Court of Appeal File No.: CA041797

COURT OF APPEAL

ON APPEAL FROM: The Order of the Honourable Mr. Justice Grauer of the Supreme Court of British Columbia, pronounced on April 14, 2014

BETWEEN:

AMERICAN CREEK RESOURCES LTD.

RESPONDENT
(Plaintiff)

AND:

TEUTON RESOURCES CORP

APPELLANT
(Defendant)

APPELLANT'S FACTUM

APPELLANT

TEUTON RESOURCES CORP.

Appellant's Counsel:

Robert D. Holmes, Q.C. and John W. Bilawich

Holmes & King
Barristers & Solicitors
1300-1111 West Georgia Street
Vancouver, B.C. V6E 4M3

Telephone: 604-681-1310

RESPONDENT

AMERICAN CREEK RESOURCES LTD.

Respondent's Counsel:

Terrance A. Kowalchuk

Miller Thomson LLP
Barristers & Solicitors
1000-840 Howe Street
Vancouver, B.C. V6Z 2M1

Telephone: 604-687-2242

Court of Appeal File No.: CA041797

COURT OF APPEAL

ON APPEAL FROM: The Order of the Honourable Mr. Justice Grauer of the Supreme Court of British Columbia, pronounced on April 14, 2014

BETWEEN:

AMERICAN CREEK RESOURCES LTD.

RESPONDENT
(Plaintiff)

AND:

TEUTON RESOURCES CORP

APPELLANT
(Defendant)

APPELLANT'S FACTUM

APPELLANT

TEUTON RESOURCES CORP.

Appellant's Counsel:

Robert D. Holmes, Q.C. and John W. Bilawich

Holmes & King
Barristers & Solicitors
1300-1111 West Georgia Street
Vancouver, B.C. V6E 4M3

Telephone: 604-681-1310

RESPONDENT

AMERICAN CREEK RESOURCES LTD.

Respondent's Counsel:

Terrance A. Kowalchuk

Miller Thomson LLP
Barristers & Solicitors
1000-840 Howe Street
Vancouver, B.C. V6Z 2M1

Telephone: 604-687-2242

INDEX

CHRONOLOGY OF DATES RELEVANT TO THE APPEAL

Date	Event
1928	Treaty Creek claims discovered and staked. Prospecting fails to identify significant mineralization.
1982	Teuton founded.
1984	Teuton acquires Treaty Creek claims.
1990	Teuton options Treaty Creek property to Tanalus Resources ("Chet Idziszek's flagship company." Tantalus spends $1.8 million out of $3.2 million required to earn an interest and abandons option.
1994	Teuton options Treaty Creek property to Homestake Mining. Homestake's initial drilling in the Eureka zone yields results of little interest. Homestake abandons the project and option.
1997	Teuton options Treaty Creek property to Global Exploration. Global funds Teuton to conduct one exploration season, but declines to continue and abandons the option.
1997	Bre-X scandal regarding misrepresentations as to drilling results on Indonesian mineral claims.
2000	Canadian Institute of Mining adopts Best Practices standards; Canadian securities regulatory agencies and exchanges adopt policies tightening standards for approval of projects by mineral exploration companies and disclosure to the public of information relating to projects.
2002	Teuton options Treaty Creek property to Heritage Exploration. Heritage chooses not to complete the earn-in requirements and abandons the option.
2004	American Creek incorporated. Headquarters in Raymond, Alberta.
2006	Silver Standard Resources and Seabridge Gold discover substantial gold reserves on claims neighbouring Treaty Creek property.
2006	Brent Ambrose joins American Creek as Vice President Explorations.
September 2006	AMK shares commence trading on TSX.
Late 2006	Brent Ambrose and Dino Cremonese discuss prospect of AMK optioning the Treaty Creek property from Teuton
February 8, 2007	Dino Cremonese email to Brent Ambrose setting out details of Treaty Creek property and possible option; Brent Ambrose

	responds that he is impressed and will forward the information to Darren Blaney, AMK's COO
March 18, 2007	Dino Cremonese emails Brent Ambrose, copy to Darren Blaney, suggested terms for an option of Treaty Creek.
April 4, 2007	Letter option agreement regarding Treaty Creek claims entered into by Teuton as optionor and AMK as optionee
August 2006	Last of the option agreements concerning Treaty Creek property prior to the Teuton-AMK option expires.
September 11, 2007	Letter amending agreement regarding Treaty Creek claims and adding thereto the Freya claims entered into by Teuton and AMK. Signed by Teuton March 20, 2008.
May 2008	Raul Sanabria, AMK's new geologist, reviews 2007 work and prepares 2007 Treaty Creek Work Assessment Report (filed September 8, 2008), setting out AMK's claim of expenditures per Mineral Tenure Act and regulations of $3,762,861.02
May 2009	Raul Sanabria prepares 2008 Treaty Creek Work Assessment Report (filed February 23, 2010) setting out AMK's claims of expenditures per Mineral Tenure Act and regulations of $451,127.09
March 31, 2010	Deadline under option agreement for AMK to have spent $5 million in exploration expenditures on the Treaty Creek property
April 2010	Raul Sanabria prepares 2009 Treaty Creek Work Assessment Report setting out AMK's claims of expenditures per Mineral Tenure Act and regulations of $2,197,258.91
December 2, 2010	American Creek starts this BC Supreme Court action against Teuton claiming it has met the $5 million option condition and is entitled to transfer of title and beneficial ownership of a 51% interest in the Treaty Creek property.
December 30, 2010	Teuton files a defence and counterclaim in this BC Supreme Court action
June 21, 2012	AMK and its management commence action in Alberta Court of Queen's Bench for defamation against Teuton, its management and others. Teuton defends action.
July 7, 2012	Reasons for Judgment of Master Baker on Teuton's application to amend.
April 1, 2013	Order of Justice Grauer refusing to allow AMK to split its case at trial.
April 22, 2013	Trial commences before Justice Grauer

June 4, 2013	Reasons for Judgment of Justice Grauer on mid-trial ruling on admissibility of Expert (K. Whitehead) report
June 11, 2013	Reasons for Judgment of Justice Grauer on mid-trial ruling on admissibility of "lay opinion" evidence
September 16, 2013	AMK Notice of Application regarding post-trial amendments to Notice of Civil Claim
September 23, 2013	Teuton Application Response to AMK's application for post-trial amendments to its Notice of Civil Claim
October 3, 2013	Trial concludes before Justice Grauer, judgment reserved
April 14, 2014	Reasons of Judgment of Justice Grauer
May 8, 2014	Teuton files Notice of Appeal
May 8, 2014	Teuton transfers Treaty Creek claims to AMK as directed by Justice Grauer's order, subject to AMK holding title in trust for Teuton as to a 49% interest
July 14, 2014	Justice Grauer directs that costs issues be scheduled for November 3, 2014, subject to a July 21, 2014 AMK application for an interim payment order
July 21, 2014	Justice Grauer pronounces order for interim payment by Teuton of $300,000 on account of costs
November 3, 2014	Scheduled hearing date for costs applications before Justice Grauer

OPENING STATEMENT OF THE APPELLANT TEUTON RESOURCES CORP.

This appeal is about an option agreement[1] concerning the "Treaty Creek" mineral claims[2] (the "Property") owned by the Appellant Teuton Resources Corp. ("Teuton"), situate in the "Golden Triangle" near Stewart, B.C. The main issue is whether the Respondent American Creek Resources Ltd. ("American Creek") strictly proved[3] that it had performed the conditions for exercise of the option, particularly by "making exploration expenditures on the Property aggregating $5,000,000" by March 31, 2010. If it did, then it would be entitled to an undivided 51% interest in the Property. If it did not, it would not be entitled to any interest in the Property.

The issues are: (a) contract interpretation, (b) the onus of proof and whether American Creek ("AMK") met the "strict proof" required, (c) evidentiary errors, including excluding evidence from Teuton as to experience, industry practices, customs, standards, and "lay opinion," the "rule" in *Browne v. Dunn,* expert evidence, and the admissibility versus reliability of facts and opinions in AMK's business records and filed assessment reports, (d) whether the Reasons are inadequate and require a new trial, and (e) post-trial amendments of AMK's claims and costs.

The trial judge agreed with Teuton that American Creek had to prove strict compliance with the option conditions, but he lowered the bar on what that amounted to by his legal interpretation of the phrase "exploration expenditures". He found that proof of American Creek having filed work assessment reports and having its business records set out what expenditures were made in relation to the Property sufficed. Thereafter, he ruled that Teuton had the burden of proving otherwise and he limited the manner of doing so.

---

[1] Reasons, ¶40 quote the body of the April 7, 2007 letter setting out the option agreement. Reasons, para. 41 quote the body of the September 11, 2007 letter setting out the amending agreement. Exhibit 3 [1 AAB 1, 1 AAB 6] includes their schedules.
[2] Exhibit 4 [1 AAB 10], 2007 Summary Report on the Treaty Creek Property, particularly pp. 1-33 [1 AAB 10-43].
[3] Reasons, ¶¶ 5-7, 46, 53, and 63. See *Pierce v. Empey* [1939] S.C.R. 247 at 252 and *1383421 Ontario Inc. v. Ole Miss Place Inc.* [2003] O.J. No. 3752, 2003 CanLII 57436 (ONCA), ¶ 53-55.

PART 1 – STATEMENT OF FACTS

Overview

1. This appeal is about a 2007 option agreement between two publicly listed mineral exploration companies. From when Teuton acquired the Property in 1984,[1] four previous optionees had done some exploration work, but then chose not to continue and their rights lapsed.[2] The choice whether to meet the option conditions was AMK's, but it had to make "exploration expenditures" of $5,000,000 by March 31, 2010. AMK purported to do so, but when Teuton asked for proof the expenses were reasonable, AMK refused.

