circumstances only include "facts known or facts that reasonably ought to have been known to both parties at or before the date of contracting": *Sattva* at para 60. The factual matrix includes (i) the genesis, aim or purpose of the contract; (ii) the nature of the relationship created by the contract; and (iii) the nature or custom of the market or industry in which the contract was formed: *Sattva* at paras 47-48; *IFP* at para 83.

[395] Surrounding circumstances cannot be allowed to overwhelm the words of the agreement: *Sattva* at para 57. Surrounding circumstances "should consist only of objective evidence of the background facts at the time of the execution of the contract": *Sattva* at para 58. It is a question of fact whether something was or ought to have been common knowledge of the parties at the time of contract execution: *Sattva* at para 58; *IFP* at para 83.

[396] Evidence of pre-contract negotiations, including prior drafts, is generally inadmissible as part of the surrounding circumstances: *Alberta Union of Provincial Employees v Alberta Health Services*, 2020 ABCA 4 at para 27. Subjective intention evidence is inadmissible because it is irrelevant; there would be no dispute if there was consensus on the intent, so the lack of consensus does not assist in interpretation: *Alberta Union of Provincial Employees* at para 30; see also *IFP* at paras 58, 79-87; Geoff R Hall, *Canadian Contractual Interpretation*, 4th ed (Toronto: LexisNexis, 2020) at §2.5.3. The concept of subjective intention includes both direct and indirect evidence about what a party thought a term or a phrase in a contract meant: *Alberta Union of Provincial Employees* at para 31. Evidence of pre-contract negotiations may be relevant to the extent it shows the factual matrix: *IFP* at para 85.

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Types of Lease Provisions

[397] A lease typically contains various provisions binding the tenant or the landlord or both, such as a covenant by the tenant to pay rent or a covenant by the landlord to maintain and repair the leased premises. A lease may also contain provisions that provide for a right of the landlord or tenant to terminate the lease under certain circumstances. Finally, a lease may contain representations and warranties.

[398] In general, a breach of a covenant by the landlord does not entitle the tenant to terminate the lease or withhold rent but instead only allows the tenant to make a claim for damages*: Shun Cheong Holdings BC Ltd v Gold Ocean City Supermarket Ltd*, 2002 BCCA 451 at para 7. In exceptional circumstances, a breach of a covenant by the landlord may allow the tenant to terminate the lease when that breach rises to the level of a fundamental breach, discussed above: *Shun Cheong* at para 9. Although a tenant is generally entitled to damages if the landlord breaches a covenant, the parties may include an exclusion of liability clause that excludes the landlord from liability: see e.g., *Irvine Recreations Ltd v Gardis* (1982), 133 DLR (3d) 220; Christopher Bentley, John McNair, & Mavis Butkus, *Williams & Rhodes' Canadian Law of Landlord and Tenant*, 6th ed (Toronto: Thomson Reuters, 2024) at §10:28.

[399] Similar to a breach of a covenant, a breach of a contractual representation or warranty by the landlord only allows the tenant to make a claim for damages aimed at restoring the tenant to the position that they would have been in had the representation or warranty been true: *Rainbow Industrial Caterers Ltd v Canadian National Railway Co*, [1991] 3 SCR 3 at 21–22, per McLachlin J (as she was then) dissenting, but not on this point.

[400] Lease parties may include an entire agreement clause that excludes the landlord from liability for pre-contractual representations: see e.g., *Spot Coffee Park Place Inc v Concord Adex Investments Limited*, 2023 ONCA 15.

3. After Alleged Grounds for Termination & The Heisler Exception

[401] The Landlord says the Tenant cannot now rely on grounds for terminating the Lease that it did not mention as a reason for terminating at the time. In what follows I refer to any such ground as an "**After Alleged Ground**".

[402] The Landlord goes further and says the Tenant certainly cannot rely on any After Alleged Ground that, if it had mentioned the ground, the Landlord could have put right that reason for terminating. I refer to this in what follows as the "**Heisler Exception**", using the name of the case commonly associated with it because of its succinct statement of the principle.

[403] In its Termination Letter, the Tenant gave the following as its reasons for terminating:

> CNOOC terminates on the basis that your conduct constitutes fundamental and/or anticipatory breach of numerous provisions of the Lease, including breach of the covenant with respect to hazardous substances and breach of the covenant of quiet enjoyment. CNOOC elects to accept your repudiation, terminating the Lease.
>
> In the alternative, section 17(b) of the Lease grants CNOOC a right to terminate the Lease when the building is unfit for occupancy and the underlying cause may

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> not be remedied within a year. Over 1 year has elapsed since the asbestos was discovered, and CNOOC hereby elects to terminate the Lease.

[404] I note at the outset that the Tenant said its prime reason for terminating is "fundamental and/or anticipatory breach" and it then offered an expressly non-exhaustive list of the particulars of the fundamental breach by use of the word "including". It then states that in the alternative the Landlord has triggered a provision of the Lease that expressly entitles the Tenant to terminate. At the time of Termination, that was its second stated ground.

[405] The Landlord says missing from these stated grounds but now improperly relied on by the Tenant in this trial are:

a. Interference with quiet enjoyment: sub-clause 16(a);

b. Failing to comply with laws: sub-clause 16(j);

c. Denying Tenant access rights: sub-clause 16(c);

d. Failure to furnish air conditioning: sub-clause 16(f);

e. Forcing the Tenant's relocation: clause 44;

f. Denying the Tenant premises in a "first class" building: sub-clauses 16(e), (i) and clause 20;

g. Imposing new rules and regulations: sub-clause 15(z).

[406] The Landlord is incorrect on the facts regarding the first entry on the above list, quiet enjoyment. The Tenant expressly mentioned it as one of its reasons in the Termination Letter and had also complained of its loss of quiet enjoyment in a letter from Wilson to the Landlord in September 2018, long before the termination. The Landlord seems aware of that, as elsewhere in its written arguments it includes the loss of quiet enjoyment as a ground for which it had notice prior to the termination.[21]

[407] The Landlord argued (italics in the Landlord's original):

> There is some authority, mostly in employment law, for the principle that a terminating party may use subsequently learned information of a repudiatory breach to justify its termination. Never, though, does the principle appear to have been applied in a lease case. And crucially, CNOOC does not claim to rely on any *information* of which it was unaware at the time of termination. CNOOC's counsel simply decided later to plead more causes of action, based on the same information.

[408] I quibble with the Landlord implying the Tenant has now pleaded "more causes of action" that it did not mention in the Termination Letter. In my view it has not. It said in the Termination Letter that the Landlord breached the Lease. Soon after when commencing this lawsuit, the Tenant pleaded as its cause of action breach of contract (that is, the Lease). It has not pleaded any new cause of action, just more particulars (grounds) for the breach of contract.

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[21] See, for example, its "Decision Tree" submitted with its final written arguments. And in its oral argument it acknowledged the reference in the Termination Letter, but then redirected its position onto the Tenant never mentioning its concern the AMP would significantly interfere with its use of the premises and amounting to a breach of quiet enjoyment until long after termination. So in *this* way the Landlord says the Tenant cannot raise its quiet enjoyment grounds after termination.

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Then, just as it said in the Termination Letter, it pleaded its contractual right to terminate that it says was triggered.

[409] The remainder of the Landlord's argument quoted above, however, correctly focuses on "information" rather than causes of action. The decided cases in this area speak of the factual basis for termination first disclosed after termination, not so much the specific contractual provisions relied upon as a basis for termination.

[410] The Landlord acknowledges that After Alleged Grounds are permitted in employment law cases, as confirmed in *Potter v New Brunswick Legal Aid Services Commission*, 2015 SCC 10, at paras 174–177, in the concurring judgment of CJC McLachlin and Justice Cromwell. The majority expressed no disagreement on this point.

[411] But advancing After Alleged Grounds is not limited to employment law cases. The case authorities cited in *Potter* for this point are not employment law cases. One of them, *British and Beningtons Ltd v North Western Cachar Tea Company*, [1923] AC 48 (HL), involved three contracts for the purchase and delivery of tea crops from three different vendors. Another, *Glencore Grain Rotterdam BV v Lebanese Organisation for International Commerce,* [1997] 4 All ER 514 (CA), involved a contract for the purchase and sale of wheat. See also, by inference, *Samson v Lockwood* (1988), 40 OR (3d) 161, at para 45.

[412] The Landlord suggests the principle has never been applied in a lease case. The Court in *Denovan v Lee*, [1991] BCJ No 830 (QL), was prepared to apply it in a lease case and would have if not for also finding the Heisler Exception applied, which I come to shortly.

[413] The Landlord did not offer case authority saying the principle does not apply in lease cases. It is doubtful such an authority exists after the following statement in *Highway Properties Ltd v Kelly*, [1971] SCR 562, at p 576, changed the process for litigating leases, which engage both contract law and property law:

> It is no longer sensible to pretend that a commercial lease, such as the one before this Court, is simply a conveyance and not also a contract. It is equally untenable to persist in denying resort to the full armoury of remedies ordinarily available to redress repudiation of covenants, merely because the covenants may be associated with an estate in land.

[414] One of those "remedies ordinarily available to redress repudiation of covenants" was allowing litigants to rely on After Alleged Grounds. Over one hundred years ago the reliance on After Alleged Grounds was already a "long established" right under contract law. In *Taylor v Oakes, Roncoroni & Co* (1922), 127 Law Times 267, at p 269, the Court said:

> It is a long established rule of law that a contracting party, who, after he has become entitled to refuse performance of his contractual obligations, gives a wrong reason for his refusal, does not thereby deprive himself of a justification which in fact existed, whether he was aware of it or not.

Therefore, that "long established rule of law" is available to the Tenant here.

[415] Also contrary to the Landlord's argument above, the availability of this long-established rule of law is not limited to contracting parties who were unaware at the time of the facts giving rise to the additional ground. As the Court in *Taylor* said, the aggrieved party is not deprived of a justification "whether he was aware of it or not". That quote above from *Taylor* was repeated

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with approval, and relied upon, in *Potter*. Elsewhere in *Potter* the point is again made, saying (my emphasis added): "... even if he was unaware of it at the time" (at para 171). As Justices McLachlin and Cromwell reasoned in *Potter*, having to be unaware of the ground at the time, to be able later to rely on it at trial, would incent a breaching party to conceal the truth and "Happily, the authorities do not support that unattractive position" (at para 173).

[416] A party may be permitted by the trying court to raise and rely on a new ground as late as at trial, by amending its pleading to accord with the trial evidence. The Supreme Court of Canada in *Lake Ontario Portland Cement Company Limited v Groner*, [1961] SCR 553, at p 563-564, said "…that it was first pleaded by way of an amendment to its defence at the trial does not, in my opinion, detract from its validity as a ground …." See also an Alberta appellate decision: *Aspinall v Mid West Collieries*, [1926] 3 DLR 362, [1926] 2 WWR 456 (ASCAD).

[417] Therefore, and subject to the Heisler Exception that I discuss next, the Tenant is not deprived of any of its rights under the Lease as grounds for terminating the Lease merely because they were not all particularized in its Termination Letter. The Tenant may rely on all such rights. It may rely on factual grounds that it learned of after termination and factual grounds it knew prior but did not refer to in its Termination Letter.

[418] The permissibility of relying on After Alleged Grounds is subject to an exception. It is stated this way in *Heisler v Anglo-Dal, Ltd*, [1954] 1 WLR 1273, [1954] 2 All ER 770 (CA), at p 773:

> This rule is, however, subject to a proviso. If the point not taken is one which if taken could have been put right, the principle will not apply.

[419] That "proviso" is what I earlier defined as the Heisler Exception. It was acknowledged in Justice Cromwell and Chief Justice McLachlin's concurring reasons in *Potter*, at para 176. There Justice Cromwell wrote:

> This principle must be qualified in certain situations, such as the case in which the ground advanced is one that, had it been advanced at the time, could have been corrected by the other party: see *Glencore*. But those sorts of qualifications of the principle are not relevant here. See also *Universal Cargo Carriers*, at p. 89; *Scandinavian Trading Co. A/B v. Zodiac Petroleum S.A.*, [1981] 1 Lloyd's Rep. 81 (Q.B.), at p. 90.

[420] This proviso in *Heisler* has been referred to in AG Guest, ed, *Chitty on Contracts*, 25th ed (London: Sweet & Maxwell, 1983) at 882-83, which was then relied upon in *Walker v Blades*, 2007 BCCA 436, at para 24:

> […] a party cannot rely on a ground which he did not specify at the time of his refusal to perform "if the point which was not taken could have been put right."

[421] The Landlord says that by terminating the Lease without telling it of the After Alleged Grounds, the Tenant denied it the right to make those grounds right and the law estops the Tenant from now relying on those grounds. In effect, it says that "if it had only known" the Tenant's concerns, it could have put them right and avoided Lease termination. The Landlord says that under the Heisler Exception, therefore, the Tenant cannot rely on its After Alleged Grounds for terminating the Lease.

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[422] On the surface that is correct on the law. However, its application in this case misses the point of the Heisler Exception. The Landlord has not been taken by surprise. The Landlord did know the factual grounds of the Tenant's termination, just not (perhaps) the specific Lease clauses triggered by the factual grounds. The Landlord has not been prejudiced by first hearing of the After Alleged Grounds after it was too late to prevent termination. The After Alleged Grounds are the Tenant's belief about additional Lease consequences, beyond the ones it expressly referred to in the Termination Letter, but they are all consequences of the same thing, the Landlord's failure to remove or even plan to remove all the SAF from the Building, but instead impose restrictions on the Tenant, interfering with its use, to manage the SAF in place.

[423] If before terminating the Lease, the Tenant informed the Landlord of these specific new Lease clauses allegedly breached, nothing would have changed. The only solution satisfactory to the Tenant of the grounds identified in the Termination Letter and the After Alleged Grounds was removing all the SAF while the Building was empty. Nothing else in the Tenant's eyes would constitute the Landlord performing its unmet obligations under the Lease. If that was done then the basis for the entirety of this action, save perhaps the breach of good faith claims, would have resolved; the After Alleged Grounds would be without further foundation. But the Landlord *was* put on notice by the Tenant this was its requirement back in March 2018, not for the first time after termination. The Tenant repeated that Ultimatum many times between March 2018 and its Termination Letter. The Landlord had ample notice of this basis for the Tenant's complaint against the Landlord. The Landlord had ample notice of what the Tenant thought was needed to make things right. The Landlord was not denied opportunity to do that. It declined the opportunity to remove all the SAF from the Building unless the Court in the Declaratory Proceeding determined the Lease required it to do so.

[424] Therefore, the Landlord has not been prejudiced in fact, by having no opportunity to make right the alleged deficiencies in the way the Heisler Exception is designed to protect against. I consider the Heisler Exception inapplicable in these circumstances. The Tenant may rely on all its After Alleged Grounds for terminating the Lease.

4. Express Right of Termination Clause 17

[425] The Lease contains an express right to terminate, in clause 17. It is available to both parties. It is a "damage and destruction" clause. The Tenant says its termination was a valid exercise of this right. The Landlord says it was not.

[426] The right to terminate is stated in the first sentence of sub-clause 17(b). It becomes available when the premises are rendered unfit for the Tenant`s occupancy. Clause 17 of the Lease reads in entirety [bold italics added, for reasons explained after the excerpt]:

> **17. DAMAGE OR DESTRUCTION**
>
> It is understood and agreed that if during the Term of this Lease the Project shall be damaged or destroyed, ***or otherwise rendered unfit for occupancy by the Tenant***, then and in each such event the following provisions shall have effect:
>
> **(a) Partial Damage to the Leased Premises**
>
> If the Leased Premises are rendered partially unfit for occupancy by the Tenant, ***whether due to damage or destruction, or due to the failure of Base Building***

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Services, or due to inaccessibility to the Leased Premises due to emergency, health, safety or other reasons, the Annual Rent and the Additional Rent hereby reserved shall abate in part only in the proportion that the part of the Leased Premises rendered unfit for occupancy bears to the whole of the Leased Premises or if the Leased Premises are rendered wholly unfit for occupancy by the Tenant the Annual Rent and Additional Rent hereby reserved shall be suspended, in each case until the Leased Premises have been rebuilt and/or repaired or restored as set out in subclause 17(e).

(b) Damage to Project and Right to Terminate the Lease

If the Project shall be incapable in the opinion of the Landlord's Architect of being rebuilt and/or repaired or restored with reasonable diligence, within ***one year*** of the happening of such destruction or damage ***("Major Damage")***, such opinion of the Landlord's Architect to be communicated by the Landlord to the Tenant within thirty (30) days of the happening of such destruction or damage, then either the Landlord or the Tenant may, at its option, terminate this Lease by notice in writing to the other given within thirty (30) days (the "Notice Period") of the day of the delivery of the opinion of the Landlord's Architect. In the event of such termination notice being so given this Lease shall cease and become null and void from the date of such destruction or damage (or to the date of surrender if and to the extent the Tenant has continued to use all or a portion of the Leased Premises for the conduct of business after the date of such destruction or damage) and the Tenant shall surrender the Leased Premises within one hundred twenty (120) days and all interest therein, other than its Trade Fixtures and equipment, to the Landlord and the rent and all other monies payable hereunder shall be apportioned and shall be payable by the Tenant only to the date of such destruction ***or damage (or to the date of surrender if and to the extent the Tenant has continued to use all or a portion of the Leased Premises for the conduct of business after the date of such destruction or damage)*** and the Landlord may re-enter and repossess the Leased Premises. However, if within the Notice Period, neither the Landlord nor the Tenant shall give notice terminating this Lease, then upon the expiration of the Notice Period the Landlord shall with reasonable diligence proceed to rebuild and/or repair or restore the Project subject to subclause l7(e). ***In the event such termination notice is given by the Tenant and such Major Damage has occurred on or before December 3l, 2016, then any Tenant Allowance previously paid to the Tenant shall be repaid to the Landlord:***

> ***(i) to the extent such Tenant Allowance had not been used to pay for New Leasehold Improvements at the time such Major Damage occurred or is required to be paid by the Tenant to third parties pursuant to obligations relating to the proposed New Leasehold Improvements, (in which case such payment shall be paid on the effective date of termination of this Lease); and***
>
> ***(ii) to the extent the Tenant recovers insurance proceeds arising from the loss of Leasehold Improvements, provided that the amount paid to the Landlord shall be prorated based on the amount of the Tenant Allowance previously paid to the Tenant***

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(and not repaid to the Landlord pursuant to subclause l 7(b)(i)) compared to the amount expended by the Tenant in respect of the New Leasehold Improvements (in which case such payment shall be made forthwith following receipt of such insurance proceeds).

(c) Restoration and Repair of the Project

If the Project is capable, in the opinion of the Landlord's Architect, of being rebuilt and/or repaired and restored with reasonable diligence within one year of the happening of such destruction or damage, such opinion of the Landlord's Architect to be communicated by the Landlord to the Tenant as set out in subclause l7(b), then the Landlord, with reasonable diligence, shall proceed to rebuild and/or repair and restore the Project subject to subclause l7(e). Provided, however, that if it shall require less than one year and more than one hundred twenty (120) days to rebuild and/or repair and restore the Project and such destruction or damage shall have occurred within the last two (2) years of the Term, the Landlord shall not be obligated to rebuild and/or repair and restore the Project.

(d) Carry Out Repair Diligently

If, pursuant to the provisions of this clause, the Landlord shall be obligated to expeditiously rebuild and/or repair and restore the Project, such rebuilding and/or repair shall be commenced promptly and shall be completed with reasonable diligence so as to rebuild and/or repair and restore the Project as soon as is practical in the circumstances.

(e) Landlord's Obligation to Repair and Restore

It is expressly understood and agreed that the obligation of the Landlord to expeditiously rebuild and/or repair or restore the Project shall include all structural elements thereto and Project systems therein but shall not extend to or be deemed to include the rebuilding and/or repair and restoration of any alterations, additions, extensions, equipment or installations existing prior to such damage or destruction and made by or for the Tenant upon the Leased Premises. The Tenant shall expeditiously rebuild and/or repair and restore the Leased Premises in accordance with this Lease and Annual Rent and Additional Rent hereunder shall be deemed to commence on that date which is the shorter of:

(i) 60 days following the date of delivery to the Tenant of written notice from the Landlord that the Leased Premises are ready for the Tenant to commence its repairs to the Leased Premises pursuant to its obligations under this Lease; or

(ii) the date the Tenant finishes such repairs, the intention being that the Tenant shall have a fixturing period equal to the shorter of the time periods in clauses (i) and (ii) above to complete its repairs without the payment of Annual Rent and Additional Rent relating to Operating Expenses and Property Taxes.

(f) Use of Insurance Proceeds

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> The Landlord agrees with the Tenant that if any mortgage, trust deed or any other financial charge or encumbrance with respect to the Landlord's interest is at any time registered against the title to the Project, or any portion thereof, while this Lease is in force and effect, the Landlord shall require the holder of any such mortgage, trust deed, or other financial charge or encumbrance to first agree in writing directly with the Tenant and with the Landlord by way of agreement acceptable to the Tenant, to permit the use of all proceeds of insurance payable in connection with any loss or destruction to the Project for repair and reconstruction of the Project in accordance with the provisions of this Lease. The Tenant shall use the proceeds of its insurance (or what it would have received if it maintained insurance as required under this Lease) to repair the Leased Premises.

[427] The portions in bold italics above highlight the new words the parties agreed to add when forming the Amended Lease, that differed from their original lease.[22] Except for where "one year" in sub-clause 17(b) replaced "180 days" in the initial lease, all the italicized words do not replace other words but are additional inserted words. These inclusions assist in understanding the parties' intention for their new clause 17.

[428] Clause 17 can be summarized as follows [underlining in the quotes added]:

- The threshold words in the preface that govern its operation provide that "if during the term of this Lease the Project shall be damaged or destroyed, or otherwise rendered unfit for occupancy by the Tenant, then and in each such event the following provisions shall have effect". Therefore, despite the heading for the Clause, it is more than just a "Damage and Destruction" clause.

- Sub-clause 17(a) provides for a full or partial abatement of rent when the premises are rendered unfit for occupancy "whether due to damage or destruction, or due to the failure of Base Building Services, or due to inaccessibility to the Leased Premises due to emergency, health, safety or other reasons". The term "Base Building Services" is defined in Schedule A to comprise the heating, ventilation, air-conditioning, electrical, mechanical, plumbing, fire, security, and safety systems, as well as the washrooms, elevators, escalators, and stairwells.

- Sub-clause 17(b) provides that, if the Landlord's architect determines that the Building is incapable of being restored "within one year of the happening of such destruction or damage ("Major Damage")", both the Tenant and the Landlord have a right to terminate the Lease. If neither party exercises their termination right, sub-clause 17(b) further provides that the Landlord is obligated to complete the necessary restoration work with reasonable diligence.

- Sub-clause 17(c) provides that, if the opinion of the Landlord's architect is that the Building can be restored within one year, the Landlord is obligated to complete the restoration work with reasonable diligence. The Landlord is not however obligated to complete the restoration work if the work will take more than 120 days in the opinion of the Landlord's architect, and the damage or destruction occurs within the last two years of the lease term.

[22] I consider the original lease, as relevant context known to both parties, to be a permissible extrinsic aid in interpreting the Amended Lease. I am not alone in this view: see e.g., *Resolute*, at paras 30–31; *Homes of Distinction (2002) Inc v Adili*, 2022 ONCA 64, at paras 12–13.

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- Sub-clause 17(d) provides that the Landlord must complete any work that is required under clause 17 (i.e., under sub-clauses 17(b) and (c)) "as soon as is practical in the circumstances."
- Sub-clause 17(e) generally provides that the Tenant is responsible for restoring any leasehold improvements. Additionally, sub-clause 17(e) provides that the rent abatement shall cease upon the earlier of 60 days after the Landlord provides notice to the Tenant that it can begin its restoration work and the date on which the Tenant completes that work.
- Finally, sub-clause 17(f) provides that if any mortgage or other interest is registered against the property, the Landlord must make an agreement with the holder of the mortgage or other interest that any insurance proceeds resulting from the damage or destruction of the Building will be put towards the restoration work. Additionally, sub-clause 17(f) provides that the Tenant must use the proceeds from its insurance to complete the restoration work required under clause 17.

[429] The Tenant argues the termination right in sub-clause 17(b) was triggered by the discovery of asbestos in the SAF, rendering the premises unfit for its occupancy within the meaning of that phrase in clause 17. The necessary restoration work—which the Tenant says is the removal of all SAF—was not completed within one year and could not have been completed within one year even if the Landlord had attempted to do so.

[430] The Landlord says the clause 17 right to terminate is not available in circumstances such as these and, in any event, the Tenant has not proven the prerequisites to be able to rely on it.

[431] For the reasons that follow, I conclude this termination right can be available in cases of the discovery of ACM releasing asbestos fibres where there is a risk of human inhalation. I conclude that it was not available to the Tenant in the circumstances of this case; the Tenant has failed to demonstrate on balance that the Building was, or was on a certain pathway to inevitably become, unfit for its occupancy. No restoration is required as contemplated by clause 17. But nonetheless the Landlord was required to procure the opinion of its architect on the duration of such restorative work.

a) Law Relevant to Lease Termination in the Event of Unfitness

[432] As explained above, interpreting the effect of a clause that expressly entitles a party to terminate a lease follows the same principles of contractual interpretation that are described above.

[433] At common law, a tenant is generally not entitled to terminate a lease, or even to an abatement of rent, if the leased premises are destroyed or otherwise rendered unfit for occupancy: *Marvin Investments Ltd v Manitoba*, 2001 MBCA 133, at para 7; *Shun Cheong*, at paras 7–8; Bentley, McNair, & Butkus, at §6:50 & §6:52.

[434] In the residential tenancy context, this rule has been abrogated by statute: *Residential Tenancies Act*, SA 2004, c R-17.1, s. 40(1).

[435] In the commercial tenancy context, the common law rule continues to operate. Against this backdrop, many leases contain a provision, typically referred to as a "damage and destruction clause" or a "fire clause," that provides for a rent abatement and, in certain circumstances, the right to terminate. That name for the clause continues to be used, even though in the last number of decades the wording focuses more on the "unfitness" effect of a cause than

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the kind of cause or its momentary or sudden nature. More recently, the damage and destruction clauses in some leases that have come before the courts have begun to focus on the "unfitness" of the premises not on whether an enumerated calamity has befallen the building.

[436] The term "untenantable" is generally understood to be synonymous with the phrase "not fit for occupancy": *Black's Law Dictionary*, 12th ed (Eagan, MN: Thomson Reuters, 2024) (defining "untenantable" as "not fit for occupancy"), cited with approval in *Pentagon Investments Ltd v Canadian Surety Co* (1991), 108 NSR (2d) 148, at para 117 (NSSC), aff'd on other grounds 1992 NSCA 55.

[437] The exact language used to describe whether the clause is triggered varies from lease to lease. Some versions of the clause apply when the premises are "unfit for occupancy" or "not fit for occupancy": see e.g., *Beantrends Inc v 1658277 Ontario Ltd*, 2019 ONSC 2646, at para 12; *Bassiouny v Lo* (2008), 173 ACWS (3d) 1209, at para 17 (ONSC); *Broadway Melody Music Ltd v Williams Roofing & Sheet Metal Ltd* (1991), 24 ACWS (3d) 852, at para 53 (BCSC). Other versions of the clause apply when the premises are "untenantable": see e.g., *United Cigar Stores Ltd v Buller & Hughes*, [1931] 2 DLR 144, at p 145 (ONCA); James DM Fraser & Lawrence H Iron, *Commercial Tenancies - Canadian Forms & Precedents* at §3F6 (Real Property Association of Canada National Standard Office Lease for Multi-Building Projects). Finally, yet other versions of the clause apply when the premises cannot be used for the tenant's business: see e.g., *Broadway - Heb Property Inc v Renegade Productions Inc*, 2019 BCSC 1693, at paras 18–20; *Short Forms of Leases Act*, RSO 1990, c S11, schedule B, cl 11 (referring to the leased premises being rendered "unfit for the purposes of the said lessee").

[438] Most of these cases canvassed, in which the terms "untenantable" and "unfit for occupancy" have been considered, do not refer to a commonly accepted test. Most present the specific facts of the case before them and make their ruling, without amplifying the test being applied or following a leading case. The few that articulate a test indicate a high bar is required for leasehold premises to be found unfit. In *United Cigar Stores*, in the context of a damage and destruction clause that referred to the leased premises being "untenantable and incapable for use and occupancy by the lessee," the Court defined "untenantable" as meaning that the leased premises cannot be used "not only with safety, but with reasonable comfort, by the class of persons by whom, and for the sort of purposes for which, they were to be occupied": at p 147; see also *Cyclone Woven Wire Fence Co Limited v Canada Wire and Cable Co Limited*, [1920] OJ No 400 (QL) at para 11 (ONSC) aff'd [1920] OJ No 247 (QL).

[439] The most commonly adopted definition of the terms "untenantable" and "unfit for occupancy" in the U.S. authorities is that the leased premises cannot be used for the purpose for which they were leased and cannot be restored without unreasonable interruption of the tenant's use of the premises: see *Flores v Allstate Texas Lloyd's Co* (2002), 229 F Supp (2d) 697, at p 700 (U.S. District Court for the Southern District of Texas) and the authorities cited therein. Clause 17 of the Lease follows this approach but specifies the duration of permissible disruption to occupancy, not leaving it to when it crosses the more nebulous "unreasonable" line. The Lease sets that length of time at one year from the Building being rendered unfit for the Tenant's occupancy, in this case by reason of being inaccessible safely: sub-clause 17(b).

[440] A variant of this test has been followed in some New York cases, that say the premises must be shown to be unusable "lawfully, safely and practically" for the purposes contemplated

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by the lease: see e.g., *Old Line Co v Getty Square Dept Store* (1971), 322 NYS (2d) 149, at p 152 (City Court, City of Yonkers, NY).

[441] Notwithstanding these variations in the wording, the standard to be applied is generally the same, absent some clear indication that the parties intended that a different standard would apply.

[442] The pivotal wording in the Lease is found in the prefacing words of clause 17, which states "unfit for occupancy by the Tenant". This is one of the two pre-conditions to the termination right being available to either party. The second is the opinion of the "Landlord's Architect" that the resulting work to restore or remedy the premises, done diligently, will require more than a year.

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b) The discovery of asbestos *can* trigger the termination right in sub-clause 17(b)

[443] The parties disagree on whether the termination right in sub-clause 17(b) may be triggered at all in a case like this. The Landlord says that sub-clause 17(b) only applies to an event of "major destruction or damage" and that based on the ordinary meaning of those words, an event of major destruction or damage would not occur upon the discovery of latent asbestos. The Landlord points out that while the preface and sub-clause 17(a) both refer to the premises being "rendered unfit for occupancy," sub-clause 17(b) that contains the termination right only refers to "destruction or damage." The Landlord also argues that the express treatment of hazardous substances elsewhere in the Lease constitute a complete code on the matter, such that clause 17 does not operate when hazardous substances are involved.

[444] The Tenant says the termination right in sub-clause 17(b) applies also to the discovery of asbestos, for several reasons. First, the Tenant points to both the preface of clause 17, which refers to the Building being damaged or destroyed "or otherwise rendered unfit for occupancy by the Tenant", and the first sentence of sub-clause 17(a), which enumerates specific examples of causes for the Building being "otherwise" unfit, including "due to inaccessibility to the Leased Premises due to emergency, health, safety or other reasons" (Tenant's underlining), which it says occurred here. Second, the Tenant points out that the preface refers to the "following provisions" [that is, sub-clauses (a) through (f)] being applicable when the Building is rendered unfit for occupancy, which it says suggests that all the provisions of clause 17, including sub-clause 17(b), apply when the Building is rendered unfit for occupancy, even if this does not result from damage or destruction. Third, the Tenant points to the term "rendered" in the preamble and in sub-clause 17(a), and the term "happening" in sub-clause 17(b), which it says suggest that the clause was intended to have a broad temporal application, not just for sudden events. Finally, the Tenant points to the reference to "such destruction or damage" in the first sentence of sub-clause 17(b), which it says was intended to refer to the triggering events enumerated in both the preamble and sub-clause 17(a).

[445] The Tenant's conclusion is correct. For the following reasons the discovery of latent asbestos may trigger the termination right in sub-clause 17(b).

[446] First, the core subject matters of the hazardous substance provisions of the Lease and of the damage and destruction provisions are completely different. They target very different concerns of the parties. The hazardous substance provisions relate to the parties' roles in the management, handling and removal of any hazardous substance. The damage and destruction provisions relate to whether the Lease will continue to bind the parties when the premises will be

unavailable for more than a year, whether the Landlord must incur the cost of restoring the Building and whether the Tenant must pay rent once the Building is restored. It applies whenever the Building is rendered unfit for the Tenant's occupancy, regardless of cause. Wording in clause 17 expressly mentions as possible causes "health and safety" reasons. Therefore, the Lease provisions addressing hazardous substances do not oust the operation of clause 17 here.

[447] Second, in those prefacing words to clause 17, the parties changed the threshold that had to be met before the termination right that follows in clause 17 could operate, from the cause of the Building's condition to the condition itself. The parties in their original lease listed two causes that could trigger the remainder of clause 17 taking effect: damage and destruction. In the Amended Lease the parties moved off of *whether* an event of damage or destruction had occurred, to the *effect* of such an event upon the Building – now from any cause. It no longer mattered what may have caused the current state of the Building. The new test the parties agreed upon is whether the premises have been rendered unfit for occupancy by the Tenant. The parties did this by adding the broadening words "or otherwise rendered unfit for occupancy by the Tenant." By saying "or otherwise" the parties indicate the aspect of the first two words (damaged or destroyed) they intend. They mean those words as effects, not as events of calamity. It is the result of such events that may trigger the rights in clause 17, now including also any other cause that would "otherwise render the premises unfit" for the Tenant's occupancy.

[448] The trigger now under the Amended Lease is unfitness for occupancy by the Tenant, not whether one of a few select forms of calamity may have befallen the Building. It is no longer occurrence-based or event-based but effects-based. In sub-clause 17(b), the wording for when the termination right may be triggered does not revert to occurrence based. That would take very express wording to have that effect, which was not used.

[449] Third, the role of the phrase "such destruction or damage" in sub-clause 17(b) is not to exclude the termination right for the new added reasons, i.e. for unfitness caused by reasons other than damage or destruction, but rather to identify the start date for determining the temporal aspect of the termination right trigger. That was the role of the identical reference in the original lease also – notably *before* the phrase in the preface to clause 17 ever existed that changed it to effects-based. The parties chose to retain the short form reference "such damage or destruction" not to exclude the expansion to its scope but to refer to the fuller expanded meaning they added in the Amended Lease. It appears that they considered the shorter reference in the first lease sufficed for that purpose, and I agree.

[450] The role of the comparable phrase in sub-clause 17(a) is not to facilitate any new category of unfitness for differential treatment. In sub-clause 17(a) the parties articulate what it would take to satisfy the "otherwise rendered unfit for occupancy by the Tenant" category in the preface, when emergency, health, safety or other reasons affect its fitness for the Tenant's occupancy. They say the test for unfitness in those circumstances, when the Building may not be visibly physically damaged like if it was "damaged or destroyed" (the clause 17 preface), is "inaccessibility to the Leased Premises". That's how the parties agreed they would gauge whether the premises have been rendered unfit in those new triggering circumstances. The purpose of sub-clause 17(a) is not to create a separate, lesser or different category to the unfitness category in the preface, but to agree in advance on what unfitness will look like in

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those foreseeable manifestations (“emergency, health, safety or other reasons”) of their new “otherwise unfit for occupancy by the Tenant” category.

[451] This conclusion is affirmed by noticing in sub-clause 17(a) that the parties do not use the word “such”. They do not say “such” damage or destruction there, as they do in sub-clause 17(b). I infer that sub-clause 17(a) is not a reference to the full category in the preface of things that may trigger the termination right, like it is in sub-clause 17(b). Instead, in sub-clause 17(a) the parties describe the circumstances when the test for unfitness would be met (circumstances of “emergency, health, safety or other reasons”); they do not create a separate, lesser or different category of unfitness.

[452] Fourth, on a plain reading, the phrase “such destruction or damage” in sub-clause 17(b) refers to the full category described in the prefacing words, not a sub-set of them. There is no wording in either sub-clause 17(a) or (b) to suggest either of them limits the generality of the prefacing words to clause 17. Conversely, the Landlord’s position is that sub-clause 17(b) is a self-contained provision that is extricable from the preamble. But sub-clause 17(b) would be essentially inoperative and unintelligible if it were read in isolation from the preamble.

[453] Further, the preface provides that if the premises are rendered unfit for occupancy by the Tenant, then “the following provisions shall have effect”. It does not say ‘the following provisions except sub-clause 17(b)’ shall have effect. Sub-clause 17(b) does not say ‘notwithstanding the generality of the prefacing words’ or anything like that. So long as the premises have been rendered unfit for the Tenant’s occupancy, by whatever cause, sub-clause 17(b) termination becomes available, along with all the other sub-clauses of clause 17. An interpretation of sub-clause 17(b) that ignores the language used in the preface would be inconsistent with the principle that a contract should be interpreted in a manner that does not render some contract language inoperative. An interpretation that gives effect to all not just some wording is to be preferred over one that does not.

[454] Still further, in the prefacing words no limit is placed on what may cause the unfitness. The express mention of some examples in sub-clause 17(a) does not mean that the absence of those examples in sub-clause 17(b) intended their exclusion. If the parties intended that result, then they would have used, and would have to have used, express wording to override the generality of the unfitness test described broadly in the preface.

[455] Fifth, the parties did not add the defined term “Major Damage” in sub-clause 17(b) to exclude causes other than damage or destruction from triggering the termination right but to find a short form for the phrase in the preface, for ease of later drafting and reading. “Major Damage” is the parties’ short form for “such damage or destruction”, for their ease of reference thereafter. That short form is then used in the lengthy additions to the end of sub-clause 17(b). It facilitates their drafting around how they chose to address the effect of a termination under sub-clause 17(b) before December 31, 2016, a short time after the Landlord will have just granted the “Tenant Allowance” for “New Leasehold Improvements”, which were very substantial rent reductions over those early years into the Lease term, before the Landlord would be able to recover it over some or all of the remaining term of the Lease, depending on how it may have chosen to amortize the rent credit. It has nothing to do with any intention to exclude certain causes of occupancy unfitness from the right to terminate.

[456] Sixth, the Landlord’s interpretation is implausible commercially. The sub-clause 17(b) right to terminate is a right exercisable by both Tenant and Landlord. One might expect tenants

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to be motivated to terminate in a situation like this case, when considerable time remains on the term of the Lease over which, if it had no right to terminate, it would have to endure over a year of disruption to its business, loss of its 'venue good will', distraction of its workforce – especially those in its workforce who would be preoccupied in planning and overseeing the logistics of all the transitions, as the Landlord proceeds to "rebuild and/or repair and restore" the Building. Tenants would not want to forgo the exit option just because the cause of the unfitness for occupancy was not the result of some calamitous event of damage or destruction.

[457] Reciprocally, one might expect landlords to be motivated to terminate in identical circumstances towards the end of a lease term, to avoid the significant cost of rebuilding suitable for the current tenant, when they may soon not renew and vacate. That is, a landlord may prefer to not expend significant funds that could not be fully recovered from a brief period of further rent revenue. The cause of the unfitness would not matter to a landlord in that situation. Landlords would not want to be obliged to restore such major damage just because it was not the result of some calamitous event of damage or destruction.

[458] It would not make commercial sense for either party to forego the termination option just because the Building was rendered unfit for the Tenant's occupancy for some reason other than damage or destruction. For that reason, the Landlord's interpretation is commercially implausible.

[459] Seventh, whatever else may have been intended by the parties for including in sub-clause 17(a) expressly that "inaccessibility to the Leased Premises due to emergency, health, safety or other reasons" would constitute "unfitness for occupancy by the Tenant," in doing so they made it clear they agreed the Building *could be* rendered unfit for the Tenant's occupancy for emergency, health, safety or other reasons.

[460] Therefore, reading sub-clause 17(b) in the context of the Lease as a whole, in the context of the original lease the parties were working from in forming the Amended Lease, and recognizing commercial realities, by clause 17 the parties agreed that the discovery of latent asbestos could trigger the termination right of both parties in sub-clause 17(b).

[461] I find, further, that the presence of asbestos in this Building could result in it being inaccessible by reason of health risks within it, and therefore unfit for occupancy as the phrase is used in the preface to clause 17. For relevant example, it could be so if the Building contains forms of harmful asbestos that is respirable by its occupants in concentrations and/or durations of demonstrated health concern. As I explain in the Facts above, and also in the next section, the Building does not contain asbestos fibres accessible to inhalation by occupants in concentrations of demonstrated health concern regardless of duration.

c) The termination right in sub-clause 17(b) was not triggered here

[462] The Landlord advances several arguments in support of its position that the premises were safe for occupancy. First, the Landlord points to the great many internal communications by the Tenant to its employees and its Board after the discovery of the asbestos, all of which assured their target audiences that the premises were safe to occupy. Second, the Landlord points to the many communications that the Tenant received from its environmental consultants, as well as the evidence of experts at trial, that suggested that the premises were safe to occupy. Third, the Landlord submits that no evidence was adduced at trial suggesting that the concentration of asbestos in the air ever exceeded a tiny fraction of the OEL under the *OHS*

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Code or that the concentrations of asbestos in the air were unsafe by any other measure recognized in Alberta. Finally, regarding the Tenant's alternative position that the premises were unfit for occupancy because they will become unsafe to occupy in the future, the Landlord responds that speculation about the future condition of the Building cannot trigger the termination right in sub-clause 17(b).

[463] In response, the Tenant argues that the first of these Landlord reasons is irrelevant to the trial question of whether the Building was unfit for the Tenant's occupancy within the meaning of clause 17. I agree. Just because the Tenant told its employees the Building was safe to occupy did not make the Building safe to occupy or prove that it was in fact safe. One of the parties' opinions on the question is not dispositive of it, nor alone terribly relevant. The question for the Court is whether *in fact* the Building was unsafe, thereby rendering it unfit for the Tenant's occupancy. For this the Court weighs the probative trial evidence.

[464] The Tenant says that, in any event, those internal staff communications were only about the immediate moments they were spoken or that they issued, and did not account for either long-term safety risks or, if the Landlord was not going to remove all the SAF, the expected disruption from all the measures necessary to maintain the safety of the premises found in the AMP.

[465] The Tenant says the standard of "unfit for occupancy" governs not, as the Landlord says, "unsafe for occupancy", and that "unfit" is broader and more onerous for the Landlord. Next the Tenant says the trial evidence proves the opposite to what the Landlord suggests; the Tenant says it has proven that the premises were wholly unfit for safe occupancy and that human health risk to its staff escalates the longer the Tenant remained in the Building.

[466] The Tenant is correct that, as I described in the previous section, the first of the two preconditions to either party exercising the right of termination is that the premises are unfit for occupancy, not unsafe for occupancy. The category of unfitness for occupancy is broader than being unsafe for occupancy. Premises may be safe but still unfit for the purposes of a particular tenant's occupancy. For example, a greenhouse may be safe to occupy but no longer fit after the landlord replaces panes of exterior glass with wood.

[467] However little turns on this distinction in this case. Here, the Tenant alleges a health and safety impediment. The Lease, at sub-clause 17(a), tells us that the way to know if the premises are unfit for occupancy for a health or safety reason is to see if they are inaccessible. So, in this case, unfitness in other ways does not assist the Tenant. For its allegation of a health and safety issue with the premises, the Tenant must show inaccessibility.

[468] The Tenant has not offered evidence of unfitness for its occupancy for any cause unrelated to the asbestos fibre release. If it had alleged and offered evidence of some other ground(s) for unfitness than a human health and safety ground (perhaps for example flood damage or perhaps a complete breakdown of "Base Building Services"), then the broader scope to "unfitness for [the Tenant's] occupancy" could be satisfied without the Tenant demonstrating that the Building could not be accessed safely. But it did not. The Tenant's allegation, and the evidence it adduced, all relate to a health and safety reason for terminating.

[469] The test here is whether the Building is inaccessible for health or safety reasons. It is a more objective test than general unfitness for the Tenant's purposes, but not necessarily a more stringent one. It lends the parties a greater degree of certainty than unfitness *simpliciter*, but the

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approach to unfitness in the law already sets a fairly high bar. The more objective "inaccessibility" language is nevertheless consistent with the meaning ascribed to the unfitness concept as it is applied in the case law. Use of the term "inaccessibility" supports the inference that "unfit for [the Tenant's] occupancy" sets a high standard.

[470] To access the right to terminate under clause 17, the Tenant must first demonstrate on balance that the premises are in fact inaccessible, which it has failed to do. The premises were not unfit for occupancy at any time. Even EcoAbate never said they were unsafe or unfit for occupancy at the time. Accordingly, they were not unfit at the date of termination. Nor were they, as the Tenant implies, on their way to becoming unfit for its occupancy before the end of the Lease term – because it says the SAF is deteriorating, releasing asbestos fibres, and the Landlord refuses to ever remove it. I have found the premises were not rendered unfit at the time and they are not more likely than not to be rendered inaccessible going forward even if the Landlord leaves all the SAF as it is.

[471] The evidence did not prove on balance that at the date of termination there was any actual, current health concern or safety risk from the almost non-existent concentrations of airborne asbestos fibres found. The evidence did not prove the Building was rendered unsafe in fact; even less was the Building rendered inaccessible safely.

[472] The Tenant says the Building has deteriorating SAF that is releasing asbestos fibres. This risk to human health was far worse, it says, than the premises that the Court found to be unfit in *Beantrends*. In *Beantrends,* there was a smell of natural gas, fire damage in the kitchen, an inoperative sprinkler system and water damage to the ceiling.

[473] I disagree. The few airborne asbestos fibres found in the Building are so rare, and their concentration so low, that regardless of their source the Building is not unsafe to occupy. It is not inaccessible for health or safety reasons. The concentration of airborne asbestos in the Building is less than 1/200,000th of the OEL in the *OHS Code*, and therefore less than 1/20,000th of "air clearance criteria" suggested in the Manual, far below even the precautionary level OHS staff use as a guide. The evidence did not prove on balance that the concentrations of asbestos in the air exceeded, or even came close to, any other widely recognized standard.

[474] In the Building there is not an actual health or safety risk as there was in the *Beantrends* building, with combustible natural gas entering. There is not a risk to safety as there is with an inoperative sprinkler system. There is not a deficiency to the intended use and functionality of the premises as there is with water damage to the ceiling. Unlike in *Beantrends*, the Building is not unfit for, or inaccessible for, the Tenant's occupancy, as is required by clause 17 before either party may terminate the Lease before the end of its term.

[475] The inaccessibility pre-condition to the clause 17 termination right is contextual. The inclusion in clause 17 of the modifier "by the Tenant" in respect of the occupancy impairment, entails a contextual assessment, measured having regard to the parties' agreed uses of the Building by the Tenant. The Building's premises must be inaccessible and thereby unfit for the specific Tenant's use and purposes in the Lease.

[476] The Lease states at sub-clause 15(m) that:

> The Tenant shall use and occupy the Leased Premises for business offices and any ancillary uses in the normal course of the business of the Tenant provided that such uses are permitted by law.

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The Tenant used the Building for its head office, from which it ran its global business of exploring, producing, and marketing oil and gas. To trigger the termination right the Building had to be rendered inaccessible safely *for that use* and thereby unfit for that use. The Tenant has not proven on balance that the Building has been rendered inaccessible for that use.

[477] Also relevant to a contextual assessment is the length of Lease term remaining. The Tenant's use under the Lease had a long runway remaining. In assessing contextually whether the Building was inaccessible, the Court must consider not just the moment of termination but the entire Lease term. The termination right here could have been triggered if the Tenant showed that the Building was releasing asbestos fibres into its air at an accelerating rate, such that the premises were becoming increasingly unsafe and were on a trajectory of becoming inaccessible before the end of the Lease term.

[478] I agree with the Landlord that mere speculation about what the future may hold is not enough to trigger the termination right. But that does not mean clause 17 is only available to the parties after the health or safety of the Building's occupants has become so endangered that it is demonstrably inaccessible. If the state of the Building is headed that way, such that absent intervening remediation or prevention, the Building is inexorably on a path to being inaccessible for health or safety reasons, then the first pre-condition of the termination right is satisfied. In my view of the Lease as a whole, the parties did not require that they each wait until the Building "crossed the line" and became inaccessible safely before the clause 17 termination right could be exercised. It would be enough if the trajectory of increasing concentrations of released airborne asbestos showed on balance the inevitability of losing safe access within the Lease term, *ceteris paribus* (*i.e.* the Landlord's Architect also opining that the Building could not be remedied or restored from the cause of the unfitness for occupancy within one year of when the Building was confirmed to be certain to be headed that way,[23] and the terminating party first giving the counter-party notice and opportunity to "make it right" to avoid the termination, which the other failed to make right[24]).

[479] The Tenant has failed to demonstrate any such trajectory. The Tenant has not shown that the undisturbed SAF has been, or is, deteriorating at all, let alone at an accelerating rate over time. The very few asbestos fibres found over the course of the testing and analysis originated from the Disturbed SAF. The levels are so low the premises are not presenting of any safety concern to its occupants. The Tenant has not shown the Building to be on its way to becoming inaccessible for health of safety reasons. The Tenant's claim that the Building's present condition rendered it unsafe to access, or that it is headed that way before the Lease term expires, and is therefore unfit for its future occupancy, was speculative and, I find, not borne out by the evidence.

[480] If the undisturbed SAF contained much higher concentrations of amphibole asbestos, then the frequency of its disturbance for the Tenant's pattern of ongoing alterations and periodic renovations might pose a greater risk of the release of asbestos fibres at unsafe levels. However, even if that were the case, now that the SAF is known to be ACM, compliance with section 35 of the *OHS Code*[25] will fully avoid that risk. In addition, the precautions in the Landlord's AMP

[23] Discussed below under the next sub-heading.
[24] Referring to the *Heisler* exception discussed above.
[25] Section 35 of the *OHS Code* is discussed in the next section of this judgment but, for convenience, states:

> 35 If a building is being altered or renovated, the employer must ensure that materials in the area of the alterations or renovations that could release asbestos fibres are encapsulated, enclosed or removed.

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further preclude the possibility of a time in the future before the term of the Lease runs out in which the Building might become unfit for the Tenant's occupancy, again, if the SAF had greater concentrations of amphibole asbestos. At present concentrations this is not a risk.

[481] The Tenant's concern about the future inaccessibility of the Building was and is premised upon a number of errors. It is premised upon, first, the Tenant's belief all the SAF is shedding asbestos fibres that have and will continue to enter the workplace. It is not. The undisturbed SAF is not releasing anything, including asbestos fibres. The asbestos in the SAF remains tightly bound up like hardened cement with the rest of the hardened SAF. It is friable so, as I also explain above, disturbing the SAF in any way breaks or loosens some of those cementitious bonds and presents the risk of asbestos release, though rarely an asbestos fibre release. The few asbestos fibres found in the Building's air originated from the Disturbed SAF, not the undisturbed SAF. Those released asbestos fibres are so infrequent that they have not been shown to come even close to an unsafe level or the OEL.

[482] It is premised upon, second, the belief that the rate of release of asbestos fibres is accelerating such that, while at the time the Tenant represented to its employees the Building was safe to occupy, it soon would not be so. That too was not proven on balance.

[483] It is premised upon, third, the belief the Landlord refused to ever remove all the SAF that is releasing asbestos fibres. That too is not accurate. At the time of termination, the Landlord had intended protective measures by its AMP and it was prepared to do whatever the Court may say is required of it under the Lease and under the law following the Declaratory Proceeding it commenced. In that sense, it was in the process of minimizing the risk of asbestos fibres being released in the Building. It was not refusing to do so.

[484] The Landlord not immediately acquiescing to the Tenant's extraordinary Ultimatum before first verifying the Tenant's claims was not demonstration of any refusal to do what was required. Wilson acknowledged it was what he would also do if the roles were reversed. The Landlord's refusal to yield to the extraordinary Ultimatum was not indicative of any unwillingness to do what was right but was justified resistance to the Tenant's over-reaction to the data and erroneous interpretation of the law.

[485] At no time did the Landlord cease its efforts to retain the Lease in force, to satisfy any reasonable requests of the Tenant. It was the Tenant that went silent for stretches. The Landlord worked to keep lines of communication open with the Tenant. The Landlord remained willing to remove all the SAF if the Court ruling declared it to be required by either the Lease or the legislation.

[486] I disagree also with the Tenant's implication that the termination right had been triggered because under the *OHS Code* the Building was deemed to be in an unsafe condition.

[487] The test for the clause 17 termination right is based on what is in fact the condition of the Building, not what is deemed to be its condition by operation of law. For purposes of this trial, that means determining if the clause 17 termination right has been triggered turns on the science, for which I look to the expert evidence.

[488] Relatedly, the legislation may deem the release of a single asbestos fibre to constitute an "unsafe condition". That does not mean it is an unsafe condition in fact. A deeming rule in legislation cannot "turn fiction into reality": *R v Verrette*, [1978] 2 SCR 838, at p 846.

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[489] In this case, even if the deeming rule in sub-section 31(1) applied, the legislation does not require the employer and owner to stop using the premises, thereby rendering them inaccessible.

[490] Similarly, the Legislature prohibiting the installation of ACM in a form or location from which they may enter an air distribution system[26] is not the same as declaring that absolutely any asbestos already in premises, similarly formed or located, necessarily renders those premises unfit for occupancy.

[491] Rather than agreeing as they did in the Lease that the science would dictate whether the right of termination is available, in it the parties could have deemed the discovery of even a single lone asbestos fibre to be "unsafe" and to trigger a termination right, or 5 of them, or 8 of them, or one of them per 500 air samples per year, or any other such metric they chose. They did not. They agreed that an *actual* safety concern, not a deemed one, would trigger a right to terminate by either party.

[492] The Tenant told its employees many times through the remaining months that they made use of the Building after the new asbestos discovery that it was safe for their occupancy and use. I consider these many statements to accurately reflect the Tenant's view at the time. It was not deceiving its employees. The Tenant persuaded me that it treated all such matters of employee safety as its top priority, after having had to confront the fact its failure to do so in the recent past contributed to two tragic workplace fatalities in the field. The memories of dealing with those losses were still quite recent for Wilson, who at the time met directly with the grieving survivors on behalf of the company and became the target of their raw emotions and reactions. Given that nascent now genuine "Safety First" priority, whereby CNOOC no longer only paid lip service to safety but had been heavily invested in transformative changes so workplace health and safety would become the priority for everyone at CNOOC, I am persuaded the Tenant would not lightly tell its employees the workplace remained safe for them to occupy at the time without first ensuring they believed it was so. As I state above, though, that did not make it so. As it turns out, the trial evidence made it quite clear that it was in fact quite safe throughout that time.

[493] I find the Building was safe to occupy, and fully accessible, throughout the time between the Discovery and the employees moving out, just as the Tenant repeatedly assured its employees. Not a single lay or expert witness who appeared at trial testified that the Building was unsafe or unfit for occupancy. The evidence does not prove on balance any impairment of the Tenant's "safety [and] ... reasonable comfort" in use of the Building.[27]

[494] Before terminating the Lease, the Tenant relocated its entire workforce to the Bow. The Tenant informed the Landlord of the decision to relocate in a September 28, 2018, letter. The Tenant explained that remaining in the Building "poses unacceptable risks, including the short term potential risk prior to abatement activities, and the absolute risks involved during abatement activities." It promised to update the Landlord once it had a "more definitive" timeline for the relocation, so that the Landlord could "promptly initiate the removal of all the hazardous substances within the Nexen tower."

[495] In an earlier letter, on September 5, 2018, the Tenant expressed its position in more dramatic terms. In this letter, the Tenant stated that "[i]t is clear that the level of risk within the

[26] Referring here to section 33 of the *OHS Code*, also discussed in the next section of this judgement.
[27] See in this regard the Quiet Enjoyment section of this judgment, below.

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building is escalating from month to month and week to week as additional hazards our [sic] discovered by our experts" and that "it is clear that the safest course of action would be to vacate." It said having its employees remain in the Building while asbestos abatement work was being completed was "not something we will accept."

[496] At trial, the Tenant said that the relocation was only intended to be temporary, to allow the Landlord to remove all the SAF, which it said could not be done safely while its employees were present in the Building.

[497] After the Tenant withdrew its workforce from the Building, the Building continued to be both fit for occupancy and accessible to the Tenant's workforce. At no time up to the Tenant's termination was the Building unfit or inaccessible for the Tenant's uses that the parties intended when entering the Lease.

[498] My finding the Building was at all times safe for occupancy, and unconditionally accessible, is not based on the assumption the Landlord will first deal with the Disturbed SAF. Even if nothing was ever done in the Plenum with the Disturbed SAF, for example to remove it, enclose it, or encapsulate it, or in some other way address the requirement of section 28 of the *OHS Code*, the threshold in clause 17 of inaccessibility by reason of health or safety condition is still not be made out. The fibre release from the Disturbed SAF is so incredibly infrequent and *de minimis* that even if nothing more was ever done in the Plenum, the threshold for triggering the termination right in clause 17—of an *actual* health-concerning concentration of airborne asbestos fibres, rendering the premises inaccessible safely—would not be met.

[499] The Tenant has failed to prove that the Building is inaccessible for health and safety reasons, or that it is more likely than not to become inaccessible safely before the expiry of the Lease term. I find that the termination right in clause 17 was not triggered; it was not available to the Tenant to exercise in this case.

d) The time to complete the necessary remedial work

[500] The right to terminate in sub-clause 17(b) arises only if each of two pre-conditions exist. The first, discussed above, was not met. The premises were not rendered unfit for the Tenant's occupancy by reason of being inaccessible safely. If they had been, though, a party could still only have a right to terminate if in the opinion of the "Landlord's Architect" the Building was "incapable" of remedy in less than one year from the "happening" of the cause of the damage. That is the second pre-condition. The actual words of that portion of sub-clause 17(b) are, again:

> If the Project shall be incapable in the opinion of the Landlord's Architect of being rebuilt and/or repaired or restored with reasonable diligence, within one year of the happening of such destruction or damage ("Major Damage"), such opinion of the Landlord's Architect to be communicated by the Landlord to the Tenant within thirty (30) days of the happening of such destruction or damage, then either the Landlord or the Tenant may, at its option, terminate this Lease by notice in writing…

[501] The word "happening" is another holdover from the previous calamity-based trigger of the termination right but, for the reasons given above, does not narrow the range of causes of the effect-based trigger: unfitness for the Tenant's occupancy. It is now an effect-based right, despite the continued use of words like "happening" and "event" in clause 17. It appears that the

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Lease writers failed to consider all the wording implications of the parties' agreement to broaden the scope of what may trigger a right to terminate, changing it from calamity-based to effects-based.

[502] The parties define the term "Landlord's Architect" as meaning:

> […] such firm of independent architects, certified to practice in the Province of Alberta, as the Landlord may from time to time engage for the purposes for which the Landlord's Architect is required pursuant to the provisions of this Lease.

[503] The Tenant takes the position that the Building was rendered unfit for occupancy on or sometime after the discovery of the airborne asbestos and the asbestos-containing SAF. It identifies several dates, ranging from November 2017 to August 2018, as feasible dates for when the 30 day and the one-year deadlines in sub-clause 17(b) commenced. It says the Building remained unfit for its occupancy on and after that date, right up to its termination of the Lease, since throughout that period no effort to remove all the SAF began or even any plan to do so was shared.

[504] Despite the amendment to clause 17, making it effects-based rather than event-based, the wording that implies only a scenario in which the Building was unexpectedly and indisputably inaccessible upon a "happening" or "event" remains, contemplating the need for the parties to make some immediate decisions about the future of the Building and the future of the tenancy. The cause of the alleged unfitness effect in this case does not fit that model. It was not apparent to all that the Building had been destroyed. It was not, all agreed, at that very moment unfit for occupancy. It required no immediate decisions. But it still has the 30 day and one-year deadlines that need a start date.

