CITATION: Simpson Oil Ltd. v. Parkland Corp., 2025 ONSC 799
COURT FILE NO.: CV-24-728657-00CL
DATE: 20250210

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: SIMPSON OIL LIMITED

Applicant

AND:

PARKLAND CORPORATION

Defendant

BEFORE: Justice Jana Steele

COUNSEL: *R. Seumas M. Woods and Sahil Kesar* for the applicant

Orestes Pasparakis and Andrew McCoomb for the respondent

HEARD: January 15, 2025

REASONS FOR JUDGMENT

Overview

[1] This is a contract interpretation case. The contract in issue is an investor rights agreement, in this case called a governance agreement. The parties disagree on the interpretation of the language of the contract regarding when certain restrictions on Simpson Oil Limited ("SOL") regarding voting its shares of Parkland Corporation ("Parkland"), among other things, cease to apply. Further, they disagree as to whether certain changes in senior management of Parkland triggered the release of the restrictions that were placed on SOL regarding its shares of Parkland.

[2] The governance agreement contains a "Material Adverse Change" clause, which triggers an end to certain restrictions on SOL regarding its shares of Parkland. Although such clauses are common in M&A transactions, MAC clauses are not common in investor rights agreements. In fact, the experts who provided evidence to the court indicated that this was the first time they had seen a MAC clause ending restrictions that would otherwise be in effect in a governance or standstill agreement.

[3] The governance agreement between the parties was executed at the same time that the parties finalized a business combination agreement ("BCA"). Under the BCA, in the first phase, SOL sold 75% of its investment company, Sol Investments Limited ("SIL"), to Parkland in

exchange for common shares of Parkland and cash. Following the transaction, SOL held approximately 9.9% of Parkland's shares and was Parkland's largest single shareholder. In the second phase, SOL sold the remaining 25% of SIL to Parkland for additional shares of Parkland.

[4] SOL brought this application, seeking clarity on whether the departure of Parkland's chief financial officer, Michael McMillan, or the departure of 8 out of 10 of Parkland's senior management, constituted a material change in Parkland's senior management and therefore a MAC under the Governance Agreement.

[5] The issue turns on the interpretation of the definition of "Material Adverse Change" in the Governance Agreement. In particular, the parties disagree regarding whether two specific events, enumerated as (A) and (B) in the definition, are illustrations of the type of event that may constitute a MAC or mandatory events that automatically constitute a MAC.

[6] For the reasons set out below, I have determined that the specific events enumerated as (A) and (B) in the definition of "Material Adverse Change" are mandatory events that automatically constitute a MAC. I have further determined that a "Material Adverse Change" as defined in the Governance Agreement has occurred. As a result, the restrictions applicable to SOL under sections 3.1 and 4.1 of the Governance Agreement no longer apply to SOL.

Background

[7] SOL is a privately held holding company incorporated under the laws of the Cayman Islands. SOL is part of the Simpson Group of Companies, that was founded by Sir Kyffin Simpson. David Simpson is currently the managing director of SOL.

[8] Parkland is an Alberta public corporation, based in Calgary. It is an international fuel distributor, marketer, and retailer. Parkland's common shares are listed on the Toronto Stock Exchange.

[9] SIL, which is the largest independent fuel marketer in the Caribbean, is now an indirect subsidiary of Parkland. SIL was previously a wholly owned subsidiary of SOL.

[10] Currently, SOL is Parkland's largest shareholder, holding approximately 19.8% of Parkland's common shares. Other than SOL, Parkland's shares are widely-held.

[11] In January 2019, Parkland bought a 75% interest in SIL for a total consideration of approximately $1.57 billion. As part of the consideration, Parkland issued 9.9% of its common shares to SOL. The transaction proceeded by way of a Business Combination Agreement, the terms of which required SOL to be bound by a Governance Agreement. The transaction was heavily negotiated over several months, including several letters of intent:

a. The parties began discussions in early 2018.

b. In March 2018, Parkland sent SOL a draft letter of intent (the "March Draft LOI"). In the March Draft LOI, Parkland proposed to buy 100% of SIL for a combination of

cash and common shares of Parkland. At that time, Parkland and SOL had been discussing a transaction structure whereby SOL would receive approximately 19.9% of the shares of Parkland as consideration with the balance payable in cash. This early draft contemplated an investor rights and support agreement. In addition, it was contemplated that the Simpson family would have a representative nominated by Parkland to its board of directors.

