This is Exhibit "E" referred to in the
Affidavit of Kevin James
sworn before me at West Vancouver
in the Province of British Columbia
this 12 day of August 2016.

A commissioner for taking Affidavits
within the Province of British Columbia

Case Name:

Fawcett v. Western Canadian Coal Corp.

Between
David Fawcett, Respondent (Petitioner), and
Western Canadian Coal Corp., Appellant (Respondent), and
Kevin James, Mark Gibson, Respondents (Respondents)

[2010] B.C.J. No. 235

2010 BCCA 70

3 B.C.L.R. (5th) 13

283 B.C.A.C. 182

67 B.L.R. (4th) 165

[2010] 8 W.W.R. 431

185 A.C.W.S. (3d) 462

86 W.C.B. (2d) 759

2010 CarswellBC 306

Docket: CA037084

British Columbia Court of Appeal
Vancouver, British Columbia

M.V. Newbury, R.T.A. Low and P.A. Kirkpatrick JJ.A.

Heard: December 17, 2009.
Judgment: February 11, 2010.

(48 paras.)

Creditors and debtors law -- Creditor-debtor relationship -- Interest -- What constitutes -- Appeal by mining company from decision finding royalties payable to former directors did not constitute

interest payable at criminal rate allowed in part -- Small advances of money by directors to secure licenses for company resulted in large royalty payments to directors under agreements -- Company's loan obligations to directors ended when amounts advanced were repaid and new royalty sharing agreement were entered, save for one debt for sum advanced at time of new agreement -- Royalty payable pursuant to this obligation was interest, and amount exceeded legal rate -- Criminal Code, s. 347.

Creditors and debtors law -- Payment and discharge of debt -- Discharge by agreement -- Appeal by mining company from decision finding royalties payable to former directors did not constitute interest payable at criminal rate allowed in part -- Small advances of money by directors to secure licenses for company resulted in large royalty payments to directors under agreements -- Company's loan obligations to directors ended when amounts advanced were repaid and new royalty sharing agreement were entered, save for one debt for sum advanced at time of new agreement -- Royalty payable pursuant to this obligation was interest, and amount exceeded legal rate.

Natural resources law -- Mines and minerals -- Leases and licenses -- Royalties and rents -- Profit sharing -- Appeal by mining company from decision finding royalties payable to former directors did not constitute interest payable at criminal rate allowed in part -- Small advances of money by directors to secure licenses for company resulted in large royalty payments to directors under agreements -- Company's loan obligations to directors ended when amounts advanced were repaid and new royalty sharing agreement were entered, save for one debt for sum advanced at time of new agreement -- Royalty payable pursuant to this obligation was interest, and amount exceeded legal rate.

Appeal by Western Canadian **Coal** from a decision concluding **royalties** payable to former directors were not costs incurred by Western to receive credit and therefore were not in violation of the criminal interest provision of the Criminal Code. Three directors loaned Western sums to secure mining licenses when Western was unable to do so. They all entered into agreements with Western providing for the payment of some royalty on production in the event the subject properties were developed. Development did in fact take place. More similar transactions between the separate directors and Western took place, so the agreements were ultimately combined into one Royalty Sharing Agreement. At the time this agreement was entered, a new sum was advanced by one director to secure two more licenses. Improved **coal** prices meant these **royalties** greatly exceeded the amount originally advanced by the directors. The judge rejected the argument the royalties amounted to charges payable for the advancing of credit by the directors. He noted Western's responsibility to repay the directors was contingent at the time it entered into the royalty sharing agreements with them, and that the debt aspect of the agreements was addressed when Western either repaid the directors the sums advanced or provided them with shares in exchange for their advances. He considered the royalty payments a matter separate from Western's debt obligations to the directors.

HELD: Appeal allowed in part. The final loan made at the time the Royalty Sharing Agreement was executed remained a loan and the royalty payable pursuant to it was at a criminal rate. Otherwise, the judge properly concluded the loan liabilities of Western to the directors no longer existed when the Royalty Sharing Agreement was executed and therefore the criminal interest rate provisions did not apply.

Statutes, Regulations and Rules Cited:

Business Corporations Act, SBC 2002, CHAPTER 57, s. 150(2)

Company Act, RSBC 1996, CHAPTER 62, s. 120

Criminal Code of Canada, R.S.C. 1985, c. C-46, s. 347, s. 347(1), s. 347(1)(b), s. 347(2), s. 347(2), s. 347(2), s. 347(4)

Appeal From:

On appeal from: Supreme Court of British Columbia, April 1, 2009 (*Fawcett v. Western Canadian Coal Corp.*, 2009 BCSC 446, Docket No. S070436)

Counsel:

Counsel for the Appellant: J. Groia, C. MacInnis.

Counsel for the Respondent, David Fawcett: J. Forstrom.

Counsel for the Respondent, Kevin James: G.B. Gomery.

Reasons for Judgment

The judgment of the Court was delivered by

1 M.V. NEWBURY J.A.:-- It has been observed on many occasions that the "criminal interest" prohibition in the *Criminal Code,* s. 347, extends to transactions that bear little or no resemblance to street-level loan sharking, the original target of the provision. In this instance, a publicly-listed mining development company (the "Company") seeks to invoke s. 347 in order to free itself from obligations arising under a "Royalty Sharing Agreement" it entered into with three individuals, two of whom were then directors of the Company. They had expended their own funds and efforts to secure certain mining licenses when the Company was financially unable to do so. The terms under which each "Investor" did so differed from property to property, but for three of the four groups of licenses, they included the payment of a royalty of some kind on production, if and when the property was developed. Later, all three individuals agreed with the Company on a royalty pooling arrangement which 'rolled up' and rationalized all the existing agreements into one, and contemplated another, final, transaction. The Company agreed to reimburse the 'advances' the three had made, and to pay them a single royalty, in proportion to their respective advances, on production from three of the properties. In due course, the Company received the licenses and developed these properties and, thanks to improved coal prices since that time, has benefited enormously from them. The former directors also stand to benefit, possibly to the extent of hundreds of thousands of dollars, if the royalty continues to be payable. The amounts originally 'advanced' - a total of $80,000 - were either repaid or converted into shares in the Company long ago.

2 A court has already ruled that the Royalty Sharing Agreement was "fair and reasonable" to the Company, despite non-compliance (which the Court attributed to a misapprehension on the part

of the Company's solicitors) with the directors' disclosure requirements of s. 120 of the *Company Act*, R.S.B.C. 1996, c. 62. The Company appealed that ruling but later abandoned the appeal. However, it suspended royalty payments owing to the three Investors once the amount payable in a year exceeded 60% of their original 'advances', asserting that the royalty constituted a "charge paid or payable for the advancing of credit" and therefore came within the expanded definition of "interest" in s. 347 of the *Code*. This position did not prevail in the court below: for reasons indexed as 2009 BCSC 446, the chambers judge concluded that the royalty was not a cost incurred by the Company to "receive credit" and therefore did not violate the criminal interest prohibition. He granted a declaration to the petitioner, one of the two former directors, that the royalty was not "interest" for purposes of s. 347. For the reasons that follow, I conclude that the Company's appeal from his order must be allowed, but only in part.

Factual Background

3 Since this appeal turns almost entirely on its specific facts, it is necessary to set out those facts in some detail in respect of each of the mining properties and each of the Investors, Messrs. Fawcett, James and Gibson. (A separate proceeding brought by Mr. Gibson was heard together with that brought by Mr. Fawcett, but it was settled before judgment was rendered. Thus it will not be necessary to determine the legality of the portion of the **royalty** owing to Gibson.)

4 The Company, Western Canadian **Coal** Corp., was incorporated as a public company in late 1997 by a group of founders that included Mr. Fawcett and Mr. James. At all material times, they were directors and/or officers of the Company, Mr. Fawcett having primary responsibility for management and Mr. James (a professional geologist) having primary responsibility for geological and technical matters. The third director at the time was Mr. Austin.