[505] The opinion of the Landlord's Architect must be provided within 30 days of the cause of the inaccessibility, of the "happening". In the context of a non-calamity-based cause of the unfitness, like here, with the just discovered ACM, by 'within 30 days of the happening' I take the parties to have meant within 30 days of their knowledge of the condition in need of remedy. That means not just within 30 days of one of the parties' discovery, but of its confirmation by the other party, acting reasonably and in good faith. This is important where, as here, the discovering party told the other but then denied it access to the Building for months, rendering it unable to confirm for itself the discovery in a timely manner, and also withheld much of its own information throughout that time.

[506] Therefore the 30-day deadline did not commence upon the Tenant's Discovery of the asbestos or its announcing its unilateral Ultimatum. Rather it started to run upon the completion of the Landlord's opportunity to independently confirm the reports, acting diligently. I find that time to have been the date of the Landlord's receipt of the final version of WSP's "Spray Insulation – Assessment and Risk Evaluation Program" report, dated September 13, 2018. This was provided to the Tenant on September 14, 2018.

[507] On August 16, 2018, the Tenant first requested of the Landlord the opinion of its architect. It repeated the request on September 5, 2018, September 26, 2018, and again on November 26, 2018.

[508] No such opinion was received within 30 days of any of those first 3 formal requests (the Tenant had asked informally back on April 10), though all but the last were before the Landlord

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had sufficient opportunity to independently assess the Tenant's allegations of the SAF in the Plenum being ACM.

[509] On December 24, 2018, the Landlord provided an opinion from its architect that the premises were not unfit for occupancy. It also provided a similar opinion from an architect that had been involved in the original design and construction of the Building. The Landlord concedes that neither opinion provided what had been requested, an opinion from its architect about whether the Building was incapable of having all the SAF removed or otherwise remediated within a year.

[510] For the reasons I explain in the Good Faith section of this judgment, the Tenant was entitled to the opinion of the Landlord's Architect, despite the Building not being rendered unfit for the Tenant's occupancy. The Landlord was obliged to get it to the Tenant and failed to do so.

[511] In conclusion on the clause 17 issues, the termination right in clause 17 was available in circumstances of latent asbestos discovery, but it was not triggered in this case. The Tenant was not entitled to terminate the Lease pursuant to clause 17.

[512] The Landlord was in breach of the Lease for not providing its Architect's Opinion, but the breach is of little consequence since the other pre-requisite to the availability of the Clause 17 termination right was not met. The Tenant was not denied any benefit under the Lease attributable to that breach.

5. Alleged Breaches of Landlord Covenants – Clauses 15, 16 and 44

5.a. Compliance with Alberta Legislation[28]

- Comply with Occupational Health and Safety Laws – 16(j)

- Remove Hazardous Substances to the Extent Required by Law – 16(o)(ii)

[513] At sub-clause 16(j) of the Lease the Landlord covenants to comply with applicable occupational health and safety laws. At paragraph 16(o)(ii) of the Lease, the Landlord covenants to remove any hazardous substances discovered in the Building to the extent required by law. The Tenant says the Landlord breached both covenants. Both allegations engage the same legislation, and therefore I am addressing them together.

[514] The Tenant says both these covenants incorporated the requirements of Alberta asbestos legislation, which required the Landlord to remove all SAF from the Building promptly, which the Tenant says the Landlord made clear by its conduct it was refusing to ever do. The Tenant says the Landlord therefore breached both these covenants, repudiating the Lease. The Tenant says its acceptance of that repudiation was a valid basis for terminating the Lease.

[515] The relevant parts of Lease sub-clause 16(j) and paragraph 16(o)(ii) state:

[28] The legislative provisions that apply in this case are those that were in force at the date of the Tenant's termination of the Lease. Precursors to those legislative provisions are canvassed here and since the date of termination some of the provisions have been amended or renumbered. The law applicable, that has been incorporated by reference in the Lease, is the law at the date of termination not at the date of signing the Lease or the date of trial because (1) clause 39 of the Lease expressly contemplates the laws governing the Lease may change and, more critically for these issues, (2) sub-clause 16(j) incorporates the laws "in force from time to time".

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16. LANDLORD'S COVENANTS

The Landlord covenants with the Tenant as follows: …

(j) Comply with Laws

The Landlord shall comply, and shall cause the Property Manager to comply, with the requirements of all present and future federal, provincial or municipal governmental or quasi-governmental laws, by-laws, codes, regulations or orders (including those relating to environmental matters, health and safety and occupational health and safety) in force from time to time in respect of the Landlord's obligations as to the management, operation, repair and maintenance of the Project and the Project Lands, except for those matters the compliance with which are the responsibility of the Tenant under the Lease, including subclause l5(l)(iii)(D)and [*sic*] subclause 15(r).

…

(o) Landlord's Obligations in respect of Hazardous Substances

The Landlord represents to the Tenant that there are no Hazardous Substances located in or on the Project or the Project Lands. The Landlord shall:

…

(ii) to the extent required by law remove any Hazardous Substances located in or on the Project (except for those Hazardous Substances brought onto the Leased Premises after the Commencement Date by the Tenant) or the Project Lands whether resulting from any act, omission or negligence of the Landlord or those for whom the Landlord is in law responsible; and …

[516] The parties agree that asbestos is a hazardous substance under the Lease. The Lease defines hazardous substances as:

> any substance, class of substance or mixture of substances which are or may be detrimental to the environment or human health, the presence of which is prohibited, controlled or regulated in the Project under any law, by-law, regulation or ordinance enacted or promulgated by any legislative, governmental or regulatory body having jurisdiction over the Landlord, the Tenant, the Leased Premises, the Project or the Project Lands.

[517] By these Lease clauses, the parties contemplated that during the term of the tenancy a hazardous substance might be discovered in the Building, even though not known at the time the Lease was signed. The parties further agreed on what would be their ensuing obligations if that occurred. They are, in a nutshell, that the Landlord promised to comply with occupational health and safety laws (16(j)) and to remove the hazardous substance to the extent the law required (16(o)(ii)).

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[518] I first describe the parties' positions on what the legislation requires, then summarize the applicable law on statutory interpretation, then explain the correct interpretation of the relevant statutory provisions, and end with my conclusions on whether the Landlord complied with that legislation and thereby with both Lease covenants.

Parties' Positions

[519] The Tenant says that the presence of the fireproofing violates the clear language of sections 31 and 33 of the *OHS Code*. These provisions state:

> 31(1) If it is determined that asbestos fibres may be released in a building, the building is in an unsafe condition.
>
> 31(2) The employer must take all necessary steps to correct the unsafe condition.
>
> …
>
> 33 A person must not use asbestos in an air distribution system or equipment in a form in which, or in a location where, asbestos fibres could enter the air supply or return air systems.

[520] The Tenant points to the testing in the Building that it says found actual airborne asbestos fibres, from which it says it follows that the "potential for release" has been proven. Asbestos fibres have released from the SAF, and so under section 31, the Building is deemed to be in an unsafe condition. All necessary steps must be taken to correct it. The Tenant says that, in addition, the potential release of asbestos fibres into the air distribution system is strictly forbidden under section 33. The Tenant says the very presence of asbestos in the Plenum means the Landlord is in breach of this section of the legislation. The Tenant says that asbestos fibres in the air presents a significant risk of harm to workers' health and safety; these provisions must be interpreted in a broad and remedial manner that protects workers' health and safety.

[521] Regarding section 31, the Tenant notes it is not framed as a continuum, but a binary proposition on whether the Building is safe or unsafe. There is no suggestion that a "mostly" safe building is acceptable, suggesting an absolute approach to building safety. Section 31(2) requires an owner to "take all necessary steps to correct the unsafe condition." Owners are not permitted to take only those steps which are convenient or within their desired budget.

[522] Regarding section 33, the Tenant says its language is also prohibitive and absolute, but with a focus on air distribution systems. A person "must not" use asbestos, which the Tenant says is an obligation, as opposed to language like "should" or "may", which allow for choice. Section 33 does not permit the owner to just use their best efforts to prevent fibre release; it is an absolute prohibition if there is any chance of fibre release. The Tenant submits this is akin to the specific ban in section 32 on the use of crocidolite asbestos in buildings. Allowing any asbestos that releases fibres to exist within the air distribution system must be rejected as contrary to express prohibitions in the legislation.

[523] The Tenant submits that sections 31 and 33 of the *OHS Code*, in combination, provide a bright-line rule to deal with a situation where there is potential asbestos fibre release in an air distribution system. It submits that a building owner is immediately in breach of the provisions if it is possible for asbestos fibres to be released into the building and/or an air distribution system,

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and the breach continues throughout the time the possibility remains. It says the Legislature relies on the building owner and employer to safeguard the air supply for workers who have no control over their work environment.

[524] The Tenant submits that the only feasible course of action for the Landlord was removal and replacement of all the "Fireproofing".[29] The Building is in an unsafe condition, and it is not onerous to require a commercial landlord to ensure that its building is safe for occupants pursuant to the province's health and safety legislation.

[525] The Landlord takes the opposing view, both factually and legally. It points out that when the SAF was used in the construction of the Building, it was not considered an ACM under Alberta law, because it contained less than one percent asbestos.[30] Even if it is considered an ACM, the trace amounts of asbestos in it do not have the potential to release asbestos fibres. The Landlord says that the test results CNOOC says show "actual release" were improperly analyzed or resulted from ambient air that entered the Building from outside.

[526] The Landlord interprets neither section 31 nor 33 as mandating removal of the SAF. It says only sections 34 and 35 mention removal.[31] Furthermore, the Landlord notes that removal is just one of three options for abatement when a building is being renovated. The Landlord submits that immediate removal of the entirety of the SAF was not required by the legislation in this case.

[527] The Landlord disagrees with the Tenant's "absolute" approach, noting the larger legislative scheme of the *Occupational Health and Safety Act*, SA 2017, c O-2.1 [*OHS Act*], and

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[29] The Tenant in its written arguments defines this term "Fireproofing" that it uses for the SAF as meaning "Deteriorating asbestos containing fireproofing in the Air Distribution system of the Building." The Landlord points to this as an inconsistency in CNOOC's arguments, saying first the Tenant says the legislation is absolute, requiring removal of all SAF from the Building, and now by hiding behind a definition implies the legislation requires only removal of *deteriorated* SAF. If CNOOC believes the legal obligation of the Landlord is just removing deteriorated SAF, says the Landlord, then "there should be no remaining dispute" because whether the Landlord agrees with that legal interpretation or not, the Landlord nonetheless removed all the SAF debris that it says constitutes poor condition SAF. It says it did so, "promptly" after the CNOOC employees left the Building.
The Tenant is not changing its position. The Tenant is not by slight of hand changing the meaning of its words for concealed advantage at the tail end of the trial. The Landlord misunderstands the Tenant's position.
The Tenant has not moved off its "absolutist" interpretation of the legislation. The difference is in the parties' opinions on whether just some or all of the SAF is deteriorating. The Tenant says it is all deteriorating, therefore all is in an unsafe condition and, even worse, it is located in the Building's air distribution system and releasing asbestos fibres. The Landlord says most of the SAF is in good condition but acknowledges only that the debris is deteriorating. When the Tenant argues that all "Fireproofing" needs to be removed, that is, all deteriorating SAF, it refers to all the SAF not just the debris. The Landlord misunderstands the Tenant to mean only the SAF presently in deteriorated condition. In fact, the Tenant is saying all the SAF is deteriorating, accordingly it all poses a continuous risk of releasing asbestos fibres, and all must be removed.
In short, when the Tenant uses its defined term "Fireproofing" it does mean all SAF. It may not all have "deteriorated", but the Tenant says it is all "deteriorating."

[30] While historically in Alberta materials with less than 1% asbestos content were not considered ACM for some purposes, that was never the legislative approach. The legislation itself has never set a minimum asbestos content requirement for material to be considered ACM; it expects all asbestos content to be kept as low as is reasonably practicable. The paramount legislative concern is not about asbestos content but about "the ability of a material to release asbestos fibres": Manual at p. 35. That can happen from ACM with any concentration of asbestos. The 2019 Manual is correct in saying, in Alberta, ACM is a building material "containing asbestos in any quantity or percentage": Manual at p. 8.

[31] And it invokes *expressio unius*, concluding those express references to the occasions when ACM must be removed mean all other occasions its removal is not mandated.

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OHS Code does not prohibit the presence of pre-existing asbestos in buildings, rather, it *regulates* its presence. There is a duty to ensure exposure to asbestos is kept as low as is reasonably achievable for workers' safety and the legislature has determined OELs for asbestos. It says the Tenant's approach of "one fibre is too many" is incorrect. The Landlord says that the legislation provides flexible options for abatement that include enclosure, encapsulation or removal of asbestos, showing the Legislature's approach is to regulate exposure to asbestos, not prohibit its presence.

[528] The Landlord submits that the language of section 31 does not make the presence of asbestos a breach of the *Code* but instead creates a duty to respond to that presence using "necessary steps" to correct the unsafe condition. The legislature could have prescribed removal as the only acceptable response to an unsafe condition, but it did not. Similarly, section 33 could have prescribed removal of existing asbestos from all air distribution systems, but it did not.

[529] The Landlord submits that the operative clause in this case is section 35 which requires abatement work be done when a building is being altered or renovated, and states that it was ready and willing to do so when the Tenant terminated the Lease. However, there was no absolute requirement under the law to remove all the SAF prior to that.

Law on Statutory Interpretation

[530] The Alberta Legislature provides guidance that governs the interpretation of its statutes and regulations. Applicable in this case, from the Alberta *Interpretation Act*, RSA 2000, c I-8 are:

> 10 An enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects.
>
> 12(2) In an enactment, …
>
> (b) marginal notes and section headers …
>
> are not part of the enactment, …
>
> 26(3) In an enactment, words in the singular include the plural, and words in the plural include the singular.
>
> 28(1) In an enactment, …
>
> (nn) "person" includes a corporation and the heirs, executors, administrators or other legal representatives of a person; …

[531] The modern principle of statutory interpretation is that "statutes are to be read in their entire context, and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd (Re),* [1998] 1 SCR 27, at para 21; *R v Alex*, 2017 SCC 37, at para 24.

[532] Health and safety legislation is treated no differently. "This approach applies to any question of statutory or regulatory interpretation, including in respect of the OHSA and its regulations": *R v Bondfield Construction Company Limited*, 2022 ONCA 302, at para 56.

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[533] This same approach applies to subordinate legislation: *Ayr Farmers Mutual Insurance Co v Wright*, 2016 ONCA 789, at para 27.

[534] The legislative evolution of a statute "forms part of the 'entire context' to be considered as part of the modern approach to statutory interpretation": *British Columbia Human Rights Tribunal v Schrenk*, 2017 SCC 62, at para 60, citing *Merk v International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, 2005 SCC 70, at para 28.

[535] Considering the entire context includes applying conventions of legislative drafting and textual analysis that have developed over time: Ruth Sullivan, *The Construction of Statutes*, 7th ed (Toronto: LexisNexis, 2022), at §8.01. Such conventions and presumptions are starting points for the interpretive exercise, not inviolable rules. The ones of influence in this case are:

a) Presumption of consistent expression: When the legislature uses the same language in relation to the same subject matter, it is presumed that the legislature intended that that language be given the same meaning; conversely, when the legislature uses different language, it is presumed that the legislature intended that that language be given a different meaning. Sullivan cites *R v Barnier*, [1980] 1 SCR 1124 at 1135–1136 for this latter branch of the principle: §8.04. Further, "the legislature is presumed to use language such that the same words have the same meaning both within a statute and across statutes": Canada (Minister *of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, at para 44.

b) Presumption of unified coherence: Statutes, and statutory schemes, are presumed to be internally consistent and coherent: *R v LTH*, 2008 SCC 49, at para 47. This means that the provisions in a statute "are presumed to fit together logically to form a rational, internally consistent framework ... each contributing something toward accomplishing the intended goal": Sullivan, at §11.01. See also *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42, at para 27.

"Interpretations favouring harmony between the various statutes enacted by the same government should indeed prevail. This presumption is even stronger when the statutes relate to the same subject matter": *Therrien (Re)*, 2001 SCC 35, at para 121; *Peace River Hydro Partners v Petrowest Corp*, 2022 SCC 41, at para 114.

"It is presumed that provisions are intended to work together as parts of a functioning whole to form a rational, internally consistent framework": *R v Kirkpatrick*, 2022 SCC 33, at para 46, citing *LTH*, at para 47.

It is presumed that the legislature does not intend to make contradictory enactments and where overlap exists the legislature intends both provisions to apply. Interpretations that avoid conflict are therefore preferred over interpretations that create direct contradictions and inconsistencies: *Thibodeau v Air Canada*, 2014 SCC 67, at paras 93-96. As stated in *Thibodeau* at para 93:

> Courts presume that "the body of legislation enacted by a legislature does not contain contradictions or inconsistencies, that each provision is capable of operating without coming into conflict with any other": R. Sullivan, *Sullivan on the Construction of*

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> *Statutes* (5th ed. 2008), at p. 325; *R. v. Ulybel Enterprises Ltd*., 2001 SCC 56, [2001] 2 S.C.R. 867, at para. 30. This is sometimes expressed as a presumption of coherence, based on the common sense idea that the legislature does not intend to make contradictory enactments: *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at p. 38. …

c) Presumption of implied exclusion: *Expressio unius est exclusion alterius*. It means the expression of one subject, object or idea is the intentional exclusion of another subject, object or idea. It has been used with caution. In *Turgeon*, at p 70–71, Newcombe J stated:

> The maxim, *expressio unius est exclusio alterius*, enunciates a principle which has its application in the construction of statutes and written instruments, and no doubt it has its uses when it aids to discover the intention; but, as has been said, while it is often a valuable servant, it is a dangerous master to follow. Much depends upon the context. One has to realize that a general rule of interpretation is not always in the mind of a draughtsman; that accidents occur; that there may be inadvertence; that sometimes unnecessary expressions are introduced, *ex abundanti cautela*, by way of least resistance, to satisfy an insistent interest, without any thought of limiting the general provision; and so the axiom is held not to be of universal application.

According to Pierre-André Côté: "But of all the interpretive arguments [*expressio unius est exclusio alterius*] is among those which must be used with the utmost caution. The courts have often declared it an unreliable tool, and …it is frequently rejected.": Pierre-André Côté, Stéphane Beaulac & Mathieu Devinat, *The Interpretation of Legislation in Canada*, 4th ed (Toronto: Carswell, 2011) at p 359.

Sullivan defends its use with these words, at §8.09[5]:

> While it is true that implied exclusion arguments are often rightly rejected, and rightly so, it does not follow that implied exclusion is unreliable or less reliable than the other maxims or other techniques for analyzing legislative text. … Like all arguments based on these presumptions, its weight depends on a range of contextual factors and the weight of competing considerations. However, it is no more likely to mislead than any other of the inferences

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> examined in this chapter and in many cases it rightly receives considerable weight.

d) Presumption against tautology: One is to presume "that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain": *Woods (Re)*, 2021 ONCA 190, at para 40.

e) Presumption against material legislative policy change absent express language:

> To begin with, I think it useful to stress the presumption that the legislature does not intend to change existing law or to depart from established principles, policies or practices. In *Goodyear Tire & Rubber Co. of Canada v. T. Eaton Co.*, 1956 CanLII 2 (SCC), [1956] S.C.R. 610, at p. 614, for example, Fauteux J. (as he then was) wrote that "a Legislature is not presumed to depart from the general system of the law without expressing its intentions to do so with irresistible clearness, failing which the law remains undisturbed".

Parry Sound (District) Welfare Administration Board v OPSEU, Local 324, 2003 SCC 42, at para 39; see also *R v T (V)*, [1992] 1 SCR 749, at p 764:

> [...] it is open to Parliament to change the law in whatever way it sees fit, the legislation in which it chooses to make these alterations known must be drafted in such a way that its intention is in no way in doubt. ...
>
> [Parliament needs] to make its intention manifest when effecting a change to the existing law.

f) Presumption against absurd consequences: It is presumed that "the legislature does not intend absurd consequences," that is, "[i]nsofar as the language of the text permits, courts should adopt interpretations that are consistent with the legislative purpose and avoid interpretations that defeat or undermine that purpose": *Woods*, at para 41.

[536] The words of the Ontario Court of Appeal in *Bondfield Construction*, at paras 58-59, about interpreting public welfare legislation are also apposite:

> The purpose of the legislation is also central to the interpretive exercise. The OHSA is public welfare legislation "intended to guarantee a minimum level of protection for the health and safety of workers." As such, provisions of the OHSA and its regulations must be interpreted generously and "[n]arrow or technical interpretations that would interfere with or frustrate the attainment of the legislature's public welfare objectives are to be avoided."
>
> A generous interpretation, however, should not be confused with a limitless one. While the OHSA aims to protect workers from both deliberate and inadvertent conduct, including accidents that result when workers make mistakes or are

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> careless or reckless, it is important to remember that the OHSA seeks to achieve a reasonable level of worker protection, not an entirely risk-free work environment. [Emphasis in original. Citations omitted.]

Role of the Alberta Asbestos Abatement Manual in Statutory Interpretation

[537] In discussing the proper interpretation of Alberta asbestos legislation, and its application in Alberta, both parties, and some of their witnesses, referred the Court to the views found within the "Alberta Asbestos Abatement Manual" (the "**2012 Manual**").

[538] Included in the 2012 Manual are comments on the meaning of Alberta asbestos legislation. It self-describes as a guidance document prepared by the Government of Alberta, to aide readers wanting to comply with the province's requirements regarding asbestos, as follows, at p 1:

> Scope of this Manual
>
> This manual describes the principles to be followed when selecting the most appropriate techniques for the safe abatement of asbestos-containing materials. The manual also presents basic information on asbestos and asbestos products, health hazards, requirements for worker protection, safe work procedures, inspection criteria, applicable legislation and competency profiles for those persons involved in abatement activities.
>
> Work practices and precautions vary considerably with the type of material being removed, the amount of asbestos it contains, its condition and location. The objective of this manual is to present best practices in asbestos abatement that are to be followed in Alberta.
>
> Occupational Health and Safety officers from Human Services use this manual as a guide when reviewing abatement work practices and employer codes of practice. Practices are assessed against those presented in the manual to determine if they meet the intent of the province's occupational health and safety legislation. Alternate practices are acceptable if they provide workers with a level of safety equal to or greater than those practices presented in this manual.

[539] The 2012 Manual falls within a wide range of types of pronouncements issued by government departments, agents, commissions, boards, tribunals, and Ministers. Some are pointed, focussed on very specific topics, whereas others are more general in nature.

[540] Such pronouncements are sometimes referred to in the case law as "non-statutory instruments". Sullivan calls the category of such pronouncements "administrative interpretation." By it she refers to "the interpretation given to legislation by persons – other than judges sitting in courts or administrative tribunals – who carry out the administration or enforcement of that legislation": Sullivan, at §23.04[1]. It encompasses the broad range of governmental, departmental, tribunal and agency publications, decisions, policies, notes, guidelines, directives, bulletins, manuals, non-binding opinion letters, and rulings.

[541] All such pronouncements may be entitled to *some* weight in the interpretive exercise, though the weight can vary widely by the nature of the pronouncement, its source, content, and its context.

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[542] Administrative interpretation is not binding but can offer confirmation of an interpretation that "appears evident on the face of the Act": *FN (Re)*, 2000 SCC 35 at para 26.

[543] It is not enforceable law: *Case Power & Equipment v MST Trucking Co*, 1994 ABCA 274, at para 29; *Ainsley Financial Corp v Ontario Securities Commission* (1994), 21 OR (3d) 104, at p 109 (CA). It "cannot be elevated to the status of law … absent legal authority mandating such treatment": *Pezim v British Columbia (Superintendent of Brokers)*, [1994] 2 SCR 557, at p 596.

[544] It "can have no effect in the face of contradictory statutory provision or regulation": *Ainsley Financial*, at p 109, citing *Capital Cities Communications Inc v Canadian RadioTelevision & Telecommunications Commission*, [1978] 2 SCR 141, 81 DLR (3d) 609, at p 629.

[545] Administrative interpretation "cannot be applied to establish mandatory requirements beyond the purview of the legislation itself": *Guenette Estate v Miller*, 1995 ABCA 49, at para 8. The Tenant put the principle well in saying in its written reply submissions: "The *OHS Code* is the law and any interpretation of the Manual inconsistent with [the *Code*] would be incorrect."

[546] On these principles the parties appear to agree generally. Nevertheless, they each find support for their divergent interpretations of the provincial asbestos legislation within the 2012 Manual, and draw the Court's attention to select portions, phrases and approaches in it that suit their individual purposes.

[547] Citing *Mattabi Mines Ltd v Ontario (Minister of Revenue)* (1988), 53 DLR (4th) 656, at p 665 (SCC), Sullivan refers to administrative interpretation as opinion: Sullivan, at §23.04[3]. I agree with that characterization. But what kind of opinion?

[548] The opinions in the 2012 Manual are not endorsed by the legislature or by those to whom it delegated the power to make regulations (the Lieutenant Governor in Council: s 60 of the *Act*) or to make the *Code* (the Minister: s 61 of the *Act*).

[549] The 2012 Manual is not opinion evidence proffered by someone the Court qualified at trial to assist it in its fact finding. And they would not be on the question of statutory interpretation. Statutory interpretation is not an expertise the courts lack. Further, the opinions were untested. Yet they are relied upon by the parties to persuade the Court on one of the ultimate issues in the trial, arguably the main reason their commercial relationship broke down. The Court must not permit indirectly in final argument what it would not permit directly in the evidentiary portion of the trial, by now relying on the 2012 Manual as if it were admissible opinion evidence.

[550] The 2012 Manual still has some relevant evidentiary use, in that its contents may help explain the state of mind and conduct of those who read it and professed to have relied upon it, including (unfortunately) as if it was declaring authoritative interpretations of the legislation.

[551] The opinions in the 2012 Manual about legislative intent have been offered to the Court in argument as in the nature of a legal opinion, such as from a legal commentator or blogger, another of the many legal "authorities" counsel may refer to in their closing submissions, and none of which are binding. As to their degree of persuasive heft, they are not from someone like a prolific and nationally renowned constitutional law academic like a Peter Hogg, or statutory interpretation academic frequently cited by the Supreme Court, like a Ruth Sullivan. They are not from a court of any level, nor from an independent quasi-judicial tribunal having developed

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institutional expertise and owed deference on the interpretation of its constating legislation. The opinions are not sourced from anyone independent in those senses. In content they appear to be the opinions of persons charged with enforcing aspects of the regulatory regime – therefore from persons with a mandate to ensure compliance rather from persons regularly called upon to independently determine issues inter-partes, with either legal or subject matter expertise, or both. Still further, the writer(s) appear concerned only with the occupational health and safety aspect of the provincial asbestos regime. Its reference to provisions having "moved" from the *Building Code* to the *OHS Code* (discussed further below) appear to have misled some participants in this litigation into thinking they were then removed from their earlier location when they were not. These opinions about legislative intent are of limited persuasive value.

[552] The opinions in the Manual are akin to the writings of a person knowledgeable of the subject matter, but less so on how to interpret the legislation as written. It may provide a window into how Alberta's Occupational Health & Safety staff apply the legislation. When as here the opinions expressed in the 2012 Manual are commended to the Court as making clear the legislature's intent for legislation at the core of the parties' dispute, the Court must proceed with the utmost caution, as urged by the many case authorities above. The Court must determine the correct legal interpretation of the disputed provisions of the legislation, not abdicate that role by merely adopting the administration's preferred interpretation or its perception of what should be the correct interpretation.

[553] In these circumstances, to ensure I determine the correct interpretation of the disputed legislation, I have interpreted the legislation provisions without any consideration of the 2012 Manual, unless at the end of that approach I am left in doubt about their meaning. I take this to be consistent with the approach described by the Supreme Court of Canada in *R v Nowegijick*, [1983] 1 SCR 29, at p 37, relying on *Harel v Deputy Minister of Revenue of Quebec*, [1978] 1 SCR 851, at p 859 (underlining added):

> Administrative policy and interpretation are not determinative but are entitled to weight and can be an "important factor" in case of doubt about the meaning of legislation ….

[554] After having applied the established principles of interpretation summarized above, I was not left in doubt as to the correct interpretation. Thus, I did not find it necessary to consult the 2012 Manual for whatever insight it may offer into any area of doubt or ambiguity as to the correct statutory interpretation.

Alberta Asbestos Legislation in force at the Date of Termination

[555] Commencing in the late 1970s and early 1980s, society's growing concerns about the risks of asbestos to human health began to be addressed in Alberta legislation. Two legislative approaches developed somewhat in tandem. The first was to regulate asbestos products in buildings through building standards legislation. The second was to regulate worker exposure to asbestos and asbestos management procedures through occupational health and safety legislation. The correct interpretation of sections 31 and 33 of the *OHS Code* is one that favours harmony among the legislation embodying these two objectives, achieves unified coherence among them and uses consistent meanings of the terms in common to both approaches.

[556] Interestingly here, the two sections of the *OHS Code* whose meaning is disputed by the parties are part of a group of 5 sections that originated in similar form in the building standards

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legislation, then were largely replicated into the occupational health and safety legislation but remained in part in the building standards legislation. Based on the presumption of coherence, it is presumed that the legislature intended to make consistent policy choices across related pieces of legislation, here, the building standard legislation and the occupational health and safety legislation: *Sharbern Holding Inc v Vancouver Airport Centre Ltd*, 2011 SCC 23, at paras 116–119. This presumption is particularly strong here given that the provisions in the occupational health and safety legislation are derived from the building standards legislation: see *Fishing Lake Metis Settlement v Metis Settlements Appeal Tribunal Land Access Panel*, 2003 ABCA 143, at paras 31–37.

[557] At the time of termination, these two components to Alberta's legislative regulation of asbestos were found in the *OHS Act*, SA 2017, c O-2.1; the *OHS Regulation*, Alta Reg 62/2003; the *OHS Code*, and Schedule 1 Table 2 to that *Code*; and the *Alberta Building Code*, enacted pursuant to the *Safety Codes Act*, RSA 2000, c S-1. Each must be considered as they set out the parties' respective obligations at the time of their dispute. Following a description of the asbestos-specific laws existing at the date of termination, I summarize their genesis and evolution where that context informs interpreting the wording in force at the date of termination.

OHS Act

[558] The *OHS Act* is aimed at protecting the health and safety and well-being of workers at their worksites. Section 2 says:

> The purposes of this Act are
>
> (a) the promotion and maintenance of the highest degree of physical, psychological and social well being of workers,
>
> (b) to prevent work site incidents, injuries, illnesses and diseases,
>
> (c) the protection of workers from factors and conditions adverse to their health and safety,
>
> (d) to ensure that all workers have
>
> (i) the right to be informed of work site hazards and the means to eliminate or control those hazards,
>
> (ii) the right to meaningful participation in health and safety activities pertaining to their work and work site, including the ability to express health and safety concerns,
>
> (iii) the right to refuse dangerous work, and
>
> (iv) the ability to work without being subject to discriminatory action for exercising a right or fulfilling a duty imposed by this Act, the regulations or the OHS code.

[559] "Worker" is defined broadly. Employers are required, "as far as is reasonably practicable" to ensure the health, safety and welfare of its workers and others who attend their worksite: *OHS Act*, s 3.

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[560] The *OHS Act* recognizes that persons other than employers can be responsible for workplace health and safety. Therefore, owners of land, such as the Landlord here, are also expressly subject to the *Act* (therefore also subject to all the enactments subordinate to it). Section 8 says:

> Every owner shall
>
> (a) ensure, as far as it is reasonably practicable to do so, that the land, infrastructure and any building or premises on the land that is under the owner's control is provided and maintained in a manner that does not endanger the health and safety of workers or any other person,
>
> (b) cooperate with any person exercising a duty imposed by this Act, the regulations and the OHS code, and
>
> (c) comply with this Act, the regulations and the OHS code.

[561] The *OHS Act* does not contain any provisions specific to asbestos alone. But the provisions excerpted above apply to the *OHS Code* which I describe next. The *OHS Act* contains more general provisions relating to matters like establishing health and safety committees, workers rights to refuse dangerous work, medical assessments, compliance and enforcement, and powers relating to subsidiary regulations and codes. There are also sections which set out the duties of OHS officers to inspect and investigate compliance and vesting them with powers to issue stop work orders.

OHS Code

[562] The *OHS Code* is a large regulation that contains health and safety rules and technical standards for worksites and work conditions in Alberta. It consists of 41 Parts with 849 sections and an additional 11 Schedules, many of which contain multiple Tables.

[563] Parts 1 to 3 contain "Core Requirements Applicable to All Industries", Parts 4 to 29 contain "Requirements Applicable to All Industries", and Parts 30 to 41 contain "Requirements Applicable to Specific Industries and Activities".

[564] The purpose of the *OHS Code* is to mandate specific standards and procedures towards ensuring the health, safety and well-being of workers at worksites across many industries.

[565] Areas that are regulated in Parts 4 to 29 include: Crane, Hoists and Lifting Devices (Part 6); Fall Protection (Part 9); Noise Exposure (Part 16); Personal Protective Equipment (Part 18); and Violence and Harassment (Part 27), to give just a few examples. Similarly, the specific industries included in Parts 30 to 41 include: Demolition (Part 30); Forestry (Part 34); Mining (Part 36); and Residential Roofing (Part 38).

[566] Sections 31 and 33 fall within Part 4.[32] Part 4 regulates harmful substances in sections 16 to 43.1 and is the primary part of the *OHS Code* that most directly regulates asbestos at worksites. It is entitled "Chemical Hazards, Biological Hazards and Harmful Substances" and applies to all industries.

[567] Part 4 begins by regulating a worker's exposure to substances listed in Schedule 1, Table 2. Asbestos appears on Schedule 1, Table 2. The starting point general requirement is found in

[32] Attached to this Judgment at Appendix B.

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sub-section 16(1) and requires a worker's exposure to such substances be kept "as low as reasonably achievable".

[568] Layered onto that general principle is the requirement, in sub-section 16(2), that an employer must also ensure that a worker's exposure to any such substance does not exceed the corresponding OEL listed in Schedule 1, Table 2.

[569] Schedule 1, Table 2 indicates that the 8-hour OEL for all forms of asbestos is 0.1 f/cc (fibres per cubic centimeter of air). "Fibre" is defined in the *OHS Code* as a particulate material with:

> (a) a diameter equal to or less than 3 micrometers,
>
> (b) a length equal to or greater than 5 micrometers, and
>
> (c) a length to diameter ratio equal to or greater than 3 to 1;

[570] Sub-section 16(3.1) of the *OHS Code* states that a worker may not be exposed to a substance listed in Schedule 1, Table 2 at a concentration exceeding its ceiling limit at any time. However, by sub-section 16(4), if, as is the case for asbestos, no 15-minute OEL or ceiling OEL is listed for a substance, the employer must:

> (a) comply with the 8-hour occupational exposure limit, and
>
> (b) ensure that a worker's exposure to that substance does not exceed
>
> (i) three times the eight-hour occupational exposure limit for more than a total of 30 minutes during a continuous 24-hour period, and five times the eight-hour occupational exposure limit, or
>
> (ii) the concentration that is immediately dangerous to life and health,
>
> whichever is lower.

[571] Thus, the Legislature requires the Tenant and the Landlord to keep the concentration of airborne asbestos fibres in the Building as low as reasonably achievable and, in any event, to not allow it to exceed the applicable OEL.

[572] Sub-section 20(1) sets out a wide range of acceptable measurement methods for airborne concentrations of harmful substances, for purposes of complying with the OEL. However, sub-section 20(3) states that if the person measuring the airborne concentration of a harmful substance is counting fibres, the person must apply NIOSH Method 7400,[33] and only to particles that meet the size criteria for fibres.

[573] Sections 21 to 23 require that workers who are exposed to harmful substances at their worksite be properly informed and trained on proper procedures, that OEL is monitored, that overexposures are documented and controlled, and that decontamination facilities are provided. Sections 26 and 27 govern procedures for the proper storage, handling and disposal of harmful substances. Sub-section 26(1) requires an employer to have a code of practice governing the

[33] NIOSH is an acronym for the United States' "National Institute for Occupational Safety and Health".

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storage, handling, use and disposal of a substance listed in Schedule 1, Table 1. Asbestos is listed in Schedule 1, Table 1.

[574] Section 28 of the *OHS Code* specifically addresses certain harmful substances that may become airborne, including asbestos. It requires an employer minimize the release of asbestos into the air as far as is reasonably practicable, keep the work site clear of unnecessary accumulations of asbestos, and ensure that decontamination methods prevent the generation of airborne asbestos as much as is reasonably practicable:

> 28 An employer must
>
> (a) minimize the release of asbestos, silica, coal dust and lead into the air as far as is reasonably practicable,
>
> (b) keep the work site clear of unnecessary accumulations of asbestos, silica, coal dust and lead and waste materials containing any of these substances, and
>
> (c) ensure that the methods used to decontaminate the work area, workers, equipment and protective clothing prevent, as much as is reasonably practicable, the generation of airborne asbestos, silica, coal dust or lead.

[575] Sections 29 and 30 relate to work in restricted areas (where asbestos or other harmful substances are present above the OEL) and the wearing of protective clothing in those areas.

[576] Then come the asbestos-specific sections 31 to 35 that I will address in greater detail below. They are:

> 31(1) If it is determined that asbestos fibres may be released in a building, the building is in an unsafe condition.
>
> 31(2) The employer must take all necessary steps to correct the unsafe condition.
>
> 32(1) A person must not use materials containing crocidolite asbestos in an existing or a new building.
>
> 32(2) A person must not apply materials containing asbestos by spraying them.
>
> 33 A person must not use asbestos in an air distribution system or equipment in a form in which, or in a location where, asbestos fibres could enter the air supply or return air systems.
>
> 34 If a building is to be demolished, the employer must ensure that materials with the potential to release asbestos fibres are removed first.
>
> 35 If a building is being altered or renovated, the employer must ensure that materials in the area of the alterations or renovations that could release asbestos fibres are encapsulated, enclosed or removed.

[577] Section 36 requires notifying OHS in advance of removing or abating any asbestos that may release asbestos fibres, from a building or equipment, pursuant to sections 34 or 35. “Abate” is defined in the *Code* as meaning to encapsulate, enclose or remove asbestos containing material.

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[578] Section 37 relates to a training course for workers who will work with asbestos. Section 38 concerns the containment and labelling of asbestos waste. Finally, section 40 sets out the procedure for health assessments if a worker is exposed to asbestos.

[579] The worker exposure ... be kept "as low as reasonably achievable" standard in sub-section 16(1), the minimize ... as much "as is reasonably practicable" standard in sub-section 28(a), and the must take "all necessary steps" standard in sub-section 31(2), all denote an objective standard and all require a circumstance-specific perspective. All are informed by the "highest degree" aspiration and absolute "prevention" expectation of section 2 of the *OHS Act*. Applying these standards entails judgment and variability according to the factual context.

OHS Regulation

[580] Most of the *OHS Regulation* concerns topics like safe equipment, safety training, blasting operations, and mining operations. Its provisions referring to asbestos are not directly relevant to this case but involve designating a "hazardous occupation" and a "hazardous work site" as ones where asbestos (or silica, coal dust or lead) are being worked with or are present at a work site at a level that may exceed the OEL.

[581] However, the *OHS Regulation* is the only enactment that defines "asbestos." It says, at sub-section 1(c): "'asbestos' includes all forms of asbestos". The effect of sub-section 87(2) of the *OHS Act* is that this definition applies throughout *OHS Code*, regardless of anything to the contrary in that *Code*.[34]

[582] In many jurisdictions, only some forms of mineral asbestos are regulated. For them, regulated asbestos refers to only the group of named asbestos minerals that are then the subject of their legislation. They target their asbestos regulation to the same most common six commercial forms of asbestos: chrysotile, actinolite, tremolite, ampholyte, crocidolite, and amosite (the "**6 Forms**").

[583] WSP said that "non-regulated asbestos fibres" refers to mineral forms other than those 6 Forms. WSP then explained:

> […] non-regulated amphibole minerals may pose similar negative health effects to regulated asbestos fibres. As such, the World Health Organization definition of asbestos includes all fibres with the physical and chemical properties as commercial asbestos.

Perhaps that is why Alberta has defined asbestos as meaning all forms of asbestos.

[584] Various witnesses referred to "non-regulated" asbestos. So did some reports of laboratory testing results. Regrettably, the reference to "non-regulated" asbestos in Alberta, where asbestos means all forms of asbestos, left the Court, and perhaps the many end-users of the lab reports, less than clear on the meaning intended by the user of that phrase. With some witnesses, counsel pursued clarification. But not in all cases and it was not possible for most lab reports.

[34] Sub-section 87(2) of the *OHS Act* provides that "where there is any conflict between any provisions in the regulations and any provisions in the *OHS Code*, the former prevail against the latter."

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[585] For the laboratory reports referred to by WSP, and perhaps some others before the Court, non-regulated meant forms of asbestos other than the 6 Forms – even though they were addressing a situation in Alberta where all forms are regulated.

[586] But maybe not. In Alberta, while for legislative purposes "asbestos means all forms of asbestos," other aspects of the legislative regime raise doubt. Schedule 1, Table 2 of the *OHS Code* refers to "Asbestos (all forms)" but then provides the reference CAS numbers[35] of only 4 forms. The Table also separately lists specific forms of asbestos, but not all the 6 Forms, let alone all forms, ascribing to each of those select few named forms the same OEL as appears on the more general "asbestos" category row of the Table. Presumably this was done by the drafters so a person consulting the Table would find that same OEL regardless of whether they looked on the Table for the general commercial label "asbestos" or for the more precise mineral name. Then, to complicate matters further, the *OHS Code* differentiates between "asbestos" and "asbestos fibres." Not all asbestos *fibres* are regulated, only those meeting the required length, diameter and aspect ratio criteria in the *OHS Code*. So, there will be some pieces of asbestos that do not fit the definition of fibre, and therefore are not regulated as asbestos fibres, but they are still regulated as asbestos. Then, the document purporting to aide readers in understanding the legislation, the 2012 Manual, refers only to those 6 Forms of asbestos, implying *perhaps* that OHS field reps are really only concerned with the 6 Forms, not all forms, despite the legislation and despite the science indicating other forms of respirable amphibole asbestos are just as harmful.

[587] Eco Abate used "non-regulated" asbestos in yet another sense. In its March 2018 Report, it explains that "nonregulated amphiboles" are a characteristic of vermiculite mined in Libby. It then goes on to say, "The mine is known for having trace amounts of asbestos in the vermiculite produced." Perhaps both statements on their own are each true, but by placing them one after the other, without explaining whether the trace amounts of that asbestos characteristic of the vermiculite are non-regulated or not, an incorrect inference may be drawn. At trial, Eco Abate's principal Blake said he explained to the Tenant that his reference to "nonregulated amphibole" (in a report on one of the sample test results), meant it was an asbestiform mineral, having the mineral characteristics of asbestos, but that it was not a regulated form, though in Alberta asbestos means all forms. He did not say non-regulated meant one of the asbestos forms other than the one of the 6 Forms; he said he meant that "it wasn't used in high enough quantities in building materials."

[588] That may be a correct understanding of the testing report, since in Ontario only material containing one of the 6 Forms of fibrous silicates in a concentration greater than 0.5% by dry weight constitutes ACM. Quebec also does not regulate below specified concentrations. In both of those jurisdictions, "non-regulated" refers to asbestos in concentrations below those bottom thresholds.

[589] Many of the labs involved in testing samples from the Building are located out of the province. It appeared that their use of "non-regulated" risked misunderstanding on the part of users of their reports. Where consultants and other witnesses used the phrase at trial, they unintentionally added a needless confusion, which only risked the Court ascribing less weight to some of their evidence.

[35] Chemical Abstract Service numbers, corresponding to US CAS Registry of every chemical substance described in the open scientific literature.

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Alberta Building Code

[590] Alberta regulated asbestos initially through building standards legislation. This legislation supports public safety in buildings through imposition of technical requirements. Concerns for asbestos first appeared in provisions preventing exposure to asbestos in the air through heating, ventilating or air conditioning systems in buildings. Soon after, the legislation began to tighten restrictions on the location of asbestos-containing products within a building.

[591] From the 1980s to present, Alberta has used the National Building Code of Canada, as the base document for its own Alberta Building Code. The National Building Code of Canada is published by the National Research Council as a model code. Although the regulation of buildings in Canada is a provincial and territorial responsibility, provinces such as Alberta use the National Building Code with changes and modifications as they see fit: see the "Preface to the Alberta Building Code 2014."

History of the Separate Approaches to Regulating Asbestos in the* OHS Code *and the* Building Code*, and Their Overlap

[592] At the date of termination of the Lease the *OHS Code* and the *Building Code* overlapped in regulating asbestos in buildings.

[593] It was not always that way. Prior to 2003 when Alberta created the *OHS Code*, consolidating occupational health and safety matters into one single code, the matters addressed by sections 31 to 35 of the *OHS Code* were located only within the *Building Code*. But when adding them to the new *2003 OHS Code*, the Legislature left them to remain within the *Building Code*. Thereafter, the five sections were not all treated the same. Some were removed from the 2006 Building Code. Some of those later resurfaced in the 2014 Building Code. A couple remained throughout the various iterations of the Building Code, from 1981 to the 2014 version. They are the ones saying no one shall install a product with the potential for releasing asbestos in a building and the one about asbestos cement board and cement pipe not being used in supply or return air systems. But provisions on crocidolite, spray application, and unsafe conditions related to asbestos fibre release did not appear again after the 1997 Building Code, which was in effect until the 2006 edition.

[594] That resulting overlap in legislative treatment of the same topics continued for many years, but with some modifications as the wording changed somewhat between the parallel versions. This dual treatment of the same concerns, and the history of them in the *Building Code*, assists in discerning the legislative intent for these sections. What follows is the historical tracing of these sources and their co-existence starting in 2003.

[595] In 1977 the *Alberta HVAC Regulations* (*Alberta Heating, Ventilation and Air Conditioning Regulations*, Alta Reg 33/77), added the following amendment to the *Canada HVAC Code 1975*:

> (h) 2.3.7 Neither supply nor return air shall pass over surfaces containing asbestos fibres, except for surfaces of fire stop flaps.

[596] The *Alberta HVAC Regulations* was enacted pursuant to the *Alberta Uniform Building Standards Act*, SA 1973, c 85. At this time asbestos, a product name for a group of minerals

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bearing similar characteristics, was permitted to be used as a building construction material, and it was very frequently used.

[597] In 1981, the *Alberta Building Code*, Alta Reg 128/81 ("***Building Code (1981)***"), replaced the *Alberta HVAC Regulations*. The *Building Code (1981)* adopted the National Building Code of Canada 1980 as its base document. The *Building Code (1981)* contained the following general provision (the "**General Asbestos Provision**"):

> Subsection 1.5.9 ASBESTOS
>
> 1.5.9.1(1) Except as permitted by Sentence (2), no person shall install any product that has a potential for releasing asbestos fibres in a *building*.
>
> (2) Asbestos-cement board and asbestos-cement pipe may be used in a *building* but not in a supply or return air system.
>
> (3) A condition in which there is a potential for releasing asbestos fibres in a *building* may be declared by the Director to be an *unsafe condition*.
>
> [italics in original, denoting defined terms]

[598] The *Building Code (1981)* defined some of these terms in s 1.3.2. "Unsafe condition" was defined as "any condition that is not *acceptable* and could endanger the life, liberty or health of any person authorized or expected to be on or about the premises" [italics in original]. "Acceptable" was defined as meaning "acceptable to the *authority having jurisdiction* or, where specified, to the *fire authority*" [italics in original]. Finally, "[a]uthority having jurisdiction" was defined as meaning "an inspector appointed pursuant to Section 2 of the Alberta Uniform Building Standards Act."

[599] By the early 1980s, health and safety legislation in Alberta began to regulate workers' exposure to airborne asbestos and proper training, procedures and protective equipment for workers working with or exposed to asbestos. This was accomplished through the *Asbestos Regulation*, Alta Reg 7/82 ("***Asbestos Regulation (1982)***") and the *Chemical Hazards Regulation*, Alta Reg 8/82 ("***Chemical Hazards Regulation (1982)***"), which were enacted at the same time pursuant to the *Occupational Health and Safety Act*, RSA 1980 c O-2 ("***1980 OHS Act***").

[600] These two health and safety regulations contained the origins of many provisions that still exist in Part 4 of the *OHS Code*. The *Asbestos Regulation (1982)* provided guidelines for the handling and labelling of asbestos products and required worksites be clear of unnecessary accumulations of asbestos waste. It also required employers to provide employees with a manual of safe practices along with protective equipment and clothing. The regulation also provided for medical assessments for workers exposed to airborne asbestos.

[601] The *Chemical Hazards Regulation (1982)* required employers to ensure workers were not exposed by possible inhalation to chemical and other substances above the prescribed OEL. If the worker was expected to be exposed beyond the OEL, the worker had to be trained in proper procedures and instructed in the use of protective equipment: ss 8-12.

[602] Thus, by the early 1980s Alberta had legislation in place to safeguard the working conditions of workers using asbestos products or exposed to asbestos in the air. Legislation had also started to prohibit or limit where ACM could be used in construction, depending on the type of material and its location in a building. These efforts were aimed at reducing or eliminating the

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exposure of workers or others to asbestos fibres in the air because of the risk they pose to human health.

[603] An addition to the 1985 version of the *Building Code* built upon this theme. It still contained the General Asbestos Provision but also added a provision prohibiting asbestos from being used in an air distribution system (the "**Air Distribution Provision**"): *Alberta Building Code, 1985*, Alta Reg 186/85 ("***1985 Building Code***"). Section 6.2.1.9. stated:

> Asbestos shall not be used in air distribution systems or equipment in a form or in a location where asbestos fibres could enter the air supply or return system.

"Asbestos" is not defined in the Building Code. It contains a section about "non-defined terms" saying that they will have the meanings ascribed in the *Safety Codes Act*, but asbestos is not defined there either. The Building Code then says "otherwise" the meanings that are commonly assigned can be used, taking into account specialized terms used by trades and professions, or else look to the Oxford Dictionary.

[604] The Building Code regulates materials that may be used in construction activities, not the ongoing use of materials previously installed in existing buildings. Therefore, this prohibition in section 6.2.1.9 was speaking of new uses or installations of asbestos in or near air distribution systems or equipment.

[605] The *1985 Building Code* also had a provision grandfathering existing buildings from its application, in subsection 1.2.2 (the "**Existing Buildings Provision**"):

> EXISTING BUILDINGS
>
> 1.2.2.1.(1) This Subsection applies to any *building* which has been legally built, occupied and used before June 30, 1985.
>
> 1.2.2.1 (2) If a *building* is altered, rehabilitated, refurbished, renovated or repaired, the level of life safety and *building* performance shall not be decreased.
>
> 1.2.2.1 (3) Except as specified in Part 10, the *authority having jurisdiction* shall accept any construction or condition that lawfully existed in Alberta before June 30, 1985 if the construction or condition does not constitute an *unsafe condition*.
>
> [italics in original, denoting defined terms]

This grandfathering protection is found in both the 2014 and 2019 Building Codes.

[606] This section shows the legislature considered and clarified how the provisions in the *Building Code* should apply to existing buildings. New and stricter requirements added to the *Building Code* over time were meant to apply prospectively only. The results of prior construction or conditions that were lawful before June 30, 1985, were still acceptable so long as they did not constitute an unsafe condition. Unsafe condition was defined as "means any condition that, in the opinion of the *authority having jurisdiction* could endanger the life, limb or health of any person authorized or expected to be on or about the premises" [italics in original].

[607] In the early 1990's further changes were made to both legislative schemes, apparently to reflect the developing knowledge around asbestos precautions at the time. For example, some of the OELs in the *Chemical Hazards Regulation (1982)* for certain forms of asbestos were lowered.

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[608] The 1991 version of the Building Code added further prohibitions to the General Asbestos Provision: *Alberta Building Code, 1991*, Alta Reg 109/91 ("***1991 Building Code***"). It prohibited the use of materials containing crocidolite and spray application of materials containing asbestos. Additionally, there was a new requirement that ACM be abated if buildings were being altered, renovated or demolished. In the case of alterations or renovations, materials with the potential to release asbestos fibres had to be encapsulated, enclosed or removed. In the case of demolition, materials with the potential to release asbestos fibres had to be removed first:

> 1.5.10 Asbestos
>
> (1) Except as permitted by Sentence (2), no person shall install any product that has a potential for releasing asbestos fibres in a *building*.
>
> (2) Asbestos-cement board and asbestos-cement pipe may be used in a *building* but not in a supply or return air system.
>
> (3) A condition in which there is a potential for releasing asbestos fibres in a *building* may be declared by the Director to be an *unsafe condition*.
>
> (4) The use of materials containing crocidolite, which is a type of asbestos, is prohibited.
>
> (5) Spray application of materials containing asbestos is prohibited.
>
> (6) In *buildings* being altered or renovated, any materials having the potential for releasing asbestos fibres found in the area of alteration or renovation shall be encapsulated, enclosed or removed.
>
> (7) In *buildings* to be demolished, materials having the potential for releasing fibres shall first be removed.
>
> [italics in original, denoting defined terms]

[609] A new provision was also added called "Correcting an Unsafe Condition", requiring an owner to "forthwith take all necessary action to correct the condition" at 1.5.11.1.

[610] The Existing Buildings Provision and the Air Distribution Provision remained.

[611] Along with 1.5.10 above, these asbestos-related provisions in the *1991 Alberta Building Code* have great similarity to sections 31 to 35 of the *OHS Code*.

[612] In 1992 the 1982 Asbestos Regulation provisions were moved into the *Chemical Hazards Regulation*: *Chemical Hazards Amendment Regulation*, Alta Reg 303/92 ("***Chemical Hazards Regulation (1992)***").

[613] The first *Occupational Health and Safety Code* was created in 2003: *Occupational Health and Safety Code 2003 Order*, Alta Reg 321/2003 ("***2003 OHS Code***"). The *2003 OHS Code* was created by combining separate regulations enacted under the then *Occupational Health and Safety Act* into one comprehensive code. The provisions at issue in this case are in Part 4 were largely taken from the *Chemical Hazards Regulation (1992)*. However, sections 31 to 35 of Part 4 of the *OHS Code* at issue in this case were new and incorporated provisions related to asbestos in buildings very similar to those in the *1991 Building Code*, and its successor, the *Alberta Building Code, 1997*, Alta Reg 50/98, ("***1997 Building Code***").

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[614] Sections 31 to 35 have remained the same since their incorporation into the *2003 OHS Code*. Sections 16 and 28 varied the wording slightly from similar provisions in the predecessor *Chemical Hazards Regulation*.

[615] There were some notable differences between the asbestos provisions as they appeared in the *Building Code* as compared to the *2003 OHS Code*. The provisions in the *2003 OHS Code* do not require a government "Director" to declare something to be an unsafe condition, nor is "unsafe condition" defined. Instead, section 31 deems an unsafe condition merely the possibility of asbestos fibre release: "[i]f it is determined that asbestos fibres may be released in a building, the building is in an unsafe condition." Then the new express duty in 1.5.11.1 of the *1991 Building Code*, to take all necessary corrective action, was moved to follow immediately after the description of an unsafe condition when these provisions were placed in the *2003 OHS Code*.

[616] Another change made was to the crocidolite prohibition, becoming sub-section 32(1) of the *OHS Code*, clarifying that it applied both "in an existing or a new building": "A person must not use materials containing crocidolite asbestos in an existing or a new building."

[617] Importantly, the inclusion of such asbestos related provisions in the *OHS Code* did not result in their corresponding wholesale removal from the *Building Code*. As will be seen, this means that from 2003 to present, there have been and continue to be two legislative schemes governing the use of asbestos in buildings. When there is overlap of this type, one operates from the presumption of coherence, discussed above.

[618] The next iteration of the Building Code in 2006, *Alberta Building Code, 2006*, Alta Reg 117/2007 ("***2006 Building Code***"), still included the General Asbestos Provision but it had shrunk, perhaps tied to the fact some provisions moved in 2003 to the new OHS Code. It still included the Existing Building Provision and, consistent with that, now said:

> 1.2.2.4.1 Asbestos
>
> 1.2.2.4.2 (1) Except as permitted by Sentence (2), no person shall install any product that has a potential for releasing asbestos fibres in a *building*.
>
> (2) Asbestos-cement board and asbestos-cement pipe may be used in a *building* but not in a supply or return system.
>
> [italics in original, denoting defined terms]

[619] The next iteration of the Building Code came in 2014. The *Alberta Building Code, 2014*, Alta Reg 31/2015 ("***2014 Building Code***") was in effect when the parties' dispute began. It remained the version in effect through the period when the parties formulated and then became entrenched in their positions, and until March 31, 2019, barely a month prior to termination.[36]

[620] The *2014 Building Code* retained the General Asbestos Provision prohibiting all installations of materials with the potential to release asbestos fibres in a building, excepting asbestos-cement board and asbestos-cement pipe unless in air distribution systems. These

[36] This 2019 Alberta Edition of the 2019 National Building Code officially took effect April 1, 2019, but subject to a transition period that was not announced until a Notice issued in May 2019. The Notice indicated the transition period was to give affected Albertans time to prepare for and adjust to the changes. None of those changes come into play in this case in any significant way, that would call on the Court to decide between old and new versions of the *Building Code* for purposes of sub-clauses 16(j) and 16(o) of the Lease.

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provisions reinforced the unity and coherence of the common legislative regime across the two tracks.

[621] The *2014 Building Code* also still contained the Existing Buildings Provision and saw the return of the Air Distribution Provision which, curiously, was dropped in the 2006 version.

[622] As with prior iterations, the 2014 Building Code included guidance on its application to existing buildings, in its Appendix A:

> A-1.1.1.2. Application to Existing Buildings. This Code is most often applied to existing buildings when an owner wishes to rehabilitate a building, change its use, or build an addition, or when an enforcement authority decrees that a building or class of buildings be altered for reasons of public safety. It is not intended that the Alberta Building Code be used to enforce the retrospective application of new requirements to existing buildings or existing portions of relocated buildings. For example, although the Alberta Fire Code could be interpreted to require the installation of fire alarm, standpipe and hose, and automatic sprinkler systems in an existing building for which there were no requirements at the time of construction, it is the intent of the Safety Codes Council that the Alberta Fire Code not be applied in this manner to these buildings unless the authority having jurisdiction has determined that there is an inherent threat to occupant safety and has issued an order to eliminate the unsafe condition, or where substantial changes or additions are being made to an existing building or the occupancy has been changed.
>
> [underlining added]

[623] The *2014 Building Code* expressly cross-referenced occupational health and safety legislation in provisions related to asbestos management and abatement work when a building is being altered or demolished, at sub-section 2.2.13.1(6):

> The owner proposing to alter or demolish a *building* shall notify in writing the *authority having jurisdiction* that the plans and specifications describing the asbestos management and abatement work have been submitted to Workplace Health and Safety for compliance with Occupational Health and Safety legislation and that the work has been completed.
>
> [italics in original, denoting defined terms]

[624] The next version of the legislation came into force April 1, 2019, through the *Building Code Amendment Regulation*, Alta Reg 20/2019 ("***2019 Building Code***"). This Building Code was adopted pursuant to the Alberta *Safety Codes Act*, RSA 2000, c S-1. The provisions on asbestos became stricter, such that products containing asbestos "shall not be installed" in a building, in HVAC systems or equipment, or in air distribution systems or equipment, with no exceptions: sub-sections 1.2.2.4, 6.2.1.7, and 9.33.4.8. The provision relating to notification before starting a project involving asbestos management or abatement remained substantively the same, as did the Existing Buildings Provision.

[625] As noted, sections 31 to 35 of the *OHS Code* were never amended after their introduction into that Code and remained the same when the Lease was terminated.

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Sections 31 and 33 of the OHS Code and Asbestos Removal

[626] The Tenant says the Landlord was required to remove all the SAF pursuant to each of sections 31 and 33 of the *OHS Code*. They are found within sections 31 to 35, that appeared as a group from their *Building Code* origins, in the first *OHS Code*, in 2003. Those sections state (again):

> 31(1) If it is determined that asbestos fibres may be released in a building, the building is in an unsafe condition.
>
> 31(2) The employer must take all necessary steps to correct the unsafe condition.
>
> 32(1) A person must not use materials containing crocidolite asbestos in an existing or a new building.
>
> 32(2) A person must not apply materials containing asbestos by spraying them.
>
> 33 A person must not use asbestos in an air distribution system or equipment in a form in which, or in a location where, asbestos fibres could enter the air supply or return air systems.
>
> 34 If a building is to be demolished, the employer must ensure that materials with the potential to release asbestos fibres are removed first.
>
> 35 If a building is being altered or renovated, the employer must ensure that materials in the area of the alterations or renovations that could release asbestos fibres are encapsulated, enclosed or removed.