c. Following further discussions between the parties, Parkland sent SOL a revised draft letter of intent on April 16, 2018 (the "April Draft LOI"). The April Draft LOI again contemplated that Parkland would buy 100% of SIL for a combination of cash and common shares of Parkland. However, it limited the number of shares to be issued in any transaction to 9.9% of the outstanding Parkland shares, with the remaining consideration in cash. This version of the LOI set out the broad terms of the proposed support and investor rights agreement. It also contemplated that SOL would have a nominee to the Parkland board as long as SOL held more than 5% of Parkland's shares and the nominee was "mutually agreed upon."

d. The next version of the LOI was sent by Parkland in June 2018 (the "June Draft LOI"). This version of the LOI contemplated a two-stage transaction under which Parkland would first acquire 80% of SIL, then the remaining 20% of SIL in a second stage two years later. Further, the June Draft LOI did not give SOL the right to nominate representatives to the Parkland board of directors. The June Draft LOI again referred to the requirement for SOL to enter into an investor rights and support agreement (renamed a governance agreement) and included a provision indicating that the restrictions under the agreement would end if there was a material adverse change. The following language was included in the June Draft LOI:

> [...] the covenants of the Simpson Shareholders set out in (A), (B) and (C) above shall terminate upon the occurrence of a material adverse change in the business or affairs of Parkland, which shall include a material change in the management of Parkland. For greater certainty, the definition of adverse material change for this purpose will include customary exemptions, such as any change in applicable laws or GAAP and changes generally affecting the industry or economy as a whole, as well as clarification that a material adverse change in Parkland due to the Sol business shall be excluded. [Emphasis added.]

e. The parties executed the final version of the letter of intent on September 7, 2018 (the "September LOI"). The September LOI contemplated that, under the first phase of the transaction, Parkland would acquire 75% of SIL. Parkland could acquire, and SOL could force Parkland to acquire, the remaining 25% of SIL in the second phase of the transaction, which could not occur for at least two years after closing of phase one. SOL was not entitled to nominate representatives to Parkland's board of directors. The September LOI incorporated the same language as set out in the June Draft LOI regarding the proposed governance agreement and its termination on a

material adverse change, "which shall include a material change in the management of Parkland."

f. The BCA was executed in October 2018.

[12] In April 2022, Parkland and SOL began negotiating Parkland's acquisition of the remaining 25% of SIL. The acquisition was completed on August 4, 2022, increasing SOL's stake in Parkland from 9.24% to 19.54%.

[13] At the end of 2019, Mike McMillan, Parkland's Senior Financial President and Chief Financial Officer, left Parkland. Parkland did not file a material change report at the time. Parkland did, however, issue a press release.

[14] Darren Smart, Parkland's Senior Vice President, Strategy and Corporate Development, was appointed as Interim CFO, and assumed that position on November 12, 2019. Again, Parkland issued a press release announcing that Mr. Smart would be assuming the role of interim CFO.

[15] Following the announcement that Mr. McMillan would be leaving Parkland, SOL passed an internal resolution resolving that a Material Adverse Change under the Governance Agreement occurred upon Mr. McMillan's resignation as Parkland's CFO.

[16] In and around the end of August 2022, Bob Espey (Parkland's CEO) says that he learned of SOL's position that Mr. McMillan's departure had resulted in a MAC under the Governance Agreement. Parkland did not agree. The parties agreed not to agree, with both sides reserving their rights.

[17] Prior to Parkland's 2023 AGM, SOL put forward a shareholder proposal that would have contemplated SOL getting two seats on Parkland's board of directors. Parkland instead suggested a Nomination Agreement, which was made as of March 21, 2023, between Parkland and Simpson.

[18] Under the Nomination Agreement, during the Nomination Period, SOL was given the right to designate two nominees to stand for election to Parkland's board of directors. Nomination Period is defined as follows:

> "Nomination Period" means the period beginning on the date hereof and continuing until the earlier of (i) the first Business Day that Simpson Oil and the SOL Group Parties collectively hold less than 5% of the Common Shares (on a non-diluted basis) and (ii) 11:59 p.m. (Toronto time) on the day that Simpson Oil delivers to Parkland written notice waiving its rights under Section 2.1(a); provided, in the case of (ii), that no Simpson Nominee serves on the Board on the date of such notice.

