

**IN THE MATTER OF AN ARBITRATION** pursuant to the Dispute  
Resolution Procedures of the Mary River Project Inuit Impact Benefit  
Agreement dated September 6, 2013 and the Arbitration Act (Nunavut)

BETWEEN:

Qikiqtani Inuit Association

CLAIMANT

AND

Baffinland Iron Mines Corporation

RESPONDENT

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**FINAL AWARD**

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**The Tribunal**

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Chair

Jim McCartney

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**ABBREVIATIONS**

|           |                                      |
|-----------|--------------------------------------|
| BIMC      | Baffinland Iron Mines Corporation    |
| DEIS      | Draft Environmental Impact Statement |
| EIS       | Environmental Impact Statement       |
| ERP       | Early Revenue Phase                  |
| Final EIS | Final Environmental Impact Statement |
| IIBA      | Inuit Impact Benefit Agreement       |
| NBRLUP    | North Baffin Regional Land Use Plan  |
| NIRB      | Nunavut Impact Review Board          |
| NLCA      | Nunavut Land Claims Agreement        |
| QIA       | Qikiqtani Inuit Association          |

## **A. INTRODUCTION**

1. This case concerns payments claimed owing to the Qikiqtani Inuit Association by Baffinland Iron Mines Corporation under the Mary River Project Inuit Impact Benefit Agreement dated September 6, 2013 made pursuant to Article 26 of the Nunavut Land Claims Agreement. The Inuit Impact Benefit Agreement provided for advance royalty payments until the mining project reached 60% of its intended capacity. The principal issue is whether intended capacity is to be interpreted as the capacity of the project as originally approved by regulatory authorities or as it was actually built when commercial sales of iron ore commenced.

## **B. THE PARTIES**

2. The Qikiqtani Inuit Association ("QIA") is a not-for-profit society incorporated pursuant to the Societies Act with its registered office located in Iqaluit, Nunavut.

3. The QIA is one of Nunavut's three Regional Inuit Associations, representing over 14,000 Inuit in the Qikiqtani (Baffin) Region of Nunavut. The QIA's mandate is to safeguard, administer and advance the rights and benefits of Inuit, to promote the Inuit language and traditions, Inuit environmental values, Inuit self-sufficiency as well as economic, social and cultural well-being through succeeding generations.

4. The QIA is a Designated Inuit Organization under the Nunavut Land Claims Agreement ("NLCA") responsible for managing Inuit Owned Lands in the Qikiqtani Region, including Baffin Island.

5. Baffinland Iron Mines Corporation ("BIMC"), is a Canadian mining corporation incorporated pursuant to the laws of Ontario. BIMC's head office is in Oakville, Ontario, and its Northern Headquarters are located in Iqaluit, Nunavut. BIMC is a privately-held company, owned 50% by ArcelorMittal and 50% by Iron Ore Holdings.

6. BIMC activities are focused on the development of the Mary River mining property on Baffin Island, Nunavut (the "Mary River Project" or "Project") involving the construction and development of an open pit iron ore mine.

## **C. THE ARBITRATION AGREEMENT AND CHOICE OF LAW**

7. BIMC obtained regulatory approvals, including a Project Certificate, from the Nunavut Impact Review Board ("NIRB"), and signed the Mary River Project Inuit Impact and Benefit Agreement ("IIBA" or "Agreement") with the QIA on September 6, 2013. Article 21 of the IIBA provides for the arbitration of disputes including any claims involving an alleged breach or anticipated breach or any claim involving the interpretation. Article 21.3 provides that the arbitration shall be conducted in accordance with the provisions of the *Arbitration Act* (Nunavut). Unless the parties agree on an Arbitration Panel consisting of one arbitrator, the dispute is to be heard by a panel of three arbitrators, one chosen by each of the parties and the third by the two nominees so chosen. Article 21.5.3 provides for the arbitration hearing to be held in Iqaluit, Nunavut unless

the parties agree on another location. The parties agreed that the arbitration hearings herein would be held in Vancouver, British Columbia.

8. Under the heading “Jurisdiction”, Article 21.6 provides that the Arbitration Panel will have jurisdiction to determine all questions of fact or mixed law and fact and to grant relief that in its discretion is appropriate to resolve the dispute. The Arbitration Panel is specifically empowered to issue orders, make awards and otherwise grant relief *ex aequo et bono* based on what is fair and just.

9. Article 25.8 provides that the governing law will be the laws of Nunavut and the laws of Canada applicable therein. Article 25.8 specifically provides that the IIBA must be interpreted in accordance with that governing law. Under the heading “IIBA Interpretation”, Article 1.11 provides that “this Agreement shall be construed in accordance with a purposive approach and pursuant to such remedial and equitable interpretation as will achieve the objectives and purposes stated herein”. The same Article also provides that: “The interpretation of this Agreement may adapt to changes in circumstances over time in the Project until Project Termination”.

#### **D. SUBMISSION TO ARBITRATION / APPOINTMENT OF ARBITRATORS / PROCEDURAL HISTORY / PLEADINGS AND EVIDENCE**

10. The QIA referred the dispute to arbitration by Notice of Arbitration dated July 19, 2016. The QIA alleges that BIMC was in default of its Advance Payment obligations pursuant to Articles 5.2(d) and 5.4. The QIA says BIMC agreed to make Advance Payments including payment of the quarterly sum of \$1,250,000 until the end of the calendar quarter when Commercial Production begins with arrears of \$6,250,000 as of June 30, 2016: \$3,750,000 for three quarters of the 2015 calendar year (later corrected to two quarters and \$2.5 million). QIA seeks relief including a Declaration that BIMC is in breach of its obligations pursuant to Article 5, and that such breach or breaches constitute a material default by BIMC, Orders confirming the amount of all Advance Payments due and payable and for payment in full of all Advance Payments due and owing in the amount of \$6,250,000 or as otherwise calculated by the Arbitration Panel, together with interest and costs including counsel fees.

11. The QIA nominated Thomas R. Berger QC as its nominee in the Notice of Arbitration and proposed that he act as sole arbitrator. By letter dated July 22, 2016 BIMC, through counsel, did not agree to a sole arbitrator and by letter dated July 28, 2016 named Jim McCartney as its nominee. The two arbitrators so appointed informed the parties by email dated August 8, 2016 that Murray Smith was chosen as Chair of the Tribunal.

12. The first procedural meeting was held by conference calls on August 15 and August 19, 2016. The QIA was represented by Michael Osland and Sylvie Molgat of Dubuc Osland in Ottawa. BIMC was represented by Brad Armstrong QC and Laura Duke of Lawson Lundell in Vancouver. Various timelines were agreed for steps in the proceeding including delivery of pleadings and arguments. A hearing date was set for October 25-26, 2016. A second procedural meeting was convened on October 21, 2016. Counsel requested an extension of timelines and an adjournment of the hearing to February 21-23, 2017. Delays caused by, inter alia, illness of a witness and the

need for more time to conduct oral discoveries resulted in a further delay of the hearings. A new hearing date of April 18-20, 2017 was set in a third procedural order on February 20, 2017.

13. The pleadings filed included the Statement of Claim dated August 26, 2016, the Statement of Defence dated September 9, 2016 and the Reply dated September 16, 2016. The QIA's Lists of Documents included the Claimant's List delivered September 19, 2016 containing Tabs 1-36, the Supplementary List attached as Exhibit "A" to Affidavit (No.1) of Stephen Williamson Bathory dated November 17, 2016 containing Tabs 37-60 and the Amended List replacing Tabs 6, 7, and 10. Respondent's Lists included the first List containing Tabs 1-47 and Confidential Documents dated September 19, 2016, and the First Supplementary List dated November 25, 2016 containing Tabs 48-60.

14. The parties filed an Agreed Statement of Facts dated November 14, 2016.

15. Affidavits filed included Affidavit (No.1) of Stephen Williamson Bathory, sworn November 17, 2016; Affidavit (No.2) of Stephen Williamson Bathory, sworn December 8, 2016; Affidavit (No.3) of Stephen Williamson Bathory, sworn December 8, 2016 (Confidential); and Affidavit of Paul Aarulaaq Quassa, sworn December 6, 2016; Affidavit (No. 1) of Michael Anderson, sworn November 25, 2016; and Affidavit (No. 2) of Michael Anderson, sworn November 25, 2016.

16. Cross-examinations of Michael Anderson and Stephen Williamson Bathory took place on March 6, 2017 and March 7, 2017 respectively. Copies of the transcripts were filed. Written arguments were also filed in advance of the hearings. The QIA filed its argument on March 22, 2017. BIMC filed its argument on March 31, 2017. The QIA filed its Reply on April 7, 2017.

17. Hearings were held in Vancouver, British Columbia on April 18-20, 2017. The QIA was represented at the hearings by Terrence J. O'Sullivan and James Renihan of Lax O'Sullivan Lissus Gottlieb LLP. BIMC was represented by Brad Armstrong QC and Laura Duke of Lawson Lundell LLP. Written submissions on quantum were requested by the Tribunal at the conclusion of the two-day hearing. The final QIA submission was filed on June 14, 2017. The BIMC submission was received on June 21, 2017. With the agreement of the parties (as transmitted by email on June 7, 2017) the Award is to be delivered on July 5, 2017.

18. At the start of the hearings on April 18, 2017, the Tribunal first considered the reception of supplementary documents tendered by BIMC and answers tendered by BIMC to outstanding questions from the cross-examination of Mr. Anderson. The parties agreed to a procedure in which direct evidence was filed in advance in writing. The party witnesses were subsequently cross-examined. BIMC sought to have new documents made part of the arbitration record including documents marked as Exhibits for Identification on the cross-examination of Mr. Williamson Bathory and Affidavit #3 of Michael Anderson dated March 28, 2017 that provided mine production records. The mine production records would be relevant if we ruled in favour of BIMC on the issue of when Commercial Production was reached under the IIBA and it fell to BIMC to establish that extraction and sale of iron ore for commercial sale had continued continuously for 90 days at not less than 60% of the Project's intended capacity.

19. The BIMC application to have those supplementary materials entered on the arbitration record was not allowed. We were not satisfied that adequate justification was shown for the late production of new documents with potential prejudice to the QIA's ability to respond to the late arriving evidence. We did not allow the lengthy answers tendered by BIMC to outstanding questions from the cross-examination of Mr. Anderson because the answers went beyond the scope

of the questions that were left outstanding by counsel for the QIA. However, we concluded that the exclusion of Anderson Affidavit #3 could impact the ability of BIMC to make its case and accordingly ruled that the issue of proof of mine production be deferred until we first ruled on the main question on the arbitration, the interpretation of the IIBA. The proceedings would be resumed to allow the parties an opportunity to tender proof relating to mine production if we rule in favour of BIMC on the contract interpretation issue. The QIA would then be given a full opportunity to respond to the new affidavit of Mr. Anderson.

## **E. SUMMARY OF THE LEGAL BACKGROUND AND FACTUAL CONTEXT FOR THE DISPUTE**

### **The Contractual Scheme**

20. The overall principles and objectives are set out in Article 2. The IIBA was negotiated over many years and was intended to provide benefits and opportunities for equitable and meaningful participation of Baffin Inuit in the Mary River Project.

21. The IIBA applies to all aspects of the Mary River Project, including all phases, changes in scope, and any amendments and modifications of regulatory approvals such that there would be no need to negotiate a separate IIBA for each phase of the Project or for any change or modification.

22. Article 5 provided for the financial participation of Inuit in the Project and set out the specific obligations of BIMC to pay Advance Payments, Royalty Payments and, where applicable, Extension Payments.

23. The provisions of Article 5 relating to Advance Payments and Royalty Payments are structured as follows:

- (a) Article 5.2 provides for lump sum "Advance Payments" to be made at specific milestones, and for quarterly Advance Payments to be made starting one year after the end of the quarter in which the Construction Decision is made and continuing during the Construction Period until the end of the calendar quarter in which Commercial Production begins;
- (b) Commencing with the first quarter after Commercial Production begins, Royalty Payments are due under Article 5.6.1. Royalty Payments are equal to Net Sales Revenue multiplied by the Royalty Percentage (which is 1.19%);
- (c) Under Article 5.4(a), Advance Payments are fully creditable against Royalty Payments. Article 5.6.2 provides formulas for crediting Advance Payments against Royalty Payments.