Contract Interpretation, What Had to Be Proven and By Whom

2. The trial judge (the "Judge") frames the issue of contract interpretation as (a) whether AMK had to show that the mineral exploration expenditures it made were reasonably and prudently made and yielded useful and reliable geoscientific information (the "Reasonableness Standard"), or (b) whether it merely had to show it spent money "in connection with a program of exploration" (the "Relational Standard").[3] In error, he largely adopts AMK's Relational Standard.[4] He held that AMK merely had to show that it made filings with the Ministry of Mines' Minerals Titles Branch (the "Ministry") that it had spent more than $5,000,000 on the Property and that the onus was then on Teuton "to demonstrate why it should not" convey the 51% interest in the Property.[5]

3. AMK preferred that Teuton set out why AMK had not complied before AMK had to answer. AMK even sought a pre-trial order allowing it to split its case. The Judge refused that.[6] Nonetheless, AMK limited its case to showing it had spent money in relation to the Property. It argued that the burden shifted to Teuton to show they did not

---

[1] 1 TR 29, l.10 to 30, Read-ins from D. Cremonese discovery.
[2] 6 AAB 1155-57 (Ex. 7 vol 2, TRC 7837) and 6 AAB 1158-9 (Ex. 7 vol 2, TRC 1863), emails from D. Cremonese to B. Ambrose dated February 8 and March 18, 2007.
[3] Reasons, ¶70.
[4] The onus was on AMK to "make out from the terms of the contract": *Consolidated-Bathurst v. Mutual Boil & Machinery Insurance* (1979), 112 D.L.R. (3d) 49 at 57, quoting from *Pense v. Northern Life Assce.* (1907), 15, O.L.R. 131 (C.A.) at 137.
[5] Pleading a position answering the plaintiff's claim does not shift the onus: *Moravian Church v. Nfld. And Labrador*, 2005 NLTD 123, ¶38-39, 57-60; *Coal Harbour Properties Partnership v. Liu*, 2005 BCSC 873, ¶30-33; *RDA Film Distribution Inc. v. B.C. Trade Dev. Corp.*, 1999 CanLII 5862 (BCSC) at 165-167.
[6] AR 135, Order of April 1, 2013, ¶1.

qualify.[7] AMK relied on assessment reports it had filed with the Ministry and its own business records. Those contain statements of opinion as well as fact, yet the Judge does not differentiate between the two. AMK chose not to call any geologists it had used on the project, including the author of AMK's assessment reports. It chose not to deliver an expert report on how it made reasonable exploration expenditures.

4. The Judge nonetheless treats AMK as meeting the Relational Standard. That is odd given that he required "good faith" and "honesty" as a component thereof, yet absent testimony from their geologists or an expert, he did not have evidence that could be said to meet those, much less the Reasonableness Standard.[8] The Judge, in error, agreed with AMK's minimalist approach to what it had to prove and fixed the burden of rebutting that on Teuton.[9] The Judge further erred by eliminating the Reasonableness Standard as factors Teuton could show were lacking so as to demonstrate AMK's non-compliance.[10] He ruled that Teuton had the burden of showing that AMK's expenditures "were not incurred in good faith, were wrongly calculated or attributed, were not incurred at all, or were in fact incurred in relation to matters other than "exploration and development work" within the meaning of the *Mineral Tenure Act Regulation* notwithstanding their acceptance by the Mineral Titles Branch."[11]

5. Contrary to the law's objective approach, the Judge held that requiring "'reasonable' and 'productive of geoscientifically useful and reliable data' import their

---

[7] AMK put in a rebuttal case anyway through its accounting expert, Paul McEwen (initial report: 4 AAB 606-622 – Ex. 34), who replied to Teuton's accounting expert, Mark Zastre (4 AAB 674-709 – Ex. 46). AMK did not require that Mr. Zastre be produced for cross-examination; his report went in unchallenged. The Judge found most of Mr. McEwen's rebuttal report to be improper, but received part (4 AAB 766-796 – Ex. 49) and allowed Mr. McEwen, over Teuton's objections, to reiterate points already made: 16 TR 2631 - l. 31 to 2659 - l. 8.

[8] Mr. Burton of AMK admitted "it would be reasonable to make inquiries as to what the third-party cost was" with at-cost agreements: 3 TR 487, l. 3-8.

[9] Reasons, ¶114. AMK split its argument, delivering a 220 page "reply" after Teuton put in a 101 page response to AMK's 120 page initial argument.

[10] Reasons, ¶116.

[11] Reasons, ¶102. The onus is generally on the party asserting a proposition (*Phipson on Evidence* (14th Edition), (London, Sweet & Maxwell, 1990), ¶4-03) and on the party with particular knowledge of the subject (*Snell v. Farrell*, [1990] 2 S.C.R. 311 at 321; *Freyberg v. Fletcher Challenge Oil and Gas Inc.,* 2005 ABCA 46 at 78-82; *Pereira v The Business Depot,* 2011 BCCA 361 at 61-69).

own uncertainties." His approach was not objective. He characterized reasonableness as uncertain and subjective: "Reasonable from whose perspective? When? Useful to whom? For what?"[12]

6. His reference to the "acceptance by the Mineral Titles Branch" concerns AMK's filings of work assessment reports with the Ministry.[13] The reports were not subjected to any particular scrutiny by the Ministry, lacked back-up materials on which any real examination could take place and amount to self-serving statements of mixed fact, opinion and hearsay by AMK.[14] Yet the Judge elevates them to an importance that no one intended and the contract language does not bear out.[15]

7. He says that expenditures in relation to the Property had to be made in "good faith"[16] or, "honestly and in good faith."[17] That is still the Relational Standard.[18] The Judge fails to explain how making expenditures intended to provide value to Teuton as vendor of a 51% interest in the Property cannot but include the Reasonableness Standard factors for which Teuton argued.[19]

8. Teuton submits that the Judge's findings are in error and ought to be set aside. The law provides that they are not entitled to deference, given that they proceed upon incorrect legal principles and a misapplication of the law to the evidence.[20]

---

[12] Reasons, ¶84-85. Also see ¶116 and 144.
[13] Reasons, ¶14.
[14] Reasons, ¶103: the Mineral Titles Branch assessment process "does not involve ... [an] investigation of reasonableness." They don't test for honesty and good faith either. AMK's 2007 report author says at ARIS 30241 [1 AAB 10 – Ex 5], "*I have not been personally on site nor supervised the works during the 2007 season as I was not employed by the Company at that time, and property is not accessible due to snow and weather conditions when this report was prepared.*" See also *Terasen Gas Inc. v. Anglo Swiss Resources Inc,* 2010 BCSC 173 at 54-56 and 65.
[15] Reasons, ¶98-104.
[16] Reasons, ¶92.
[17] Reasons, ¶96.
[18] At Reasons, ¶104 he shifts this, stating, without evidence, that the assessment reports provided a "baseline" of "appropriateness, usefulness, reliability and efficacy."
[19] See *Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39 at ¶65; *Shelanu Inc. v. Print Three Franchising Corporation* (2003), 64 O.R. (3d) 533 (C.A.) at ¶5, 69-70.
[20] *Housen v. Nicholaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at ¶31, 33-36, *Opitz v. Wrzesnewskyj*, 2012 SCC 55 at 80-82, 112-113; *Hickman Motors v Canada*, [1997] 2 S.C.R. 336 at ¶96, per L'Heureux-Dube, J. concurring; *R. v. Couture*, 2007 SCC 28 at 81-86, *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at ¶53.

Securities Regulation and Applicable Mineral Exploration Standards

9. Both Teuton and AMK are companies whose shares are publicly listed for trading on the TSX Venture Exchange, are "reporting issuers" under the provisions of the applicable securities laws and their agreement subject to TSX approval.[21] As mineral exploration companies, they were also governed by applicable mineral tenure laws.[22]

10. The B.C. Securities Commission has adopted National Policy 43-101[23] and companion policy 43-101CP[24], which govern how securities regulatory approval for transactions involving reporting issuers will be considered and how such issuers report to regulators and the public. The B.C. Securities Commission companion policy 43-101CP provides, in part, in s. 1.6 that the Canadian Institute of Mining, Metallurgy and Petroleum Exploration Best Practices Guidelines (the "CIM Best Practices") should be followed by reporting issuers and qualified persons.

11. The TSX Venture Exchange Mining Standards Guidelines[25] "incorporate and expand upon" the "minimum standard prescribed by Securities Laws". The TSX regulates how transactions involving reporting issuers listed with it are to be approved and how such issuers are to report on their affairs. The TSX Mining Standards Guidelines provide that the CIM Best Practices are to be met in relation to public disclosure of "the results of exploration and development activity on mineral properties" and "encourages" them to be followed in relation to all "quality assurance programs, check programs, assay laboratories, assay results, non-fire assay results, filed procedures, and the application of conventional mining techniques."

12. The CIM Best Practices were adopted in 2000 so as to avoid repeating the Bre-X

---

[21] The Judge refers to "the market" and "promotion" of securities, but leaves off mention of the laws and policies applicable thereto. See *Securities Act*, R.S.B.C. 1996, c. 418, s. 1 ("material change" and "material fact"), s. 85 ("continuous disclosure"), and s. 184(1)-(2) and s. 188 (Securities Commission "policy statements"); 12 TR. 1822, l. 11-39, D. Cremonese in chief (identifying TSX Venture Exchange regulations and CIM Best Practices). Also, 2 TR 277, l. 8-29, and 281, l. 9 to 27, A. Burton in chief. Contrast 10 TR 1479, l. 39 to 1480, l. 30, B. Ambrose cross (didn't remember what regulations applied).

[22] Reasons, ¶16.

[23] 4 AAB 655-673 – Ex. 44, Tab 4.

[24] 4 AAB 640-654 – Ex. 44, Tab 3.

[25] 4 AAB 623-637 – Ex. 36, Tab 20, TRC015123.

disaster, among others.[26] Exploration programs are to be under the supervision of a "qualified person" and that such person must be "responsible and accountable for the planning, execution and interpretation of all exploration activity as well as the implementation of quality assurance programs and reporting." CIM Best Practices "has been drawn up to ensure a consistently high quality of work that will maintain public confidence and assist security regulators."[27]

13. The parties were also subject to legislation and regulations applicable to mineral claims and exploration. The *Mineral Tenure Act* R.S.B.C. 1996, c. 292 defines in s. 1 the phrase "exploration and development" by referring to the *Mineral Tenure Act Regulations*, B.C. Reg. 529/2004. The regulations define "physical exploration and development" and "technical exploration and development." S. 29 of the Act describes how claims are held and expire. S. 33(1) provides reports had to be filed "in the form and manner prescribed by the regulations."

The Option Agreement and Amending Agreement

14. By August 2006, the previous option agreements on Treaty Creek had come to an end and Teuton was seeking a new optionee for it.[28] Teuton sought to interest another mineral exploration company, Sabina Silver, with whom it had dealt on another property. Sabina expressed some interest.

15. In early 2007, Teuton decided to approach AMK as well. AMK owned the Electrum claims and had under option the Tide claims, both of which were nearby. AMK appeared to have experience in the area, had cash, a share price and a record of raising money that seemed promising.[29]

16. Most of the claims making up the Property had 2011 or 2012 expiry dates (unless

---

[26] At Reasons, ¶79, the Judge errs in dismissing the CIM Best Practices as not required and mischaracterizes Mr. Cremonese's evidence that he was not "familiar" with their details as equivalent to not being aware of them at all (2 TR 248, l. 30-34, D. Cremonese read-ins; 12 TR. 1727, l. 33 to 1730, l. 39, D. Cremonese in chief). Even if not "required", they are entitled to respect and deference like professional standards: *MacDonald Estate v Martin*, [1990] 3 S.C.R. 1235 at ¶16 and 18; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at ¶50-52.