[627] The meaning and effect of sections 34 and 35 are not in dispute. Neither of the terms "alterations" or "renovations" is defined in the *OHS Code*. They then bear no unique meaning beyond their common usage. They also arise in the federal *Income Tax Act* and, when judicially considered in that context, the Court relied on their definitions in the Oxford English Dictionary, 1st ed.: *Rosen v Canada*, [2000] 3 CTC 2640, at paras 9-10 (TCC); and *Attas v Canada*, [2000] 3 CTC 2773, at paras 15-16 (TCC).

[628] Renovations refers to the more significant changes: restorations, refurbishments, renewals, and changes in such things as the condition or configuration or purpose of a building. These have a greater prospect of encountering more of a building's component materials.

[629] Alterations, used in tandem with renovation, means something other than the things referred to by renovations, but that may still disturb ACM. It covers the broad range of changes to a building that are of lesser magnitude, including in this case removing or installing or relocating mechanical things such as VAV boxes, light fixtures, AV monitor supports and wiring conduit. Of these things, there were frequent "alterations" somewhere in the Plenum spaces, as the wishes of so many occupants occupying so great a total space in the offices necessitated.

[630] The discovery of asbestos in the Building mid-2017 by Eco Abate resulted from it conducting a hazardous materials assessment of areas in the Building that were slated for renovation. This was a standard first step in any renovation process, among other reasons to learn if action might be required under section 35 (and sections 36 and 37).

[631] Then we come to the disputed sections.

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[632] Section 31 on its face does not require the removal of all ACM from a building. It *may* require the removal of all SAF from the Building, or just some of it, but only if doing so is "necessary" to correct an unsafe condition in the Building. The parties do not disagree on that. They disagree on whether the effect of section 31 on this Building necessitates removal of all SAF. Whether "asbestos fibres may be released in a building" is vague. The parties disagree on what it means. If it is found that asbestos fibres may be released in the Building, then what the necessary steps are to correct that unsafe condition is also disputed by the parties.

[633] Section 33 does not require the removal of all asbestos from existing buildings that may release asbestos fibres into its air distribution system. Section 33 prohibits now *adding* ACM in the identified locations or forms that may release asbestos fibres. If any ACM in the identified form and location may release asbestos fibres, then it is caught by section 31. It constitutes an unsafe condition and must be corrected by taking all necessary steps. That may or may not mean removal of some or all the ACM, but if so, it would be pursuant to section 31 not section 33.

[634] I next explain those conclusions, starting with noting the wording choices of the legislators across sections 31 to 35, in their statutory and historical context, and their place within the broader scheme of all Alberta's legislation pertaining to asbestos in buildings.

(a) Wording choices

[635] I point out three wording choices used across sections 31 to 35. For each the Legislature is taken to have intended different things by employing the different words; none are superfluous or selected in vain.

i. Asbestos vs Asbestos fibres

[636] Within the five sections, sometimes "asbestos" is the word used and sometimes the term "asbestos fibres" is used. In one of the two disputed sections, section 33, both are used.

[637] "Asbestos" is the descriptor of the mineral when the legislation speaks about it as a material that would be applied, added or used in a building. For example, by sub-section 32(1), "materials containing crocidolite asbestos" must not be used in an existing or in a new building.

[638] "Asbestos fibres" is the descriptor when the legislators speak about the "release" of the mineral. It is the inhalation of individual respirable amphibole fibres over 5 microns in length, having a diameter less than 3 microns, and with an aspect ratio greater than 3:1, that is the paramount concern for human health and workplace safety, not the mere presence of asbestos *per se*, which can be tightly bound up with or inseparable from other materials, as it is in the duct mastic, or present as bundles of asbestos fragments, or mere fragments.

[639] Though "asbestos fibres" is plural throughout the five sections, by operation of law the word "fibres" includes also the singular: *Interpretation Act*, s. 26(3). The requirements about "asbestos fibres", therefore, presumptively apply even if only a single asbestos fibre is involved, *mutatis mutandis.* I find that presumption rebutted here, for reasons I describe below.

ii. Employer vs Person

[640] Sometimes the prohibitions in the five sections are directed at an "employer" and sometimes at a "person." Sections 31, 34 and 35 are directed at employers. Sections 32 and 33

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are directed at persons. This is the first of the clear indications that sections 31, 34 and 35 target buildings already containing asbestos, while sections 32 and 33 prohibit only the addition of asbestos into buildings.

[641] In sub-section 1(n) of the *OHS Act*:

> (n) "employer" means
>
> > (i) a person who employs or engages one or more workers, including a person who employs or engages workers from a temporary staffing agency,
> >
> > (ii) a person designated by an employer as the employer's representative, or
> >
> > (iii) a director or officer of a corporation or a person employed by the employer who oversees the occupational health and safety of the workers employed by the corporation or employer;

[642] "Person" is of course a much broader term. It is not defined in the *OHS Act*, *OHS Regulation* or *OHS Code* in force at the relevant times. By common usage it means everyone and, by para 28(1)(nn) of the Alberta *Interpretation Act*, person "includes a corporation and the heirs, executors, administrators or other legal representatives of a person". Other legislation applicable in Alberta has the term also including corporate bodies, trusts, partnerships, funds, associations and organizations.

[643] I infer that by choosing the word "person," not "employer", the legislators imposed the stated requirements on more than just employers and owners. Sections 31, 34, and 35 use "employer" and each speaks of existing buildings where there are ACMs that may release asbestos fibres. I am hard-pressed to conceive of anyone other than an employer or owner that would be responsible to correct an existing unsafe condition or to remove ACM before demolition, renovation, or alteration, or to conceive of anyone other than an employer or an owner that should bear responsibility for doing so.

[644] Both sections 32 and 33 do not use "employer" but both use "person". Section 32 clearly speaks of now adding asbestos. For that activity it is not enough to just prohibit employers and owners. It is an activity in which persons beyond just employers and owners could engage. Obvious examples are contractors, labourers, project engineers, and suppliers, and no doubt there are others. Therefore, the legislation directs the prohibition at all Albertans by the term "person." Both sub-sections of section 32 prohibit the addition of ACM by a "person": sub-section (1) prohibits adding material containing crocidolite asbestos and sub-section (2) prohibits applying ACM by spraying. Persons other than employers and owners could get involved in either activity. All persons are targeted by the broader term, person, rather than the more limited term, employer. This broader array of persons may not have authority over a building to decide on conducting such an activity and initiating it, but all are prohibited from having any hand in carrying them out.

[645] We then come to section 33, which also uses the word "person" not "employer". This implies that section 33 is not directed at the presence of existing asbestos in existing buildings, which only employers and owners could address, but at the addition of asbestos to existing or new buildings in which the broader array of Albertans could do. Consistent with this inference,

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the Building Code's General Asbestos Provision also uses the word "person" in saying: "no person shall install...."

[646] The scope of the prohibition in section 33 would be ambiguous if read as a stand-alone section apart from its placement within the context of these five sections. On its face it could be taken as meaning a person is not to use the offending asbestos in the sense of not *continuing to make use* of or not *continuing to rely on* such asbestos that is already present in the building (as the Tenant takes it to mean) or it could mean not use in the sense of not *now adding more* offending asbestos. In the former sense it would mean no person may now benefit from its continued presence; no person can continue to make use of it so either they must leave the building, or the offending asbestos must leave the building. In the latter sense of the word "use" it would mean no person can now add it in the described form or location. In its context, given the word used is "person" not "employer," section 33 refers to adding asbestos into a building, not continuing to use asbestos already present in a building.

[647] The legislators chose the word "person" for section 33 which is far more consistent with the latter interpretation of the word "use". Choosing the word "person" not "employer" indicates which of the two senses of "use" the legislators intended. If the legislator intended to prohibit the continued use of asbestos already present in a building, then like sections 31, 34 and 35 it would have used the word "employer." I am hard-pressed to conceive of anyone other than an employer or owner who could bear responsibility for allowing existing offending asbestos to remain in place and continue in use. I consider it more likely that, by choosing the word "person" the legislators were targeting the prohibition to all those who may become involved in the prohibited conduct; by prohibiting "persons" the legislators are prohibiting "use" in the sense of now adding such asbestos. If it prohibited "employers" then it is more likely the legislators would have meant "use" in the sense of continuing to benefit from such asbestos already present.

iii. Must Not Use versus Remove

[648] The prohibitions across sections 31 through 35 employ different verbs. The verbs in sections 31(2), 34 and 35 are not contentious. Those provisions all apply to asbestos that is already in existing buildings that may release asbestos fibres for which the verbs are, in order, "must take all necessary steps," "must ensure", and again "must ensure". The prohibition in sub-section 32(2) is similarly not contentious, in that it deals with the method of adding asbestos to a building – that is, by spraying. There the verb used is "apply," in the phrase "must not apply … by spraying."

[649] Less clear on its face is the verb "use" in both remaining provisions: sub-section 32(1) "must not use" (materials containing crocidolite asbestos), and section 33 "must not use" (asbestos in a location or form from where or from which asbestos fibres may enter an air distribution system or equipment).

[650] On its face, that is, out of its context in a stand-alone phrase, the verb "use" could mean either "do not add" or "do not continue to rely on" (or it could mean both). The Tenant's interpretation of section 33 is either the 'do not continue to rely on' or the 'or both' possibility.

[651] The Tenant says section 33 is a prohibition against continuing to make use of any asbestos already in the prohibited way. By "the prohibited way" I mean, quoting from section 33, "in an air distribution system or equipment in a form in which, or in a location where, asbestos fibres could enter the air supply or return air systems."

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[652] The Tenant says, therefore, that for the Landlord to comply with section 33 it must remove all SAF from being present in the prohibited way. The SAF in the Plenum spaces and Shafts is ACM in a location and form that is releasing asbestos fibres. If the Landlord leaves the SAF where it is it will be "using" it, in breach of section 33.

[653] Just as the legislators' choice of the word "person" not "employer" in section 33 militates in favour of concluding they intend "not use" to mean 'not add' rather than 'not continue to rely on' (that is, 'must remove from existing buildings') so too does understanding section 33 within the full legislative regime around asbestos in buildings compel that interpretation.

[654] The presumption of consistent expression has that effect. Having expressly stated that ACM that may release asbestos fibres must be "removed" in section 34 (prior to demolition) and in section 35 (prior to renovation or alteration) as one of three possible actions mandated, if the legislature intended that the circumstances in sub-section 32(1) or section 33 required the removal of asbestos from existing buildings, then it would have expressly stated so – using the word "remove", just as it did in sections 34 and 35. It did not say "remove" in section 32 or 33. The implication is that removal of existing ACM is not required by either section 32 or 33. Similarly the term "use" in sub-section 32(1) refers to the act of installing, so likely its repetition in section 33 conveys the same meaning.

[655] If this interpretation is incorrect, and sub-section 32(1) is intended to also require removal of any crocidolite asbestos from existing buildings (without saying so and regardless of whether it may release asbestos fibres), then the effect of the interpretive maxim *expressio unius* is that the express mention of only crocidolite, and not any of the other 6 Forms, means that only crocidolite (the most dangerous to human health of the 6 Forms of asbestos), must be disturbed (and the associated risk of its inhalation courted). This would be counter-intuitive. It is the one form for which exposure risks ought to be minimized. Further, requiring disturbing by removal of any form of asbestos is inconsistent with the long-standing policy approach, which will be discussed later in this decision, of not disturbing ACM in existing buildings without the requisite language of "irresistible clearness."

[656] In my view, sub-section 32(1) does not prohibit leaving crocidolite to be managed in place where it has already been installed in existing buildings but prohibits now adding it to existing or new buildings. If leaving it in place creates an unsafe condition, then it must be addressed pursuant to sub-section 31(2), perhaps by removal, but not because of sub-section 32(1).

[657] Also if this interpretation is incorrect (and sub-section 32(1) is intended to also require immediately the removal of any crocidolite asbestos from existing buildings, without saying so and regardless of whether it may release asbestos fibres), the absence of the word "existing" from section 33 implies, by the presumption of consistent expression, that section 33 does not require removal of the ACM from existing buildings that may release asbestos fibres into an air distribution system. Section 33 does not use the word "existing" as does sub-section 32(1); it does not say asbestos cannot be used in an "existing" air distribution system or equipment in a form in which, or in a location where, asbestos fibres could enter the air supply or return air systems.

(b) Alberta's Policy Approach and Legislative Overlap

i. Scheme of the OHS Code for Managing ACM

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[658] Asbestos use in building construction was widespread in Alberta until its dangers became known. Governments began mandating its removal. In the United States in 1985 the EPA issued its "Purple Book" which became symbolic of that period of mandated total removal. An Ontario Royal Commission led similarly to mandated total removal.

[659] Experience quickly showed removing all ACM to be counter productive. One expert referred to this approach across the continent as "over-zealous." Disturbing all the ACM to remove it created harmful exposures to respirable asbestos, whereas managing it in place until it would have to be disturbed for another reason, such as building demolition, renovation, or maintenance, reduced the risk of harm to human health. In 1990 the US EPA published its "Green Book" reflecting this safer approach, to replace the Purple Book.

[660] At that point governments in general resiled from mandating removal of all ACM. They transitioned to a more circumstance-specific and 'as-needed' approach.

[661] Years later, when Alberta consolidated the various separate enactments into the new *2003 OHS Code*, the established best practices was managing asbestos in place, with care and precaution to guard the safety of workers coming in the vicinity of the ACM, unless circumstances necessitated removal earlier. This manage-in-place approach is reflected in Part 4 of the *OHS Code*, including sections 31-35.

[662] Presently under this longstanding approach, ACM may remain in existing buildings. The legislative regime speaks of its removal in 4 specific circumstances. First, ACM must be removed when imminent disturbance of the ACM may release asbestos fibres, either because the building is slated for demolition (section 34) or for renovation or alteration (section 35). In the case of the former it must be removed prior to demolition. In the latter, removal is only one of three remedial options. The other two are enclosure and encapsulation.

[663] Second, ACM must be removed from existing buildings when its continued presence "is determined to" constitute an unsafe condition because it may release asbestos fibres *and* removal is "necessary," in whole or in part, to correct that unsafe condition (section 31).

[664] Third, ACM must be removed when it is either reasonably practicable as a means of minimizing asbestos release (sub-section 28(a)), or it is reasonably achievable to reduce worker-exposures to asbestos by removing it (sub-section 16(1)). Note that these two provisions, unlike the first three mentioned above, are not limited to when "asbestos fibres" may be released but apply to the release of or the exposure to all asbestos particles and shapes, that is, regardless of the released asbestos being in the dangerous amphibole fibrous form. The objective is to reduce the release of asbestos fibres, but the means is by removing all ACM (when either reasonably achievable or practicable). Neither of those latter two provisions mandates removal always in all cases of ACM. In both provisions removal is dependant on the circumstances. Sub-section 16(2) refers specifically to airborne asbestos fibres, by its reference to Schedule 1 Table 2 that speaks of concentrations of a substance per volume of air,[37] but not sub-section 16(1).

[665] All three of the foregoing circumstances entail the possibility of asbestos that is already present in existing buildings remaining in them, potentially even past demolition of the building.

[37] Schedule 1, Table 2 at the first of the opening explanatory sections, section (1) and the Table 2 itself measures the OEL by "f/cc" – "fibres" per cc.

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Only if the planned demolition has the potential to release asbestos fibres is prior removal of the ACM required.

[666] Fourth, unlike those latter three, buildings must always be kept clear of "unnecessary accumulations" of asbestos (sub-section 28(b)). That means removal is mandated, an ongoing obligation, and regardless of the degree of health risk from the potential of the asbestos accumulation to release asbestos fibres.

[667] At any of the foregoing times that asbestos is removed, the process of doing so is subject to tight restrictions intended to protect worker health and safety by, among other things, minimizing the risk of exposure to asbestos fibres (sections 26, 35 to 38 and 40, of the *OHS Code*).

[668] But the legislative policy approach does not court those risks unless doing so is necessary. Managing in place is the default; the remedy to the exposure risk of asbestos in existing buildings is not to be worse than the condition.

ii. Alberta's Legislative Overlap Regarding Asbestos in Existing Buildings

[669] The Tenant says there is a further circumstance in which Alberta mandates removal of all ACM. It says section 33 requires its removal if the ACM is "in a form in which, or in a location where, asbestos fibres could enter the air supply or return air systems." Section 33, it says, prohibits its continued use there, meaning it must be removed.

[670] In addition to this interpretation of section 33 being inconsistent with the broader scheme of the *OHS Code*, which favours the management of ACMs in place, as explained above, it is inconsistent with how the words of section 33 are used beyond the *OHS Code*, elsewhere in the province's asbestos legislation.

[671] Since 1985 the *Building Code* has contained a provision almost identical to section 33, the Air Distribution Provision, but exempted its application to existing buildings by grandfathering the existing buildings with ACM. When the Legislature created the *2003 OHS Code* and replicated in it (along with a few other sections) section 33, it did not remove the virtually identical *Building Code* provision. Both continued in force. It seems most unlikely that the legislature intended that section 33 be interpreted as mandating removal of all air distribution ACM while virtually identical wording in the *Building Code* exempted it from removal.

[672] Under the *Building Code* provision, ACM does not have to be removed from existing buildings. Under the Tenant's interpretation of section 33 of the *OHS Code*, it does. Under the alternate interpretation of section 33, the one I find to be the correct one, ACM does not have to be removed from existing buildings.

[673] The presumption of unified coherence invites one to choose from among the possible interpretations, the one which maintains consistency across the separate provisions that address the same thing. The legislature prefers interpretations of those provisions that avoids inconsistency.

[674] This further confirms the interpretation of section 33 I have reached above, as having only prospective effect, is the correct interpretation. This interpretation avoids the inconsistency with the *Building Code* provisions that address the very same subject matter.

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[675] Section 33 does not represent a change to the longstanding approach embodied in the *Building Code*, since it lacks the "irresistible clearness" (*Goodyear Tire*, at p 614; *Parry Sound*, at para 39) necessary to depart from it so markedly. Failing such express wording, the Supreme Court of Canada said in those two cases, "the law remains undisturbed." There is no such clear express wording here.

[676] The overall regulatory scheme prefers management of asbestos in place and removal only when expressly mandated in one of the circumstances described above, or at any other time when it is reasonably practicable (*OHS Act* section 8 and *OHS Code* section 28) or reasonably achievable (*OHS Code* section 16), and in any event always keeping buildings clear of unnecessary accumulations of asbestos (*OHS Code* section 28).

(c) Section 33 does not mandate removal of anything

[677] To summarize the above in respect of section 33, when it is read in the context of all Alberta legislation addressing asbestos in existing buildings, section 33 does not require removal of any ACM from which asbestos fibres could enter an air distribution system.

[678] The Tenant's interpretation of section 33 is also inconsistent with section 31. If ACM located in or near an air distribution system is not in a form that could release asbestos fibres, under section 31 it does not constitute an "unsafe condition" that must then be corrected. However, under the Tenant's interpretation of section 33, regardless of being in a form that could not release asbestos fibres, it must be removed.

[679] A current example may help explain. The duct mastic in the Building contains asbestos and is in a location from which any asbestos fibres it might release could enter the Building's air distribution system. It is in and throughout the air distribution system. It has been applied to every join of the air supply ducting throughout the Building, almost all of which is within the air return system – the Plenum spaces and the vertical Shafts. Therefore, it satisfies the "location" prerequisite to section 33. But the duct mastic is not in a form that could shed asbestos fibres. The Tenant's interpretation of section 33 says it all must be removed, though pointless and though doing so would expose Building occupants to a risk that does not exist just leaving the duct mastic as and where it is.

[680] Section 33 uses the word "or" ("in a form in which, ***or*** in a location where"), not "and" (in a form in which, ***and*** in a location where). If it said "and", then under the Tenant's interpretation of section 33 removal would not be required, because the duct mastic would not satisfy both the location and form requirements. It would not have to be removed. But section 33 does not use "and" it uses "or". Under the Tenant's interpretation if the duct mastic meets either the location or form requirements, then it must be removed, even though it would be completely pointless to do so. The Tenant's interpretation leads to an absurd result and one that is inconsistent with the clear policy choice of the Legislature to only disturb ACM that may release asbestos fibres when doing so is necessary to correct an unsafe condition or to avoid one during an imminent disturbance event.

[681] The correct interpretation of section 33 avoids that absurdity. When section 33 is properly understood as referring only to adding asbestos in the future, the "or" makes sense. It means adding asbestos is prohibited if it satisfies either the location or the form prerequisite. It is not "and" such that both the form and the location prerequisite would have to be satisfied before adding asbestos would be prohibited. Using "or" is the more comprehensive prohibition on

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adding asbestos that may release asbestos fibres. The "must not add" interpretation of "must not use" is more consistent with the overall scheme of prohibiting any further installations of asbestos in buildings, in any form or in any location. If ACM in or near an air distribution system is in a form that may shed respirable asbestos fibres, it will trigger action pursuant to section 31.

[682] Section 33 using the word "or" not "and" still further confirms that section 33 was ever only intended to prohibit prospective uses of asbestos that may release asbestos fibres, not past uses in existing buildings. The Tenant's interpretation of section 33 requires removal of the duct mastic now even though it is not required under section 31 because under section 31 the duct mastic does not create an unsafe condition – it is not in a form that could release asbestos fibres.

[683] Under the correct interpretation of section 33 the two sections operate sensibly and consistently. No inconsistency with section 31 arises because section 31 does not prohibit new installations of asbestos. Section 31 is the Legislature's chosen way of addressing ACM of concern that is already in buildings, anywhere and in any form that it may exist.

[684] I note that the Tenant is not suggesting all duct mastic be promptly removed, despite such a demand being the logical consequence of its interpretation of section 33.

[685] Section 33 of the *OHS Code* does not require the removal of anything by the Landlord. It is not remedial but preventative. It only prohibits the addition of ACM in the described form or in the designated location.

(d) Section 31 does not mandate removal of all the SAF

[686] The Tenant says there is no doubt there is a potential for release of asbestos fibres from the SAF in the Building because the SAF has already released asbestos fibres. The Tenant says the only solution to the resulting deemed unsafe condition is the removal of all the SAF. The Tenant says the potential release of a single asbestos fibre in the circumstances of this case makes removal of all the SAF in the entire Building necessary.

[687] The Tenant has not proven that the Landlord failed to remove all the ACM that section 31 requires.

[688] Section 31 does not mandate removal of all ACM that may release asbestos fibres. It *may* require removal but only if it is a "necessary step." Removal of all ACM is very likely going to be a sufficient corrective step, in most any case. Done effectively, it is certain to get rid of the cause. But that does not mean it is the only step sufficient to correct an unsafe condition nor that it is a necessary step to correct the deemed unsafe condition. Other steps may be equally or more effective, while being more practicable or more reasonable. Other steps may be equally effective but less risky, not creating a greater unsafe condition by the process of removal. Other steps may address the matter gradually as optimal circumstances for addressing the condition arise over time, and protective measures are put in place to retard or avoid the actual release of an asbestos fibre in the interim.

[689] The Tenant appears to agree that section 31 does not require removal of all ACM always. But the Tenant says it is the required and the necessary corrective step in this case. The Tenant says, "No expert seriously suggested that the [SAF] could be repaired or enclosed, or that it would be feasible to encapsulate it."

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[690] The Tenant also says the Manual is clear that ACM cannot be effectively managed when any of four circumstances exists, and in this case all four of them exist. All four circumstances are not, in fact, present in this case, though two are. Neither of those two necessitates removal of all the SAF. The portion of the Manual relied upon by the Tenant says, at p 13:

> Examples of materials that cannot be effectively managed include:
>
> (a) materials in air handling systems where air movement can break down or erode the material;
>
> (b) materials that are damaged by water or vibration;
>
> (c) materials that are easily accessible to the general public and may be damaged by accident or through vandalism; and
>
> (d) friable materials in proximity to maintenance activities.

Only (b) and (d) apply to the Building.

[691] Circumstance (a) does not exist at the Building as the air movement in the Plenum spaces does not break down or erode the undisturbed cementitious SAF. I take (a) to be directed primarily at the loose dry insulating materials blown into residential attics. Circumstance (c) does not apply at the Building; the SAF is not easily accessible to the general public.

[692] Regarding (b), in rare locations in the Plenum spaces there was evidence of some SAF staining that was attributed to water leaking in the vicinity and, in one such location at least, some resulting delamination of SAF was evident. Concluding from these rare spots in the Building that the law requires removal of all the SAF throughout the Building is quite an overreach.

[693] Regarding (d), now that it is known that the SAF is ACM, in the future all maintenance activities in those Plenum spaces, as "alterations" triggers section 35 of the *OHS Code*. Section 35 requires one of encapsulation, enclosure, or removal of such proximate ACM prior to the Plenum altering activity, not necessarily removal, and only in the area of the maintenance not throughout all 33 floors.

[694] If removal is the option selected, the evidence shows that under proper protocols the SAF can be safely removed without the release of asbestos fibres; the Building need not be vacated at such times.

[695] Removal from the Building now of all SAF is an absurdly disproportionate consequence, beyond any sense of what might be considered "necessary". The Tenant's approach means that the mere theoretical possibility of just a single asbestos fibre releasing from some ACM, anywhere in or around the well over 600,000 square feet of inhabitable floor space, at anytime over the next 13 ½ years, triggers a requirement to remove all the source ACM. It does not.

[696] Taken to its logical extreme, the Tenant's approach (1) results in a mandate to remove all asbestos from all buildings without delay, regardless of their circumstances or of any actual health risk, because under this approach every building with ACM will trigger this extraordinary standard of "remove it all now on a remote theoretical someday it might" possibility standard, and (2) renders nugatory all the other asbestos-related provisions about grandfathering non-risky ACM in existing buildings while still protecting against exposure to it. Under the Tenant's interpretation, managing ACM in place would never be tolerated because all buildings would be

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caught by the Tenant's approach to section 31, despite managing in place being the more prudent approach in most cases. The Tenant's interpretation does not reflect the Legislature's intent.

[697] Perhaps the Legislature intends that the prefacing phrase to sub-section 31(1): "If it is determined", to cause a more situation-specific risk assessment, before the sub-section 31(2) necessary corrective steps are triggered. In all other aspects of the asbestos regime, concentration matters. The Manual offers an "Exposure Risk Algorithm" and a "Risk Decision Tree" to assist people determining what to do with their ACM. Under the *OHS Code* apart from section 31, 34 and 35, concentrations posing an exposure risk are to be minimized and mitigated, but not necessarily eliminated, and only insofar as is reasonably achievable and practicable. This approach to sub-section 31(1), and the "If it is determined" phrase in it, would not be unlike the approach of the BC Court of Appeal in *Manns v Vancouver Island Health Authority*, 2024 BCCA 110, where the Court discusses how ambiguity may arise on a closer analysis of the context and purpose of a provision, that may not be apparent on a "casual examination." It says at paras 18 and 19:

> The respondents contend that there is no ambiguity in the statute. They say that s. 14 is a clear and broad grant of immunity, such that it is not permissible for the Court to go beyond the language of the Act in search of its correct interpretation.
>
> A cursory reading of a statute, however, will not always uncover complexities of interpretation; genuine ambiguities will not necessarily leap off the page. A detailed analysis of statutory provisions can reveal difficulties that are not apparent from a more casual examination. The appellant contends that the judge erred "by applying a strictly textual analysis of the Act". I take this to be an assertion that a more detailed look at the text, context and purposes of the Act may support a different interpretation.

[698] Perhaps the Legislature intends the sub-section 31(2) consequence of employers taking all necessary corrective steps to be the place for the situation-specific risk assessment, such as contemplated above in considering the meaning of "If it is determined." The number of asbestos fibres that may release, and how frequently they may release, and over what area they may release, are perhaps intended to inform what the "necessary" steps are to correct the unsafe condition. Perhaps in the necessary steps analysis one considers just how comprehensive and how quickly the corrective action is required, or like here whether anything at all may need to be done – ever.

[699] Either way, the Legislature followed the deeming provision in sub-section 31(1) with the consequence provision in sub-section 31(2). The consequence is to be commensurate with the condition. Not every unsafe condition is equally unsafe. Any unsafe condition must be corrected proportionate to the severity of the condition. "All necessary steps" must be taken, but no more than are necessary must be done, and certainly none that create a greater risk of exposure than the unsafe condition.

[700] Either way, the requirements of section 31 in this case are not remotely close to the 'remove all SAF forthwith while we wait in another building at your expense' wish of Wilson.

[701] Whether the actual circumstances are considered in applying the "it is determined" phrase in sub-section 31(1) or in the "all necessary steps" phrase in sub-section 31(2) is not

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necessary for me to decide in this case. What is clear is that section 31 as a whole mandates a situation-specific condition and response assessment.

[702] The Tenant's approach to section 31 leaves no room for necessity, practicability, and rationality in the circumstances. It is rigidly black and white, regardless of the reality. Yet reading the *OHS Act* and *OHS Code* as a whole leaves a very different impression. Consistent with the rest of the legislation, the Legislature intends Albertans to apply the two sub-sections to section 31 through the lens of such contextual factors, addressing any situation that may pose even a small risk to human health. But not, as here, where there is virtually no such risk.

[703] The Legislature expects Albertans to gradually rid existing buildings of their ACM, but in ways that do not increase risks to human health. Not only would applying section 31 as the Tenant proposes, when the quantity of asbestos fibre release from the SAF is virtually nil and posing no risk to human health, be inconsistent with the broader scheme of the *OHS Act* and *OHS Code*, which favours the management of ACM in place, but it would run up against the presumption against absurdity. There could be no rational purpose in requiring building owners to take corrective measures when there is nothing actual to correct, only a deemed need of correction. There could be no rational purpose in requiring building owners to take corrective measures when, like here, the actual risk to human health infinitely approaches zero.

[704] If I am incorrect in my finding of fact that the undisturbed SAF may not in future release even one asbestos fibre so long as it remains undisturbed, the Tenant has not proven on balance that removing it all is a necessary step to preventing that risk of fibre release. Other means are conceivable and not ruled out, including perhaps by preventing return air flowing in the Plenum from re-entering the Building with the fresh supply air, by exhausting all return air outside the Building, or by increasing the quality and performance efficiency of the filtration on recirculated air to ensure no fibre 5 or more microns in length, with a diameter less than 3 microns and the requisite aspect ratio, passes through the filters.

[705] In any event further, I consider the Landlord's compliance in future with its AMP, provided it is appropriately revised, to constitute a sufficient corrective step to the condition presented by the potential for release of more asbestos fibres from any of the SAF. Removal is not necessary.

(e) Section 31 also does not mandate removal of just the Disturbed SAF promptly, while the Building is empty

[706] The Tenant argued in the alternative to removal of all SAF, that section 31 requires that all poor condition SAF be removed. As I indicate above, I prefer to speak of Disturbed SAF and undisturbed SAF, not differentiate among SAF according to its good, fair or poor condition. Those categories are more subjective. Capable experts looking at the same SAF could not agree on the attribution of those labels. As I explained above in my findings of fact, and largely because of the friable quality of the SAF, I prefer the more objectively certain approach of differentiating between the SAF that has been Disturbed and that which has not. If SAF has been disturbed in any way, because it is friable, there is a greater risk it will release an asbestos fibre, even if that SAF might be described by some experienced observers as being in good condition. Objective observers should more readily agree on whether any SAF has been disturbed, than what condition it may be, making any removal requirement easier to apply.

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[707] While the so very few airborne asbestos fibres found in the Building all came from the Disturbed SAF, it still amounted to virtually none by concentration. In the Disturbed SAF, be it crushed, loose hanging or pulverized dust, the concentration of amphibole asbestos was also extremely low. Complete removal of all the Disturbed SAF, when only a very small portion of it may ever release even a single fibre, is out of all proportion to the risk of release of an asbestos fibre and is not the Legislature's intent.

[708] Nevertheless, and provided the Legislature has not intended a rational risk threshold be first satisfied before "it is determined" there is an unsafe condition under sub-section 31(1), the Disturbed SAF in that scenario does constitute an unsafe condition.

[709] However, the Tenant has failed to prove that full removal of all Disturbed SAF is a necessary corrective step under sub-section 31(2). That is not to say that removing all the Disturbed SAF is not a necessary corrective step, only that the Tenant did not prove it to be so.

[710] When the potential for asbestos fibre release is so infinitesimally low, I remain skeptical that removing any of it is a necessary corrective step to a deemed unsafe condition.

[711] Removal of some Disturbed SAF was required, not by sections 31 or 33, but by sub-section 28(b) of the *OHS Code*. This sub-section requires keeping the Building clear of unnecessary accumulations of asbestos. Here the Plenum debris is an unnecessary accumulation of ACM, and therefore an unnecessary accumulation of asbestos.

[712] As soon as the Tenant permitted the Landlord back into the Building for activity in the Plenum, which was after all its employees had left, the Landlord began its process of clearing out the debris. That work was completed before the end of 2019.

[713] But the Landlord needs to do more than that. That is not all that section 28 requires. The Landlord's instruction to the abatement contractor was to clear all horizontal surfaces. Still remaining, because it was outside the scope of work of the contractor, are all the bits of Disturbed SAF still connected, some loosely dangling and others frayed from a rough-edge remaining after other SAF has been scraped, bumped or removed. These pieces of ACM will be released into the air when they fall and are therefore required to be preventatively addressed. Sub-section 28(a) requires the Landlord minimize "as far as reasonably practicable" the release of asbestos into the air.

[714] Like sub-section 28(b) just discussed, sub-section 28(a) is not directed at limiting the release of asbestos fibres into the respirable air, but the release of any asbestos that may become airborne, that is, regardless of shape and risk to human health. Removing the SAF bits that dangle by tenuous connection to Disturbed or undisturbed SAF, and any other pieces of Disturbed SAF that are only loosely bound to other Disturbed or undisturbed SAF, or are delaminated from a Plenum surface, or are the remnant of surface scraped of surficial SAF, pose a risk of release of asbestos, of any particle size, into the Building air. Because of the *de minimis* concentration of asbestos in the SAF the risk is extremely low. But it is higher than the risk of release of an asbestos fibre. Provided it is reasonably practicable to do so, sub-section 28(a) requires the Landlord to remove all such ACM from the Building.

[715] The Landlord was not in breach of the Lease for not having done more yet because, first, the Tenant delayed the Landlord's access to the Building to investigate and then work in the Plenum. Second, the Landlord established its AMP, pursuant to which (if appropriately revised) more may soon be done with Disturbed SAF in the Plenum. Third, soon after the Landlord could

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access the Plenum to do any work, the Tenant terminated the Lease. After termination by the Tenant, the Landlord was no longer bound by its covenants. It is still subject to the provincial law but any non-compliance therewith no longer could constitute a breach of the Lease.

[716] The Tenant also argued in the alternative that the Landlord was required to remove SAF in the areas of its planned renovations. This is required by section 35, not section 31, and there was no suggestion in the evidence that the Landlord was not going to comply with that requirement when the Tenant resumed its planned renovations, now that the Landlord knows the SAF is ACM. This also was not a valid basis for the Tenant to terminate the Lease.

Implications for the Tenant's Allegations of the Landlord's Breach of Lease covenants 16(j) or 16(o)(ii)

[717] The Landlord did not fail to comply with section 33 and therefore the Landlord's approach to section 33 did not provide the Tenant a valid reason to terminate the Lease under either of covenants 16(j) or 16(o)(ii).

[718] The Landlord did not fail to comply with section 31 and therefore the Landlord's approach to section 31 also did not provide the Tenant a valid reason to terminate the Lease under either of covenants 16(j) or 16(o)(ii).

[719] In any event, the Landlord was in the process of complying with the applicable legislation at the date of Termination, including sections 16, 21 and 28 of the *OHS Code*. It was not in breach of its Lease covenants 16(j) or 16(o)(ii). It certainly was not in fundamental breach, nor did its conduct give rise to anticipatory breach.

5. b. Quiet Enjoyment

Law on Quiet Enjoyment

[720] At common law a right of quiet enjoyment protects against two things: interference with the title and physical interference with the use of the property: *581834 Alberta Ltd v Alberta (Gaming & Liquor Commission)*, 2007 ABCA 332, at para 9. The Tenant claims a breach from the Landlord's interference with its use of the property.

[721] Where enjoyment of premises "is substantially interfered with by acts of the lessor, the covenant is broken" and it is a question of fact in each such case whether the actions of the lessor constitute a breach of the covenant for quiet enjoyment: *Franco v Lachman* (1962), 36 DLR (2nd) 357 (Alta SCAD), at paras 18-19.

[722] A breach of the right requires proof of more than temporary inconvenience. In the words of the Court in *Firth v BD Management Ltd*, (1990), 73 DLR (4th) 375 (BCCA), at 379 – 80:

> […] the question of whether there has been a substantial interference is a question of fact. Mere temporary inconvenience is not enough - the interference must be of a grave and permanent nature. It must be a serious interference with the tenant's proper freedom of action in exercising its right of possession. See *Kenny v. Preen*, [1963] 1 Q.B. 499 (C.A.).

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> Similarly, when one considers whether a landlord's acts can be construed as a derogation from its grant, the [tenant] must demonstrate that there has been some act which renders the premises substantially less fit for the purposes for which they were let.

[723] The interference with a tenant's freedom of action may result from things other than direct physical obstruction. Lord Denning MR in *McCall v Abelesz*, [1976] QB 585, at p 594, said:

> This covenant is not confined to direct physical interference by the landlord. It extends to any conduct of the landlord or his agents which interferes with the tenant's freedom of action in exercising his rights as a tenant.… It covers, therefore, any acts calculated to interfere with the place or comfort of the tenant, or his family.

It has been applied in circumstances of landlord intimidation and persecution: see *Heckert v 5470 Investments Ltd*, 2008 BCSC 1298, at para 106.

[724] It does not matter that the landlord may have acted reasonably: *Watchcraft Shop Ltd v L & A Development (Canada) Ltd*, [1996] OJ No 2252 (ONCJ), at para 32.

[725] The test for substantial interference with the right to quiet enjoyment is objective not subjective. It has been stated as: "whether a reasonable tenant, in the same circumstances as the complainant, would conclude that the activities...complained of would significantly interfere with the enjoyment of the lease": *615636 Saskatchewan Ltd v Keith Pierce Insurance Financial Ltd*, 2001 SKQB 510, adopted in Alberta in *HPWC 9707 110 Street Limited Partnership v Funds Administrative Services Inc*, 2019 ABQB 167, at para 77.

[726] Parties to a lease may include wording in their lease about quiet enjoyment. In so doing they may make express what the common law will imply, or they may modify it, by wording their lease accordingly. The parties here made the Tenant's right to quiet enjoyment and its scope express. In sub-clause 16(a) of the Lease the parties agreed:

> The Landlord shall warrant and defend the Tenant in the quiet enjoyment and possession of the Leased Premises during the Term without any interruption from or by the Landlord or any persons lawfully claiming by, through or under the Landlord, subject to the terms and conditions of this Lease.

[727] The remedy for a breach of quiet enjoyment depends on the gravity and permanence of the breach. Substantial interference with the right will typically entitle the tenant to suspension of rent and damages, but not to termination of the lease: *HPWC* at 76. Termination may be possible for a landlord's breach of quiet enjoyment if either the parties expressly say so in their lease or, if they do not do that, if the tenant can show a breach of its right to quiet enjoyment amounting to a fundamental breach.

[728] Fundamental breach requires the tenant to prove it lost substantially the whole benefit of the lease, or that further performance of the lease was impossible. As was stated in *Firth* at 380:

> To constitute fundamental breach the landlord's conduct must be such as to go to the very root of the contract - not merely to part of it - so that it makes further performance impossible or it deprives the tenant of substantially the whole

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> benefit which it was the intention of the parties to the lease that the tenant should obtain as consideration for the rentals it was obliged to pay.

Tenant's Claims

[729] The Tenant claims the Landlord breached its right to quiet enjoyment by interfering with its uses of the property in several ways, which it says collectively also amount to a fundamental breach.

[730] First, it says the very presence of the asbestos impedes its quiet enjoyment. It says the disruption was obvious. It points to the evidence of one of its executives who said workers prefer to feel safe. It said asbestos in the Building disrupted its business because employees and management were pre-occupied with the associated safety risks, impairing management's ability to run the business.

[731] Second, it claims the AMP substantially impeded day to day Building operations and consequently the Tenant's use of the premises. It says the AMP "directly interfered with this daily work", speaking of the ongoing Building maintenance, repair and upkeep. Most all these activities required Plenum access, risking contact with or disturbance of the SAF or with the scattered debris of the many past SAF disturbances (on top of ceiling tiles, dangling in the return air vents spaces, hanging loose from intact SAF) or with airborne asbestos in the flow of return air within the Plenum.

[732] Because of the cessation of all Plenum activities caused by the discovery of asbestos present there, the Tenant says it already lost the associated comforts and quality of space it had bargained for, and that the Landlord was obliged to provide.

[733] Third, the Tenant claims that going forward the Landlord's plan of leaving the asbestos in place and imposing the intrusive measures set out in its AMP whenever the Plenum might be accessed, would very significantly further interfere with it's normal and unfettered use and enjoyment of the premises. The Tenant anticipated these AMP requirements would "cripple Building operations".

[734] The Tenant spoke of the AMP's emergency procedures, which when triggered could require halting activities to seek advice from an environmental consultant, potentially shutting down the Building's ventilation system (which it said could result in a temperature drop), and potential clearance of employees from an area along with notice to employees of potential exposure in case they wished to consult a physician. This has the potential to disrupt day-to-day life in the Building even further, every time triggered. The Tenant maintains these potential substantial disruptions and dislocations are inconsistent with the right of quiet enjoyment.

[735] Further, the Tenant says leaving the asbestos in place will substantially interfere with its ability to modify the premises in future, under the Landlord's intended management of it by its AMP. It meant an end to the planned Project Renaissance that was just commencing in 2017 and for which the Lease reflected a $27 million Tenant Allowance. It also means an end to all future periodic renovations and reconfigurations of the premises when, as it had done in the past, the Tenant wants to upgrade video conferencing equipment in meeting rooms, kitchen servery areas on each floor, IT connections in offices, and adjust office sizes to address such things as employee promotions, changing business group compositions, and changing department adjacencies. It means a continued delay to and a significant interference with all the future daily

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maintenance, repair, and adjustment work that was previously conducted throughout the premises.

[736] The Tenant concluded the Landlord was indifferent to these impacts and intended they continue over the entire duration of the Lease term. The Tenant says it therefore would be unable to use the premises in the agreed way for that remaining term. Because the Landlord refused to remove the SAF, the Tenant knew it would never return to the prior simple protocol for Plenum access for routine matters.

[737] The Tenant says these various individual substantial interferences in combination constitute a fundamental breach.

Conclusions on Quiet Enjoyment

[738] The Lease states at sub-clause 15(m) that:

> The Tenant shall use and occupy the Leased Premises for business offices and any ancillary uses in the normal course of the business of the Tenant provided that such uses are permitted by law.

The Tenant used the premises within that permitted scope, for its head office, from which it ran its global business of exploring, producing, and marketing oil and gas.

[739] I find the Landlord did not breach the Tenant's right to quiet enjoyment for such uses and the claimed breaches of quiet enjoyment do not individually or collectively amount to a fundamental breach by the Landlord of the Tenant's right to quiet enjoyment.

[740] First, for some of the Tenant's claims of substantial interference the trial record lacks supporting evidence.

[741] Contrary to the Tenant's claims, there was no direct evidence of noise from air monitoring equipment bothering employees' use of the premises, let alone substantially interfering with it. Employees were relocated away from areas under investigation by air monitoring and other testing methods. Other areas of the Building selected for testing were away from active employee workspaces, or outside employee work hours, as the Tenant insisted. The Tenant had a great number of empty floors, further enabling the search for asbestos to not interfere with the employees' use of the premises.

[742] The statement of opinion of a CNOOC executive that generally workers prefer to feel safe is not proof that CNOOC employees did not feel safe. The Tenant did not present to testify a single employee who said they did not feel safe in the Building.

[743] The Tenant speaks of the interference it experienced from the Landlord's AMP, yet the Tenant was already exiting the Building as the AMP was rolled out in November 2018. There was no direct evidence of it causing any interference with the Tenant's use of the premises.

[744] As presently written the AMP will never interfere with the Tenant's use of the premises. By defining ACM as it has, and asbestos as it has, the Landlord can be assured the AMP will never be triggered. In the Building the asbestos concentration will never exceed 0.1% dry weight, which is how it defines ACM. Under that weight and the AMP will not apply. The Tenant has not proven the Building's ACM meets the AMP definition of ACM. None of the Building's ACM is anywhere close to being over that threshold. Also, most of the types of Libby

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amphiboles are not included in the definition of asbestos – it does not include winchite or richterite, yet those two comprise 95% of all Libby amphiboles. Why limit the forms of asbestos to be addressed by the AMP at all, when all forms of the silicate mineral are "asbestos" in Alberta? If intentional, this AMP is designed to enable the Landlord to say 'we have an AMP', all the while knowing it will never require the Landlord to do anything. I trust this was an oversight borne of hasty drafting or perhaps by working off a precedent from another jurisdiction. I trust it will soon be remedied, or at least before the Building is again occupied. But until then it will not interfere with any tenant's quiet enjoyment.

[745] The asbestos legislation does not intend ACM be managed down to the maximum permissible concentration. Rather the intention is that it never exceed the maximum concentration while over time reducing the quantity of ACM whenever reasonably feasible or practicable to do so, including if the suitable approach in advance of an alternation or renovation in the vicinity of the ACM.

[746] The Tenant delayed the Landlord's remediation work from early 2019, right after completing its AMP, until the Tenant had fully vacated the Building. This delay was not to avoid any anticipated interference from the requirements of the AMP during that work, but to avoid the risk of exposure to airborne asbestos by the Tenant's employees from that work. Previous testing results demonstrated there to be no such risk. The legislation required the Landlord clear the unnecessary accumulations of asbestos. But the Landlord acquiesced to the Tenant's request. Rather than showing the AMP interfered with the Tenant's use, as the Tenant argues, the evidence shows that the Tenant impeded the Landlord's access to the Plenum to begin addressing the stated concerns of the Tenant.

[747] The Tenant in its argument also spoke about the future potential for interference from the AMP. It spoke of the potential for the AMP to disrupt use, to require a shut down, or for it to cause employee relocations. In respect of these arguments I will assume, as I think all parties believed, that the AMP will apply whenever activity in the Building might come in contact with the SAF.

[748] I agree with the Landlord that in the Building's circumstances, the chance of the emergency procedures in the AMP being triggered leading to a shut down of the Building "is not even a remote possibility" and that's even after the AMP is appropriately revised.

[749] With respect to the concern for air monitoring interfering with the Tenant's use of its premises in future, I accept the evidence of the Landlord's expert that quieter air monitoring machines are available than the one demonstrated in Court. And the Tenant's evidence included comment on its installation prior to the air monitoring in 2017, on most every floor of its premises, of electronic noise masking systems – that mask noise by producing it themselves:

> This is a system that has been dubbed in the technical field as "white noise", and it's a series of low-frequency transmissions that are generated from a machine -- a device that's mounted in the ceiling, and that's designed to mask typically the kinds of sounds that we'd hear in an office space, and that would be largely voices emanating from meeting rooms where we want to keep information quiet, confidential, and other background-type acoustical transmissions. This was installed in the space. It's controlled by a device in a core room, the electrical closet, and we can adjust it as required to mask any sound carrying across the floor.

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The imposition of the AMP has not been shown to have interfered in any way with the Tenant's use of the premises prior to the Tenant's termination, let alone substantially interfere with it in breach of sub-clause 16(a). The requirements of the AMP on all Plenum activities cause incremental inconvenience. I say "incremental" because the AMP does not create the reasons for going into the Plenum. Those already existed before the Discovery and would continue after had the Tenant remained in the Building. They are the primary cause of any intrusion. The adherence to the AMP will only incrementally increase the overall intrusion upon the Tenant's quiet enjoyment of the premises. It affects how the work in the Plenum is done and its duration, not whether the work will be done.

[750] The *potential* for a breach of quiet enjoyment is not a breach of the right. Regarding the *anticipated* future substantial interferences under the AMP, I discuss the claims of a valid termination based on an anticipatory breaches later in this judgment.

[751] Second, some of the Tenant's claims of substantial interference are exaggerated or not proven on balance.

[752] Very soon after the asbestos discovery, on December 19, 2017, the Tenant asked the Landlord that no ceiling tile be lifted until after the debris and dust atop them was removed. The Landlord abided by the request. In practical terms it meant the cessation of most all activity in the Plenum, since access to it was by lifting and setting aside one or more ceiling tiles. One exception was an entry by a contractor who was missed by the nascent Tenant prohibition and not stopped by Security. It led to re-enforcement of the prohibition. Then a flood on the 24th floor necessitated Plenum access, so after coping with that by getting EcoAbate on it, the parties in March 2018 began work on a protocol for any further Plenum access. The protocol was complete April 20, 2018. Among other things it required prior approvals from Century West and three different "Nexen" contacts or groups, plus also from "external vendors", before the Plenum could be entered. The Tenant never approved any request for such access for Building operational purposes. On July 20, 2018, the Tenant by email confirmed it was by its own doing that "all mechanical work in the Tower be stopped". At that time the Tenant then extended that prohibition to include also any "lighting issues" because, it said, "we are unwilling to expose our staff to" the additional risk it created. In testimony the Tenant explained it was "due to insulation within the return-air vents that were adjacent to the lights." Thereafter not even light bulbs could be changed from within the office workspaces.

[753] As a result of the prohibition on Plenum activities without the Tenant's prior approval, and it then not approving any such maintenance or routine repair activities, the Tenant was left with poorly lit areas, flooding and uncomfortable temperatures for extended periods. These undoubtedly inconvenienced Tenant staff, but this was not caused by the Landlord. It was the Tenant not the Landlord that suspended effectively all activities in the Plenum, not the Landlord or the Landlord's AMP.

[754] Similarly, the temporary inconvenience of some employees relocating their offices to different floors in the summer of 2018, when there were some testing results of concern to the Tenant, resulted from the Tenant's over-reaction and decision, not from anything the Landlord unilaterally imposed. It was contrary to the Tenant's consultant's advice that the premises remained safe for occupancy at least in the immediate term. It was not caused by the presence of the trace amount of asbestos in the SAF.

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[755] These temporary inconveniences resulted from the Tenant's choice to take, as one of its executives described it, "a cautious approach". The Tenant said this erring on the side of caution was not wanting to take any chances with the health and safety of its workforce. The Tenant was free to take its extremely cautious approach. However, and looking at these circumstances objectively, it was an unnecessary overreaction based on the initial information and advice it received about the asbestos discovery in the SAF. The first airborne asbestos fibre was found in July 2018, long after the Ultimatum. The immediate cessation of the renovation project in mid-2017 was appropriate, as was the cessation of activity in the Plenum after November 9, 2017. But then as the results of additional investigations were received, the Plenum prohibition should have relaxed and operations returned to normal under suitable asbestos management protocols, such as the Landlord has developed in its AMP if appropriately revised in scope. The Tenant's persistence with its initial cautious approach became an overreaction and then later a wholly unnecessary extreme. It lends credence to the Landlord's theory of the Tenant pursuing an ulterior motive following the discovery, after shown to not be still justified. The Tenant was of course at liberty to persist in its overly cautious approach, but not at the Landlord's expense.

[756] The Tenant has not proven on balance that its managers were pre-occupied with safety concerns associated with the Discovery, let alone substantially interfered with by such pre-occupations. None of the Tenant's managers who testified said they were. The member of the executive who was specifically asked about employee pre-occupation said that it was hard to tell, and then mused that it might distract some staff as "a good thing to talk about over coffee because there wasn't much going on with whatever else in their lives." It seems the Tenant worked to provide its managers with controlled messages to deliver to their employees, frequently assuring them that the Building remains a safe place to work.

[757] The Tenant has not proven on balance that the presence of the asbestos in the Plenum, or that consultants searching for it, interfered with or disrupted their management or non-management employees' use of the space for their office work. Each of Messrs. Wilson, Auger and Jusseaume revealed their lack of concern by continuing to work in the Building, as each then confirmed in their testimony. Wilson stated several times he thought the Building was safe to occupy in the immediate term. Jusseaume believed the Building "was never unsafe to occupy, and if it had been, I'd probably be the first one out the door." Auger said he "felt safe because we were air monitoring, because we were doing the things we're doing. So, we were being very proactive and very communicative with folks to assure them. So, if I didn't feel safe, how could I project that to other people? I wouldn't do it. I wouldn't be credible. I'd quit."

[758] All employees, management and non-management alike, were told by the Tenant, many times and in different ways, that the Building remained a safe place to work. I do not infer from these repeated employee assurances that they were a response to employees saying they felt unsafe. As Auger said, they were "very proactive" with their internal messaging. From that I infer the messages were not issued as a response to employee expressions of concern.

[759] I find the primary cause of any inconvenience experienced by the Tenant after the initial appropriate precautions it took upon discovery of the asbestos, was self-induced. After the initial discovery of asbestos, subsequent testing results revealed, and then more and more and more and still more testing results confirmed, that the concentrations of asbestos in the Building were wildly below levels of concern in Alberta and under the Lease. The Tenant chose not to relax the restrictions it imposed on its use of the premises. To the extent these did interfere with its quiet enjoyment, it was not the Landlord's doing.

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[760] I find, further, that any residual inconvenience that might be attributable to the Landlord's involvement in the Tenant's Lease premises did not permanently restrict the Tenant's freedom of action or have any other adverse effect upon it more than temporary or transitory.

[761] Third, in any event of the Tenant not proving a substantial interference, its arguments misunderstand the scope of its right to quiet enjoyment.

[762] The last phrase of sub-clause 16(a) limits the scope of the Tenant's quiet enjoyment right. That sub-clause ends with the words "subject to the terms and conditions of this Lease." Those words limit the scope of the Tenant's right to quiet enjoyment; it has been made expressly subject to the other terms and conditions in the Lease.

[763] Therefore, if the Lease requires the Landlord to remove some or all the SAF, for example perhaps pursuant to sub-clause 16(o) or to sub-clause 16(j) addressed above, or to sub-clause 15(i) (entitling the Landlord to enter to make repairs or alterations it deems necessary for the safety of the premises), any resulting interference with the Tenant's use of the Building as the Landlord complies with those Lease obligations will not constitute a breach of the Tenant's right to quiet enjoyment. While the Tenant's right to quiet enjoyment is subordinated to such necessary interferences by the Landlord occasioned by its compliance with its other Lease duties, when doing so the Landlord must limit to the extent reasonably possible its interference. That is, the quiet enjoyment covenant still applies, commensurate with the circumstances. This follows from the "practical, common-sense approach" spoken of in *Sattva* at para 47.

[764] *Perhaps* the Tenant is really saying that just the presence alone of asbestos in the Building is the thing that substantially interfered with the Tenant's quiet enjoyment – and that's on the Landlord. The Discovery itself triggered all the ensuing activity by both Landlord and Tenant, the argument perhaps goes, which so disrupted the Tenant in the many and diverse ways it complains of above, that collectively it was a substantial interference with the Tenant's quiet enjoyment.

[765] However, sub-clauses 16(j) and 16(o) expressly address the requirements of the Landlord in the event any hazardous substance is found in the Tenant's premises. In the Lease the Tenant has agreed that it will not be entitled to quiet enjoyment when the Landlord is acting as required by the Lease. The quiet enjoyment right is "subject to" these agreed activities in the Lease's terms and conditions. Any actual interference by the Landlord from doing more than is required in the Lease upon the discovery of asbestos was done either to assuage the Tenant's unreasonable demands, timelines, and restrictions, or to respond to the Tenant's unreasonable Ultimatum.

[766] Just as was noted in *PD Riverside Ventures Inc. v Stapleton,* 2023 BCSC 110 (at para 54), the Tenant here "... provided no jurisprudential examples where a landlord's contractually mandated actions constituted breach of quiet enjoyment...".

[767] Fourth, the Tenant has not satisfied the objective test for breach of quiet enjoyment.

[768] The objective test is, again, "whether a reasonable tenant, in the same circumstances as the complainant, would conclude that the activities...complained of would significantly interfere with the enjoyment of the lease": *HPWC* at para 77.

[769] I find a reasonable tenant in the same circumstances would not conclude that its use of the premises was substantially interfered with by the Landlord. Rather than finding the Landlord to have substantially interfered with the Tenant's use of the premises, or to have interfered at all

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outside the scope of interference permitted by the Lease (the "subject to" wording addressed above), I find the Landlord for the most part did the opposite. The Landlord respected the Tenant's wishes about where and when to do its testing. The Landlord acceded to the Tenant's wishes by deferring its entering onto the Tenant's premises to conduct its own investigation for months, until the Tenant allowed it. The Landlord acceded to the Tenant's wishes to delay its debris clean-up work in the Plenum. These forbearances at the Tenant's requests were despite the Landlord's express right to enter, pursuant to sub-clause 15(i) of the Lease (underlining added):

> The Tenant shall permit the Landlord from time to time within Normal Business Hours (after at least 24 hours prior notice to the Tenant), or at any time in the case of emergency, to enter and examine the state of maintenance, repair and order of the Leased Premises ...

[770] In support of its claim to a breach of quiet enjoyment, the Tenant relies on the *Plain Jane* case: *0824606 BC Ltd v Plain Jane Boutique*, 2018 BCSC 1887. This case does not assist the Tenant's argument. I find the facts here are nowhere close to the degree of interference suffered by the tenant in that case. Further, the quiet enjoyment clause in that case does not include any concluding wording like the "subject to" wording here or even the less limiting "save and except" wording in *HPCW*. In other words, here the right to freedom from substantial interference was significantly limited, whereas in *Plain Jane* it was not. Finally, in *Plain Jane*, unlike this case, the landlord failed to show reasonable care considering its obligations under the lease: at paras 126-127.

[771] The Tenant relies on the wording "without any interruption from" in sub-clause 16(a) to say this wording – and particularly the word "any" – sets a lower threshold of permissible interference than the common law permits with "substantial" interference before there can be a breach, just as in *Plain Jane.* However, first, this comment in *Plain Jane* is different than what the Court in that case actually did in finding a breach of quiet enjoyment. In that case the Court found the substantial interference threshold was met: see paras 114, 116. Second, this lower threshold of interference urged now by the Tenant because of the Lease wording "any interruption" is inconsistent with most every other decided case that has a clause using the "any interruption" or even the "any interruption or disturbance" wording. See as examples: *Christin v Dey*, [1923] 3 DLR 1116, at p 1117, 52 OLR 308, 1922 CanLII 559 (ON CA), *Terminal Warehouses Ltd v JH Lock & Sons Ltd* (1958), 12 DLR (2d) 12, at 19 (ON CA), *Federic v Perpetual Investments Ltd* (1968), 2 DLR (3d) 50, at 53 (ON SC), *Irvine Recreations,* at 222 – 23 (SK KB), *Amadon Properties Ltd v Pacific Apparel Inc*, 1990 CanLII 682 (BC SC), at 73 – 74 & 76, *116531 Canada Inc v 569562 Ontario Inc*, 1995 CarswellOnt 402 (WL), at paras 33 & 40 (ONCJ), *Keith Pierce Insurance*, at para 77, *He v Yeung*, 2010 BCSC 571, at paras 40 & 56, *HPWC*, at paras 9 and 79, *PD Riverside*, at paras 46 – 7, *Dewberry Financial Limited v Weishaar*, 2009 ABQB 692, at paras 61 and 63. All these cases on identical wording apply the substantial interference test.