24. The "Mary River Project" is defined in Article 3.1 as follows:

The "Mary River Project" includes all of the following activities carried on by the Company, its successors or assigns from time to time within the Project Area:

- (a) The project described in the Final EIS for the Mary River Project as it may be amended, or any other activities described in future filings with NIRB, NWB [Nunavut Water Board] or other Governmental Authorities including without limitation the construction, operation, modification, maintenance, decommissioning, abandonment or other works or undertakings located at Milne Inlet, the Milne Inlet Tote Road, Mary River Mine Site, the railway, the Steensby Inlet Port, year round marine shipping, air traffic, ongoing exploration and geotechnical exploration;
- (b) Discovery, development and mining of additional mineral deposits, with new or expanded infrastructure and new or increased capacity and use of roads, railways, power generation facilities, ports and ship loading facilities and shipping;
- (c) Exploration activities including surface drilling as well as advanced exploration, bulk sampling and access for that purpose by any means including without limitation the construction and use of winter or all season roads; and
- (d) Activities at the Company's office(s) in Nunavut and the physical activities in Nunavut in support of the Company's activities in the Project Area; (all of the foregoing being collectively defined to be the "Mary River Project").

25. The "Initial Project" is defined in Article 3.2 as follows:

### **3.2 Initial Project Definition**

The "Initial Project" is as described in the Final EIS as approved by NIRB and described in Project Certificate 005, for the construction, operation, closure and reclamation of the Project described in Section 3.1 (a) and includes amendments and modifications of such approval and all related licences, permits and authorizations.

26. There is no obligation or duty on BIMC to carry out the full Mary River Project or any amendments or modifications at any time. Article 5.14 provides as follows:

### **5.14 No Implied Covenants**

5.14.1 There are no implied covenants or duties on the part of the Company to QIA, whether relating to the exploration, development or mining of the Project, the marketing or sale of Products or otherwise. Without limiting the generality of the foregoing, the Company is not under any obligation to explore, develop or produce Products from the Project or to continue production once commenced and the Company has the unfettered right to suspend, curtail or terminate any such operation or activity as it in its sole discretion may determine.

27. Article 5 relates to financial participation by the QIA and sets out the circumstances under which Advance Payments are payable. Article 5.2 provides as follows:

## 5.2 Advance Payments

Subject to Section 5.4, the Company will make the following payments ("Advance Payments") to QIA:

- (a) \$5,000,000 on the date this Agreement is signed by both Parties (the "Initial Payment");
- (b) \$5,000,000 within five Business Days after the date on which a Class A Water Licence is issued to the Company pursuant to the Nunavut Waters and Nunavut Surface Rights Tribunal Act in respect of the Initial Project;
- (c) \$10,000,000 within five Business Days after the date of the Construction Decision; and
- (d) \$1,250,000 at the end of each calendar quarter starting one year after the end of the calendar quarter in which the Construction Decision is made and continuing during the Construction Period until the end of the calendar quarter in which Commercial Production begins.

28. Article 5.16 sets out definitions of terms and conditions applicable under Article 5. The Article 5 definitions which are relevant to Article 5.2(d) include:

5.16(d) "Commercial Production" means when the Project transforms from the period of mine construction and completion to its phase of normalized operations and iron ore crushing and screen operations, following the extraction and sale of iron ore for commercial sale, has continued continuously for 90 days at not less than 60% of the Project's intended capacity, but specifically does not include bulk sampling, test or pilot plant operations planned to occur in advance of commercial production;

5.16(e) "Construction Decision" means the publication of a press release or formal notice by the Company announcing a final decision having been made by the Board of Directors of the Company to execute the Initial Project after the Class "A" Water Licence for the Initial Project is issued by NWB and this IIBA and a Commercial Lease for Inuit Owned Lands have been obtained from QIA, to authorize construction and operation of the Initial Project, with the Company to provide written notice of such within five Business Days;

5.16(f) "Construction Period" means the period of time between the date of the Construction Decision and the date of Commercial Production.

29. Under the heading "Definitions" in Article 1.1 the definition of Commercial Production is slightly different from the definition in Article 5.16(e). In Article 1.1 the definition is:

1.1(j) "Commercial Production" means when the Initial Project transitions from the period of mine construction and completion to its phase of normalized operations and iron ore crushing and screen operations, following the extraction of iron ore for commercial sale, has continued continuously for 90 days at not less than 60% of the Initial Project's intended capacity, but specifically does not include sampling, or operations in advance of Commercial Production.

30. Advance Payments are advances on Royalty Payments to be credited and deducted from the Royalty Payments payable in accordance with Articles 5.4(a) and 5.6.

31. Article 5.4 (e) provides that: "Notwithstanding anything to the contrary in this Agreement, the cumulative total of all Advance Payments and Extension Payments shall not exceed \$75,000,000."

32. Article 5.6 sets out when royalties are payable to the QIA as follows:

#### **5.6 Royalty**

5.6.1 The Company and its successors and permitted assigns shall pay to QIA a royalty (the "Royalty") for each calendar quarter, commencing with the first calendar quarter after Commercial Production begins, equal to the Net Sales Revenue for the calendar quarter multiplied by the Royalty Percentage (such payments being defined as the "Royalty Payments").

5.6.2 Advance Payments and Extension Payments shall be deducted from the Royalty Payments payable to pursuant to Section 5.6.1 as follows:

a) Up to 25% of the Royalty Payments otherwise payable for each of the first 36 calendar quarters after Commercial Production begins may be deducted and credited to the repayment of Advance Payments; and

b) Up to 50% of the Royalty Payments otherwise payable for each calendar quarter after the first 36 calendar quarters after Commercial Production begins may be deducted and credited to the repayment of Advance Payments until repaid in full.

5.6.3 All computations under this Article 5 shall be determined in accordance with IFRS or other generally accepted accounting principles as used and applied by the Company."

33. During the fourth quarter of each Year preceding a Year in which a Royalty Payment is to be remitted to the QIA, Article 5.7 requires that BIMC deliver its forecast for all Royalty Payments that the Company anticipates will be paid during the forthcoming Year (the "Royalty Forecast").

34. Pursuant to Article 5.8.1, within 90 days after the end of each Year, commencing with the Year in which Commercial Production commences and in every Year thereafter until Project Termination, BIMC is required to prepare and deliver to the QIA an Annual Statement of the Royalty Payments that were due and payable for the Project for such Year of calculation.

### **Agreed Statement of Facts**

35. The essential facts as taken from the Agreed Statement of Facts begin on March 20, 2008, when BIMC submitted its Development Proposal for the Mary River Project for a Project Certificate from the NIRB. The description for the Mary River Project included development of the mine site and related facilities, construction of a 150 km railway link to port facilities to be constructed at Steensby Inlet, and all-season shipping of ore from Steensby Inlet Port using both market vessels during the open water season and purpose-built ore carriers with ice-breaking capabilities for year round shipping activities. A smaller marine facility to be located at Milne Inlet was to be used solely for incoming supplies such as fuel, construction equipment and personnel, to be transported by truck along an existing tote road between Milne Inlet and the mine site, but with no transport of ore from Milne Inlet.

36. The NIRB screened the Mary River Project Proposal and indicated to the Minister of Aboriginal Affairs and Northern Development Canada ("Minister") that the proposal would require a full review under Part 5 of Article 12 of the NLCA. Under the Part 5 review, the NIRB issued guidelines for the preparation of an Environmental Impact Statement ("EIS") for the Proposal which required detailed consideration of potential environmental and socioeconomic impacts and benefits.

37. On February 13, 2012, BIMC submitted the Final Environmental Impact Statement ("Final EIS") for the Mary River Project proposal. The scope of the Project as defined in the Final EIS is for 18 Mt/a, with transport of ore by rail to Steensby Port and year-round shipping.

38. In September 2012, the NIRB issued its Final Hearing Report on the Mary River Project. In the report, the NIRB recommended that the Project should be allowed to proceed, subject to recommended Terms and Conditions. In December 2012, the Minister accepted the NIRB report and recommendations and directed the NIRB to issue a Project Certificate for the Mary River Project Proposal.

39. On December 28, 2012 and following extensive public review, the NIRB issued Project Certificate 005 for the Mary River Project as described in the Final EIS, subject to certain terms and conditions imposed by the NIRB. The Project approved in Project Certificate 005 was for the extraction for commercial sale of 18 Mt/a with transport of the ore by rail to Steensby Port and year-round shipping from Steensby Port.

40. In 2012, after having already submitted its application for a Project Certificate with the NIRB, BIMC determined that it would be unable to raise sufficient capital to construct all aspects

of the Mary River Project at one time due to constraints in the financial markets. Accordingly, BIMC began planning for the implementation of a phased approach to the Mary River Project.

41. In January 2013, BIMC informed the NIRB that BIMC was proposing amendments and modifications to the Project. BIMC noted that it understood that this Project amendment request would potentially necessitate a reconsideration of the terms and conditions contained in Project Certificate 005.

42. On January 10, 2013, BIMC wrote a letter to the NIRB, copied to the QIA, advising of its proposal to proceed with the Early Revenue Phase ("ERP").

43. The January 10, 2013 letter requested an amendment to the Project Certificate to authorize the proposed ERP which would include development of a nominal 3.5 Mt/a road haulage operation from Mary River to a small port facility at Milne Inlet for shipping of iron ore during the three-month open water season.

44. Throughout the NIRB proceedings to approve the Final EIS scope of the Project, the QIA and BIMC continued to negotiate the scope and terms of the IIBA as required by Article 26 of the NLCA.

45. Prior to March 2013, the parties were negotiating the financial participation provisions of the IIBA on the basis that the QIA would receive a Free Cash Flow type of royalty. Between March 2013 and August 2013, BIMC and the QIA were engaged in a process of determining the rate for a Net Sales Royalty equivalent to a Free Cash Flow Royalty of 4.5%.

46. As part of this process, each of the parties considered financial modelling of the Mary River Project to determine the equivalent rate of Net Sales Royalty to a Free Cash Flow Royalty rate of 4.5%.

47. The parties entered into a Protocol Agreement on May 9, 2013 under which BIMC would determine the percentage rate at which a Net Sales Royalty would be equivalent to a 4.5% Free Cash Flow Royalty. The QIA would then select an independent Chartered Accountant to verify the rate determination. The firm of Pricewaterhouse Coopers LLP ("PWC") was selected.

48. BIMC's financial models (the "Models") were provided in confidence to PWC to verify whether BIMC's calculations on the equivalent rate for the Net Sales Royalty were accurate.

49. Due to BIMC's stated need to protect confidential financial information, the Models were not shared with the QIA. The QIA relied on the conclusions of the review by PWC regarding the question of royalty equivalency, without being privy to the Models or other financial information. In turn, the QIA declined to share any economic modelling with BIMC.

50. PWC issued a Report to QIA entitled "Baffinland Iron Mines Corporation - Equivalency Test of Royalty Formula" (the "PWC Equivalency Report") on June 19, 2013. The PWC Equivalency Report confirmed that an NSR Royalty rate of 1.19% was equivalent to a 4.5% Free Cash Flow Royalty.

51. In response to BIMC's request to amend the Project Certificate to include the ERP, the NIRB determined that it would proceed with a reconsideration of the Terms and Conditions of Project Certificate 005 under Section 12.8.2 of the NLCA. The NIRB requested that BIMC prepare a

comprehensive addendum to the Mary River Final EIS describing all aspects of the ERP Proposal including impact prediction and proposed mitigation and monitoring plans.

52. BIMC submitted its EIS Addendum to the Final EIS for the ERP Proposal to the NIRB on June 20, 2013.

53. While the NIRB process for consideration of the ERP Proposal was ongoing, BIMC and the QIA continued with the IIBA negotiations.

54. The QIA wrote to BIMC on July 15, 2013 to say that the QIA had completed its review of the PWC Equivalency Report of June 19, 2013. The QIA indicated to BIMC that it had determined its own forecast of Royalty Cash Flow for the Project but that this was based "solely on public and limited Historical information provided by BIM" and further that "QIA's economic models for the proposed Tote/Rail project have been based on its own interpretation" of historical and public documents that were several years old. The QIA requested a further review of the equivalency calculation, in particular with reference to Initial Capital Costs and allowances for Mine Rehabilitation Closure. BIMC responded on July 15, 2013, and the QIA responded again on July 23, 2013.

55. 55. The parties agreed to request that PWC give further consideration to the equivalency review, and on August 27, 2013, PWC issued an addendum report entitled "Addendum to "Baffinland Iron Mines Corporation — Equivalency Test of Royalty Formulas".

56. By late August 2013, after PWC had confirmed the calculations contained in the Models, the parties agreed that a Net Sales Royalty of 1.19% was equivalent to a Free Cash Flow Royalty of 4.5%, and that this Net Sales Royalty would be included as part of Article 5.

57. By early September 2013, the parties reached agreement on final terms of the IIBA that were approved by the QIA Board of Directors at a community meeting held in the Iqaluit Anglican Church Hall.

58. The QIA and BIMC signed the IIBA on September 6, 2013.

59. BIMC issued a Construction Decision on September 13, 2013 to proceed with construction activities associated with the ERP Proposal of the Mary River Project.

60. In January 2013, the NIRB undertook a review of the ERP Proposal as a proposed amendment to Project Certificate 005. That review process was concluded in March 2014.

61. In March 2014, the NIRB issued its public hearing report entitled "Mary River Project: Early Revenue Phase Proposal".