5 The Company carried out an IPO in 1999 primarily for the purpose of raising capital to explore and develop a group of coal licenses on property known as the "Belcourt" property; but due to declining coal prices between 1997 and 2000, that project proved not to be economically viable and was eventually abandoned. Various attempts by the Company to raise additional operating capital were unsuccessful. On the other hand, since larger mining companies were responding to the declining market by forfeiting or abandoning coal licenses in northern British Columbia, Messrs. Fawcett and James recognized that promising coal properties might become available to smaller developers.

The Burnt River Property

6 In 1998, Mr. James identified a property known as Burnt River that had been explored by a large developer in the 1980s. Mr. James and Mr. Fawcett thought it had good potential and according to Mr. James' affidavit, "it was agreed that the licenses would be acquired for [the Company]." He and Mr. Fawcett personally advanced the funds to the Crown necessary to apply for the licenses, and Mr. James carried out certain work in connection with them. Once the licenses were issued in his name, Mr. James and the Company entered into a "Coal Property Acquisition Agreement," prepared by the Company's solicitor, made as of April 30, 1999 under which he (as the "beneficial owner" of the "Burnt River coal interests") agreed to sell and transfer them to the Company (as "purchaser") in return for $22,758.32, his total out-of-pocket expenses and related costs. Although the agreement contemplated that Mr. James would be paid on closing, the Company was not able to pay the $22,758.32 and it remained outstanding until some time later. Certain consulting services

rendered by Mr. James in connection with the Burnt River and Belcourt properties also went unremunerated for some time.

The West Brazion Licenses

7 As found by the chambers judge, Messrs. James and Fawcett identified another promising set of licenses, in respect of the so-called "West Brazion" property, in the fall of 1999. The Company agreed that they were attractive, but in the words of Mr. Austin, "I did not feel that we could apply available cash (if any) to acquire new licenses, since this would place us at risk of forfeiting our existing licenses, or being unable to complete the ongoing feasibility work on the Belcourt property (the purpose for which the IPO funds were raised)." Messrs. James and Fawcett went ahead and acquired the licenses in their own names, to which the Company did not object. Again according to Mr. Austin, "[w]e were still discussing whether or not [the Company] could or should acquire these licenses, but I understood that Fawcett and James wanted to tie up the licenses in the meantime." The necessary applications were made in the name of Mr. James' wife, and the license fees totalled approximately $13,000, half of which was contributed by Mr. Fawcett and half by Mr. James.

8 The chambers judge accepted the evidence of Fawcett and James that in February 2000, they granted the Company an option to acquire the West Brazion licenses (presumably with Mrs. James' cooperation) from them in exchange for the amount of their out-of-pocket expenses plus a 1% **royalty** on any **coal** produced by the Company from the property. The Company denied that the option had been granted, but the chambers judge found on the evidence - a form of "consent resolution" signed by Messrs. Austin and James approving the option, and a press release issued by the Company on February 24, 2000 referring to the option - that it had in fact been granted. The resolution stated at the bottom that because of their material interest in the transaction, Fawcett and James had abstained from voting and had executed it "only to comply with s. 125(3) of the *Company Act*." Because Mr. Fawcett had not signed the consent resolution, the chambers judge stated that the option was not enforceable - a conclusion that, with due respect, is not necessarily correct. In any event, the chambers judge found that the events of February 2000 were relevant to show that the Company was interested in acquiring the West Brazion properties.

9 As will be seen below, the option agreement was later superseded by the Royalty Sharing Agreement. Subsequently, in August 2000, the West Brazion licenses were issued to Mrs. James, who then assigned them to the Company. The $13,000 owed to Mr. James and Mr. Fawcett was paid in May 2001.

Mount Spieker

10 A third group of promising coal properties was identified later in 1999 by Mr. James and Mr. Fawcett. These were referred to collectively as the "Wolverine" group, comprised of Mount Spieker, Perry Creek, and Hermann. Again, the Company lacked sufficient capital to pay the application fees and associated acquisition costs. This time, Mr. Austin identified Mr. Gibson, who held shares in the Company, as a person who might be willing to provide financial assistance. By agreement dated January 28, 2000, Mr. Gibson agreed to lend $20,000 to the Company to acquire the Mount Spieker licenses. The Company agreed to repay the loan by January 31, 2002 and to pay him a royalty of $.25 per tonne on the first 2.5 million tonnes of product sold from the Mount Spieker property. He was also given the right to "convert" the loan to a 20% working interest in that property at the time the coal licenses were granted. If he exercised that right, the Company would be entitled to acquire the working interest for fair market value.

11 The Company applied for the Mount Spieker coal licenses on February 2, 2000 and received them on October 30, 2000.

12 This left the Perry Creek and Hermann license applications, for which $30,000 was needed. Mr. Gibson was prepared to contribute $10,000 but was concerned that he had no control over the Company's development of other properties that involved the payment of royalties to James and Fawcett. As the latter recalled:

> I recall [Mr. Gibson's] saying he was concerned about having a separate interest in only some of the licenses that [the Company] was acquiring, when [the Company] would have unilateral control over which of the new properties might be explored and developed, when, or in what order. He felt it would be preferable to have a shared interest in all of the new licenses acquired or to be acquired by [the Company]. He suggested that in conjunction with any agreement to provide further funding to enable [the Company] to acquire the Perry Creek and Hermann licenses, we (Gibson, James and I) should be pooling our several interests in the West Brazion and Mount Spieker licenses, and creating a shared interest in all the licenses acquired or to be acquired.

This evidence was accepted by the chambers judge.

13 Accordingly, the parties agreed orally in February 2000 on new terms which Mr. Fawcett described in an affidavit:

> Eventually we reached a new agreement (the "February Agreement"), under which Gibson and I agreed to provide a further $30,000 to be used by [the Company] to apply for the Perry Creek and Hermann licences. In addition to providing more money for new licence applications, Gibson gave up his royalty and right to acquire a working or joint venture interest in the Mt. Spieker licences under the Gibson Agreement. James and I gave up our right to acquire a separate royalty interest in the West Brazion licences if [the Company] exercised the option to acquire them. In return, [the Company] agreed to grant a 1% **royalty** which would apply to **coal** produced from any of the West Brazion or Wolverine licences which if acquired, and which would be shared between Gibson, James and me in properties to our respective contributions to the acquisition of these licences, once determined.
>
> Attached as exhibit "F" to this affidavit is a copy of a summary of the basic terms of the royalty we negotiated as part of the February Agreement. I prepared this document around the time the February Agreement was negotiated. The table at the top of this document details the basis upon which Gibson, James and I agreed to share the 1% royalty between us. For the purposes of allocating of the royalty, we agreed to recognize the following contributions:
>
> (a) The out of pocket expenses paid by James and me to apply for the West Brazion licences ($13,000 which would become payable if the licences were granted, and [the Company] exercised the option to acquire them);

(b) a portion of the amounts paid by James and me to acquire the Burnt River licences ($6,000 to each of James and me, which was part of the amount [the Company] paid us when we assigned the Burnt River licences ...;

(c) the $20,000 previously provided to [the Company] by Gibson to apply for the Mt. Spieker licences under the Gibson Agreement;

(d) the new amounts of $10,000 and $20,000 being provided by Gibson and myself, respectively, to apply for the Perry Creek and Hermann licences; and

(e) An amount of $5000 reflecting the value of the work James did to assist [the Company] in assessing and applying for the Wolverine licences.

14 The terms of this arrangement were put down on a 'term sheet' by Mr. Fawcett, a copy of which I have attached to these reasons as Schedule 1. At the outset, it stated the parties' respective positions with respect to cash and work contributed:

James		Gibson		Fawcett	
West Brazion	$6,500	Mount Spieker	$20,000	Wolverine	$20,000
Burnt River	$6,000	Wolverine	$10,000	West Brazion	$6,500
Work (Wolverine)	$5,000			Burnt River	$6,000

James	$17,500	21.9%
Fawcett	$32,500	40.6%
Gibson	$30,000	37.5%
Total	$80,000	

The sheet referred to a 1% royalty to be paid by the Company to the three "Investors" for "advancing" the funds referred to - even though a good portion of the funds had already been expended on application fees paid to the government and related expenses.