[27] 4 AAB 623-637 – Ex. 36, Tab 20, TRC015124.

[28] 3 AAB 474-491 – Ex. 9, vol. 1, ACR6884 at 6891; 13 TR 2061, l. 9 to 2063, l. 29, D. Cremonese cross.

[29] 1 TR 50, l. 14-36, and 56, l. 21 to 58, l. 35, Read-ins from D. Cremonese discovery.

extended by making required payments to the government or filing work assessment reports showing work done).[30] The claims could be extended by way of work assessment credits, the yearly amounts required being modest (~$117,000). The $5,000,000 "First Earn-in" far exceeded what Teuton could use to extend the expiry dates of its mineral claims to the maximum allowed.[31] AMK could use the excess for "portable assessment credit" on its other properties, with no benefit to Teuton.

17. The benefits to Teuton from the option agreement were seen by it as including obtaining reliable geoscientific information, finding valuable mineralization and being able to use the facts of entering the option agreement and the assay results of the exploration work for promotional purposes.[32] Proper "QA/QC" controls had to be in place in order to ensure that results were reliable for purposes of, among other things, issuing news releases and using the data in a feasibility study.[33]

18. Both parties were clearly aiming at creating and enhancing value. Both clearly understood the risks. Teuton had paid for the acquisition of the Property and previous optionees had spent money on it. AMK well understood the value held by Teuton in terms of past work and acquisition costs and that if it chose to complete the option requirements, it could earn a 51% interest in a Property with exploration expenditures that may improve the Property's value.[34]

19. AMK was motivated to enter the option agreement and agreed not just to the option "First Earn-in" providing for $5,000,000 in exploration expenditures by March 31,

---

[30] See the schedules listing the mineral claims making up the Property- 1 AAB 1-5 and 6-9 – Ex. 3, letter agreements.

[31] See 4 AAB 710-734 and 735-6 (Ex. 47), $1,362,380.58 in credits resulted from the assessment reports: 2007 - $522,687.24 (4 AAB 723 - ACR019247), 2008 - $52,473.80 (4 AAB 734 - ACR019258), 2009 - $343,958.48 (4 AAB 742 - ACR019266), $83,828.02 (4 AAB 754 - ACR019278) and $359,433.04 (4 AAB 765 - ACR019289). Contrast Reasons ¶90-91 and 117(e) that credits were key to whether expenses counted as exploration expenses under the option agreement.

[32] 1 TR 30, l. 33 to 43, l. 32, D. Cremonese read-ins. Yearly work assessment credits were $4 per hectare for the first years and $8 thereafter. See *Mineral Tenure Act Regulations*, s. 8(4). The Property had 11,425 hectares at $8 per year and 6,488.12 at $4, making for $117,359.49 per year for the 17,913 hectares (1 AAB 17 – Ex. 5, p. 7).

[33] 2 TR 228, l. 34 to 229, l. 5, D. Cremonese read-ins; 11 TR 1652, l. 33-40, K. Whitehead in chief.

[34] *Adroit Resources v. HMTQ*, 2009 BCSC 841 at ¶195-199; award varied at 2010 BCCA 334, see ¶18-20, 27-28 and 50-53.

2010, and the "Second Earn-in" indeterminate, but much larger sums required for a feasibility study, but also committed to spend at least $500,000 in the first year or pay the difference between what was expended and $500,000 to Teuton.[35]

20. Weather and other conditions on the Property make mineral exploration work feasible only from July to September. This obliged AMK to start work promptly, if it did not want to pay the difference in cash to Teuton.

21. The April 4, 2007 option letter agreement contemplated that the parties would enter into a more formal agreement, including agreeing to terms of a possible joint venture, but they never did. They entered an amending agreement dated September 11, 2007, adding the Freya Claims and providing that legal title would be transferred "upon completion of the First Earn In," with AMK thereafter to "hold legal title to the Property in trust for the interest of Teuton."[36]

2007 Expenditure and Operational Issues

22. **Personnel, Management and Organization.** From the start of its work on the Property, AMK had serious personnel and management difficulties, including:

a) While it held itself out as being familiar with the area and having the capacity to do the job, AMK was a relatively new company and its management lacked experience in mineral exploration; [37]

b) AMK had not planned on another project, was fully occupied with its Tide and Electrum properties and took on the Property and the commitment to do at least $500,000 in work in 2007 knowing of the "short prospecting window", the lack of budgeting, planning and funds, the need to raise more money and that it was "stretching" its resources thin;[38]

c) The market was robust in 2006-7 and attracting and keeping people to work was difficult, including geologists, field labourers, drillers, helicopters, cooks, and safety

---

[35] 11 TR 1708, l. 1-8, 12 TR 1833, l. 9-33, 1838, l. 43 -1839, l. 16, D. Cremonese in chief.
[36] 1 AAB 1 and 1 AAB 6 – both Ex. 3.
[37] 3 TR 382, l. 13 – 383, l. 11, A. Burton cross.
[38] 2 TR 301, l. 24-42, A. Burton in chief.

people;[39]

d) AMK's drilling contractor, More Core, was also "newly established" and appears to have lacked resources;[40]

e) AMK and More Core, its drilling contractor, had trouble attracting experienced and knowledgeable personnel and often contented itself with hiring "green" students and unqualified personnel;[41]

f) AMK had personnel issues with its senior field personnel at the outset of the 2007 program on the Property when its geologist, Sue Deane, left. It was unable to find a replacement and turned instead to geology students;[42]

g) AMK's Vice President of Exploration, Mr. Ambrose, had little to no experience in mineral exploration, his background being in carpet cleaning;[43]

h) Part of the difficulties with Ms. Deane arose because Mr. Ambrose became involved in a relationship with her that made work "awkward" just prior to the outset of the 2007 program on the Property and contributed to her leaving;[44]

i) Mr. Ambrose "had some issues where he wasn't following through" and AMK chose to demote him just as the 2007 program on the Property was starting;[45]

j) AMK had him continue to be responsible for the program on the Property, however, but found him increasingly unreliable, including for reports and filings. It put another person, Mr. Yancie, in as field manager, but Mr. Yancie didn't work well with others, had health problems and a "power struggle" developed. Mr. Yancie and Ms. Mullin, a geology student, left,[46] resulting in Mr. Ambrose resuming the role of field manager "even though he didn't have the title", and was later fired;[47]

k) Mr. Ambrose had AMK retain Mac Millard to fill in as head geologist for the

---

[39] 2 TR 295, l. 1-37, Allan Burton in chief; also 6 TR 911, l. 38 – 912, l. 5, D. Blaney in chief.
[40] Reasons, ¶28. 3 TR. 401, l. 8 to 403, l. 13, A. Burton cross.
[41] 8 TR 1235, l. 46 to 1236, l. 5, cross of S. Pownall.
[42] 6 TR 917, l. 8 to 918, l. 10, D. Blaney in chief.
[43] 9 TR 1322, l. 19 to 1325, l. 29, B. Ambrose in chief.
[44] 6 TR 914, l. 22-39, D. Blaney in chief; also, 2 TR 299, l. 3 to 300, l. 4, A. Burton in chief.
[45] 6 TR 914, l. 30 to 915, l. 23, l. 10, D. Blaney in chief.
[46] 16 TR 2510, l. 15-7, K. White-Wilsdon cross.
[47] 6 TR. 915, l. 24 to 917, l. 7, D. Blaney in chief. 2 TR. 345, 8-21, A. Burton in chief.

Property's 2007 program, he had no previous experience with this type of mineral exploration work, having worked in the oil & gas field,[48] but his education and professional credentials in Saskatchewan allowed him to be a "QP" (Qualified Person for national securities regulatory purposes under National Policy 43-101), but he was unsure if he was qualified in B.C.;[49]

l) Mr. Ambrose and Mr. Millard both drank and were characterized as regularly "intoxicated" or "alcoholic";[50]

m) AMK was supposed to run a "dry camp" at the Property, but failed to enforce that, a lot of drinking went on and a lot of alcohol was transported in;[51]

n) Mr. Millard proved unsatisfactory as project manager, was "uncomfortable" with basic skills of a mineral geologist - e.g., logging core - and left it to students, handed over to Desmond O'Brien, a student, the job of running the program, did not complete the reports required on the Property's 2007 program, was not used in subsequent years, and AMK hired another geologist, Mr. Sanabria, to review the materials and make the filing notwithstanding that he had no involvement with the 2007 work.[52]

o) The Judge found Mr. Millard's credentials "less than ideal," his background being "mainly in oil & gas drilling", and that changing to Mr. Sanabria "was an upgrade" - but decided "it would be unfair to characterize him as incompetent," as opposed to

---

[48] 15 TR 2458, l. 20-38, M. White-Wilsdon in chief.

[49] 9 TR 1334, l. 10 to 1335, l. 39, B. Ambrose in chief; contacting the Association of Mineral Exploration British Columbia is hearsay and it is an industry association, not the Association of Professional Engineers and Geoscientists of B.C.: *Engineers and Geoscientists Act*, R.S.B.C. 1996 c. 116. He did not testify and no evidence was presented as to him qualifying in B.C.

[50] Mr. Burton's evidence as to Mr. Ambrose's intoxication is noted above. In cross-examining D. Cremonese, AMK's counsel put discovery questions about Mr. Millard being an alcoholic: 14 TR. 2106 l. 25 to 2107, l. 25. See also, A. Mullin in chief, 16 TR 2553, l. 4 to 2554, l. 36.

[51] 8 TR 1236, l. 31 to 1238, l. 11, S. Pownall cross; 10 TR 1534, l. 17-18, B. Ambrose cross; 11 TR 1594, l. 14-22, and 1600, l. 6 to 1601, l. 21, G. Thomsen in chief; 15 TR 2458, l. 39 to 2459, l. 9, 2465, l. 32-41, and 2476, l. 8-12, M. White-Wilsdon in chief.