62. The NIRB sent a letter to the Minister on March 17, 2014 recommending that the Project Certificate should be amended to allow for the ERP in accordance with revised terms and conditions of Project Certificate 005 to mitigate potential environmental or socio-economic impacts.

63. The NIRB issued Amendment #01 to Project Certificate 005 on May 28, 2014 approving the ERP Proposal and continuing to authorize a Project of 18 Mt/a. BIMC advised the NIRB and

the QIA that it remained committed to the Project as defined in the Final EIS, but that the Rail Execution Phase would be deferred.

64. In April 2016, when BIMC met with the QIA to discuss payment arrears, BIMC advised that it had achieved Commercial Production in the fourth quarter of 2015.

65. BIMC wrote to the QIA on April 22, 2016 confirming its position in writing that Commercial Production had been achieved and setting out the terms of an updated proposal for deferred payments.

66. Under Articles 5.2 (a), (b) & (c), the QIA received payments of \$10,000,000 on September 6, 2013 on signing, and \$10,000,000 on September 18, 2013 after issuance of the Construction Decision. These payments constituted Advance Payments of royalties under Article 5.6.

67. Pursuant to Articles 5.2(d) & 5.4, BIMC also agreed to make Advance Payments to QIA in the form of a quarterly sum of \$1,250,000 (\$5,000,000 in aggregate per calendar year) until the end of the calendar quarter when Commercial Production had begun.

68. BIMC made Advance Payments to the QIA in accordance with Article 5.2(d) starting in the fourth quarter of 2014, and continuing until the second quarter of 2015.

69. BIMC owes Advance Payments for the third and fourth quarters of 2015 in the amount of \$2,500,000. BIMC made a quarterly payment of \$1.25 million for the first and second quarters. Interest is being paid on the outstanding amount and is current. This amount was originally misstated as \$3,750,000 in the Agreed Statement of Facts but was corrected by Mr. Williamson Bathory on cross-examination.

## **F. EVIDENCE OF WITNESSES**

### **Stephen Williamson Bathory**

70. Parts of the evidence of Mr. Williamson Bathory given by affidavit were inadmissible as constituting evidence of subjective intent and negotiations. We will accordingly not repeat all of the evidence here. We will omit reference to such parts of the evidence as we consider unhelpful.

71. In Affidavit No.1, sworn November 17, 2016, Mr. Williamson Bathory deposed that he is the Director of Major Projects at the QIA. He has been employed by the QIA since 2007, during which time he assisted QIA in the management of the Mary River Project. His roles included that of Environmental Technician, Director of the Department of Lands and Resources, Project Manager for Environmental Assessment, and Director of the Department of Major Projects. Mr. Williamson Bathory acted as one of the primary contacts for the QIA on the Project and represented the QIA in all public and regulatory matters.

72. The IIBA, and a Commercial Production Lease were signed at a signing ceremony on September 6, 2013. Mr. Williamson Bathory states that at no time did any issue arise regarding the intended Project scope being anything other than the entire Project described in the Final EIS and ERP Addendum to the Final EIS.

73. One week after signing, BIMC announced its decision to proceed with construction activities associated with the ERP component of the Project. The Construction Decision did not limit the Project to the proposed ERP component. The Construction Decision stated: "Baffinland Iron

Mines Corporation is pleased to announce a formal decision to proceed with approved construction activities associated with the Mary River Project.” and further that work: “would focus on construction activities that are currently approved.” The NIRB had not yet approved the ERP amendment for the Project.

74. Construction activities currently under way at the Project are not to be limited to the ERP and are to include activities in anticipation of a proposed increase in the capacity of the ERP referred to as “Phase II” which includes a rail component, now proposed to be constructed to Milne Inlet rather than Steensby Inlet. Construction activities to date have included elements that relate to both the full 18 Mt/a intended Project as well as the ERP phase, with the ERP adding additional elements such as Milne Inlet and Tote Road upgrades.

75. The NIRB issued its Final Hearing Report to the Minister on March 17, 2014. The Report included recommendations for revised terms and conditions to address the ERP and discussion on the scope of the Project and production rates, noting that the ERP was in addition to the already approved rail project. The NIRB recommended revision of Project Certificate 005 to ensure that the overall production amount from both the ERP and the rail component of the Project would not exceed 18 Mt/a. Project Certificate 005 was amended on May 28, 2014, approving BIMC’s proposal for an ERP. Approval of the ERP adjusted the capacity of the Project to 21.5 Mt/a.

76. BIMC applied to amend Project Certificate 005 to include the Phase II proposal for the Project on October 29, 2014. On February 17, 2016 BIMC issued a letter to the NIRB proposing to modify its Phase II changes to provide for trucking ore to Milne Inlet and a rail line as a means of transporting ore from the mine site to Milne Inlet.

### **Michael Anderson**

77. By Affidavit No.1, sworn November 25, 2016, Michael Anderson deposed that he is the Chief Technology Officer at BIMC. He joined the company in July of 2011 as the Vice President of Operations and participated in the engineering design, feasibility and operational readiness activities of the Mary River Project both for the 18 Mt/a phase and the ERP. He was part of the team that negotiated the Commercial Lease and the IIBA. He served on the Joint Executive Committee for the IIBA until the end of 2014 during which time the first implementation budget was negotiated. In his role of Vice President of Operations, Mr. Anderson was in charge of mining, crushing, ore hauling, ship loading, maintenance, procurement and logistics and site services activities.

78. The final Project Proposal submitted to the NIRB in December 2008 did not include a proposal to ship ore from Milne Port. The Project Proposal outlined that once Steensby Port (which would operate year-round) is operational, Milne Port would only be used occasionally for the delivery of oversized equipment to the mine site. The expected capital cost of the Mary River Project is over \$5 billion, including the cost of the 150 km railway and 13 Polar Class ore carriers.

79. On December 28, 2012, the NIRB issued Project Certificate 005 approving the Project including a requirement in Section 2.0 that when Steensby Port is operational, Milne Port will only be used occasionally for the delivery of oversized equipment for the Mine Site. Project Certificate 005 did not authorize any hauling of ore along the Tote Road to Milne Port, did not authorize stockpiling of ore at Milne Port, and did not authorize shipments of iron ore from Milne Port. In order for the 18 Mt/a Project to proceed under Project Certificate 005, BIMC was required to obtain an

amendment to the North Baffin Regional Land Use Plan ("NBRLUP") to allow for the development of the railway to Steensby Port. BIMC applied for that amendment, but it has not yet been issued. Finalization of the amendment would be required to construct the railway, which is necessary if BIMC were to proceed with the 18 Mt/a Project.

80. When the Mary River Project was approved in December 2012, BIMC determined that the large development capital cost as authorized under Project Certificate 005 would be difficult to finance under the global economic conditions which existed at the time. In addition, BIMC determined there were risks such as large funding requirements during four years of construction and marketing uncertainties. Accordingly, BIMC considered an alternative development strategy to address these risks by developing the Project in two stages. The first phase was to be an ERP, with the second phase, being the rail execution phase, to be deferred. The rail execution phase would commence only as and when global economic conditions improved and infrastructure debt financing became available.

81. On January 10, 2013, BIMC wrote to the NIRB advising of the proposal to proceed with the ERP which would include development of a nominal 3.5 Mt/a road haulage operation from Mary River to a small port facility at Milne Inlet for shipping of iron ore during the three-month open water season. Development of the original Project would be delayed until the global financial environment supported financing of the large development capital cost.

82. While the NIRB process for consideration of the ERP Proposal was underway, BIMC and the QIA continued with negotiations of the IIBA. Those negotiations had been underway since 2006. Pursuant to Article 26.2.1 of the NLCA, no "Major Development Project" may commence until an IIBA is finalized in accordance with Article 26 of the NLCA. The QIA and BIMC negotiated provisions for financial participation, including a royalty payable to the QIA.

83. Each of BIMC and the QIA were advised by lawyers and expert consultants with respect to the negotiation of the IIBA, and in particular in respect of the provisions of Article 3, Project Description and Article 5, Financial Participation and royalties.

84. In 2012, and prior to the announcement of the ERP, BIMC and the QIA reached agreement in principle on a draft of Article 5 under which the QIA would receive a royalty of 4.5% of annual free cash flow (the "Free Cash Flow Royalty"). At the February 27 to March 2, 2013 negotiation session, the QIA requested a change to the terms of the royalty provisions from the Free Cash Flow Royalty to a royalty based on sales revenue (the "Net Sales Royalty").

85. Based on Amended Project Certificate 005 issued by the NIRB on May 28, 2014 BIMC was able to proceed with construction of those components of the ERP Proposal which were not part of the original approval of the Mary River Project under the earlier version of Project Certificate 005. Those components included construction of port facilities at Milne Port including laydown areas for ore stockpiling, and modifying the port facilities to enable loading of ore carriers.

86. ERP mining began in September 2014 at low rates. Construction of various facilities continued up until the fourth quarter of 2015. On or before the fourth quarter of 2015, the Project

transformed from the period of mine construction and completion to its phase of normalized operations and iron ore crushing and screen operations, following the extraction and sale of iron ore for commercial sale.

87. Advance Payments of \$2,500,000 are owing for the third and fourth quarters of 2015. Interest is being paid on the outstanding amount. The Q2 2015 Advance Payment was made in March 2015.

88. On September 21, 2016, BIMC wrote to the QIA explaining the royalties for the first half of 2016, and provided a forecast of royalties payable for the second half of 2016. BIMC enclosed a cheque for the royalty payment for Q1 and Q2 of 2016, as BIMC had achieved Commercial Production in Q4 of 2015.

89. In BIMC's Audited Financial Statements for the period ending December 31, 2015, BIMC's auditors confirmed that it had achieved Commercial Production in the fourth quarter of 2015. Prior to Commercial Production, mining expenditures are capitalized. Once Commercial Production is achieved, expenditures must be deducted from the revenues for financial and tax purposes. Article 5.6.4 specifies that all computations under Article 5 shall be determined in accordance with generally accepted accounting principles as used and applied by the Company.

90. On April 22, 2016, BIMC wrote to the QIA to set out the conditions of the proposal for the deferment of payments, and to reconfirm that Commercial Production had been achieved. BIMC indicated that it recognized that the QIA may not agree with the determination that Commercial Production had been achieved and was open to an independent audit firm to work with the QIA and BIMC to provide confirmation of this declaration.

91. The ERP was undertaken to enable the Project to get started and to generate revenue. Capital costs were estimated at \$704 million. However, a number of factors have affected the financial viability of the ERP. Iron ore prices have fallen substantially. In January 2013, the price was USD\$150 per ton. Since the summer of 2015, prices have been below USD\$60 per ton.

92. Production rates for the ERP were not as expected, and further investment was required to meet production targets. This has resulted in operating costs being higher than projected. As a result, BIMC has been suffering financial losses from the ERP at current production rates and iron ore prices.

93. By Affidavit No.2, sworn November 25, 2016, Mr. Anderson responded to the Affidavit of Mr. Williamson Bathory sworn November 17, 2016 and deposed that total payments made to the QIA under all headings, including, but not limited to, IIBA reimbursement, commercial lease, Advance Payments, royalties, and IIBA implementation total \$51,116,588 with \$41,611,104 of those payments made since the IIBA was signed in September 2013.

94. In response to the Williamson Bathory Affidavit, Mr. Anderson says that the QIA minutes of the January 9, 2013 meeting indicate that BIMC advised the QIA that by 2015 the ERP would

be "fully operational and would be shipping 3-4 million tons/year" and that: "This would be considered the 'general operation' until a decision was made to build the rail portion of the Project.". Mr. Anderson states that the ERP is, in fact, the general operation at this time.

95. On cross-examination Mr. Anderson agreed that no matter how much ore was actually extracted from the site, the "Inuit owned land at the mine site would be significantly impacted".

### **Stephen Williamson Bathory #2**

96. In Affidavit (No.2) sworn December 8, 2016, Mr. Williamson Bathory responded to Anderson Affidavits #1 and #2, sworn on November 25, 2016. Mr. Williamson Bathory states that BIMC's introduction of an ERP was part of the reason for requesting that the royalty calculation change from the Free Cash Flow Royalty payment to a "Net Sales Royalty", but it was not the primary reason.

97. Mr. Williamson Bathory states that the intended capacity of the Project as described to the NIRB by BIMC was 18 Mt/a, as amended to add up to an additional 4.2 Mt/a to accommodate the 3.5 Mt/a ERP proposal, resulting in a total approved Project capacity of 22.4 Mt/a. He says that this is currently the Project.

98. Mr. Williamson Bathory states that Advance Payments are required for the programs and support that could be provided to ameliorate social conditions, including mitigating the negative effects of the Mary River Project on Inuit communities. The Project is disrupting traditional Inuit food gathering by disrupting: (a) caribou travel routes and calving grounds; and, (b) Narwhal calving grounds in Milne Inlet and vicinity. Inuit hunters have advised that summer seal and narwhal harvesting is more difficult during the summer BIMC shipping, as is finding caribou in traditional hunting areas. Certain areas are now closed to Inuit hunters.