[19] The Nomination Agreement contains restrictions on voting, among other things, similar to those in the Governance Agreement. These restrictions are for the "Voting Period", defined as:

> "Voting Period" means the period beginning on the date hereof and continuing until 11:50 p.m. (Toronto time) on the day that is three months after the Nomination Period ends.

[20] In 2023, further to the Nomination Agreement, SOL proposed two nominees, who were elected to Parkland's board of directors. At the end of 2023, the two directors nominated by SOL resigned from Parkland's board, following which SOL gave Parkland notice that it waived its rights under the Nomination Agreement. Accordingly, effective April 1, 2024, the voting and other restrictions under the Nomination Agreement would no longer apply to SOL. As are result, it became a live issue as to whether the Governance Agreement restrictions continued to apply or had been lifted by the change(s) in Parkland's management.

Definition of Material Adverse Change in the Governance Agreement

[21] "Material Adverse Change" is defined in the Governance Agreement as follows:

> **"Material Adverse Change"** means any change that has a material adverse effect on the business, results of operations or financial condition of Parkland and its Subsidiaries, taken as a whole, that would require Parkland to file a material change report (as such term is defined under Securities Laws) with the applicable securities regulatory authorities, which shall include (A) a replacement of a majority of the members of the Board of Directors at any one meeting of shareholders or otherwise within a three month period, and (B) a material change in the composition of senior management at Parkland (which, for greater certainty, will not include any change in titles of such senior management); provided, however, that in no event would any of the following, alone or in combination, be deemed to constitute, nor shall any of the following (including the effect of any of the following) be taken into account in determining whether there has been or will be, a "Material Adverse Change": (i) any change in applicable Laws or generally accepted accounting principles, or any interpretation thereof; (ii) any change in interest rates or economic, business or financial market conditions generally; (iii) any change generally affecting any of the industries in which Parkland or any of its Subsidiaries operate or the economy as a whole; (iv) any acts of terrorism, war, revolution, riot, insurrection, civil commotion, sabotage, public demonstration or the outbreak or escalation of disease, hostilities or change in geopolitical conditions; (v) any temporary labor disturbance (including a work slowdown or work stoppage) or other labor dispute (including a grievance or arbitration proceeding); (vi) any Material Adverse Change due, in whole or in part, directly or indirectly, to the acquisition of the SOL Business, unless such Material Adverse Change results from actions or inactions of Parkland, or (vii) any failure of any of the representations and

> warranties of SOL Limited in the Business Combination Agreement to be true. For greater certainty, the filing of a material change report with the applicable securities regulatory authorities does not, absent the other requirements of this definition being satisfied, result in the occurrence of a Material Adverse Change. [Emphasis added.]

Issues

[22] There are two issues before the court on this application:

a. What constitutes a "Material Adverse Change" under the Governance Agreement?

b. Has a "Material Adverse Change" occurred?

Analysis

[23] As noted above, the parties entered into the Governance Agreement when they closed the BCA transaction. The transaction and the terms of the ancillary agreements, including the Governance Agreement, were heavily negotiated between the parties, both of which had sophisticated counsel. There were multiple letters of intent leading up to the finalizing of the deal.

[24] The Governance Agreement, in Article 3, contains restrictions on SOL's ability to vote the shares of Parkland it received as partial consideration under the transaction. The restrictions on voting remain in force during the Voting Period, which is defined as follows:

> "Voting Period" means any period during which the SOL Group Parties collectively Beneficially Own five percent or more of Parkland's issued and outstanding Common Shares and for 60 days thereafter, provided that a Voting Period shall end upon the occurrence of a Material Adverse Change.

[25] During a Voting Period, SOL is required to either vote all the Parkland securities it holds in a manner consistent with the public recommendation of Parkland's board or abstain from voting. Among other things, during the Voting Period SOL is not permitted to:

a. Call or seek to call a meeting of Parkland shareholders or initiate any shareholder proposal for action of Parkland's shareholders, or seek election or appointment or removal of a director on Parkland's board;

b. Conduct or seek to effect any "take-over bid" or exchange offer or other similar transactions involving SOL's shares of Parkland;

c. Engage in any other action similar to that of an Activist Investor.