15 The Company's solicitor was instructed to prepare a formal document to reflect the term sheet. He prepared what he called the "Royalty Sharing Agreement" ("RSA"), which was dated as of March 31, 2000 (although the evidence indicates it was actually signed in June). The chambers judge set forth the material terms of the RSA at para. 34 of his reasons. I attach as a schedule hereto those material terms and the respective proportions (which replicate those set forth in the term sheet) of the royalty to be paid to Messrs. Fawcett, James and Gibson thereunder, as stated in Schedule 2.1 to the RSA. It will be noted that the recitals refer to the Investors' having "assisted" the Company in acquiring various properties and to the Company's wishing to pay a "royalty to the Investors for the Investors' contributions", i.e., the $80,000 total mentioned in the term sheet. The opening clause of the Agreement used the terms "Purchaser" and "Vendors", but those terms were not defined and counsel for the Company suggests they may have been used in error.

16 At para. 1.1, the Company acknowledged that each of the Investors had advanced funds to the Company in the amounts stated. Para. 2.1 then provided:

> As consideration for advancing the funds, the Company will pay a royalty (the "Royalty") of one percent (1%) of the price (FOBT at Port) for all product tonnes produced from the West Brazion, Mount Spieker and Wolverine coal properties on a quarterly basis to the Investors as set out in Schedule "2.1" attached hereto and forming a material part hereof.

No 'end-date' for the payment of the royalties was specified. At para. 6.1, the Company covenanted to repay the Investors' advances (not including funds advanced for the Burnt River property, which had already been repaid) within two years. Paragraph 9.4 stated that the terms of the Agreement constituted the entire agreement between the parties and would supersede all previous oral or written communications between them.

17 From the Company's point of view, the RSA made it possible "to acquire what has subsequently proven to be extremely valuable." In Mr. Austin's words:

> The transaction involved very little risk to [the Company], since no security was required, and there would be no cost of borrowing unless any of the properties acquired could be successfully developed into a producing mine. In that case, the transaction would be beneficial to [the Company], regardless of the royalty. As things have turned out, it appears the agreement will be beneficial to all parties. At the time [the RSA was signed], I considered any potential rewards that the royalty holders might realize in future to be reasonably proportional to the significant risks they were undertaking, and the substantial benefits which would accrue to [the Company] if any of these licenses could ever actually be brought into production.
>
> Later in the spring of 2000, we were able to arrange new private placement financing for [the Company]. In fact, I believe that our acquisition of the new properties under the royalty sharing agreement was instrumental to [the Company's] ability to raise new financing. [Emphasis added.]

18 Finally in this narrative, I note that in May 2000, in connection with a new private placement, the Company decided it was desirable for balance-sheet purposes that various of its debts be exchanged for shares. As of June 19, 2000, the directors of the Company signed a "consent resolution" authorizing the issuance of shares to Mr. Gibson at a price of $.30 per share in full settlement of the $30,000 owing to him in connection with the Wolverine licenses; to Mr. James in settlement of outstanding consulting fees of $15,000; and to Mr. Fawcett in settlement of outstanding consulting fees of $15,000 and the $20,000 he had advanced in respect of the Wolverine licenses. This 'shares for debt' arrangement did not affect the $13,000 that Messrs. Fawcett and James had laid out in respect of the West Brazion licenses, which was reimbursed to them the following year.

Court Proceedings

19 As mentioned earlier, the RSA was the subject of proceedings before the Supreme Court of British Columbia in 2006. By this time, the Company had different directors and officers. It alleged that the directors had not complied with the disclosure requirements of the *Company Act* at a meet-

ing of directors or shareholders, in connection with the RSA. The Company's petition stated that it did not intend to seek shareholder ratification of the RSA, as it did not consider the Agreement to be in its best interests. It sought an order setting the Agreement aside pursuant to s. 150(2) of the *Business Corporations Act*, S.B.C. 2002, c. 57, which came into force on March 29, 2004. Section 150(2) provides:

> (2) Unless a contract or transaction in which a director or senior officer has a disclosable interest has been approved in accordance with section 148(2), the court may, on an application by the company or by a director, senior officer, shareholder or beneficial owner of shares of the company, make one or more of the following orders if the court determines that the contract or transaction was not fair and reasonable to the company:
>
> (a) enjoin the company from entering into the proposed contract or transaction;
> (b) order that the director or senior officer is liable to account for any profit that accrues to the director or senior officer under or as a result of the contract or transaction;
> (c) make any other order that the court considers appropriate. [Emphasis added.]

The Company also sought an accounting of all amounts received by the former directors James and Fawcett under the Agreement.

20 Tysoe J., as he then was, dismissed the Company's petition for reasons indexed as 2006 BCSC 463. He noted that the question of whether the RSA was fair and reasonable had to be assessed at the time the parties had reached the Agreement, and found that it was substantively fair and reasonable to the Company at that time. He relied in part on expert evidence adduced by the Investors that supported the fairness of the Agreement, including evidence to the effect that the amount of royalties thereunder was "in the low range of royalty payments for similar transactions in the Canadian mining industry." (Para. 44.) The expert opinions were not challenged on cross-examination or by contrary opinions from other experts.

21 The Company did provide expert actuarial evidence to the Court to the effect that royalties payable under the RSA were likely to constitute a return in excess of 60% per annum by the beginning of 2007. In response to this argument, Tysoe J. stated:

> ... I am not persuaded by this submission for two reasons. First, the Royalty Sharing Agreement itself does not provide for payment of a return in excess of 60% per annum and s. 347 will only become engaged when and if interest in excess of 60% per annum is paid. If that occurs, the Petitioner will then be entitled to pursue a remedy to limit the payments which it is obliged to make under the Agreement. Second, it is not clear from the evidence that the royalty payments will constitute interest within the meaning of s. 347. While it does appear that some of the advances were in the form of loans to the Petitioner, it also appears that some of the advances were made by Messrs. Fawcett and James to initially acquire the licenses in their own names. [At para. 47.]

In the result, the Company's petition was dismissed.

22 The Company brought the criminal interest issue to a head in March 2007 when it declined to pay to Messrs. Fawcett, James and Gibson the full amount of royalties owing under the RSA, on the basis that the effective annual rate of interest had exceeded 60% per annum. In respect of Mr. Fawcett, for example, the royalty accruing in the first quarter of 2007 under the RSA was $164,045.26, but the Company paid him only $22,605. As the chambers judge noted, Mr. Fawcett responded by bringing this proceeding, seeking a declaration that *inter alia* "the royalty provided for in the Royalty Sharing Agreement ... does not constitute 'interest' within the meaning of s. 347 of the *Criminal Code*".

The Chambers Judge's Reasons

23 The chambers judge began his analysis by reciting s. 347(1), the definitions of "credit advanced", "criminal rate" and "interest" in ss. (2), and ss. (4), which I reproduce here:

> 347(1) Despite any other Act of Parliament, every one who enters into an agreement or arrangement to receive interest at a criminal rate, or receives a payment or partial payment of interest at a criminal rate, is
>
> (a) guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or
> (b) guilty of an offence punishable on summary conviction and liable to a fine not exceeding $25,000 or to imprisonment for a term not exceeding six months or to both.
>
> (2) In this section,
>
> "credit advanced" means the aggregate of the money and the monetary value of any goods, services or benefits actually advanced or to be advanced under any agreement or arrangement minus the aggregate of any required deposit balance and any fee, fine, penalty, commission and other similar charge or expense directly or indirectly incurred under the original or any collateral agreement or arrangement;
>
> "criminal rate" means an effective annual rate of interest calculated in accordance with generally accepted actuarial practices and principles that exceeds sixty per cent on the credit advanced under an agreement or arrangement;
>
> ...
>
> "interest" means the aggregate of all charges and expenses, whether in the form of a fee, fine, penalty, commission or other similar charge or expense or in any other form, paid or payable for the advancing of credit under an agreement or arrangement, by or on behalf of the person to whom the credit is or is to be advanced, irrespective of the person to whom any such charges and expenses are or are to be paid or payable, but does not include

> any repayment of credit advanced or any insurance charge, official fee, overdraft charge, required deposit balance or, in the case of a mortgage transaction, any amount required to be paid on account of property taxes;
>
> ...
>
> (4) In any proceedings under this section, a certificate of a Fellow of the Canadian Institute of Actuaries stating that he has calculated the effective annual rate of interest on any credit advanced under an agreement or arrangement and setting out the calculations and the information on which they are based is, in the absence of evidence to the contrary, proof of the effective annual rate without proof of the signature or official character of the person appearing to have signed the certificate. [At para. 51; emphasis added.]