99. These Project impacts have reduced access to the foregoing types of "country foods" and increased Inuit food reliance upon store bought foods. Given the high prices of store bought food in the communities, "food security" is a very important issue in Nunavut. Other negative social consequences of the Project include problems with absenteeism from families for Inuit working at the mine, leading to increased instances of spousal and child abandonment and family break up. Wages from mine workers flowing into the communities has fueled an increase in existing drug and alcohol problems.

100. The impact of increased alcohol consumption in the communities has been verified by local Alcohol Committees who have seen increased purchasing and bootlegging. In addition, the soapstone quarry adjacent to the mine site is now inaccessible to Inuit, thereby reducing the ability to support local artist industries. The QIA continues to put its own money into long term monitoring programs designed to observe the social changes arising from the Project. Reducing Advance Payments negotiated by Inuit under the IIBA directly reduces the social programs and assistance that can be funded by the QIA to address social conditions.

101. Advance Payments were necessary to ensure that Inuit received direct and immediate benefits as soon as the Project commenced. The Advance Payments would provide regular and pre-determined funding to compensate for the negative impacts on the environment and the wildlife as well as the social and cultural disruption once the Project commenced. The Advance

Payments would continue until the Project had achieved a stable and positive cash flow. During the course of negotiations, the Advance Payments were capped at \$75M for the benefit of BIMC.

102. In reply to paragraph 24 of Anderson Affidavit #2, Mr. Williamson Bathory says the NIRB was required to consider the cumulative effects of the ERP together with the Steensby Port railroad phase because the Project consists of both phases. The ERP did not replace the original Project or reduce the Project's intended capacity. The ERP was an addition to the Project. If the Project's intended capacity was to be reduced in scope, then the ERP would have been reviewed upon its own set of impact predictions. While it was clear the rail portion was being deferred and that a timeline for its development was not clearly indicated, BIMC represented that the production levels from the rail component were still part of the intended capacity of the Project.

103. In reply to paragraph 25 of Anderson Affidavit #2, Mr. Williamson Bathory says the Minister rejected the NIRB's recommendation to limit the Project's intended capacity to 18 Mt/a for both rail and ERP phases. The schedule to the Minister's letter of April 28, 2014 provides that the NIRB's recommendation would limit total volume to 18 Mt/a: "despite the stated intention of the Proponent to make sure the ore shipping volume processed through Milne Inlet (4.2 Mt/a maximum) [was] additive to the ore to be transported out by railway and Steensby Inlet (18 Mt/a maximum)."

104. In reply to paragraph 26 of Anderson Affidavit #2, Mr. Williamson Bathory says the intended capacity of the Project, and specifically the scope of the Project described in the IIBA, was always represented by BIMC to be 18 Mt/a to start, then amended to increase for the ERP phase (up to an additional 4.2 Mt/a). Future unknown development could increase capacity, including suggested development that might increase total annual production up to 30 Mt/a (including if the Phase 2 proposal proceeds). At the time of signing the IIBA, the intended capacity of the Project was initially 18 Mt/a plus the proposed ERP.

105. In Affidavit No.3, sworn December 8, 2016 Mr. Williamson Bathory makes a response to the Confidential Documents provided by BIMC on December 5, 2016. The "Mary River Staged Project Submission Report Early Revenue Phase (ERP) Report" is said to show that that financing for the Steensby Port railroad would become available to begin engineering in 2014 and mobilization in 2015 based on rate of 18Mtpa and ramp up to 30Mtpa over 5 years. The ERP Report states: "The agreement is subject to some minimums and maximums (including a cap of \$75M on Advance Payments) which are effective in the event of significant delays in construction."

106. On cross-examination, Mr. Williamson Bathory conceded that QIA notes from a January 2013 meeting recorded that the ERP would be considered to be the "general operation" until a decision was made to build the railway. Mr. Williamson Bathory also confirmed that certain paragraphs of the Agreed Statement of Facts required correction. BIMC made a quarterly payment of \$1.25 million for the second quarter of 2015. Only the third and fourth quarter 2015 payments remain owing – for a total of \$2.5 million. In oral argument Mr. Armstrong relied upon answers

from the cross-examination to confirm the QIA position that Advance Payments would be payable regardless of how much money is generated by the Project, i.e., even if Royalty Payments would exceed Advance Payments.

### **Paul Aarulaaq Quassa**

107. In his Affidavit sworn December 6, 2016, Paul Aarulaaq Quassa states that various things were said by BIMC during the course of negotiations that caused the QIA to believe certain things regarding the Project. Such evidence is inadmissible as going to the subjective intentions of one party. No reliance was placed on this Affidavit in argument.

### **G. ISSUE TO BE DETERMINED**

108. The QIA casts the issue in terms of the meaning to be given to the words “intended capacity” in the Article 5.16(d) definition of Commercial Production.

109. BIMC describes the issue slightly differently and focusses on the meaning to be given to the words in Article 5.16(d) dealing with when construction ends and commercial production begins.

110. To highlight those different approaches the relevant language of Article 5.16(d) is repeated:

5.16(d) "Commercial Production" means when the Project transforms from the period of mine construction and completion to its phase of normalized operations and iron ore crushing and screen operations, following the extraction and sale of iron ore for commercial sale, has continued continuously for 90 days at not less than 60% of the Project's intended capacity, but specifically does not include bulk sampling, test or pilot plant operations planned to occur in advance of commercial production;

111. We will consider the issue from the perspective of both parties. The question is what meaning is to be given to the words in Article 5.16(d) that, when taken together in the context of

the Agreement as a whole, triggers the transition from Advance Payments to regular Royalty Payments.

## **H. POSITIONS OF THE PARTIES**

### **The QIA**

112. The QIA says that the intended capacity of the Mary River Project at the time of signing was 18 Mt/a and that Advance Payments are to continue until extraction and sale of iron ore has continued for 90 days at not less than 60% of that intended capacity.

113. In support of its position, the QIA relies primarily upon the description of the Project in the Final EIS submitted by BIMC to obtain regulatory approval:

Mary River Project (the Project) consists of mining iron ore from the reserve at Deposit No. 1 at a production rate of 18 Million tons per year (Mt/a).

114. The QIA says that BIMC continuously maintained that it was committed to building the infrastructure necessary to produce 18 Mt/a. The Project is proceeding in two phases, the ERP under which 3.5 Mt/a will be transported by road and the railway phase under which an additional 18 Mt/a will be transported by rail. BIMC always maintained that the ERP was in addition to the railway phase, not in substitution. BIMC consistently remained committed to the full development of the Project and always intended to reach a capacity of at least 18 Mt/a. The term “intended capacity” could not be construed as referring only to the first phase.

115. The QIA stresses the importance of Advance Payments to Inuit communities. The Project has disrupted traditional hunting grounds and cultural sites and has aggravated Inuit social problems. The Advance Payments are said to be essential to ameliorate those problems that subsist during and after completion of the ERP.

116. On tours of the region prior to the signing, with community open houses held to describe the project to Inuit communities, BIMC described the project as involving the shipment of 18 Mt/a of iron ore to market. Mr. Williamson Bathory stated that this became the foundation for all future discussions.

117. In the Draft EIS submitted on January 20, 2011, BIMC said that 18 Mt/a of iron ore would be transported from the mine by a railway, and then shipped from Steensby Port. The railway was expected to take 4 years to construct. An additional 3 Mt/a would be transported via road and shipped from Milne Port during the summer. The road haulage portion of the Project was removed in April 2011 because it would require revisions to the NIRB’s Scoping Report and delay the environmental assessment.

118. The Final EIS was submitted on February 13, 2012, still representing that the mine was intended to produce 18 Mt/a of iron ore. The QIA delivered Final Written Submissions to the NIRB on May 30, 2012. Those submissions supported the project based on an impact assessment for a

production capacity of 18 Mt/a. On September 14, 2012, the NIRB delivered its Final Hearing Report and recommended that the Mary River Project proceed.

119. On November 13, 2012, BIMC proposed a change to the IIBA, which was then being negotiated, to expand the definition of “Project” to include additional deposits in the North Baffin area. Previously, the draft IIBA and its definition of “Project” applied only to the 18 Mt/a operation described in the Final EIS. The proposed expansion of the definition of “Project” resulted in the introduction of a new defined term into the IIBA: “initial Project”, meant to refer specifically to the operation described in the Final EIS.

120. In December 2012, BIMC introduced the ERP to develop the Project in two phases: the ERP and the railway phase. The ERP was essentially the same road haulage option that had been removed from the Draft EIS in April 2011. BIMC would transport 3.5 Mt/a to Milne Port by road and ship it during the three-month open water season. The ERP, introduced prior to the larger 18 Mt/a rail phase, would mitigate risk as it would bring in early revenues and did not require a new ship design.

121. The parties eventually agreed on an open-ended project scope for the IIBA and a royalty rate based on net sales. The IIBA was signed on September 6, 2013. The ERP had not yet been approved by the NIRB.

122. The QIA says that Advance Payments are advances on royalties. The IIBA sets out a mechanism for crediting Advance Payments against subsequent royalties. As a result, the QIA does not receive initial royalty payments in full. Advance Payments help to offset the negative impacts of the Mary River Project.

123. Advance Payments are put in the QIA Legacy Fund which distributes up to 4% of its overall account balance annually to the QIA Benefits Fund. The QIA Benefits Fund is used to support various social programs including language and cultural activities, counsellor training programs, local and internet distribution of Inuit media, traditional skills workshops, elder and youth programs and community hunts. The manner in which Advance Payments are disbursed to the QIA Benefits Fund ensures that these monies will benefit the Inuit in perpetuity. A reduction in Advance Payments has a direct consequence on the availability of programs and impedes the ability to mitigate the negative impacts of the Mary River Project.

124. The Advance Payments ensure that, even if Commercial Production is never reached, the QIA will receive a minimum of \$75 million, used to mitigate negative impacts of the Project. Shortcomings in payments received in any given year have a direct impact on the overall amount of money available to the Benefits Fund. Annual reductions in payments received by the QIA Legacy Fund carry both immediate and perpetual impact on the benefits Inuit will derive from the Project.

125. The QIA relies upon the post-contractual conduct of BIMC to show that Advance Payments would continue to be paid after Q4 2015. On February 9, 2016, while in arrears of Advance Payments owing in 2015 and 2016, BIMC provided the QIA with a schedule that included all four Advance Payments for 2016, payment of which BIMC wished to defer to 2017.

126. During a meeting on April 14, 2016 to discuss mounting arrears, BIMC advised that it was declaring commercial production to have been reached in the last quarter of 2015, based on

the advice of its auditors. BIMC acknowledged that its auditors had used a different definition of “commercial production” than is found in the IIBA.

127. In his first affidavit, Mr. Anderson said that it was BIMC’s auditors who determined that commercial production had been reached but on cross-examination, after first saying that it was the auditors who determined commercial production had been reached both for accounting purposes and under the IIBA, revealed that all of his evidence was based on undisclosed hearsay. Mr. Anderson himself never had any discussions with the auditors. BIMC’s 2015 financial statements, prepared by its auditors, expressly state that BIMC’s management made the assessment of when the Company is expected to enter commercial production.

128. The QIA relies upon *798839 Ontario Limited v. Platt*, 2016 ONCA 488, at para. 23 to argue that the interpretation of a commercial contract requires the decision maker to give effect to the parties’ intentions as derived from the words they actually used, in the context of the contract as a whole and within the factual matrix (also called surrounding circumstances). The QIA relies upon *Sattva Capital Corp. v. Creston Moly Corp.*, [2014] 2 S.C.R. 633, at paras. 56-58 to argue that the factual matrix consists of any objective evidence which reasonably ought to have been known to the parties at the time the contract was entered into. One important aspect of the factual matrix is the purpose of a provision according to *Starrcoll Inc. v. 2281927 Ontario Ltd.*, 2016 ONCA 275, at para. 21. The case of *Group Eight Investments Ltd. v. Tadei*, 2005 BCCA 489, at paras. 19-20 is cited for the principles that the intention of the parties is to be determined from the actual words used and not their subjective intentions and that commercial contracts are interpreted as a whole in accordance with sound commercial principles and good business sense.

129. The QIA submits that commercial reasonableness is not a matter of evidence, but rather is a “mode of reasoning which must be done objectively.” (*Lauren International, Inc. v. Reichert*, 2008 ONCA 382, at para. 23 and *Kentucky Fried Chicken Canada v. Scotts Food Services Inc.* (1998), 41 B.L.R. (2d) 42 (Ont. C.A.), at para. 27). Evidence of post-contractual conduct is admissible for the purpose of interpreting the contract if the language of the contract is ambiguous (*Shewchuk v. Blackmont Capital Inc.*, 2016 ONCA 912, at para. 56).