[52] 10 TR 1520, l. 37 to 1521, l. 6, B. Ambrose cross; 7 TR 1041, l. 45 to 1045, l. 34, D. Blaney cross; 2 TR 344, l. 39 – 345, l. 8 and 345, l. 22 – 348, l. 45, 359, l. 1-6, A. Burton in chief, and 4 TR 543, l. 18 – 544, l. 41, A. Burton cross. Mr. Sanabria's first visit to the Property was in the summer of 2008: 5 TR 723, l. 3-40, R. Edwards cross.

making findings whether he had acted reasonably.[53]

23. **Experience, Practices and Standards.** The Judge complained about the absence of expert evidence as to "industry standards". He faults Teuton for that, notwithstanding that properly it was AMK's burden.[54] He had allowed evidence from AMK as to witness' experiences, including hearsay.[55] Yet through the course of the hearing, in error, he upheld AMK objections and interjected some of his own as to evidence Teuton sought to elicit of witnesses' experiences.[56] With Teuton's geological expert, Mr. Whitehead, the Judge, in error, excised large portions of his report, including as to practices and experiences on other exploration projects.[57] He ignored evidence of the CIM Best Practices and related regulatory requirements. The lens through which he viewed such things was, again, not based on Reasonable Standards, "which, on the findings" he made as to contract interpretation, did "not arise."[58]

24. **Market Conditions.** The Judge, in error, found that upbeat "market conditions" in 2007 afforded AMK an excuse for cost, inefficiencies and mistakes. He does the same in relation to 2008, although that year was a down market and AMK's lack of financing led to waste, no drilling and no significant exploration work.

25. **Drilling.** The two largest disputed items are in relation to drilling and helicopter expense. Regarding drilling expense, on a "purely factual basis," More Core bills to AMK in 2007 were "a little over $1,300,000" and Teuton established that, had that work been done under the contract and rates AMK and More Core agreed upon in December 2006, the cost would have been "approximately $687,000."[59] Less still, if done efficiently and only Reasonableness Standard expenses included. Further, if the rates were as charged by Elite Drilling on Teuton's own Orion project, "the cost would have been just

---

[53] Reasons, ¶159. 2 TR 344, lines 9-38, A. Burton in chief, Millard's contract not renewed.
[54] Reasons, ¶139-140.
[55] 2 TR 282, l. 46 – 283, l. 47; 287, l. 23 – 288, l. 1; 288, l. 22-40; 345, l. 22 – 348, l. 45, A. Burton in chief. 7 TR 1165, l. 17-45, S. Pownall in chief.
[56] 8 TR 1245, line 21 to 1246, line 2 and 1257, lines 23-26, S. Pownall cross. 12 TR 1852, l. 7-23, D. Cremonese in chief, 16 TR 2597, l. 23 – 2598, l. 8; 2600, l. 7 – 2601, l. 17, E. Kruchkowski in chief.
[57] See his AR 149-160, Reasons on Expert Report of Mr. Whitehead, 2013 BCSC 2202.
[58] Reasons, ¶150.
[59] Note that AMK's Mr. Burton admitted in cross that the rates set out in the December 2006 contract were "market rates": 3 TR 419, l. 47 to 420, l. 35.

over $843,000."[60] The contrast between the 2007 per meter cost of drilling on the Property vs. later years and vs. Electrum and Tide, two other AMK properties, is stark.

Drill Cost per Meter for AMK Programs in the Stewart Area[61]

Property Program	Year of drilling	Meters drilled	Billed Cost by More Core Drill Contractor	Total Cost per Meter
Treaty	2007(*1)	5470.0	$1,622,982.07	**$296.71**
Treaty	2008(*2)	0.0	$37,000.00	No Drilling
Treaty	2009(*3)	9,519.5	$1,116,534.04	$117.53
Electrum	*2007(*4)*	*12,574.0*	*$1,667,486.68*	*$132.61*
Tide	*2007(*5)*	*1,835.0*	*$262,452.79*	*$143.02*

26. The Judge's comment at ¶170 and ¶ 179 that the December 2006 contract between AMK and More Core was just for Electrum is wrong. Mr. Burton admitted the contract was general and could be applied to any property and the contract itself has no such restriction.[62] Indeed, in addition to drilling on the Electrum property it was applied to drilling 1835 meters on the Tide property. It was also applied initially to billing on the Property, but then varied by an "oral agreement" for a "day rate" sought by More Core and without any negotiation by AMK as to amount. More Core had complained it was not achieving many meters on the Eureka claims on the Property. Mr. Blaney described AMK's approach as being "let's see how it goes and adjust as we need to."[63]

27. The Judge fixes, in error, on Eureka ground conditions to justify the "oral agreement." From the assessment report filed, the meters drilled on the Eureka claims in 2007 only comprise 780.03 (14.3%) of the 5,465.02 meters drilled on the Property in 2007. AMK adduced no evidence to support as reasonable the change from the December 2006 drilling agreement to the day rates More Core demanded.

28. AMK did not keep copies of the 2007 daily drilling reports from More Core, assuming it got them. It did not have copies of More Core contracts either. The copies

---

[60] Reasons, ¶178.

[61] (*1) 1 AAB 10 - 2 AAB 315-ARIS rpt 30241, (*2) 2 AAB 316 - 3 AAB 421 - ARIS rpt 30910, (*3) 3 AAB 422-473 - ARIS rpt 31827, (*4) 3 AAB 560-592 - ARIS rpt 30206 (Ex. 22 Tab 11 TRC13776 at 13790 and 13806), (*5) 3 AAB 593-597 - Ex 22. Tab 13 - ACR002629-002633 More Core Inv # 111 and ACR002641-002645 Inv # 113.

[62] Drilling will be "at locations specified by" AMK: 3 AAB 487 – Ex. 14, Tab C ACR2110; See ¶5 of the two subsequent written contracts - rates "apply to drilling on locations throughout British Columbia." 4 AAB 493 at ¶5, 4 AAB 497 at ¶5.

[63] 6 TR 936, l. 16 to 938, l. 10, D. Blaney in chief.

put in evidence came from More Core.[64] There was no evidence that AMK reviewed drilling reports or had an officer knowledgeable of the work sign off before payment.

29. The Judge compounds his errors by referring at ¶171 to the oral agreement terms as providing for "an all-inclusive daily rate of $8,000 per day." First, the rate AMK's witnesses put in evidence was $10,000 per day.[65] Second, it was not "all-inclusive". It continued to have additional charges for materials, accommodation expenses, rentals and so on, just as the billing under the December 2006 contract did. What it did was provide an incentive not to drill as much as a per meter contract rate would.[66]

30. The Judge notes at ¶172 that in October 2007, AMK and More Core entered into yet another agreement, this time in writing, providing for a 3 year term for drilling services, and for rising day rates of $10,000, $11,000 and $12,000 in 2008-2010.[67] This agreement, like the December 2006 one, does not restrict itself to any particular property. This agreement did not serve much purpose, however. In 2008 there was no drilling. In 2009, there was, but the parties threw it overboard and negotiated yet another agreement, this time reducing the day rate to $8,000 and the drilling amounts to 3,000-4,000 meters.[68]

31. At ¶155 of his Reasons, the Judge accepts the evidence of Mr. Pownall of More Core that "rates and everything go up" in a booming period like 2007. Yet he fails to explain why that has any application to the drilling contract when (a) AMK already had

---

[64] 3 TR 410, l. 32 to 420, l. 6, A. Burton cross.

[65] Ex. 21, vol. 1, Tabs 10-1 to 10-15 include the More Core invoices, including Tab 10-1 [3 AAB 537], More Core invoice August 17, 2007, for July 26-August 9, with charges on December 2006 contract rate per meter basis noted; Tab 10-2 [3 AAB 544] , More Core Invoice August 24, 2007 for August 7-22, no per meter or daily rate noted; Tab 10-3 [3 AAB 546], More Core Invoice August 24, 2007 for August 10-22, $10,000 per day applied; Tab 10-4 [3 AAB 548], More Core Invoice September 4, 2007, for August 22-31, $10,000 per day applied; Tabs 10-5 [3AAB 551], 10-6 [3 AAB 554] and 10-7 [3 AAB 558] are More Core October 2007 billing and include both the $10,000 per day rate applied to its demobilization (when no drilling was done) and as well $5,000 per 7 hour periods for certain overlapping days. These rates may be contrasted with those in 2008 (when no drilling was done) and 2009, when the parties entered yet another agreement for an $8,000 per day rate.

[66] 11 TR 1685, l. 24-42, K. Whitehead cross.

[67] 3 AAB 492 – Ex. 14, Tab E, ACR001226, dated (in error) October 15, 2006, but which AMK's Mr. Blaney said was really meant to say 2007.

[68] 3 AAB 497 – Ex. 14, Tab J, ACR000127, AMK and More Core Drilling Agreement dated April 1, 2009.

More Core under contract to drill 20,000 meters prior to entering the option agreement, (b) AMK actually drilled only 19,805 meters on the properties it was exploring in 2007 including the Property, (c) AMK entered into "oral agreements" with More Core for just the Property and at substantially higher cost than its other properties, and (d) the drilling done was inefficient, ineffective and largely aimed at promotional considerations.

32. The Judge also fails to consider whether evidence of AMK having bought drills early in 2007 and then supplying them to More Core on an oral lease to purchase basis affected the reasonableness of the drilling costs claimed under the option.[69] Instead, having excised reasonableness from considerations, he tests whether anything nefarious was proven about the transaction. That, however, misses the point.

33. The facts here are that AMK bought drills, found it had no use for them itself, arranged to let More Core use them, agreed to sell first one or two (later, at the end of 2007 it sold some more, until by 2009 five were sold), agreed to More Core's request for more money for work on the Property, not on Electrum or Tide, and then agreed upon payments made as an offset to More Core's billings starting after the "oral agreement" to shift to a day rate on the Property.[70]

34. The Judge errs further by his chronology of these events. At ¶29, he says "ultimately" AMK agreed to sell the drills "with the purchase price being credited to the cost of drilling." But he then, in error, adds that "at this point in early 2007, Teuton and Treaty Creek were not yet on the horizon." The evidence is clear that there were several "agreements" made with More Core on a rolling basis through 2007, with terms fluctuating even into 2009. The earliest of those was just for two drills and the terms are completely unclear. What is clear is that the discussions involved drills on a rolling basis through 2007 and beyond,[71] with payment not being made until after the "oral

---

[69] Reasons, ¶29, 170-177; 3 TR. 402, l. 13 to 410, l. 31, A. Burton cross.

[70] 4 TR 662, l. 11 to 668, l. 18, R. Edwards, examination in chief; 3 AAB 536 – Ex. 20, ACR011139, Email exchange between B. Ambrose and R. Edwards, November 2, 2007, referring to More Core agreeing then to purchase 2 more drills, payable over time; Ex. 21, vol. 1, Tabs 10.1 [3 AAB 537], 10.2 [3 AAB 544], 10.5 [3 AAB 551] and 10.6 [3 AAB 554].