He observed that since the RSA was not on its face an agreement for the payment of interest at a criminal rate (determined at the time the Agreement was made), the first offence created by s. 347(1) was not engaged. Instead, the second offence - the receipt of a payment or partial payment of interest at a criminal rate (determined at the time of receipt) - was at issue: see *Degelder Construction Co. v. Dancorp Developments Ltd.* [1998] 3 S.C.R. 90 at para. 34.

24 The chambers judge noted the leading case on the interpretation of what was formerly s. 347(1)(b) of the *Code*, *Garland v. Consumers' Gas Co.* [1998] 3 S.C.R. 112. He summarized the principles stated by the Supreme Court of Canada in *Garland* as follows:

> (a) Although s. 347 was enacted to assist in the prosecution of loan sharks, it is clear from the language of the section that it was designed to have a much broader application. Section 347 is most often applied to commercial transactions in civil actions, where borrowers assert the doctrine of illegality in an attempt to avoid or recover interest payments. (paras. 24, 25);
> (b) The substance, rather than the form of a charge or expense determines whether it is governed by s. 347. (para. 28);
> (c) In order to constitute "interest" under s. 347 a charge must be "paid or payable for the advancing of credit under an agreement or arrangement". (para. 30);
> (d) The term "credit advanced" is broadly defined in s. 347(2) and includes not only money, but also the monetary value of any goods, services or benefits advanced, or to be advanced, under an agreement or arrangement. (para. 34);
> (e) Under s. 347(2) "an advance" of "the monetary value of any goods, services or benefits" means a deferral of payment. "A debt is deferred - and credit extended - when an agreement or arrangement permits a debtor to pay later than the time at which payment would otherwise have been due. ... The substance of such "credit" is a determined amount of money which is payable over time." (para. 35);
> (f) Section 347 regulates the relationship between creditors and debtors rather than the relationship between commercial actors in the ordinary course of business. (para. 37);

> (g) In order for the deferral of the debt to constitute "credit advanced" there must be "a specified amount owing, and that amount must actually be due in the absence of an arrangement permitting later payment". (para. 39) [At para. 56.]

The chambers judge also noted the Court's "cautionary note" at para. 52 of *Garland*, where it described s. 347 as "a deeply problematic law" whose two facets "do not comfortably co-exist", and which has given rise to a large volume of civil litigation and interpretive difficulties.

25 *Garland* was applied by this court in *Boyd v. International Utility Structures Inc.* 2002 BCCA 438, 216 D.L.R. (4th) 139, a case relied on heavily by the Company in this appeal. In *Boyd*, a borrower agreed to pay a royalty as part consideration for a loan. (Indeed, the royalty agreement expressly stated that "As further consideration for the Loan [the payor] has agreed to grant to Boyd the Royalty subject to the terms and upon the conditions hereinafter set forth.") This court upheld the chambers judge's conclusion that the substance of the royalty agreement was not to create a profit-sharing arrangement or a joint venture, but to "compensate Dr. Boyd for the use of his money to buy the technology to manufacture the poles on which the royalty is paid." In the result, the plaintiff could enforce the royalty only to the extent it did not exceed the criminal interest rate.

26 At paras. 61-65 of his reasons, the chambers judge reviewed the relevant principles of contractual interpretation - that the goal of interpreting a commercial contract is to discover the objective intention of the parties at the time they entered into it; that evidence of the parties' subjective intentions is not relevant or admissible (see *Prenn v. Simmonds* [1971] 3 All. E.R. 237 (H.L.); *Eli Lilly & Co. v. Novopharm Ltd.* [1998] 2 S.C.R. 129); that if words in a contract are ambiguous, the court may consider extrinsic evidence; and that where the question of interpretation relates to consideration:

> ... extrinsic evidence is admissible to prove the actual consideration where no consideration, or nominal consideration is stated in the contract; where the consideration is ambiguous; or where substantial consideration is stated, but additional consideration exists. However, the additional consideration must not be inconsistent with the terms of the written contract: *Pao On v. Lau Yiu Long* [1979] 3 All E.R. 65 (Hong Kong P.C.) at p. 631; *Turner v. Forwood*, [1951] 1 All E.R. 746 (C.A.); *Cadinha v. Chamer Corp.* [1995] B.C.J. No. 755 (B.C.S.C.) at paras. 12-13. [At para. 64.]

Finally, the chambers judge noted, while the language of the contract may be informed by the factual matrix (see *ACLI Ltd. v. Cominco Ltd.* (1985) 61 B.C.L.R. 177 (C.A.) at 180; *Kingsway General Insurance Co. v. Lougheed Enterprises Ltd.* (2004) 32 B.C.L.R. (4th) 56 (C.A.), at para. 10), the words should not be "overwhelmed by a contextual analysis" (*Black Swan Gold Mines Ltd. v. Goldbelt Resources Ltd.* (1996) 25 B.C.L.R. (3d) 285 (C.A.) at para. 19). None of these principles is controversial or challenged on this appeal.

27 The chambers judge also referred to *Canadian Deposit Insurance Corp. v. Canadian Commercial Bank* [1992] 3 S.C.R. 558 - not a criminal interest case but a bankruptcy contest in which the issue was whether an advance of funds made to a failing bank pursuant to a highly complex agreement had been a loan or a capital investment. The Court described the "hybrid transaction" before it as involving elements of "both debt and equity investment" and observed that in searching

for the substance of the transaction, one "should not too easily be distracted by aspects which are, in reality, only incidental or secondary in nature to the main thrust of the agreement." (At 590.)

28 Under the heading "The Language of the Contract", the chambers judge formulated the central question before him - whether the royalty under the RSA was consideration payable by the Company "for credit received" from Messrs. Fawcett, James and Gibson. (Para. 66.) He noted the references in the recitals to "contributions" by the Investors, which were not limited to amounts advanced to the Company, but included other forms of assistance provided to acquire and maintain the coal licenses. Although the Company emphasized the statement at para. 2.1 that "As consideration for advancing the funds", it would pay the 1% royalty to the three Investors, the chambers judge found these references, and particularly the word "advances", to be capable of more than one reasonable meaning. One was that the royalty was payable in consideration for loans totalling $80,000, to be repaid within two years but, the chambers judge reasoned:

> ... the nature of the funds advanced is not specified. None of the funds advanced are described anywhere in the RSA as a loan, nor is there any express provision for payment of interest on the funds advanced for the West Brazion, Wolverine and Mount Spieker properties during the period of up to two years within which the RSA contemplated repayment of those funds.
>
> An "advance" is not necessarily a loan. In *London Financial Association v. Kelk* (1884) 26 Ch. Div. 107, Bacon, V.C. held at p. 136:
>
> > The words "advancing" and "lending" may each have a different signification; money may be "advanced" without being "lent"; the relation of borrower and lender does not exist in a great variety of the transactions that are distinctly authorized.
>
> *Black's Law Dictionary*, 7th Edition, defines "advance" as:
>
> > Advance, n. 1. The furnishing of money or goods before any consideration is received in return. 2. The money or goods furnished. [At paras. 82-4; emphasis added.]