130. Reliance is also placed on Article 1.11 which provides that the IIBA is to be interpreted “in accordance with a purposive approach and pursuant to such remedial and equitable interpretation as will achieve the objectives and purposes stated herein”. The purpose of the IIBA is said to ensure that the negative environmental and social impacts of the Project are mitigated and that Inuit properly benefit from the use made of Inuit Owned Lands. Article 5.1.1 specifies that the purpose of Article 5 is to “provide for the financial participation of Inuit”. The QIA argues that the words “intended capacity” must not be interpreted in a manner that reduces benefits to Inuit as that would not be consistent with this purpose.

131. “Project” is defined in Article 3.1 to include:

The project described in the Final EIS for the Mary River Project as it may be amended, or any other activities described in future filings with NIRB, NWB or other Governmental Authorities including without limitation the construction, operation, modification, maintenance, decommissioning, abandonment or other works or undertakings located at Milne Inlet, the Milne Inlet Tote Road, Mary River Mine Site, the railway, the Steensby

Inlet Port, year round marine shipping, air traffic, ongoing exploration and geotechnical exploration.

132. The Final EIS describes the Project as:

The Mary River Project (the Project) consists of mining iron ore from the reserve at Deposit No. 1 at a production rate of 18 Million tons per year (Mt/a).

133. The QIA argues that the provision of Article 3.1 that refers to the Final EIS “as it may be amended, or any other activities described in future filings with NIRB” would only be relevant if the introduction of the ERP amended the Final EIS in such a way that the Project no longer includes a production rate of 18 Mt/a. Because the Final EIS defines the Project as having a capacity of 18 Mt/a and was never amended to change this, the plain language of the IIBA supports the QIA’s position. There is no textual support for BIMC’s position that the “Project” should be understood as applying only to the ERP for the purposes of the “Commercial Production” definition.

134. In addition to the definition of “Commercial Production” contained in Article 5.16(d), a second definition is provided at Article 1.1(j). Article 5.16 specifies that the definition at Article 5.16(d) is to be used for all parts of Article 5. The QIA says that the definition of Article 1.1(j) only applies to other articles and thus is not relevant to the interpretation of Article 5.2(d). It is a principle of contractual interpretation that a specific term ought to take priority over a general term. To do otherwise would deprive the specific term of any meaning (*Maher v. Central Building Services Group Ltd.*, 2010 ONCA 415, at para. 43).

135. In any event, the only notable change is that the definition at Article 1.1(j) refers to the “Initial Project’s intended capacity”, rather than the “Project’s intended capacity”. “Initial Project” is defined at Article 3.2:

The “initial Project” is as described in the Final EIS as approved by NIRB and described in Project Certificate 005, for the construction, operation, closure and reclamation of the Project described in Section 3.1(a) and includes amendments and modifications of such approval and all related licenses, permits and authorizations.

136. The QIA argues that the definition of “Initial Project” was introduced because of BIMC’s wish to expand the scope of the IIBA to apply to any future mining activities. “Initial Project”, as described, includes only the approved project detailed in the Final EIS, but not any future mining activities. “Initial Project” does not refer to the ERP but does refer to a project with a capacity of 18 Mt/a. In addition, the definition of “Initial Project” specifically references Article 3.1(a) which includes express references to the railway and Steensby Inlet Port.

137. The QIA says that the fact that there were economic difficulties does not support the BIMC contractual interpretation argument and that financial performance of the Project is irrelevant to the interpretation of the IIBA at the time it was signed.

138. In response to the BIMC argument that it was known to both parties that the railway phase might never get built, the QIA notes that the IIBA includes a cap on Advance Payments of \$75 million. It would take 11 years for the cap to be hit. When the ERP was approved by the NIRB, it was expected that the railway phase would be ready in 2019. As Advance Payments began in

Q4 2014, Advance Payments were expected to be paid for at least 5 years. The cap effectively provided that Advance Payments could continue for a further 6 years in the event of delay. This is said to be commercially reasonable in the context of a significant operation particularly when all the money is to be credited against future royalties. On cross-examination Mr. Anderson agreed that no matter how much ore was actually extracted from the site, "Inuit owned land at the mine site would be significantly impacted".

139. The QIA also argues that the contingent nature of the railway phase is not relevant to interpreting the meaning of the "Project's intended capacity". An "intended capacity" does not mean a "guaranteed capacity". There is no doubt that the railway was "intended" but determining the meaning of the words "intended capacity" does not involve a consideration of BIMC's subjective intentions.

140. Accordingly, the QIA seeks:

- (a) an order declaring that the "Project's intended capacity" for the purposes of the definition of Commercial Production in Article 5.16(d) is 18 Mt/a;
- (b) an order requiring that BIMC pay the sum of \$7,500,000 plus interest owed with CPI adjustment, on account of the Advance Payments due for the third and fourth quarters of 2015, all four quarters of 2016 and the first quarter of 2017;
- (c) an order confirming BIMC's continuing obligation to pay Advance Payments until Commercial Production has been reached, as per Article 5.16(d); and
- (d) an order requiring that BIMC pay costs.

## **BIMC**

141. BIMC argues that the plain meaning of Article 5 is that the transition to regular Royalty Payments is to occur when the Construction Period ends and Commercial Production of iron ore commences. This occurred in Q4 2015 when the Construction Period for the Project (which is currently the ERP) ended, and the Project transformed from construction to normalized operations, producing at or above 60% of the intended capacity of the facilities and infrastructure then being constructed (3.5 Mt/a) for 90 days or more.

142. BIMC concedes that the Advance Payments for Q3 and Q4 2015 remain owing in the total amount of \$2.5 million. Royalty Payments of 1.19% on Net Sales Revenue for commercial production of iron ore for 2016 have been paid and will continue to be paid going forward. When the IIBA was signed, iron ore prices were over USD \$125 per ton. At an iron ore price of USD \$125 per ton, the Royalty Payments in 2016 would have been more than double and would have exceeded CDN \$5 million. The statements in paragraphs 63, 64 and 65 of the Agreed Statement of Facts are incorrect. Only the third and fourth quarter 2015 Advance Payments remain owing for a total of \$2.5 million.

143. BIMC makes reference to a number of additional facts that are not included in the Agreed Statement of Facts but are said to be relevant to the proper interpretation of the IIBA. In

particular, BIMC notes that on July 5, 2013 the lead negotiator for BIMC provided the following written response to a QIA request with respect to forecasting future Royalty Payments:

While we are pursuing a 3.5 Mt/a initial operation from the ERP, we have indicated a desire to expand to 18 Mt/a (as re-indicated in the amendment to the recent Project amendment issued to NIRB) and future desire to potentially expand to 30 Mt/a (as indicated in original NIRB submission). Given that future expansions decisions are dependent on a number of factors outside the companies (sic) control (regulatory approvals, financing, market conditions, iron ore pricing), BIM is unable to provide specific forecasts due to these unknown factors. (BIMC Document No. 19)

144. Further, in a letter dated July 15, 2013, from the QIA:

Early this year, Baffinland Iron Ore Mines Corp. (BIM) announced publicly that it had issued a letter to Nunavut authorities that it was replacing a mine plan to produce 18 Mtpa of iron ore with one that would produce 3.5 Mtpa. Based on this material change in project scope, QIA felt it was justified in requesting that the terms of the IIBA financial participation be revised from a FCF to an equivalent NSR royalty. BIM agreed to this request if the determination of an equivalent NSR rate be based on their own calculation rather than be defined as part of a negotiated process. (BIMC Document No. 20)

145. BIMC also highlights the provision of the QIA Plain Language Guide to the IIBA regarding the size of the initial Project:

The Mary River Project is an iron ore exploration and mining project in the North Baffin region of Nunavut with a proposed lifespan of 21-years beginning in 2013. The Project is initially expected to produce approximately 3.5 million tonnes of iron ore each year (but may expand to a nominal rate of 18 million tons per year, and possibly as high as 30 million tons per year over the course of the Project). Shipments of iron ore are initially planned via the Milne Inlet Tote Road to ore carriers, and on to European smelters. Should the production rate increase, shipments of iron ore would occur via a railway and port at Steensby Inlet, and on to European smelters. (BIMC Document No. 26)

146. Principles relevant to interpretation of the IIBA are said to be contained within the Agreement itself. Under the heading "IIBA Interpretation", Article 1.11 provides that the IIBA "shall be construed in accordance with a purposive approach and pursuant to such remedial and equitable interpretation as will achieve the objectives and purposes stated" and that the interpretation of the IIBA "may adapt to changes in circumstances over time in the Project until Project Termination." The overall principles and objectives of the IIBA are set out in Article 2. The IIBA

was negotiated over many years and is intended to provide benefits and opportunities for equitable and meaningful participation of Baffin Inuit in the Mary River Project.

147. BIMC relies upon *Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 S.C.R. 888 at 889 for the principle that interpretation of a commercial contract is an exercise in giving effect to the intentions of the parties by putting the words of the contract in context and begins with the words the parties have chosen. “[E]ffect must first be given to the intention of the parties to be gathered from the words they have used.”

148. Other interpretive aids are discussed by Geoff Hall in *Canadian Contractual Interpretation Law* including the importance of context to take into account the way language is used in the document as a whole. This principle is contained in the rule that contracts must be read as a whole with meaning given to all provisions. Context is also important in considering the surrounding circumstances which give rise to the contract. This aspect of context is given effect by the rule that the factual matrix must be considered when interpreting a contract.

149. BIMC argues that in addition to Article 1.11 governing interpretation, the Entire Agreement clause in Article 25.10 provides that the written Agreement:

...supersedes all prior agreements, understandings, negotiations and discussions, whether written or oral, including prior memoranda of understanding or position unless such prior agreements and understanding have been incorporated herein. There are no conditions, covenants, agreements, representations, warranties or other provisions, express or implied, collateral, statutory or otherwise, relating to the subject matter except provided in this Agreement. No reliance is placed by any Party on any warranty, representation, opinion, advice or assertion of fact made by any Party or its directors, officers, employees or agents, to any other Party or its directors, officers, employees or agents, except to the extent that it has been reduced to writing and included in this Agreement.

150. As did the QIA, BIMC cites *Sattva Capital Corp. v. Creston Moly Corp.*, [2014] 2 S.C.R. 633, at para. 57 but highlights the rule that the surrounding circumstances must never be allowed to overwhelm the words of an agreement. The factual matrix should consist only of objective evidence of the background facts at the time of the execution of the contract - knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting.

151. BIMC argues that the transition from Advance Payments to Royalty Payments occurred when construction ended and production began. In September 2013, BIMC announced construction of mining facilities and infrastructure with an intended capacity of 3.5 Mt/a. The Construction Period for the ERP was completed in Q4 2015 and the Project transformed from the period of mine construction and completion to its phase of normalized operations. The determination of BIMC to proceed with construction and operation (Commercial Production) of the ERP was fully understood and contemplated by both parties at the time of signing the IIBA.

152. BIMC argues that the QIA’s proposed interpretation does not make sense when the ordinary meaning and grammatical sense of the words in the IIBA are examined. The IIBA only contemplates one construction decision and one construction period. These definitions are singular. “Construction Period” is defined to be the period of time between the date of the Construction

Decision and the date of Commercial Production. BIMC clearly commenced the Construction Period by issuing the Construction Decision. It does not make sense to say that it is still in the “Construction Period” even though it has ceased construction activities and is now producing iron ore for commercial sale.

153. According to BIMC, there are two objective background facts that form part of the “factual matrix” and are relevant to the interpretation of the IIBA. First, the QIA was aware and acknowledged that BIMC was only planning to build the ERP, and that the railway phase of the project was indefinitely deferred. At the very first meeting to discuss the ERP on January 9, 2013, the QIA notes confirm that the ERP would be the “general operation” until a decision was made to build the rail portion of the Project (QIA Document 41). Second, at the time the parties were negotiating the IIBA and preparing their financial modelling of the Project, iron ore prices were in the range of US\$125 per ton. At those prices, the QIA would receive significantly larger royalties from ERP production.

154. BIMC says that the jurisprudence confirms that commercial contract interpretations that result in a commercial absurdity should be avoided. It would not make commercial sense to find that a construction decision was made with respect to the ERP, the construction of mining facilities has been completed, and there is a mine that is producing iron ore for commercial sale, but that commercial production has not yet been achieved (based on the notional “intended capacity” of an expanded Project or a Project phase that remains deferred, is only a potential, and not a guarantee). To accept this interpretation, BIMC could indefinitely be in the “Construction Period” as it may never build a project that achieves the capacity that the QIA say is required to meet the definition of “intended capacity”.