[71] 3 AAB 533 –Ex. 20, Tab D, ACR002480 is an AMK invoice selling a JKS Super 300 Drill to More Core on November 5, 2007 that 3 AAB 531 -Tab E, ACR006314 shows it had purchased on April 24, 2007; 3 AAB 534 -ACR006316 is an AMK invoice selling another JKS Super 300 Drill to More Core on September 17, 2009 that it had purchased

agreement" for the $10,000 per day rate on the Property around the third week of August 2007,[72] and the documentation for the first drill sale to More Core. Contrast that and the Judge's "not on the horizon" comment with his findings at Reasons, paras. 35-40, which show discussions with Teuton from "late 2006" becoming negotiations about the Property by February 8, 2007 and a concluded option agreement by April 4, 2007.

35. The coincidence of (a) the amount of drilling expense on the Property above and beyond the "market rates" provided for in the December 2006 agreement roughly matching (b) the price More Core paid for the drills, underscores how unreasonable this arrangement was. It put on the Property's expense tab the capital cost of purchasing these drills. It did so by increasing the cost far beyond what AMK admitted were the "market rates". On the other properties AMK had there was no such additional cost burden. The Judge applies the wrong standard testing this evidence and comes to the wrong conclusion about it.

36. In addition to issues relating to the cost of drilling, the court was faced with issues whether the drilling that was done met the Reasonableness Standard. The Judge's Reasons, in error, find that unnecessary. But during the trial itself, the Judge made several rulings disallowing evidence material to the issue. Included in those are the rulings excising most of the expert report of Mr. Whitehead,[73] a geologist called by Teuton[74] and precluding much of the evidence sought to be given by Teuton's President,

---

as a used drill on February 15, 2007; 3 AAB 529 -ACR006318 has two Discovery drills sold to More Core August 27, 2007 that AMK had agreed to purchase March 27, 2007, but did not take delivery of until April 24, 2007; 3 AAB 502-Ex. 14, Tab K at ACR000122 and ACR000126 shows More Core owed $215,000 on the two JKS drills in April 2009.

[72] Notably, it was not till August 28, 2007 that payment on invoices 106 and 107 were made, less an $85,000 offset for part payment on the first two drills: 3 AAB 559 - Ex 21, vol. 1, Tab 10.8. By that time, about $1,850,000 had been paid to More Core in 2007. Not a penny was paid for the drills prior to the oral agreement to shift to day rates.

[73] 5 AAB 297-853, Unredacted Version of Whitehead report; 5 AAB 854, Redacted Version of Whitehead report.

[74] AR 149, Ruling re Expert Report, June 4, 2013; 11 TR 1659, l. 45 to 1661, l. 22; Reasons, ¶140-150. The Judge mischaracterizes evidence in saying there are no industry standards because "every project is different"; he ignores both the CIM standards, the statutory basis for professional engineers and geologists and expert evidence that while projects differed, principles of professional judgment applied: 11 TR 1645, l. 40 to 1647, l. 15 and continuing with through to 1653, l. 3, K. Whitehead in chief; 11 TR 1674, l. 18-34, K. Whitehead cross.

Mr. Cremonese.[75] The testimony of both witnesses was caught up with lengthy objections and argument.[76]

37. With regard to the Whitehead report, the Judge, in error, deleted Question 1-2, 4-6 and 11, the effect of which was to eliminate expert opinion and fact evidence concerning the role of project geologists in mineral exploration programs, the use and rationale of tendering in exploration programs, differences in the geologist profession between "hard rock" and "oil & gas" qualifications, the use and importance of drill results, and a commentary on a comparable project and the rates accepted on it and comparable contract bids on other projects in the Eskay Creek area.

38. With regard to Mr. Cremonese's evidence, the Judge characterized his ruling as pertaining to "the admissibility of lay opinion evidence", adopted an overly narrow approach to that topic,[77] and then limited questioning on matters of fact or "lay opinion" involving Mr. Cremonese's experience, understanding of the industry and its practices and concerns about what AMK did, including whether drilling was too costly, fit within acceptable standards and was useful. Oddly, when the Judge came to write his Reasons, he repeatedly referenced statements by Mr. Cremonese as to those same matters adduced by AMK in support of its case.[78] If those were opinion and mattered, then in fairness, Teuton ought to have been permitted to address them.

39. Desmond O'Brien, a geology student notes[79] included: at ACR002863, Mr. Millard making a rare site visit for a "walk around"; at ACR002867, Mr. O'Brien and Mr. Ambrose had set the location for drilling and were "worried about not hitting bedrock in

---

[75] AR 161, Ruling re Admissibility of "Lay Opinion Evidence", June 11, 2013.
[76] 11 TR 1638, l. 41 and continues to 1686, l. 7, K. Whitehead.
[77] Dickson, J., in *R. v. Graat*, [1982], 2 S.C.R.819 held that there was "greater freedom" to receive such evidence wherever "helpful"; but the Judge adopted an unduly narrow approach: see AR 166-7, Ruling, ¶18. Also, *Fagnan v. Ure Estate* [1958] S.C.R. 377 says much evidence of experience is fact, not opinion.
[78] See Reasons, ¶24, 35, 37, 68-69, 80-82, 86-89, 104, 122, 129, 156, 159-166, 168-169, 189-190, 194, 197, 201-3, 205. It was unfair ruling at AR 167, Ruling, ¶20 that Rule 11-1(1)(b) did not permit Mr. Cremonese's evidence as his conduct was not in issue and then relying upon his "conduct" where AMK put it in. The same holds true for his blanket rejection at AR 164, Ruling, ¶12, of parties ever qualifying as experts, notwithstanding his finding in Reasons, ¶31 as to Mr. Cremonese's qualifications. Note 11 TR 1686, l. 31 to 1689, l. 34, and 1701, l. 19-26, D. Cremonese in chief.
[79] 3 AAB 507-528 – Ex. 17, Field Notes of D. O'Brien.

time and [they] decided to continue with -50 and see what happens"; at ACR002865, with an unhappy face, More Core's Mr. Pownall had not come on August 16; Mr. O'Brien had to contend with a Mines Inspector about safety and emergency preparedness, who shut the project down as there was "no permit" for the Caterpillar's work; his ongoing frustration at the lack of resources and "awaiting air support full time."

40. There are numerous other drilling issues. AMK claimed $150,000 for late September and October More Core charges for drills that were not drilling.[80] AMK's lack of records of consumables it bought and absence of checks on those More Core alleged, led to improper charges, including charging the Property for items used on Electrum or Tide.[81] The Judge sweeps these and other concerns aside as "mistakes" and "inefficiencies" and forgives them given his refusal to measure them on the Reasonableness Standard.

41. AMK's drilling was unreasonable as well as it was designed to satisfy promotional ends, rather than provide meaningful geoscientific information. Mr. Pownall testified that AMK decided on the drill hole locations and depths; Ms. White-Wilsdon expressed frustration at drilling not being done for geoscientific purposes; Mr. Ambrose admitted AMK management directed drilling, without regard for what the geologists said.[82]

42. The example of 10 holes drilled from the same platform at Copper Belle and 9 holes at a platform at GR2 in what looked respectively like a "starfish" and a "squid" was an issue.[83] Mineral exploration involves drilling to locate mineralization or extend what has been located, usually at 50 meter step-out intervals.[84] Useful information about continuity and geology results. Drilling holes repeatedly in one location, even at different angles, wastes money, duplicates information and does not amount to "exploration expenditures". AMK did not call any qualified person to support its thesis that such an

---

[80] 5 TR 764, l. 15 to 765, l. 31, R. Edwards cross.
[81] 5 TR 767, l. 31 to 768, l. 29, R. Edwards cross.
[82] 8 TR 1278, l. 4-44, S. Pownall cross; 10 TR 1524, l. 36 to 1526, l. 38, B. Ambrose cross; 15 TR 2457, l. 15-21 and 2470, l. 6-43, M. White-Wilsdon in chief.
[83] 4 AAB 638 and 4 AAB 639 - Ex 36, Tabs 26 and 27, TRC015181 and 15182.
[84] 11 TR 1708, l. 20-47 and 12 TR. 1825, l. 16 to 1826, l. 5, D. Cremonese in chief and 14 TR 2119, l. 38 to 2120, l. 18, D. Cremonese cross. *Canaco Resources Inc (Re)*, 2013 BCSECCOM 310 at ¶34 and 98 and *Bayens v. Kinross Gold Corp.*, 2013 ONSC 6864 at ¶73-78 explain exploration, extension (also called expansion or step-out) drilling, as contrasted with infill ("nearby") drilling that is not explorational.

approach to drilling was appropriate or qualified as "exploration."

43. **Helicopters** -- The next major expenditure item relates to helicopter usage. AMK said that it had lost the helicopter contract documents. Teuton complained at trial that the helicopter expenses claimed by AMK were excessive, arising largely from lack of proper organization and management and inefficiencies arising from, among other things, using larger helicopters than required for various aspects of the job and failing to truck supplies from Stewart to Bell-II, a location accessible by road that was much nearer to the Property.[85] Once again, the expenditures in 2007 were disproportionately high compared to what AMK spent in 2009.[86]

44. In many instances, AMK was unable to produce documentation to support what its helicopter use was for. While helicopter invoices and flight tickets provide some information, in many instances they are silent on who or what was transported. Teuton called Garry Thomsen, the project manager for Vancouver Island Helicopters in Stewart, and Ms. White-Wilsdon, one of the geology students AMK hired. Mr. Thomsen explained that the route from Stewart to the Property was 39 nautical miles if there were sunny conditions and a direct flight. Otherwise, the distance had to go up to 49-59 miles.[87] The routes from the Property to the Bell II camp was much closer, even in difficult weather. Mr. Thomsen made suggestions on economising to AMK, but got no constructive response. Instead, AMK persisted in running up costs transporting people, supplies and equipment from Stewart, B.C. For example, in 2007, Mr. Thomsen counted 26 flights from Stewart carrying rollagons of fuel to the Property, and 10 flights carrying back empty rollagons.[88] Against that evidence from someone who knew about helicopters, AMK offered the views of Mr. Ambrose, who obviously did not.

45. On October 4, 2007, when he arrived to start the demobilization from the Property as directed, Mr. Thomsen was greeted by two intoxicated workers with snowboards who

---

[85] Reasons, ¶19.

[86] Ex. 21, Tab 1, p. B-1, sets out that 2007 expenses were 2 ½ times that of 2009 ($1,062,433.67 versus $427,446.96). Yet 9,520 meters were drilled in 2009 versus 5,470 in 2007. Even allowing for camp construction in 2007, there is no justification for the excessive 2007 expenses. More drilling should mean more helicopter usage, not less.