[772] In saying there has been a fundamental breach from the Landlord's denial of quiet enjoyment, the Tenant relies on *Shun Cheong*. In that case a grocery store experienced leaks of oily fluids, washroom leaks, and falling ceiling tiles from the restaurant above, over a four-month period. Although the store continued to operate and band-aid solutions had been applied, the store owner felt he was unable to remain at the location due to the health and safety

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standards needed for his customers and store. The BC Court of Appeal upheld a trial finding of fundamental breach, saying, at para 13:

> The trial judge concluded that leakages into Gold Ocean's store undermined the tenancy "in a fundamental way" and justified its termination of the lease even though Gold Ocean denied that its business had become unprofitable (Mr. Zheng testified that the business was "progressing" and that he was "not losing money") and despite the absence of evidence that, for example, local health authorities had threatened to close the store down. (See *Buttimer v Bettz* (1914), 6 W.W.R. 22 (B.C. Co. Ct.). But if, as the trial judge found, Gold Ocean was effectively prevented from carrying on business in a reasonable manner by the continuous leaks, it was clearly open to her to conclude as well that the purpose of the tenancy - the operation of a grocery store - was undermined in a substantial way.

[773] In this case, however, the Tenant's use of the Building was not undermined in any fundamental way. CNOOC was not prevented from carrying on its business in a reasonable manner.

[774] No Landlord action or omission deprived the Tenant of substantially the whole benefit it bargained for under the Lease. The Tenant entered into the Lease for office space in a building that it knew well. It knew when it was constructed. It had roughly 13 years experience in the Building including clean reports from previous pre-renovation hazardous substances testing. It knew the Building may nevertheless contain hazardous substances, or substances that may become identified as hazardous as regulatory regimes change with better knowledge. It agreed with the Landlord on how such a discovery or legislative change would be handled as between them. The degree of permitted interference with the Tenant's quiet enjoyment of the premises includes all that those terms and conditions of the Lease entail.

[775] For the reasons I have given there was no substantial interference and therefore no such breach of sub-clause 16(a). The evidence discloses no substantial interference to its conduct of the business and no interferences beyond momentary or short term that were not either contemplated by other Lease terms or self-inflicted by the Tenant. Even less, then, was there a breach rising to the level of a fundamental breach. The Tenant enjoyed the use of the Building it bargained for – that bargain including the promises of the Landlord in the event any hazardous substance was found during the term of the Lease and in the event further action by the Landlord is discovered to be required to comply with occupational health and safety laws.

5. c. Operate & Maintain the Building as a First-Class Property – 16(e) and (i)

[776] The Tenant says the Building ceased being a "first class building", constituting a breach of sub-clauses 16(e) and 16(i) of the Lease. Those sub-clauses say:

> **(e) Operation Standard of the Project**
>
> The Landlord shall operate the Project in accordance with Project management standards as are established by custom and practice for first class office buildings leased to tenants of comparable size and use as the Tenant.
>
> ...

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(i) Project Maintenance and Repair

The Landlord shall keep and maintain the Project (including, without limitation, the Common Facilities) in a proper state of maintenance and repair consistent with the Project management standards and consistent with a first class office building comparable to the Project provided for in this Lease including, without limitation, those contained and provided for in subclause 16(e), excepting: reasonable wear and tear which does not detract from the required operational standard, the obligations of the Tenant pursuant to subclause 15(h), and any other repair and maintenance obligations of other tenants of the Project. The Landlord shall also make as soon as reasonably possible having regard to the circumstances, all repairs and replacements to the Project escalators and elevators, the Base Building Services and the machinery and equipment relating thereto, ducts, shafts, Project storage areas and facilities and Project service areas and facilities which are not exclusive to any Project tenant or the property of or installed by or for the Tenant.

All such maintenance, repairs and/or replacements shall be carried out and made by the Landlord in a proper workmanlike manner as expeditiously as is reasonably possible in the circumstances.

[777] With similar effect, the Lease also says at clause 20:

20. **PROPERTY MANAGEMENT**

To the extent the Property Manager has responsibility and liability to the Landlord to manage and operate the Project and the Project Lands, the Landlord shall cause the Property Manager to carry out, implement and comply with the obligations of the Landlord to the Tenant pursuant to the terms and conditions of this Lease in a professional and diligent manner consistent with property management of first class office buildings in the business district of the City of Calgary.

[778] The Building was a "first class building" (Class A or AA in commercial real estate parlance) before the Discovery. Both parties say that it was a first class building and they both represented it to be so prior to the date of the Discovery. The Landlord represented it to be so during the RFP process leading to the Amended Lease. The Tenant represented it to be so in early 2017 when marketing some of its space in the Building for a possible sub-lease, to offset its cost for space it was not using.

[779] In its written submissions the Tenant frames the issue by the question, "Is the Building still 'first-class'?". The Landlord similarly devotes its attention and arguments to that question. But that is not the question under the Lease.

[780] The question the Court must answer in deciding if the Landlord breached sub-clause 16(e) is not whether the Building ceased being a first class building, but whether the Landlord ceased operating it as one, whether it ceased operating it "in accordance with [building] management standards as are established by custom and practice for first class office buildings leased to tenants of comparable size and use as the Tenant." It is about whether the Building ceased being operated just as a first class building would be operated.

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[781] The question the Court must answer in deciding if the Landlord breached sub-clause 16(i) is not whether the Building ceased being a first class building, but whether the Landlord ceased keeping and maintaining it as one, whether it ceased keeping and maintaining it "in a proper state of maintenance and repair consistent with [building] management standards and consistent with a first class office building comparable to" the Building. It is about whether the Building ceased being kept and maintained like a comparable first class building. The Lease adds further clarity on how the parties would measure that, saying: the "maintenance, repairs and/or replacements shall be carried out and made by the Landlord in a proper workmanlike manner as expeditiously as is reasonably possible in the circumstances."

[782] No issue was taken with the Landlord's operations or management of the Building prior to the Discovery; it was not suggested that the Landlord did not operate it in accordance with the standards of a first class building.

[783] No issue was taken also with the Landlord's keeping and maintaining the Building in a proper state of maintenance and repair consistent with the standards of comparable first class buildings prior to the Discovery. Indeed, the parties collaborated via a joint committee on such matters from initiating through prioritizing, planning and undertaking to reviews of all such Tenant needs.

[784] Proving a breach of sub-clause 16(e) requires evidence showing, first, what are the operating "management standards as are established by custom and practice for first class office buildings leased to tenants of comparable size and use as the Tenant" and then proving, second, that the Landlord fell short of those standards. The Tenant failed to satisfy either requirement.

[785] Proving a breach of sub-clause 16(i) requires evidence showing, first, what are maintenance and repair building management standards consistent with a first class office building comparable to the Building and then proving, second, that the Landlord fell short of those standards. Again, the Tenant failed on both requirements.

[786] The Tenant says the Building being littered with deteriorating SAF above the air vents "in every office and washroom" does not meet the expected quality of a first class building. Maybe not. But that was not the evidence. This exaggerates the incidents of dangling SAF bits presented in the evidence. Latitude is given to advocates seeking to persuade, but such efforts must still remain true to the evidence.

[787] Inattention to clean-up by contractors does not amount to a breach of the Lease, especially when (1) both parties had opportunity to review and sign-off on satisfactory completion of work, and (2) the Landlord would never know of dangling bits in the vents, perhaps shaken free and fallen sometime long after work completion and sign-off, unless the Tenant drew it to the Landlord's attention. After the Discovery the Tenant drew to the Landlord's attention the debris in the Plenum and the vent spaces but then asked the Landlord to delay the clean-up until it was out of the Building, to which the Landlord acceded.

[788] Those undertaking work in the Plenum spaces before the Discovery appeared to not bother cleaning up the area of their work upon completion. The Plenum spaces were strewn with accumulations of SAF debris and dust from the friable SAF, scraping, breaking, or knocking chunks off and pulverizing to dust other SAF. This was left where it fell – including on top of air supply ducts, on light fixtures, on conduit, on ceiling tiles. Some was left dangling in the open spaces in ceiling vents, through which the return air travelled up from the offices into the

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Plenum spaces, which (again) serves as the return portion of the air distribution system. If any of this was noticed by CNOOC employees, and communicated, it did not sufficiently grip the attention of those persons with either the Tenant or the Landlord who could remedy the situation.

[789] Prior to the Discovery, though, neither the Tenant nor the Landlord appreciated that such bits noticeably lodged in or dangling in some ceiling vents was ACM. Had either party known that it is ACM, I am confident it would have received more diligent attention.

[790] In opining on why the Building is no longer first class, the Tenant's expert relied in part on the "slow and unreasonable" time that it took the Landlord to respond to the Discovery. Response time is certainly a factor in assessing the Landlord's operations and management practices.

[791] The problem for the Tenant here is that it caused most of the Landlord's delays, including by concealing its information explaining the Discovery for four months, concealing the follow-up data gathered by its consultant two months, delaying and constraining the Landlord's access to the Building for its own testing numerous times, and delaying the Landlord's clean-up of SAF debris the Tenant complained about. From the moment of the Discovery, the Landlord was keen to learn more and act appropriately. It was thwarted by the Tenant. The Tenant took 4 months to generate and disclose its consultant's first report, while enjoying unfettered access to its premises for that purpose. The Landlord took five months to have generated and then release its consultant's first report, all the while constrained, delayed and impeded in its access to the Tenant's premises for that purpose. I find there was no problem with the Landlord's response time in operating and managing the Building.

[792] The Tenant says if it remained in the Building, then the intrusion of the AMP upon the workforce would be inconsistent with a first class building. It says that:

> Common sense, echoed by the Trial evidence, is that a first-class building is not one where the Tenant cannot fix a burnt out light or adjust the temperature in an office without triggering a potential evacuation of the Building.

[793] But those are not true of this Building. Replacing a light bulb does not necessitate Plenum access or impacting any SAF. It is done from the office below. Not every burnt out light requires replacing the troffer, which would require access to and activity in the Plenum. Accessing a VAV box is not required for every temperature adjustment.

[794] Even if Plenum access is required, evacuating this Building is not ever a realistic potential under the AMP, since the Building has no asbestos in the Plenum over the threshold that would trigger the AMP: ACM with greater than 0.1% dry weight asbestos. That is not this Building. And then, even if the AMP is appropriately revised and its threshold met, an emergency situation will rarely be triggered. But if the emergency procedures are triggered, then only "the area" would be vacated by personnel, not a mass evacuation of the entire Building. I find the Tenant again improperly exaggerating the risk presented beyond what the evidence can sustain.

[795] Nothing about the SAF being ACM has been shown to adversely affect how the Tenant uses the premises or how the Building will be operated, repaired and maintained. The Tenant has not proven the Landlord breached these Lease sub-clauses.

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[796] The Tenant has not proven a breach of the Lease on either basis. And though it would not constitute a breach if proven, nothing about the SAF containing virtually no asbestos has been proven to now or in the future adversely affect the Building's first class status. I see nothing about the newfound ACM in the Building at and after the Discovery that should change the Building's status as a first class building. To the extent there may now be some stigma attached to it given all that has transpired, it would be entirely the consequence of the Tenant's unfounded allegations, exaggerations, and over-reactions to what should have been a non-issue.

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5. d. Imposition of Rules & Regulations - Lease Clause 15(z)

[797] The Tenant says the Landlord breached its obligation to not impose additional rules and regulations on it without its prior agreement. It refers to Lease sub-clause 15(z), which says (emphasis added):

> The Tenant covenants and agrees that the rules and regulations annexed hereto as Schedule "I" are part of this Lease and shall in all respects be observed and obeyed, conformed to and performed by the Tenant and its employees, servants and agents. The Landlord shall have the right to make such other further reasonable rules and regulations relating to the Leased Premises …, subject to the prior consultation with the Tenant and the Tenant's agreement relating to such rules and regulations. If the Landlord and the Tenant cannot agree as to such further rules and regulations, the matter shall be determined by arbitration in accordance with the provisions of this Lease. All such rules and regulations now and hereafter in force shall be read as forming part of the terms and conditions of this Lease as if the same were embodied herein. All such other and further rules and regulations hereafter made by the Landlord shall be binding upon the Tenant upon delivery of a copy thereof to the Tenant in the manner set out in clause 34.

[798] The Tenant says the Landlord's AMP constitutes additional rules and regulations that would be binding on it. It says that they were imposed without its prior agreement. The Tenant says it certainly did not consent to the entire remainder of "its tenancy being defined and limited by the AMP."

[799] The Tenant was not asked to agree with any draft or the finished version. There is no evidence that it did agree. The Landlord did not take the matter to arbitration.

[800] Imposition of the AMP, says the Tenant, is therefore a breach of the Lease. The Tenant regards it to be a "massive, complex, and … highly intrusive set of rules that dramatically impedes the Tenant's ability to operate its business" in the Building.

[801] The Tenant is correct that on the occasions when the AMP will apply to activity near the SAF[38], it would be a significant incremental intrusion on the use of the affected rental space. By incremental I mean beyond the degree of intrusion that would have occurred in any event, prior to the Discovery, by the need to regularly access and work in the Plenum spaces.

[38] See my comments above under the Quiet Enjoyment heading, on it being highly unlikely the AMP will ever be triggered by SAF in the Building but, like there, I am considering the implications of the AMP as if it is appropriately revised (its scope of application expanded).

[802] The Landlord says, first, that all the experts said if you are leaving the SAF in place you need to have an AMP. Second, it said Alberta OH&S legislation requires the Landlord to have one and sub-clause 16(j) of the Lease requires the Landlord to comply with all such laws. It implies that it was therefore required to impose the AMP and the Tenant's agreement was not required; the Tenant's agreement did not apply when the law mandates its production and use.

[803] The AMP falls within the scope of what is meant by "rules and regulations" referred to in sub-clause 15(z) and is not unlike the ones listed at Schedule "I" to the Lease. The AMP mandates things of all Building tenants. Primarily it requires they accommodate the added intrusion and added duration associated with such intrusions, that will be associated with all affected Building repair, maintenance, alteration and renovation activities involving or affecting the Plenum spaces. Therefore, any expectation of the Landlord that the Tenant be governed by and comply with the AMP would be offside the Tenant's rights in sub-clause 15(z) above.

[804] The Landlord did not meaningfully consult with the Tenant about the content of the AMP. It consulted with Rogerson of OH&S which, while prudent, was not required. But it did not consult with the Tenant which was required. On November 21, 2018, the Landlord sent the Tenant a copy, and not in accordance with the notice process in clause 34 of the Lease. At that time it began imposing its requirements. It brought to an end the Tenant's demand early on that all the Landlord's work in the Building had to be under the Tenant's (largely Eco Abate's) supervision. Henceforth, the Landlord declared, under its AMP all the Tenant's consultant's activity had to cease and thereafter be coordinated by the Landlord. The Landlord did, in fact, impose the AMP on the Tenant.

[805] The AMP is an evolving document, to be added to over time as more is learned and recorded in it. Though the Landlord professed a willingness to consider any input the Tenant might later offer, it certainly did not get the Tenant's agreement before imposing the AMP on it.

[806] The rights in sub-clause 15(z) must be interpreted in light of other provisions of the Lease. Of relevance here are also sub-clauses 15(i) and 15(r), two other Tenant covenants. They state:

> **(i) <u>Permit Access to the Landlord</u>**
>
> […] The Tenant agrees that the Landlord shall have the right to enter the Leased Premises at all reasonable times during the Term (after reasonable prior notice to the Tenant or without notice in the case of an emergency) to make repairs or alterations as the Landlord, acting reasonably, shall deem necessary for the safety or preservation or proper administration of the Leased Premises or any other portion of the Project.
>
> […]
>
> **(r) <u>Comply with Law</u>**
>
> The Leased Premises shall be used and occupied by the Tenant in a safe, careful and proper manner so as not to contravene any present or future federal, provincial or municipal governmental or quasi-governmental laws, by-laws, codes, regulations or orders (including those relating to environmental matters, health and safety and occupational health and safety). …

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[807] The *OHS Code* requires what it calls a "code of practice". An AMP could satisfy this requirement insofar as it addresses the "storage, handling, use and disposal" of asbestos. Under sub-section 26(1) it is required regardless of whether the asbestos will be managed in place or entirely removed, provided the amount or concentration of the asbestos exceeds the pre-requisites. It states, at section 26:

> **26(1)** An employer must have a code of practice governing the storage, handling, use and disposal of a substance listed in Schedule 1, Table 1 that is present at a work site
>
> (a) as pure substance in an amount exceeding 10 kilograms, or
>
> (b) in a mixture in which the amount of the substance is more than 10 kilograms and at a concentration of 0.1 percent by weight or more.
>
> **26(2)** The code of practice must include measures to be used to prevent the uncontrolled release of the substance and the procedures to be followed if there is an uncontrolled release.

Asbestos is one of the substances listed in Schedule 1, Table 1 (see Appendix B). But neither pre-requisite in sub-section 26(1) is met. No code of practice is required when in pure form there is not more than 10 kilograms of the substance in aggregate at the work site.[39] Even though the work site here comprises almost the entire Building, it is most improbable that the total asbestos in pure form would come close to 10 kilograms in weight.

[808] The second pre-requisite for having a code of practice is when the concentration of asbestos within the ACM is greater than 0.1% by weight. The evidence is that the concentration of asbestos in the SAF is far lower than that.

[809] Therefore, under section 26 of the *OHS Code*, an AMP is not required. Establishing one would be prudent but not required.

[810] However, the *OHS Code* also requires "procedures" be developed to minimize exposures to harmful substances at worksites, and workers to be trained in them. It states, at section 21:

> 21(1) If a worker may be exposed to a harmful substance at a work site, an employer must identify the health hazards associated with the exposure and assess the worker's exposure.
>
> 21(2) The employer must ensure that a worker who may be exposed to a harmful substance at a work site
>
> (a) is informed of the health hazards associated with exposure to that substance,
>
> (b) is informed of measurements made of airborne concentrations of harmful substances at the work site, and

[39] "Work site" is defined in the *OHS Act* at sub-section 1(bbb), as meaning "a location where a worker is, or is likely to be, engaged in any occupation and includes any vehicle or mobile equipment used by a worker in an occupation.

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> (c) is trained in procedures developed by the employer to minimize the worker's exposure to harmful substances, and understands the procedures.
>
> 21(3) A worker who is provided with training under subsection (2) must use the procedures appropriately and apply the training.

[811] "Worker" is defined in the *OHS Act* as follows:

> (tt) "worker" means a person engaged in an occupation, including a person who performs or supplies services for no monetary compensation for an organization or employer, but does not include
>
> (i) a student in learning activities conducted by or within an educational institution for which no compensation is paid to the student, or
>
> (ii) except for the purpose of section 5(1)(a) and (b), the following persons engaged in a farming and ranching operation ...

[812] All the Tenant's employees fall into this definition of "workers". To the extent the AMP contains information on such identified hazards, exposure risks, information and procedures, the AMP is required by the legislation.

[813] The *OHS Act* requires the Tenant to cooperate with the Landlord in its performance of duties under the legislation, saying at sub-section 3(3):

> Every employer shall cooperate with any person exercising a duty imposed by this Act, the regulations and the OHS Code.

[814] Even though an AMP is required by the legislation for the Building, and the Tenant is required to cooperate with the Landlord in complying with that duty, the Tenant's right to not have rules and regulations imposed on it unilaterally by the Landlord still applies. The Tenant is not obliged to agree to just whatever the Landlord may choose to include in the AMP.

[815] The Tenant did not like what the AMP represented, that the Landlord's plan was to manage the asbestos in place, not remove all the SAF. Apart from that disagreement of principle, the Tenant may not actually disagree with there being an AMP (for example given the importance it places on worker safety), but it still had the contractual right to ensure the content met with its agreement. It may object to the AMP foisting all the burden of its rules onto the Tenant, for example. It may think the AMP is not sufficiently protective of its employees when the Landlord is disturbing ACM in its or in another tenant's Plenum space, as another example, wanting the Landlord to set the bar higher than the statutory minimums. That is evident from the parties agreeing in the Lease that such added rules and regulations affecting the Tenant would be developed in consultation, not unilaterally.

[816] Neither of the Landlord's rights in sub-clauses 15(i) and (r) of the Lease exempt it from the obligation in sub-clause 15(z) to consult with and procure the agreement of the Tenant to the content of the AMP.

[817] The fact all or most experts at the trial said an AMP is needed in this Building does not exempt the Landlord from imposing the AMP upon the Tenant only with its agreement on its content.

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[818] The fact the Manual commends the creation of an AMP does not exempt the Landlord from imposing one upon the Tenant only with its agreement on its content.

[819] The fact the legislation requires a "code of practice" and "procedures", does not oust the Tenant's right to be consulted and to agree with the content before it is subjected to it.

[820] This right of the Tenant is not ousted by it agreeing in sub-clause 16(j) that the Landlord had to comply with all health and safety legislation.

[821] The Landlord's request for feedback from the Tenant on its draft AMP fell considerably short of a meaningful consultation. Regardless, it did not secure the Tenant's agreement. The Tenant made no mention of its opposition to the AMP on the basis that, by imposing the AMP, the Landlord was breaching its rights under sub-clause 15(z) of the Lease. Neither party took the matter to arbitration. By this time the parties had drawn their lines in the sand and Lease clause 15(z) was not top of mind.

[822] Nevertheless, the Landlord breached the Lease for failing to get the Tenant's agreement before implementing the AMP within the Tenant's premises, while the Lease was still in force and the Tenant still had the right to occupy them all.

[823] The Landlord's breach did not deny the Tenant of the whole benefit of its Lease rights. It did not constitute a valid basis to terminate the Lease. Beyond that finding, any other possible consequences of the breach are not for this phase of the litigation.

5. e. Other Alleged Breaches

[824] The Tenant says that the Landlord also breached three additional provisions of the Lease, which generally provide that the Landlord will permit the Tenant's employees access to the Building, at sub-clause 16(c); will provide normal building services, notably air conditioning and ventilation, at sub-clause 16(f); and has no right to relocate the Tenant from the Building "for any reason whatsoever," at clause 44.

[825] These provisions read as follows:

> **16. LANDLORD'S COVENANTS**
>
> The Landlord covenants with the Tenant as follows:
>
> ...
>
> **(c)** **<u>Right of Access to the Leased Premises</u>**
>
> The Landlord shall permit the Tenant, its employees and all persons lawfully requiring access to the Leased Premises or to the Tenant, to have access to the Leased Premises and to the Project during Normal Business Hours. At times other than Normal Business Hours the Landlord shall permit the Tenant, its employees and those accompanying its employees access to the Leased Premises and to the Project, subject to the rules and regulations established by the Landlord under this Lease in accordance with the provisions of subclause l5(z).
>
> ...

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(f) Air Conditioning

The Landlord shall furnish air conditioning to the Leased Premises during Normal Business Hours and the Landlord, when requested by any employee of the Tenant but subject to clause l6(n), shall furnish air conditioning or ventilation to the Leased Premises at times other than during Normal Business Hours.

...

44. NO RELOCATION

Throughout the Term and any extensions thereof, the Landlord, its agents or nominees, shall not have the right to relocate the Tenant from the Premises for any reason whatsoever. The Landlord shall have no right to relocate the Common Facilities or the Storage Premises without the consent in writing of the Tenant. Notwithstanding the foregoing, the Tenant will enter into discussions with the Landlord, without any obligations of the Tenant, to set out the terms and conditions under which the Conference Centre Lands may be redeveloped at any time following the Initial Expiry Date. It is understood that those uses and the facilities currently provided to the Tenant in the portion of the Project located on the Conference Centre Lands would be replicated without interruption of the Tenant's use thereof to the satisfaction of the Tenant, acting reasonably.

[826] The Tenant says that these provisions were breached due to:

> …the required forced relocations, access restrictions and evacuations required to address any planned or unplanned maintenance events, and accompanying shut down of Building's Air Distribution System.

[827] The Landlord did not deny the Tenant access to the Building. The Tenant left of its own accord and choice. The Landlord offered to do more than the Lease and the legislation required to assuage the Tenant's unfounded concerns and not leave.

[828] Any reduction in air conditioning or ventilation were either at the request of the Tenant or were caused by the Tenant's unwarranted over-reaction to the Discovery.

[829] The Landlord did not require that the Tenant relocate. It did what it could do reasonably to dissuade the Tenant from relocating.

[830] Accordingly, I conclude that the Tenant has not established that the Landlord breached sub-clause 16(c) or (f), or clause 44, or that the Landlord would be in breach of these provisions over the remaining term of the Lease.

6. Fundamental Breach, Anticipatory Breach and the Declaratory Proceeding

Law on Fundamental Breach and Anticipatory Breach

[831] The doctrines of fundamental breach and anticipatory breach are closely related, and the consequences of their application are the same. When a fundamental breach or an anticipatory breach occurs, the innocent party may elect to either terminate the contract or insist on

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performance: *Potter* at paras 144–49; *Mantar Holdings Ltd v 0858370 BC Ltd*, 2014 BCCA 361 at para 11.

[832] Both a fundamental breach and an anticipatory breach are sometimes referred to as a "repudiation" of the contract: see e.g., *Potter* at paras 147–48; *Guarantee Co of North America v Gordon Capital Corp*, [1999] 3 SCR 423 at para 40; Swan, Adamksi, & Na, *Canadian Contract Law*, 4th ed (Toronto: LexisNexis, 2018) at §7.74 & §7.91. Here I will use the terms "fundamental breach" and "anticipatory breach" throughout.

[833] If, upon a fundamental or anticipatory breach, the innocent party elects to terminate the contract, both parties are discharged from further performance under the contract, and the innocent party may bring a claim for damages, including in relation to obligations that had not yet accrued at the time of termination: *Guarantee Co* at paras 40–41.

Law on Fundamental Breach

[834] A fundamental breach occurs when a single breach—or multiple breaches collectively—deprive the innocent party of substantially the whole benefit of the contract: *Hunter Engineering Co v Syncrude Canada Ltd*, [1989] 1 SCR 426 at 499–500; *Booster Juice Inc v West Edmonton Mall Property Inc*, 2019 ABCA 58 at para 13; *Kussmann v AT & T Capital Canada Inc*, 2002 BCCA 281 at paras 16, 27.

[835] When assessing whether a fundamental breach has occurred, a court may consider the following five factors:

(1) the ratio of the party's obligations not performed to that party's obligations as a whole;

(2) the seriousness of the breach to the innocent party;

(3) the likelihood of repetition of such breach;

(4) the seriousness of the consequences of the breach; and

(5) the relationship of the part of the obligation performed to the whole obligation: *Spirent Communications of Ottawa Limited v Quake Technologies (Canada) Inc*, 2008 ONCA 92 at para 36; *RIC New Brunswick Inc v Telecommunications Research Laboratories*, 2010 ABCA 227 at para 17.

Law on Anticipatory Breach

[836] An anticipatory breach occurs when two elements are satisfied.

[837] First, one party, by words or conduct, must evince a "clear and unequivocal" intention not to be bound by the contract, such that a reasonable person would conclude that that party no longer intends to be bound by the contract: *Guarantee Co* at para 40; *Spirent Communications* at para 37; *Kuo v Kuo*, 2017 BCCA 245 at para 40. This element of the test has been alternatively formulated as requiring that one party's conduct amounts to "an absolute refusal to perform the contract": *McBride and Hogaboam v Johnson*, [1962] SCR 202 at 208, citing *Mersey Steel & Iron Co (Limited) v Naylor, Benzon & Co* (1884), 9 App Cas 434 at 442–43 (HL).

[838] Second, the breaches that that party has communicated that it intends to commit would deprive the innocent party of substantially the whole benefit of the contract: *Spirent*

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Communications at para 37. In this way, the doctrine of anticipatory breach can be understood as a forward-looking version of the doctrine of fundamental breach: *Potter* at para 149; *Spirent Communications* at para 37; Swan, Adamksi, & Na, at §7.92.

[839] The five factors discussed above in the context of fundamental breach are also relevant when assessing whether the second element of the test for anticipatory breach is satisfied: *Spirent Communications* at paras 36–37.

1. Declaratory Proceeding

[840] The Landlord says that when the Tenant terminated the Lease, the Declaratory Proceeding was in process and constituted a full answer to any suggestion the Landlord refused to perform all its Lease obligations. It did not believe any had been omitted, but if there were, by initiating and pursuing the Declaratory Proceeding it was already in the process of putting right anything that it was obliged to when the Tenant terminated. The Landlord says that since it would have performed anything more the Court might have declared was its obligation under the Lease, the Tenant cannot succeed on any argument of anticipatory or fundamental breach.

[841] In its written argument the Landlord says the "express purpose" of the Declaratory Proceeding was "to determine the obligations of the Landlord". That is a fair characterization of its application, since at para 3 of the Originating Application the Landlord said:

> In light of those [Lease] provisions the Landlord seeks various declarations as to the parties' rights and obligations …

[842] Immediately after its filing early March 2019, Shoraka sent an email to Wilson as a courtesy, notifying him of the application to the Court, saying it was "seeking the Courts' assistance in settling our apparent differences of opinion on the interpretation of certain contractual matters contained in the Lease." His email also expressed hope there might still be "dialogue and negotiation" to settle their differences directly and offered to travel to "a location and time of your convenience" to do so.

[843] The Landlord then suggests in its argument that it intended to perform anything in the Lease that the Court in that proceeding determined were its obligation and that it was not already doing. The Originating Application does not say that expressly, nor did the Shoraka email. At no place does he undertake or even indicate that the Landlord will proceed with whatever else the Court determines the Lease requires it to do.

[844] I find nevertheless that that was the Landlord's intent. Both Shoraka and Killi testified that it was; as I mentioned above, in neither case was that point in their evidence shaken in cross-examination, or even challenged. While the requested outcomes of the Declaratory Proceeding were declarations only, without further coercive or consequential relief, they would have had great practical effect in resolving a live controversy, determining the parties' rights and avoiding either of them breaching the Lease. See in these respects: *Restoule*, at paras 279, 281; *SA v Metro Vancouver Housing Corp*, 2019 SCC 4 at para 61; and Justice Malcolm Rowe and Diane Shnier, "The Limits of the Declaratory Judgment" (2022) 67:3 McGill L J 295 at p 327. I have no doubt that the Landlord intended to do more if the Court so ruled. It was highly motivated economically to do so. It intended to do its best to persuade the Court to interpret the Lease its way but, if it failed, it intended to remedy any deficiencies the Court might declare and thereby maintain the Lease in force.

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[845] A reasonable person viewing objectively these circumstances would not conclude that the Landlord did not intend to be bound by the Lease in the future, no matter how the Court ruled on the Declaratory Proceeding: see in this regard *Potter*, at para 179.

[846] I find that the Tenant cannot succeed on any argument of fundamental breach or anticipatory breach in the face of the Declaratory Proceeding. This alone doomed the Tenant's wish to terminate on all grounds alleged, other than its express right to terminate in clause 17, and should have prevented it from doing so. Employee safety did not necessitate the termination; the employees had already relocated from the Building. The Tenant terminated for economic reasons.

[847] In the event I am wrong in that conclusion, I next address fundamental breach and anticipatory breach in the absence of the Declaratory Proceeding.

2. Fundamental Breach

[848] Do the alleged breaches of the Lease by the Landlord, individually or in aggregate, constitute a fundamental breach? Very few of the Tenant's Lease allegations succeeded. For those that did not it necessarily follows that none of them could alone constitute a fundamental breach.

[849] The Tenant did prove the Landlord breached its right to be consulted and agree on any new rule and regulation the Landlord might impose on it. And it proved the Landlord represented in the Lease something that was not true, saying the Building had no hazardous substances in it. But neither of these separately or in combination with any of the other perceived but unfounded slights deprived the Tenant of the whole benefit of the Lease. Whether the two proven claims caused the Tenant any compensable damage at all can be addressed in the second phase of this litigation.

[850] However, the Tenant continued to enjoy the entirety of what it bargained for. Its claim of fundamental breach fails on the individual claims of breach and considering them in aggregate. Any adverse impact on the Tenant following its Discovery of the trace amount of asbestos, beyond its initial prudent reaction to shut down the planned renovations and to conduct further investigations, was entirely of its own making. It over-reacted and, blurred by either the fortuitous opportunity first presented to maybe get out of the Lease, or by the enabling but erroneous and improvident legal advice from its hazardous materials survey consultant thereafter, or both, the Tenant maintained the façade of a crisis, made the Landlord out to be inhumane, and rushed for the exits for no valid reason.

3. Anticipatory Breach

[851] Has the Tenant proven anticipatory breach by the Landlord? No, because the Tenant failed to prove that the Landlord refused to perform the Lease going forward. The opposite was true. From the time the Tenant reported to the Landlord its discovery of the ACM, it was the Landlord entreating the Tenant. At first, the Landlord just wanted to learn more from the Tenant about its discovery of asbestos. Later, the Landlord had to contend with the Tenant's bombshell Ultimatum and unwavering adherence to it, despite the Landlord's attempts to resolve the issues between the parties. When it appeared the two were at an impasse, by Wilson not even responding to the Landlord after mid-December 2018, the Landlord in March 2019 attempted

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dispute resolution involving the Court by filing the Declaratory Proceeding. The Landlord took the initiative to ask the Court to decide what was required under the Lease and the legislation. These all evince the opposite of a certain intent to exit the Lease on the part of the Landlord.

[852] The Landlord says that so long as the Declaratory Proceeding remained extant, the Tenant cannot prove the Landlord repudiated the Lease. The Declaratory Proceeding reflected the Landlord's intention to yet perform any Lease obligations it had not yet fully performed. Therefore, the Tenant cannot say that it would not still get all that it bargained for. I address this further in the separate section of this judgment below.

[853] The Tenant says the Court needs to look not at what the Landlord said but at what it did or, in this case, what it plainly refused to do. It says no matter what the Landlord may have been saying or says now about the intentions of its Declaratory Proceeding, its actions left no doubt that it was only ever intending to manage the asbestos in place. It was intending to never remove all the SAF when the Building was empty, even though the Tenant had vacated the Building so it could happen without risk to its employees, but also so the Landlord could get it removed as expeditiously as possible.

[854] As proof the Landlord would never remove all the SAF now, the Tenant points to the Landlord's long silence to its repeated requests that the Landlord engage its Architect for an opinion (on how long it would take to have all the SAF removed, pursuant to the terms of Clause 17 of the Lease). When an answer finally came, its architect did not even answer the question, but instead parroted the Landlord's position that it did not require removal. The Tenant also points to the Landlord creating an AMP, which would not be needed if the Landlord would remove the SAF. The AMP self declares that it "provides the basis for managing all ACM in place." This evidence and more like it proves on balance that the Landlord was not planning to remove all the SAF in one single Building-wide process during the Lease term, as the Tenant believed the Lease and the law required and that it therefore demanded.

[855] Unfortunately for the Tenant, the test is not whether the Landlord refused to do what the Tenant wanted, but whether the Landlord refused to perform the Lease. The evidence does not show the Landlord refused to perform the Lease. Quite the contrary. The evidence shows that it was the Tenant that intended to not be bound by the Lease if at all possible. A party can wish it were out of their lease. A party can vacate the premises while their lease continues to run. This Lease does not require that the Tenant occupy the premises,[40] only that it pay rent for the exclusive right to the premises.

[856] A party can only terminate their lease on valid, that is, lawful, grounds. The Tenant had no such grounds.

[857] The Tenant was never at risk of losing the whole benefit of the Lease by the Landlord's conduct. It voluntarily brought the Lease to an end, to suit its own purposes, despite the efforts of the Landlord to avoid the Tenant breaking the Lease. The Tenant's claims of anticipatory breach fail.

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[40] The Lease does say at sub-clause 15(m), under the heading "Use of Leased Premises" (underlining added):

> The Tenant shall use and occupy the Leased Premises for business offices and any ancillary uses in the normal course of the business of the Tenant provided that such uses are permitted by law.But the underlined words are followed by other words that make clear this term is about what the premises may be used *for* not a mandate that they must be used at all.

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4. Timeliness of the Tenant's Termination

[858] The Landlord said the Tenant's termination was not valid because it failed to terminate within a reasonable time, relying on the decision in *Van Camp v Laurentian Bank of Canada*, 2015 ABCA 83, at para 32.

[859] The Tenant says this view is inconsistent with the case law in the circumstances of this case, citing for example *DMX Plastics Ltd v Misco Holdings Inc* (2008), 172 ACWS (3d) 212 (ONSC). It also says that the Lease at Clause 29 overrides any such requirement. It says the Tenant's forbearance of the Landlord's Lease breaches does not waive its other Lease rights.

[860] Given the findings herein of the Tenant's termination being invalid on other grounds, it is not necessary for the Court to decide this issue, other than to say that if anything the Tenant's approach was precipitously hasty and not delayed beyond what is reasonable in the circumstances. Confident its understanding of the law was correct, the Tenant was proactive in locating alternate space without waiting for the Landlord's involvement. If the Tenant was correct on the law and the Lease, its proactive diligence would have significantly benefited the Landlord.

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7. Cross-claims of breach of the duty of good faith contractual performance

[861] Both the Landlord and Tenant claim against the other for breach of their duty to perform the Lease in good faith, between the fall of 2017 and its termination in the spring of 2019.

General Legal Principles

[862] The Supreme Court of Canada has recognized a general organizing principle of good faith that requires parties to "perform their contractual duties honestly and reasonably and not capriciously or arbitrarily": *Bhasin v Hrynew*, 2014 SCC 71, at para 63. The doctrine is referred to as an "organizing principle" and is not a free-standing rule; it is a standard that helps to develop the law in a "coherent and principled way": *Bhasin*, at para 64.

[863] The organizing principle requires parties to a contract to have "appropriate regard to the legitimate contractual interests of the contracting partner" in the performance of the contract: *Bhasin* at para 65; *Quebec (Attorney General) v Pekuakamiulnuatsh Takuhikan*, 2024 SCC 39, at paras 9 and 110. This does not require a contracting party to serve the other party's interests in all instances and is not the same as a duty of loyalty in a fiduciary relationship.

[864] The "appropriate regard" will depend on the context of the relationship; it merely requires a party "not seek to undermine" the other's interests "in bad faith": *Bhasin* at para 65. "At a minimum, acting in good faith in relation to contractual dealings means being honest, reasonable, candid, and forthright": *Potter*, at para 99, citing *Bhasin*, at para 66.

[865] The Court elaborates in *Bhasin* at para 66 (emphasis added):

> This organizing principle of good faith manifests itself through the existing doctrines about the types of situations and relationships in which the law requires, in certain respects, honest, candid, forthright or reasonable contractual performance. *Generally, claims of good faith will not succeed if they do not fall*

within these existing doctrines. But we should also recognize that this list is not closed.

[866] However, the principle must be applied "in a manner that is consistent with .... the common law of contract which generally places great weight on the freedom of contracting parties to pursue their individual self-interest": *Bhasin* at para 70.

[867] From this general organizing principle of good faith, several duties arise: *Bhasin* at paras 49-51. Parties have a duty to cooperate to achieve the objects of a contract, a duty of honesty in their contractual performance, a duty to exercise a discretion in the contract in good faith, and to not evade contractual obligations in bad faith. See also: *Wastech Services Ltd v Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7, at para 128.

[868] The parties' cross-allegations engage three of the four established doctrines; between them they allege all but the duty to exercise a contractual discretion in good faith have been breached.

[869] The duty of honest performance includes a duty to correct misapprehensions caused by a party's own misleading conduct: *CM Callow Inc v Zollinger*, 2020 SCC 45, at paras 89–91. In this limited sense, the duty of honest performance imposes a duty of disclosure. It does not, however, impose a more general duty to disclose: *Bhasin*, at pars 73 & 86; *Callow*, at para 80. The Alberta Court of Appeal said "Companies are entitled to expect that the parties with whom they contract will be honest" in their contractual dealings: *IFP*, at para 4, cited with approval by the Supreme Court of Canada in *Callow*, at para 83. Expecting that one's counterparty will perform the bargain without lies or deception is "a minimum standard": *Callow*, at para 83.

[870] This duty of good faith performance does not require parties to act against their own self-interest, to avoid acting in their own interests, or to "speak up in service of the requirements of good faith where nothing in the parties' contractual relationship brings a duty to do so," *Callow* at paras 81-82. Such a positive duty would provide the recipient party with a benefit they did not bargain for. Instead, the duty is best understood as prohibiting, not mandating, conduct –to "refrain" from lying or knowingly misleading their counterparty": *Callow* at para 86. This duty does require contracting parties to not "lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract": *Bhasin* at para 73. To "knowingly mislead" can include "lies, half-truths, omissions, and even silence, depending on the circumstances": *Callow*, at para 91. It is therefore a highly fact-specific determination: *Callow*, at para 91.

[871] Good faith duties are considered in the context of the parties' actual contractual bargain, which in this case was an extensive and comprehensive lease, extending a 13 year commercial relationship for an additional 18 years. The parties' good faith, or lack of it, must be judged in the context of the rights and obligations they bargained for in the Lease.

Particulars of the Parties' Claims of Breach of Good Faith

[872] The Tenant alleges the following as particulars of the Landlord's failure to perform the Lease in good faith:

1. Dishonestly representing there "are no Hazardous Substances located in or on the" Building in Lease sub-clause 16(o)

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2. Not performing its covenant to remedy any hazardous substances found in the Building pursuant to the laws of Alberta
3. Denying it the express termination right in clause 17 of the Lease
4. Engaging in a campaign of concealment, misrepresentations and half-truths to avoid remedying the hazardous substance (asbestos) found in the Building by:

    a. Misleading Alberta OH&S and misleading the Tenant about its discussions with Alberta OH&S

    b. Misrepresenting, manipulating and concealing the reports and tests of its hired consultants

    c. Misleading the Tenant as to its true intentions all along, which was never to remove all the SAF

    d. Hiring consultants whose independence was compromised

5. Unduly pressuring its consultants into changing their opinions to align with the Landlord's desired narrative.

[873] These and other behaviours like them, the Tenant says, were designed to convince the Tenant to stay in a dangerous building, just to save itself money from the costs of remediating the Building, the Tenant's move, and the Tenant's interim sub-lease, and instead continue to receive the Tenant's rent payments, all the while gambling with the lives of its employees.

[874] The Landlord alleges the following as particulars of the Tenant's failure to perform the Lease in good faith:

1. Refusing to cooperate in the Declaratory Proceeding
2. Professing to negotiate in good faith regarding the Lease, while behind scenes instructing its lawyers to draft the Termination Letter and a complex Statement of Claim
3. Obstructing the Landlord's investigations
4. Substantially re-writing its consultant's report on the asbestos find
5. Concealing test results that contradicted the Tenant's desired narrative
6. Plotting to break the Lease based on the pretext of finding asbestos in the SAF
7. Distorting the trace amounts of asbestos out to be something far greater than it is
8. Withholding rent
9. Terminating the Lease after there could be no argument that the termination was done for the safety of its employees, since they had all long since vacated the Building.

[875] These and other behaviours like them, the Landlord says, were driven not by employee safety, as there was no safety risk and the Tenant knew it, but by its ulterior motive to get out of excessive rent costs.

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Analysis

[876] Some of these particulars warrant little discussion. They are not all "directly linked to the performance of the contract": *Bhasin*, at para 73. Others are a function largely of the parties' anticipating imminent litigation or are without foundation since they are based on facts different than the facts proven at trial. I first discuss those different categories of particulars generally. Some of the particulars fall into more than one such category. After that I discuss the individual allegations and then my conclusions on their collective effect on the parties' contractual duties of good faith. I begin then with general comments on groups of the cross-allegations.

Category 1: Litigation Conduct

[877] Some of the particulars of the alleged breaches of good faith reflected the parties' positioning for the Lease litigation they both expected. From early on the parties were strategizing, protecting information, interacting guardedly, revising their consultants' reports, and readying themselves for that expected litigation, all the while bearing their continuing obligation to conduct themselves in good faith about matters relating to the Lease. The concurrent duties came into conflict.

[878] Actual litigation had not commenced until early March 2019, but long before then the potential for it heavily influenced the conduct of both parties. It was a priority consideration in everything the Tenant did beginning October 24, 2017, at the latest. The Tenant considered it a very real possibility no later than October 24, 2017. By March 14, 2018, the Tenant had decided to litigate to get what it wanted, if the Landlord denied it any element of its Ultimatum. The Landlord discovered abruptly that litigation was a very real possibility at the March 14, 2018, meeting when it was met with multiple lawyers and hit with the Ultimatum. It became certain it would be in Lease litigation with the Tenant at the latest on September 28, 2018, when it learned that the Tenant had committed to a second lease across town.

[879] This dynamic deterred the parties from transparency and responding efficiently to each other. It affected their communication and their lack of candour. It coloured the Lease-related conduct of both parties. It factored into their reticence to immediately disclose information to and cooperate with each other. An exception may have been in their periodic meetings subject to settlement privilege. The Court is not aware of the contents of those meetings other than the obvious, that they did not resolve the parties' issues.

[880] The Court of course infers nothing about the content of those privileged meetings or about the privileged Team meetings of the Tenant,[41] beyond what is already on the record about them: that the Tenant had been advised the Landlord would sue if the Tenant tried to break or to renegotiate the Lease, that the Tenant assembled its Team and asserted litigation privilege over all its communications on the basis of the Lease litigation it contemplated, and it contemplated Lease litigation over the presence of asbestos in the duct mastic. That was on October 24, 2018.

[41] *Wentworth v Lloyd* (1864), 10 HL Cas 589, 11 ER 1154, cited with approval in *R v Meer*, 2015 ABCA 141, at paras 36.

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After the Discovery, on November 8, 2017, the Tenant transferred its focus about asbestos in the duct mastic to asbestos in the SAF.[42]

[881] Both parties attempted to journey simultaneously along these two separate tracks, endeavouring to cooperatively perform their Lease obligations in good faith while strategically preparing to litigate (a word that comes from the Latin root *litigare*, meaning to fight, argue, quarrel). The two roles landed each party in a difficult tension, that they wrestled with on most every new decision they faced. This tension was not unlike the uneasy position many matrimonial litigants find themselves in, struggling with almost every day to day decision, wondering how the decision they make might be construed in the litigation. For example, they may be torn between their duty to serve the best interests of their children while simultaneously worrying about, if they do so (for example setting boundaries for them) how it might be played back against them later in court. Some even initiate circumstances because of how they think it may help their litigation outcomes.

[882] Each party communicated with the other and with third parties in ways that focused on solidifying their respective positions, sometimes even relying on their lawyers and other advisors to ghost-write their communications because of the possible litigation effects of the communications. Other times both penned words for their consultants, hoping the consultant would agree to sign it as their own independent view.

[883] The parties' relationship deteriorated over the months following the Ultimatum meeting. As is not uncommon between litigants, the levels of mistrust and suspicion escalated. Each party engaged consultants, experts, and legal counsel, who then were similarly tainted with the same brush of suspicion and mistrust. Each imputing to the other ulterior motives.

[884] To what extent does the almost certain prospect of litigation over the Lease affect the parties' obligation to conduct themselves in good faith about matters directly linked to that Lease? Is it a relevant consideration at all in assessing whether either party breached their duty of good faith?

[885] First, the effect upon the parties' interests and conduct of litigation looming is a relevant consideration. What is entailed by the obligation to have "appropriate regard" for the contract counterparty depends on the context: *Bhasin*, at para 65. The parties to the Lease positioning for expected litigation is a significant contextual factor affecting the scope of their good faith duties.

[886] Second, legal privilege is presumptively paramount to the contractual obligations of acting in good faith. It is protected as fundamental to the proper functioning of our legal system: *Lizotte v Aviva Insurance Company of Canada*, 2016 SCC 52, at para 64, citing *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, 2008 SCC 44, at para 9.

[887] The duty of good faith does not override a valid assertion of privilege. There are ways to challenge privilege in court; that was done in this case in the pre-trial applications before one of the Case Management Justices: see *CNOOC Petroleum North America ULC v 801 Seventh Inc*, 2021 ABQB 861; *CNOOC Petroleum North America ULC v 801 Seventh Inc*, 2022 ABCA 293.

[42] With respect to the duct mastic the Tenant accepted it could be managed in place but only until it might be in the path of a renovation or alteration, in which case it had to be removed in accordance with the section 35 of the *OHS Code*.

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The rulings led to some of the information previously withheld on a claim of privilege being disclosed, but it does not appear that the duty of good faith was raised in either case.

[888] As explained below in the context of the "pouncing" category, later being found to have been wrong on the law of privilege or its application does not necessarily mean that party is in breach of their duties of good faith, absent perhaps malice or disingenuity in the assertion of privilege.

[889] It is not a breach of the duties of good faith to keep confidential Lease related information that is subject to an assertion of privilege. The duty to cooperate to achieve the objects of the contract, which may entail that parties share information relevant to the performance of the Lease, does not prevail over the confidentiality that privilege protects.

[890] Third, a party will not be found in breach of the duties of good faith for acting in its own litigation interests, consistent with the organizing principle of good faith performance not extending so far as to require a party to subordinate its own interests to the other party: *Pekuakamiulnuatsh Takuhikan*, at para 9. Its obligation to have "appropriate regard" (*Bhasin*, at para 65), for the counterparty remains, but does not oblige it to undermine its own litigation interests.

[891] The organizing principle of good faith should not be used as a pretext for scrutinizing the motives of contracting parties: *Bhasin*, at para 70. The good faith principle similarly should not be used to scrutinize every action of a party on a litigation track.

[892] Fourth, being in litigation mode does not diminish in any way the parties' obligation of honesty one to the other in performing their contract (subject to keeping confidential all privileged information, noted above). On this aspect of the duty of good faith there is no conflict with a litigant's obligations during judicial and quasi-judicial processes. Deceit and obfuscation have no place in either setting.

[893] Similarly, being in litigation is not license to evade one's contractual commitments in bad faith. However, the delay that often results from litigation and the anticipation of it, to think twice about every potentially relevant decision or to solicit a lawyer's perspective on such decisions, is not bad faith evasion or a breach of the duty of cooperation, *ceteris paribus*.

[894] The extent to which the litigation context between contracting parties may affect a party's exercise of a contractual discretion in good faith does not arise in this case. How that duty may be affected when the contracting parties are anticipating and positioning for litigation is left for a future case.

[895] In the manners described above, I consider the parties' anticipation of and positioning for imminent litigation in assessing their cross-allegations of breaches of the duties of good faith. For the allegations involving conduct on an after early March 2019, litigation had commenced.

Category 2: Pouncing

[896] A party may wish to exit a contract for any number of reasons. The law permits it to "pounce" on a valid opportunity to do so, whenever such an opportunity presents. Pouncing in such circumstances does not constitute a breach of the duty of good faith, let alone bad faith. However, pouncing will constitute a breach of the duty if the opportunity to pounce was orchestrated by the party wanting out of its contract. The Ontario Court of Appeal made these

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points in *2161907 Alberta Ltd v 11180673 Canada Inc*, 2021 ONCA 590, [the "***Tokyo Smoke***" case] at paras 57 and 58:

> [...] A party is not prevented from exercising a right of termination simply because it wishes to bring its relationship with the other party to an end. ... Where a party is anxious to end a relationship, and a valid reason to do so presents itself, that party is not, in the absence of some other relevant fact, prevented from "pouncing" on it.
>
> While 216's basis for terminating the License Agreement ultimately proved invalid, as discussed above, its position on termination was not unreasonable, malicious, or so inconsiderate of 111's legitimate contractual interests as to constitute bad faith. It was neither manufactured nor concocted. Mr. Farbstein believed Mr. Heydon's threat constituted a breach.

[897] In *Mason v Freedman*, [1958] SCR 483, at page 486, the Court held that a clause of the purchase and sale agreement in issue did not "enable a person to repudiate a contract for a cause which he himself has brought about.... Nor does it justify a capricious or an arbitrary repudiation." See also *Toulaney v Green Gables Food Stores Limited* (1980), S H No 24890 (NSSCTD), a commercial lease case, where at page 12 the Court held:

> In my opinion, there was an implied obligation on the defendant to take all reasonable steps to get the permit. This the defendant did not do; the defendant cannot take advantage of a situation which the defendant brought about; ....

[898] If the reason for exiting the contract is later found to have been invalid, and to constitute a breach of the contract, as is the case here, that does not make the pouncing bad faith conduct. Sometimes a breach of contract is nothing more than that - just a breach: *Tokyo Smoke*, at para 71; *1218807 Alberta Ltd v Muslim Assn of Canada Ltd*, 2023 ABKB 300, at para 160.

[899] Here the genesis for the pouncing was not concocted or manufactured; there was no breach of a good faith duty by the Tenant in pouncing upon the unexpected Discovery of asbestos in its premises.

[900] It is not a breach of good faith for a party to a contract to go looking to see if the other side has done anything or failed to do anything that might present an opportunity to pounce. It is not a breach of good faith to conduct an "audit" of the other side's compliance with their contract obligations, in search of a reason to pounce. These are not manufacturing or concocting the reason.

[901] An objective viewer informed of the circumstances here, including informed of the Alberta legislative regime about asbestos, would justifiably question why the Tenant did not cease pouncing as more and more testing information revealed just how extraordinarily little asbestos was in the SAF and how commensurately few asbestos fibres were found in the Building. Not a single airborne asbestos fibre was found until July 2018. But the Tenant forged ahead undeterred and undaunted. It signed the sub-lease at the Bow building and started relocating its employees remarkably quickly given all that the move of complex business systems, leasehold improvements, and over a thousand employees entailed. One might say it was aggressively soon after the initial Discovery. But then, the Tenant was so convinced of being right on what the law required of the Landlord that it decided to leave the Building before it even detailed for the Landlord what Eco Abate found at the Building, at the Ultimatum meeting. Audacious maybe, but not bad faith. It signed the Bow building sub-lease *after* it received the

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WSP reports that (i) it found no airborne asbestos and that (ii) remedial work could proceed safely while the Building was occupied (based on its pilot abatement). It did not trust any consultant hired by the Landlord. It signed the sub-lease anyway and, soon after, vacated the Building. And it signed the sub-lease and began the move *before* the Tenant received a draft AMP, from which the Tenant could be certain that the Landlord planned to manage the ACM in place.

[902] The good faith question for the Court is whether the *way* the Tenant pounced constituted a breach of good faith, in all the circumstances, or whether *its persistence in* pouncing in all the circumstances breached its duty of good faith. Did it fail to act reasonably to sustain the purposes of the Lease?

Category 3: Allegations Based on Unproven Facts

[903] A number of the alleged particulars of bad faith are not proven by the evidence. These are the ones embellished by hyperbole, the ones that impute malicious intent to everything the other side did, and the ones resulting from scrutinizing every minor slight of the other.

Category 4: Breaches of Lease Provisions

[904] Not entirely distinct from Category 3, some of the allegations of breach of good faith are nothing more than a repeat of the conduct alleged to constitute a breach of one of the written terms of the Lease, but now with intentional bad faith about the conduct constituting the breach of a written term. While it is possible for evidence related to a breach of an express contractual term to also be evidence of a breach of one the four good faith duties, the question in the good faith analysis is about whether one of the four specific duties was breached. Intentionally breaching a term of the Lease, without more, falls short of proof of breach of one of the duties of good faith.

[905] To repeat, sometimes a breach is just a breach, no matter the amount of acrimony and mistrust building between parties headed to litigation with so much at stake.

Tenant's Alleged Particulars against the Landlord

[906] I now discuss the individual alleged particulars of breach of good faith performance starting with the Tenant's allegations against the Landlord.

1. Dishonestly representing in Lease sub-clause 16(o) that there "are no Hazardous Substances located in or on the" Building

[907] The Tenant has not proven dishonesty in the representation that the Building had no hazardous substances. The Landlord's early error regarding the construction material comprising the SAF was a misunderstanding, made innocently, by persons unaware that MK-5 was a red flag for ACM due to its vermiculite content, whereas CAFCO was not considered an ACM.

[908] As for the representation itself, the Landlord's misstatement was made during the formation of the Lease, not in its performance. It is in the performance of contract terms that the good faith duty operates.

2. Not performing its covenant to remedy any hazardous substances found in the Building pursuant to the laws of Alberta

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[909] The Landlord did not fail to comply with the laws of Alberta regarding asbestos found in the SAF. The Tenant misinterprets those laws. One is not acting in bad faith by not doing something that is not required.

3. Denied it the benefit of the termination right in clause 17 of the Lease

[910] The Tenant was not denied the benefit of its clause 17 right to terminate. As explained above the circumstances here did not trigger that right. The first prerequisite for the Tenant being able to terminate under clause 17 was not met: whether the Building had been destroyed or damaged rendering its premises unfit for the Tenant's occupancy.

[911] But the Tenant's good faith allegation is about the second prerequisite. The second prerequisite was that the opinion of the Landlord's Architect had to be that restoring the Building would take over one year, acting diligently.

[912] It fell to the Landlord to procure this information. Sometimes the Landlord may wish to trigger the clause 17 termination right, sometimes it may be the Tenant. The Landlord agreed in the Lease that in either case its architect's opinion would determine the point. That means that in either case it would need to procure the opinion. The Tenant was at the Landlord's mercy for this information it fairly requested from the Landlord under the Lease, largely to ascertain if the termination right in clause 17 had been triggered.

[913] The Landlord first delayed any response at all to the request for its architect's opinion. Then, after the Tenant repeated the request more than once, the Landlord arranged for its architect, and the architect involved in the original construction, to both restate the Landlord's view on the first prerequisite. Upon reviewing the content of both opinion letters, I have no doubt the responses were prompted, enabled, and coordinated by the Landlord. Upon reviewing both opinion letters, I doubt the architects were even asked the second prerequisite question.

[914] The Landlord piggy-backed upon the occasion of forwarding those opinions to the Tenant to clarify its position on all major points of disagreement about the asbestos, in a five page cover letter. The portion specific to the architects' opinions states:

> In your November 26, 2018 letter, you invited us to obtain a Landlord's Architect's letter. We have done so, and it is enclosed. We have gone further and obtained the additional enclosed letters from WSP and from the original architect for the Building. As you will see, all of them confirm that no section 17 condition exists, that no qualifying damage or destruction has occurred, and no occurrence has rendered the Project unfit for occupancy.
>
> Please stop implying that there is any proper justification for Nexen to terminate its Lease.

That was not responsive to the Tenant's request about the second prerequisite. Like the opinion letters, it is all about the first prerequisite. This was a letter designed to dissuade the Tenant from breaking the Lease and from compelling litigation.

[915] Those motivations are not a breach of good faith, but the Landlord's evasion of its role under the Lease was. It was obligated under the Lease to procure the requested opinion. It failed to do so.

[916] The Tenant began asking informally as far back as April 2018. The Landlord's delay in responding to the repeated requests can be chalked up to the litigation positioning well

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underway. Both parties were more circumspect about every interaction between them. By now they were preoccupied by, for the Landlord, maintaining the Tenant's rent payments, and for the Tenant, protecting the fallback of having to litigate to get the Landlord to do as it was required or to be free of the Lease. Delays in this context were not a breach of any of the good faith duties.

[917] But by the content of the Landlord's response, the Tenant was denied the ability to assess its full legal position under the Lease if, as it thought, it was right that the first prerequisite was met. It believed it was because of, among other things, its erroneous legal interpretation of the *OHS Code*, in which it believed it found support in the Manual.

[918] Just because the Landlord did not agree with the Tenant's opinion about the first prerequisite, and was convinced there was a bad faith ulterior motive behind it, its duties of good faith performance of its obligation regarding the second prerequisite were not suspended. Good faith duties are not waived because the counterparty may be acting unreasonably or behaving unsavory. A breaking down of the commercial relationship, and the loss of the once cordial and constructive working relationship, do not justify a party then unilaterally picking and choosing among the remaining contract obligations which to deign to perform. Responding to the actual request would not undermine the Landlord's interests. A simple caveat that providing the requested opinion should not be construed as the Landlord agreeing that the first prerequisite was met would suffice.

[919] The Landlord's litigation interests did not relieve it of its duty of honouring the role it agreed in the Lease to take. The Lease did not describe the task as discretionary. The Lease did not describe the task as conditional on the parties first agreeing that the Building had been destroyed or damaged to the point of being rendered unfit for the Tenant's occupancy.

[920] The obligation to perform the counterparty's valid request under the Lease is not conditional on the counterparty being right on the law. Just as being wrong on the law does not necessarily mean a contracting party is acting in bad faith when acting on that erroneous view, so too being right on the law does not entitle a contracting party to disregard its other contract duties, even ones arising from the counterparty's erroneous views.

[921] The Landlord was not acting in good faith when it unilaterally thwarted the Tenant's attempt to pursue what it asserted was its valid right under the Lease. This moved beyond positioning for litigation to evading a contract obligation and failing to cooperate with the Tenant as it agreed to do in clause 17 of the Lease.