29 Given this ambiguity, the chambers judge turned to consider "extrinsic evidence, including the factual matrix". (Para. 86; cf. *Kingsway General Insurance, supra,* at para. 10.) He reviewed the facts I have set out above, limiting his analysis to what the parties knew at the time they signed the RSA. These circumstances showed that when the Company agreed to pay the royalty in consideration of the Investors' "advancing the funds", the parties had not intended to "restrict the consideration for the royalty to any credit advanced to [the Company] by the Investors." Rather, the chambers judge said, "[t]he amounts contributed by each Investor as set out in paragraph 1.1 also included money expended, and in the case of Mr. James, work performed, in transactions which did not involve a loan by the Investors or a deferral of payment by [the Company]." (Para. 99.) He then examined the "contributions" comprising the "advanced funds" attributed to each Investor at para. 1.1 of the RSA. His findings are sufficiently detailed that they should be set out in full:

Mr. James' contribution of $17,500 consisted of $6,500 for West Brazion, $6,000 for Burnt River and $5,000 for work related to Wolverine. Mr. Gibson's contribution of $30,000 consisted of $20,000 for Mount Spieker and $10,000 for Wolverine. Mr. Fawcett's contribution of $32,500 consisted of $20,000 for Wolverine, $6,500 for West Brazion and $6,000 for Burnt River.

I have already found that the contributions of Mr. James and Mr. Fawcett for Burnt River did not constitute credit. In 1999, [the Company] had purchased the Burnt River coal licenses from Mr. James and paid to him a purchase price which included reimbursement of $12,000 for license application fees, which Messrs. James and Fawcett had previously paid to the government.

The $5,000 allocated to Mr. James for Wolverine was compensation for research and assessment work he performed in connection with the Wolverine properties. This amount formed part of the sum of $17,500, which determined Mr. James' proportionate share of the royalty. It was only after [the Company] had asserted that receipt by the investors of the royalty would violate s. 347 of the *Code* that the company tendered payment to Mr. James for the Wolverine work. In late December 2006, when [the Company] made the first royalty payment to Mr. James, it added the sum of $5,000 to Mr. James' proportionate share of the royalty, as payment for the Wolverine work. Mr. James refused to accept payment of the $5,000 on the basis that sum was not owed to him. The services which Mr. James had provided to [the Company] for the Wolverine properties were recognized and compensated through his proportionate share of the royalty. The $5,000 attributed to the Wolverine work formed part of the consideration provided by Mr. James to [the Company] in exchange for his share of the royalty, but involved no advance by him of credit to [the Company].

At the time the parties made the RSA, Messrs. Fawcett and James had not loaned any money and did not advance any credit to [the Company] in relation to the West Brazion property. The RSA contemplated the acquisition by [the Company] of the West Brazion property. However, [the Company's] acquisition of that property, and its obligation to pay back $6,500 both to Mr. Fawcett and to Mr. James, was contingent upon the government issuing the coal licenses to Mrs. James, and her assignment of those licenses to the company. Those events did not occur until November 2000. At that point, after [the Company] had acquired the West Brazion property, it was obliged to repay $6,500 to both Mr. Fawcett and Mr. James within two years of the date of the RSA under paragraph 6.1, as "funds advanced" by those Investors for the West Brazion property. In essence, [the Company], in consideration for its acquisition of the interests of Messrs. Fawcett and James in West Brazion, agreed to pay the royalty and to reimburse those Investors for the application costs they had previously incurred.

The language of the introductory paragraph to the RSA, which describes [the Company] as the "Purchaser" and refers to Messrs. Fawcett, James and Gibson as the "Vendors", must be given its plain, ordinary meaning, unless to do so would

result in an absurdity. This language is consistent with the reality of the transaction governed by the RSA. The terms "Purchaser" and "Vendors" reflect the intention of the parties that [the Company] would acquire potentially valuable coal properties, including West Brazion, for "$1 and other good and valuable consideration". That consideration included payment by [the Company] to the Investors of the shared royalty.

Mr. Gibson had advanced $20,000 to [the Company] in January 2000 to fund [the Company's] application for the Mount Spieker licenses. Mr. Gibson acquired an option to convert his loan into a 20% working interest when the licenses were granted. [the Company] also agreed to pay a **royalty** to him from **coal** produced from the Mount Spieker property. Mr. Gibson advanced the $20,000 and [the Company] applied for the Mount Spieker licenses on February 2, 2000, before the parties made the RSA.

By the RSA, [the Company] and the investors agreed to a new royalty that would apply to the West Brazion, Mount Spieker and Wolverine properties, in which all of the investors would share in proportion to their total contributions, in the percentages set out in Schedule 2.1.

By paragraph 9.4, the parties agreed that the terms and provisions of the RSA constituted their entire agreement and superseded all previous oral or written communications. Upon entering into the RSA, the Investors relinquished any rights they each had with respect to particular **coal** properties in exchange for their shared interest in the **royalty** payable under the RSA.

Thus, Mr. Gibson gave up his option to acquire a 20% working interest in the Mount Spieker licenses and his former royalty interest in the Mount Spieker properties in exchange for the new shared royalty.

The consideration provided by the investors in return for the shared royalty also included Mr. Fawcett's agreement to advance a further $20,000 to [the Company] to pay for its license applications for the Wolverine group, and Mr. Gibson's agreement to advance a further $10,000 to [the Company] for the same purpose.

Finally, by virtue of paragraph 4.2 of the RSA, Messrs. Fawcett, James and Gibson agreed to share proportionately their respective interests in any part of the moneys which they had contributed and which might be returned by the government to [the Company] if any of the West Brazion, Mount Spieker and Wolverine license applications were withdrawn or not granted. [para. 30]

30 The chambers judge characterized the RSA as a "hybrid transaction" (para. 113), although one might better describe it as multi-faceted. Part of the benefit to the Company was the fact that Messrs. Fawcett and Gibson loaned the $30,000 in total that the Company needed to apply for the coal licenses at Perry Creek and Hermann. But there were other aspects to the Agreement referable to transactions that were already complete - Burnt River, West Brazion and Mount Spieker. Mr. Gibson surrendered his right to convert his "investment" to a 20% working interest in Mount Spiek-

er and his royalty of $.25 per tonne described earlier; the 1% royalty contemplated by the West Brazion option agreement between the Company and Messrs. Fawcett and James was 'rolled in' to the royalty pool; and consulting services rendered on Wolverine by Mr. James were recognized. The chambers judge summarized its various effects:

> ... In addition to making provision in paragraph 6.1 for the advance of some credit to [the Company], the RSA also involved the acquisition by [the Company] of the Investors' interests in certain coal licenses, the provision of additional funds to [the Company] to assist it in acquiring the Wolverine licenses, and the agreement of the Investors to pool their interests and to accept a royalty they would share in proportion to their respective contributions. The RSA also had elements of a speculative investment. At the time when Messrs. Fawcett, James and Gibson entered into the RSA, they had no assurance that their contributions to [the Company's] acquisition of the West Brazion, Mount Spieker and Wolverine licenses would result in payment of the royalty provided in paragraph 2.1 of the RSA. Their receipt of the **royalty** was contingent upon [the Company] first acquiring the **coal** licenses, and then successfully developing a producing coal mine. [At para. 113.]

31 Finally, the chambers judge turned to the central question of whether the royalty under the RSA was "paid or payable for the advancing of credit under an agreement" within the meaning of s. 347. In this regard, he referred to *Garland, supra,* and in particular the reasoning of the majority at paras. 37-39 where Major J. emphasized that for the deferral of a debt to constitute "credit advanced", there must be a specified amount owing which must "actually be due in the absence of an arrangement permitting later payment." Applying this reasoning to the RSA, the chambers judge observed that the only funds advanced to the Company at the time the RSA was made were the $30,000 contributed by Mr. Fawcett and Mr. Gibson to enable the Company to apply for the Perry Creek and Hermann licenses. The remainder of $50,000 had already been advanced.

32 The only part of the RSA which the chambers judge regarded as "a provision for the extension of credit by the Investors to [the Company]" was para. 6.1. It stated that within two years of the Agreement or upon receiving adequate financing, whichever occurred first, the Company would pay back to the Investors "all funds advanced ... for the West Brazion, Wolverine and Mount Spieker properties". (My emphasis.) The chambers judge reasoned that para. 6.1 could have no application to the contributions of Messrs. James and Fawcett in respect of Burnt River, since those amounts had already been repaid; nor did it apply to the value of work performed by Mr. James in connection with the Wolverine claims. He found that Mr. James "extended no credit" to the Company in connection with that work (para. 117). As it turned out, the Company decided to credit $5,000 to him as compensation, as the chambers judge had noted at para. 30 of his reasons.