[87] 11 TR 1559, l. 20 to 1560, l. 31, G. Thomsen in chief.

[88] 11 TR 1570, l. 39 to 1574, l. 19, G. Thomsen in chief.

wanted to go heli-skiing, which he declined to do.[89] The camp was not ready to demobilize as the workers had been partying.

46. The Judge precluded Teuton from presenting evidence relating to AMK's expenditures through a misapplication of the "rule" in *Browne v. Dunn* and his approach to what constituted fact versus opinion evidence.[90] The result was to eliminate from the record material evidence.

47. Ms. White-Wilsdon recounted that Mr. Ambrose had slept in, missed the flight taking others and then ordered a helicopter from Stewart to the Property for himself.[91] Mr. Ambrose's counter to that was to say it was her who slept in. In either event, the accounts show disorganization and no regard for cost. She also spoke of the promotional events that AMK put on, using helicopter services for brokers and promoters.[92]

48. The Judge found that the helicopter expenses met his Relational Standard.[93] He says "the result may not always have been ideal" and concedes that there is something

---

[89] 11 TR 1601, l. 3-15, G. Thomsen in chief. In cross, AMK's counsel repeats this evidence, but does nothing to challenge it.

[90] See, for example, AMK's objection at 11 TR 1575, l. 20 to 1577, l. 27, G. Thomsen in chief, the Judge's comment, "I'm not sure how far I will allow this kind of thing to go if it hasn't been raised earlier"; 11 TR 1578, l. 26 to 1579, l. 6, where the Judge disallows evidence saying, "No, I think we are going too far now"; 11 TR 1579, l. 7 to 1582, l. 23, where the Judge objects to "opinion evidence" from the pilot over whether plywood AMK directed to be picked up should have been in place when he arrived and then directs Teuton's counsel to "stop there"; 11 TR 1582, l. 24 to 1583, l. 16 where the Judge reiterates that specifics of AMK's disorganization had to have been put to Mr. Ambrose or would not be allowed; 11 TR 1584, l. 17 to 1586, l. 38, argument over what was put to Mr. Ambrose and what questions can be asked, with the Judge acknowledging that general and some specific points were put, but concluding that Teuton's counsel could proceed "One question at a time"; 11 TR 1586, l. 43 to 1604, l. 3, Mr. Thomsen gives some evidence, albeit in a stilted manner given the restrictions imposed, identifying examples of mismanagement and inefficiency in helicopter usage; 11 TR 1604, l. 35 to 1609, l. 20 the Judge refuses to allow Teuton's counsel to ask the pilot whether, based on his experience, AMK used his helicopter services efficiently.

[91] 15 TR 2475, l. 21-33, M. White-Wilsdon in chief.

[92] 15 TR 2476, l. 8 to 2478, l. 10, M. White-Wilsdon in chief. See also 4 AAB 603-605 – Ex. 31, Tab E-2, ACR0010387, 9 TR 1461, l. 22 to 1462, l. 35, B. Ambrose cross, 3 TR 522, l. 3-41, A. Burton cross, 16 TR 2671, l. 43 to 2672, l. 2, P. McEwen cross and 6 TR 865, l. 1-26, K. Trotman cross, as to AMK's recording of promotional expenses as Property expenses.

[93] Reasons, ¶185-6.

to the allegations of ineffective use, but not "to the extent that would disqualify a meaningful amount" of them. He does not set out what "meaningful" means. He fails to address Teuton's points and explain why they are not being accepted.

49. Also, he ignores, of course, the knock-on effect that each inefficient or ineffective use of drills, helicopters, personnel or other costs has on the project as a whole. It should have been for AMK to demonstrate that it had provided real value on reasonable terms, but that simply did not happen at trial.

50. The Judge continues viewing the evidence through the lens of requiring Teuton to establish that expenses were invalid. He mentions evidence from one of the geological students (Ms. White-Wilsdon) and Mr. Thomsen the helicopter pilot about liquor being transported into the Property, but discounts it, in error, saying it was not put to Mr. Ambrose.[94] He ignores $10,800 for demobilizing on Electrum charged to the Property.[95] None of the over-charges were picked up by AMK's auditor or the Ministry, because they were not reviewing for such matters and were not provided information by AMK to do so.[96] He allows amortization and management compensation even though the Ministry would not.[97] He allows AMK's promotional expenses.[98] He holds that unreliable AMK drill results contaminated by silver solder in a drill bit were still valid expenses on the good faith test.[99]

2008 Operational and Expenditure Issues

51. The Judge deals with 2008 in ¶¶ 120-130 of his Reasons. The 2008 expenses claimed by AMK were about $450,000. "In fact, no drilling took place that year and helicopter usage was limited."[100] The expenses were largely "penalties charged to

---

[94] Reasons, ¶187-8. Mr. Ambrose was cross-examined about helicopter inefficiencies, that it was "not a dry camp", whether he was found in a bar in Stewart, drinking being at "party" or just a "drink or two" levels and whether supplies were shipped efficiently and so on: 10 TR 1526, l. 39 to 1536, l. 29, B. Ambrose cross. Given Mr. Burton's admission (2 TR 299, l. 12-34) that Mr. Ambrose was demoted, then fired and had serious alcohol and work performance problems, the Judge's findings are quite unfair.

[95] 5 TR 704, l. 35 to 705, l. 10, R. Edwards cross. Neither was the $150,000 More Core charged for not drilling.

[96] 5 TR 723, l. 3-40, R. Edwards cross.

[97] Reasons, ¶112.

[98] Reasons, ¶189-195.

[99] Reasons, ¶199-207.

[100] Reasons, ¶120.

AMK." The reason AMK gave for its choice not to conduct a substantial program was inability to raise money, due to economic conditions. But it had raised $4 million in flow-through funds to be used in 2008.[101] Its decision meant that commitments it had previously made were wasted. The Judge held that afforded AMK an excuse.[102] Teuton denies that. There is nothing in the parties' agreement saying that impecuniosity affords an excuse. No term provides that penalties are reasonable exploration expenditures.

2009 Operational and Expenditure Issues

52. The Judge says that "By the end of the trial, Teuton had abandoned any challenge to the expenditures of approximately $2.2 million claimed by AMK for the 2009 program."[103] That is incorrect. Teuton maintained throughout that the burden was on AMK to establish that the expenses claimed met the Reasonableness Standard.[104] Also, Teuton expressly argued that there was no proper basis for allowing the 2009 drilling expense daily rate of $8,000 per day. Teuton complained that approach resulted in excessive cost. The fact that the day rate was $8,000 in 2009 versus $10,000 for 2007 does not make either appropriate. It appears that the Judge misunderstood Teuton's use of AMK's 2009 expenditures as a contrast to those from 2007. Using 2009 in that manner does not establish reasonableness. It just shows that the 2007 ones (which had about triple the drilling cost per meter, for example)[105] were more unreasonable than the 2009 ones.

Were the Option Conditions Met?

53. The Judge found that the question whether exploration expenditures qualified under the option agreement "must be" examined "in the context of the exploration program as a whole over the course of three years." That allowed unreasonable expenses to count as "actually incurred, in good faith, ... related to exploration and

---

[101] 2 TR 359, l. 20 -33, A. Burton in chief.
[102] Reasons, ¶127.
[103] Reasons, ¶119.
[104] 5 AAB 870 to 6 AAB 1007, Defendant's Submissions, ¶1-27, 170-177, 198-206, 216, 221, 222, 235, 270-273, 327, 334, 337, 365-372 set out several complaints about 2009 expenses. 6 AAB 1008-1034, Plaintiff's Closing Argument in Reply, AMK obviously thought that 2009 expenses were a live issue as it responded to those in its reply, including at 66, 89-92
[105] A fact that the Judge accepted, see Reasons, ¶132. The CFO of AMK confirmed it in his cross: 4 TR 690, l. 17 to 691, l. 21, at which point, the Judge interrupted cross.

development work within the meaning of the Mineral Tenure Act Regulation, and were accepted as part of the value to be credited for that year, to Teuton's benefit." [106]

54. He treats AMK's evidence of work assessment reports made by Mr. Sanabria with the Ministry and its business records as to how it allocated expenses to the Property as meeting its evidentiary obligations. He notes Teuton's challenges to that, including that "if the 2007 program had been carried out at the same rate as the 2009 program," AMK would only have expenses of $4.238 million and would fail to meet the $5 million threshold.[107] But he "emphasize[s] that the onus of establishing these allegations was on Teuton."

PART 2 – ERRORS IN JUDGMENT

55. The Judge erred in the following material respects.

56. FIRST ISSUE – CONTRACT INTERPRETATION – interpreting "exploration expenditures" as involving the Relational Standard, not the Reasonableness Standard;

57. SECOND ISSUE – ONUS OF PROOF AND "STRICT PROOF" – putting the onus on Teuton to disprove the Relational Standard of "exploration expenses", failing to put on AMK the onus to prove the Reasonableness Standard, and failing to dismiss the action given AMK's failure to meet the "strict proof" requirement;

58. THIRD ISSUE — EVIDENTIARY ERRORS –

a) Excluding evidence from Teuton as to experience, industry practices, customs, and standards;

b) Excluding admissible "lay opinion";

c) Misapplying the "rule" in *Browne v. Dunn;*

d) Confusing admissibility with reliability of evidence of filings made with the Ministry of Mines and AMK's "business records";

e) Failing to identify and exclude opinion, as opposed to fact contained in the filings

---

[106] Reasons, ¶127.

[107] Reasons, ¶132. He ignores the unchallenged report of Mr. Zastre (4 AAB 674- Ex. 46; 16 TR 2615, l. 37-44) that (a) AMK's statements could not be relied upon to confirm the exploration expenses reported on the Property as they are not prepared for that purpose and the audit would not focus on property allocation or whether expenses qualified under the parties' option agreement (¶28-29); and (b) an accounting opinion could not be provided based on what AMK had disclosed (¶55-56). Even AMK's expert admitted that he had not looked at "whether or not these records accurately reflected what happened on the ground": 16 TR 2674, l. 14-47, P. McEwen cross.

made with the Ministry of Mines and AMK's "business records"; and

f) Excluding material, admissible parts of the expert report and evidence of Mr. Whitehead;

59. FOURTH ISSUE – ADEQUACY OF REASONS –

a) Alternatively, the foregoing errors made by the Judge so affected his findings and reasoning as to make them inadequate for purposes of adjudicating this dispute, he failed to adjudicate the facts and evidence in accordance with the applicable legal standards and a new trial is thus required; and

b) Failing to provide reasons as to credibility; and

60. FIFTH ISSUE – COSTS AND POST-TRIAL AMENDMENTS – The Judge erred in allowing AMK to amend its pleadings after trial relating to punitive damages and special costs and in entertaining an application for special costs or other costs orders based thereon, including based upon out of court expression alleged to be attributable to Teuton.