155. Citing Hall again at pg. 142, BIMC argues that the principle of *expressio unius* is applicable. That principle provides that where there is an express enumeration of certain items in a document, it is taken to mean that non-enumerated items are excluded. While this maxim should be applied with caution, it may be applied where it will serve to further an interpretive exercise. The definition of “Commercial Production” specifically excludes certain activities: “..but specifically does not include bulk sampling, test or pilot plan operations planned to occur in advance of commercial production.” That list of exclusions does not include production of iron ore for commercial sale from the ERP. If the parties had intended to exclude ERP production from the definition of Commercial Production, they could have chosen to do so. This provides further assistance in interpreting the meaning of Commercial Production in the IIBA.

156. BIMC submits that the plain wording of the contract and the surrounding facts show that the “intended capacity” of the Project was 3.5 Mt/a. The definitions of the “Mary River Project” in Article 3.1 and “Initial Project” in Article 3.2 are both general and flexible. They include:

- (a) activities carried on . . . from time to time within the Project Area (s. 3.1 opening paragraph);
- (b) the project described in the Final EIS for the Mary River Project “as it may be amended”, or any other activities . . . including, without limitation, the construction, operation, modification, maintenance, decommissioning, abandonment or other works and undertakings...(s. 3.1(a));
- (c) amendments and modifications (s. 3.2).

157. BIMC argues that it is expressly not under any duty or obligation to develop the Project. Article 5.14 provides that there are no implied covenants:

5.14.1 There are no implied covenants or duties on the part of the Company to QIA, whether relating to the exploration, development or mining of the Project, the marketing or sale of Products or otherwise. Without limiting the generality of the foregoing, the Company is not under any obligation to explore, develop or produce Products from the Project or to continue production once commenced and the Company has the unfettered right to suspend, curtail or terminate any such operation or activity as it in its sole discretion may determine.

158. BIMC says that it is the prerogative of the Company to determine when it will commence construction and to determine the size and capacity of the Project which is feasible and economically achievable. BIMC argues that it was very clear before the IIBA was signed that it intended to proceed with the 3.5 Mt/a ERP, and that it was deferring an investment decision and construction of the \$5 billion railway phase indefinitely.

159. As shown in BIMC Document No. 19, in response to a request for information upon which to project royalty revenues, BIMC on July 10, 2013 stated that it was pursuing a 3.5 Mt/a initial operation from the ERP, with a desire to expand to 18 Mt/a and a future desire to potentially expand to 30 Mt/a and that future expansions decisions are dependent on a number of factors outside its control (regulatory approvals, financing, market conditions, iron ore pricing).

160. The July 15, 2013 letter from the QIA (BIMC Document No. 20) makes it clear that the QIA had requested a change to royalties based on Net Sales Revenue, at least in part because the Project was to move forward in a phased approach with the ERP as the initial phase with an intended capacity of 3.5 Mt/a.

161. BIMC says that at the time the IIBA was signed in September 2013, it was clear that BIMC was seeking to amend or modify the Project by seeking approval for the ERP and to proceed with construction of the ERP and defer construction of the railway and port facilities at Steensby which could handle 18 Mt/a. It was understood that there was no guarantee that the \$5 billion railway phase would be constructed. BIMC notes the concession at para. 115 of the QIA's Argument that the QIA does not dispute that the execution of the railway phase was not guaranteed and was contingent on financial feasibility.

162. BIMC says that it is the Construction Decision that indicates what it intends to construct. These facilities were the ERP which had an intended capacity of 3.5 Mt/a. The NIRB decision and Project Certificate Amendment authorizing the ERP permitted a variance of up to 20% in terms of ore shipped out of Milne Inlet each year (BIMC Document No. 31).

163. The IIBA defines "Construction Period" as:

5.16(f) "**Construction Period**" means the period of time between the date of the Construction Decision and the date of Commercial Production;

164. BIMC argues that this is similar to the terms of Article 5.2(d) which specifies when the quarterly Advance Payments of \$1,250,000 start, and when they end:

5.2(d) \$1,250,000 at the end of each calendar quarter starting one year after the end of the calendar quarter in which the Construction Decision is made and continuing during the Construction Period until the end of the calendar quarter in which Commercial Production begins.

165. There are only two periods – the Construction Period (Advance Payments) and Commercial Production (Royalty Payments). The ERP was exactly what was understood and planned, and the QIA negotiated a change in Royalty Payments so that it would have immediate financial participation in commercial sales of iron ore from the ERP, at 1.19% of Net Sales Revenue.

166. BIMC argues that there is no reference in the IIBA that suggests any fixed number such as 18 Mt/a or 21.5 Mt/a (18 Mt/a plus 3.5 Mt/a) as “intended capacity”. In response to the QIA argument that the definition of “Commercial Production” should be read as saying: “... for 90 days at not less than 60% of [18 Mt/a] ...”, BIMC says that this would lead to the proposition that if the current Project is expanded to 10 Mt/a, royalties would still not be payable despite the fact that the Construction Period has ended, and the mine is producing 10 Mt/a of iron ore for commercial sale.

167. BIMC says that the QIA is seeking a guarantee of a Project of 18 Mt/a contrary to its own admission that there was never any guarantee. The QIA will continue to receive Royalty Payments from the commercial production of iron ore from the Project, and these Royalty Payments will increase as commercial production of ore increases if and when Phase 2 is brought forward.

168. Accordingly, BIMC submits that the requirement to make Advance Payments came to an end in Q4 2015 when the Project transformed from construction to normalized operations and met the 60% of intended capacity threshold. BIMC accordingly requests that the QIA’s claim be denied with costs.

### **The QIA’s Reply**

169. The QIA argues that BIMC has put too great an emphasis on “construction” and paid too little regard to “intended capacity” as those words are used in Article 5.16(d). The QIA says that Advance Payments do not depend upon whether BIMC is presently engaged in construction activities. The flaw in BIMC’s argument is said to be the focus on “construction” in isolation from the requirement that operations have reached 60% of the Project’s intended capacity. Cessation of construction activities alone is not sufficient to trigger the transition from Advance Payments to Royalty Payments.

170. The QIA also emphasizes the requirement under Article 5.16(d) that the period of mine construction be “completed”. The Project, as defined, includes the railway phase. Phase 2 has yet to be completed. Likewise, the “Construction Period” as defined under Article 5.16(f) does not cease upon the sale of iron ore. There must also be ore crushing and screen operations that have reached 60% of intended capacity.

171. The QIA argues that regard must be had to the definitions of “Construction Period” and “Commercial Production” in the interpretation of the IIBA. BIMC’s “Construction Decision” was announced eight months before the ERP was approved. The Project’s intended capacity is not

restricted to the ERP but ERP production does count toward the calculation of 60% of intended capacity.

172. In response to the BIMC argument that the QIA is “effectively seeking a guarantee of a Project of 18 Mt/a”, the QIA acknowledges that the IIBA does not require that the Project be fully developed. The very rationale for Advance Payments, the purpose of which is the mitigation of harmful effects of the Project, is that there is no production guarantee. There is a cap on Advance Payments and both parties are protected. BIMC is said by contrast to wish to eliminate any protection for QIA by a unilateral decision to reduce the intended capacity of the Project at a time of its own choosing. An interpretation that would grant BIMC such a discretion would be unreasonable.

173. In response to BIMC’s reliance upon Document 41 and the argument that Mr. Williamson Bathory’s notes of the meeting of January 9, 2013 confirm that the ERP would be the “general operation” until a decision was made to build the rail portion of the Project, the QIA says that the notes are irrelevant, that “Project” is a defined term in the IIBA and that “general operation” is not synonymous with “intended capacity”. The QIA notes that BIMC itself emphasized that the ERP was merely a “stepping stone”.

## I. ANALYSIS

### Applicable Principles for the Interpretation of Contracts

174. Directions for the interpretation of the IIBA are found in the Agreement itself. Article 25.8 provides that the IIBA is to be interpreted in accordance with the laws of Nunavut and the laws of Canada applicable therein. Article 1.11 provides that “this Agreement shall be construed in accordance with a purposive approach and pursuant to such remedial and equitable interpretation as will achieve the objectives and purposes stated herein”. Article 1.11 also provides that: “The interpretation of this Agreement may adapt to changes in circumstances over time in the Project until Project Termination”.

175. The common law principles applicable to the interpretation of contracts in Nunavut are set out in various decisions of Canadian courts including the Supreme Court of Canada. Most recently, the importance of “commercial sense” has gained prominence. In *Group Eight Investments Ltd. v. Tadei*, 2005 BCCA 489, at paras. 20-22, Kirkpatrick J. A. wrote:

[20] The plain and ordinary meaning must be given to words in a contract unless to do so would result in an absurdity: *Ex parte Walton. In re Levy* (1881), 17 Ch.D. 746 (C.A.). Words must be interpreted in light of the whole of the contract and the intention of the parties expressed therein. In construing contracts, the court assumes that the words in the contract are there for a purpose and “reject an interpretation that would render one of [the contract’s] terms ineffective” (*National Trust Co. v. Mead* (1990), 1990 CanLII 73 (SCC), 71 D.L.R. (4th) 488 at 499).

[21] A helpful review of the principles of contract interpretation in the commercial context is found in the decision of *Scanlon v. Castlepoint Development Corp.* (1992), 1992 CanLII 7745 (ON CA), 99 D.L.R. (4th) 153

(Ont. C.A.); leave to appeal to S.C.C. refused (1993), 102 D.L.R. (4th) vii. Robins J.A. stated at 179:

The agreement with which we are concerned is a negotiated commercial document which should be construed in accordance with sound commercial principles and good business sense. To the extent that it is possible to do so, it should be construed as a whole and effect should be given to all of its provisions. The provisions should be read, not as standing alone, but in light of the agreement as a whole and the other provisions thereof: *Hillis Oil & Sales Ltd. v. Wynn's Canada Ltd.* (1986), 1986 CanLII 44 (SCC), 25 D.L.R. (4th) 649 at p. 655, [1986] 1 S.C.R. 57, 71 N.S.R. (2d) 353.

[22] More recently, this Court summarized the principles of contract interpretation in *Gilchrist v. Western Star Trucks Inc.* (2000), 2000 BCCA 70 (CanLII), 73 B.C.L.R. (3d) 102, at paras. 17-18:

The goal in interpreting an agreement is to discover, objectively, the parties' intention at the time the contract was made. The most significant tool is the language of the agreement itself. This language must be read in the context of the surrounding circumstances prevalent at the time of contracting. Only when the words, viewed objectively, bear two or more reasonable interpretations, may the court consider other matters such as the post-contracting conduct of the parties: *Delisle v. Bulman Group Ltd.* (1991), 1991 CanLII 295 (BC SC), 54 B.C.L.R. (2d) 343 (B.C.S.C.), approved by Chief Justice McEachern in *Bramalea Ltd. v. Vancouver School Board No. 39* (1992), 1992 CanLII 5958 (BC CA), 65 B.C.L.R. (2d) 334 (B.C.C.A.); *Prenn v. Simmonds*, [1971] 3 All E.R. 237 (U.K.H.L.); *Eli Lilly and Co. v. Novopharm Ltd.* (1998), 1998 CanLII 791 (SCC), 161 D.L.R. (4th) 1, (S.C.C.).

The first inquiry, then, is to determine whether there is only one reasonable meaning to the words in the contract, or more than one. In this search one must look to the surrounding circumstances and the whole of the contract. The words of the contract must be looked at in their ordinary and natural sense and cannot be distorted beyond their actual meaning: *MacMillan Bloedel Ltd. v. British Columbia Hydro & Power Authority* (1992), 1992 CanLII 2287 (BC CA), 72 B.C.L.R. (2d) 273 (B.C.C.A.); *Melanesian Mission Trust Board v. Australian Mutual Provident Society*, [1997] 1 N.Z.L.R. 391 (New Zealand P.C.).

176. In *Kentucky Fried Chicken v. Scott's Food Services* (1998) 41 B.L.R. (2d) 42 (Ont. C.A.) the principle was set out at greater length. Goudge J.A. for the court wrote:

[27] Where, as here, the document to be construed is a negotiated commercial document, the court should avoid an interpretation that would result in a commercial absurdity. Rather the document should be construed in accordance with sound commercial principles and good business sense. Care must be taken, however, to do this objectively rather than from the perspective of one contracting party or the other, since what might make good business sense to one party would not necessarily do so for the other.

177. The relevance of the factual matrix was described in *Sattva Capital Corp. v. Creston Moly Corp.*, [2014] 2 S.C.R. 633, by Rothstein J. at paras. 57-58:

[57] While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement (*Hayes Forest Services*, at para. 14; and Hall, at p. 30). The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract (Hall, at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement (*Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc.* (1997), 1997 CanLII 4085 (BC CA), 101 B.C.A.C. 62).