[26] Article 4 of the Governance Agreement contains other restrictions on SOL, including SOL's ability to acquire additional securities of Parkland, during the "Standstill Period", which is defined as:

> "Standstill Period" means the period beginning on the date hereof and continuing until the earlier of (i) the occurrence of a Material Adverse Change, and (ii) the first Business Day on which none of the SOL Group Parties Beneficially Own any Common Shares.

[27] During the Standstill Period, SOL is restricted from, among other things:

a. Acquiring any additional securities of Parkland; or

b. Advising, assisting or acting as a financing source for or otherwise joining or investing in any third party with respect to the acquisition of additional securities of Parkland.

[28] Accordingly, whether a "Material Adverse Change" has occurred is significant to the parties. When a MAC occurs, the restrictions on SOL's ability to freely vote its Parkland shares, among other things, are lifted.

[29] The evidence is that SOL had tried to insert a two-year sunset provision in the Governance Agreement when it was being negotiated, which was refused by Parkland.

[30] Both parties provided expert evidence regarding the nature of governance or standstill agreements, among other things. Ed Waitzer was retained by the applicants to provide expert evidence. Clay Horner was retained by the respondents to provide expert evidence. The experts agreed that investor rights or governance agreements are common in transactions such as the one between the parties.

[31] With these types of agreements, the public company issuing the shares to a single shareholder will generally want to retain as many restrictions for as long as possible, whereas the party acquiring the shares of the public company will want as few restrictions on voting, etc. for as short a period as possible. Mr. Waitzer noted that he agreed with the following observation made by Mr. Horner:

> [A] public company board issuing a significant percentage of its voting shares to a single shareholder (or group of shareholders acting jointly) will typically consider the ability of such a shareholder to exert control or deal with its shares in a manner that could be disruptive to the company and its shareholders and that one way to address such concerns [...] is to try to negotiate restrictions on the rights of the shareholder to (a) vote its shares or support activist activities or (b) acquire further shares or dispose of its holdings.

[32] Regarding the typical duration of restrictions on voting in governance or standstill agreements, Mr. Waitzer's evidence was that "a maximum 24 month term is the norm for restrictions on voting and the ability of a shareholder to increase its position." Mr. Waitzer further indicated that "[i]t would be atypical, in my experience, for such restrictions to endure indefinitely." Mr. Waitzer stated that "[w]hile each situation is unique, it is difficult to imagine why a counterparty with negotiating leverage would typically agree to indefinite restrictions."

[33] Mr. Horner's evidence was that "voting arrangements and limitations on the shareholder's ability to increase its position generally endure for a longer or indefinite period." Mr. Horner indicated that voting restrictions will "usually endure until and unless the shareholder's holdings fall below a prescribed percentage – often 5%." He further noted that "[i]n exchange for these restrictions, investor rights or governance agreements often (but not always) provide the shareholder with representation on the public company's board of directors or observer status." In cross examination, Mr. Horner conceded that generally such restrictions will not endure for an indefinite period, but many will endure for more than two years. In his cross examination, Mr. Horner was asked about other significant transactions with shareholder voting restrictions, many of which provided the shareholder with the ability to nominate persons to the board of directors. As noted above, SOL is not entitled to nominate persons to Parkland's board of directors under the Governance Agreement.

[34] Based on the expert evidence and the cross examinations, these governance or standstill agreements are generally unique or, as stated by Mr. Waitzer, "idiosyncratic." The contents of a particular governance agreement will reflect, among other things, the nature of the transaction and the concerns of the parties.

[35] No party was able to point to a specific governance or standstill agreement where there was a MAC clause ending restrictions that would otherwise be in effect.

[36] Mr. Waitzer and Mr. Horner disagreed regarding whether the "high bar" that generally applies to a MAC clause in the context of transactional agreements would be extended to a governance agreement. Mr. Waitzer indicated that he was unclear on what basis Mr. Horner extended the "high bar" observation to governance agreements "where the issues in play are typically quite different."