PART 3 – ARGUMENT

FIRST ISSUE – CONTRACT INTERPRETATION

61. "Exploration expenditures" in ¶1 of the April 4, 2007 option agreement ought to be interpreted as incorporating the Reasonableness Standard either as a matter of "plain meaning" construction or by virtue of the law relating to implied terms.

62. The Judge did not find ambiguity.[108] Assuming no ambiguity, his elaboration on what to do if there was is irrelevant.

63. The "plain and ordinary meaning" of contract language and "the context of the agreement as a whole" govern. The approach is to be "objective." "If necessary," the text is considered "in light of the surrounding circumstances" at the time of execution. What a reasonable person would have objectively intended, not "subjective intentions" count.[109] Commercial absurdity is to be avoided.[110]

---

[108] Reasons, ¶75.

[109] See Reasons, ¶43-44 and *Jardine General Hydrogen Corp.*, 2007 BCSC 119 per Tysoe, J. at ¶23, *Water St. Pictures Ltd. v. Forefront Releasing Inc.*, 2006 BCCA 459 per Lowry, J.A. at 23-27, *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at ¶ 53.

[110] *Salah v. Timothy's Coffees of the World*, 2010 ONCA 673 at ¶16; *Rainy Sky SA and others v Kookmin Bank*, [2011] UKSC 50 at ¶23-29.

64. The Judge recites, but does not apply that law. Instead, he focuses on the parties' negotiations and their subjective intentions. At paras. 68-69 and elsewhere in his judgment, he quotes selectively from Mr. Cremonese, including discovery, exhibits and trial testimony, apparently to bolster his ruling.

65. While in ¶72 he concedes that it would be commercially untenable to count drilling "repeated useless holes in an area where no mineralization has been found or is expected, simply to run up costs in order to reach the specified threshold," he does not carry that through to the standard he devises. He observes that "The value of the interest to be earned depends upon exploration being carried out that identifies promising mineralization," but he focuses on "value" to the optionee, not the optionor.

66. At ¶73, in error, he treats as "equally" reasonable AMK's argument that it ought not have to justify its expenditures through "a retrospective forensic investigation of the sort undertaken in this case." Yet the law made it AMK's obligation to "demonstrate full compliance,"[111] AMK's chose admittedly less than adequate geological and operational staff to do the work, engaged in poor planning and documentation, made serious "mistakes", and when the trial came on, chose not to support what it had done through evidence from its own geologists or an expert.

67. At ¶78, he engages, improperly, in an exercise of comparative analysis with other contracts. His reference to the absence of the express language setting out the Reasonableness Standard is telling. It is error when construing objective intentions of reasonable persons to exclude "reasonable", "prudent", and "reliable" as standards.[112]

68. At ¶79, he errs in dispatching the regulatory and professional standards applicable to securities markets and mineral exploration. No one referred to Teck Resources or industry giants, yet the Judge introduces those in his Reasons, suggesting that following objectively good practices set out by professionals and endorsed by regulatory agencies is not required for junior exploration companies. That subjective approach is wrong. The agreements here required TSX approval. The notion that smaller companies require less scrutiny is a recipe for a repeat of Bre-X and does not

---

[111] Reasons, ¶66.

[112] *Roberts v. Heavy Metal Marine Ltd.*, 2011 BCCA 435 at 19-24; *White v. E.B.F. Manufacturing Ltd.*, 2005 NSCA 167 at ¶33-34; *Tau Holdings Ltd. v. Alderbridge Development Corp.*(1991), 60 B.C.L.R. (2d) 161 (C.A.).

bear examination. CIM Best Practices standards make no such distinction. Securities regulation is, if anything, more exacting of junior companies than larger ones.

69. The Judge refers to "three clues" to the meaning of "exploration expenditures." The first is clause 11 and Teuton's right to "monitor" activities on its Property and "access all data" generated. The Judge calls that "protection", but it is no protection at all if his Relational Standard applies.[113] Even the closest monitoring and most exacting review of data will not avail Teuton to ensure value for parting with 51% of the Property in that case.

70. Next, he fastens on the "absence of qualifying adjectives" of the nature Teuton argued for, but ignores the "absence" of the adjectives that he devises. His comment in ¶ 89 that it would have been simple to spell out the CIM Best Practices reverses the norm that the law presumes parties intend to comply with legal standards and generally applicable policies in a profession or industry. The parties could have expressly stated that "audited financial statements" or "work assessment reports" governed, but did not.

71. The "third clue" the Judge finds is in ¶ 12 relating to filing assessment reports with the Mines Ministry. The Judge elevates this beyond what is appropriate and reasonable. Only ~$117,000 a year was required to keep the claims alive. Only a fraction of the $5 million the parties expressly contemplated being spent could ever be useful for such credits on this Property. Even then, they could only extend the mineral claims from their scheduled expiry to the 10 year maximum. It is wrong to treat that as an "essential aspect" for the parties. From AMK's perspective, the option could be dropped if it chose. If it chose to exercise the option, the next stage would call for more AMK expense by getting on with a feasibility study within four years. No one could reasonably regard delaying things till the credit from the "First Earn-In" expired as "essential."

72. AMK could earn a further 9% by "performing and paying for such additional exploration work, engineering studies and report as may be necessary in order to provide Teuton with a positive feasibility study." The option provided as well for a joint venture to be formed. Those provisions undercut the Judge's comments about the absence of reasonableness, prudence, reliability and usefulness of information generated. The object here was not to string out mineral claims if they had no value. It

---

[113] The Judge repeats this notion at ¶88-89 and 94.

was to add value by making exploration expenditures that met the Reasonableness Standard to try to identify the existence and extent of mineralization and carry on with a feasibility study, joint venture and development.

73. Perhaps most significant is the basic fact of Teuton being a vendor. Vendors want value. Where they are not paid cash, but rather agree to joint ownership if someone improves the property, then their interest, objectively seen, is most keenly focused on what is spent on the improvement. There should be a similar interest in the Reasonableness Standard on the part of the purchaser.

74. The Judge's version of the Relational Standards is uncertain and inconsistent. He adds "good faith" and "honesty" as enclitics to showing expenses "related to" the Property. He rejects the "discretionary power" cases to which Teuton referred.[114] But then he says that all those cases do is require showing that "in carrying out its program of exploration, AMK must act honestly and in good faith."[115] That misreads the cases. But it leads to these questions: To whom is the good faith obligation owed?; and How can "good faith" and "honesty" be shown without (a) objective reasonableness, and (b) due consideration of the interests of the other party.[116] The Judge's excision of reasonableness from "good faith" is itself unreasonable. He makes "good faith" a subjective and unmoored construct, to be examined "from the perspective" of AMK *qua* "junior" company and through the lay witnesses it called. He ignores objectivity and proper regard for Teuton's interests. If he is correct that only an obligation of "good faith" exists here, it must involve the concepts of reasonableness and an obligation to Teuton that he expressly eliminates.

75. The Judge regards Teuton as seeking to imply adjectives as terms, although what he does for AMK just uses different adjectives.[117] There may be a distinction between implying terms and construing a contract's existing terms. There are even

---

[114] Reasons, ¶94-95, citing *Greenberg v. Meffert* (1985), 50 OR 2d 755 (C.A.) and *Jack Wookey Holdings v. Tanizul Timber* (1988), 28 B.C.L.R. (2nd) 221 (C.A.); *Mesa Operating Ltd. Partnership v. Amoco Canada*, [1994] A.J. No. 201, 19 Alta. L.R. (3d) 38 (C.A.) at ¶22-23; *Freyberg v. Fletcher Challenge Oil and Gas Inc.*, 2005 ABCA 46 at ¶94-96. *CivicLife.com Inc. v. Canada*, [2006] O.J. No. 2474 at ¶44-52 (C.A.).

[115] Reasons, ¶96.

[116] *Shelanu Inc. v. Print Three Franchising* (2003), 64 O.R. (3d) 533 (C.A.) ¶69-70.

[117] Reasons, ¶92 - 93.

several different bases on which terms may be implied (including doing so on the "officious bystander" test *or doing so on the basis that the nature of the vendor/ purchaser relationship made certain terms standard unless expressly excluded*).[118] Teuton submits that if terms are to be implied, then the Reasonableness Standard is most appropriate.[119]

SECOND ISSUE – THE ONUS OF PROOF AND "STRICT PROOF"

76. The Judge should have held AMK to the onus of making strict proof of compliance with the option conditions on the Reasonableness Standard.[120] AMK chose to avoid putting forward any opinion evidence on how the Reasonableness Standard applied to its "exploration expenditures." Instead, it relied upon a ritual incantation of that phrase as if it repeating it made it so.[121] The evidence upon which it relied (the assessment reports and its business records) merely show what it recorded, not what was reasonable or appropriate. That evidence was full of errors. But even if error were not shown, the evidence only shows what AMK recorded, not that the expenditures were in fact "exploration expenditures." Its claims ought to have been dismissed.

THIRD ISSUE – EVIDENTIARY ERRORS

77. **Excluding evidence from Teuton as to experience, industry practices, customs, and standards.** The Judge erred by refusing to permit admissible evidence relating to Teuton's witnesses' experience, industry practices, observations and concerns.[122] He treated all such evidence as opinion evidence, when the law is clear

---

[118] *Machtinger v. HOJ Industries*, [1992] 1 S.C.R. 986 at ¶50-56 per McLachlin, J.; *Attorney General of Belize & Ors v Belize Telecom Ltd & Anor (Belize*, [2009] UKPC 10 at ¶16-27; *Health Care Developers Inc. v. Newfoundland* (1996), 136 D.L.R. (4th) 609 (Nfld. C.A.) at ¶28, 30, 35-39; *Societe Generale, London Branch v Geys*, [2012] UKSC 63 at 55-56 per Baroness Hale; *M.J.B. Enterprises Ltd. v. Defence Construction*, [1999] 1 S.C.R. 619 at ¶27-29.

[119] *West Coast Paving v. B.C.* (1983), 50 B.C.L.R. 234 (S.C.) at ¶11-12.

[120] *Pierce v. Empey,* [1939] S.C.R. 247 at 252 and *1383421 Ontario Inc. v. Ole Miss Place Inc.*, [2003] O.J. No. 3752, 2003 CanLII 57436, ¶53-55; *Akiko-Lori Gold v Ecstall Mining*, [1991] B.C.J. No. 2287 (S.C.) at ¶4; *Electrum Resource Corp. v. Stealth Minerals Ltd.*, 2005 BCSC 1199 at 6, 10-11, 17, 24-28.