4. Engaging in a campaign of concealment, misrepresentations and half-truths to avoid remedying the hazardous substance (asbestos) found in the Building by:
    a. Misleading Alberta OH&S and misleading the Tenant about its discussions with Alberta OH&S
    b. Misrepresenting, manipulating and concealing the reports and tests of its hired consultants
    c. Misleading the Tenant as to its true intentions all along, which was never to remove all the SAF
    d. Hiring compromised consultants whose independence was compromised

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[922] I discuss the allegation of the Landlord misleading Alberta OH&S and the Tenant about its discussions with Alberta OH&S separately below. The rest of these allegations are best addressed in conjunction with the following comparable allegations by the Landlord of the Tenant's breach of good faith:

1. Obstructing the Landlord's investigations
2. Substantially re-writing its consultant's report on the asbestos find
3. Concealing test results that contradicted the Tenant's desired narrative

[923] Both parties allege the other selectively withheld test results and consultant reports.

[924] The Landlord alleges that the Tenant concealed test results to its advantage by not providing the initial test results from November 2017 until months later at the March meeting.

[925] The Tenant alleges the Landlord intentionally withheld in bad faith WSP's positive OEL readings in May 2018, for over a month. The Tenant says that those results should have been provided immediately as OEL exceedances necessitate a "pull the fire alarm" response. The Tenant alleges that the Landlord knowingly put the Tenant at risk by failing to communicate the exceedances promptly.

[926] The Landlord alleges the Tenant misrepresented that four of the floors tested positive for asbestos in July when only one floor was confirmed to be positive. The Landlord alleges the Tenant misrepresented there were 177 areas of high-risk debris when testing revealed no asbestos fibres in the debris.

[927] The Landlord also alleges the Tenant began concealing its air monitoring reports in the fall of 2018 after the AMP was imposed.

[928] The Tenant alleges that the Landlord withheld air monitoring reports March 2019 and April 2019, even though all say there were no readings above even the lower air clearance criteria.

[929] The Tenant alleges that the Landlord denied its attempt to access testing results in March 2019. In support it cites evidence of when the Landlord turned away some CNOOC contractors who showed up at the Building without notice in March 2019 to do testing, which of course is not the same thing.

[930] Neither party has proven that the other misrepresented or manipulated the work product of its consultants. Other than the Tenant's secrecy from early November 2017 to mid-March 2018, neither concealed in bad faith that work product. At most they delayed release of some as they considered positioning for litigation or as they "helped" their consultants find the most advantageous wording with litigation in mind.

[931] The Tenant has not proven the Landlord hired compromised consultants.

[932] OEL exceedances are not, without more, "pull the fire alarm" events. This was more unhelpful litigation hyperbole that undermines the objective of persuasion.

[933] The Tenant has not proven the Landlord intended all along to never remove all the SAF. The Landlord only reached its decision that managing in place was the most prudent approach from a safety perspective after conducting its own investigation and consulting a range of

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advisors. But it remained open to remove all the SAF if the Court ruled it required in the Declaratory Proceeding.

[934] The Tenant did not provide the detailed test results Eco Abate conducted in November until the March meeting when it provided the Eco Abate Report. It did not provide updated information over the course of its follow-up investigations after appeasing the Landlord with an assurance that it would. The Tenant was not transparent with the Landlord about the information it was receiving about hazardous substances in the Landlord's Building. It left the Landlord with the impression the discovery was not a big deal for the Tenant, which was not true. Taking it seriously, as potentially a big deal, was a reasonable, if not appropriately prudent reaction for the Tenant, until it learned more. But keeping the Landlord in the dark and distanced from its Building throughout fell short of the duty of cooperation that was part of its duty of good faith performance. The secrecy undermined the Landlord's ability to determine if any its obligations in the Lease had been triggered and it then setting about to perform them with reasonable diligence. The Tenant was also placing its own Lease breaking aspirations ahead of its Lease performing duties and, for these reasons, the Tenant fell short of its duty of cooperation in the performance of the Lease. I speak more about this 4-month period below.

[935] There is a certain irony here to the Tenant, after keeping the Landlord in the dark for those four months, then complaining about the Landlord taking a single month to disclose the May 2018 test results from WSP.

[936] But the bare allegation of the Landlord intentionally withholding important safety information from the Tenant for a month misses the context. First, the Landlord did not receive immediately from WSP the data of concern. It had contracted with WSP to conduct its work and report when done. WSP knew "mere exceedances" (that is, not asbestos fibre exceedances but just high fibre counts) were not cause for concern here. WSP knew to do further testing to see if the exceedances contained asbestos fibres and did so.

[937] Second, the test results were not of concern because the exceedances all arose during a bulk sampling program when the SAF was being disturbed by trained and protected workers in a controlled environment. The work was done in enclosed areas away from the Tenant's employees, so they were not at risk.

[938] Third, as noted, all samples with exceedances were sent for TEM analysis to learn what kind of fibres were present. The results detected no asbestos and the exceedances were likely due to disturbance dust. WSP explained this in its draft report:

> ... Select samples analyzed using PCM analytical procedures identified elevated fibre concentrations. However, all samples with elevated fibre concentrations were submitted to the laboratory for TEM analysis. All ambient air and occupational samples submitted for TEM analysis did not contain asbestos fibres. As such, the elevated fibre concentrations measured using PCM are likely attributed to the presence of other non-asbestos fibres that were generated through the disturbance of ceiling tiles and/or the spray insulation/mineral wool.

[939] The results of that testing were put into an Interim Spray Insulation Sampling and Testing Program Report that was dated June 19, 2018, and was passed on to the Tenant June 20, 2018. The Landlord did not withhold at all and certainly not in bad faith.

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[940] Both parties were quicker to inform the other of information that supported their own desired narrative and purposes but not so quick when new information had the opposite effect.

[941] The Landlord is correct that in July 2018 the Tenant suggested that 4 samples from Eco Abate's ongoing air monitoring tested positive for asbestos fibres and then reported that concentrations could not be determined for 3 of those 4. As I explain in the description of the various kinds of testing methodologies early in this judgment, there can be challenges when moving from one to another. Just because the asbestos was not observed again under quantitative TEM, that had been observed under qualitative TEM, does not mean the qualitative TEM was wrong. It could just as easily mean the quantitative TEM was wrong or, far more likely, following the prescribed testing protocols meant the quantitative TEM looked at different locations on the specimen than where qualitative TEM observed the asbestos. I am satisfied all 4 samples had asbestos in them, as first observed. The greater likelihood of finding some was the very reason Eco Abate suggested to the Tenant, and the Tenant agreed, to start with qualitative TEM not PCM.

[942] The Landlord is also correct that the Tenant identified 177 high-risk areas of debris but that eventual testing, of a few samples of debris, did not result in any findings of asbestos fibres. That does not mean the Tenant misrepresented areas of concern. Its consultant Eco Abate conducted a vent debris assessment in July 2018 and found SAF debris in a number of areas and recommended solutions including vacuuming. As the SAF is considered ACM, even if not all debris tests positive for asbestos fibres, there was no misleading conduct by the Tenant.

[943] By 2019 the Tenant was pretty much moved out and the Landlord was inviting the Court to determine their Lease obligations with its Declaratory Proceeding. Both parties knew they were on track to litigation and were choosing to share, or not share, information depending on whether it promoted their own, now fully entrenched, positions.

Dealings with Alberta OH&S

[944] The Tenant says the Landlord misled Alberta OH&S and it did so to get OH&S to conclude the Landlord was legally compliant. During the pre-trial disclosure phase of this action, the Tenant learned of the Landlord's communications with OH&S. It accuses the Landlord of bad faith for sharing only selective information with OH&S – not telling it the SAF was MK-5 and not telling it of any of the Eco Abate findings of asbestos. Klimenko, a member of the Landlord's consulting firm WSP, expressed her discomfort in the Landlord not presenting to OH&S the Eco Abate results, as by that time it was thought that Eco Abate found more ACM. The Landlord in other internal emails said Klimenko "was pissed" at the decision to not include the added information.

[945] The Tenant accuses the Landlord of bad faith also for not telling the Tenant at the time about these communications.

[946] The Tenant further accuses the Landlord of bad faith for misrepresenting OH&S' position that was included in the WSP final report.

[947] The first two of these three accusations are not breaches of good faith; the third is.

[948] The contact with OH&S arose from WSP suggesting to the Landlord that it contact Rogerson at Alberta OH&S for its perspective on how the Landlord was addressing the asbestos concerns raised and the approach WSP was taking. The Landlord did so, but it was not obliged

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to disclose that to the Tenant. To repeat the law above, the duty of honest performance imposes only a limited duty of disclosure. It does not impose a more general duty to disclose everything. The Landlord wanted to do things right, needed reassurance on what it was doing, and sought that from a person well placed that its consultant recommended. That is not a bad thing. There was no bad faith in proceeding accordingly without sharing it with the Tenant. Alberta OH&S commendably offers such informational assistance to those wanting to comply with the laws it administers.

[949] The duty of good faith did not require the Landlord to provide any or all its known test results to Rogerson. If the Landlord wanted to limit what it told Rogerson before eliciting his perspective, that was its choice. It was under no obligation to share with Rogerson all the relevant information. Of course, the value of the feedback from Rogerson would diminish the less the Landlord told him. But such decisions are not breaches of good faith in performing the contact.

[950] Further, the Landlord had been told the Eco Abate information it received was confidential. At the Ultimatum meeting the Tenant emphasized the Eco Abate report and the meeting information were privileged. I accept the Landlord's evidence that it did not think it *could* share all the Building information with Rogerson. So it gave Rogerson WSP's information only.

[951] No good faith duty required disclosure by the Landlord of its dealings with Rogerson to the Tenant. A party is at liberty to make confidential inquiries about how it is addressing an issue without having to compromise its self-interests by sharing that information. OH&S was not providing an official ruling or position to the Landlord. It was not determining the Landlord's state of compliance. Rogerson was merely providing "insight", as he put it, just a perspective in the interests of assisting a party wanting to comply with provincial requirements.

[952] The real problem came from the Landlord's use of that feedback.

[953] The Landlord sent WSP's draft report to Rogerson, then held two calls with him. The second was convened with WSP's Kennealy participating, because the Landlord liked what it heard in the first call and wanted Kennealy to hear it and then add it into the WSP final report.

[954] However, on August 27 in advance of the call, Rogerson[43] sent an email to Sardachuk saying:

> As you may or may not know we do not approve work procedures or assess compliance with the Alberta OHS legislation outside of a formal inspection process. We can provide insight; however, I will not be able to provide you with a determination on your state of compliance.

[955] Barely one week later, however, on September 5, 2018, despite those very clear statements on the limits to any information Rogerson could offer, that it would be insight only, Sardachuk scripted information for WSP to include in its final report that OH&S provided helpful feedback regarding the report. The summary to the Final Report provided the following

[43] Matthew Rogerson's email signature block states after his name: "MPH, ROHT, Director of Occupational Hygiene, Director of Radiation, Federal WHMIS Coordinator, Occupational health and Safety, Alberta Ministry of Labour".

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comments concealing that fact and misrepresented that OH&S was on board with WSP's approach:

> OH&S affirms the findings and recommendations of this report. OH&S confirmed that the building could be occupied while implementing the asbestos management plan. OH&S stated that based on the WSP report, the building does not meet the definition of an unsafe building and is safe for occupancy as it pertains to the subject matter discussed in this report.

[956] Those are three things Rogerson said OH&S did not do "outside of a formal inspection process". The third refers to compliance with section 31 of the *Code*. The Landlord misrepresented that OH&S had reached these conclusions. The Landlord in bad faith deceived the Tenant by misrepresenting the Rogerson communications, by overstepping the Rogerson limitations email and by not disclosing those limitations along with the portion of the Rogerson feedback that was accurate. This breached the duty of honest performance in respect of covenants 16(j) and (o).[44]

[957] The Landlord never sent the final report containing those representations to Rogerson.

[958] Upon receipt of the WSP final report with those OH&S comments of approval, the Tenant did not appear concerned or moved in any way. By then (mid-September 2018) it was in process of signing the sub-lease, kicking off the relocation, and firmly entrenched in its position. The Landlord's attempt to convince the Tenant it was in compliance with its obligations and that there was no reason to leave the Building during any abatement fell on deaf ears.

[959] The Landlord had made similar representations directly to the Tenant that OH&S had approved the Landlord's approach, writing in August 2018 that the Landlord had "communicated with OHS to ensure that all legal/regulatory requirements are promptly determined and performed". The Tenant correctly calls this out as a misrepresentation and deceitful, a breach of the duty of honest performance.

5. Unduly pressuring its consultants into changing their opinions to align with the Landlord's desired narrative

[960] This was not proven by the Tenant. The consultants signed off on their respective reports, so no matter how much had been from the pens of the clients, the consultants said by their signatures the contents were their own views. Both defended those views capably at trial, without any successful attempt to demonstrate they were their client's myrmidon.

[961] This allegation, like many others by both parties, is indicative of the growing mistrust between them following the Tenant's post-November 9, 2017, secrecy, which then spiralled downward into the ensuing 'all gloves are off,' unduly protracted, hard fought litigation.

Landlord's Alleged Particulars against the Tenant

[962] The Landlord's particulars of the alleged breach of good faith by the Tenant numbered 3, 4, and some of 5 have been discussed above.

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[44] In doing this the Landlord also manipulated WSP into including Rogerson comments without telling WSP of Rogerson's limitations email. While this is far from commendable behaviour, it is not also a breach of good faith vis a vis the Tenant for it was not sufficiently tied to any term of the Lease.

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[963] Numbers 1 and 2 are not related to the Tenant's performance of any Lease obligation. They are, again:

1. Failing to cooperate with the Landlord in the Declaratory Proceeding to bring an end to the stalemate between the parties
2. Professing to negotiate in good faith regarding the Lease, while behind scenes instructing its lawyers to draft the Termination Letter and a complex Statement of Claim

[964] These pertain to the Tenant's litigation conduct. Neither are "directly linked to the performance of the contract" (*Bhasin*, at para 73). They are not matters about which the Lease designated a particular method of dispute resolution. They reflect the Tenant's choices based on its litigation strategy. They have been discussed briefly in the context of the Tenant's anticipatory breach claim. Beyond that they may be addressed by the parties if they return to speak to costs, so I will not comment further.

[965] Numbers 6 through 9 all describe or support the Landlord's theory of the case that employee safety was a pre-text for the Tenant's ulterior motive, which was to break the Lease. The Landlord says this is bad faith. I discuss these four together. Those particulars are, again:

Concealing for Four Months

[966] The details of this aspect of allegation number 5 by the Landlord against the Tenant are in the Facts portion of this judgment, in the section dealing with the time from November 9, 2017, to and including the March 14, 2018, Ultimatum meeting.

[967] During this time the Tenant commenced the appropriate phase 2 inspection and delineation work. However, during this time the Tenant also barred the Landlord from its premises, closed its ranks and began concealing information.

[968] During this time, it also strategized on how it might or would pounce on the Discovery. This is clear because before the end of this time, before it ever shared anything of substance about the Discovery with the Landlord, it had already reported to its owner its plan to leave the Building and after that "manage Lease negotiations". It formulated this strategy despite receiving, on November 10, Eco Abate's report that floors 8 to 17 all met health and safety requirements, information it also concealed from the Landlord. It formulated this strategy after also receiving, on November 16, Pinchin's report that it found no asbestos on any of the 32 floors it tested November 12. This also the Tenant did not share with the Landlord. There was no reason consistent with dealing in good faith for not passing them on to the Landlord. They were not subject to any privilege. And, after assuring the Landlord it would be updated as appropriate, it continued to conceal this information.

[969] The Tenant concealed important information about an hazardous substance in its Building, for which the Landlord bore statutory and contractual (Lease) duties. The Tenant in this litigation claims the Landlord shirked, and would continue to shirk, a statutory duty to remove all the SAF, yet the Tenant withheld some critical information that was very relevant to that duty. On the one hand the Tenant chastises the Landlord for not performing its statutory obligations while on the other handcuffing the Landlord from attending to the alleged duty for four months.

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[970] In addition to being contrary to the Tenant's duty to cooperate about things required to perform the Lease, and its duty under sub-clause 15 (bb)(i) of the Lease to immediately notify the Landlord upon discovery of any hazardous substance, the Tenant also had a statutory duty to cooperate with the Landlord in respect of its requirements under the *OHS Act*. That statute says, at sub-section 3(7):

> Every employer shall cooperate with any person exercising a duty imposed by this Act, the regulations and the OHS Code.

So, if the Landlord had a duty to remove all the SAF under the *OHS Code* as the Tenant argues it does, the Tenant was required to share its information with the Landlord so that it could comply. It did not.

[971] The Tenant had all the site data from Eco Abate that it finally reported on March 14, in early January at the latest, when it received Eco Abate's draft report on that data. It kept this to itself for over two months. Yet in the litigation it claimed the Landlord did not act quick enough.

[972] It also had the Pinchin data and conclusions from early November that were favourable to the Landlord and that it did not disclose for even longer. Concealing all this information, as if it did not exist, was misleading, if not bordering on deceit, and contrary to the duty of honest performance of the very parts of the Lease that the Tenant claims the Landlord has breached. The Tenant has failed to cooperate with the Landlord in achieving the objects of the Lease.

[973] Assuring the Landlord that it would be kept informed and that CNOOC considered the matter to be no big deal were similarly misleading, if not deceitful, and in breach.

6. Plotting to break the Lease based on the pre-text of inflated consequences of only trace amounts of asbestos in the SAF
7. Distorting the true state of affairs with the SAF, making "trace amounts of asbestos" out to be something far greater than it is
8. Withholding rent
9. Terminating the Lease after there could be no argument that the termination was done for the safety of its employees, since they had all long since vacated the Building

[974] As still further evidence of this alleged disingenuous conduct by the Tenant, the Landlord refers again to the Tenant's decisions and conduct over the 4 months between November 9, 2017, and March 14, 2018. The Landlord says the Tenant was busy plotting how to turn this discovery into a way out of the Lease. Over time the data confirmed only "trace amounts" of asbestos in the SAF, but the Tenant was not interested in the facts, only its desired outcome. This, the Landlord says, is bad faith.

[975] The Landlord asks me to find the Tenant's multiple re-writings of the initial Eco Abate Report, the unusual personal involvement of the CEO in a routine occupational health and safety matter, and that its actions over the months following the discovery of asbestos were done in bad faith to evade their contractual obligations. The Landlord says the Tenant's purported emphasis on "Safety First" was insincere insofar as the asbestos in the SAF was concerned.

[976] The Landlord says that these indicia prove the Tenant's real motive all along was getting out of a long-term lease that the Tenant could no longer fully utilize or afford. If it were proven, then this duplicity would constitute a breach of the duty of good faith.

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[977] However, the Landlord has not proven all those indicia of bad faith that it relies on and it has not proven the overall inference it asks me to draw from the evidence in aggregate. The evidence is at least equally consistent with, if not more aligned with, an inference that the Tenant was not acting in bad faith and perpetrating the sham the Landlord alleges but acting consistent with its erroneous interpretation of the law.

[978] The Landlord is right that the Tenant's owner was pressuring it, and Wilson in particular, to reduce overhead expenses. That certainly attuned Wilson to be vigilant in finding ways to cut. It had everything to do with Wilson forming the Team after speaking with his top lawyer O'Brien, after learning there was asbestos in the duct mastic. Litigation privilege was asserted over all the Team's communications. That meant the Tenant thought the only communication of the Team was about Lease litigation – perhaps terminating it, perhaps suing for reimbursement of its costs resulting from the Discovery of asbestos the Landlord represented was not in the Building, perhaps considering other options to pounce.[45] Regardless of the nature of possible Lease litigation contemplated, the dominant purpose of the litigation privileged communications was not employee safety. Any discussion of that was merely ancillary to the dominant purpose of Lease litigation, otherwise the communications were not protected by litigation privilege.

[979] It was another two weeks after that when the SAF was also found to contain asbestos. The focus of the Team expanded to encompass now the SAF. Over time, the SAF as ACM become the Tenant's singular point of emphasis. It was in the Plenum, which is part of the Building's air distribution system, and it is friable. The Tenant had good reason to be genuinely concerned at the outset, regardless of any opportunity it may have presented to reduce rent costs.

[980] That the Tenant started the process of looking for new space to rent before even informing the Landlord of Eco Abate's findings and dictating its Ultimatum is equally open to the inference that, just as the Tenant said, such processes have long lead times. Moving a data room that remotely operates high pressure gathering, processing, and delivery equipment containing environmentally harmful hydrocarbons, cannot be done overnight, for example. The same is true of the Tenant's state of the art digital 3D reservoir modelling equipment. Having been told the Landlord would go to court before accommodating Lease reductions, Wilson wisely began preparing for various possible scenarios that the company may face. For long lead time processes, to have a relocation available an option when needed, if a 'Plan A' fails, required proactivity. And the Tenant's advisors had already warned it that the Landlord would resist any attempt to reopen the Lease before it learned about the ACM in the Building, so a possible need to relocate was a high probability event.

[981] The Discovery of asbestos, even though it turned out to be in only nano-trace amounts overall, was not a manufactured or concocted safety concern.

[982] The Tenant's emphasis on Safety First was not just theatre:

[45] Part of the Landlord's theory of the case is that the assertion of litigation privilege meant the Tenant intended from the outset to terminate the Lease. Even though the Tenant asserted litigation privilege before the Discovery, on the basis of learning the duct mastic contained asbestos, it does not necessarily follow from the assertion of litigation privilege, that the only Lease litigation contemplated was around Lease termination. Two alternatives are mentioned above. And they may have all been discussed, plus others. That does not support an inference that termination was the sole or even primary motivation from the beginning.

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a. The emphasis started before ACM was found. It resulted from CNOOC's efforts to make systemic changes following the two fatalities. It was determined to break out of what Wilson called its "culture of complacency."

b. Auger's hiring was a part of its genuine desire to change, by hiring a reputable and experienced executive who had recently retired from what is now Shell plc, who could objectively critique and point out what those in the company may have become blind to, inconsistent with a safe workplace. This also pre-dated the asbestos find.

c. Wilson's first-hand experience meeting with the families of the employees killed made it personal for him. He took a personal interest in this latest potential for an extraordinarily high safety risk to his entire head-office workforce. He testified persuasively in describing those experiences and that he did not want another fatality on his watch. Also, Nexen had not faired well in recent years with workplace safety investigations by OH&S, under Wilson's authority before he moved up to CEO, and Wilson wanted to improve upon its safety record.

d. The Tenant's other lay witnesses were also consistent that safety was what guided the Tenant's position and decision to both relocate and ultimately terminate the Lease. Their testimony on that point was not shaken on cross-examination. Many of them are no longer employed by CNOOC.

[983] The "re-writing" of Eco Abate's first report from its initial survey for hazardous substances is not so nefarious as the Landlord makes it out to be. As I indicated earlier, the Tenant was not alone in this practice of encouraging its 'editorial suggestions' on their consultant's reports, with litigation firmly in mind. In either case, Eco Abate and WSP, the consultant has the final say on what goes in the final report to which it signs, subject to the standards of their professions.

[984] Blake of Eco Abate testified at the trial and his ownership of the final wording withstood cross-examination. I am satisfied the final wording was his own opinion and recommendations, that he genuinely believed to be accurate. Whether or not he originated the recommendation that removal of all SAF was mandated by provincial legislation and that the safest way to remove it was for all employees to be out of the Building, he agreed with it.

[985] Relatedly, Blake's independent assessment that the Tenant was genuinely concerned about the safety of occupancy is also inconsistent with the Landlord's theory of it being contrived.

[986] The Tenant's experienced senior in-house advisor on such things, Auger, also felt the only way they could be 100% sure the Building was safe was to remove all the SAF.

[987] The Tenant also had legal counsel involved on these concerns from the outset, both internal and external, before issuing its Ultimatum and thereafter, implying it was not making its decisions capriciously or arbitrarily.

[988] In addition, in the face of the lack of clarity in the applicable laws, the Tenant's error on the law is even more difficult to characterize as displaying bad faith. This lack of clarity is exacerbated by the document the government produced to add clarity, the Manual. The 2012 Manual, the most recent available to the parties during their growing dispute:

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a. remained unclear on whether ACM with less than 1% weight asbestos was subject to any restrictions.

b. complicated matters by providing its own commentary and somewhat ambiguous direction on what to do in cases of insulation containing vermiculite (and thus potentially asbestos). Experts and consultants interpreted the advice differently, either as applicable to the SAF in this case or as irrelevant and only applicable to loose-fill insulation commonly found in attics.

c. advised on how its "Control II" would apply to the situation of ACM in the Building but was unclear on whether removal was required immediately or whether it could remain in place under a management plan. Again, capable experts differed on how to interpret it.

d. contained ambiguous guidance on the meaning of section 33 of the *Code*, implying that asbestos was prohibited from being in a supply or return air system in both new and existing buildings.

e. implied that upon being added to the *OHS Code*, the provisions contained in its sections 31 to 35 were removed from their prior enactment.

[989] The uncertainty in the role of the Manual and the uncertainty in the requirements of the law were evident at trial also in the conflicting opinions of two seasoned occupational health and safety asbestos experts, Mr. Dan Clarke and Mr. Glyn Jones, as to whether removal was required in this case.

[990] Thus, although the Tenant was pushy, aggressive and impatient with its demanding the most extreme response from the Landlord based on virtually no asbestos fibre release, operating from what it understood the law required of the Landlord, being wrong in that interpretation does not constitute a breach of good faith: *Tokyo Smoke*, at para 64; *Muslim Assn of Canada Ltd*, at para 160. I further find the Tenant did not lie or knowingly mislead the Landlord about its position that the legislation required the SAF to be fully removed from the Building. Its position was in error, but was not fabricated or formed in bad faith – unreasonably, maliciously, arbitrarily, or without appropriate regard to the Landlord's contractual interest in maintaining the Lease, *Tokyo Smoke* at para 58. Appropriate regard does not mean subjugating ones own differing view or legal interpretation.

[991] Given the dissonance between the law as the Tenant interpreted it and the historic practice within the province,[46] one might have expected the Tenant to be a bit less brazen in its position, and open-minded, not to make up its mind before first finding a single airborne asbestos fibre anywhere in the Building and before first even speaking with its counterparty. One might have expected it not so quick to issue and then never waver from its Ultimatum. But if you genuinely believe the Building may be on fire, being brazen, aggressive and impatient is not bad faith conduct.

[992] Finally, under cross-examination Wilson was not shaken in his genuine concern for employee safety and it being the Tenant's paramount consideration in all its decisions (while

[46] By "the practice within the province" I refer to asbestos management practice – the grandfathering of ACM already existing in buildings, the examples of managing ACM in place, and the removal of ACM only when it might be disturbed for other reasons: at a renovation, alteration or demolition.

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still positioning for the litigation it anticipated would result). He was not shaken from being convinced the law prohibited the use of friable ACM in the Building's air distribution system and therefore the Landlord was required to remove it all without delay.

[993] Like so many of the Tenant's witnesses, by the time of the trial Wilson no longer was in the Tenant's employ. Yet none of those witnesses, including Wilson, appeared to falter in their conviction the Tenant was sincerely motivated and in the right throughout. Their evidence is not reduced in weight by reason of potential bias.

[994] I am not persuaded that the *way* the Tenant pounced constituted a breach of good faith, in all the circumstances, or that its persistence in pouncing in all the circumstances breached its duty of good faith.

[995] For all these reasons, the evidence has not proven on balance the Landlord's theory of the Tenant behaving dishonestly, pursuing its ulterior motive from day one. There is certainly evidence consistent with that theory, but that evidence is also consistent with the Tenant genuinely intending nothing more than it said throughout about taking no chances with employee safety, and any collateral benefit in reducing its annual overhead costs through to the end of 2031 was just a happy coincidence for the Tenant.

Result on Alleged Breach of Good Faith

[996] The consequence for the Tenant of its aggressive pursuit of a position unsustainable under both the Lease and provincial legislation, is that it is in breach of the Lease and will bear liability for it. Despite all the acrimony and mistrust between the parties, animating their palpable mutual disdain, and notwithstanding a small number of one-off/discreet breaches, most of the parties' claims are not made out.

[997] Those 'one-off' breaches were:

By the Landlord:

- breach of the duty of honest performance in the deception about Rogerson's informal comments to offer insight, being Alberta OH&S's official, considered, fully informed position; and
- evading its role under Clause 17 of the Lease to procure its Architect's Opinion.

By the Tenant:

- for the 4 month period immediately following the discovery of ACM in the friable SAF, during which it did not cooperate with the Landlord about it even though it believed the Landlord had both a statutory and a contractual duty to address it, and during which it misled the Landlord in its representations.

[998] For both parties these were the exception not the rule. For both parties these exceptions represent unfortunate choices to place their litigation interests ahead of honourable conduct. Overall, both parties reasonably continued to perform contract duties in good faith considering the entire year and a half from early November 2017 to early May 2019. This included the Tenant continuing to pay full rent for about a half year after starting to vacate the Building and for three months after fully vacating.

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[999] To repeat, the organizing principle of good faith should not be used as a pretext for scrutinizing the motives of contracting parties (*Bhasin*, at para 70); even less so for scrutinizing the motives of every single step of the party opposite, as they acrimoniously jockeyed for position on their descent down into full litigation.

8. Third Party Indemnity Claims

[1000] Both the Landlord and the Tenant claim a right to indemnity from third parties. The Landlord claims against CNOOC Limited. The Tenant claims against the Beneficial Owners.

Landlord's Claim Against CNOOC Limited

[1001] In claiming against CNOOC Limited, the Landlord relies on the Lease Indemnity Agreement between it and CNOOC Limited, dated December 30, 2013. Clause 2 of the Lease Indemnity Agreement, which the Landlord specifically relies on, reads as follows:

> The Indemnifier [*CNOOC Limited*] hereby agrees with the Landlord that at all times during the Term of the Lease, the Indemnifier shall indemnify and save the Landlord harmless from and against any and all losses, liabilities, damages, costs, expenses (including, without limitation, legal foes and disbursements on a solicitor and own client basis), actions and causes of action incurred by the Landlord, or to which the Landlord becomes subject, as a result of or arising out of any failure by the Tenant to pay any Rent or any other sums and amounts of any kind whatsoever payable under the Lease by the Tenant (whether to the Landlord or otherwise) or which is the result of or arises from any default by the Tenant to observe or perform any of its covenants or obligations under the Lease.

[1002] CNOOC Limited is the parent corporation of the Tenant. Interposed between CNOOC Limited and the Tenant is an additional corporation, CNOOC International, with additional corporate entities possibly interposed between CNOOC Limited and CNOOC International, and between CNOOC International and the Tenant.

Lease Indemnity Agreement

[1003] In its pleading, CNOOC Limited says that it is not obligated to indemnify the Landlord under the Lease Indemnity Agreement because the Tenant did not breach its obligations under the Lease.

[1004] At trial, CNOOC Limited did not call any evidence or raise any arguments to establish that the Lease Indemnity Agreement is not enforceable or suggest it did not attorn to this Court. CNOOC Limited did not deny liability if the Tenant is found liable to the Landlord under the Lease. By implication, then, CNOOC Limited concedes that it would be liable under the Lease Indemnity Agreement if the Tenant did in fact breach its obligations under the Lease.

[1005] Given that the Tenant is liable to the Landlord under the Lease, I conclude that CNOOC Limited is also liable to the Landlord under the Lease Indemnity Agreement.

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Piercing Corporate Veil

[1006] In its Second Amended Counterclaim, the Landlord pleads that "[t]he acts and knowledge of [the Tenant] are the acts and knowledge of [CNOOC Limited]." In the alternative, the Landlord pleads that CNOOC Limited directed the actions of the Tenant for a common improper purpose, namely, terminating the Lease, and thereby improperly and tortiously interfered with the contractual relationship between the Landlord and the Tenant.

[1007] In its closing brief, the Landlord concedes that CNOOC Limited did not direct the actions of the Tenant for the common improper purpose of terminating the Lease. But the Landlord maintains its position that the acts and knowledge of the Tenant were the acts and knowledge of CNOOC Limited. In support of this position, the Landlord points to evidence describing the efforts to integrate the Tenant into CNOOC International following the acquisition. Additionally, the Tenant points to CNOOC Limited's legal counsel examining witnesses and arguing certain applications during the trial.

[1008] The Landlord does not explicitly identify the legal framework under which its arguments should be considered. I agree with CNOOC Limited, however, that for the Landlord to succeed in this argument the Court would have to pierce the corporate veil between the Tenant and CNOOC Limited.

[1009] CNOOC Limited says that the evidence that the Landlord relies on, which describes the relationship between the Tenant and CNOOC International, cannot provide a basis to pierce the corporate veil between the Tenant and CNOOC Limited, a legal entity that is distinct from CNOOC International. Further, CNOOC Limited says that the evidence establishes that the Tenant carries on its own operations, and that the Tenant's board of directors and management has wide latitude in managing these operations. Finally, CNOOC Limited says that collaboration between its legal counsel and the Tenant's legal counsel in this trial is irrelevant to the question of whether the corporate veil between CNOOC Limited and the Tenant should be pierced.

[1010] For the reasons that follow, I decline to pierce the corporate veil between the Tenant and CNOOC Limited.

[1011] The corporate veil between a parent and a subsidiary corporation will only be pierced when:

> (1) the parent completely controls the subsidiary, such that the subsidiary is the "mere puppet" of the parent corporation; and
>
> (2) the subsidiary was incorporated for a fraudulent or improper purpose or used by the parent as a shell for improper activity.

See: *Yaiguaje v Chevron Corporation*, 2018 ONCA 472, at para 66, citing *Transamerica Life Insurance Co of Canada v Canada Life Assurance Co* (1996), 28 OR (3d) 423, at pp 433-434 (ONSC); see also *Driving Force Inc v I Spy-Eagle Eyes Safety Inc*, 2022 ABCA 25, at para 53; *Condominium Corporation No 0828219 v Carrington Holdings Ltd*, 2023 ABCA 222, at para 12.

[1012] The Landlord failed to satisfy both branches of the test.

[1013] First, the evidence does not establish that the Tenant was under the complete control of CNOOC Limited.

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[1014] In its closing brief, the Landlord refers to CNOOC International as a "division" of CNOOC Limited. Although no detailed evidence was led at trial about the corporate structure above the Tenant, the evidence available does establish that CNOOC International is in fact a distinct legal entity interposed between the Tenant and CNOOC Limited.

[1015] The evidence that the Landlord relies on does not establish that the Tenant was under the complete control of CNOOC International, let alone that the Tenant was under the control of CNOOC Limited, a separate legal entity.

[1016] Collaboration between the legal counsel of both distinct entities, in a trial in which the two have some common interests, is not probative. If it implies control by one over the other, which it does not, the implication is equally strong that the subsidiary is the one controlling. There is nothing untoward about collaboration between legal counsel for parties that are aligned in interest, and this collaboration hardly provides a basis to infer that one party is under the complete control of the other.

[1017] Second, the Landlord has not proven on balance that the separate legal personalities of the Tenant and CNOOC Limited was exploited for a fraudulent or improper purpose.

[1018] I infer from the Landlord signing the Lease Indemnity Agreement that the Landlord knew that the Tenant and CNOOC Limited were separate legal entities.

Tenant's Claims Against the Beneficial Owners

[1019] The Tenant says that the Beneficial Owners are liable for the Landlord's breaches of the Lease pursuant to the Beneficial Owners Agreement, dated December 30, 2013, between the Landlord, the Tenant, and each of the Beneficial Owners. Specifically, the Tenant relies on clause 4 of that agreement:

> The Beneficial Owners acknowledge, covenant and agree with the Tenant that the agreements and covenants of the Landlord contained in the Nexen Tower Lease in favour of the Tenant shall be effective for all purposes to bind the Beneficial Owners' interest in the Project and to provide all remedies and rights arising from or relating thereto against the Beneficial Owners' interests therein.

[1020] In the alternative, the Tenant says that the Beneficial Owners are liable for the Landlord's breaches of the Lease because the Landlord is "the mere agent and bare trustee of the Beneficial Owners."

[1021] The Beneficial Owners say that, by virtue of clause 4 of the Beneficial Owners Agreement, the Beneficial Owners are only liable to the extent of their respective interests in the Building and that the Tenant has erroneously attempted to transform this limited commitment into a full recourse guarantee.

[1022] While the Landlord is the successful party overall in this judgment, the Tenant has succeeded on a select few claims. Despite it being remote that any recourse against the Beneficial Owners will be necessary, a ruling on the Tenant's indemnity claim against them is nevertheless required.

[1023] The Beneficial Owners concede that they are liable under the Beneficial Owners Agreement to the extent of their respective interests in the Building.

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[1024] I do not agree with the Tenant's suggestion that the liability of the Beneficial Owners extends beyond their respective interests in the Building. The Tenant is correct that, at common law, a principal is liable for the acts and omissions of its agent. Parties may however enter into agreements to limit liability that would otherwise exist at common law. The parties did so here by entering into the Beneficial Owners Agreement, and the Tenant has not identified any reason why the Court should override this bargain.

[1025] Accordingly, I conclude that the Beneficial Owners are only liable to the extent of their respective interests in the Building, in accordance with clause 4 of the Beneficial Owners Agreement.

9. Misrepresentation

[1026] In its Statement of Claim the Tenant pleaded that during the negotiations of the Lease the Landlord represented the Building had no hazardous substances. It alleged that at the time, however, it possessed environmental reporting that the Building likely contained asbestos but withheld this information. The Tenant alleged this was an inducement to enter into the Lease and carry out renovations, constituting a negligent misrepresentation.

[1027] At the end of the trial the Landlord said this of the allegations:

> After years of doggedly pursuing claims of negligence, negligent misrepresentation and unjust enrichment, CNOOC made no mention of such claims in its written or oral trial opening submissions, and it led little evidence that could have been intended to prove them. As its silence implied, there was and is no merit to any of these claims.

[1028] That is not entirely correct. The Tenant did lead evidence of the process around the parties' predecessors entering into the original lease, of the oral representations to Mr. McLeod (then Nexen's business lead through the extension of that lease), of the Tenant's RFP process and the Landlord's responses to formal questions about hazardous substances as a part of that RFP process, and then there is the Lease itself entered in evidence, which contains the representation as to hazardous substances.

[1029] But the Tenant has not in its closing pursued the claim except (1) as an indicium of the Landlord's breach of its duty of good faith, (2) as a reason why the onus throughout the case should be upon the Landlord – since, the Tenant argues:

> It would be anathema to public policy to suggest that the innocent tenant must prove that its landlord corrected its misrepresentation of no asbestos in a manner consistent with the landlord's obligations under both law and contract.

and (3) in listing the ways the Landlord is liable to the Tenant for which the Beneficial Owners ought to be found liable to the Tenant.

[1030] I have already addressed both the allegations of breach of good faith and liability of the Beneficial Owners. Accordingly, I confine my further treatment of the alleged misrepresentations to these few additional observations.

[1031] In the environmental reporting done prior to entering into the first lease, testing of the SAF by PHH Environmental in 2000 did not identify ACM. There was further environmental

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testing conducted prior to the Lease of 2013, none of which identified asbestos as a hazardous substance in the Building.

[1032] The Tenant has not proven that the Landlord withheld any information at the times of the lease formations: the initial lease or the amended Lease. A few years after the initial lease, in 2004, JWEL conducted an environmental assessment of the Building, in conjunction with OPTrust's due diligence in acquiring an interest in it. The resulting report was not shared with the Tenant. It was not done at the time of entering into the initial lease or amended Lease, so it could not have been an inducement by the Landlord. The JWEL report reached the same conclusion as all the other such assessments and Building surveys, with respect to asbestos, that there was none.

[1033] The Landlord was incorrect when representing in the Lease the Building did not have any hazardous substances in the Building, at sub-clause 16(o) of the Lease. Had it conducted a more thorough review of the binders it retained that listed all the materials used to construct the Building, it would not have concluded the SAF was CAFCO, but that MK-5 was also used.

[1034] The Tenant was not prepared to rely on the Landlord's representation alone. It also procured all past inspection reports. It also included at sub-clause 16(o) the consequences if the representation was incorrect. It was also able to conduct whatsoever other independent inspection of the Building it wished since it enjoyed exclusive possession of it under the initial lease.

[1035] The Landlord did not knowingly mislead the Tenant, or act negligently in representing the Building to be free of hazardous substances: *Queen v Cognos Inc*, [1993] 1 SCR 87, at p 110. At the time the representation in the Lease was made, the Landlord believed it to be true. Any claim of misrepresentation still being made fails. It follows that the consequential claim against the Beneficial Owners does also.

10. Concluding Comments

[1036] This trial was about whether one of the parties breached the Lease. Did the Landlord breach the Lease for not responding as the Lease required to the Discovery of asbestos in the Building, followed by proof the building material discovered to be ACM releases respirable asbestos fibres within the Building's air distribution system, or breach the Lease for the consequences of the Discovery the Tenant faced? Or, did the Tenant breach the Lease for terminating it without valid reason and ceasing to pay rent?

[1037] At its core, the disagreement turned on the parties' differing interpretations of Alberta's asbestos legislation and, more specifically, what it does or does not require for existing buildings that have ACM in circumstances like the Landlord's Building.

[1038] The Tenant took offence with the Landlord doing nothing because the concentration of airborne asbestos fibres was below the legislated maximum tolerable. The Tenant occupied a premiere office tower and expected better; it expected all ACM removed. Perhaps the following exchange is the most telling. It is an excerpt of the cross examination of the Tenant's CEO, Quinn Wilson:

> Q So when you were talking "abate", it didn't matter to you what the legal definition was?

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A I'm not thinking about a legal -- from my perspective, I want it cleaned completely above the ceiling tiles, and that means all the insulation, all the spray-foam insulation.

Q One fibre is too many?

A One fibre is too many.

Q I -- I asked you earlier -- I just wanted to flip back to it -- about -- I suggested to you that it hadn't really been your intention to reopen those four floors, and I want to show you something. This is in tab 10 of the white binder. It's the July 22 email from you.

Do you see that?

A Okay.

Q And if you go into the fifth paragraph, you say: (as read)

> Additional abatement work will take place at these four floors with enhanced or air -- with enhanced air-quality testing scheduled for next week. Regardless of these results, I do not anticipate reopening these floors. Any asbestos readings, regardless of OH&S limit, are too much.

A Correct.

Q And we saw Mr. Jusseaume's email the next day talking about a single fibre; right?

A Asking -- yeah, asking about that. From my -- from -- as it was explained to me, and I can't remember whether it was with Eco Abate or whether it was with Lou, a single fibre being captured means that the room could have a hundred thousand or more fibres, and so when we use that terminology "single fibre", it means that's what's being picked up. It doesn't mean that's all that there is in the room because, by definition, it could mean that the room has so many more. So ...

Q But that's why you do air monitoring; right?

A For sure.

Q And some of your colourful phrases will live after you, sir. You've told my friend that air testing was like catching fish. You recall that?

A Yeah.

Q And here's what you said: (as read)

> You can do an air-quality test on a particular day. You could get a higher reading, and two weeks later, you can do a test, and you might get no reading at all.

Do you remember that?

A Correct.

Q But this isn't a two-week spread; right? Nexen is doing daily testing?

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A Yes.

Q More than 600 so far?

A That’s why we were told, as long as we were doing the air testing in the immediate term, our employees should be safe. If we didn't hold that belief, we would have had to do the fire alarm exit.

Q Did I understand you to tell my friend yesterday that you weren’t comfortable even with daily testing? You said you wouldn’t be comfortable even with testing every four hours? Do you recall that?

A You’re doing it -- no. I'm talking about the reporting. I would have liked the reporting to be much less than 48 hours.

Q All right.

A Yeah, ’cause the testing is ongoing all the time.

Q Let's switch from the air testing to another subject you’ve touched on, the occupational exposure limit, the OEL.

A Yeah.

Q So if you could turn back to tab 131. This is the WSP report. And yesterday my friend took you to Roman numeral page II. This is the -- the main page with the findings and recommendations. Do you see that? Just before the table of contents.

A Yes. Yeah.

Q So in the first bullet at the top, my friend read you the first sentence. I would like to read you the rest. (as read)

> Based on the laboratory results, background air samples collected within areas with damaged spray insulation did not indicate elevated fibre concentrations above 10 percent of the OEL or any detectable concentration of asbestos. As such, it is expected that if the damaged spray insulation is left in its current state, it is not expected to give rise to elevated fibre concentrations above 10 percent of the OEL.

Fair to say you read that, but it did not sway you?

A No, it didn’t. I’ve got a – I’ve got an expert that’s told me what I’ve already repeated a number of times. So there are differences between WSP and Eco Abate, but, like I shared last week, I don’t have the liberty of going with the easiest option.

Q I don’t want to -- why don’t I just read to you what you’ve said so far, and unless I’ve got it wrong --

A Sure.

Q -- you can just confirm I’ve got it right. You said to my friend you weren’t: (as read)

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> ... prepared to look at my staff and say it’s okay ’cause it’s under the OEL limit, so it’s okay for you to breathe in that much asbestos.

You remember that?

A Correct.

Q And yesterday you said this: (as read)

> If we get a positive air-quality test, I’m not concerned about whether it’s above the OEL level or not. I just know that if I get a positive test, I’ve got fibres in play ...

A Correct.

Q And this: (as read)

> I am putting my staff at some level of exposure to asbestos by having them in those work spaces, and I'm not prepared to do that.

Right?

A That was my understanding, yeah.

Q I was listening. (as read)

> I’m not going to be in a situation where I have to say, You know what? It wasn’t a lot of asbestos, so I thought it was okay. I don't want to be in that spot. If I got a positive test, I'm done. I don't want my people in there.

You remember that?

A Correct.

Q So, from your perspective, the OEL standard was kind of irrelevant; right?

A Yes.

Q And one-tenth of the OEL standard was irrelevant?

A I’m not looking to get up to the maximum -- just below the maximum of the OEL limit.

Q Okay.

A So whether that's 99, 50, 10, or 5 --

Q Or 1/300th?

A If I’m getting positive asbestos readings from my staff, no, I don’t feel comfortable with it because I’m told it’s going to continue to degrade. I’m told it’s going -- there's going to be a point where it will not be safe in the immediate term, and it’s going to be unsafe for your staff, and because it exists, it should be removed. Then we can debate which kind of abatement to do, but, from our perspective, I don’t want any of it.

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[1039] The evidence from members of the Tenant's Board of Directors was similar. It wanted to not risk its employees' health. It wanted to do the right thing. Wilson heard the same message also from Fang.

[1040] And so the Tenant was not prepared to take *any* chances with the health and safety of its employees. It wanted to minimize *all* risk of exposure.

[1041] While that may have been a laudable position for it to take, it was not a position open to it under the Lease. It was at liberty to proceed that way, but not at the Landlord's expense. The Lease did not entitle it to foist the cost of its new safety ideals, its new Safety First policy, onto the Landlord. That was not the deal it struck when renting the Building.

[1042] If the Tenant's Ultimatum position was not for such laudable selfless reasons, then the Tenant really was (as the Landlord says) fixated on levering the initial Discovery into a favourable Lease amendment or, better yet, complete termination. Once it heard of some ACM, and conceived of a possible way out of its contract, it forged ahead, undaunted by or just not trusting all contrary messaging, in pursuit of that ulterior purpose. It planned to vacate the Building and then negotiate with the Landlord. It did so. When negotiations ran aground, it terminated the Lease – even though virtually no asbestos fibres were ever found.

[1043] In this view of the events, the Tenant's conduct was analogous to the conduct of the tenant in *Keith Pierce Insurance*. In that case, at para 27, the Court said:

> [the tenant] became fixated on the issue and permitted his perception of it to grow out of proportion to the reality of the problem. His resulting frustration and anger caused him to take a confrontational problem-oriented approach rather than a conciliatory solution-oriented one. It also prevented him from dealing rationally with the offending tenants and the mall management. Had he done so, an amicable solution could likely have been worked out and this lawsuit would have been avoided.

[Cited with approval by this Court in *HPWC*, at para 77.]

[1044] As I explain above in the discussion of possible breaches of good faith performance of the Lease by either side, the evidence is consistent with both of these theories of the Tenant's motivations. Neither has been proven on balance by the totality of the evidence. The Court would be speculating in preferring one theory over the other. While that is fatal to the Landlord's claim that the Tenant acted throughout in bad faith, the Landlord having failed to prove its theory on balance, it is of no consequence on all the other claims of breaches of the Lease.

[1045] The Tenant has failed to prove the Leased premises were unfit for its occupancy.

[1046] The Tenant has failed to prove the Landlord did not comply with the applicable health and safety laws.

[1047] The Tenant has failed to prove the Landlord did not remove all the hazardous asbestos to the extent required by law.

[1048] The Tenant has failed to prove the Landlord denied it quiet enjoyment.

[1049] The Tenant has failed to prove the Landlord failed to operate or maintain the Building like a first class building.

[1050] The Tenant has failed to prove the Landlord denied the Tenant access to the Building.

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[1051] The Tenant has failed to prove the Landlord denied it air conditioning and other Building services.

[1052] The Tenant has failed to prove the Landlord forced it to relocate.

[1053] The Tenant has proven that the Landlord imposed the AMP without consulting the Tenant and without the Tenant's prior agreement.

[1054] The Tenant has proven the Landlord breached its duty of honest performance of the Lease when it misrepresented to the Tenant that Alberta OH&S officially approved its approach, and implied that it did so based on all available information.

[1055] The Tenant has also proven the Landlord evaded its obligation under Clause 17 of the Lease to procure its Architect's Opinion. But other than that, the Tenant failed to prove the Landlord breached its duty of good faith performance of the Lease overall.

[1056] The Landlord has proven the Tenant breached its duty of cooperation with the Landlord in respect of achieving the objects of the Lease for the 4 month period between the Discovery and the Ultimatum, during which period it also misled the Landlord by its false representations. But other than that, the Landlord failed to prove the Tenant breached its duty of good faith performance of the Lease overall.

[1057] As a result of these conclusions, it follows that the Landlord has proven the Tenant unlawfully terminated the Lease and unlawfully ceased paying the Landlord as required under the Lease. It follows further that the Tenant has failed to prove the Landlord was unjustly enriched by the amount of the Tenant's rent payments prior to Termination.

[1058] The Landlord has more to do to comply with the requirements of provincial regulation, if it has not by now done so. At the close of the record it was not fully compliant now that it knows it has ACM to be actively managed in the Building. I refer here to such things as completing the clean up of SAF debris in the Plenum and implementing an AMP that has actual relevance to the Building and that aligns with the requirements and objectives of the applicable legislation. If I am incorrect in my interpretation of section 31 of the *OHS Code*¸ an appropriately revised and implemented AMP will more than suffice as the necessary corrective step to the deemed unsafe condition.

[1059] At the outset of this judgment I indicated the case gave this Court its first opportunity to consider the effect of provincial legislation addressing asbestos in existing buildings. That discussion is found under section 5.a. above. However, a further comment is warranted in respect of the Manual. In this judgment I have identified places in it where it might be interpreted in a manner inconsistent with the legislation. I have not attempted an exhaustive list of those inconsistencies or ambiguities. More importantly, my comments on the Manual should not be construed as suggesting that its abatement procedures and guidance are not sound. I have no opinion on such matters, nor should I without first having the benefit of OH&S's perspective on it.

[1060] I also indicated the case gave opportunity to the Court to consider how the implied duty to perform a contract in good faith may be affected when the parties to that contract are also anticipating litigation, endeavouring to protect their legal interests and position for a likely lawsuit to come. Those ways it operates in such a circumstance are found at paras 885 - 894 above.

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[1061] Finally, I indicated the case gave opportunity to the Court to determine whether a contracting party who genuinely believes it has discovered an opportunity to lawfully exit the contract, an opportunity that it did not orchestrate and so at law is permitted to "pounce" on that opportunity, may breach its duty of good faith in the process of pouncing. I determined that in the process of pouncing a contracting party remains bound by the duty to perform the contract in good faith but that in this case it was not proven by the Landlord that the Tenant breached that duty in the manner it pounced.

[1062] If the parties are unable to agree on costs to this point in their litigation, then that may be addressed at the end of the second phase, unless the Court is persuaded to do so sooner upon formal application.

Dated at the City of Calgary, Alberta, this 14th day of March 2025.

P.R. Jeffrey
J.C.K.B.A.

Appearances:

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for CNOOC Limited

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APPENDIX “A”

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APPENDIX A:
THE LEASE

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AMENDED AND RESTATED LEASE

BETWEEN

801 SEVENTH INC.

as the Landlord

AND

NEXEN ENERGY ULC

as the Tenant

801 - 7th Avenue S.W., Calgary, Alberta

Dated: December 30, 2013.

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AMENDED AND RESTATED LEASE

This Amended and Restated Lease made effective the 30th day of December, 2013.

BETWEEN:

801 SEVENTH INC., a body corporate having an office in the City of Calgary, in the Province of Alberta (the "**Landlord**")

- and -

NEXEN ENERGY ULC., a body corporate having an office in the City of Calgary, in the Province of Alberta (the "**Tenant**")

BACKGROUND

A. Pursuant to a lease dated February 4, 2000, among Transcanada Pipelines Limited, Canadian Occidental Petroleum Ltd. and Nova Gas Transmissions Ltd. (the "**Original Lease**"), Transcanada Pipelines Limited leased to Canadian Occidental Petroleum Ltd. certain premises in the building municipally known as 801 – 7th Avenue SW, Calgary, Alberta, (the "**Office Tower**") subject to the provisions contained in the Original Lease;

B. Pursuant to a lease amending agreement made July 17, 2000, among Transcanada Pipelines Limited, Canadian Occidental Petroleum Ltd. and Nova Gas Transmissions Ltd., (the "**1st Amending Agreement**"), the parties thereto amended the lease to include the 4th and 5th floors of the Office Tower, subject to the provisions contained in such lease amending agreement;

C. By an assignment made on July 19, 2000, between Transcanada Pipelines Limited, Nova Gas Transmissions Ltd. and 697604 Alberta Ltd., Transcanada Pipelines Limited and Nova Gas Transmissions Ltd. transferred and assigned to 697604 Alberta Ltd. all of their right, title, interest and estate in and to the Original Lease and the 1st Amending Agreement, and 697604 Alberta Ltd. agreed to accept such assignment;

D. Canadian Occidental Petroleum Ltd. changed its name to Nexen Inc. effective November 2, 2000;

E. Pursuant to an offer to lease additional premises dated December 14, 2000, between Nexen Inc. and 697604 Alberta Ltd., (the "**16th Floor Offer**"), Nexen Inc. agreed to lease all of the 16th floor of the Office Tower;

F. Pursuant to an offer to lease additional premises dated March 1, 2001, between Nexen Inc. and 697604 Alberta Ltd., (the "**11th – 15th Floor Offer**"), Nexen Inc. agreed to lease all of the 11th to the 15th floors of the Office Tower;

G. Pursuant to an offer to lease annex premises dated April 11, 2005, between Nexen Inc. and 697604 Alberta Ltd., (the "**Annex Offer**"), Nexen Inc. agreed to lease all the

Rentable Area on the 3rd floor of the Conference Centre, consisting of approximately 7,156 square feet of Rentable Area;

H. 697604 Alberta Ltd. changed its name to 801 Seventh Inc. on March 18, 2005;

I. Pursuant to an agreement dated July 18, 2005 between Nexen Inc. and 801 Seventh Inc., (the "**6th – 10th Floor Agreement**"), 801 Seventh Inc. agreed to sub-sublease and thereafter to lease directly to Nexen Inc. the 6th to the 10th floors of the Office Tower;

J. Pursuant to an agreement dated August 8th, 2012 between Nexen Inc. and 801 Seventh Inc., (the "**10th Floor Consent Agreement**"), 801 Seventh Inc. consented to Nexen Inc.'s development of the 10th floor of the Office Tower under certain terms and conditions;

K. The Original Lease, the 1st Amending Agreement, the 16th Floor Offer, the 11th – 15th Floor Offer, the Annex Offer, the 6th – 10th Floor Agreement and the 10th Floor Consent Agreement shall hereinafter be referred to as the "**Existing Lease**";

L. Nexen Energy ULC is the successor by amalgamation of Nexen Inc.; and

M. The Landlord and the Tenant have agreed to amend, supersede and restate the Existing Lease by the Tenant from the Landlord of the Leased Premises and related facilities in the Project as hereinafter more particularly described.

NOW THEREFORE, in consideration of the mutual covenants and agreements of the Landlord and the Tenant pursuant to this Lease, this Lease witnesses that the Landlord and the Tenant covenant and agree as follows:

1. DEFINITIONS AND INTERPRETATION

In this Lease (including all schedules hereto) or any amendment hereto or supplement hereof, capitalized terms used shall have the meaning ascribed to them in Schedule "A", except if defined elsewhere in this Lease, in which event they shall have the meaning attributed to them in this Lease.

2. DEMISE

(a) Lease and Leased Premises

In consideration of the rents, covenants, agreements and conditions hereinafter reserved and contained on the part of the Tenant to be paid, observed, kept and performed, the Landlord demises and leases to the Tenant and the Tenant leases from the Landlord during the Term, the Leased Premises on the terms and conditions contained in this Lease. The Existing Lease is amended, superseded and restated as provided herein. For greater certainty this Lease amends and supersedes the Existing Lease and restates and consolidates in one document, dated as of the date of this Lease, the terms and provisions of the Existing Lease as amended by this Lease, which constitutes the only lease between the Landlord and the Tenant in respect of the Project.

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(b) **Conference Facilities**

The Tenant shall have the exclusive right and license (having regard to the size of their tenancy) to utilize the Conference Facilities for the purpose of holding meetings, receptions, fund raising events and other tenant functions, which use will be free of rent (but shall be subject to a reasonable charge in respect of cleaning, janitorial and security costs relating to such right, license and use, which charge shall be for the sole account of the Tenant) and without prior booking of such space and subject to such reasonable rules and regulations as the Landlord may establish from time to time. The Tenant shall act reasonably in approving requests from the Landlord to make occasional bookings for third parties (including outside interest groups, and charitable and non-profit organizations) and shall honour such bookings once approved.

5. **TERM**

(a) **Initial Term**

The initial term under the Existing Lease is for a term commencing on the Commencement Date and ending on the 31st day of December, 2016 (the "**Initial Expiry Date**").

(b) **Extended Term**

The term under the Lease is extended beyond the Initial Expiry Date and shall end on the 31st day of December, 2031 (the "**Expiry Date**"). In the event that the term of the Century Gardens Tower Lease expires after the Expiry Date, the Landlord and the Tenant agree that the term of this Lease shall be extended by the period of time required to make the Expiry Date co-terminus with the expiry of the Century Gardens Tower Lease. The Annual Rent applicable to such extension, if required, shall be equal to the Annual Rent payable during the last year of the term as outlined in subclause 4(a)(iv).

(c) **Options to Renew**

Provided:

(i) The Tenant is not then in default of a material provision of this Lease for which the Tenant has received written notice and has failed to remedy or to commence and proceed diligently to remedy; and

(ii) The Tenant is Nexen Energy ULC, or its Successor or its Affiliate assignees, and the Tenant occupies a minimum of twelve (12) floors of the Office Premises,

then the Tenant shall have the option to renew the Term of this Lease for an additional five (5) year period (the "**First Renewal Term**") and, if the Tenant has exercised the option to renew for the First Renewal Term, then the Tenant shall have the option to renew the term of the Lease for a second five (5) year period (the "**Second Renewal Term**"), on the same covenants and conditions as are herein contained, with the exception of, firstly, the amount of Annual Rent to be paid by the Tenant to the Landlord

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during any Renewal Term and, secondly, any Tenant Allowances, Landlord's Work, refurbishment or upgrade of the Leased Premises or the common areas of the Project, Annual Rent abatement, Refurbishment Abatement, inducement payments (including as set out in Section 47 of this Lease, to the extent such section does not apply to the applicable renewal term), rebates or commissions, whether set forth in this Lease or otherwise, and in the case of the Second Renewal Term, also excepting the option to renew. The options to renew herein granted shall be exercised by the Tenant giving to the Landlord written notice (herein called the "**Renewal Notice**") not earlier than twenty-four (24) months and no later than fifteen (15) months prior to the end of the Term or the end of the First Renewal Term, as the case may be.