What constitutes a MAC under the Governance Agreement?

[37] The court is asked to interpret the definition of "Material Adverse Change" and, in particular, paragraph (B) of the definition set out in the Governance Agreement.

[38] The applicant takes the position that the inclusion of the mandatory language "which shall include" is key. Based on this, the applicant's position is that "a material change in the composition of senior management at Parkland (which, for greater certainty, will not include any change in titles of such senior management)" is a standalone trigger. In other words, the applicant states that if either (A) or (B) in the MAC definition occurs, there has been a MAC.

[39] The respondent's position is that paragraphs (A) and (B) in the MAC definition are merely illustrations of the types of events that may constitute a MAC. The respondent takes the position that paragraph (B) is modified by the words preceding paragraph (A) and therefore, for the MAC clause to be triggered, the applicant is required to show adversity and that there was a "material change" under Securities Law. In addition, the respondent submits that the clause sets a high bar.

[40] The Supreme Court of Canada in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at paras. 47-50, stated that when interpreting a contract, the contract must

be read as a whole "giving the words used their ordinary and grammatical meaning". Further, a "practical, common-sense approach" must be employed, and the court must try to "ascertain the objective intent of the parties":

> [47] ... [T]he interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" (*Jesuit Fathers of Upper Canada v Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] S.C.R. 744, at para. 27, *per* LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways*), 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 64-65, *per* Cromwell J.). To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:
>
> > No contracts are made in a vacuum: there is always a setting in which they have to be placed. ... In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.
> >
> > (*Reardon Smith Line*, at p. 574, *per* Lord Wilberforce)

[41] In *Weyerhaeuser Company Limited v. Ontario (Attorney General)*, 2017 ONCA 1007, 287 A.C.W.S. (3d) 93, the Court of Appeal provided the following summary of the principles of contractual interpretation, at para. 65:

> The general principles guiding adjudicators about "how" to interpret a commercial contract were summarized in *Sattva*, at para. 47, and by this court in two 2007 decisions - *Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust*, 2007 ONCA 205, 85 O.R. (3d) 254 (Ont. C.A.), at para. 24, and *Drumbell v. Regional Group of Cos.*, 2007 ONCA 59, 85 O.R. (3d) 616 (Ont. C.A.), at paras. 52-56. When interpreting a contract, an adjudicator should:
>
> i. determine the intention of the parties in accordance with the language they have used in the written document, based upon the "cardinal presumption" that they have intended what they have said;
>
> ii. read the text of the written agreement as a whole, giving the words used their ordinary and grammatical meaning, in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective;

iii. read the contract in the context of the surrounding circumstances known to the parties at the time of the formation of the contract. The surrounding circumstances, or factual matrix, include facts that were known or reasonably capable or being known by the parties when they entered into the written agreement, such as facts concerning the genesis of the agreement, its purpose, and the commercial context in which the agreement was made. However, the factual matrix cannot include evidence about the subjective intention of the parties; and

iv. read the text in a fashion that accords with sound commercial principles and good business sense, avoiding a commercially absurd result, objectively assessed.

[42] The applicant submits that the inclusion of the words "which shall include (A) [...] and (B) [...]" supports its interpretation that the events set out in (A) and (B) are not examples of the types of events that may be MACs. Instead, the applicant says these events "shall" be considered MACs. The applicant states that the parties chose to use mandatory language, instead of language such as "may include" or "including but not limited to".

[43] The applicant submits that the factual matrix supports its interpretation. As set out above, the September LOI stated in reference to the governance agreement that "[t]he covenants of Sol Limited [...] shall terminate upon the occurrence of a material adverse change in the business or affairs of Parkland, which shall include a material change in the management of Parkland." The LOI referred to a "material change" in the management of Parkland as being an event that "shall" be included as a MAC.

[44] The applicant further submits that its interpretation is consistent with the notion that shareholder rights are not to be restricted lightly: *Paulson & Co. Inc. v. Algoma Steel Inc.*, 79 O.R. (3d) 191.

[45] The applicant also states that the interpretation it propounds is a commercially reasonable interpretation. The applicant says that the parties wanted certain bright line events where it would be clear that the restrictions placed on SOL would be lifted, and one of such events was a material change in the composition of Parkland's senior management.