33 With respect to "sums advanced" in connection with West Brazion, Wolverine and Mount Spieker, any obligation on the part of the Company to repay such funds had been contingent upon its obtaining the respective licenses to mine those properties. In the chambers judge's analysis:

> ... All of the license applications were still pending when the parties executed the RSA in June 2000. Under paragraph 4.2, if any of the coal licenses were not granted, or if [the Company] withdrew any of the applications, the Investors were to be repaid proportionately upon the government returning the license applica-

> tion fees to [the Company]. If a coal license was not granted, or an application was withdrawn by [the Company], the amount advanced by an Investor to [the Company] for that license would not be repaid to the Investor under paragraph 6.1. Instead [the Company], upon receipt of the refunded application fees, was required to repay those fees to the Investors proportionately under paragraph 4.2 of the RSA.
>
> As counsel for the petitioner submits, this provision served to preserve the shared interest of the Investors, not only in the royalty, but also in the pooled value of their contributions toward [the Company's] acquisition of the coal licenses. [At paras. 118-19.]

34 In fact, the licenses did issue by the fall of 2000, with the result that the repayment provision, para. 6.1, "kicked in". However, in July 2000, the "shares for debt" arrangement was implemented, thus extinguishing any debt obligation of the Company related to the advance of funds on the Mount Spieker and Wolverine licences. In the chambers judge's analysis, there was at most an extension of credit under para. 6.1 for monies advanced on these properties from March 31, 2000 (the date of the RSA) to July 11, 2000 (the date of the shares for debt arrangement), and it was at least arguable that no credit was ever advanced by the Investors to the Company with respect to these properties, given the timing of the shares for debt arrangement.

35 Similarly, the repayment of the $13,000 "advanced" by Messrs. Fawcett and James on the West Brazion licenses was a contingency at the time the RSA was entered into because the licenses had not yet been granted. Again in the chambers judge's analysis, the extension of credit in this scenario did not begin until November 20, 2000, the date Mrs. James assigned the licenses to the Company, and ended on May 28, 2001, the date the Company reimbursed the $13,000 owing to Messrs. James and Fawcett. (Para. 124.)

36 The chambers judge concluded that in all the circumstances, the Investors' agreement to advance "credit" to the Company had been incidental to the main purpose of the RSA. In his words:

> ... In substance, the RSA was an agreement by which the Investors assisted [the Company] in acquiring potentially valuable **coal** licenses in consideration for a shared **royalty** interest in those licenses. The royalty was not in substance a cost paid by [the Company] in order to receive credit. Rather, the royalty was the principal consideration flowing from [the Company] to the Investors for their contributions to [the Company's] acquisition of the coal licenses. The Investors' contributions included their agreement to pool their interests, the transfer of the West Brazion coal licenses, the provision of funds to enable to apply for coal licenses, the payment of coal license application fees, and work relating to the assessment of the Wolverine properties.
>
> When the Investors contributed funds to assist [the Company] in acquiring coal licenses, they were taking the risk that the properties might never go into production. Although they stood to earn a handsome return in the event that [the Company] was able to develop producing coal mines, they had no assurance that any of the properties would go into production. This case is distinguishable from *Boyd v. International Utility Structures Inc.* 2002 BCCA 438, where there was no

> consideration for the royalty other than the loan, and where the royalty was expressly stated to be in furtherance of the loan. [At paras. 125-6; emphasis added.]

In the result, he ruled that in substance, the royalties payable under the RSA had not been incurred by the Company in consideration of the advancing of credit. Thus they did not constitute "interest" for purposes of s. 347 and Mr. Fawcett, the petitioner, was entitled to the declarations sought in his petition.

On Appeal

37 In its factum the Company argued that the chambers judge had erred in two respects - in construing the RSA as more predominantly an equity than a debt transaction, and in his interpretation of the law regarding s. 347 and in particular the meaning of "credit advanced" and "interest" under the *Code*. In oral argument, Mr. Groia supplemented these two points with a submission that may be summarized as follows:

(a) The most important factor in construing a contract is the language used by the parties;
(b) In this case, the language of the RSA is clear and there is very little, if any, ambiguity in it;
(c) On its face, the RSA did not contemplate that the Company's obligation to repay the advances was contingent on the Company's being granted the coal licenses or that the Company would "acquire" the licenses from Messrs. Fawcett, James and Gibson, but "rather that they [would] advance credit to [the Company] to purchase the licenses";
(d) The references in the RSA to each Investor's having "advanced" funds (or money's worth in the case of Mr. James' services) and to the obligation in para. 6.1 to repay the 'advances' in two years indicate that the substance of the Agreement was the advancing of credit to the Company - contrary to the chambers judge's finding that it was only incidental; and
(e) The chambers judge failed to analyze the true nature of the royalty payments "to determine if they operate more like interest on a debt or a return on equity". As in *Boyd*, the consideration for the royalty on a plain reading of the RSA "was and only was the advance of the funds", rather than payment to the Investors for their contributions to the Company's acquisition of the coal licenses as found by the chambers judge.

38 It is notable that the Company did <u>not</u> contend that it had not been open to the chambers judge to consider the "factual matrix" or background of the various transactions between the Investors and the Company that took place prior to the negotiation and execution of the RSA. Indeed, the Company devoted a good deal of its written submission to the argument that because Messrs. Fawcett and James had been directors and officers of the Company, it would not have been "open to them" as fiduciaries to acquire the prospective mining opportunities for their own account (see generally *Canadian Metals Exploration v. Wiese*, 2007 BCCA 318 and the cases cited therein). If this is so, the Company argued, the royalties payable under the RSA are more likely to be "on account of debt rather than equity."

39 Counsel for Mr. Fawcett responded to the latter argument by characterizing it as "false to fact". Mr. Forstrom noted the evidence of Mr. Austin and Mr. Fawcett concerning the circumstances

of Mrs. James' acquisition of the West Brazion licenses in late 1999, including the fact the Company did not have the funds to acquire them and still had not reached a decision when Fawcett and James decided to "tie up the licenses in the meantime". As has been seen, the Company agreed to purchase the West Brazion (and Burnt River) licences - it did not borrow the funds to do so. It has never been argued, as far as I am aware, that the West Brazion option agreement - or the Coal Property Acquisition Agreement regarding the Burnt River licences - was a sham or a nullity.

40 Nor can it now be said that because Fawcett and James were directors, they somehow lacked the capacity to acquire the licences as they did, or to agree to sell and transfer them to the Company. The chambers judge suggested that because the purported consent resolution approving the West Brazion option agreement had not been signed by Mr. Fawcett, the option was unenforceable but, as is evident from Tysoe J.'s reasons in the related proceeding, nothing turned on the existence of a consent resolution, given the requirement that a meeting of the board be held where full disclosure was required to be made. The critical point is that Tysoe J. found the RSA to be fair and reasonable to the Company - a finding that extended to the previous transactions that were 'rolled up' into the RSA. As noted by Ryan J. (as she then was) in a slightly different context in *Rhyolite Resources Inc. v. CanQuest Resource Corp.* [1990] B.C.J. No 1803, 50 B.L.R. 275 (S.C.), an order of the kind made by Tysoe J. effectively "absolves" a director from liability for what would otherwise be a breach of fiduciary duty in respect of transactions in which he or she had a personal interest. (In the case at bar, of course, those personal interests were obviously known to all three directors.)

41 Equally important for purposes of this case is the fact that the Company did enter the option agreement, and the parties, having no reason to think otherwise, conducted themselves on the assumption it was valid. We must therefore proceed on the basis that this and the other pre-existing transactions are to be considered as part of the factual matrix in the usual way, regardless of what legal challenges are later advanced. If the facts indicate that the royalty was more in the nature of debt than equity, that fact must be considered; but if the facts are the other way, that must also be considered and weighed accordingly.

42 Returning to Mr. Groia's main argument, there can be no doubt that the language used by the parties in their contract is the most important consideration in construing the meaning of the contract. I do not agree, however, that the language of the RSA is clear and unambiguous, particularly in its use of the word 'advance'. On this point, counsel for the Company relied on the observation of the Court in *Garland*, *supra*, at para. 35:

> The most plausible interpretation of s. 347(2) is that an "advance" of "the monetary value of any goods, services or benefits" means a deferral of payment for such items. A debt is deferred - and credit extended - when an agreement or arrangement permits a debtor to pay later than the time at which payment would otherwise have been due.