The Annual Rent for the Leased Premises for any Renewal Term shall be the market rental rate for renewing multiple full floor tenancies of 100,000 square feet or more in comparable space in comparable downtown Calgary office buildings, having regard to the location and size of the Project and the condition of the Leasehold Improvements and the demountable or moveable wall partitions as described and included within the definition of Trade Fixtures, at such time, for a five (5) year term. The Annual Rent shall be mutually agreed upon by the Landlord and the Tenant at least 90 days prior to the expiration of the Term, failing which the Landlord and the Tenant shall submit the determination of the Annual Rent for the Renewal Term to arbitration, having regard to the provisions of this paragraph, in accordance with the *Arbitration Act of Alberta*, as amended or replaced from time to time.

4. ANNUAL RENT

Yielding and paying annually therefor unto the Landlord at the Landlord's office in the City of Calgary or to such other person or persons at such other place or places as the Landlord may from time to time in writing designate, Annual Rent as follows:

(a) **Annual Rent for Office Premises**

During the balance of the Term, the Annual Rent payable for the Office Premises and the Annex Premises shall be payable in twelve equal monthly instalments and shall be calculated as follows:

(i) For the current period to December 31, 2016, inclusive:

(A) $19.00 per square foot per annum of Rentable Area of Floors 4 and 5;

(B) $24.00 per square foot per annum of Rentable Area of Floors 6 to 10;

(C) $20.00 per square foot per annum of Rentable Area of Floors 11 to 15;

(D) $19.00 per square foot per annum of Rentable Area of 16 to 36; and

(E) $12.50 per square foot per annum of Rentable Area of Annex Premises.

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(ii) From and after January 1, 2017, to December 31, 2021, inclusive, $33.00 per square foot per annum of Rentable Area of the Office Premises and the Annex Premises;

(iii) From and after January 1, 2022, to December 31, 2026, inclusive, $34.75 per square foot per annum of Rentable Area of the Office Premises and the Annex Premises; and

(iv) From and after January 1, 2027, to December 31, 2031, inclusive, $36.75 per square foot per annum of Rentable Area of the Office Premises and the Annex Premises.

(b) Annual Rent for the Storage Premises

During the Term, the gross Annual Rent payable for the Storage Premises shall be payable in twelve equal monthly instalments and shall be calculated as follows:

(i) For the current period to December 31, 2016, inclusive $15.00 per square foot per annum on 6,695 square feet of Rentable Area of the Storage Premises, except that for the Storage Premises located in the former fitness centre in the Conference Centre it shall be $10.00 per square foot per annum on 9,305 square feet of Rentable Area of such Storage Premises; and

(ii) From and after January 1, 2017, to December 31, 2031, inclusive, and during the First Renewal Term and the Second Renewal Term, if applicable, $18.00 per square foot per annum of Rentable Area of the Storage Premises.

For clarity, it is acknowledged that as the Annual Rent for the Storage Premises is a gross rent, no Additional Rent is payable with respect to the Tenant's Proportionate Share of Operating Expenses and Property Taxes as it relates only to the Storage Premises.

(c) Payment of Instalments of Annual Rent

The monthly instalments of Annual Rent provided for in this clause 4 shall be payable on the first day of each and every month during the Term commencing on the Commencement Date. Annual Rent shall be calculated on Rentable Area for all Leased Premises.

5. MEASUREMENT OF THE LEASED PREMISES AND THE PROJECT

(a) Rentable Area

The Rentable Area of the Project or any area in the Project shall be determined by the Landlord's Architect utilizing the following methodology:

(i) in the case of a single tenancy floor, all floor area measured from the inside surface of the outer glass or exterior wall (wherever such wall has no glass) of the Office Tower, to the inside surface of the opposite outer glass or exterior wall,

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excluding only the major vertical penetrations including stairs, elevator shafts, flues, pipe shafts, vertical ducts, vents, stacks and the like, and their enclosing walls but including any vertical penetrations built for the private use of a tenant, structural columns and openings for vertical electrical cable, telephone distribution and plumbing, plus an amount as allocated and determined by the Landlord's Architect, being the floor area of that portion of the Common Facilities accessible by and for the general benefit of all tenants in the Project in, first, the Conference Facilities on the Plus 15 level and, second, the Common Facilities located on the ground floor and Plus 15 level of the Office Tower;

(ii) in the case of partial or multiple tenancy floor, all floor area within the inside surface of the outer glass or exterior wall (wherever such wall has no glass) enclosing the portion of the premises on such floor and measured to the mid-point of the walls separating areas leased by or held for lease to other tenants or from areas devoted to corridors, elevator foyers, rest rooms, mechanical rooms, janitor closets, vending areas and other similar facilities for the use of all tenants on a particular floor (the "**Floor Common Areas**"), plus a proportionate area of the Floor Common Areas located on such floor based upon the ratio which the Rentable Area of such premises (determined by excluding such Floor Common Areas) bears to the total Rentable Area of such floor (determined by excluding such Floor Common Areas), plus an amount as allocated and determined by the Landlord's Architect, being the floor area of that portion of the Common Facilities accessible by and for the general benefit of all tenants in the Office Tower in, first, the Conference Facilities on the Plus 15 level and, second, the Common Facilities located on the ground floor and Plus 15 level of the Office Tower.

No deductions from Rentable Area shall be made for columns or projections in the Project.

If there is any change in Rentable Area (whether due to Landlord's Work, improvements to the Project, or otherwise), or disagreement between the Landlord and the Tenant respecting the Rentable Area of the Project or any area in the Project, the Project or such area of the Project shall be measured by the Landlord's Architect, and a certificate of the Landlord's Architect as to the Rentable Area of the Project or any such area of the Project, as the case may be, shall be conclusive for the purposes of this Lease.

(b) **Storage Premises**

The Rentable Area of the Storage Premises has been calculated in accordance with the methodology described in subclause 5(a). For all purposes of this Lease, the Landlord and the Tenant hereby acknowledge and agree that the Rentable Area of Storage Premises shall be 16,000 square feet until the Initial Expiry Date and thereafter shall be 17,303 square feet in the Conference Centre and 408 square feet in the Parking Facility.

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(c) **Office Premises**

The Rentable Area of the Office Premises has been calculated in accordance with the methodology described in subclause 5(a). For all purposes of this Lease, the Landlord and the Tenant hereby acknowledge and agree that the Rentable Area of the Office Premises on a floor-by-floor basis shall be as described in the respective definition for each area as set out in Schedule "F" hereto. The Rentable Area of the Office Premises is 597,055 square feet of Rentable Area.

(d) **Project**

The Rentable Area of the Project has been calculated in accordance with the methodology described in subclause 5(a). For all purposes of this Lease, the Landlord and the Tenant hereby acknowledge and agree that the Rentable Area of the Project excluding the Storage Premises shall be 615,659 square feet.

(e) **Annex Premises**

The Rentable Area of the Annex Premises has been calculated in accordance with the methodology described in subclause 5(a). For all purposes of this Lease, the Landlord and the Tenant hereby acknowledge and agree that the Rentable Area of the Annex Premises shall be 7,156 square feet.

6. **PROPERTY TAXES AND OPERATING EXPENSES**

(a) **Payment of Annual Property Taxes and Operating Expenses**

The Tenant shall pay to the Landlord as Additional Rent the Tenant's Proportionate Share of the annual Property Taxes and Operating Expenses as such annual Property Taxes and Operating Expenses may be levied and incurred from time to time during the Term of this Lease. The Tenant's Proportionate Share of any such Property Taxes and Operating Expenses shall be paid by the Tenant to the Landlord in the manner provided in subclause 6(b), provided:

(i) notwithstanding anything contained in this Lease, in order to calculate the Tenant's Proportionate Share of the Operating Expenses of the Project at such times during any Operating Year that less than one hundred percent of the Project is occupied by tenants, those items of Operating Expenses which vary with the use and occupancy of the Project, which shall include, without limitation, items such as the janitorial costs and garbage removal, shall be grossed up and expressed, as they would have been if, in the Landlord's estimation, acting reasonably, the Project was one hundred percent occupied during the entire Operating Year; and

(ii) notwithstanding the definitions of Taxation Year and Operating Year, if and whenever a Taxation Year or an Operating Year shall be less than twelve (12) consecutive months having regard to the date for commencement or termination of the Term of this Lease, or to the adoption by the Landlord of an Operating

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Year or by the Taxing Authority of a Taxation Year other than as specified as aforesaid, then for the purposes of this Lease, such lesser period of time shall be deemed to be the Taxation Year and Operating Year applicable to such period and any and all appropriate adjustments shall be made with respect to such deemed Taxation Year and Operating Year.

(b) **Payment of Monthly Estimate of Annual Property Taxes and Operating Expenses**

In addition to the Annual Rent hereby reserved the Tenant agrees to pay to the Landlord a monthly amount as Additional Rent payable on the first day of each month during the relevant Term consisting of:

(i) one-twelfth of the Tenant's Proportionate Share of Property Taxes for each Taxation Year, or portion thereof, occurring within the Term of this Lease as such terms are defined herein and as such Property Taxes as are estimated by the Landlord, acting reasonably, yearly in advance and determined in accordance with subclause 6(a); and

(ii) one-twelfth of the Tenant's Proportionate Share of Operating Expenses for each Operating Year or portion thereof, occurring within the Term of this Lease as such terms are defined herein and as such Operating Expenses are estimated by the Landlord yearly in advance, acting reasonably, and determined in accordance with subclause 6(a).

(c) **Intent Regarding Recovery of Operating Expenses**

The parties acknowledge that it is their intent that with respect to the recovery by the Landlord of the Tenant's Proportionate Share of Operating Expenses that this Lease shall be fully net to the Landlord except for those items which are excluded from Operating Expenses under clause 3 of Schedule "E" and those amounts which reduce Operating Expenses under clause 2 of Schedule "E".

7. OPERATING EXPENSES AND PROPERTY TAXES ESTIMATES

Not less than one (1) month prior to the beginning of each Operating Year during the Term, the Landlord shall deliver to the Tenant an itemized statement (a "**Budget**") of the estimated Operating Expenses and Property Taxes to be incurred during the subsequent Operating Year. The Budget shall be prepared in accordance with Generally Accepted Accounting Principles and shall include or be accompanied by supporting information on an account by account basis in no less detail than the form and description of accounts set forth in the form annexed hereto as Schedule "G", taking into consideration the itemized matters set out in the definition of Operating Expenses and a comparison of the year to date Operating Expenses and Property Taxes in the current Operating Year (other than with respect to the first Operating Year), together with a comparison of the Operating Expenses and Property Taxes of the current Operating Year to the Budget for the current Operating Year.

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8. OPERATING EXPENSES STATEMENTS

Within one hundred twenty (120) days after the end of each Operating Year, commencing at the end of the first Operating Year, the Landlord shall deliver to the Tenant an audited statement (a "**Statement**") prepared by an independent chartered accountant on an account by account basis, prepared in accordance with Generally Accepted Accounting Principles, in no less detail and otherwise substantially in the form and description of accounts set forth in the form annexed hereto as Schedule "G" and which Statement shall also contain the following summary and calculations:

(a) the amount of each of the costs and expenses described in clause 1 of Schedule "E" annexed hereto incurred during the Operating Year (less the amount of any such costs and expenses covered by clause 2 of Schedule "E" annexed hereto), the total of all such costs and expenses and the Tenant's Proportionate Share of such total;

(b) the amount of Operating Expenses for the relevant Operating Year,

(c) the total amount, if any, paid by the Tenant for the Operating Year under subclause 6(b); and

(d) the amount, if any, payable by the Tenant to the Landlord or by the Landlord to the Tenant, as the case may be, under clause 10 for that Operating Year.

9. PROPERTY TAX STATEMENTS

Within ten (10) days of receipt by the Landlord of any assessment notice or tax notice for Property Taxes for each and every Taxation Year, the Landlord shall deliver to the Tenant a true copy of each such notice together with a statement of the Tenant's Proportionate Share of Property Taxes.

10. ADJUSTMENT FOR OPERATING EXPENSES AND PROPERTY TAXES

Within one hundred and twenty (120) days after the end of each Taxation Year and Operating Year occurring during the Term, the aggregate of such monthly charges paid by the Tenant during the relevant Taxation Year and Operating Year shall be adjusted appropriately by the Landlord on the basis of the actual amount payable by the Tenant for such Taxation Year and Operating Year pursuant to this Lease and as set forth in the statement to be furnished by the Landlord to the Tenant following the expiration of each Taxation Year and Operating Year. Any resulting excess or deficiency being payable respectively by the Landlord to the Tenant or by the Tenant to the Landlord shall be paid within thirty (30) days after the furnishing of each such statement.

11. MAINTENANCE OF ACCOUNTS AND RECORDS

(a) The Landlord shall keep or cause to be kept and maintained separate accounting records for the Project and the Project Lands and for all Operating Expenses and Property Taxes, such records to consist of a reasonably detailed breakdown of all items thereof (in no less detail than the Budget and the statements required to be provided pursuant to clauses 8

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and 9) and shall include such supporting or ancillary records, invoices, vouchers, cost allocations and additional information as may be necessary to enable an audit, calculation or allocation of Operating Expenses and Property Taxes. The Landlord's records shall be available for inspection and audit by the Tenant at the offices of the Landlord in Calgary, Alberta on reasonable prior notice and during Normal Business Hours, subject to the provisions of clause 13. The Landlord shall allow the Tenant and its authorized professional representatives, at their expense, to make copies and take extracts of records provided for herein. The Tenant shall carry out or cause to be carried out any audit of Operating Expenses and Property Taxes at its expense in such a manner so as not to interrupt the normal business of the Landlord. The records provided for in this clause 11 shall be available for inspection and audit by the Tenant for a period of eighteen (18) months following the delivery, pursuant to clause 8 or 9, of the statements to be provided thereunder in respect of the Operating Year or the Taxation Year to which they relate and the Landlord acknowledges and agrees that notwithstanding the delivery to the Tenant of any such statement, the Tenant may at its own expense cause an audit to be undertaken pursuant to this clause 11.

(b) The Tenant agrees that in undertaking or causing any audit to be undertaken, the Tenant and its employees, servants, agents and consultants retained for the purpose of conducting such audit (collectively, the "**Audit Personnel**") shall maintain all information disclosed during such audit strictly confidential and shall not disclose any such information to any third party without the Landlord's prior written consent, which consent may be arbitrarily withheld by the Landlord; and the Tenant shall indemnify and hold harmless the Landlord in respect of all claims, demands, awards and proceedings brought against the Landlord and from all losses, damages and expenses suffered or incurred by the Landlord as a result of any breach by the Tenant or the Audit Personnel of the provisions hereof.

12. DISAGREEMENT ON OPERATING EXPENSES OR PROPERTY TAXES

If the Landlord and the Tenant disagree on the inclusion of any items as Operating Expenses or Property Taxes, the accuracy of Operating Expenses or Property Taxes or the allocation of Operating Expenses or Property Taxes set forth in the statements provided pursuant to clauses 8 or 9, the Tenant shall nevertheless make payment in accordance with any notice given by the Landlord, but the disagreement shall immediately be referred by the Landlord for prompt decision by an independent public accountant, architect, insurance broker or other professional consultant mutually acceptable to the Landlord and the Tenant, who shall be deemed to be acting as an expert and not as an arbitrator, and a determination signed by the selected expert shall be final and binding on both the Landlord and the Tenant. If the Landlord and the Tenant cannot agree on the type of expert or the expert best qualified to determine the matter or matters which is or are the subject matter of disagreement, either the Landlord or the Tenant, on not less than five (5) Business Days notice to the other, shall have the right to apply to a Justice of the Court of Queen's Bench of Alberta for the selection of the type of expert or the expert best qualified, as the case may be. Any adjustment required to any previous payment made by the Tenant or the Landlord by reason of any such decision shall be made within thirty (30) days thereof and the party required to make payment under such adjustment shall bear all costs of the expert making such decision (including any costs incurred in the appointment of the expert). If any such adjustment is in favour of the Tenant, and the amount of such adjustment is in excess of five

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(5%) percent of the total of the Operating Expenses or the Property Tax during the relevant Taxation Year or Operating Year, as the case may be, the Landlord shall pay all of the Tenant's reasonable third party costs in respect of the Tenant's third party Audit Personnel.

13. LIMITATION ON ADJUSTMENT

Neither the Landlord nor the Tenant shall have the right to dispute or claim a readjustment in respect of Operating Expenses or Property Taxes for an Operating Year or Taxation Year except by notice delivered to the other within eighteen (18) months after the date of delivery of a statement in respect thereof pursuant to clauses 8 and 9, respectively.

14. CONDITION OF LEASED PREMISES

Except as may be otherwise expressly provided in this Lease, the Tenant hereby accepts the Leased Premises in an "as is" condition.

15. TENANT'S COVENANTS

The Tenant, for itself and its assigns, for the Term hereby created and every renewal of this Lease, if any, hereby covenants with the Landlord as follows:

(a) **Pay Annual Rent and Additional Rent**

The Tenant agrees to pay in lawful money of Canada to the Landlord the Annual Rent herein reserved and the Additional Rent herein provided at the times herein provided without notice, demand, set off, deduction or abatement whatsoever, at the office of the Landlord at the address specified or designated herein or at such other address in Canada as the Landlord may from time to time direct the Tenant by notice in writing.

(b) **Rent**

All Annual Rent and Additional Rent shall be deemed to accrue from day to day and if for any reason it shall become necessary to calculate rent for irregular periods of less than one year or less than one month, rent shall be calculated on a per diem basis so as to reflect such daily accrual. Any Annual Rent and Additional Rent not paid to the Landlord when due may be recovered by the Landlord as rent in arrears by any and all remedies available to the Landlord for the recovery of rent in arrears. All Annual Rent, Additional Rent and all other amounts which are payable or reimbursable by the Tenant to the Landlord under this Lease shall be deemed to be rent.

(c) **Pay Utility Costs**

The Tenant shall pay for all electricity consumed or used in the Leased Premises for the normal usage of the Tenant. The Tenant shall also pay for telephone, gas, water, and other utility services consumed or used in the Leased Premises by the Tenant including, without limitation, electricity and all other utilities used by the Tenant for any special air conditioning system servicing its own computers or telephone equipment room or any other machinery or equipment whether situate within or without the Leased Premises. At

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the request of the Landlord, the Tenant shall install and maintain, at the sole cost and expense of the Landlord, metering devices for checking the use of any such utility or service to the Leased Premises. The Tenant, at its sole cost and expense, shall have the right to install and maintain metering devices for checking the use of any such utility or service in the Leased Premises. If the Tenant proposes to install metering devices to check the use of such utility or service and any such utility or service either is not or cannot reasonably be sub-metered separately from the same utility service provided to parts of the Project other than the Leased Premises, the Tenant shall pay for such utility service as determined by the Landlord's engineer, acting reasonably, provided any such determination may be disputed by the Tenant pursuant to the provisions of this Lease.

(d) **Pay Business Taxes and Licence Fees**

The Tenant shall pay, as and when due, all business taxes and any other taxes or licence fees imposed on the Tenant in respect of the occupation of and the operations conducted in, on or from the Leased Premises by the Tenant. The Tenant shall pay all taxes, rates and assessments levied, charged or assessed by any school, municipal, regional, provincial, federal or parliamentary body or authority against or in respect of personal property, other than that owned by the Landlord, situate in or on the Leased Premises or any part thereof, whether or not such personal property is owned by the Tenant and whether such taxes, rates and assessments are levied, charged or assessed to the Landlord or to the Tenant, such personal property to include, without limitation, fixtures, machinery and equipment made and installed by the Tenant upon or in the Leased Premises.

(e) **Pay Taxes**

The Tenant shall pay, in addition to the other amounts payable hereunder, any multi-stage sales, sales, business transfer, use, consumption, value-added or other similar taxes imposed by any Taxing Authority upon the Taxpayer or the Tenant on or in respect of this Lease, the payments made by the Tenant in respect of this Lease or the goods and services provided by the Landlord hereunder including, without limitation, the rental of the Leased Premises and administrative services provided by the Landlord to the Tenant. Any tax payable by the Tenant pursuant to this subclause 15(e) shall be due and payable by the Tenant when the amount payable hereunder to which such tax relates is due and payable. The Landlord agrees, at the request and cost of the Tenant, to prepare and execute any forms necessary to establish that the Tenant has paid to the Landlord the taxes payable under this subclause 15(e) and that the Taxpayer has remitted such taxes to the appropriate Taxing Authorities.

(f) **Non-Payment of Certain Amounts**

In the event the Tenant fails to pay the aforesaid utilities, taxes, licence fees, rates or assessments which it has covenanted to pay in subclauses 15(c), (d) and (e) and which may constitute a lien or charge upon the Leased Premises or its contents, or the Project, the Landlord may, if such default is not cured after the giving of thirty (30) days' notice to the Tenant by the Landlord, pay all or any of the same and all of such payments so

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made shall be recoverable in the same manner as rent in arrears; provided, however, where there is a *bona fide* dispute of the amount or propriety of any payment alleged to be due from the Tenant and the Landlord is not prejudiced and continues not to be prejudiced by non-payment, the Landlord shall not pay the same until such dispute has been resolved either by agreement of the Tenant or by the decision of a competent authority whichever is the earlier in date whereupon such period of thirty (30) days will be deemed to commence on the date of such agreement or decision.

(g) **Pay For Lighting Tubes and Ballasts**

The Tenant shall pay the cost, including installation, of all electric light bulbs, fluorescent tubes and ballasts, all of which shall be Project Standard, used to replace those currently in the Leased Premises together with the cost of maintenance and repair of fluorescent fixtures and the Landlord shall have the exclusive right to supply and effect such installation, maintenance and repair.

(h) **Obligation to Repair and Maintain Leased Premises**

The Tenant shall at its expense and throughout the Term, keep the Leased Premises, the Leasehold Improvements and Trade Fixtures (excluding built-in furniture, furnishings and moveable floor coverings) therein in good condition and in a good and tenantable state of maintenance and repair, all to the standard of a first class office building in the City of Calgary, excepting for structural and other repairs to the Project or the Common Facilities for which the Landlord is responsible pursuant to this Lease and excepting reasonable wear and tear which does not detract from the standard of a first class office building. Notwithstanding anything to the contrary in this Lease, if the Tenant's repair obligation is in respect of any system, facility, equipment, apparatus or device which materially affects the Base Building Services or the operation or performance of any equipment relating thereto, including without limitation any item which is described as comprising part of the Leasehold Improvements, such repairs and maintenance thereto shall, at the Landlord's option, be undertaken by the Landlord's contractors for the Project, at the Tenant's cost.

(i) **Permit Access to the Landlord**

The Tenant shall permit the Landlord from time to time within Normal Business Hours (after at least 24 hours prior notice to the Tenant), or at any time in the case of emergency, to enter and examine the state of maintenance, repair and order of the Leased Premises, all equipment and fixtures within the Leased Premises and any improvements now or hereafter made to the Leased Premises and the Landlord may give notice to the Tenant requiring that the Tenant perform such maintenance or effect such repairs or replacement to the Leasehold Improvements and Trade Fixtures (excluding built-in furniture, furnishings and moveable floor coverings) as may be found necessary from such examination; provided, however, that the failure of the Landlord to give such notice shall not relieve the Tenant from its obligations to maintain, repair and keep the Leased Premises and the Tenant's Leasehold Improvements, furniture and equipment therein in good condition and in a good and tenantable state of maintenance and repair. The Tenant

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agrees that the Landlord shall have the right to enter the Leased Premises at all reasonable times during the Term (after reasonable prior notice to the Tenant or without notice in the case of an emergency) to make repairs or alterations as the Landlord, acting reasonably, shall deem necessary for the safety or preservation or proper administration of the Leased Premises or any other portion of the Project.

(j) **Intentionally Deleted**

(k) **Carry Out Repairs and Maintenance of the Leased Premises**

The Tenant, when necessary during the Term of this Lease and whether upon receipt of notice from the Landlord or not, shall perform, effect and pay for such maintenance, repairs or replacements as may be the responsibility of the Tenant under this Lease by the use of contractors or other qualified workmen, subject always to the provisions of subclause 15(h) hereof, approved by the Landlord in writing, such approval not to be unreasonably withheld or delayed. In the event that the Tenant fails to comply with the Landlord's notice to effect maintenance, repairs or replacements within a reasonable period of time (or in the case of any such maintenance, repairs or replacements which relate to or would affect the structural integrity of the Project, or materially affect the operation of the Office Tower, in which case all such matters shall be carried out as soon as possible having regard to the circumstances), then the Landlord may cause such maintenance, repairs or replacements to be undertaken and the Landlord shall be entitled to recover from the Tenant the cost thereof together with a fee for supervision of the carrying out of the Tenant's obligations, such fee to be an amount equal to fifteen percent (15%) of the costs incurred by the Landlord with respect thereto, which costs and fees shall be forthwith payable by the Tenant to the Landlord and shall be recoverable in the same manner as rent in arrears.

(l) **Delivery of Possession and Removal of Leasehold Improvements**

(i) Upon the expiration or sooner termination of the Term, the Tenant shall deliver to the Landlord vacant possession of the Leased Premises in accordance with the terms and conditions of this Lease.

(ii) Except as may be otherwise expressly agreed by the Landlord in writing or set forth in this subclause (l), no Leasehold Improvements or Trade Fixtures shall be removed by the Tenant from the Leased Premises, either during or at the expiration or sooner termination of the Term of this Lease.

(iii) Notwithstanding the foregoing:

(A) During the Term of this Lease, the Tenant may remove from the Leased Premises Trade Fixtures in the normal course of its business or where and to the extent that the Trade Fixtures have become excess for the Tenant's purposes.

(B) On the Expiry Date of this Lease, if all amounts payable by the Tenant pursuant to this Lease have been paid in full, the Tenant or its Affiliate or

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Successor may remove such Trade Fixtures as the Tenant determines to remove, subject to the provisions of this subclause 15(I)(iii); provided that the Tenant shall only be entitled to remove its Trade Fixtures comprising:

(I) built-in furnishings and improvements;

(II) demountable wall or moveable partitions including doors and hardware affixed to and electrical and utility installations included within such demountable or moveable partitions;

(III) any other materials in the nature of Trade Fixtures which are affixed to the Leased Premises; and

only from the Leased Premises that the Tenant or its Affiliate or Successor was in actual physical occupation thereof on the Expiry Date.

(C) At the expiry of the Term, or any extensions thereof, the Tenant shall not be required to remove any Leasehold Improvements (or any of the Wellness Improvements) or restore the Leased Premises to base building condition except for the removal of the Tenant's signage, as outlined in Section 16 (q) of this Lease. Notwithstanding the foregoing, the Tenant shall be required to remove any or all of the Tenant's furniture and office equipment in the Leased Premises except the Tenant shall be entitled to remove, and shall not be obligated to surrender any furniture and equipment, sports and exercise equipment, CCTV, stereo, audio or first aid equipment (regardless of whether they are attached to floor, walls, or ceilings or comprise fixtures) located at the area of the Wellness Improvements. For clarity, the Tenant shall have no further obligation to restore the Leased Premises or to pay any money for demolishing the Wellness Improvements or restoring any portion of the 10th floor.

(D) All removal and restoration work undertaken by or on behalf of the Tenant or required to be undertaken by the Tenant to the Leased Premises shall be undertaken at the Tenant's sole expense, prior to the expiry of the Term or immediately after termination of this Lease and shall be carried out and completed expeditiously and to the satisfaction of the Landlord and in compliance with all applicable laws, codes, by-laws or requirements of any government body or agency having jurisdiction over such matters (collectively, "**Applicable Laws**").

(E) In the case of any removal or restoration by the Tenant either during or at the end of the Term of this Lease, the Tenant shall, at its expense, make good any damage caused to the Leased Premises or the Project by the installation or removal to the satisfaction of the Landlord and in compliance with Applicable Laws.

(F) In the event that, for whatever reason, the Tenant has not completed all removal or restoration work either prior to the expiry of the Term or

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immediately after the termination of the Term, the Tenant shall pay to the Landlord upon demand, the Landlord's reasonable estimate of the cost to complete such removal or restoration (including supervision thereof by the Landlord).

(iv) All Trade Fixtures not removed or required to be removed from the Leased Premises at the expiration or sooner termination of the Term shall become the Landlord's absolute property without compensation therefor to the Tenant and shall not be removed by the Tenant after the expiration of the Term.

(v) In the event of any dispute as to the removal or restoration or any item by the Tenant, the completion of any work or repair relating thereto or the compliance with Applicable Laws as required herein, the dispute shall be resolved by arbitration as provided in this Lease.

(vi) This subclause 15(l) shall survive the expiry or earlier termination of this Lease.

(m) **Use of Leased Premises**

The Tenant shall use and occupy the Leased Premises for business offices and any ancillary uses in the normal course of the business of the Tenant provided that such uses are permitted by law.

(n) **Not to Permit Nuisance**

The Tenant shall not use or permit any part of the Leased Premises to be used in such manner as to cause a nuisance or otherwise cause or permit annoying noises or vibrations or offensive odours to emanate therefrom. The Tenant shall not permit or suffer any overloading of the floor or floors of the Leased Premises and the Tenant shall not place therein any safe, heavy business machine or other heavy object, which would affect the structural integrity of the Office Tower or any portion thereof or exceed the load-bearing capacity of any floor of the Office Tower or any portion thereof without first obtaining the written consent of the Landlord.

(o) **Not to Increase Insurance Premiums or Effect Cancellation of Insurance**

The Tenant shall not do or permit to be done or omit to do anything or permit any omission which shall cause or shall have the effect of causing the rate of insurance upon the Project or any part thereof to be increased at any time during the Term or which shall cause or have the effect of causing the cancellation of the insurance upon the Project by the insurer thereunder by reason of the use or occupancy of the Leased Premises by the Tenant or by any act or omission of the Tenant. If the rate of such insurance shall be increased directly as a result of the use and occupancy of the Leased Premises by the Tenant or by any act or omission of the Tenant, the Tenant shall on demand pay to the Landlord the amount by which the insurance premium shall be so increased. The Landlord agrees to provide to the Tenant written particulars relating to any such increase with respect to the rate of such insurance evidencing the use and occupancy of the Leased Premises or the act, omission or use of the Tenant giving rise to such increased cost.

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(p) **Use of Common Facilities**

The Tenant shall not obstruct the Common Facilities or use the Common Facilities other than for their intended purposes, without the consent of the Landlord having regard to the rules and regulations and the use and enjoyment of the other tenants of the Project.

(q) **Standard Project Window Coverings**

The Tenant shall use Project standard window coverings, as provided at the relevant possession dates or such other window coverings as the Landlord may approve from time to time. The Tenant shall be responsible for ensuring the window coverings are cleaned and maintained. The Tenant shall have the right to install over curtains, provided that any such over curtains shall be placed on the room side of the window coverings supplied by the Landlord and provided that such over curtains shall not disrupt heating or air conditioning functions.

(r) **Comply with Law**

The Leased Premises shall be used and occupied by the Tenant in a safe, careful and proper manner so as not to contravene any present or future federal, provincial or municipal governmental or quasi-governmental laws, by-laws, codes, regulations or orders (including those relating to environmental matters, health and safety and occupational health and safety). If due solely to the use of the Leased Premises by the Tenant for its business, improvements or other work are necessary to comply with any of the foregoing or with the reasonable requirements of the insurance carriers of the Project, the Tenant shall pay the entire cost and expense thereof. The Tenant shall comply with all police, fire and sanitary regulations imposed by any federal, provincial or municipal authorities or made by insurance underwriters which relate directly and specifically to the business of the Tenant carried on in the Leased Premises and not to office premises in general.

(s) **Restriction on Signage of the Tenant**

Save as provided in subclause 16(q) the Tenant shall not paint, display, inscribe, place or affix any sign, picture, advertisement, notice, lettering or direction (collectively, a "**Sign**") on any part of the outside of the Project or inside the Project without the prior written consent of the Landlord. It is agreed that the provisions of this subclause 15(s) shall not apply with respect to any Sign on the inside of the Leased Premises.

(t) **Alterations to the Leased Premises by the Tenant**

The Tenant, with the prior written consent of the Landlord, such consent not to be unreasonably withheld, from time to time during the Term, in accordance with the Construction Procedures, shall have the right to make such alterations, additions, substitutions and improvements to the Leased Premises or any part thereof as the Tenant may reasonably deem necessary or desirable to adapt the Leased Premises for its purposes provided that the structural integrity of the Project and the heating, ventilating, air conditioning, security and other Project systems, facilities and equipment are not

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adversely affected and that the value of the Project is not diminished. The work shall be carried out by contractors or other qualified workmen approved by the Landlord, in writing, such approval not to be unreasonably withheld or delayed, provided that the following shall be carried out at the Tenant's expense by the Landlord's contractors:

(i) all approved modifications to the base Project structural, heating, cooling, sprinkler, ventilation, exhaust, control, electrical distribution and life safety systems as installed by the Landlord,

(ii) patching of Project Standard fireproofing,

(iii) any drilling, cutting, coring and patching for conduit, pipe sleeves, chases, duct equipment, or openings in the floors, walls, columns or roofs of the Project which is approved by the Landlord, such approval not to be unreasonably withheld,

(iv) transformation and power termination at a fused disconnect switch located in the Leased Premises,

(v) connections to base Project systems, except low pressure duct work connections.

All work carried out by the Tenant shall be at the sole cost and expense of the Tenant and the Tenant shall submit to the Landlord's inspection of such work for approval, the Landlord being neither the supervisor of such work nor the contractor of the Tenant. The Tenant shall promptly pay the Landlord's reasonable direct third party charges and expenses pertaining to such inspection which shall include the reasonable costs and expenses of the Landlord's Architect, engineer or other consultants.

All Leasehold Improvements shall upon their construction or installation in the Leased Premises become the property of the Landlord, but subject to the Tenant's obligation to repair, maintain and insure them in accordance with this Lease. All Trade Fixtures shall upon their installation in the Leased Premises remain the property of the Tenant, subject to the provisions of subclause 15(l) and the Tenant's obligation to repair, maintain and insure them in accordance with this Lease.

(u) **Indemnity of the Landlord**

Except:

(i) where due to, arising from or to the extent contributed to by the Landlord's breach of this Lease or the negligent acts or omissions or wilful misconduct of the Landlord, its servants, agents, employees, contractors and persons for whom the Landlord is responsible in law (other than the Tenant); and

(ii) in respect of those liabilities, claims, damages, losses and expenses for which the Landlord is required to insure under this Lease pursuant to clause 16(l) hereof;

the Tenant shall indemnify and save the Landlord and all of its servants, agents, employees, contractors and persons for whom the Landlord is responsible in law

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harmless from and against any and all liabilities, claims, damages, losses and expenses, including all legal fees and disbursements, due to, arising from or to the extent contributed to by:

(iii) any breach by the Tenant or any assignee or sublessee of any provisions of this Lease;

(iv) any negligent acts or omissions or the wilful misconduct of the Tenant or any assignee or sublessee or any of its or their servants, agents, employees, contractors or persons for whom the Tenant or any assignee or sublessee is in law responsible on the Leased Premises or elsewhere on or about the Project; and

(v) any damage or destruction to any part of the Project caused by any negligent acts, omissions or wilful misconduct of the Tenant or any assignee or sublessee, or any of its or their servants, agents, employees, contractors or persons for whom the Tenant or any assignee or sublessee is in law responsible.

Notwithstanding the foregoing, in no event shall the Tenant be liable for any indirect or consequential damages suffered or incurred by the Landlord. It is agreed that the obligation of the Tenant to indemnify the Landlord is subject to the limitation on the liability of the Tenant with respect to those matters set out in subclause 15(x)(vii)(B) of this Lease.

(v) **Tenant's Insurance**

(i) Throughout the Term and such other times as the Tenant occupies the Leased Premises or any part thereof, the Tenant shall, at its expense, take out and keep in force, as would be maintained by a prudent tenant in similar circumstances, the following insurance:

(A) all risks property insurance upon property of every kind owned by the Tenant, or for which the Tenant is legally liable, or installed by or on behalf of the Tenant in the Project, with limits for each accident in an amount of not less than the full replacement cost thereof without any deduction for depreciation, and such insurance may contain typical boiler and machinery exclusions. Such coverage shall insure against fire and all other perils as are from time to time included in the standard "all risks" coverage including, without limitation, sprinkler leakages (where applicable), earthquake and flood and collapse;

(B) if applicable and if the all risks property insurance does contain the typical boiler and machinery exclusions, then the Tenant shall maintain broad form comprehensive boiler and machinery insurance on a blanket repair and replacement basis with limits for each accident in an amount not less than the full replacement cost of all boilers, pressure vessels, air-conditioning equipment and miscellaneous electrical apparatus owned and operated by the Tenant or others other than the Landlord, on behalf of the Tenant in or serving the Leased Premises;

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(C) commercial general liability insurance for third party liability including property damage, bodily injury (including personal injury), blanket contractual liability, tenant's legal liability, non-owned automobile liability and products and completed operations with respect to the Leased Premises and Tenant's use of the Project; coverage to include the activities conducted by the Tenant and of its servants, agents, contractors and persons for whom the Tenant is in law responsible, in any part of the Project; such policies shall have inclusive limits of Twenty-Five Million Dollars ($25,000,000) for each occurrence involving bodily injury, death or property damage, or such higher limits as the Landlord may reasonably require from time to time;

(ii) Each of the Tenant's insurance policies shall:

(A) with respect to all risk property and boiler and machinery policies (other than with respect to the Tenant's trade fixtures and the Tenant's personal property) show the Landlord as additional insured as its interest may appear;

(B) with respect to the commercial general liability insurance, include the Landlord, its directors, officers, servants, agents and employees and the Landlord's Mortgagee as additional insureds, but only with respect to events occurring on the Leased Premises and excluding where any event arises or the policy is brought into play by reason of or arising from the negligent acts or omissions or wilful misconduct of the Landlord, its servants, agents, employees and those for whom the Landlord is responsible in law, and the Landlord's independent contractors; such policy will contain a severability of interests clause and shall be considered, but only with respect to such events, primary and not call into contribution other policies of insurance available to the Landlord;

(C) contain a waiver of breach of conditions clause in respect of the interest of the Landlord relating to any breach by the Tenant of any warranties, representations, declarations or conditions contained in such policies; and

(D) contain an undertaking by the insurers that no change that reduces or restricts coverage, cancellation or termination of any policy will be made unless the Landlord has received not less than thirty (30) days prior notice thereof, delivered in accordance with the provisions of this Lease.

It is acknowledged and agreed by the Landlord and the Tenant, for greater certainty, that notwithstanding the endorsements referred to in this subclause 15(v) and the inclusion of the Landlord as additional insured, the Landlord shall have no right to receive or recover proceeds under the Tenant's policies. The Landlord agrees to execute and deliver upon request all such documents and agreements relating to the proof of claims and the payment of losses such that the Tenant will receive the proceeds of insurance payable under such policies to

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enable the Tenant to use such proceeds for the repair and rebuilding of the Leasehold Improvements in accordance with the provisions of this Lease, or to be provided to the Tenant if this Lease is terminated pursuant to subclause 17(b) and the Tenant repays the Tenant Allowance in accordance with subclause 17(b).

(iii) If requested by the Landlord, the Tenant shall deliver to the Landlord evidence of such insurance required to be obtained by the Tenant, and with insurers and in such form, satisfactory from time to time to the Landlord, acting reasonably.

(iv) The Tenant does hereby absolutely release and discharge the Landlord, its servants, agents, employees and those for whom the Landlord is responsible in law (including the Landlord's independent contractors) with respect to all costs, losses, damages and expenses suffered or incurred by the Tenant arising out or in any way related to, in whole or in part, any matter in respect of which the Tenant is required to insure under this Lease, save and except with respect to those matters for which the Landlord is required to indemnify the Tenant pursuant to subclause 16(m) of this Lease.

(v) The Landlord shall neither do, permit nor omit to be done, anything in the Project which might result in any increase in the premiums for the Tenant's insurance coverage or which might result in actual or threatened reduction or cancellation of or a material adverse change in such coverage. The Landlord shall pay any increases in premiums caused by its actions or omissions and such amounts shall not be recoverable from the Tenant as an Operating Expense. In determining the Landlord's responsibility for any increased premiums, a statement by the party establishing the relevant insurance rate, together with such supporting documentation and information as the Landlord or the Tenant may reasonably require, to establish the relative insurance rate, shall be prima facie evidence of the various components of such rate. In the event of a disagreement as to such increase in premiums, the Landlord shall nonetheless pay such amount as required, if necessary to effect insurance as required under this Lease, and then refer the matter for dispute resolution (notwithstanding the payment of such amount) under clause 22

(w) **Release of the Landlord**

Except in respect of any claim, loss, damage or expense against which the Landlord is required to indemnify the Tenant pursuant to subclause 16(m) of this Lease, the Landlord shall not be liable to the Tenant:

(i) for any bodily injury or death of, or loss or damage to any property belonging to, or any other loss or damage suffered by, the Tenant or its servants, agents, employees, invitees or licensees or any other person in, on or about the Project;

(ii) for any damage which is caused by steam, water, rain or snow which may leak into, issue or flow from any part of the Project or from the pipes or plumbing works thereof (including sprinkler leakage) or from any other place or for any

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damage caused by or attributable to the condition or arrangement of any electrical or other wiring or for any damage caused by anything done or omitted by any other tenant of the Project; or

(iii) for any bodily injury, death, or damage attributable in whole or in part to the malfunction or failure to function of any sprinkler system or any other protective device or system which may be provided by the Landlord.

(x) Assignment and Subletting

(i) The Tenant will not make a Transfer except in accordance with this subclause 15(x). Subject to subclause 15(x)(ii) and 15(x)(viii), the Tenant will not make or attempt to make a Transfer unless it has received or procured a Transfer Offer and has delivered a Transfer Request to the Landlord, which Transfer Request shall be accompanied by a true copy of the Transfer Offer. The Landlord may, within five (5) Business Days after receipt of a Transfer Request, deliver a Data Request to the Tenant.

(ii) The Tenant shall have the right to make a Transfer to an Affiliate of the Tenant or a Successor without the consent of, but with notice to, the Landlord, provided:

(A) the Tenant and the Affiliate first execute and deliver the Assumption Agreement in the form attached as Schedule "J" hereto; and

(B) the Tenant shall continue to be bound by all of the provisions of this Lease.

If the Affiliate does not remain an Affiliate of the Tenant or a Successor, then any Transfer that has been made to an Affiliate shall be subject to compliance with the requirements of subclause 15(x)(v), and any subsequent Transfer either by such former Affiliate or by the Affiliate if it remains an Affiliate of the Tenant or a Successor, as the case may be, shall be subject to the provisions of subclause 15(x), other than subclause 15(x)(v)(B) which shall not apply where any subsequent Transferee of such former Affiliate, or Successor or Affiliate, as the case may be, remains in occupation of the Office Premises (or portion thereof) transferred to it and is carrying on its business therefrom.

(iii) If the proposed Transfer is by way of either an assignment of this Lease or a sublease of all of the Office Premises that the Tenant is in actual physical occupation of, to a Transferee which is not an Affiliate of the Tenant, or a Successor, the Landlord shall have the right to terminate this Lease, subject to the provisions of the following sentence. Notwithstanding the preceding sentence, if the proposed Transfer is by way of an assignment of this Lease to a Transferee which is not an Affiliate of the Tenant or a Successor and a portion of the Office Premises has been sublet, then in such circumstances the Landlord shall not be entitled to terminate this Lease but shall be entitled to require, and the Tenant does hereby agree, upon such request being made, to assign the Tenant's interest in this Lease to an Affiliate of the Landlord and in such circumstances, the Tenant

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shall be released of its obligations under this Lease except with respect to the Office Premises which have been sublet.

If the proposed Transfer is by way of a sublease during the last five years of the Term or any renewal term and the Tenant, or an Affiliate or a Successor is not then in actual physical occupation of at least 150,000 square feet of Rentable Area of Office Premises, the Landlord shall have the right to terminate this Lease in respect of the Rentable Area to be sublet under the Transfer Offer.

(iv) The Landlord's termination rights set out in subclause 15(x)(iii) shall be exercised by giving written notice to the Tenant within ten (10) Business Days of the later of receipt by the Landlord of the Transfer Request and compliance by the Tenant with a Data Request made by the Landlord, and the termination date (the "**Termination Date**") shall be the date set out as the commencement date of the sublease or the effective date of the assignment set out in the Transfer Offer. If the Landlord exercises its termination rights set out in subclause 15(x)(iii), the Tenant shall have the right to withdraw the Transfer Request in respect thereof, such right to be exercised by giving written notice to the Landlord within five (5) Business Days of the Landlord having given notice to the Tenant that it is exercising its said termination rights. If the Tenant exercises its right to withdraw the Transfer Request within the time limited therefor, it will be deemed to have never delivered the Transfer Request. If the Tenant does not exercise its right to withdraw the Transfer Request within the time limited therefor, and the Landlord exercises its right of termination, this Lease shall be terminated in respect of the Rentable Area to be sublet under the Transfer Offer or terminated in its entirety, as the case may be, on the Termination Date. If this Lease is terminated by the Landlord with respect to a part of the Leased Premises, then Rent payable under this Lease shall thereafter abate proportionately and all other appropriate recalculations shall be made to recognize that the Rentable Area of the Leased Premises has diminished.

(v) If the provisions of subclause 15(x)(iii) apply but the Landlord does not exercise any of its rights thereunder, or if the provisions of subclause 15(x)(iii) do not apply, then the Tenant shall be free to effect the Transfer to the Transfer Offeror on the terms and conditions contained in the Transfer Offer, subject to the prior compliance by the Tenant with the following requirements:

(A) the proposed Transferee is consistent with the dignity and character of a first class office building;

(B) the proposed Transfer is not to an existing tenant in the Project unless the Landlord does not have sufficient space available to lease to such tenant;

(C) the Tenant is not in default of a material provision of this Lease for which the Tenant has received written notice and has failed to remedy or to commence and proceed diligently to remedy; and

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(D) the Tenant and the proposed Transferee have both executed and delivered the Assumption Agreement as required under subclause 15(x)(vi).

If the Landlord asserts that the Tenant has not complied with all of the preceding requirements under this subclause 15(x)(v), the Tenant's remedy shall be restricted to an application to a court of competent jurisdiction for an order determining the matter, but under no circumstances whatsoever shall any such determination by the Landlord give rise to any right of the Tenant to terminate or repudiate this Lease. The Tenant agrees to provide the Landlord with copies of all subleases and assignments of this Lease together with such other related information, including information pertaining to the Transferee, as the Landlord may reasonably request.

(vi) The Tenant and proposed Transferee (other than a Transferee which is an Affiliate of the Tenant) under the Transfer Offer must execute and deliver an Assumption Agreement, in the form attached hereto as Schedule "J-1", prepared by the Landlord or its solicitors, before the proposed Transfer is effective. If so requested by the Landlord, all other documentation to implement any Transfer and all other agreements shall be reviewed by the Landlord or its solicitor. The Landlord shall be entitled to charge a reasonable fee in respect of its review of a Transfer Request and all reasonable out of pocket costs of reviewing or executing any other documentation to implement any Transfer and all other agreements contemplated hereby, which costs shall be paid by the Tenant immediately after demand.

(vii) (A) No consent of the Landlord to a Transfer shall be effective unless given in writing and executed by the Landlord and no such consent shall be deemed or presumed by any act or omission of the Landlord or by the Landlord's failure to respond to any Transfer Request or by the Landlord's accepting any payment of any amount payable hereunder from any party other than the Tenant. If the Tenant is in default hereunder the Landlord may collect rent and any other amounts from any Transferee (and the Assumption Agreement shall so provide) and apply the net amount collected to any Rent and the collection or acceptance of or consent to any such Transfer shall not operate as a release of any of the Tenant's obligations under this Lease. No Transfer and no consent by the Landlord to any Transfer shall constitute a waiver of the necessity to obtain the Landlord's consent to a subsequent or other Transfer.

(B) In the event of any Transfer or any consent by the Landlord to any Transfer, the Tenant shall not thereby be released from any of its obligations under this Lease but shall remain bound by all such obligations for the balance of the Term notwithstanding any subsequent amendments to this Lease and subsequent alterations to the Leased Premises, in either or both cases made after any such Transfer; provided always however that the Tenant's obligations shall only be to the extent of what would have been the Tenant's obligations under this Lease had such amendments to

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the Lease and alterations to the Leased Premises not been made, the intention of the parties being that the liability for all such obligations arising out of any such amendments to the Lease and alterations to the Leased Premises made after any such Transfer shall be the responsibility of the Transferee and not the Tenant. Subject to the limitation of liability on the part of the Tenant as set out in the preceding sentence, the Tenant hereby consents to any amendments made to this Lease between the Landlord and the Transferee and any alterations to the Leased Premises made after any such Transfer, without further consent or agreement of the Tenant.

(C) Every Transferee shall be obliged to comply with all of the obligations of the Tenant under this Lease. The Tenant shall enforce all of such obligations against each Transferee. Any default of any Transferee shall also constitute a default of the Tenant hereunder.

(viii) It is acknowledged and agreed that any amalgamation or merger of the Tenant or the transfer of the majority of the issued shares in the capital stock or any transfer, issuance or division of any shares of the corporation sufficient to transfer control to other than the present shareholders of the Tenant (collectively, "**Change of Control**"), shall not be deemed to be a Transfer and shall be permitted. However, any Transferee of: (x) the Tenant or a Successor, or (y) an Affiliate of the Tenant, or (z) an Affiliate of a Successor shall be subject to the Change of Control provisions and any such Change of Control shall be deemed to be a Transfer and subject to the provisions of subclause 15(x), other than in the circumstances where there is a Change of Control in an Affiliate or a Successor of the Tenant and such Transferee of such Affiliate or Successor of the Tenant remains in occupation of the Office Premises that it is then in possession of and is carrying on its business therefrom. It is further agreed that the provisions of this subclause 15(x)(viii) shall not apply to any of the parties referenced in subclauses (x), (y) or (z) as contained in this subclause (viii) or any Transferee of any such parties so long as such party is in occupation of the Office Premises and is a corporation whose shares are listed and traded on any recognized public stock exchange in Canada or the United States.

(ix) The Tenant shall not be entitled to make or effect any assigning, subletting, mortgaging, charging or otherwise transferring of the Leased Premises, any part thereof, or this Lease, for the purpose of securing any loan or the repayment thereof by the Tenant, without the consent of the Landlord having been first obtained, which consent may be arbitrarily refused.

(x) If at any time the Tenant receives any fee or consideration for an assignment of this Lease, the Tenant shall assign and transfer to the Landlord fifty percent (50%) of the assignment fee (after deducting the Tenant's out-of-pocket costs associated with such assignment, including without limiting the generality of the foregoing, the costs for leasehold improvements, tenant allowances, inducements, free rent, re-demising or professional fees associated with the said assignment forthwith

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upon receipt). If at any time the annual rent reserved in any sublease of all or any part of the Leased Premises exceeds the Annual Rent for the Leased Premises payable to the Landlord in this Lease, the Tenant shall pay to the Landlord upon receipt by the Tenant fifty percent (50%) of the excess of the sublease annual rent (after deducting the Tenant's out-of-pocket costs, including without limiting the generality of the foregoing, the costs for leasehold improvements, tenant allowances, inducements, free rent, re-demising or professional fees associated with the subletting of the Leased Premises) over the Annual Rent applicable to the portion of the Leased Premises so subleased.

(y) **Permit Access to Relet**

The Tenant shall permit the Landlord or its agents at any time within twelve (12) months before the end of the Term in the company of prospective tenants or at any time during the Term, in the company of prospective purchasers of the Project, upon at least 24 hours written notice to enter the Leased Premises during Normal Business Hours for the purpose of showing the Leased Premises to such prospective tenants or purchasers, as the case may be.

(z) **Rules and Regulations**

The Tenant covenants and agrees that the rules and regulations annexed hereto as Schedule "I" are part of this Lease and shall in all respects be observed and obeyed, conformed to and performed by the Tenant and its employees, servants and agents. The Landlord shall have the right to make such other further reasonable rules and regulations relating to the Leased Premises and to the Project which are of general application to all tenants of the Project and which are not inconsistent with the provisions of this Lease and which will not increase the amount of Rent payable by the Tenant, subject to the prior consultation with the Tenant and the Tenant's agreement relating to such rules and regulations. If the Landlord and the Tenant cannot agree as to such further rules and regulations, the matter shall be determined by arbitration in accordance with the provisions of this Lease. All such rules and regulations now and hereafter in force shall be read as forming part of the terms and conditions of this Lease as if the same were embodied herein. All such other and further rules and regulations hereafter made by the Landlord shall be binding upon the Tenant upon delivery of a copy thereof to the Tenant in the manner set out in clause 34.

(aa) **Priority of this Lease and Attornment to Mortgagee or Encumbrancee**

This Lease including, without limitation, any option to renew provided for in the Lease, shall, at the election of the Landlord, either:

(i) have priority to any ground lease, mortgage or charge which may now or hereafter be placed by the Landlord against the Project and the Project Lands or part thereof and shall have priority to any lease, mortgage or charge which may now or hereafter be placed by the owner of the Project Lands against the Project Lands or the Project or part thereof or any of them or

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(ii) be subordinate to any such ground lease, mortgage or charge,

and the Tenant, if the Landlord has elected that this Lease be subordinate, shall subordinate this Lease upon receipt of the Lease Recognition Agreement reflecting the provisions of this subclause 15(aa) and be bound to any Mortgagee of the Landlord from and after such Mortgagee taking possession of, or becoming the owner of, the Project and the Project Lands either directly or indirectly, whether by an agent or receiver or receiver and manager; provided always that the Tenant's use and occupancy of the Leased Premises shall not be interfered with by any such Mortgagee so long as the Tenant shall not, at such time, be in breach of any of its material covenants or obligations under this Lease. In the event the ground landlord or the Mortgagee of any such ground lease, mortgage or charge takes possession of the Project and the Project Lands, either directly or indirectly, or acquires title to the Project and the Project Lands or transfers same or any agent, receiver or receiver and manager or any such party transfers same, the Tenant hereby agrees to attorn to such ground landlord or Mortgagee or transferee and to be bound to such Mortgagee or transferee as its tenant of the Leased Premises for the then unexpired residue of the Term upon and subject to the terms and conditions contained in this Lease and to execute and deliver to the Mortgagee or ground landlord an instrument of attornment as the Mortgagee or ground landlord may reasonably require; provided always that the Tenant's use and occupancy of the Leased Premises shall not be interfered with by any such Mortgagee or ground landlord so long as the Tenant shall not, at such time, be in breach of any of its material covenants or obligations under this Lease. The ground landlord or Mortgagee of any such ground lease, mortgage or charge in the Lease Recognition Agreement referred to above shall covenant that it shall not nor shall any agent, receiver or receiver and manager transfer the Project or the Project Lands without first obtaining the written agreement of the proposed transferee of the Project and the Project Lands in accordance with the terms and conditions of the Lease Recognition Agreement to be bound by the terms and conditions of this Lease. Additionally, the Landlord shall obtain from any ground landlord or Mortgagee of any such ground lease, mortgage or charge existing as of the date the Tenant registers a caveat in respect of this Lease and which has priority over such caveat, either a Lease Recognition Agreement in accordance with the foregoing requirements of this subclause 15(aa) or a statutory postponement in favour of such caveat.

(bb) Tenant's Obligations in respect of Hazardous Substances

The Tenant shall:

(i) notify the Landlord immediately in the event that the Tenant receives notice of any violation of an environmental law or that any order of any administrative tribunal or any other governmental authority is made or is proposed to be made against the Tenant in respect of any Hazardous Substance in or on the Leased Premises, the Project or the Project Lands, and the Tenant shall notify the Landlord immediately of any discharge, release or discovery of any Hazardous Substance by the Tenant in or on any part of the Leased Premises, the Project or the Project Lands;

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(ii) to the extent required by law, remove any Hazardous Substances brought onto the Leased Premises by the Tenant after the Commencement Date and whether resulting from any act, omission or negligence of the Tenant or those for whom the Tenant is in law responsible; and

(iii) indemnify and save harmless the Landlord from and against all death, injury, damage to property, costs, liability and expenses resulting from the existence or improper handling of any Hazardous Substances stored in the Leased Premises by the Tenant or those for whom the Tenant is in law responsible. If the Landlord, without fault on the part of the Landlord, is made a party to any litigation commenced by or against the Tenant, then the Tenant shall protect, indemnify and hold the Landlord harmless and pay all costs and expenses (including all legal fees on a solicitor/client basis) incurred or paid by the Landlord in connection with such litigation.

(cc) **Tenant's Statement**

The Tenant shall at any time and from time to time upon not less than seven (7) days' prior notice from the Landlord, execute and deliver to the Landlord or such addressee as the Landlord may direct, a statement in writing stating that this Lease is unmodified and in full force and effect or, if modified, stating the modifications and that the Lease is in full force and effect as modified, the amount of the Annual Rent and Additional Rent payable hereunder, the dates to which the Annual Rent, Additional Rent and other charges hereunder have been paid, by instalments or otherwise, and whether or not, to the knowledge of the signatory of such certificate, there is any default on the part of the Landlord of which the Tenant has knowledge, and such other information as to the status or performance of any other covenants or obligations of the Landlord and the Tenant under this Lease as the Landlord may reasonably require.

(dd) **Assignment by the Landlord**

Subject to the rights of the Tenant pursuant to clause 42, the Landlord shall have the right to sell, convey, transfer or assign the Project and the Project Lands. In the event the Landlord:

(i) sells, conveys, transfers or assigns all or any portion of its interest in the Project and the Project Lands or otherwise divests itself of all or any portion of its interest in the Project and the Project Lands; and

(ii) has provided to the Tenant the written acknowledgment, agreement and covenant of the purchaser, transferee or assignee of the Project and the Project Lands, or any interest therein, pursuant to which such purchaser, transferee or assignee agrees in favour of the Tenant to observe, perform, fulfil and keep each and every one of the obligations, agreements and covenants on the part of the Landlord to be observed, performed, fulfilled and kept pursuant to the provisions of this Lease, including without limiting the generality of the foregoing pursuant to subclauses

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16(b) and 16(p) except to the extent previously satisfied, following the effective date of such sale, conveyance, transfer or assignment, as the case may be,

the Landlord shall be relieved of all of its obligations and liabilities under the Lease arising after the effective date of the sale, conveyance, transfer or assignment, as the case may be.

(ee) Registration of this Lease

The Tenant shall not register this Lease but the Tenant shall have the right to register a caveat setting out the particulars of this Lease including, without limitation, the Leased Premises, the Term, the Commencement Date and the options to renew the Lease, but without any reference to any financial details of the Lease.

(ff) Builders' Liens

The Tenant shall pay before delinquency all costs for work done or caused to be done by the Tenant in the Leased Premises which could result in any lien or encumbrance on the interest of the Landlord in the Project and the Project Lands or any part thereof and shall keep the title to the Project Lands and every part thereof free and clear of any lien or encumbrance in respect of such work. Whenever and so often as such liens or encumbrances shall attach or claim therefor shall be filed, the Tenant shall immediately notify the Landlord thereof and shall diligently contest such lien or cause the same to be removed within fifteen (15) Business Days (or such additional period of time as the Landlord, acting reasonably, may consent to in writing), failing which the Landlord may take such action as the Landlord deems necessary to remove or discharge the same and the entire reasonable cost thereof shall be immediately due and payable by the Tenant to the Landlord.

(gg) The Landlord Reimbursement

The Tenant agrees to reimburse the Landlord in respect of actual out-of-pocket third party costs incurred by the Landlord with respect to the review and approval of drawings and specifications for Tenant's Work, utilities, hoisting charges, or such other similar items provided by the Landlord related to completion of Tenant's Work, or with respect to any alterations or improvements carried on by the Tenant during the Term, but the Tenant shall not be required to pay the Landlord's administrative fees, co-ordination or supervisory services in connection with Tenant's Work.

(hh) Financial Information

The Tenant shall furnish to the Landlord such financial statements and other financial information as the Landlord may reasonably request from time to time. Within 180 days following the end of each fiscal year of the Tenant, the Tenant shall provide to the Landlord such financial information which shall accurately and fairly present the results of operations and the financial condition of the Tenant at the end of and for the most recent fiscal period.