[121] *Rhesa Shipping Co. SA v. Edmunds*, [1985] 2 All E.R. 712 at 716 (HL) *and I.C.R.V. Holdings Ltd. v. Tri-Par Holdings Ltd.* (1994), 2 B.C.L.R. (3d) 289 (C.A.) at ¶7-8.

[122] *Fagnan v. Ure Estate*, [1958] S.C.R. 377: "factual evidence of the existence of a practice ... of which practice the witness had personal knowledge" is not opinion; *PricewaterhouseCoopers Inc., as Trustee v. Olympia & York Realty Corp.* (2003), 68

that it is factual.

78. **Excluding admissible "lay opinion".** Even were such evidence regarded as opinion evidence, it ought to have been admitted. The Judge did not reject such lay evidence as AMK chose to adduce as to what it had done and how it allocated expenses to the Property.

79. He cannot be said to have allowed that under Rule 11-1 (party testifying as to his own conduct). The party on such an approach would be AMK. The witness entitled to such an exception would have to be either the professional geologist in charge, whose professional opinion as to the Reasonableness Standard would be the evidence applicable, or perhaps AMK's "operating mind". Mr. Ambrose does not satisfy either of those categories. AMK chose not to call its professional geologists. It was unfair to Teuton to allow and rely upon AMK witnesses as if their statements as to what they did met either the Relational Standard (or the Reasonableness Standard) and preclude Teuton from doing the same. Given his repeated references to Mr. Cremonese's statements or conduct on matters as well as fixing the onus on Teuton, it was improper to characterize as "opinion" Mr. Cremonese's efforts to explain his concerns and why AMK's expenses did not measure up.

80. Also, on the strength of *R. v. Graat*,[123] the approach to admitting lay opinion evidence is not inflexible and the rigidity of older approaches has been superseded. Where such evidence would be helpful, it is to be permitted. The Judge repeatedly complains about being without expert evidence, yet he chose to exclude evidence from Teuton's witnesses whose knowledge of the matters in issue was, with respect, greater than the court's and whose evidence he could have evaluated if only he had heard it all.

81. **Misapplying the "rule" in *Browne v. Dunn*.** The "rule" in *Browne v. Dunn* is not a fixed and inflexible rule, but a rule of practice and if triggered should lead the Judge to

---

O.R. (3d) 544 (C.A.) at ¶30; *Verveniotis v. Canada*, [1973] F.C.J. No. 516 at ¶27-28; *Day & Ross Ltd. v. Canada*, [1977] 1 F.C. 780 at ¶27; *Kuczak v. Doolitte*, [1976] O.J. No. 438 at ¶16-17, *Anderson v. Canadian Mercantile* Insurance Co. (1965), 51 W.W.R. 129 (Alta. Q.B.) at ¶12-15; aff'd at (1965) 53 W.W.R. 446 (Alta. C.A.); *Noble v. Kennoway* (1780), 2 Doug KB 510, 99 ER 326, [1775-1802] All ER Rep 439; *Fleet v Murton* (1871), L. R. 7 QB 126.

[123] *R. v Graat*, [1982] 2 S.C.R. 819; *L'Association des parents de l'école Rose-des-vents v. Conseil Scolaire Francophone*, 2012 BCSC 1614 at ¶26-27.

offer the aggrieved party the option of having the witness recalled or instructing himself as to the weight given the contradictory evidence.[124] Here, the Judge decided, without evidence, that recalling Mr. Ambrose from Alberta would not take place. He precluded questioning and appears to have felt obliged to treat evidence of matters not put to Mr. Ambrose as of no weight. He erred in requiring exacting detail in what was put to Plaintiff's witnesses before evidence of contact with them or their conduct could be led. Alternative evidence is to be received and it is a legal error to disallow it or to hold that it automatically receives little or no weight.[125]

82. **Confusing admissibility with reliability of evidence of filings made with the Ministry of Mines and AMK's "business records".** The Judge erred in confusing admissibility with reliability of evidence of filings made with the Ministry of Mines and AMK's "business records."[126] Taking those as reliable evidence was an error, particularly given the evidence of their respective frailties. It was doubly so given that AMK led no expert or even professional geological evidence to support its position that the expenditures were appropriate. That obligation was on it to perform. It cannot say that Teuton had the onus of showing that all of its expense entries were invalid.[127]

83. **Failing to identify and exclude opinion, as opposed to fact contained in the filings made with the Ministry of Mines and AMK's "business records".** Also, with respect, the law applicable to restricting the business records exception to facts and not opinions ought to apply not just to those records, but also to the work assessment reports.[128] The judge treats the assessment reports prepared by Mr. Sanabria as effectively ending all analysis of whether AMK met the option requirements. Mr.

---

[124] *R. v. Gardiner*, 2010 NBCA 46 at ¶19-23; *Fast Trac Bobcat & Excavating v. Riverfront Corporate Centre Ltd.*, 2008 BCSC 848 at ¶9; *Vasiliopoulos v. Dosanjh*, 2008 BCCA 399 at ¶36-37; *R. v. Drydgen*, 2013 BCCA 253 at ¶15-17; *R. v. McNeill* (2000) , 48 OR (3d) 212, [2000] O.J. No. 1357 (ONCA) by Moldaver J.A. at paras 44 – 50; *Swan v. Cardel Construction Ltd.*, 2004 ABQB 99 at ¶48-55.

[125] *R. v. Carter*, 2005 BCCA 381, [2005] B.C.J. No. 1651, at paras 56 – 58; *R. v. Paris*, [2000] O.J. No. 4687 (ONCA) at paras 22-23; *R. v. Dexter*, 2013 ONCA 744, [2013] O.J. No. 5686 at ¶20-22; *R. v. MacKinnon*, [1992] B.C.J. No. 831(QL) (B.C.C.A.).

[126] *R. v. Khelawon*, [2006] 2 S.C.R. 787 at ¶3 and 50.

[127] *IDSS Enterprises Ltd. v. Dynasty P.G. & Grandsons Holdings Inc.* 2012 BCSC 1246 at 34 and 38-40, appeal allowed on other grounds: 2013 BCCA 354 at ¶38.

[128] *Makara v. Weihmann*, 2005 BCSC 1846 at ¶16; *Fame v. Daoust* (1995), 3 B.C.L.R. (3d) 128 (C.A.) at 19-20.

Sanabria had no direct knowledge of 2007. His report was hearsay and opinion. He purposefully excluded reference to quality assurance protocols in his report on 2007, while including such references in the 2008 and 2009 reports. The judge fails to take account of any of this.

84. Excluding material, admissible parts of the expert report and evidence of Mr. Whitehead. The foregoing points affect how the Judge excluded large parts of the evidence of Mr. Whitehead as well. He rejected evidence of Mr. Whitehead's other experiences and his views on how those would apply in relation to the Property, regardless whether those were opinion or factual. He adopted an unreasonable approach in relation to excluding evidence based notionally on notice issues, notwithstanding that American Creek had ample opportunity to present such evidence, chose not to do so and never sought an adjournment to adduce evidence that it should have put before the court in the first place. Eliminating evidence of comparisons and other experience by saying every project is different mischaracterizes what geologists and mining engineers and their professional associations have as professional practices, standards and judgment was wrong.

FOURTH ISSUE – ADEQUACY OF REASONS

85. Alternatively, if AMK's claims are not dismissed, Teuton submits that the Judge's errors make the findings of fact and law set out in his Reasons inadequate and the result he reached incorrect and, then the action should be referred back for a new trial before a different judge.[129] Further, the judge makes bald assertions of high scruples and credibility without providing an explanation why (e.g., the evidence of Mr. Pownall). That too makes his Reasons inadequate, including for purposes of appellate review, and amounts to a legal error.[130]

FIFTH ISSUE – COSTS AND POST-TRIAL AMENDMENTS

86. After evidence in the case had closed and without addressing Teuton's points against it, the Judge allowed AMK to amend its pleadings to set out a claim for punitive

---

[129] *Mariano v. Campbell*, 2010 BCCA 410 at ¶44-52.

[130] See Reasons, ¶154, 184 and 192. No explanation is given for how Mr. Pownall's "scruples" make the expenses reasonable or how the comment answers Teuton's points. The same applies to Mr. Ambrose and Mr. Burton. *Sokolowska v. Notre Dame Cemetery*, [2001] O.J. No. 2277 (Div. Ct.) at ¶47-52; *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.); *Warner v. Cousins*, 2014 BCCA 29 at ¶24-38.

damages and special costs based upon allegations relating to matters addressed in an ongoing, separate action AMK and its management had brought in Alberta.[131] In so doing, he caused serious prejudice to Teuton and allowed an abuse of process.[132] While he dismissed the punitive damages claim, the Judge is scheduled to hear costs issues on November 3, 2014.

87. Teuton seeks its costs of this appeal and in the court below. If Teuton is successful on this appeal, the trial costs hearing may be moot. If not, there are significant issues, including constitutional questions[133], raised therein and Teuton reserves the right to appeal any adverse order made and asks for directions from this court.

PART 4 – NATURE OF ORDER SOUGHT

88. Teuton prays for an order allowing the appeal, setting aside the Orders[134] of the judge, declaring that AMK has no interest in the Property and dismissing the action with costs here and in the court below. Alternatively, Teuton seeks an order for a new trial with costs here and of the first trial awarded to Teuton. In either event, Teuton seeks ancillary orders that AMK reconvey the Property to it, at AMK's expense and repay any money paid on account of costs. In the further alternative, Teuton seeks directions as to the hearing of issues relating to the post-trial amendments and trial costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

Date: August 8, 2014

Robert D. Holmes, Q.C. and John W. Bilawich
Counsel for the Appellant/Defendant
Teuton Resources Corp.

---

[131] AR 42-59 (Notice of Application), AR 60-62 (Application Response), 6 AAB 1035-1115 - Affidavit #1 of Lindsay Harvyl, Reasons ¶216-221.

[132] Prejudice exists in having two proceedings on the same issues, not having had the opportunity for discovery or cross-examination of AMK's witnesses, and not having had advance notice. See *Whiten v. Pilot Insurance,* 2002 SCC 18 at 86-88, *Drover v. BCE Inc.*, 2013 BCSC 1341 at ¶19-23,41, *Lacharity v. University of Victoria Students' Society*, 2012 BCSC 1819 ¶24-26, *CNR v Imperial Oil,* 2007 BCSC 1193.

[133] 6 AAB 1138-1154 - Notice of Constitutional Questions

[134] Both as to the AMK amendments and the result (the former was not drawn or entered, the latter is at AR 137).

TABLE OF AUTHORITIES