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

178. We must decide what a reasonable person with knowledge of the surrounding circumstances would have understood the parties to have meant by the words used at the time the IIBA was signed. We must first look at the words the parties have used and give those words their usual and ordinary meaning. If the meaning of the words is plain we need go no further. But if further assistance is required to construe the contract terms we may look to the factual matrix. We may also consider the aim and genesis of the transaction and the commercial purpose of the

Agreement. The IIBA provides that the interpretation given to it may adapt to changes in circumstances over time.

179. There are certain cautions in respect of the evidence that may be taken into account. There was much evidence of the negotiating history of the IIBA and the subjective understandings of the parties. Subjective intent, pre-contract negotiations and prior drafts are generally inadmissible for the purpose of construing the contract.

180. In giving effect to the words used in Article 5.16 we must also consider Article 25.10, the Entire Agreement clause which provides that the written Agreement supersedes all prior understandings and discussions.

### **Factual Matrix**

181. The surrounding circumstances at the time of the making of the contract may be considered for the purpose of gaining insight into the mutual intention of the parties. We must only consider the facts known to both parties to ascertain objectively their mutual intention. The combination of the parol evidence rule and the Entire Agreement clause render inadmissible any evidence outside the written agreement for the purpose of qualifying the words used.

182. Admissible evidence of the factual matrix is found in the Agreed Statement of Facts, in the evidence of witnesses and in documents tendered in the arbitration. While there was much evidence as to the understanding of each party at the time of signing the IIBA we must be careful to distinguish between what was the subjective intention of each party and what is to be objectively seen as the mutual intention of both parties. We accept the submission of the QIA that matters of public record as set out in regulatory approvals constitute objective facts that may be considered. The following are the objective facts that we take into consideration in finding the factual matrix. We have included objective facts that post-date the signing because such facts may be relevant to the interpretation of the contractual definition of the term "Commercial Production".

183. In February and March 2008, BIMC submitted its Development Proposal for the Mary River Project. The description for the Project included development of the mine site and related facilities, construction of a 150 km railway link to port facilities to be constructed at Steensby Inlet, and all-season shipping of ore from Steensby Inlet Port using both market vessels during the open water season and purpose-built ore carriers with ice-breaking capabilities for year round shipping activities. A smaller marine facility to be located at Milne Inlet was to be used solely for incoming supplies such as fuel, construction equipment and personnel, to be transported by truck along an existing tote road between Milne Inlet and the mine site, but with no transport of ore from Milne Inlet.

184. The NIRB advised the Minister that the Mary River Project Proposal would require a full review under Part 5 of Article 12 of the NLCA. Under the Part 5 review, the NIRB issued guidelines for the preparation of an EIS for the Proposal which required detailed consideration of potential environmental and socio-economic impacts and benefits.

185. The NIRB prepared a Public Scoping Meeting Summary Report for the Mary River Project in 2009 which was then used to develop guidelines for the preparation of an environmental impact

statement. The Scoping Report and the NIRB Guidelines were both based upon a Project scope of 18 Mt/a, with iron ore transported by rail from Mary River to Steensby Port.

186. The QIA and BIMC signed a Memorandum of Understanding in 2009 for the proposed IIBA that was designed to support advance benefits related to early development activities of the Mary River Project. The MoU included provisions regarding training, employment, contracting and business capacity, contract enforcement, work place conditions, support for communities, reporting requirements and dispute resolution.

187. BIMC filed its Draft Environmental Impact Statement (“DEIS”) in early 2011. The DEIS proposed a Project of 21.5 Mt/a of iron ore, with 18 MT/a via Steensby Port being augmented by an additional 3.5 Mt/a via summer shipments from Milne Inlet. During the public review of the DEIS, BIMC removed the 3.5 Mt/a addition because it would have required revision of the NIRB Scoping Report.

188. The QIA filed a detailed technical submission with the NIRB on October 5<sup>th</sup>, 2011 based upon the Project having an intended scope of 18 Mt/a. BIMC submitted the Final EIS in February of 2012. The Final EIS also provided for a Project with an intended scope of 18 Mt/a using a railway south to Steensby Port.

189. BIMC submitted the Final EIS on February 13, 2012. The scope of the Project as defined in the Final EIS was for a Project with an intended scope of 18 Mt/a, with transport of ore by rail to Steensby Port and year-round shipping.

190. The NIRB issued its Final Hearing Report in September 2012 recommending that the Project be allowed to proceed, subject to Terms and Conditions which it considered necessary to prevent or mitigate the potential adverse environmental and socio-economic effects associated with the Project. The Minister of Aboriginal Affairs and Northern Development Canada accepted the Board's report and recommendations and in December 2012 directed the Board to issue a Project Certificate for the Mary River Project Proposal.

191. The NIRB issued Project Certificate 005 as described in the Final EIS on December 28, 2012. The Project approved by the NIRB was for 18 Mt/a with transport of the ore by rail to Steensby Port and year-round shipping from Steensby. In order for the 18 Mt/a Project to proceed, BIMC was required to obtain an amendment to the NBRLUP to allow for the development of the railway to Steensby. BIMC applied for that amendment but it has not yet been issued. Finalization of the amendment would be required to construct the railway that would be necessary for BIMC to proceed with the 18 Mt/a Project.

192. BIMC filed a formal request to the NIRB on January 10, 2013 to amend Project Certificate 005. BIMC was taking a “phased strategy approach that would initially see a first development phase with reduced upfront capital requirements and shortened construction duration such that production and revenue generation were able to commence sooner with the objective of facilitating the second, larger, railway phase (as described in the Final EIS) of the Project at a later date.” BIMC went on to state: “Baffinland remains committed to the Project as defined in the Final EIS and to the

approved Project Certificate”. On June 20, 2013, BIMC submitted its EIS Addendum to the Final EIS for the ERP Proposal to the NIRB.

193. The QIA wrote a letter to BIMC dated July 15, 2013 saying:

Early this year, [BIMC] announced publicly that it had issued a letter to Nunavut authorities that it was replacing a mine plan to produce 18 Mtpa of iron ore with one that would produce 3.5 Mtpa. Based on this material change in project scope, QIA felt it was justified in requesting that the terms of the IIBA financial participation be revised from a FCF to an equivalent NSR royalty. BIM agreed to this request if the determination of an equivalent NSR rate be based on their own calculation rather than be defined as part of a negotiated process. (BIMC Document No. 20)

194. On September 6, 2013, the QIA and BIMC signed the IIBA.

195. BIMC announced the Construction Decision on September 13, 2013 by a press release stating the decision to proceed with construction activities currently approved through the environmental assessment process and: “As further approvals are obtained in the coming months our construction activities will encompass development required to achieve our Early Revenue Phase and allow for the eventual shipment of ore”. The construction was to continue into 2014 (much less time than would be needed to construct the 18 Mt/a Project).

196. The ERP Proposal was approved by the NIRB on May 28, 2014 and Project Certificate 005 was amended to include the 3.5 Mt/a phase. The construction of the railway has never been fully approved. After signing, the parties proceeded on the premise that the ERP alone was going forward and that the 18 Mt/a Project was being deferred.

197. The parties negotiated a change to the terms of the royalty provisions from a Free Cash Flow Royalty to a Net Sales Royalty but, notwithstanding the QIA letter of July 15, 2013 suggesting that this was because the 18 Mt/a project was being replaced with a 3.5 Mt/a project, we do not consider these negotiations to be an admissible element of the factual matrix. Negotiations are not considered relevant to determining the mutual intention of the parties in a final document.

198. The price for iron ore at the time of signing the IIBA was more than USD \$125/ton but is now approximately \$50-\$60/ton. At \$125 per ton the QIA would receive significantly larger royalties from ERP production.

### **Plain Meaning of the Words Used**

199. The critical clause to be interpreted is the definition of Commercial Production in Article 5.16(d):

“Commercial Production” means when the Project transforms from the period of mine construction and completion to its phase of normalized operations and iron ore crushing and screen operations, following the extraction and sale of iron ore for commercial sale, has continued continuously for 90 days at not less than 60% of the Project's intended capacity, but specifically does not include bulk sampling, test or pilot plant operations planned to occur in advance of commercial production;

200. BIMC contends for an interpretation that finds Commercial Production has been reached in respect of a 3.5 Mt/a project. The QIA says the Project was always one of 18 Mt/a, with the 3.5 Mt/a ERP added later. Effect must be given to the plain meaning of the words used by the parties. We must give effect to the word "Project" and the words "intended capacity" in the definition of Commercial Production in Article 5.16(d). We must also give effect to the words relating to "when the Project transforms from the period of mine construction and completion to its phase of normalized operations". The question to be answered is what a reasonable observer would say the parties mutually intended on September 6, 2013. Further, does the language of the contract regarding modification or amendment allow for an intended capacity on a date after signing that is different than the intended capacity on the date of signing?

201. The first term to be interpreted in Article 5.16(d) is the word "Project". It is defined in Article 1.1(yy) to mean the Mary River Project. The "Mary River Project" is defined in Article 3.1 as follows:

The "Mary River Project" includes all of the following activities carried on by the Company, its successors or assigns from time to time within the Project Area:

- (a) The project described in the Final EIS for the Mary River Project as it may be amended, or any other activities described in future filings with NIRB, NWB or other Governmental Authorities including without limitation the construction, operation, modification, maintenance, decommissioning, abandonment or other works or undertakings located at Milne Inlet, the Milne Inlet Tote Road, Mary River Mine Site, the railway, the Steensby Inlet Port, year round marine shipping, air traffic, ongoing exploration and geotechnical exploration;
- (b) Discovery, development and mining of additional mineral deposits, with new or expanded infrastructure and new or increased capacity and use of roads, railways, power generation facilities, ports and ship loading facilities and shipping;
- (c) Exploration activities including surface drilling as well as advanced exploration, bulk sampling and access for that purpose by any means including without limitation the construction and use of winter or all season roads; and
- (d) Activities at the Company's office(s) in Nunavut and the physical activities in Nunavut in support of the Company's activities in the Project Area; (all of the foregoing being collectively defined to be the "Mary River Project").

202. The definition includes "all" of the activities carried on by BIMC and includes the project described in the Final EIS. The main determinant in finding the meaning of the term "Project" is thus the project as it is described in the Final EIS. The Final EIS described a project of 18 Mt/a. The factual matrix also supports an interpretation that the parties intended a project of 18 Mt/a

at the time the IIBA was signed. Background facts contained in public documents support a mutual intention on the part of the parties that the meaning of “Project” in Article 5 was an 18 Mt/a project. The NIRB issued Project Certificate 005 for the Mary River Project as described in the Final EIS on December 28, 2012. The Project approved by the NIRB was for the extraction for commercial sale of 18 Mt/a with transport of the ore by rail to Steensby Port.

203. BIMC filed a request to amend Project Certificate 005 on January 10, 2013. BIMC stated that: “[BIMC] remains committed to the Project as defined in the Final EIS and to the approved Project Certificate”. On June 20, 2013, BIMC submitted its EIS Addendum to the Final EIS for the ERP Proposal to the NIRB. On September 6, 2013, the parties signed the Mary River IIBA.

204. BIMC takes the position that the parties intended a Project of 3.5 Mt/a on September 6, 2013. BIMC argues that the Advance Payments ended when production reached 60% of an intended capacity of 3.5 Mt/a. BIMC built something that was contemplated and understood at the time the ERP was signed, i.e., the 3.5 Mt/a project. The factual matrix includes the agreement of the parties to proceed only with the ERP even though it had not yet been approved by regulatory authorities and further that the parties agreed to defer the 18 Mt/a project. QIA’s July 15, 2013 letter said that BIMC was replacing a mine plan to produce 18 Mt/a with one that would produce 3.5 Mt/a and called it a “material change in project scope”.

205. BIMC argues that when the IIBA was signed it was clear that the company intended to go ahead only with the 3.5 Mt/a project and defer the 18 Mt/a plan. The 18 Mt/a project was merely aspirational. The 18 Mt/a project could not legally go ahead without regulatory approval to build the railway. BIMC argues that “intended capacity” is not defined in the IIBA as 18 Mt/a. The intended capacity was what the parties agreed at the time of signing would be the project that would go ahead. There was no guarantee of an 18 Mt/a project in the IIBA. Article 5.14.1 states that there are no implied covenants or duties on the part of the company. On the day that the construction decision to go ahead with the ERP was announced, BIMC paid \$10 million to the QIA. \$20 million in Advance Payments were paid immediately. The company did what was clearly understood and intended at the time the IIBA was signed.

206. We have two concerns with BIMC’s argument that there was in essence a collateral agreement that only the ERP was going to go ahead. The first is the admonition in *Sattva* that the factual matrix may not be used to overwhelm the plain meaning of the words used. The second is the written agreement of the parties that understandings outside the written document may not be used to qualify the words used in the contract. We are precluded by Article 25.10, the Entire Agreement clause, from taking such collateral agreement, if it exists, into consideration.