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16. LANDLORD'S COVENANTS

The Landlord covenants with the Tenant as follows:

(a) **Quiet Enjoyment**

The Landlord shall warrant and defend the Tenant in the quiet enjoyment and possession of the Leased Premises during the Term without any interruption from or by the Landlord or any persons lawfully claiming by, through or under the Landlord, subject to the terms and conditions of this Lease.

(b) **Completion of the Landlord's Work**

Prior to the Initial Expiry Date, except as otherwise stated below, the Landlord shall perform and complete the Landlord's Work at the Landlord's sole cost and expense acting prudently and using reasonable commercial efforts to complete such work substantially in accordance with the timelines outlined in Schedule "C" attached hereto. For clarity, all costs associated with the Landlord's Work shall be to the Landlord's account and shall not be recoverable from the Tenant in any way whatsoever, during the Term or any extensions thereof. All of the Landlord's Work shall be to a quality and standard mutually agreed to in writing by the Landlord and the Tenant, as represented by the Committee, both acting reasonably.

If any delay occurs in the performance of the Landlord's Work, as contemplated by this Lease, (other than material delays caused by the Tenant or a delay in obtaining a LEED-EB (Existing Building) designation for the Project as outlined in Schedule "C" - Section f. or an Unavoidable Delay, so that the Landlord's Work is not substantially completed by the Initial Expiry Date, then (i) the Landlord shall provide the Tenant with free Annual Rent on the basis of one (1) day of free Annual Rent for every one (1) day that the Landlord's Work is delayed beyond the Initial Expiry Date in the event that such delay is ninety (90) days or less, and two (2) days of free Annual Rent for every one (1) day that the Landlord's Work is delayed beyond the Initial Expiry Date in the event that such delay is greater than ninety (90) days; and (ii) the Landlord shall not be liable to the Tenant for any other claims, damages or losses resulting from such delay.

(c) **Right of Access to the Leased Premises**

The Landlord shall permit the Tenant, its employees and all persons lawfully requiring access to the Leased Premises or to the Tenant, to have access to the Leased Premises and to the Project during Normal Business Hours. At times other than Normal Business Hours the Landlord shall permit the Tenant, its employees and those accompanying its employees access to the Leased Premises and to the Project, subject to the rules and regulations established by the Landlord under this Lease in accordance with the provisions of subclause 15(z).

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(d) **Right of Access to Common Washrooms**

The Landlord shall permit the Tenant, its employees, invitees and licensees the right of access to and use of, in common with other tenants of the Project, the toilet and washroom facilities in the Project other than those provided exclusively for the use of other tenants and the Landlord shall keep such toilet and washroom facilities in good repair and working order, reasonable wear and tear excepted, and supplied with hot and cold water.

(e) **Operation Standard of the Project**

The Landlord shall operate the Project in accordance with Project management standards as are established by custom and practice for first class office buildings leased to tenants of comparable size and use as the Tenant.

(f) **Air Conditioning**

The Landlord shall furnish air conditioning to the Leased Premises during Normal Business Hours and the Landlord, when requested by any employee of the Tenant but subject to clause 16(n), shall furnish air conditioning or ventilation to the Leased Premises at times other than during Normal Business Hours.

(g) **Elevator Service**

The Landlord shall provide elevator and escalator service in the Project during Normal Business Hours and at least one (or more if reasonably required) passenger elevator for service to any floor of the Office Premises at all other times; provided, however, that in the event any elevator or escalator in the Project is incapable of operating, the Landlord shall repair such elevator or escalator with all due dispatch having regard to all of the circumstances. All elevators shall provide for security card access to all floors after Normal Business Hours.

(h) **Security**

The Landlord shall provide security service adequate for the safety and care of the Project and the Project Lands including, without limitation, the Office Premises (but not the contents thereof including, without limitation, the property of the Tenant) and the Parking Facility and for the preservation of good order therein, such security service to be comprised of proficient security personnel who shall be bonded and who shall be on duty in the Project at all times. Specifically, there shall be security personnel on duty at the information and registration desk in the lobby of the Project on a 24 hour per day basis and at the loading dock facility in the Project at all times during Normal Business Hours.

The Tenant shall determine the security services and procedures for the Leased Premises. The Landlord shall ensure that all temporary and permanent identification passes are promptly issued.

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The Landlord agrees to meet and consult with the Tenant, from time to time, with respect to the security system for the Office Tower and the Parking Facility. If as a result of such meeting and consultation (each party acting reasonably) the Landlord and the Tenant mutually agree upon any modifications or improvements to the existing security system which are for the benefit of the Office Premises or the Office Tower generally, including the Parking Facility. If the Tenant then wishes any such modifications or improvements to be undertaken, the Landlord shall do so in accordance with the provisions of this Lease. To the extent such improvements or modifications are for the benefit of the Office Tower generally, including the Parking Facility, then the capital costs of such improvements and modifications shall form part of Operating Expenses in respect of which the Tenant shall pay its Proportionate Share; in any of the foregoing circumstances, the repair and maintenance costs relating to any such improvements or modifications shall form part of Operating Expenses in respect of which the Tenant shall pay its Proportionate Share. To the extent such improvements or modifications to the existing security system are for the benefit of the Office Premises the Tenant shall pay for the capital costs thereof. Notwithstanding the foregoing, to the extent such improvements or modifications are part of the Landlord's Work, such amounts shall be paid by the Landlord (which Landlord obligation will end upon completion of the Landlord's Work).

The security personnel may require all persons including, without limitation, employees or invitees of the Tenant, to register when entering or leaving the Project at any time and shall further have the right to refuse admission to the Project to any person not producing an identification pass authorized by the Landlord and provided by the Landlord to the Tenant for distribution by the Tenant to its directors, officers, employees, invitees and guests. The Tenant shall be responsible for the payment of all costs pertaining to the preparation or replacement of any identification passes provided to the Tenant.

(i) **Project Maintenance and Repair**

The Landlord shall keep and maintain the Project (including, without limitation, the Common Facilities) in a proper state of maintenance and repair consistent with the Project management standards and consistent with a first class office building comparable to the Project provided for in this Lease including, without limitation, those contained and provided for in subclause 16(e), excepting: reasonable wear and tear which does not detract from the required operational standard, the obligations of the Tenant pursuant to subclause 15(h), and any other repair and maintenance obligations of other tenants of the Project. The Landlord shall also make as soon as reasonably possible having regard to the circumstances, all repairs and replacements to the Project escalators and elevators, the Base Building Services and the machinery and equipment relating thereto, ducts, shafts, Project storage areas and facilities and Project service areas and facilities which are not exclusive to any Project tenant or the property of or installed by or for the Tenant.

All such maintenance, repairs and/or replacements shall be carried out and made by the Landlord in a proper workmanlike manner as expeditiously as is reasonably possible in the circumstances.

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(j) **Comply with Laws**

The Landlord shall comply, and shall cause the Property Manager to comply, with the requirements of all present and future federal, provincial or municipal governmental or quasi-governmental laws, by-laws, codes, regulations or orders (including those relating to environmental matters, health and safety and occupational health and safety) in force from time to time in respect of the Landlord's obligations as to the management, operation, repair and maintenance of the Project and the Project Lands, except for those matters the compliance with which are the responsibility of the Tenant under the Lease, including subclause 15(l)(iii)(D)and subclause 15(r).

(k) **Pay Property Taxes**

The Landlord shall pay when due Property Taxes, rates and charges levied or assessed against the Project and the Project Lands, saving and excepting any tax on personal property or income, licences, fees or other taxes or charges imposed upon the property, business or income of tenants of the Project and the use of any premises by tenants of the Project including, without limitation, the Leased Premises. The Landlord agrees that it shall upon the written request of the Tenant, contest the amount of any Property Taxes, or permit the Tenant, in consultation with the Landlord, to contest the amount of any Property Taxes (at the Tenant's sole cost) if the Landlord has not already done so or is commencing to do so, provided that the Tenant is not in default of a material provision of this Lease for which the Tenant has received written notice and has failed to remedy or to commence and proceed diligently to remedy and that all costs and expenses incurred by or on behalf of the Landlord as a result thereof shall form part of Operating Expenses.

(l) **Landlord's Insurance**

(i) The Landlord shall take out and keep in force through the Term (and shall at the request of the Tenant provide certificates of insurance as evidence thereof), upon such terms and conditions and in such amounts and deductibles as would be maintained by a prudent owner of a property similar to the Project, the following insurance:

(A) all risks property insurance with respect to the Project, including property of every kind owned by the Landlord, or for which the Landlord is legally liable, or installed by or on behalf of the Landlord in the Project (except property that the Tenant or any other tenant is required to insure), with limits for each accident in an amount of not less than the full replacement cost thereof without any deduction for depreciation and without co-insurance provisions. Such coverage shall insure against fire and all other perils as are from time to time included in the standard "all risks" coverage including, without limitation, sprinkler leakages (where applicable) and earthquake, flood and collapse, where available and carried by prudent landlords;

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(B) broad form comprehensive boiler and machinery insurance on a blanket repair and replacement basis with limits for each accident in an amount not less than the full replacement cost of all boilers, pressure vessels, air-conditioning equipment and miscellaneous electrical apparatus owned and operated by the Landlord or others other than the Tenant, on behalf of the Landlord in or serving the Project;

(C) commercial general liability insurance for third party liability including property damage, bodily injury (including personal injury), blanket contractual liability, non-owned automobile liability, and products and completed operations with respect to the Project and the Landlord's use of the Project; coverage to include the activities conducted by the Landlord and any of its servants, agents, contractors and persons for whom the Landlord is in law responsible, in any part of the Project; such policies shall have inclusive limits of Twenty-Five Million Dollars ($25,000,000) for each occurrence provided that if the limits of the Tenant policy under subclause 15(v)(i)(C) are increased, the limits of the Landlord's policy under this paragraph (C) shall be increased by a like amount;

(D) insurance for loss of rental income arising by virtue of, first, any abatement of Rent which occurs pursuant to the terms hereof, including the interruption of those services as set out in subclauses 16 (e), (f), (g), and (h) or, second, the termination of the Lease for the reasonable period of rebuilding of the Office Tower, as such period may be determined by the Landlord's Architect or engineer, but in any event for an indemnity period of at least eighteen (18) months (unless otherwise agreed); and

(E) such other forms of insurance (save and except mortgage insurance) as the Landlord and any Mortgagee may from time to time consider advisable, acting reasonably and to the extent required of prudent owners of property similar to the Project.

(ii) The Tenant acknowledges and agrees that, notwithstanding that the Tenant shall be contributing to the cost of the Landlord's insurance on the Project, the Tenant shall not have any insurable interest in, or any right to recover any proceeds under, any of the Landlord's policies except to the extent otherwise provided by the terms hereof.

(iii) Each of the Landlord's insurance policies shall:

(A) with respect to all risks property, boiler and machinery, and loss of rental income insurance policies, contain an endorsement whereby the right of subrogation against the Tenant, its servants, agents, employees and those for whom the Tenant is responsible in law (excluding the Tenant's independent contractors), is waived, if such waiver is available and the additional premium, if any, shall be included in Operating Expenses;

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(B) with respect to the commercial general liability insurance, such policy shall contain an endorsement whereby the Tenant, its servants, agents and employees are included as additional insureds on a non-reporting basis and a cross-liability and severability of interest clause, but only with respect to liability of the Landlord arising out of this Lease. It is acknowledged and agreed that the intention of the Landlord and the Tenant is that the Landlord's policies shall be primary and respond firstly to any claim, loss or damage, except where occurring with respect to the Leased Premises (unless in respect of claims, losses or damages pertaining to the Leased Premises caused by the negligent acts, omissions or wilful misconduct of the Landlord, its servants, agents, employees, contractors or those persons for whom the Landlord is responsible in law);

(C) contain an undertaking by the insurers that no change that reduces or restricts coverage, cancellation or termination of any policy will be made unless the Tenant has received not less than thirty (30) days prior written notice thereof, delivered in accordance with the provisions of this Lease.

(iv) The Landlord does hereby absolutely release and discharge the Tenant, its servants, agents, employees and those for whom the Tenant is responsible in law (excluding the Tenant's independent contractors), with respect to all costs, losses, damages and expenses suffered or incurred by the Landlord arising out of or in any way related to, in whole or in part, any matter in respect of which the Landlord is required to insure under this Lease, subject to the provisions of subclause 16(1)(iii)(B), and for which the Tenant is paying the Tenant's Proportionate Share of the premiums, provided that such release and discharge shall only apply to the extent of the insurance coverage under such policies of insurance.

(v) The Tenant shall neither do, permit nor omit to be done, anything in the Leased Premises or the Project which might result in any increase in the premiums for the Landlord's insurance coverage or which might result in actual or threatened reduction or cancellation of or material adverse change in such coverage.

(vi) The Tenant shall pay any increases in premiums caused by its actions or omissions or use of the Leased Premises or any portion thereof forthwith upon demand as an Operating Expense. In determining the Tenant's responsibility for any increased premiums, a statement by the party establishing the relevant insurance rate, together with such supporting documentation and information as the Tenant may reasonably require, to establish the relative insurance rate, shall be prima facie evidence of the various components of such rate. In the event of a disagreement as to such increase in premiums, the Tenant shall nonetheless pay such amount as required, if necessary to effect insurance as required under this Lease, and then refer the matter for dispute resolution (notwithstanding the payment of such amount) under clause 22.

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(vii) If any insurance coverage with respect to the Project or any part thereof is actually, or threatened to be, either cancelled, materially reduced or materially adversely changed by the insurer by reason of the condition, use or occupancy of the Leased Premises or any part thereof, or any act or omission by the Tenant or any person for whom the Tenant is at law responsible, and the Tenant fails to remedy the condition, use, occupancy, act or omission giving rise to such actual or threatened cancellation, material reduction or material adverse change within thirty (30) days (or such longer period of time as may be required provided the Tenant is diligently and continuously remedying same) after notice thereof from the Landlord to the Tenant, the Landlord may enter upon the Leased Premises and remedy such condition, use, occupancy, act or omission (but the Landlord shall have no right of termination in connection therewith, subject however to the provisions in the following sentence) and the Tenant shall on demand pay the Landlord for the remedy as an Operating Expense. If the Landlord is unable to remedy the condition, use, occupancy, act or omission of the Tenant giving rise to such actual or threatened cancellation, material reduction or material change in the Landlord's insurance policies, with the result that the Landlord's policies would be subject to cancellation, material reduction or material adverse change, the Landlord shall have no right of termination in connection therewith provided the Tenant obtains comparable insurance coverage to that of the Landlord which is then subject to such cancellation, material reduction or material adverse change and provides the Landlord with evidence thereof acceptable to the Landlord acting reasonably. The Tenant agrees that no such entry by the Landlord shall be deemed re-entry or breach of any covenant of quiet enjoyment contained in this Lease.

(viii) The Tenant agrees that the Landlord shall not be liable for any damage to any property located on the Leased Premises as a result of any such entry or re-entry by the Landlord, unless caused by default by the Landlord pursuant to the Lease or the negligent acts or omissions or wilful misconduct of the Landlord or its servants, agents or employees or those for whom the Landlord is responsible in law.

(ix) If requested by the Tenant, the Landlord shall provide to the Tenant evidence of such insurance required to be obtained by the Landlord, together with a breakdown of all insurance premiums and deductibles.

(m) **Indemnity of the Tenant**

Except:

(i) where due to, arising from or to the extent contributed to by the Tenant's breach of the Lease or the negligent acts or omissions or wilful misconduct of the Tenant, its servants, agents, employees, contractors and persons for whom the Tenant is responsible in law; and

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(ii) in respect of those liabilities, claims, damages, losses and expenses for which the Tenant is required to insure under this Lease pursuant to clause 15(v) hereof (other than in circumstances where the loss under such policies has arisen from or to the extent contributed to by the negligent acts or omissions or wilful misconduct of the Landlord, its servants, agents, employees, contractors and persons for whom the Landlord is responsible in law);

the Landlord shall indemnify and save the Tenant and all of its servants, agents, employees, contractors and persons for whom the Tenant is responsible in law harmless from and against any and all liabilities, claims, damages, losses and expenses, including all legal fees and disbursements, due to, arising from or to the extent contributed to by:

(iii) any breach by the Landlord of any provisions of this Lease;

(iv) any negligent acts or omissions or the wilful misconduct of the Landlord or any of its servants, agents, employees, contractors or persons for whom the Landlord is in law responsible on the Leased Premises or elsewhere on or about the Project; and

(v) any damage or destruction to any part of the Leased Premises caused by any negligent acts, omissions or wilful misconduct of the Landlord, or its servants, agents, employees, contractors or persons for whom the Landlord is in law responsible.

Notwithstanding the foregoing, the Landlord shall not be liable for any indirect or consequential damages suffered or incurred by the Tenant.

(n) **Additional Services and After Hours Services**

(i) If from time to time during the Term the Landlord is requested in writing by the Tenant to provide in the Leased Premises services which are not expressly set forth in this Lease and to the extent the Landlord can do so ("**Additional Services**") the Landlord shall first confirm in writing to the Tenant the total costs and expenses of such Additional Services together with reasonably detailed supporting documentation relating thereto. If the Tenant has confirmed in writing to the Landlord the acceptance by the Tenant of such total costs and expenses the Landlord shall provide the Additional Services. If the Tenant does not confirm in writing to the Landlord its acceptance of such costs and expenses the Landlord shall not be required to provide the Additional Services. The Landlord hereby agrees that the costs and expenses provided for in this subclause 16(n)(i) shall not include any other fee, profit or other benefit for the Landlord other than the management fee of three percent (3%) of such costs and expenses. The Tenant shall pay the Landlord for the costs and expenses within thirty (30) days following receipt of an invoice therefor.

(ii) If from time to time during the Term, the Landlord is required to provide to the Tenant services that are disproportionate to the services provided to the other tenants of the Project, the Landlord shall be entitled to charge the Tenant for the

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disproportionate cost of such services (as estimated by the Landlord acting reasonably) as Additional Services pursuant to subclause 16(n)(i), including the three percent (3%) management fee, but without any other profit or benefit to the Landlord.

(iii) Where the Tenant requires services in addition to those services provided during Normal Business Hours ("**After Hours Services**"), including without limitation, air conditioning, ventilation, lighting and related services, from time to time, the Tenant shall pay to the Landlord the cost and expense of the After Hours Services based on the Landlord's cost therefor plus the fee of three percent (3%) of such costs, but without any other profit or benefit to the Landlord.

(iv) If the Landlord and the Tenant disagree on the inclusion of any items as Additional Services or After Hours Services or the calculation or the accuracy of Additional Services or After Hours Services, the Tenant shall nevertheless make payment in accordance with any notice given by the Landlord, but the disagreement shall immediately be referred by the Landlord for prompt decision by an independent public accountant, architect or other professional consultant mutually acceptable to the Landlord and the Tenant who shall be deemed to be acting as an expert and not as an arbitrator, and a determination signed by the selected expert shall be final and binding on both the Landlord and the Tenant. If the Landlord and the Tenant cannot agree on the type of expert or the expert best qualified to determine the matter or matters which is or are the subject matter of disagreement, either the Landlord or the Tenant, on no less than five (5) Business Days notice to the other, shall have the right to apply to a Justice of the Court of Queen's Bench of Alberta for the selection of the type of expert or the expert best qualified, as the case may be. Any adjustment required to any previous payment made by the Tenant or the Landlord by reason of any such decision shall be made within thirty (30) days thereof and the party required to make payment under such adjustment shall bear all costs of the expert making such decision (including any costs incurred in the appointment of the expert).

(o) **Landlord's Obligations in respect of Hazardous Substances**

The Landlord represents to the Tenant that there are no Hazardous Substances located in or on the Project or the Project Lands. The Landlord shall:

(i) notify the Tenant immediately in the event that the Landlord receives written notice of any violation of an environmental law or that any order of any administrative tribunal or any other governmental authority is made or is proposed to be made against the Landlord in respect of any Hazardous Substance in, on or near the Project or the Project Lands, and shall notify the Tenant immediately of any discharge, release or discovery of any Hazardous Substance in, on or near any part of the Project or the Project Lands;

(ii) to the extent required by law remove any Hazardous Substances located in or on the Project (except for those Hazardous Substances brought onto the Leased

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Premises after the Commencement Date by the Tenant) or the Project Lands whether resulting from any act, omission or negligence of the Landlord or those for whom the Landlord is in law responsible; and

(iii) indemnify and save harmless the Tenant from and against all death, injury, damage to property, costs, liability and expenses resulting from the negligent handling of any Hazardous Substances stored in the Project or on the Project Lands except where so stored or brought upon the Project Lands or handled by the Tenant or those for whom the Tenant is in law responsible. If the Tenant, without fault on the part of the Tenant, is made a party to any litigation commenced by or against the Landlord by reason of the Landlord's negligent handling of any Hazardous Substances upon the Project Lands, or the existence of any Hazardous Substance upon the Project Lands prior to the date of this Lease, then the Landlord shall protect, indemnify and hold the Tenant harmless and pay all costs and expenses (including all legal fees on a solicitor and his own client basis) incurred or paid by the Tenant in connection with such litigation.

(p) **Tenant Allowance**

Provided the Tenant is not in default in the payment of Annual Rent or Additional Rent for which the Tenant has received written notice and has failed to make such payment, for ten (10) days after written notice of such failure has been provided by the Landlord to the Tenant, but for greater certainty not during such period of default and until such default has been remedied, the Landlord shall provide to the Tenant a one-time only allowance (the "**Tenant Allowance**") equal to Forty Five Dollars ($45.00) per square foot of the Office Premises and the Annex Premises for the making of leasehold improvements comprised of all hard and soft cost items required to physically construct, renovate, cable, connect, furnish and manage the Office Premises, including but not limited to all labour, materials, overheads, fees and any other costs associated with the development and furnishing of the Office Premises, to the specifications and sole satisfaction and discretion of the Tenant (collectively, the "**New Leasehold Improvements**"). Payment of the Tenant Allowance shall be made as follows:

(i) fifty percent (50%) of the Tenant Allowance shall be paid to the Tenant in six (6) equal monthly instalments commencing January 1, 2015, and

(ii) the remaining fifty percent (50%) of the Tenant Allowance shall be paid to the Tenant forty-five (45) days after the later of:

(A) the Initial Expiry Date;

(B) substantial completion as certified by the Tenant's designer of all New Leasehold Improvements in accordance with the drawings and specifications approved by the Landlord;

(C) provision by the Tenant of a statutory declaration declaring that it has paid in full all amounts payable for the New Leasehold Improvements in the Office Premises and that no builders' liens are registered against title to the

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Project with respect to the New Leasehold Improvements and that the builders' lien period applicable to such work has expired;

(D) provision by the Tenant of a letter from the Workers' Compensation Board (Alberta) stating that the Tenant's account therewith with respect to the Office Tower is in good standing; and

(E) provision by the Tenant of a written invoice requesting payment of the Tenant Allowance which shall include the amounts paid by the Tenant to each of the contractors and suppliers of the New Leasehold Improvements.

(iii) Following satisfaction of the provisions of subclause 16(p) above, to the extent that any portion of the Tenant Allowance is not expended by the Tenant in the making of the New Leasehold Improvements, the remainder of the Tenant Allowance shall be paid to the Tenant by certified cheque within thirty (30) days following written notice from the Tenant to the Landlord that it has completed the New Leasehold Improvements.

Following the commencement of construction of the New Leasehold Improvements, the Landlord shall provide the Tenant with a credit of free Annual Rent (based on $19.81 per square foot per annum) and Operating Expenses and Property Taxes (the "**Refurbishment Abatement**") for a four (4) month period for each floor vacated and refurbished (on a one time basis per floor) by the Tenant during the period commencing January 1, 2015 and ending December 31, 2018.

The Tenant shall provide three (3) months written notice to the Landlord as to which floors shall be vacated and refurbished and when such work shall commence. The Landlord shall provide the above credit for Annual Rent, Operating Expenses and Property Taxes upon the commencement of such work and for the ensuing four (4) months. For greater certainty, the Annual Rent credit shall be based on $19.81 per square foot per annum, applied monthly for such four (4) month period, and the Tenant shall continue to pay the amount of the Annual Rent that exceeds such credit.

(q) **Office Tower Identification**

Provided the Tenant is Nexen Energy ULC or its Successor(s) or its Affiliate assignees, the Tenant shall have the right during the Term to identify the Office Tower on its exterior over the main entries to the Office Tower, and on monument signage located outside the entry points of the Project, and at the top portion of the Office Tower by erecting at its sole cost a sign or signs indicating "Nexen Tower" or if acceptable to the Landlord such other name as the Tenant shall determine, each party acting reasonably. Also acting reasonably and expeditiously, the Landlord shall have fifteen (15) business days from receipt of same to approve the size, installation, nature and design of said signage. All signage costs shall be borne by the Tenant including installation, maintenance, removal, and restoration and repair costs associated with signage removal. The Landlord shall not be required to enforce the use of such name of the Office Tower by other occupants or tenants thereof. The rights granted to the Tenant in this subclause

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16(q) are personal to Nexen Energy ULC and its Successor(s) or its Affiliate assignees, and may not be transferred or assigned to any other person without the Landlord's prior written consent, which consent may be arbitrarily refused. Should the Tenant change its name, the Tenant may make corresponding changes to the exterior signage. Subject to the foregoing, the Landlord or other tenants shall be permitted to install signage upon the exterior of the Office Tower, the Project or the Project Lands identifying other tenants of the Project.

(r) **Landlord's Statement**

The Landlord shall at any time and from time to time upon not less than seven (7) days' prior notice from the Tenant, execute and deliver to the Tenant or such addressee as the Tenant may direct, a statement in writing stating that this Lease is unmodified and in full force and effect or, if modified, stating the modifications and that the Lease is in full force and effect as modified, the amount of the Annual Rent and Additional Rent payable hereunder, the dates to which the Annual Rent, Additional Rent and other charges hereunder have been paid, by instalments or otherwise, and whether or not, to the knowledge of the signatory of such certificate, there is any default on the part of the Tenant of which the Landlord has knowledge, and such other information as to the status or performance of any other covenants or obligations of the Landlord and the Tenant under this Lease as the Tenant may reasonably require.

(s) **Back-up Diesel Generator**

The Landlord will permit the Tenant to retain the diesel generator in its current location in the Project, to be used as back-up power for the Tenant's computer room power and computer room cooling requirements. Supply, installation, operation, repairs and testing of the diesel generator shall be the Tenant's sole responsibility.

17. DAMAGE OR DESTRUCTION

It is understood and agreed that if during the Term of this Lease the Project shall be damaged or destroyed, or otherwise rendered unfit for occupancy by the Tenant, then and in each such event the following provisions shall have effect:

(a) **Partial Damage to the Leased Premises**

If the Leased Premises are rendered partially unfit for occupancy by the Tenant, whether due to damage or destruction, or due to the failure of Base Building Services, or due to inaccessibility to the Leased Premises due to emergency, health, safety or other reasons, the Annual Rent and the Additional Rent hereby reserved shall abate in part only in the proportion that the part of the Leased Premises rendered unfit for occupancy bears to the whole of the Leased Premises or if the Leased Premises are rendered wholly unfit for occupancy by the Tenant the Annual Rent and Additional Rent hereby reserved shall be suspended, in each case until the Leased Premises have been rebuilt and/or repaired or restored as set out in subclause 17(e).

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(b) Damage to Project and Right to Terminate the Lease

If the Project shall be incapable in the opinion of the Landlord's Architect of being rebuilt and/or repaired or restored with reasonable diligence, within one year of the happening of such destruction or damage ("**Major Damage**"), such opinion of the Landlord's Architect to be communicated by the Landlord to the Tenant within thirty (30) days of the happening of such destruction or damage, then either the Landlord or the Tenant may, at its option, terminate this Lease by notice in writing to the other given within thirty (30) days (the "**Notice Period**") of the day of the delivery of the opinion of the Landlord's Architect. In the event of such termination notice being so given this Lease shall cease and become null and void from the date of such destruction or damage (or to the date of surrender if and to the extent the Tenant has continued to use all or a portion of the Leased Premises for the conduct of business after the date of such destruction or damage) and the Tenant shall surrender the Leased Premises within one hundred twenty (120) days and all interest therein, other than its Trade Fixtures and equipment, to the Landlord and the rent and all other monies payable hereunder shall be apportioned and shall be payable by the Tenant only to the date of such destruction or damage (or to the date of surrender if and to the extent the Tenant has continued to use all or a portion of the Leased Premises for the conduct of business after the date of such destruction or damage) and the Landlord may re-enter and repossess the Leased Premises. However, if within the Notice Period, neither the Landlord nor the Tenant shall give notice terminating this Lease, then upon the expiration of the Notice Period the Landlord shall with reasonable diligence proceed to rebuild and/or repair or restore the Project subject to subclause 17(e). In the event such termination notice is given by the Tenant and such Major Damage has occurred on or before December 31, 2016, then any Tenant Allowance previously paid to the Tenant shall be repaid to the Landlord:

(i) to the extent such Tenant Allowance had not been used to pay for New Leasehold Improvements at the time such Major Damage occurred or is required to be paid by the Tenant to third parties pursuant to obligations relating to the proposed New Leasehold Improvements, (in which case such payment shall be paid on the effective date of termination of this Lease); and

(ii) to the extent the Tenant recovers insurance proceeds arising from the loss of Leasehold Improvements, provided that the amount paid to the Landlord shall be prorated based on the amount of the Tenant Allowance previously paid to the Tenant (and not repaid to the Landlord pursuant to subclause 17(b)(i)) compared to the amount expended by the Tenant in respect of the New Leasehold Improvements (in which case such payment shall be made forthwith following receipt of such insurance proceeds).

(c) Restoration and Repair of the Project

If the Project is capable, in the opinion of the Landlord's Architect, of being rebuilt and/or repaired and restored with reasonable diligence within one year of the happening of such destruction or damage, such opinion of the Landlord's Architect to be communicated by the Landlord to the Tenant as set out in subclause 17(b), then the Landlord, with

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reasonable diligence, shall proceed to rebuild and/or repair and restore the Project subject to subclause 17(e). Provided, however, that if it shall require less than one year and more than one hundred twenty (120) days to rebuild and/or repair and restore the Project and such destruction or damage shall have occurred within the last two (2) years of the Term, the Landlord shall not be obligated to rebuild and/or repair and restore the Project.

(d) **Carry Out Repair Diligently**

If, pursuant to the provisions of this clause, the Landlord shall be obligated to expeditiously rebuild and/or repair and restore the Project, such rebuilding and/or repair shall be commenced promptly and shall be completed with reasonable diligence so as to rebuild and/or repair and restore the Project as soon as is practical in the circumstances.

(e) **Landlord's Obligation to Repair and Restore**

It is expressly understood and agreed that the obligation of the Landlord to expeditiously rebuild and/or repair or restore the Project shall include all structural elements thereto and Project systems therein but shall not extend to or be deemed to include the rebuilding and/or repair and restoration of any alterations, additions, extensions, equipment or installations existing prior to such damage or destruction and made by or for the Tenant upon the Leased Premises. The Tenant shall expeditiously rebuild and/or repair and restore the Leased Premises in accordance with this Lease and Annual Rent and Additional Rent hereunder shall be deemed to commence on that date which is the shorter of:

(i) 60 days following the date of delivery to the Tenant of written notice from the Landlord that the Leased Premises are ready for the Tenant to commence its repairs to the Leased Premises pursuant to its obligations under this Lease; or

(ii) the date the Tenant finishes such repairs,

the intention being that the Tenant shall have a fixturing period equal to the shorter of the time periods in clauses (i) and (ii) above to complete its repairs without the payment of Annual Rent and Additional Rent relating to Operating Expenses and Property Taxes.

(f) **Use of Insurance Proceeds**

The Landlord agrees with the Tenant that if any mortgage, trust deed or any other financial charge or encumbrance with respect to the Landlord's interest is at any time registered against the title to the Project, or any portion thereof, while this Lease is in force and effect, the Landlord shall require the holder of any such mortgage, trust deed, or other financial charge or encumbrance to first agree in writing directly with the Tenant and with the Landlord by way of agreement acceptable to the Tenant, to permit the use of all proceeds of insurance payable in connection with any loss or destruction to the Project for repair and reconstruction of the Project in accordance with the provisions of this Lease. The Tenant shall use the proceeds of its insurance (or what it would have received if it maintained insurance as required under this Lease) to repair the Leased Premises.

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18. EXPROPRIATION

If during the Term of this Lease the whole of the Leased Premises or any part of the Leased Premises, to the extent that the remainder is not sufficient in size to allow the Tenant in its reasonable opinion to efficiently carry on its normal business operations, shall be taken or expropriated by any public authority under the power of expropriation, then the obligation of the Tenant for the payment of rent and other monies beyond the date of vesting of title to the Leased Premises in the public authority or the date upon which the public authority shall have the right to the possession of the Leased Premises, whichever shall be the earlier (the "**Condemnation Date**"), shall cease and determine and following the due settlement by the expropriating party of such award or awards as may be payable as a result of such expropriation, this Lease and all right, title and interest of the Tenant hereunder shall terminate, effective as of the Condemnation Date. However, if during the Term of this Lease a part of the Leased Premises shall be taken or expropriated by any public authority under the power of expropriation and the remainder of the Leased Premises is sufficient to allow the Tenant in its reasonable opinion to efficiently carry on its normal business operations, this Lease shall continue in full force and effect, save and except the Tenant shall be liable for rent in respect of the part of the Leased Premises so taken only up to the Condemnation Date and thereafter the rent and other charges payable hereunder shall be reduced and adjusted proportionately.

Upon any such taking or expropriation, the Landlord shall be entitled to receive and retain the entire award, compensation and damages for the affected lands and improvements and the Tenant shall be entitled to receive and retain the entire award, compensation and damages for the value of its property including, without limitation, its trade fixtures and chattels in the Leased Premises, its leasehold estate, the unexpired Term of the Lease and any renewals thereof, for costs of removal or relocation, for business interruption expense and for any other damages arising out of such taking or expropriation, but the Tenant shall not advance any claim with respect thereto against the Landlord. If any such award made or compensation or damages paid to either party specifically includes an award or amount for the other, the party receiving the same shall promptly account therefor to the other.

19. PARKING STALLS

(a) At all times during the Term the Tenant shall have the exclusive irrevocable licence and right to use, which the Landlord hereby grants to the Tenant, and the Tenant hereby accepts and agrees to such license and right to use, from the Landlord, a contiguous block of non-tandem parking stalls (collectively, "**Stalls**", and individually a "**Stall**") located in the uppermost levels of the Project's Parking Facility. The Stalls shall be located commencing on the top parking level and progressing to the contiguous lower levels until the required number of Stalls have been allocated and shall be available on an unreserved basis. The number of Stalls in the contiguous block as of the date hereof is three hundred thirty four (334). The number of Stalls in the contiguous block as of the Initial Expiry Date shall be three hundred thirty nine (339).

(b) Subject to subclause 19(c) below, the rate for each Stall shall be based on the market rate for comparable unreserved parking stalls in buildings comparable to the Project in a comparable location in downtown Calgary and is subject to adjustment upon the

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Landlord providing thirty days prior written notice to the Tenant. The fees payable for all Stalls shall be payable in advance on the first day of each and every month as Additional Rent, commencing on the Commencement Date. In the event of any dispute as to the market rate for the Stalls the matter shall be determined by arbitration pursuant to this Lease, having regard to the provisions of this clause 19.

(c) The Tenant shall have the right, at its cost, subject to the Landlord's prior approval, to install signs identifying the parking stalls used by the Tenant as the Tenant's Stalls. The cost of maintaining such signs shall be the responsibility of the Tenant.

(d) Concurrent with execution of this Lease and to the extent not already done so, the Tenant shall execute the Landlord's standard parking agreement attached hereto as Schedule "K".

(e) From and after August 1, 2005 to the Initial Expiry Date, inclusive (and for no other period) the rate for each of the forty three (43) reserved stalls provided to the Tenant pursuant to the 6th - 10th Floor Agreement shall be based on the market rate for comparable reserved parking stalls in buildings comparable to the Project in a comparable location in downtown Calgary. For greater certainty, after the Initial Expiry Date, the aforesaid forty three (43) stalls shall be treated as unreserved stalls on the same terms as provided in subclauses 19 (a), (b) and (c).

20. PROPERTY MANAGEMENT

To the extent the Property Manager has responsibility and liability to the Landlord to manage and operate the Project and the Project Lands, the Landlord shall cause the Property Manager to carry out, implement and comply with the obligations of the Landlord to the Tenant pursuant to the terms and conditions of this Lease in a professional and diligent manner consistent with property management of first class office buildings in the business district of the City of Calgary.

21. CONSENTS OR APPROVALS

The consent or approval of the Landlord or the Tenant to any matter required pursuant to this Lease shall be of no force and effect unless given in writing. Except as otherwise expressly provided in this Lease to the contrary, whenever a determination by, or the consent, acceptance or approval of, a party is required or the opinion of any party is to be provided or given:

(a) such determination, consent, acceptance or approval shall not be unreasonably withheld or delayed, nor any such opinion shall be given otherwise than in good faith, whether so stated or not; and

(b) except for any provision of this Lease pertaining to assignment or subletting, the party whose determination, consent, approval or opinion is required, unless otherwise expressly provided in this Lease, within ten (10) Business Days after the request therefor is received, shall advise the party requesting same of its determination or opinion, that it consents or approves, or that it withholds its consent or approval, as the case may be, and if the party whose determination, opinion, consent or approval has been requested does nothing within such period of ten (10) Business Days, the party who requested such determination, consent, approval or opinion may re-issue its request (which request shall

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in bold type refer to this Section and specify that a failure to respond in five (5) Business Days shall result in deemed approval) and if within five (5) Business Days after such request the party whose determination, opinion, consent or approval has been requested does nothing within such five (5) Business Day period, that party shall be conclusively deemed to have given its consent or approval or make a determination or to have given an opinion consistent with that of the other party. For any consent, approval, determination or opinion required for any provision under this Lease as to assignment or subletting, the period of time within which a party must respond is ten (10) Business Days and failing a response by one party to the request of another, the party failing to respond shall be conclusively deemed to have given its consent or approval or make a determination or give an opinion consistent with that of the other party.

22. ARBITRATION

Where pursuant to the provisions of subclauses 3(c), 15(z), 16(l) and 19(b) of this Lease any dispute is to be referred to arbitration, the matters in dispute shall be settled by arbitration pursuant to the *Arbitration Act* (Alberta), as amended from time to time under legislation in substitution therefor. In such cases the matter in dispute shall be determined by a single arbitrator mutually acceptable to both the Landlord and the Tenant, having qualifications which are necessary having regard to the nature of the dispute in question. If the Landlord and the Tenant cannot agree upon the arbitrator within the time provided in this Lease, or where no time is specifically provided, then within five (5) Business Days from the date either party notifies the other in writing that it is referring the matter to arbitration in the event the parties are unable to agree upon or have not resolved such dispute, either the Landlord or the Tenant may upon two (2) days prior written notice to the other apply to a judge of the Court of Queen's Bench of Alberta to appoint such an arbitrator.

23. DEFAULT BY THE TENANT

If any of the events of default occur as follows:

(a) if the Tenant fails to pay Annual Rent or Additional Rent or any part thereof and such default continues for ten (10) days after written notice of such failure has been provided by the Landlord to the Tenant; or

(b) if the Tenant fails to observe, perform or keep all the covenants, agreements, conditions, restrictions or stipulations herein contained, to be observed, performed or kept by the Tenant including default in payment of any other amounts which are payable or reimbursable by the Tenant to the Landlord, and if any such default continues for thirty (30) days after written notice thereof to the Tenant by the Landlord, and the Tenant shall not have remedied such default within such thirty (30) day period (or if any such failure or default would reasonably require more than thirty (30) days to remedy or rectify, unless the Tenant commences the remedy or rectification within such thirty (30) day period and thereafter proceeds diligently with the remedy or rectification of the failure or default); or

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(c) if any order is made by a court of competent jurisdiction declaring the Tenant bankrupt or insolvent, or the Tenant takes the benefit of any statute that may be in force for bankrupt or insolvent debtors or the Tenant becomes involved in voluntary winding-up proceedings; or

(d) if the Tenant becomes involved in involuntary winding-up proceedings or if a receiver shall be appointed for the business, property, affairs or revenues of the Tenant and the Tenant fails to contest in good faith such proceedings or appointment by appropriate and diligent action,

then and in any of such cases, provided such default shall be continuing beyond the period, if any, to cure such default set out above and in addition to the Landlord's rights and remedies at law which shall be cumulative and not alternative, it shall be lawful for the Landlord at any time thereafter to re-enter into and upon the Leased Premises or any part thereof, and take possession thereof, by force or otherwise, as it may see fit and to have, repossess and enjoy the Leased Premises as of its former estate, anything hereinafter contained to the contrary notwithstanding and to effect termination of this Lease by giving Notice of such termination to the Tenant; and provided such default shall be continuing beyond the period for cure set out above, no acceptance of rent subsequent to any breach or defaults other than non-payment of rents and no condoning, excluding or overlooking by the Landlord on previous occasions of breaches or defaults similar to that for which re-entry is made shall be taken to operate as a waiver of this condition, nor in any way to defeat or affect the right of the Landlord hereunder. The proviso shall extend and apply to all covenants herein contained, whether positive or negative.

Default hereunder by the Tenant entitling the Landlord to declare forfeiture of this Lease and, if it so elects, to terminate shall not affect or prejudice the right of the Landlord to sue for all arrears of rent and other monies due under this Lease prior to termination or re-entry, whichever shall be later, and all damages arising from the unexpired portion of the Term (including without limitation the payment of all Annual Rent and Additional Rent payable thereunder) and the default of the Tenant, subject always to the Landlord's obligation at law, if any to mitigate its damages.

24. DISTRESS

The Tenant waives and renounces the benefit of any present or future law taking away or limiting the Landlord's right of distress on the property of the Tenant and, notwithstanding any such law, the Landlord may seize and sell all the Tenant's goods and property within the Leased Premises and apply the proceeds of such sale upon rent and all other amounts outstanding under this Lease including the costs of the seizure and sale in the same manner as might have been done if such law had not been passed.

25. RIGHT OF RE-ENTRY

On the Landlord becoming entitled to re-enter the Leased Premises under any of the provisions of this Lease, the Landlord, in addition to all other rights, shall have the right to enter the Leased Premises and to relet the Leased Premises (without effecting a termination of this Lease as a result) and to receive the rent therefor and, to apply the proceeds of such rent derived from

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reletting the Leased Premises upon account of the Rent payable under this Lease, and the Tenant shall be liable to the Landlord for the deficiency, if any, and shall pay any such deficiency upon demand.

26. RIGHT TO PERFORM

All covenants and terms herein contained to be observed and performed by the Tenant shall be observed and performed by the Tenant at its expense, and if the Tenant shall fail, neglect or refuse to observe and perform any of the covenants or terms herein contained, without precluding the Landlord from availing itself of any other remedy at law or in equity, the Landlord may at its option observe and perform, but shall not be obligated to observe and perform, on the Tenant's behalf any such covenant or term and if the Landlord shall pay any sum of money or do any act which requires the payment of money by reason of failure, neglect or refusal of the Tenant to observe and perform such covenant or term, or if the Tenant fails to pay any monies due by it to the Landlord hereunder, the sum or sums of money so paid or owing to the Landlord shall be payable by the Tenant to the Landlord forthwith upon demand and shall be recoverable by the Landlord in the same manner as rent in arrears.

27. INTEREST ON ARREARS

If default shall be made by the Tenant in the payment of Annual Rent, Additional Rent or other monies when the same become due and payable pursuant to any covenant, agreement or condition contained in this Lease, interest at the rate equal to four (4%) percent above the then Prime Rate shall be payable on any such monies from the date of default to the date of payment and no such default shall be considered to be remedied until the said interest has also been paid. If default shall be made by the Landlord in the payment of any monies owing to the Tenant pursuant to this Lease when the same become due and payable pursuant to any covenant, agreement or condition contained in this Lease, interest at the rate equal to four percent (4%) above the then Prime Rate shall be payable on any such monies from the date of default to the date of payment and no such default shall be considered to be remedied until the said interest has also been paid. This covenant shall survive the expiration or sooner termination of this Lease.

28. NON-WAIVER BY THE LANDLORD

No covenant, term or condition of this Lease to be performed, observed or satisfied by the Tenant shall be waived except by written consent of the Landlord and the forbearance or indulgence by the Landlord in any regard whatsoever shall not constitute a waiver of the covenant, term or condition to be performed by the Tenant and the Landlord shall be entitled to invoke any remedy available under this Lease or at law or in equity despite such forbearance or indulgence. The waiver of any breach of any covenant, term or condition by the Landlord shall not constitute a waiver of any other breach regardless of the Landlord's knowledge thereof. The subsequent acceptance of rent by the Landlord shall not be deemed a waiver of any preceding breach of any obligation hereunder by the Tenant other than the failure to pay the particular rent so accepted and the acceptance by the Landlord of any rent from any person other than the Tenant shall not be construed as a recognition of any rights not herein expressly granted, or as a waiver of any of the Landlord's rights, or as an admission that such person is, or as a consent that such person shall be deemed to be, a subtenant under or assignee of this Lease. Nevertheless the

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Landlord may accept rent from any person occupying the Leased Premises at any time without in any way waiving any right under this Lease. Any condoning, excusing or overlooking by the Landlord of any default, breach or non-performance by the Tenant at any time in respect of any payment, covenant, agreement, proviso or condition contained in this Lease shall not operate as a waiver of the Landlord's rights in respect of any subsequent and/or continuing default, breach or non-performance, or defeat or affect in any way the rights of the Landlord herein in respect of any such subsequent default, breach or non-performance. Time shall be of and continue to be of the essence of this Lease and of all covenants, agreements, provisos and conditions contained in this Lease.

29. NON-WAIVER BY THE TENANT

No covenant, term or condition of this Lease to be performed, observed or satisfied by the Landlord shall be waived except by written consent of the Tenant and the forbearance or indulgence by the Tenant in any regard whatsoever shall not constitute a waiver of the covenant, term or condition to be performed by the Landlord and the Tenant shall be entitled to invoke any remedy available under this Lease or at law or in equity despite such forbearance or indulgence. The waiver of any breach of any covenant, term or condition by the Tenant shall not constitute a waiver of any other breach regardless of the Tenant's knowledge thereto. Any condoning, excusing or overlooking by the Tenant of any default, breach or non-performance by the Landlord at any time in respect of any payment, covenant, agreement, proviso or condition contained in this Lease shall not operate as a waiver of the Tenant's rights in respect of any subsequent and/or continuing default, breach or non-performance, or defeat or affect in any way the rights of the Tenant herein in respect of any such subsequent default, breach or non-performance. Time shall be of and continue to be of the essence of this Lease and of all covenants, agreements, provises and conditions contained in this Lease.

30. LEGAL COSTS

The Tenant hereby agrees to pay to the Landlord promptly on demand all legal fees, on a solicitor and his own client basis, incurred by the Landlord for the enforcement of any rights of the Landlord under this Lease or in the enforcement of any of the provisions of this Lease or in the obtaining of possession of the Leased Premises, or for the collection of any monies from the Tenant or for any other related matter. This covenant shall survive the expiration or sooner termination of this Lease.

The Landlord hereby agrees to pay to the Tenant promptly on demand all legal fees, on a solicitor and his own client basis, incurred by the Tenant for the enforcement of any rights of the Tenant under this Lease or in the enforcement of any provision of this Lease or for the collection of any monies from the Landlord owing to the Tenant pursuant to the provisions hereof. This covenant shall survive the expiration or sooner termination of this Lease.

31. FORCE MAJEURE

For the purpose of this Lease, force majeure shall mean any act of God, strikes, lockouts or other industrial disturbances, acts of the Queen's enemies, sabotage, war, blockades, insurrections, riots, epidemics, lightning, earthquakes, floods, fires, washouts, nuclear and radiation activity or

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fallout, arrests, and restraints of rulers and people, civil disturbances, explosions, breakage of or accident to machinery, inability to obtain materials or equipment, any legislative, administrative or judicial action which has been resisted in good faith by all reasonable legal means (but without the payment of additional sums of money), any act, omission or event whether of the kind herein enumerated or otherwise not within the control of such party, and which by the exercise of due diligence such party could not have prevented, but lack of funds on the part of such party shall be deemed not to be a force majeure. Save and except for the obligations of the Tenant as set forth in this Lease to pay Rent, if either party shall fail to meet its obligations within the time prescribed, and such failure shall be caused or materially contributed to by force majeure, such failure shall not be deemed to be a breach of the obligations of such party and the time for the performance of such obligations shall be extended accordingly. Provided, however, nothing contained in this clause 31 shall extend or otherwise change the date of expiration of the Term hereof.

32. RESERVATION TO THE LANDLORD

Any space within the Leased Premises used for stairways and passageways to other adjoining premises and stacks, shafts, pipes, conduits, ducts or other Project facilities, the heating, electrical, plumbing, ventilation, air conditioning and other Project systems, and the use thereof as well as access thereto through the Leased Premises for the purpose of use, operation, maintenance and repair are expressly reserved to the Landlord. Notwithstanding the reservation of such areas to the Landlord, the Tenant acknowledges that the cost of operation, maintenance and repair thereof shall be included in Operating Expenses.

33. OVERHOLDING

Upon the expiration or other termination of this Lease, the Tenant shall quit and surrender the Leased Premises in good order and condition, reasonable wear and tear excepted, and subject to and in accordance with the provisions of this Lease. If, however, the Tenant remains in occupation beyond the expiration or other termination of this Lease (without the written agreement of the Landlord to such occupation), such continued occupation by the Tenant shall not have the effect of extending the Term or renewing the Term of this Lease for any period of time, notwithstanding any statute or law to the contrary, and the Tenant shall be presumed to occupy the Leased Premises against the will of the Landlord, who shall thereupon be entitled to make use of any and all remedies by law provided for the expulsion of the Tenant including claims for loss or damages directly suffered and incurred by the Landlord as a result thereof; provided however, that the Landlord, at its option, may give to the Tenant written notice that the Tenant may continue to occupy the Leased Premises under a tenancy from month to month (and which tenancy may be terminated by either party giving one clear calendar month prior written notice to the other) and otherwise on the same terms and conditions as are contained in this Lease except for the amount of Annual Rent which, unless otherwise specified in such written notice, shall be equal to one and one-half times the Annual Rent payable hereunder at the time of such expiration or termination.

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34. NOTICES

All notices, demands and requests ("**Notices**") which may be or are required to be given under this Lease shall be in writing. All Notices shall be served personally or sent by facsimile transmission or pdf transmission addressed:

in the case of the Tenant, to it at:

Nexen Energy ULC
Suite 2900, 801 – 7th Avenue SW
Calgary, AB T2P 3P7
Attention: Jim McLeod
Email: jim.mcleod@nexencnoocltd.com
Facsimile No: (403) 232-1641

with a copy to:

Blake Cassels & Graydon
Barristers & Solicitors
Suite 3500, 855-2nd Street S.W.
Calgary, AB T2P 4J8
Attention: Mr. Richard Dawson, Q.C.
Email: rick.dawson@blakes.com
Facsimile No: (403) 260-9700

and, in the case of the Landlord, to it at:

Century West Management Inc.
801 7th Avenue SW
Calgary, AB T2P 3P7
Attention: Mitch Brody
Email: mbrody@century-west.com
Facsimile: (403) 262-3013

and;

Centurion Holdings Ltd.
Suite 1210, 606 4th Street SW
Calgary, AB T2P1T1
Attention : Marc Sardachuk
Email: msardachuk@centurionholdings.ca
Facsimile: (403) 237-8097

and:

OPTrust 801 7th Avenue Inc.
1 Adelaide Street East, Suite 1200
Toronto, ON M5C 3A7

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Attention : Marcel Shoraka
Email: MShoraka@optrust.com
Facsimile: (416) 681-2500

or at such other place in Calgary, Alberta as either the Landlord or the Tenant may from time to time designate by written Notice to the other. Notices which are served in the manner aforesaid shall be deemed sufficiently served or given for all purposes of this Lease, in the case of those personally served, on the day of such service, and, in the case of those given by facsimile transmission or pdf transmission, on the first Business Day following the date of successful transmission thereof.

35. TIME OF ESSENCE

Time shall be of the essence of this Lease.

36. LANDLORD'S REPRESENTATIONS

The Tenant acknowledges that there have been no representations, warranties, agreements, covenants, or conditions expressed or implied, affecting or relating to this Lease made or given by the Landlord or any agent, officer, employee or servant of the Landlord which are not set out in this Lease and that this Lease constitutes the entire agreement between the Landlord and the Tenant and may not be modified except by subsequent agreement in writing duly signed by the Landlord and the Tenant.

37. ENUREMENT

Subject to the provisions of this Lease respecting assignment by the Tenant and the Landlord, this Lease shall enure to the benefit of and be binding upon the Landlord, the Tenant and their respective successors and permitted assigns.

38. CAPTIONS

The captions appearing in this Lease have been inserted as a matter of convenience and for reference only and in no way define, limit or enlarge the scope or meaning of this Lease, nor of any provision hereof.

39. GOVERNING LAW

This Lease shall be construed and governed by the laws and the courts of the Province of Alberta and the laws of Canada applicable therein and the parties expressly attorn to the non-exclusive jurisdiction of such courts. Should any provision or condition of this Lease be or become illegal or not enforceable it or they shall be considered separate and severable from this Lease and its remaining provisions and conditions shall remain in force and be binding upon the parties hereto as though the said provision or condition had never been included.

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40. LANDLORD'S REPRESENTATION AND WARRANTY AS TO RESIDENCY

The Landlord represents and warrants to the Tenant that it is not a non-resident within the meaning of the *Income Tax Act* (Canada) ("**Tax Act**"). If the Landlord becomes a non-resident, the Landlord shall immediately notify the Tenant.

41. WITHHOLDING OF TAX BY THE TENANT

Where the Landlord is a non-resident within the meaning of the Tax Act or the Tenant receives a demand or notice from a Taxing Authority, the Tenant may withhold any non-resident withholding tax exigible from the payment by the Tenant of rent or any other amount to the Landlord under this Lease and if the Tenant does withhold any such tax, the Tenant shall, in accordance with the requirements of the Tax Act, remit such tax directly to the applicable Taxing Authority and shall provide evidence of such payment to the Landlord. Upon the Tenant making such payment to the Taxing Authority, the Tenant shall have no further liability to the Landlord in respect of that portion of the rent or amount that the Tenant withheld on account of such tax.

42. RIGHT OF FIRST OFFER TO PURCHASE

Provided:

(a) The Tenant is not then in default of a material provision of the Lease for which the Tenant has received written notice and has failed to remedy or to commence and proceed diligently to remedy, and

(b) The Tenant is Nexen Energy ULC or its permitted assignee,

then, if the Landlord determines to sell all or any portion of the Project and the Project Lands, (in either such case, a "**Sale**") to someone (a "**Third Party**") other than a Beneficial Owner or a person who is not dealing at arm's length (within the meaning attributed to such term pursuant to the *Income Tax Act*, Canada) with the Landlord or a Beneficial Owner, or a third party with prior rights to purchase, then:

(c) The Landlord or Beneficial Owner, as the case may be, shall promptly notify the Tenant by written notice of its intention to effect a Sale (the "**Sale Notice**");

(d) The Landlord or Beneficial Owner, as the case may be, shall, within five (5) Business Days of such written notice, provide the Tenant with the following:

(i) an executed form of offer to sell such interest in the Project and the Project Lands (the "**Sale Offer**"), setting forth: (i) the price at which it is prepared to sell such interest in the Project or the Project Lands; (ii) a property due diligence condition in favour of the Tenant with a due diligence period of sixty (60) days; and (iii) including all attachments and schedules;

(ii) all collateral agreements and documents proposed to be entered into in connection with or as a result of a Sale, including any co-owners agreement in connection with a sale of a portion of the Project or the Project Lands; and

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(iii) all information intended to be provided by the Landlord or such Beneficial Owner to a Third Party in connection with a Sale, including but not limited to: all tenancy schedules and tenant leases, operating expense statements, parking agreements, encumbrances on title, mortgages, and any other information which has or will have influence on the value of the Project and the Project Lands or which is reasonably requested by the Tenant.

(e) subject to compliance by the Tenant of the requirements set forth in subclause 42 (f), the Tenant shall have twenty (20) Business Days (**"Offer Period"**) after receiving the Sale Offer and other documents and information set forth in subclause 42 (d) in which to advise the Landlord in writing (**"Election Notice"**) of its decision to purchase the Landlord's or the Beneficial Owner's interest in the Project and the Project Lands and enclosing an executed Sale Offer creating a binding purchase agreement;

(f) accompanying the Election Notice and executed Sale Offer, the Tenant shall pay a deposit (the **"First Offer Deposit"**) to the Landlord's solicitor, in trust, in the amount of One Million ($1,000,000) Dollars, which shall constitute a refundable deposit to be refunded to the Tenant if the due diligence condition set forth in the Sale Offer is not waived or credited against the purchase price and transferred to the Landlord on the closing (or forfeited to the Landlord in the event of the failure of the Tenant to complete the closing) of the purchase of the Landlord's or the Beneficial Owner's interest in the Project and the Project Lands in accordance with the Sale Offer;

(g) if at the expiration of the Offer Period, the Tenant has not accepted the Sale Offer, the Sale Offer shall be deemed to have been declined, and the Landlord or the Beneficial Owner, as the case may be, shall then have the right to sell its interest in the Project and the Project Lands to any Third Party pursuant to an offer (a **"Third Party Offer"**) at any price not less than the purchase price and on terms, on the whole, not more favourable to the Third Party than those terms offered to the Tenant in the Sale Offer.

Upon the sale of any interest in the Project or the Project Lands to any Third Party in accordance with subclause 42 (g) or subclause 42 (h), this right of first offer to purchase shall terminate in respect of such interest. This right of first offer to purchase shall survive respecting any remaining partial interest in the Project or the Project Lands by a Beneficial Owner.

(h) If the Landlord or the Beneficial Owner, as the case may be, subsequently determines to sell its interest in the Project and the Project Lands to any Third Party at a price that is less than the purchase price or on terms, on the whole, more favourable to the Third Party than those terms offered to the Tenant in the Sale Offer, the Landlord shall provide to the Tenant a revised Sale Notice together with a revised Sale Offer reflecting such reduced sale price, including all attachments, schedules and collateral agreements and documents proposed to be entered into in connection with or as a result of the revised Sale Offer. The Tenant shall have seven (7) Business Days after receiving the revised Sale Notice and revised Sale Offer in which to advise the Landlord in writing of its decision to purchase the Landlord's or the Beneficial Owner's interest in the Project and the Project Lands under the revised Sale Offer and to pay the First Offer Deposit. If at the expiration of the seven (7) Business Day notice period referred to above, the Tenant has not elected

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to purchase the Landlord's or the Beneficial Owner's interest in the Project and the Project Lands in the manner required, the revised Sale Offer shall be deemed to have been declined by the Tenant, and the Landlord or the Beneficial Owner shall then have the right to sell its interest in the Project and the Project Lands to such Third Party in accordance with and pursuant to the Third Party Offer at any price not less than the purchase price and on terms, on the whole, not more favourable to the Third Party than those terms offered to the Tenant in the revised Sale Offer.

(i) If the Landlord or the Beneficial Owner does not complete the sale of the Project and the Project Lands in accordance with the Third Party Offer within One Hundred and Eighty (180) days following the Tenant's receipt of the Sale Notice or the revised Sale Notice, as the case may be, then the Landlord or the Beneficial Owner shall not complete such sale in accordance with such Third Party Offer except upon further compliance with the Tenant's right of first offer to purchase on the terms provided herein.

(j) The Tenant agrees that at all times it will keep confidential all information it obtains from the Landlord relating to any sale or potential sale of the Project and the Project Lands. The Tenant will not communicate with any prospective purchaser of the Project and the Project Lands regarding the terms of any potential purchase and sale of the Project and the Project Lands or any matter relating to the post sale operation and management of the Project and the Project Lands without first obtaining the written consent of the Landlord, which consent will not be unreasonably withheld.