The Court in *Garland*, however, was construing s. 347, the prohibition on criminal interest, rather than a contract that might or might not provide for interest. As we have seen, the chambers judge quoted authority for the proposition that an "advance" is not necessarily a loan. In my view, this accords with the usage of the term in ordinary parlance.

43 That the words "advances" and "advanced" were used as neutral terms is supported by the fact that not all the advances referred to had, prior to the execution of the RSA, represented loans, but that both the Burnt River and West Brazion transactions had been sale/purchase transactions.

These licenses had originally been issued in the name of Mr. or Mrs. James and/or Mr. Fawcett, who then sold them to the Company. The use of the terms "Vendor" and "Purchaser" in the opening paragraph of the RSA gives some slight support to this conclusion. This is not true, on the other hand, of the Wolverine loan transactions involving Mr. Gibson (of which no more need be said given the settlement of his claims) and Mr. James, to which loans I shall return below.

44 The chambers judge was of the view that para. 6.1 of the RSA was a "provision for the extension of credit by the Investors to [the Company]." With respect, I read para. 6.1 as a covenant for the repayment of all the advances, both those that had been loans and those arising from purchase transactions. The Company takes issue with the chambers judge's finding that the repayment obligation was contingent on its receiving the coal licenses, but whether or not this was correct in respect of some or all of the licenses is not in my view significant in law or in fact. As a matter of law, the question is whether the royalties were consideration for the advancing of credit, regardless of when the loan became repayable, and regardless of the period over which the credit was outstanding. As observed in *Garland*, the "time factor" is not necessary to bring a payment within the ambit of s. 347, which applies even to one-time charges, whether payable at the outset or later, "after repayment (e.g., fines and penalties.)" (Para. 29.) *A fortiori,* the same must be true of charges that are contingent, if the contingency does in fact come to pass. Nor does the nature of a loan, or the 'advancing of credit', change by reason of the fact the loan was outstanding for only a short time.

45 As a matter of fact, the Company's covenant to repay the "advances" was irrelevant in the case of Burnt River, since the expenses incurred by Messrs. James and Fawcett had already been reimbursed to them, as the Company acknowledged at para. 6.2 of the RSA. In the case of West Brazion, the covenant was merely confirmatory, given that under the terms of the option agreement, the Company had already obliged itself to reimburse the out-of-pocket costs of Messrs. Fawcett and James - and of course, to pay a royalty of 1% - upon the exercise of the option. Thus the purchase price payable by the Company for the property in this transaction was not a "fixed amount" and para. 6.1 of the RSA did not perform the function of providing for an extension of credit to the Company. Instead, it recorded and confirmed the Company's existing obligation to pay the purchase price (an "equity" payment, in Mr. Groia's parlance), consisting of (a) the royalty shares of Messrs. Fawcett and James plus (b) an amount equal to what they had originally advanced. With respect to Perry Creek and Hermann, on the other hand, the RSA was effectively a loan agreement, and para. 6.1 was the covenant for repayment. The $30,000 required for the Perry Creek and Hermann licenses was the only "new money" advanced pursuant to the RSA, and it was an advance by way of loan. As in *Boyd*, the royalty was the consideration for the loan and therefore came within the definition of "interest" in s. 347 of the *Code.*

46 Overall, the RSA was a commercial agreement. Its "substance" was to rationalize and bring together the pre-existing contracts and to pool the royalties payable thereunder, as required by Mr. Gibson as a condition of making his loan in connection with Perry Creek and Hermann. This made the royalty arrangements fairer as between the three Investors and simplified the hodgepodge of different terms in different agreements to which the Company was party. It did not, however, change the nature of the pre-existing transactions. What had been sale/purchase transactions remained so.

47 Conversely, the loan made by Mr. Fawcett also remained a loan, and the royalty payable in consideration therefor comes within the extended definition of "interest" in s. 347(2) of the *Code.* This portion of the total royalty payable under the RSA can be easily severed from the non-interest

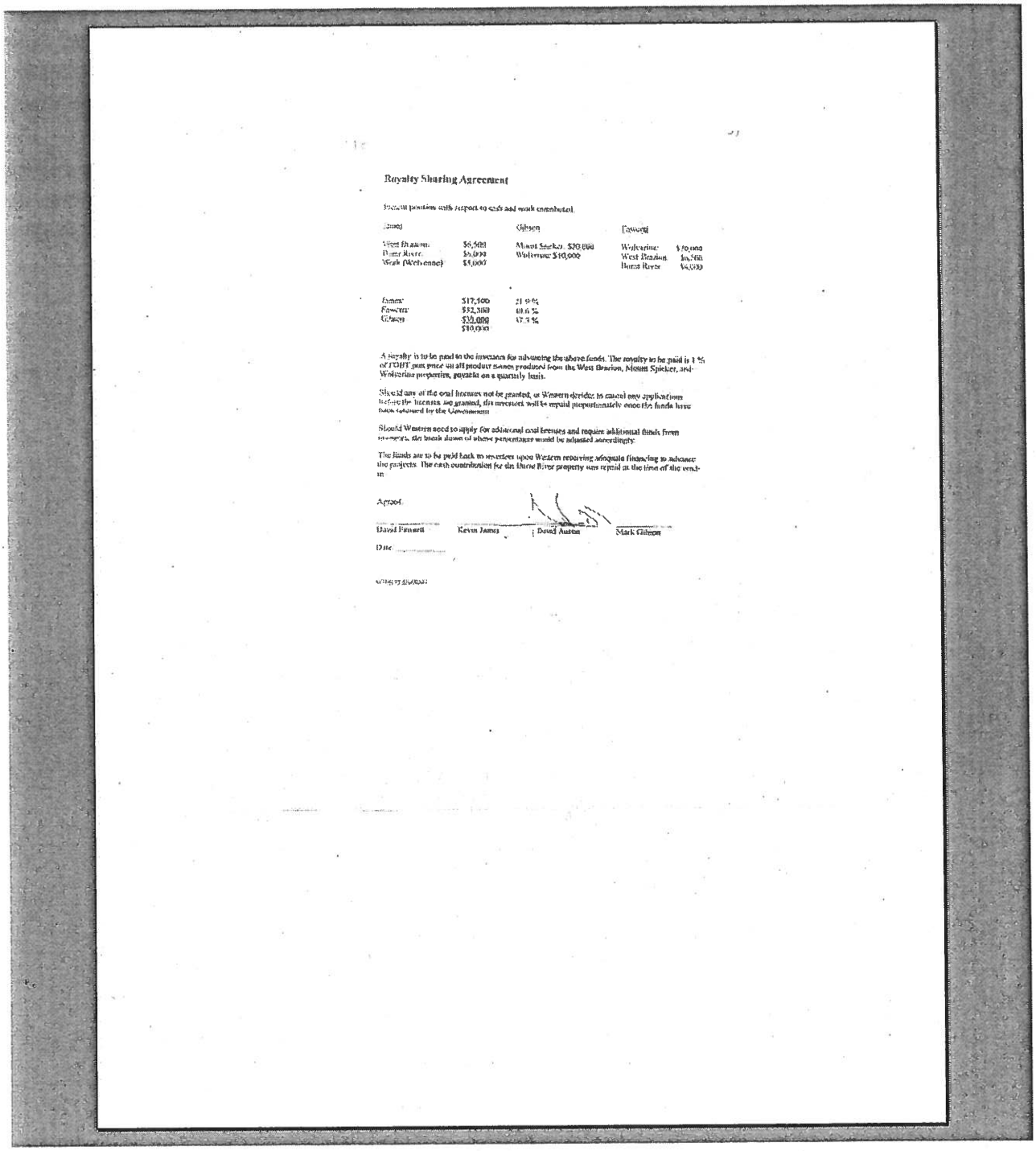
portion by means of an order declaring that 20,000/32,500 of the share of the royalty payable to Mr. Fawcett will constitute illegal interest to the extent the 60% per annum limitation in s. 347 is exceeded each year. I would allow the appeal to this extent.