207. We find that the plain meaning of the words used in the IIBA is that the Project was intended to be one of 18 Mt/a. We hold that a reasonable person with knowledge of the surrounding circumstances would not have understood the parties to have intended that BIMC have a unilateral right to determine the size of the project and thus terminate Advance Payments on the basis of an interpretation of Article 5 that left it to BIMC alone to determine what was the “Project” and what was the “intended capacity”.

208. Subject to the further arguments that are made by BIMC regarding changes to the Project over time that are addressed below, we find that the plain meaning of the words used in the

IIBA, against the background of the relevant factual matrix, was that on September 6, 2013 the parties intended the Project to be one of 18 Mt/a.

### **The Project as Modified**

209. BIMC argues that the parties contemplated changing circumstances in the language used in the contract. BIMC says that effect must be given to the words relating to project amendment and future filings that are found in Article 3.1: "...as it may be amended, or any other activities described in future filings with NIRB, NWB or other Governmental Authorities...". The ERP Proposal was approved by the NIRB on May 28, 2014 and Project Certificate 005 was amended to allow for the 3.5 Mt/a project.

210. The construction of the railway was an essential component of the 18 Mt/a project but was never approved. The 18 Mt/a project could not go ahead without that approval. BIMC relies upon the fact that the parties proceeded on the premise that the ERP alone was going forward after signing and that the common intention was that the 18 Mt/a Project was being deferred. Mr. Armstrong emphasizes the fact that the QIA does not dispute the Construction Decision to go ahead with the 3.5 Mt/a ERP. In essence, BIMC argues that notwithstanding what might have been the original intention of the parties, the meaning of the term Project was a moving target after September 6, 2013 and the Project could change following new regulatory approvals, actual construction and development of the mine and subsequent agreement of the parties outside the contract itself.

211. The QIA responds to this argument by saying that the regulatory authorities did not approve a 3.5 Mt/a project in isolation from the earlier approved project of 18 Mt/a. All approvals contemplated the 18 Mt/a Project remained in place. Later amendments or modifications in regulatory approvals allowed for the 3.5 Mt/a ERP in addition to the 18 Mt/a project described in the Final EIS.

212. The foundation for BIMC's argument is that the word "it" in the phrase "as it may be amended" in Article 3.1 modifies the word "project" used at the beginning of the sentence and that the relevant consideration is thus the project as it may be changed or described in future filings with the NIRB. BIMC says that the project as at the 4<sup>th</sup> quarter of 2015 when Commercial Production was declared had morphed to the ERP alone. The QIA, however, argues that the word "it" refers to the "Final EIS" as it may be amended not the "project" as it may be amended.

213. This is a pivotal issue. Is it open to BIMC to contend that the ERP alone is the Project that transformed to normalized operations as described in Article 5.16(d)? We hold that such an interpretation is not available. The word "it" in Article 3.1 plainly refers to the Final EIS as it may be amended, not the project as it may be amended. This interpretation is reinforced by the reference to the definition of the "Initial Project" later described in Article 3. In Article 3.2 reference is made to the project as described in the Final EIS and Project Certificate 005 including "amendments and modifications of such approvals". The amendments or modifications in regulatory approvals described in Article 3.2 refer to the Final EIS. The same approach is warranted in respect of Article 3.1(a). After the IIBA was signed on September 6, 2013 the NIRB allowed for the 3.5 Mt/a

ERP in addition to the 18 Mt/a project described in the Final EIS but did not approve of a 3.5 Mt/a project in isolation.

### **Commercial Sense**

214. BIMC submits that the interpretation of the term “Project” in Article 5.16(d) to mean an intended project of 18 Mt/a makes no commercial sense and indeed would lead to a commercial absurdity. BIMC says that such an interpretation should be rejected in favour of one that recognizes normalized operations of extraction and sale of iron ore for commercial sale based on the project that was actually constructed.

215. BIMC’s argument is based in part on the scenario that would unfold if production and sales reached 10 Mt/a but no more. If the Project were considered to be one of either 18 Mt/a or 21.5 Mt/a then 60% of intended capacity would not be reached at 10 Mt/a. The Advance Payment at 10 Mt/a would be less than would be paid as NSR. If a 10 Mt/a project were to continue for a lengthy period, the QIA would be confined to a maximum of \$75M in revenue because there would be no transformation to Commercial Production and the NSR would not be payable, potentially in perpetuity. BIMC argues that the QIA would be in a much worse situation if the intended capacity were found to be 18 Mt/a or 21.5 Mt/a.

216. Something of a royalty limbo might be created if the project ramped up to 10Mt/a and stayed there for a considerable period of time. Advance Payments would be capped at \$75M and the NSR would not be payable. The QIA argues in favour of an interpretation that would permit such a result. Business efficacy is an important consideration in determining what a reasonable person would have understood the parties to have meant by the words used in the contract. To fully consider BIMC’s argument we must go back to examine the aim and genesis of the transaction and the commercial purpose of the IIBA.

### **Commercial Purpose**

217. The overall objectives of the IIBA are set out in Article 2. The Agreement was intended to provide for equitable and meaningful participation of Inuit in the Mary River Project. Under Article 2.2.3 the parties are to work together in good faith to maximize Inuit benefits from the exploration of the iron ore resource. Article 2 speaks of maximizing Inuit employment and financial participation in the Project. Inuit benefits listed at the end of Article 2 include protection of archaeological sites, environmental concerns and disruption of wildlife. There is no express specification that Advance Payments are intended to mitigate environmental damage or to ameliorate social harm caused by the Project. Article 5, which provides for Advance Payments, only states that the purpose of the Article is to provide for the financial participation of Inuit in the Mary River Project.

218. While not expressly stated in the IIBA we accept the premise that one of the purposes intended for Inuit financial participation in the Project was to benefit Inuit by providing the resources necessary to address such consequences as disruption of wildlife, aggravation of social problems and amelioration of environmental and socioeconomic impacts of the Project. Article 12.1 sets out objectives of the IIBA. The parties recognized that the project was likely to create social and cultural impacts and stresses on Inuit communities including families and individuals.

The mitigation of potential impacts and the promotion of community wellbeing is recognized as a shared responsibility.

219. An objective observer would recognize that BIMC was bargaining for Inuit to grant access to their lands and the permanent removal of mineral resources. This would require financial payments sufficient to ensure that environmental and socio-economic impacts were adequately mitigated. Indeed, very large financial payments would be required to meet those objectives. Actual environmental harm and socio-economic impacts would arise immediately upon the commencement of construction and the dramatic alteration of Inuit lands. Such impacts would arise from the very first excavations and building of roads and infrastructure.

220. We are of the view that Advance Payments are to be objectively seen as the minimum payment to be made in any event of Project size or the length of delays in Project construction. Notwithstanding significant delays in Project construction, the QIA would receive at least \$75M in Advance Payments or Extension Payments under Article 5. Advance Payments are to be fully credited against Royalty Payments in due course. Advance Payments described in Article 5.2(d) would thus be fully repaid out of NSR payments. The very large cap on Advance Payments is an assurance that the consideration under the IIBA will be sufficient to ensure remediation of Inuit lands, environmental harm and socio-economic impacts.

### **Consideration of the Contract as a Whole**

221. BIMC further argues that a Construction Decision was only ever taken in respect of the ERP. Article 5.16(e) defines the term "Construction Decision". BIMC argues that the IIBA only contemplates one construction decision and one construction period. The definitions are singular. "Construction Period" is defined as the period of time between the date of the Construction Decision and the date of Commercial Production. BIMC commenced the Construction Period by issuing the Construction Decision. BIMC argues that it does not make sense to say that the project is still in the "Construction Period" even though BIMC has ceased construction activities and is now producing iron ore for commercial sale. The Construction Decision was confined to the ERP and a decision to begin construction on the 18 Mt/a Project can only be taken after permits are issued for the railway.

222. The success of this argument turns on whether or not the Construction Decision could be taken in respect of the ERP alone. The two relevant terms are defined in the IIBA:

5.16(e) "Construction Decision" means the publication of a press release or formal notice by the Company announcing a final decision having been made by the Board of Directors of the Company to execute the Initial Project ... to authorize construction and operation of the Initial Project, with the Company to provide written notice of such within five Business Days;

5.16(f) "Construction Period" means the period of time between the date of the Construction Decision and the date of Commercial Production.

223. The Construction Decision press release announced the decision to proceed with the ERP and allow for the eventual shipment of ore. The construction was to continue throughout

late 2013 and into 2014. The IIBA provides for a construction decision to execute the Initial Project. The "Initial Project" is defined in Article 3.2 as follows:

The "Initial Project" is as described in the Final EIS as approved by NIRB and described in Project Certificate 005, for the construction, operation, closure and reclamation of the Project described in Section 3.1 (a) and includes amendments and modifications of such approval and all related licences, permits and authorizations.

224. The Construction Decision could thus only be taken in respect of the project described in the Final EIS as amended or modified. The Final EIS was never amended or modified to remove the 18 Mt/a project as originally approved. The Construction Decision accordingly could only be taken in respect of a project of 18 Mt/a as amended to add the ERP and BIMC's argument that the Construction Decision could be taken to execute the ERP alone fails. A Construction decision could not have been taken in respect of the ERP alone because the ERP was not approved until eight months after September 13, 2013. The construction was staged in phases and there was no impediment under the IIBA to starting the ERP while still seeking approval for the railway phase. That then brings us full circle to when Commercial Production began with respect to a Project with an intended capacity of 18 Mt/a on September 6, 2013.

#### **Post-Contract Conduct**

225. We find that there is no evidence of post-contract conduct that is helpful in interpreting the IIBA. The evidence of conduct of the parties after the IIBA was signed is at best equivocal and must always be treated with caution. We have found that the language of the IIBA is not ambiguous. There is no admissible evidence of conduct after the signing that assists us in determining what the parties agreed was the intended capacity of the Project for the purpose of transitioning to Royalty Payments.

#### **J. CONCLUSION**

226. Upon giving the words in the IIBA their plain and ordinary meaning in the context of the Agreement as a whole, and upon considering the factual matrix, we conclude that the mutual intention of the parties was to proceed initially with a project with an intended capacity of 18 Mt/a. The final Project may have become larger or smaller, but at the time of signing it was approved for 18 Mt/a by regulatory authorities. The definition of "Commercial Production" in Article 5.16(d) did not have the effect of reducing the intended capacity of the Project to 3.5 Mt/a such that Advance Payments were terminated upon completion of construction of the ERP. The Advance Payments must continue to a maximum of \$75M (adjusted for inflation) until the Project reaches Commercial Production as defined in the IIBA.

#### **K. QUANTUM AND INTEREST**

227. Quarterly Advance Payments are owed from mid-2015. The total to June 30, 2017 for eight quarters is \$10M. Pursuant to Article 5.5 the Advance Payments must be adjusted annually for inflation based on the Consumer Price All Items Index for Iqaluit. In addition, deficiencies in Royalty Payments carry simple interest at the Royal Bank Prime Rate plus 2% per annum pursuant

to Article 5.10. BIMC has paid interest on some but not all arrears of Advance Payments. BIMC has paid Royalties (NSR) on production, which amounts should be deducted from the total of Advance Payments owing to June 30, 2017.

228. There is a difference between the positions of the parties on calculations in the amount of \$6,984.84. The difference largely relates to the method by which interest is calculated. The QIA is prepared to accept the BIMC calculations for the purpose of this arbitration only and without prejudice to the QIA's position on the proper calculation of interest in the future. This is a sensible way to proceed.

229. The total amount owing to June 30, 2017 after adjustment for inflation, interest and Royalty Payments is \$7,265,442.74. That balance will carry post-award interest at the rate provided in Article 5.10

We thank the parties and counsel for their cooperation in ensuring a fair and efficient arbitration process. We are indebted to counsel for their very professional handling of the case. The excellent written and oral presentations were invaluable in resolving this complex matter.

**FINAL AWARD**

- a) Baffinland Iron Mines Corporation must pay the Qikiqtani Inuit Association the sum of \$7,265,442.74 to June 30, 2017. Post-award interest after June 30, 2017 will be payable on the same terms as set out in Article 5.10 of the Mary River Project Inuit Impact Benefit Agreement dated September 6, 2013.
- b) Advance Payments under Article 5 of the Mary River Project Inuit Impact Benefit Agreement will continue to a maximum of \$75M (adjusted for inflation) until the Project reaches 60% of its intended capacity as set out in the Final EIS as the Final EIS may be amended from time to time.
- c) The matter of costs is reserved.

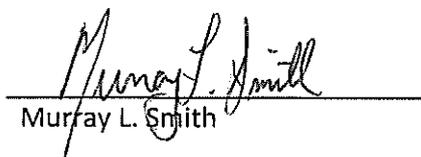
**DEEMED MADE** at the City of Iqaluit, Nunavut, Canada this 30<sup>th</sup> day of June, 2017.



Jim McCartney



Thomas R. Berger QC



Murray L. Smith