[46] The respondent disagrees with the applicant's interpretation. The respondent relies on *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [2012] 2 S.C.R. 231, which in my view does not apply. The Supreme Court in *Entertainment Software* was interpreting a clause in a statute, not a contract negotiated between two sophisticated arm's length parties. In addition, the language in the relevant clause in *Entertainment Software* defined the term by first describing what the term "means" and then outlining what the term "includes." The language used by the parties in the instant case is different. The parties chose to use the words "shall include" before listing two events that were meant to be standalone triggers.

[47] The respondent states that the words “shall include” are simply illustrative and make clear that changes to the board or senior management are within the ambit of changes that will give rise to a MAC. However, the respondent states that a negative impact must also be demonstrated.

[48] The respondent’s position is that to be a “Material Adverse Change”, the change must (a) have a material adverse effect on Parkland’s business, results of operations or financial condition; and (b) oblige Parkland to file a material change report. The respondent submits that the words preceding paragraph (A) require that SOL lead evidence to show that the changes to Parkland’s senior management had a negative impact on Parkland. SOL has not led any evidence in this regard. The respondent further submits that to trigger the clause, SOL is required to show that the changes to Parkland’s senior management constitute a “material change” within the meaning of securities law. Again, SOL has not led any evidence in this regard. SOL says it has not led this evidence because, based on its interpretation of the MAC clause, it was not necessary to do so.

[49] Parkland further notes that during negotiations SOL had suggested that the voting restrictions fall away with a change to the CEO/CFO, which was rejected by Parkland.

[50] Parkland also points to the “for greater certainty” language at the end of the definition of “Material Adverse Change” as stressing that a material change (and the filing of a material change report) is not alone sufficient, and that the other requirements must be fulfilled for a MAC to have occurred. However, if SOL’s interpretation is correct, the “for greater certainty language” would only apply where there is a requirement to file a material change report (i.e., it would not apply to the standalone events in (A) and (B)).

[51] In my view, although there are grammatical imperfections in the language in the definition of Material Adverse Change, the inclusion of paragraphs (A) and (B) only makes sense if they are in reference to the concept of “Material Adverse Change” generally (without the pre-conditions leading up to “which shall include”). In this “idiosyncratic” agreement, a MAC shall include “A) a replacement of a majority of the members of the Board of Directors at any one meeting of shareholders or otherwise within a three month period, and (B) a material change in the composition of senior management at Parkland (which, for greater certainty, will not include any change in titles of such senior management)”. It would be redundant to include paragraphs (A) and (B) if the preconditions in the language prior to (A) (i.e., a material adverse effect on Parkland’s business, results of operations or financial condition, and obligation to file a material adverse change report) also had to be satisfied.

[52] For there to be a “Material Adverse Change” generally, Parkland must be required to file a material change report (as such term is defined under Securities Laws). As noted by Parkland, in reference to the *Securities Act* and Mr. Waitzer’s evidence, as a securities law concept, a “material change” is a change that “would reasonably be expected to have a significant effect on the market price or value of a security of the issuer.” As Mr. Waitzer indicated, the term “material change” is not a “loose [term] but [has] particular meaning in the securities industry.” It would be generally understood in the securities industry whether a particular event is a material change. Accordingly,

(A) and (B) would not be required if they were not standalone events that had no pre-conditions to being a "Material Adverse Change."

[53] As indicated the language is imperfect. However, the best sense that can be made of the language is that a "Material Adverse Change" shall include (A) and (B), without any further pre-condition or prerequisite.

[54] The interpretation advanced by SOL is further supported by the factual matrix. Given the letters of intent leading up to the transaction, the more likely interpretation of the wording in the MAC definition is that the parties had contemplated that a material change in the management of Parkland would constitute a "Material Adverse Change." As noted above, the Draft June LOI and the September LOI contained similar mandatory language to that in the Governance Agreement, stating that a MAC "shall include a material change in the management of Parkland."