43. CONFIDENTIALITY

The Tenant agrees that the terms and conditions of this Lease are sensitive and confidential in nature and that the disclosure of this information to any third party may be expected to cause substantial loss and damage to the Landlord. For this reason, the Tenant agrees that, except for disclosure as required by law or disclosure on the same confidential basis only to officers, directors and/or employees and advisors of the Tenant who have a *bona fide* and actual need to know the confidential terms on behalf of the Tenant, the Tenant shall hold in strict confidence all terms and conditions of this Lease and shall not disclose the same to any third party.

44. NO RELOCATION

Throughout the Term and any extensions thereof, the Landlord, its agents or nominees, shall not have the right to relocate the Tenant from the Premises for any reason whatsoever. The Landlord shall have no right to relocate the Common Facilities or the Storage Premises without the consent in writing of the Tenant. Notwithstanding the foregoing, the Tenant will enter into discussions with the Landlord, without any obligations of the Tenant, to set out the terms and conditions under which the Conference Centre Lands may be redeveloped at any time following the Initial Expiry Date. It is understood that those uses and the facilities currently provided to the Tenant in the portion of the Project located on the Conference Centre Lands would be replicated without interruption of the Tenant's use thereof to the satisfaction of the Tenant, acting reasonably.

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45. POINT OF PRESENCE ROOM

The Tenant shall be provided access to a dedicated point of presence room in the lower level of the Office Tower at no additional cost to the Tenant. The Tenant may choose the telecommunications provider or providers from time to time which provide dedicated services to the point of presence room.

46. ROOF ACCESS

Provided that the Tenant complies with all Applicable Laws and obtains any necessary permits, the Tenant shall be permitted to use the roof of the Project on an exclusive basis, except for the existing uses on the roof and the Landlord's access to the roof, at no cost to the Tenant for such use, and may at its cost and expense install and operate thereon dishes, disks, antenna and other communications equipment in locations selected by the Tenant and approved by the Landlord, acting reasonably. At the expiry or earlier termination of the Term, all such dishes, disks, antenna and other communications equipment shall, at the Landlord's request, be removed at the Tenant's expense. In the event that these installations cause any damage to the roof or the roof structure and systems, the cost of repair of such damage shall also be at the Tenant's expense.

47. IMPROVEMENTS TO THE PROJECT

The Landlord and the Tenant shall form a committee of no less than 4 persons with equal representation by the Landlord and the Tenant, who shall meet no less than four (4) times per year during the Term and any extensions thereof (the "**Committee**"), in order to review and recommend improvements to the Project, both parties acting reasonably.

In addition to the Unused Portion, the Landlord covenants and agrees to allocate a minimum of Three Million Dollars ($3,000,000) and a maximum of Five Million Dollars ($5,000,000) which shall be used to refurbish and upgrade the common areas of the Project during the 11th year following the Initial Expiry Date, as per the recommendations of the Committee. Additionally, provided that the Tenant exercises its first extension option as outlined in Section 3(c), the Landlord covenants and agrees to allocate a minimum of Two Million Dollars ($2,000,000) and a maximum of Three Million Dollars ($3,000,000) which shall be used to refurbish and upgrade the Common Facilities of the Project during the 1st year of the first extension of the Term, as per the recommendations of the Committee. The Landlord and the Tenant agree that the allocation of amounts outlined above shall be amortized over the useful life of such refurbishment or upgrade and shall be recovered by the Landlord from the Tenant as Operating Costs.

IN WITNESS WHEREOF the parties hereto have executed this Lease by affixing their corporate seals by their authorized officers in that behalf as of the day and year set out above.

LANDLORD: **801 SEVENTH INC.**

Per: _____

Per: _____

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TENANT: **NEXEN ENERGY ULC**

Per: _____

Per: _____

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SCHEDULE "A"

DEFINITIONS

"Additional Rent" means any and all other and further rents or amounts, other than Annual Rent, which may, at any time or times during the Term, be or become payable or reimbursable by the Tenant to the Landlord under this Lease whether designated as Additional Rent or otherwise.

"Additional Services" has the meaning as set out in subclause 16(n)(i).

"Affiliate" means any of:

- an "affiliate" (as such term is defined pursuant to the *Canada Business Corporations Act* (Canada) as amended from time to time);

- a partnership comprised entirely of either:

  the Tenant or Landlord and one or more of its wholly owned subsidiaries, whether such ownership is direct or indirect; or

  any two or more of the Tenant's or Landlord's wholly owned subsidiaries, whether such ownership is direct or indirect; or

  the Tenant or Landlord and one or more entities in which the interest of Tenant or Landlord in such partnership is greater than 50% and by reason of which interest Tenant or Landlord controls such partnership;

- a trust in which the Tenant or Landlord or an "affiliate" of the Tenant or Landlord has a beneficial interest, which interest of the Tenant or the Landlord or the "affiliate" of the Tenant or Landlord in such trust is greater than 50% and by reason of which interest the Tenant or Landlord or such "affiliate" of the Tenant or Landlord controls such trust.

"After Hours Services" has the meaning set out in subclause 16(n)(iii).

"Air Rights" means the rights demised pursuant to that certain Air Space Lease dated June 25, 1980 between the City of Calgary and Algas Properties Limited, as amended and assigned from time to time.

"Annex Premises" means all the Rentable Area on the 3rd floor of the Conference Centre.

"Annual Rent" means the Annual Rent provided for and referred to in clause 4.

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"Applicable Laws" has the meaning set out in subclause 15(I)(iii)(D).

"Assumption Agreement" means an assumption agreement in substantially the form as attached hereto as Schedule "J" or Schedule "J-1", as the case may be.

"Audit Personnel" has the meaning set out in clause 11.

"Base Building Services" means the services, systems, equipment and facilities which provide for the distribution and supply of the following to the applicable various areas of the Project, as the case may be: (i) standard building heating, ventilation, air-conditioning, electrical, mechanical, plumbing, fire, security and safety; and (ii) washrooms, passenger elevators, freight elevator(s), escalators, stairs and stairwells.

"Beneficial Owner" means a beneficial owner from time to time of the Project or the Project Lands, or any interest therein.

"Budget" has the meaning set out in clause 7.

"Business Day" means a calendar day other than a Saturday, Sunday or statutory holiday in the Province of Alberta, and "Business Days" means more than one Business Day.

"Business Taxes" means all taxes, rates, duties, levies, fees, charges and assessments whatsoever imposed by any Taxing Authority upon the Taxpayer which are based upon the business, income or occupancy of the Taxpayer.

"Capital Tax" means any tax or taxes paid or payable by the Taxpayer to any Taxing Authority based upon or computed by reference to the capital employed by the Taxpayer or the paid-up capital or place of business of the Taxpayer or the amount of any capital tax that would be payable by the Taxpayer under any legislation imposing taxes on account of capital or any similar basis for taxation whether existing at the date hereof or hereafter imposed by any Taxing Authority including, without limitation, the liability of the Taxpayer for the Large Corporations' Tax under the *Income Tax Act* (Canada) (as described in Part I.3 of the *Income Tax Act* (Canada)) and any similar tax in addition, substitution or amendment thereof.

"Century Gardens Tower Lease" means the lease to be entered into by the Tenant (as tenant) and others pursuant to the Option for Expansion Premises, in the event the option therein is exercised by the Tenant.

"Change of Control" has the meaning set out in subclause 15(x)(viii).

"Commencement Date" means the 1st day of January, 2002.

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"Committee" has the meaning set out in clause 47.

"Common Facilities" means the facilities serving or benefiting the Project and located on or connected to, or benefiting the Project Lands which are provided or designated by the Landlord as being for the common use or benefit of the Project, the Project tenants or their employees, customers, licensees and invitees or the general public and expressly includes, without limitation, and as the same may be changed from time to time, the Conference Centre, entrances, lobbies, corridors, passageways, interior and exterior pedestrian walkways whether below, at or above ground level, if any, stairways which are not exclusive to any tenant, public elevators, public escalators, public washrooms and, where applicable, parking facilities, loading and unloading areas, public plazas and interior and exterior covered pedestrian malls, landscaped areas, interior gardens and service elevators, together with the Project systems, facilities or equipment within, attached to, serving or benefiting the Project and the tenants thereof including, without limitation, heating, ventilating, air-conditioning and security systems, mechanical and electrical rooms and facilities and the machinery and equipment therein, fire protection and detection equipment, ducts, shafts, Project storage areas and facilities which are not exclusive to any Project tenant and service areas and facilities.

"Condemnation Date" has the meaning set out in clause 18.

"Conference Centre" means the office, conference centre and shipping and receiving facility and all appurtenances thereto and that portion of the other Common Facilities situate upon the Conference Centre Lands.

"Conference Facilities" means the conference and meeting facilities located in the Conference Centre as shown outlined in red on the plans annexed hereto as Schedule "B" Part II.

"Conference Centre Lands" means the lands and premises in the City of Calgary, in the Province of Alberta legally described as:

Plan "A1"
Block 34
Lots 21 to 26 inclusive
Excepting thereout: (as to surface only)
The road widening and corner cuts on Plan 8111565

"Construction Procedures" means the construction procedures set out on Schedule "H".

"Data Request" means a request by the Landlord to the Tenant whereby the Landlord requests that the Tenant furnish and provide to the Landlord the information contained in Schedule "L".

"Election Notice" has the meaning set out in subclause 42(c).

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"Existing Lease" has the meaning set out in paragraph K in the preamble to this Lease.

"Expiry Date" has the meaning set out in subclause 3(b).

"First Offer Deposit" has the meaning set out in subclause 42(f).

"First Renewal Term" has the meaning set out in subclause 3(c).

"Floor Common Areas" has the meaning set out in subclause 5(a)(ii)

"Generally Accepted Accounting Principles" means those accounting principles and practices established from time to time by the Canadian Institute of Chartered Accountants for the preparation of financial statements and the recording and treatment of transactions.

"Hazardous Substances" means any substance, class of substance or mixture of substances which are or may be detrimental to the environment or human health, the presence of which is prohibited, controlled or regulated in the Project under any law, by-law, regulation or ordinance enacted or promulgated by any legislative, governmental or regulatory body having jurisdiction over the Landlord, the Tenant, the Leased Premises, the Project or the Project Lands.

"Initial Expiry Date" has the meaning set out in subclause 3(a).

"Landlord's Architect" means such firm of independent architects, certified to practice in the Province of Alberta, as the Landlord may from time to time engage for the purposes for which the Landlord's Architect is required pursuant to the provisions of this Lease.

"Landlord's Work" means the materials to be supplied and the work and improvements to be undertaken by the Landlord in and to the Project and the Leased Premises and described in Schedule "C" annexed hereto.

"Lease" means this amended and restated lease and the schedules attached hereto, as amended, supplemented, modified and restated from time to time and includes, for greater certainty, all options to renew or any other rights now or hereinafter granted by the Landlord to the Tenant under this lease.

"Lease Recognition Agreement" means the agreement substantially in the form attached hereto as Schedule "D";

"Leased Premises" means, collectively, the Office Premises, the Annex Premises and the Storage Premises.

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"Leasehold Improvements" means, without limitation, all fixtures, improvements, installations, alterations and additions from time to time made, erected or installed in or about the Leased Premises, and includes all the following: doors, partitions and hardware; mechanical, electrical and utility installations; stairwells; floor and window coverings and hardware; heating, ventilating, air conditioning and humidity control equipment; lighting fixtures; and anything else in any way connected to the Leased Premises or to any utility services, systems or equipment located therein, including the New Leasehold Improvements; but shall not include Trade Fixtures, including in the exclusion of Trade Fixtures for clarity, the demountable or moveable wall partitions, doors and hardware affixed to and electrical and utility installations included within such demountable or moveable partitions.

"Major Damage" has the meaning set out in subclause 17(b).

"Mortgagee" means any mortgage lender of the Landlord to whom the Landlord has granted a lien, charge or encumbrance against the Project Lands or the Project and includes a trustee for bond holders.

"New Leasehold Improvements" has the meaning set out in subclause 16(p).

"Normal Business Hours" means the hours from 7:00 a.m. to 6:00 p.m. Monday to Friday excluding any public holiday, or such other reasonable hours as may be mutually agreed to from time to time by the Landlord and the Tenant, acting reasonably.

"Notice" has the meaning set out in clause 34.

"Offer Period" has the meaning set out in subclause 42(e).

"Office Premises" means floors 4 to 36 of the Office Tower.

"Office Tower" means the office complex municipally addressed as 801 - 7th Avenue S.W., Calgary, Alberta and all appurtenances thereto, including retail, service and storage premises and that portion of the Common Facilities situate upon or connected to or servicing the Office Tower Lands.

"Office Tower Lands" means the lands and premises in the City of Calgary, in the Province of Alberta legally described as:

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Descriptive Plan 9210939
Block 46
Lot 15 'A'
Excepting thereout all mines and minerals

All mines and minerals within, upon or under:
Plan 8050EJ
Block 46
Lot F

All mines and minerals within, upon or under:
Plan A1
Block 46
Lots 15 to 20 inclusive

"Operating Expenses" means all those expenses and costs set out in Schedule "E" to this Lease incurred by or on behalf of the Landlord in an Operating Year with respect to the Project and the Project Lands.

"Operating Year" means a consecutive twelve (12) month period commencing on January 1 and ending on December 31 or such other consecutive twelve (12) month period as the Landlord from time to time may adopt. The Landlord shall notify the Tenant of any such change to the Operating Year as soon as practicable after the effective date of such change.

"Option for Expansion Premises" means the option for the lease of expansion premises in a new office building to be named Century Gardens Tower, in the agreement entered into by the Tenant (as tenant) and others and dated October 31, 2013.

"Parking Facility" means that portion of the Office Tower located on the Office Tower Lands which is comprised of 4 levels of below grade parking.

"Prime Rate" means the rate of interest per annum established from time to time by the Canadian Imperial Bank of Commerce or its successors as a reference rate of interest for Canadian dollar loans made by it in Canada to its most creditworthy customers and adjusted automatically upon any change in such rate of interest.

"Project" means, collectively, the Office Tower, the Conference Centre and the improvements constructed upon and within the Air Rights.

"Project Standard" means the quantity and quality of materials, finishing and workmanship for a first class office building from time to time specified by the Landlord for the Project from time to time, acting reasonably.

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"Property Manager" means the property manager appointed by the Landlord from time to time to manage the Project and the Project Lands.

"Project Lands" means, collectively, the Office Tower Lands, the Air Rights and the Conference Centre Lands.

"Property Taxes" means all real property, municipal, school and local improvement taxes, assessments and rates and all taxes, assessments and rates of a like nature imposed in respect of the Project Lands and the Project from time to time by any Taxing Authority, including machinery tax, if any, but excluding income or profits taxes based upon the income of the Landlord to the extent such taxes are not levied in lieu of taxes, rates, duties, levies and assessments against the Project or the Project Lands or upon the Landlord in respect thereof; if the system of property taxation shall be altered or varied and any new tax shall be levied or imposed on all or any portion of the Project and the Project Lands and/or the revenues therefrom and/or the Landlord in substitution for and/or in addition to Property Taxes presently levied or imposed, then any such new tax or levy shall be deemed to be Property Taxes except that "Property Taxes" shall not include Capital Taxes or Business Taxes.

"Refurbishment Abatement" has the meaning set out in subclause 16(p).

"Renewal Notice" has the meaning set out in subclause 3(c).

"Renewal Term" means either or both of the First Renewal Term and the Second Renewal Term, as such expressions are defined in subclause 3(c) hereof.

"Rent" means Annual Rent and Additional Rent.

"Rentable Area", with respect to the Project, the Leased Premises or any portion of the Project comprising the Leased Premises, has the meaning given in and has been measured pursuant to clause 5.

"Sale" has the meaning set out in clause 42.

"Sale Notice" has the meaning set out in subclause 42(c).

"Second Renewal Term" has the meaning set out in subclause 3(c).

"Sign" has the meaning set out in subclause 15(s).

"Stall" has the meaning set out in subclause 19(a).

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"Statement" has the meaning set out in clause 8.

"Storage Premises" means those portions of the Project leased to the Tenant for storage, the exact Rentable Area of which has been determined pursuant to subclause 5(b).

"Successor" means any corporation, body or entity: (i) with whom the current tenant, Nexen Energy ULC, has merged or amalgamated; or (ii) to whom the transfer of the majority of the issued shares in the capital stock or other interest has been made or by whom the majority of such shares or other interest has been acquired; or (iii) to whom any transfer, issuance or division of any shares or other interest of the current tenant, Nexen Energy ULC has been made which is sufficient to transfer control to other than the present shareholders (as of the date of this Lease) of the current tenant, Nexen Energy ULC, or (iv) which: (x) has purchased all or substantially all of the assets of the current tenant, Nexen Energy ULC, including, without limitation its interest as tenant in the Lease; (y) is in occupation of the Office Premises and carrying on business therefrom; and (z) has executed and delivered the Assumption Agreement to the Landlord in the form attached as Schedule "J-1" (as assignee), as required under subclause 15(x);

"Tax Act" has the meaning set out in clause 40.

"Taxation Year" means a consecutive twelve (12) month period ending December 31 or such other consecutive twelve (12) month period which is from time to time used by any Taxing Authority for the purposes of levying, charging or assessing Property Taxes.

"Taxing Authority" means any school, utility, municipal, regional, provincial, federal or other governmental or corporate authority, agency or commission.

"Taxpayer" means the Landlord, each of the entities constituting the Landlord and for each of the legal or Beneficial Owners of the Project or the Project Lands.

"Tenant Allowance" has the meaning set out in subclause 16(p).

"Tenant's Proportionate Share" means:

For the purposes of calculating the Tenant's proportionate share of Operating Expenses (the "Tenant's Proportionate Share of Operating Expenses"), the calculation shall be made by dividing:

- the total of the Rentable Area of the Office Premises and the Conference Facilities; by

- the square footage arrived at by taking the Rentable Area of the Project (which is 615,659 square feet).

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As of the date hereof, the Tenant's Proportionate Share of Operating Expenses will be 604,211 square feet divided by 615,659 square feet.

For the purposes of calculating the Tenant's proportionate share of Property Taxes (the "Tenant's Proportionate Share of Property Taxes"), the calculation shall be made by dividing:

- the total of the Rentable Area of the Office Premises and the Conference Facilities; by

- the square footage arrived at by taking the Rentable Area of the Project (which is, as of the date hereof, 615,659 square feet).

As of the date hereof, the Tenant's Proportionate Share of Property Taxes will be 604,211 square feet divided by 615,659 square feet.

These calculations are subject to adjustment from time to time, according to any change in the Rentable Area of the Office Premises or the Rentable Area of the Conference Facilities or the Rentable Area of the Project or any change in the Rentable Area of any portion of the Office Premises or the Conference Facilities or the Project which is or should be excluded ("Excluded Areas") from any of the calculations above which are, as of the Commencement Date, or become, after the Commencement Date, premises that have utilities which are separately allocated or metered but such change in Rentable Area of the Office Premises, or the Conference Facilities or the Project or the Excluded Areas shall be measured in accordance with clause 5. The Landlord shall notify the Tenant of any such change in the Rentable Area of the Office Premises, or the Conference Facilities, or the Project or the Excluded Areas as soon as practicable after the effective date of such change and shall provide a certificate of the Landlord's Architect as to the Rentable Area of the Office Premises, or the Conference Facilities, or the Project or the Excluded Areas, as the case may be, within thirty (30) days thereafter.

"Tenant's Work" means the materials to be supplied and the work and improvements to be undertaken by the Tenant in and to the Project and the Leased Premises and described in Schedule "C" annexed hereto.

"Term" means the period of time set out in subclause 3(a), as extended pursuant to subclause 3(b), and any Renewal Term which is exercised by the Tenant in accordance with subclause 3(c).

"Termination Date" has the meaning set out in subclause 15(x).

"Third Party" has the meaning set out in clause 42.

"Third Party Offer" has the meaning set out in subclause 42(g).

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"this Lease", "hereof", "herein", "hereto" and similar expressions mean and refer to this Lease and include any instrument amending or supplementing the same, and the expressions "clause" and "subclause" followed by a number or letter mean and refer to the specified clause or subclause of this Lease.

"Trade Fixtures" means built-in furniture, furnishings, counters, equipment, unattached movable floor coverings, demountable or moveable wall partitions, doors and hardware affixed to and electrical and utility installations included within such demountable or moveable partitions and other materials in the nature of trade fixtures which are affixed to the Leased Premises, but shall not include notwithstanding any provision to the contrary in this definition or elsewhere in the Lease: (x) any system, facility, equipment, apparatus or device which affects the Base Building Services or the operation or performance of any equipment relating thereto; and (y) any, item, matter or thing which in any way relates to or affects the structure of the Project or any part thereof.

"Transfer" means (other than for purposes of mortgaging, hypothecating or charging) any assignment, transfer, sublease, parting with possession or setting over or otherwise by any act or deed whereby the Leased Premises or any part thereof is sublet or rights of occupancy are given or this Lease is assigned, transferred or set over to any person, firm, corporation or entity.

"Transfer Offer" means a bona fide arm's length written offer received or procured by the Tenant, which offer does not contravene the provisions of this Lease and the acceptance of which would not breach any provisions of this Lease and which the Tenant has determined to accept subject to compliance with subclause 15(x).

"Transfer Offeror" means the offeror named in the Transfer Offer.

"Transfer Request" means a request in writing by the Tenant for the Landlord's consent to a proposed Transfer.

"Transferee" means the person, firm, corporation or entity to whom a Transfer is made.

"Unavoidable Delay" means an event or cause beyond the reasonable control of Landlord (other than lack of funds or corporate planning) which shall delay the completion of Landlord's Work.

"Unused Portion" has the meaning set out in Schedule "C".

"Wellness Improvements" means the fitness and wellness leasehold improvements located on the 10th floor of the Office Tower.

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SCHEDULE "I"

RULES AND REGULATIONS

1. The Landlord shall have the right to control and operate the public portions of the Project, as well as facilities furnished for the common use of the tenants, as it deems best for the benefit of the tenants generally. The Tenant shall not invite or permit the visit of any person, or persons in such numbers, or under such conditions as to interfere with the use and enjoyment of the Common Facilities.

2. The Landlord shall have the right to refuse admission to the Project outside of Normal Business Hours to any person not producing acceptable identification, and may require all persons admitted to or leaving the Building outside of Normal Business Hours to register.

3. The Tenant shall not install or permit the installation or use of any machine dispensing goods for sale (other than food or beverage dispensing machines) in the Leased Premises or the Project without the written approval of the Landlord.

4. Freight, furniture, business equipment, merchandise and bulky matter of any description shall be ordinarily delivered to and removed from the Leased Premises at such times, and only in the elevator or elevators so designated by the Landlord for freight use, and through the service entrances and corridors. Special arrangements with the Landlord must be made for moving large quantities of furniture and equipment into or out of the Building.

5. Canvassing, soliciting or peddling in the Project is prohibited and the Tenant shall cooperate to prevent same except that this provision is not intended to prevent the Tenant from conducting, promoting or participating in charitable activities for the United Way, the Canadian Cancer Society and similar charities or organizations.

6. Any hand carts, carryalls, or similar appliances used for the delivery or receipt of merchandise or equipment shall be equipped with rubber tires, side guards and such other safeguards as the Landlord requires.

7. If any apparatus used or installed by the Tenant requires a permit as a condition for its installation, the Tenant must file a copy of such permit with the Landlord.

8. The Tenant shall not place any locks upon any doors within the Leased Premises without the written consent of the Landlord and all such locks shall conform with the Project standard key system except for those security locks in place as of the Commencement Date and those installed by the Tenant thereafter from time to time pursuant to the Tenant's security requirements

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9. The Landlord may publish, from time to time, emergency fire regulations and evacuation procedures in consultation with the applicable municipal authorities. The Tenant will, at the Landlord's request, appoint a premises warden who will be responsible for liaison with Project's management in all emergency matters and who will be responsible for instructing employees of the Tenant in emergency matters.

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APPENDIX B:

PART 4 OF THE OHS CODE IN FORCE ON MAY 2, 2019

ALBERTA REGULATION 87/2009
Occupational Health and Safety Act
OCCUPATIONAL HEALTH AND SAFETY CODE

Part 1
Definitions and General Application

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Definitions

1 In this Code,

"abate" means to encapsulate, enclose or remove asbestos-containing material;

...

"Act" means the *Occupational Health and Safety Act*;

...

"approved by a Director" or "approved by the Director" means an approval issued under section 56 of the Act;

...

"asbestos waste" means material that is discarded because there is a reasonable chance that asbestos might be released from it and become airborne, including protective clothing that is contaminated with asbestos;

...

"contaminant" means a chemical, biological or radiological material in a concentration that will likely endanger the health and safety of a worker if it is inhaled, ingested or absorbed;

"contaminated" means affected by the presence of a harmful substance on workers or at the work site in a quantity sufficient to pose a risk to health;

...

"exposed worker" means a worker who may reasonably be expected to work in a restricted area at least 30 work days in a 12-month period;

...

"fibre" means a particulate material with

(a) a diameter equal to or less than 3 micrometres,
(b) a length equal to or greater than 5 micrometres, and
(c) a length to diameter ratio equal to or greater than 3 to 1;

...

"hazard assessment" means an assessment made in accordance with section 7 or 21;

...

"immediately dangerous to life or health" means circumstances in which the atmosphere is deficient in oxygen or the concentration of a harmful substance in the atmosphere

(a) is an immediate threat to life,
(b) may affect health irreversibly,
(c) may have future adverse effects on health, or
(d) may interfere with a worker's ability to escape from a dangerous atmosphere;

...

"ISO" means the International Organization for Standardization;

...

"NIOSH" means the National Institute for Occupational Safety and Health;

...

“occupational exposure limit (OEL)” with respect to a substance, means the occupational exposure limit established in Schedule 1, Table 2 for that substance;

...

“pulmonary function technician” means a person who

(a) has passed, or has been approved by a Director of Medical Services as having done the equivalent of passing, a pulmonary function technician course approved by a Director of Medical Services, and

(b) if so required by a Director of Medical Services, has passed a re-qualification examination approved by such a Director;

...

“restricted area” means an area of a work site where there is a reasonable chance that the airborne concentration of asbestos, silica, coal dust or lead exceeds or may exceed the occupational exposure limit for one or more of the substances;

...

“work area” means a place at a work site where a worker is, or may be, during work or during a work break;

...

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Part 4

Chemical Hazards, Biological Hazards and Harmful Substances

General Requirements

Worker exposure to harmful substances

16(1) An employer must ensure that a worker's exposure to any substance listed in Schedule 1, Table 2 is kept as low as reasonably achievable.

16(2) An employer must ensure that a worker's exposure to any substance listed in Schedule 1, Table 2 does not exceed its occupational exposure limits listed in Schedule 1, Table 2.

16(2.1) The amended occupational exposure limit for coal dust as shown in Schedule 1, Table 2 comes into effect on July 1, 2010.

16(3) If no occupational exposure limit is established for a harmful substance present at a work site, an employer must ensure that a worker's exposure to that substance is kept as low as reasonably achievable.

16(3.1) A worker may not be exposed to a substance listed in Schedule 1, Table 2 at a concentration exceeding its ceiling limit at any time.

16(4) If no 15-minute occupational exposure limit or ceiling occupational exposure limit is listed for a substance in Schedule 1, Table 2, the employer must

(a) comply with the eight-hour occupational exposure limit, and

(b) ensure that a worker's exposure to that substance does not exceed

(i) three times the eight-hour occupational exposure limit for more than a total of 30 minutes during a continuous 24-hour period, and five times the eight-hour occupational exposure limit, or

(ii) the concentration that is immediately dangerous to life and health,

whichever is lower.

Exposure to multiple substances

17 An employer must take all reasonably practicable steps to ensure that, if a worker is exposed to more than one substance listed in Schedule 1, Table 2 during a single work shift, and the toxicological effects have similar modes of toxic action, the value of D in the formula

$$D = \frac{C_1}{_} + \frac{C_2}{_} + \cdots + \frac{C_n}{_}$$

does not exceed 1, where C_1, C_2,…C_n refer to the airborne concentrations during exposure to contaminants 1, 2,…n, and T_1, T_2,…T_n are their respective occupational exposure limit values expressed in the same units as C_n.

Exposure during shifts longer than 8 hours

18(1) Subject to subsection (3), if a worker is exposed to a substance listed in Schedule 1, Table 2 during a single work shift that is longer than eight hours, the employer must ensure that equivalent protection from adverse health effects is achieved by adjusting the eight-hour exposure limit using the following formulas:

adjusted exposure limit = eight-hour occupational exposure limit x daily reduction factor

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where the daily reduction factor $= \left\{ \frac{8}{h} x \left(\frac{24-h}{16} \right) \right\}$, and

h = hours worked per day.

18(2) Subsection (1) does not apply to a substance for which the number "3" appears in the "Substance Interaction" column of Schedule 1, Table 2.

18(3) An employer may adjust the eight-hour exposure limit by another method that uses recognized scientific principles and that is approved by a Director of Occupational Hygiene.

Review of exposure limits

19(1) A person may apply to a Director of Occupational Hygiene to request a review of the occupational exposure limit of a substance.

19(2) An application must be in writing and must include reasons for the review, proposed changes and information that supports the request.

19(3) On receipt of a request for a review of an occupational exposure limit, a Director of Occupational Hygiene may review the occupational exposure limit.

Airborne concentration measurements

20(1) If a person measures the airborne concentration of a harmful substance for the purposes of complying with the occupational exposure limits as required by this Code, the person must make the measurement in accordance with any one of

(a) the NIOSH Manual of Analytical Methods, 4PthP Edition (August 1994), published by the United States Department of Health and Human Services, as amended up to and including the 2PndP supplement (January 15, 1998),

(b) Sampling and Analytical Methods published by the U.S. Occupational Safety and Health Administration,

(c) Methods for the Determination of Hazardous Substances guidance published by the Health and Safety Executive of Great Britain,

(d) EPA Test Methods published by the U.S. Environmental Protection Agency (EPA),

(e) Workplace Air Contamination Sampling Guide published by the Institut de recherché Robert-Sauvé en santé et en sécurité du travail (IRRSST),

(f) ISO Standards and Guides of Air Quality published by ISO Technical Committee TC146, or

(g) Analyses of hazardous substances in air/DFG Deutsche Forschngsgemeinschaft – Commission for the Investigation of Health Hazards of Chemical Compounds in the Work Area.

(h) repealed AR 56/2018 s9.

20(2) If there is no analytical method or procedure that complies with subsection (1), an employer may use a continuous reading direct-reading instrument to measure airborne concentrations of a harmful substance for the purposes of complying with the occupational exposure limits as required by this Code provided that the instrument is used, calibrated and maintained according to the manufacturer's specifications.

20(2.1) An employer must ensure that the person undertaking airborne measurements is competent to do so.

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20(3) If the person is counting fibres, the person must apply NIOSH Method 7400, and only to particles that meet the size criteria for fibres.

20(4) An employer must record the results of the measurements and keep them for 3 years from the date on which the measurements were taken.

Potential worker exposure

21(1) If a worker may be exposed to a harmful substance at a work site, an employer must identify the health hazards associated with the exposure and assess the worker's exposure.

21(2) The employer must ensure that a worker who may be exposed to a harmful substance at a work site

(a) is informed of the health hazards associated with exposure to that substance,

(b) is informed of measurements made of airborne concentrations of harmful substances at the work site, and

(c) is trained in procedures developed by the employer to minimize the worker's exposure to harmful substances, and understands the procedures.

21(3) A worker who is provided with training under subsection (2) must use the procedures appropriately and apply the training.

Worker overexposure

22(1) If a worker may be exposed to an airborne concentration that is more than the occupational exposure limit of a substance, the employer must conduct measurements of the concentrations of that substance at the work site.

22(2) If a worker is exposed to more than the occupational exposure limit of a substance, the employer must immediately

(a) identify the cause of the overexposure,

(b) protect the worker from any further exposure,

(c) control the situation so that no other workers are exposed to the substance at airborne concentrations that are more than the occupational exposure limit, and

(d) explain to the worker the nature and extent of the overexposure.

22(3) As soon as reasonably practicable, an employer must inform the joint work site health and safety committee or health and safety representative, if there is one, in writing, that a worker has been exposed to more than the occupational exposure limit of a substance, and of the steps taken to control the overexposure.

Worker decontamination

23 If a worker may be contaminated by a harmful substance at a work site, the employer must

(a) provide the facilities, including showers, the worker needs to remove the contamination before the worker leaves the work site, and

(b) ensure that only those articles and clothing that have been properly decontaminated or cleaned are taken from the work site by the worker.

Emergency baths, showers, eye wash equipment

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24 If a worker is present at a work site where chemicals harmful to the eyes or skin are used, the employer must ensure that the worker has immediate access at the work site to emergency baths, showers, eye wash equipment or other equipment appropriate for the potential level of exposure.

Prohibited activities

25(1) An employer must ensure that workers do not eat, drink or smoke tobacco in a part of a work site contaminated by a harmful substance.

25(2) A worker must not eat, drink or smoke tobacco in a part of a work site contaminated by a harmful substance.

Codes of practice

26(1) An employer must have a code of practice governing the storage, handling, use and disposal of a substance listed in Schedule 1, Table 1 that is present at a work site

(a) as pure substance in an amount exceeding 10 kilograms, or

(b) in a mixture in which the amount of the substance is more than 10 kilograms and at a concentration of 0.1 percent by weight or more.

26(2) The code of practice must include measures to be used to prevent the uncontrolled release of the substance and the procedures to be followed if there is an uncontrolled release.

Storage of harmful substances

27 An employer must ensure that a harmful substance used or stored at a work site

(a) is clearly identified, or its container is clearly identified, and

(b) is used and stored in such a way that the use or storage is not a hazard to workers.

General provisions for asbestos, silica, coal dust and lead

28 An employer must

(a) minimize the release of asbestos, silica, coal dust and lead into the air as far as is reasonably practicable,

(b) keep the work site clear of unnecessary accumulations of asbestos, silica, coal dust and lead and waste materials containing any of these substances, and

(c) ensure that the methods used to decontaminate the work area, workers, equipment and protective clothing prevent, as much as is reasonably practicable, the generation of airborne asbestos, silica, coal dust or lead.

Restricted area

29(1) An employer must ensure that only a person authorized by the employer or by law to do so enters a restricted area.

29(2) An employer must post signs that clearly indicate that

(a) asbestos, silica, coal dust or lead are present in the area,

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(b) only authorized persons may enter the area, and

(c) eating, drinking and smoking are prohibited in the area.

29(3) Signs posted under subsection (2) must

(a) be in a conspicuous location at the entrances to and on the periphery of each restricted area, as appropriate, and

(b) remain posted until the area is no longer a restricted area.

29(4) An employer must

(a) provide workers in a restricted area with protective clothing that protects other clothing worn by the worker from contamination by asbestos, silica, coal dust or lead,

(b) ensure that workers' street clothing is not contaminated by asbestos, silica, coal dust or lead, and

(c) ensure that a worker does not leave a restricted area until the worker has been decontaminated.

29(5) Subsection (4) does not apply in an emergency if the health or safety of a worker requires the worker to leave a restricted area without being decontaminated.

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Protective clothing used in restricted areas containing asbestos or lead

30(1) If clothing used in a restricted area containing asbestos or lead is reused and not discarded, the employer must have the clothing laundered in the appropriate manner and at appropriate intervals to ensure

(a) the clothing is decontaminated, and

(b) there is no cross-contamination of other clothing by asbestos or lead.

30(2) The employer must ensure that clothing contaminated with asbestos or lead that is to be laundered before being reused is stored and transported in sealed containers.

30(3) Containers used in subsection (2) must be clearly labelled

(a) to identify the contents,

(b) to indicate that the contents are a hazard, and

(c) to warn workers that dust from the contents should not be inhaled.

Release of asbestos

31(1) If it is determined that asbestos fibres may be released in a building, the building is in an unsafe condition.

31(2) The employer must take all necessary steps to correct the unsafe condition.

Prohibitions related to asbestos

32(1) A person must not use materials containing crocidolite asbestos in an existing or a new building.

32(2) A person must not apply materials containing asbestos by spraying them.

Asbestos in air distribution systems

33 A person must not use asbestos in an air distribution system or equipment in a form in which, or in a location where, asbestos fibres could enter the air supply or return air systems.

Asbestos in a building to be demolished

34 If a building is to be demolished, the employer must ensure that materials with the potential to release asbestos fibres are removed first.

Encapsulation, enclosure or removal of asbestos

35 If a building is being altered or renovated, the employer must ensure that materials in the area of the alterations or renovations that could release asbestos fibres are encapsulated, enclosed or removed.

Notification of a project

36(1) An employer who is responsible for removing or abating asbestos or for demolishing or renovating a building or equipment containing asbestos must notify a Director of Inspection of the activity at least 72 hours before beginning the activities that may release asbestos fibres.

36(2) A person must not remove or abate asbestos or demolish or renovate a building or equipment containing asbestos if a Director of Inspection has not been notified in accordance with subsection (1).

Asbestos worker course

37(1) An employer must ensure that a worker who works with asbestos receives the training necessary for the worker to perform the work safely.

37(2) An employer must ensure that a worker who enters a restricted area that is designated as a restricted area due to the presence of asbestos

(a) has successfully completed a course of instruction approved by a Director of Occupational Hygiene, and

(b) has in the worker's possession the original valid certificate of completion of the course issued to the worker.

Containment and labelling of asbestos waste

38(1) An employer must ensure that asbestos waste is stored, transported and disposed of in sealed containers that are impervious to asbestos and asbestos waste.

38(2) An employer must ensure that a container of an asbestos product and asbestos waste is clearly labelled

(a) to identify the contents as an asbestos product and carcinogenic, and

(b) to warn handlers that dust from the contents should not be inhaled.

Use of crystalline silica in abrasive blasting

39(1) If conducting abrasive blasting, an employer must, where reasonably practicable, ensure that crystalline silica is replaced with a less harmful substance.

39(2) Repealed

Health assessments for workers exposed to asbestos, silica or coal dust

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40(1) This section applies to an exposed worker who may be exposed to asbestos, silica or coal dust.

40(2) A health assessment of the worker must include the following:

(a) the identity of the worker and the employer;

(b) the date of the medical examination, chest x-ray and spirogram;

(c) a 35 centimetres by 43 centimetres postero-anterior view chest x-ray, including a radiologist's report;

(d) a spirogram, conducted by a pulmonary function technician, including determinations of forced expiratory volume in the first, second and forced vital capacity;

(e) a history covering

(i) occupational exposures to asbestos, silica, coal dust or other industrial dusts and carcinogens,

(ii) significant exposures to asbestos, silica, coal dust, other dust and carcinogens during non work-related activities,

(iii) significant symptoms that may indicate silicosis, pneumoconiosis, asbestosis or cancer,

(iv) past and current medical diagnoses of respiratory disease, and

(v) the worker's smoking history,

(f) a written interpretation and explanation of the results of the assessment by a physician, with particular reference to the worker's exposure to airborne substances.

40(3) The physician must give the written interpretation and explanation of the results of the health assessment to the worker not more than 60 days after the tests are completed.

40(4) The physician must ensure that the records of the health assessment are kept for not less than 30 years.

40(5) The person with custody of the health assessment record must ensure that no person, other than the worker or health professional who conducts the health assessment, the staff supervised by the health professional or another person authorized by law to have access, has access to the exposed worker's health assessment unless

(a) the record is in a form that does not identify the worker, or

(b) the worker gives written permission for access by another person.

40(6) An employer must ensure that a worker undergoes a health assessment

(a) not more than 30 calendar days after the worker becomes an exposed worker, and

(b) every two years after the first health assessment.

40(7) If an exposed worker received a health assessment from a previous employer within the immediately preceding two years, the worker must inform the present employer of the date or approximate date of that health assessment at the earliest possible time.

40(8) An employer must ensure that an exposed worker has received a health assessment within the immediately preceding two years.

40(9) Despite subsections (7) and (8), exposed workers may refuse to undergo part or all of a health assessment by giving the employer a written statement refusing it.

40(10) An employer must not coerce, threaten or force a worker into refusing part or all of a health assessment.

40(11) An employer must pay the cost of the health assessment, medical interpretation and explanation required by this section.

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40(12) An employer must ensure that, if it is reasonably practicable, a health assessment is performed during normal hours of work.

40(13) An employer must not make a deduction from the worker's wages, salary or other remuneration or benefits for the time during which an exposed worker

(a) undergoes a health assessment, or

(b) travels to or from a health assessment.

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Lead exposure control plan

41(1) An employer must develop an exposure control plan for lead if

(a) a worker at the work site may be exposed to airborne lead in excess of its occupational exposure limit for more than 30 days in a year, or

(b) a worker's exposure to lead at the work site could result in an elevated body burden of lead through any route of entry.

41(2) The exposure control plan must include at least the following:

(a) a statement of purpose and of the responsibilities of individuals;

(b) methods of hazard identification, assessment and control;

(c) worker education and training;

(d) safe work practices if these are required by the hazard assessment under this Code;

(e) descriptions of personal and work site hygiene practices and decontamination practices;

(f) processes of health monitoring, including biological testing;

(g) methods of documentation and record keeping;

(h) procedures for maintenance of the plan, including annual reviews and updating.

41(3) A worker must follow the exposure control plan and practice the personal and work site hygiene practices established by the employer to minimize lead exposure at the work site.

Lead — air monitoring

42 If a worker may be exposed to lead in harmful amounts at a work site, an employer must ensure that air monitoring and surface testing for lead is regularly conducted to confirm that the controls in place are effective.

Medical monitoring for lead

43(1) An employer must ensure blood lead level testing is available to a worker if the worker at a work site could reasonably be expected to have an elevated body burden of lead.

43(2) An employer must ensure that a worker exposed to lead is informed of the availability of the blood lead test.

43(3) The employer must pay the cost of a blood level test.

43(4) An exposed worker may refuse to undergo a blood level test by giving the employer a written statement refusing it.

43(5) An employer must not coerce, threaten or force a worker into refusing part or all of the test.

43(6) Where the worker has a blood level that indicates lead poisoning, an occupational health and safety officer, under the direction of a Director of Medical Services, may require the employer to remove the worker from further lead exposure.

Controlling mould exposure

43.1 Where mould exists or may exist, an employer must ensure that a worker's exposure to the mould is controlled in accordance with section 9.

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Schedule 1
Chemical Substances

Table 1
Substances and processes requiring a code of practice

Arsenic and arsenic compounds

Asbestos

Benzene

Beryllium

1,3-Butadiene

Cadmium

Coal tar pitch volatiles

1,2-Dibromoethane (Ethylene dibromide)

Ethylene oxide

Hexachlorobutadiene

Hydrazines

Hydrogen sulphide

Isocyanates

Lead and lead compounds

Methyl bromide

Methyl hydrazine

Perchlorates

Silica-crystalline, respirable

Styrene in styrene resin fabrication

Vinyl chloride (Chloroethylene**)**

Zinc chromate

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Table 2
Occupational exposure limits for chemical substances

(1) A person using this Table may apply either the "mg/m^3" or "ppm" measure defined as follows:

"mg/m^3" means milligrams of substance per cubic metre of air measured at ambient work site conditions;

"ppm" (parts per million) means parts of a vapour or gas by volume at standard conditions (25ºC and an absolute barometric pressure of 101.3 kilopascals) per parts of contaminated air by volume at ambient work site conditions.

(2) "f/cc" means fibres per cubic centimetre of air; "CAS" means Chemical Abstracts Service.

(3) The numbers 1, 2 and 3 in the "Substance Interaction" column have the following meanings:

1 — substance may be readily absorbed through intact skin;

2 — substance is a simple asphyxiant that may create an atmosphere deficient in oxygen; available oxygen in the range of 19.5 percent to 23 percent by volume must be present.

3 — occupational exposure limit is based on irritation effects and its adjustment to compensate for unusual work schedules is not required.

(4) A carcinogen is defined as "an agent capable of inducing benign or malignant neoplasms." Based on the weight of evidence from epidemiologic studies, "A1" would be a Confirmed Human Carcinogen and means that the agent is carcinogenic to humans. "A2" would be a Suspected Human Carcinogen and means that human data are accepted as adequate in quality but are conflicting or insufficient to classify the agent as A1 *(American Conference of Governmental Industrial Hygienists*).

Substance	**CAS number**	**8-hour occupational exposure limit**			**15-minute or ceiling (c) occupational exposure limit**		**Substance interaction 1, 2, 3**	**Carcinogenicity A1, A2**
		ppm	**mg/m^3**	**f/cc**	**ppm**	**mg/m^3**		
...								
Amosite (Asbestos)	12172-73-5	-	-	0.1	-	-	-	A1
...								
Asbestos, all forms	1332-21-4 12172-73-5 12001-29-5 12172-67-7	-	-	0.1	-	-	-	A1
...								
Chrysotile (Asbestos)	12001-29-5	-	-	0.1	-	-	-	A1
…								
Crocidolite (Asbestos)	12001-28-4	-	-	0.1	-	-	-	A1
...								
Gypsum (Calcium sulphate)	13397-24-5	-	10	-	-	-	-	
...								

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Substance	CAS number	8-hour occupational exposure limit			15-minute or ceiling (c) occupational exposure limit		Substance interaction 1, 2, 3	Carcinogenicity A1, A2
		ppm	mg/m^3	f/cc	ppm	mg/m^3		
Tremolite (Asbestos)	1332-21-4	-	-	0.1	-	-	-	A1
...								

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APPENDIX C:

DECLARATORY PROCEEDING

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FORM7
[RULE 3.8]

. CllER.K'S.STAMP

1901 - *03187*

COURT OF QUEEN'S BENCH OF ALBERTA

COURT FILE NUMBER	
COURT	CALGARY
JUDICIAL CENTRE	
APPLICANT	**801 SEVENTH INC.**
RESPONDENT	**CNOOC PETROLEUM NORTH AMERICA ULC**
DOCUMENT	**ORIGINATING APPLICATION**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**BENNETT JONES LLP** Barristers and Solicitors 4500, 855 - 2nd Street SW Calgary, Alberta T2P 4K7 Attention: Blair C. Yorke-Slader, Q.C. / David R. McKinnon Telephone No.: 403-298-3291; 403-298-3495 Fax No.: 403-265-7219 Client File No.: 86461-1

NOTICE TO THE RESPONDENT

This application is made against you. You are a respondent.
You have the right to state your side of this matter before the Court.

To do so, you must be in Court when the application is heard as shown below:

Date:	March 20, 2019
Time:	10:00 a.m.
Where:	Calgary Courts Centre 601 - 5th Street SW Calgary, AB T2P 5P7
Before:	Presiding Justice in Chambers

Go to the end of this document to see what you can do and when you must do it.

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Basis for this claim:

Overview I Nature of Application

1. This Application concerns a lease of premises in a downtown Calgary office building. The tenant leases virtually all of the building. For some years, however, it has been reducing its workforce, so it currently uses only a portion of its premises. Several months ago it began threatening to withhold rent, alleging that parts of its premises were unfit for occupancy by reason of the presence of a hazardous substance, asbestos. It has recently moved most of its employees out of the building into smaller and lower priced space, and it appears to intend to relocate all of them.

2. Provisions of the lease address the parties' rights and obligations in the event of the presence of a hazardous substance, and in the event that the premises or some part of them might, for a period of time, be rendered unfit for occupancy.

3. In light of those provisions, the landlord seeks various declarations as to the parties' rights and obligations, including a declaration that the premises have not been rendered unfit for occupancy, and that unless and until they are shown to have been rendered unfit for occupancy the tenant has no entitlement to withhold any part of its rent.

4. To the landlord's understanding, the facts underlying the allegations regarding fitness for occupancy are not disputed by the tenant:

Facts

5. The Applicant (the **"Landlord")** and the Respondent **("CNOOC"),** formerly known as Nexen Energy ULC, are landlord and tenant, respectively, under an Amended and Restated Lease dated December 30, 2013 (the **"Lease")** for the lease of more than 600,000 square feet of Premises (the **"Premises")** in a 37 storey office building known as the Nexen Building, located at 801 - 7th Avenue SW in

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downtown Calgary (the **"Building").** The Premises are essentially all of the rentable premises in the Building, other than some main floor and mezzanine level retail space. Pursuant to the Lease, the Building and a small adjacent building comprise the **"Project".** At the time of entering into the Lease, CNOOC had approximately 2300 employees and contractors occupying the Building.

6. Over time, CNOOC has substantially reduced its operations in the Premises, to the extent that by the fall of 2017 it was utilizing only about half of the Premises and had only 1000 or so employees and contractors there.

7. In September, 2017, CNOOC tried unsuccessfully to sublet its Premises.

8. In early November 2017, CNOOC reported to the Landlord that hazardous substances had been identified in certain parts of its Premises. It turned out that a spray insulation product containing a mineral called vermiculite had been used in parts of the Building during its original construction in the early 1980s. Some vermiculite used in insulation at that time had been extracted from a mine in Libby, Montana, and had been contaminated by a natural deposit of asbestos at the mine. That vermiculite, containing trace elements of asbestos, appears to have been contained in some of the spray insulation product used in the Building.

9. Extensive air sampling was undertaken in the Building. Since November 2017, over 280 air samples have been taken by the Landlord alone and have been tested. None has indicated concentrations of airborne fibres of any kind exceeding the occupational exposure limits for asbestos or the levels specified by Alberta Occupational Health and

Safety **("OH&S**[11] in its guidance document (the *Alberta Asbestos Abatement Manual)* as

clearance levels for safe occupancy.

10. A pilot program of removal of certain of the spray insulation material was conducted by the Landlord in late July and early August 2018, safely and without incident.

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l l. In various correspondence to the Landlord commencing in August 2018, CNOOC began to allege that the Building had been rendered unfit for occupancy. It alleged that an event of damage or destruction had occurred in the Building, and it alleged that the Building was not capable of being returned to fitness for occupancy within a period of a year. That circumstance, it alleged, entitled it to exercise an option in the Lease to terminate its tenancy and thereby to avoid its obligations over the remaining almost 13 years of its Lease term. It notified the Landlord that it would be withholding rent in proportion to the areas it considered to have been rendered unfit for occupancy.

12. In accordance with the *Occupational Health and Safety Act* and the *Regulation* and *Code* made thereunder, the Landlord and its consultants prepared an Asbestos Management Plan (the **"AMP")** to address the asbestos containing material, and began to implement it.

13. Commencing in mid-November 2018, CNOOC began moving employees out of its Premises to another downtown Calgary office building, where it had leased a significantly smaller amount of office space at lesser rents.

14. The Landlord wishes to continue to implement the AMP, including the removal outside usual business hours of such of the asbestos containing material as is currently proposed to be removed. At CNOOC's request, however, the Landlord has postponed such work pending CNOOC's relocation of some or all of its remaining employees.

15. CNOOC has assured its employees that the Premises are safe. Its remaining employees, employees of the property management firm for the Building, and employees of the retail tenants of the Building, remain in the Building.

16. The Landlord has provided CNOOC with expert reports which confirm that the Premises and the Building are fit for occupancy. CNOOC's own experts have confirmed the same.

17. As at the date of filing of this Originating Application, more than 900 of

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CNOOC's roughly 1,000 employees have been relocated. CNOOC has informed the Landlord that it expects to move out its remaining employees by sometime in the second quarter of 2019. It has not withdrawn its threat to withhold rent.

Relevant Lease Provisions

18. The Lease contains the following provisions:

> **Schedule "A"**
>
> "Hazardous Substances" means any substance, class of substance or mixture of substances which are or may be detrimental to the environment or human health, the presence of which is prohibited, controlled or regulated in the Project under any law, by-law, regulation or ordinance enacted or promulgated by any legislative, governmental or regulatory body having jurisdiction over the Landlord, the Tenant, the Leased Premises, the Project or the Project Lands.
>
> **16(0) Landlord's Obligations in respect of Hazardous Substances**
>
> The Landlord represents to the Tenant that there are no Hazardous Substances located in or on the Project or the Project Lands. The Landlord shall:
>
> (i) notify the Tenant immediately in the event that the Landlord receives written notice of any violation of an environmental law or that any order of any administrative tribunal or any other governmental authority is made or is proposed to be made against the Landlord in respect of any Hazardous Substance in, on or near the Project or the Project Lands, and shall notify the Tenant immediately of any discharge, release or discovery of any Hazardous Substance in, on or near any part of the Project or the Project Lands;
>
> (ii) to the extent required by law remove any Hazardous Substances located in or on the Project (except for those Hazardous Substances brought onto the Leased Premises after the Commencement Date by the Tenant) or the Project Lands whether resulting from any act, omission or negligence of the Landlord or those for whom the Landlord is in law responsible; and
>
> (iii) indemnify and save harmless the Tenant from and against all death, injury, damage to property, costs, liability and expenses resulting from the negligent handling of any Hazardous Substances stored in the Project or on the Project Lands except where so stored or

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brought upon the Project Lands or handled by the Tenant or those for whom the Tenant is in law responsible. If the Tenant, without fault on the part of the Tenant, is made a party to any litigation commenced by or against the Landlord by reason of the Landlord's negligent handling of any Hazardous Substances upon the Project Lands, or the existence of any Hazardous Substance upon the Project Lands prior to the date of this Lease, then the Landlord shall protect, indemnify and hold the Tenant harmless and pay all costs and expenses (including all legal fees on a solicitor and his own client basis) incurred or paid by the Tenant in connection with such litigation.

17 DAMAGE OR DESTRUCTION

It is understood and agreed that if during the term of this Lease the Project shall be damaged or destroyed, or otherwise rendered unfit for occupancy by the Tenant, then and in each such event the following provisions shall have effect:

(a) Partial Damage to the Leased Premises

If the Leased Premises are rendered partially unfit for occupancy by the Tenant, whether due to damage or destruction, or due to the failure of Base Building Services, or due to inaccessibility to the Leased Premises due to emergency, health, safety or other reasons, the Annual Rent and the Additional Rent hereby reserved shall abate in part only in the proportion that the part of the Leased Premises rendered unfit for occupancy bears to the whole of the Leased Premises or if the Leased Premises are rendered wholly unfit for occupancy by the Tenant the Annual Rent and Additional Rent hereby reserved shall be suspended, in each case until the Leased Premises have been rebuilt and/or repaired or restored as set out in subclause 17(e).

(b) Damage to Project and Right to Terminate the Lease

If the Project shall be incapable in the opinion of the Landlord's Architect of being rebuilt and/or repaired or restored with reasonable diligence, within one year of the happening of such destruction or damage ("Major Damage"), such opinion of the Landlord's Architect to be communicated by the Landlord to the Tenant within thirty (30) days of the happening of such destruction or damage, then either the Landlord or the Tenant may, at its option, terminate this Lease by notice in writing to the other given within thirty (30) days (the "Notice Period") of the day of the delivery of the opinion of the Landlord's Architect. In the event of such termination notice being so given this Lease shall cease and become null and void from the date of such destruction or damage (or to the date of surrender if and to the extent the Tenant has continued to use all or a portion of the Leased Premises for the conduct of business after the date of such destruction or damage) and the Tenant shall surrender the Leased Premises within one

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hundred twenty (120) days and all interest therein, other than its Trade Fixtures and equipment, to the Landlord and the rent and all other monies payable hereunder shall be apportioned and shall be payable by the Tenant only to the date of such destruction or damage (or to the date of surrender if and to the extent the Tenant has continued to use all or a portion of the Leased Premises for the conduct of business after the date of such destruction or damage)and the Landlord may re-enter and repossess the Leased Premises. However, if within the Notice Period, neither the Landlord nor the Tenant shall give notice terminating this Lease, then upon the expiration of the Notice Period the Landlord shall with reasonable diligence proceed to rebuild and/or repair or restore the Project subject to subclause 17(e). In the event such termination notice is given by the Tenant and such Major Damage has occurred on or before December 31, 2016, then any Tenant Allowance previously paid to the Tenant shall be repaid to the Landlord:

(i) to the extent such Tenant Allowance had not been used to pay for New Leasehold Improvements at the time such Major Damage occurred or is required to be paid by the Tenant to third parties pursuant to obligations relating to the proposed New Leasehold Improvements, (in which case such payment shall be paid on the effective date of termination of this Lease); and

(ii) to the extent the Tenant recovers insurance proceeds arising from the loss of Leasehold Improvements, provided that the amount paid to the Landlord shall be prorated based on the amount of the Tenant Allowance previously paid to the Tenant (and not repaid to the Landlord pursuant to subclause **l** 7(b)(i)) compared to the amount expended by the Tenant in respect of the New Leasehold Improvements (in which case such payment shall be made forthwith following receipt of such insurance proceeds).

(c) Restoration and Repair of the Project

If the Project is capable, in the opinion of the Landlord's Architect, of being rebuilt and/or repaired and restored with reasonable diligence within one year of the happening of such destruction or damage, such opinion of the Landlord's Architect to be communicated by the Landlord to the Tenant as set out in subclause l 7(b), then the Landlord, with reasonable diligence, shall proceed to rebuild and/or repair and restore the Project subject to subclause l 7(e). Provided, however, that if it shall require less than one year and more than one hundred twenty (120) days to rebuild and/or repair and restore the Project and such destruction or damage shall have occurred within the last two (2) years of the Term, the Landlord shall not be obligated to rebuild and/or repair and restore the Project.

(d) Carry Out Repair Diligently

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If, pursuant to the provisions of this clause, the Landlord shall be obligated to expeditiously rebuild and/or repair and restore the Project, such rebuilding and/or repair shall be commenced promptly and shall be completed with reasonable diligence so as to rebuild and/or repair and restore the Project as soon as is practical in the circumstances.

(e) Landlord's Obligation to Repair and Restore

It is expressly understood and agreed that the obligation of the Landlord to expeditiously rebuild and/or repair or restore the Project shall include all structural elements thereto and Project systems therein but shall not extend to or be deemed to include the rebuilding and/or repair and restoration of any alterations, additions, extensions, equipment or installations existing prior to such damage or destruction and made by or for the Tenant upon the Leased Premises. The Tenant shall expeditiously rebuild and/or repair and restore the Leased Premises in accordance with this Lease and Annual Rent and Additional Rent hereunder shall be deemed to commence on that date which is the shorter of:

(i) 60 days following the date of delivery to the Tenant of written notice from the Landlord that the Leased Premises are ready for the Tenant to commence its repairs to the Leased Premises pursuant to its obligations under this Lease; or

(ii) the date the Tenant finishes such repairs,

the intention being that the Tenant shall have a fixturing period equal to the shorter of the time periods in clauses (i) and (ii) above to complete its repairs without the payment of Annual Rent and Additional Rent relating to Operating Expenses and Property Taxes.

Appropriateness of Declaratory Relief

19. The Lease is expressly governed by Alberta law.

20. CNOOC has threatened to withhold rent. Because CNOOC leases the vast majority of the rentable Premises in the Building, any substantial withholding of rent would cause severe damage to the Landlord.

21. Despite CNOOC's assertions that the Building is unfit for occupancy, there is no substantial factual dispute between the parties.

22. To address the "fitness for occupancy" issues raised by CNOOC, a ruling under Alberta law in respect of the relevant provisions of the Lease will be required in a timely fashion.

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Remedy sought:

23. The Applicant seeks the following relief:

(a) A declaration that the Landlord's obligations under the Lease to remove any of the asbestos containing spray insulation may be satisfied by compliance with the AMP and, in the event that an order or directive concerning such material may be made in the future by OH&S, by compliance with any such order or directive;

(b) A declaration that the Premises have not been rendered unfit for occupancy;

(c) A declaration that, unless and until the Premises are shown to have been rendered unfit for occupancy, the Respondent has no entitlement to withhold any part of its rent pursuant to subsection 17(a) of the Lease;

(d) A declaration that the presence of traces of the said spray insulation is not an "event" by which the Project has been "damaged or destroyed", and it is not "the happening of ... destruction or damage" pursuant to Section 17 of the Lease;

(e) Costs of this action; and

(f) Such further and other relief as to the Court may seem appropriate.

Affidavit or other evidence to be used in support of this application:

24. In support of this Application, the Applicant will rely on the Affidavits of Marco Sardachuk and Glyn Jones, filed.

Applicable Acts and regulations:

25. The Applicant will rely on the *Occupational Health and Safety Act*, S.A. 2017, c. 0-2.1, and such other authority as to the Court may seem appropriate.

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