[55] The interpretation advanced by SOL is also commercially reasonable because otherwise SOL is restricted indefinitely from voting (among other things) its Parkland shares. SOL is a significant shareholder of Parkland and under the heavily negotiated Governance Agreement does not have the right to nominate representatives to Parkland's board of directors. Mr. Simpson indicated that his view was that "Parkland had a capable management team and board of directors, and SOL could therefore be a passive investor in Parkland without any board representation." As noted by SOL, indefinitely disenfranchising a shareholder that holds 9.9% or 19.6% of Parkland's shares does not make commercial sense, particularly when that shareholder does not have any right to nominate representatives to Parkland's board of directors.

Has a MAC occurred?

[56] The applicant submits that there was a material change in senior management in 2019 when Mr. McMillan resigned from Parkland. SOL argues in the alternative that the departure of eight of the ten people identified as Parkland's senior management as of the date the parties signed the Governance Agreement would certainly qualify as a material change in Parkland's senior management.

[57] On May 1, 2019, Parkland announced that Mr. McMillan had decided to move back to Ontario to spend more time with his family. Mr. McMillan left Parkland at the end of December 2019.

[58] Around the time of Mr. McMillan's departure, SOL passed an internal resolution documenting its view that a MAC had occurred under the Governance Agreement. Mr. Simpson says that he informed Mr. Epsey of his view around the time SOL passed the resolution; however, Mr. Epsey denies this.

[59] SOL submits that Mr. McMillan's departure on its own was a material change in senior management. SOL notes that from a corporate officer point of view, the CFO of a public company is important because of the role the CFO plays in the company's management. SOL further notes that National Policy 52-201 provides a non-exhaustive list of examples of the types of events that may be material, including where the company's CFO or CEO departs.

[60] Parkland announced Mr. McMillan's departure in a press release announcing Parkland's financial results for the first quarter of 2019. Mr. McMillan was one of Parkland's five Named Executive Officers in its information circular for its 2019 Annual and General Meeting of Shareholders.

[61] Parkland's evidence is that it did not view Mr. McMillan's departure as a material change, let alone a MAC. Parkland saw Mr. McMillan's departure as ordinary course. He was replaced internally, and no material change report was filed.

[62] SOL argues that, in addition to Mr. McMillan's departure, the departure of seven other members of senior management between October 2019 and April 2024 is a material change in Parkland's senior management. There are only two members of Parkland's senior management, Mr. Espey and Mr. Smart, who were members of Parkland's senior management when the Governance Agreement was signed.

[63] SOL submits that the lack of any defined period in the change in the senior management part of the MAC provision (unlike the provision dealing with changes in the Parkland board of directors) indicates that changes in senior management are not to be measured over any defined period of time, but instead are measured in the context of the senior management at the time the parties entered into the Governance Agreement. I agree that this is a reasonable interpretation.

[64] Mr. Espey stated: "Like most organizations, Parkland's management team has over the past six years experienced employee attrition (by way of resignation, retirement and in one case an untimely death) and employee reassignment and/or title changes. Each of the departures has been, to my knowledge, the ordinary evolution of the senior management team. Most employees had their roles filled by internal candidates."

[65] The definition of "Material Adverse Change" provides that it shall include "a material change in the composition of senior management at Parkland (which, for greater certainty, will not include any change in titles of such senior management)." The departure of eight out of ten members of Parkland's senior management from the time the Governance Agreement was struck constitutes a material change in senior management. As noted, unlike changes to Parkland's board of directors, there is no defined period of time specified for changes in senior management.

Disposition and Costs

[66] A "Material Adverse Change" as defined in the Governance Agreement has occurred. As a result, the restrictions applicable to SOL under sections 3.1 and 4.1 of the Governance Agreement no longer apply to SOL.

[67] If the parties are unable to agree on costs by February 28, 2025, they shall notify my judicial assistant. In such case, the parties may make written submissions as follows: SOL shall deliver its Bill of Costs and written submissions (no more than 3 pages) by March 14, 2025. Parkland shall deliver its Bill of Costs and written submissions (no more than 3 pages) by March 28, 2025. When the submissions are delivered, they shall be sent by email to my judicial assistant and posted on Case Centre.

Justice Jana Steele

Date: February 10, 2025

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DATE: 20250210

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

SIMPSON OIL LIMITED

Applicant

AND:

PARKLAND CORPORATION

Defendant

REASONS FOR JUDGMENT

Justice Jana Steele

Released: February 10, 2025