48 The balance (12,500/32,500) of the royalty payable to Mr. Fawcett and the entire royalty payable to Mr. James would continue unaffected by s. 347, and the chambers judge's declaration would continue to apply thereto. I would so order. In light of the settlement of Mr. Gibson's claim, the declaration would, I assume, not apply to him or his share of the royalty.

M.V. NEWBURY J.A.
R.T.A. LOW J.A.:-- I agree.
P.A. KIRKPATRICK J.A.:-- I agree.

* * * * *

Schedule 1



Royalty Sharing Agreement

Financial positions with respect to cash and work contributed.

James		Gibson		Fawcett	
West Braeburn	$6,500	Mount Sicker	$20,000	Wolverine	$10,000
Burns River	$6,000	Wolverine	$10,000	West Braeburn	$6,500
Work (Welcome)	$5,000			Burns River	$4,500
James	$17,500	21.9 %			
Fawcett	$32,500	40.6 %			
Gibson	$30,000	37.5 %			
	$80,000				

A royalty is to be paid to the investors for advancing the above funds. The royalty to be paid is 1 % of FOBT pan price on all product stones produced from the West Braeburn, Mount Sicker, and Wolverine properties, payable on a quarterly basis.

Should any of the coal licenses not be granted, or Western decides to cancel any applications before the licenses are granted, the investors will be repaid proportionately once the funds have been returned by the Government.

Should Western need to apply for additional coal licenses and require additional funds from investors, the break down of above percentages would be adjusted accordingly.

The funds are to be paid back to investors upon Western receiving adequate financing to advance the projects. The cash contribution for the Burns River property was repaid at the time of the work in

Agreed:

David Fawcett Kevin James David Austen Mark Gibson

Date:

* * * * *

Schedule 2

The relevant provisions of the RSA are as follows:

WHEREAS:

A. The Company has made application for and expects to become the beneficial owner of a 100% interest in and to certain coal interests in the West Brazion, Burnt River, Wolverine and Mount Spieker properties set out in Schedule "A" (collectively, the "Properties"),

B. Each of the Investors have assisted the Company in acquiring and maintaining the Properties; and

C. The Company wishes to pay a royalty to the Investors for the Investors' contributions on the terms and conditions herein contained.

THIS AGREEMENT WITNESSETH THAT in consideration of the payment by the Purchaser to the Vendors of $1.00 and other good and valuable consideration, receipt of which is hereby acknowledged, the parties mutually covenant and agree as follows:

1. INVESTMENT

1.1 Each of the Investors represent and warrant to the Company that they have advanced funds to the Company for the Properties as follows:

Investor	Amount
Fawcett	$32,500
James	$17,500
Gibson	$30,000

2. CONSIDERATION

2.1 As consideration for advancing the funds, the Company will pay a royalty (the "Royalty") of one percent (1%) of the price (FOBT at Port) for all product tonnes produced from the West Brazion, Mount Spieker and Wolverine coal properties on a quarterly basis to the Investors as set out in Schedule "2.1" attached hereto and forming a material part hereof.

...

4. COAL LICENSES

4.1 Upon the Coal Licenses being granted and recorded under the Company's name, the Company will maintain the Coal Licenses in good standing with the mining recorder, or such other entity with jurisdiction over such matters.

4.2 In the event that any of the Coal Licenses comprising the Properties are not granted or the Company decides to cancel any applications prior to the Coal Licenses being granted, the Investors will be repaid proportionately immediately upon the funds being returned by the government.

4.3 Any forfeiture of the Coal Licenses shall be by mutual consent of the Parties to this Agreement, and such consent shall not be unreasonably withheld. In the event that the Company forfeits the Coal Licenses, the Company will assign the Coal Licenses to the Investors for a minimum period of 30 days prior to the date the forfeiture is to become effective.

...

6. REPAYMENT OF FUNDS

6.1 Within two years from the date of this Agreement, or upon the Company receiving adequate financing, to be reasonably determined by the Company, whichever date is earlier, the Company will pay back to the Investors all funds advanced by the Investors for the West Brazion, Wolverine and Mount Spieker properties.

6.2 The funds advanced for the Burnt River property have been repaid.

...

9. GENERAL

...

9.4 The terms and provisions herein contained constitute the entire agreement between the parties and will supersede all previous oral or written communications.

Schedule "2.1"

The Royalty will be divided among the parties as follows:

David Fawcett 40.6%

Kevin James	21.9%
Mark Gibson	37.5%

From: Riesterer, Patrick <PRiesterer@osler.com>
Sent: Thursday, April 21, 2016 12:46 PM
To: Heather Jones
Cc: Schwartzentruber, Mike A; Wasserman, Marc
Subject: RE: Requested Documents Walter Energy re Kevin James

Ms. Jones,
Thank you for your email, which was forwarded to me by the Court-appointed Monitor of Walter Energy Canada Holdings, Inc. and its various subsidiaries ("Walter Canada"). As you are aware, Walter Canada is undergoing a Court-supervised sales process as part of its proceedings under the *Companies' Creditors Arrangement Act*. The royalty agreements have been made available to potential purchasers in the data room established as part of the sales process. At this time, Walter Canada has not formed a view as to how the royalty agreements may be treated in the CCAA proceedings and cannot comment on the views any potential purchaser may put forward in respect of any proposed sale transaction. This issue will be addressed, if necessary, in due course. We will ask the Monitor to add you to the service list for this matter.
Yours very truly,
Patrick

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This is Exhibit "F" referred to in the
Affidavit of Kevin James
sworn before me at West Vancouver
in the Province of British Columbia
this 12 day of August 2016.

A commissioner for taking Affidavits
within the Province of British Columbia

From: Heather Jones [mailto:hjones@sagerllp.com]
Sent: Friday, April 08, 2016 4:17 PM
To: Schwartzentruber, Mike A
Cc: Linda McKnight
Subject: FW: Requested Documents Walter Energy re Kevin James

Heather L. Jones*
Partner, Civil Litigation | **Sager LLP Legal Advisors**
Direct: 604-913-9886 | hjones@sagerllp.com | *www.sagerllp.com*
**denotes Law Corporation*

Mike,

It was a pleasure to talk to you yesterday regarding our client Kevin James and his royalty agreements relating to the Walter Energy assets.
You had asked that we provide you with a copy of the two royalty agreements and we are also enclosing the decision by the Supreme Court of British Columbia and the Court of Appeal relating to the same. As stated, the royalty agreements run with the land and should be part of any purchase and sale agreement and we want to ensure that they will be so.
We look forward to confirmation of the same from either you or counsel.
Have a good weekend.

Heather L. Jones*
Partner, Civil Litigation | **Sager LLP Legal Advisors**
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denotes Law Corporation

This is Exhibit "G" referred to in the Affidavit of Kevin Jones sworn before me at West Vancouver in the Province of British Columbia this 12 day of August 2016.

A commissioner for taking Affidavits within the Province of British Columbia

SCHEDULE 1.1(kkk)

Royalty Payment Terms

1. In this Schedule:

(a) "**Agreement**" means the Agreement of Sale and Purchase between Pine Valley Mining Corporation, Cambrian Mining PLC and Falls Mountain Coal Inc. dated April 26, 2007, of which this Schedule forms a part;

(b) "**Brule Deposit**" means the Brule deposit within the Burnt River property;

(c) "**Change of Control**" means the occurrence of any of the following events after the Closing Date:

(1) the acquisition, directly or indirectly, by any person, or group of persons acting jointly or in concert, as such terms are defined in the *Securities Act* (British Columbia), of the voting shares of the Purchaser, which when added to all other voting shares of the Purchaser at the time held directly or indirectly by such person or group of persons acting jointly or in concert, totals more than 50% of the outstanding voting shares of the Purchaser at the time of such acquisition; or

(2) the Purchaser ceasing to beneficially hold, directly or indirectly, more than 50% of the common shares of FMC; or

(3) consummation of a sale or other disposition of all or substantially all of the assets of the Purchaser or FMC (other than to an Affiliate of the Purchaser or WCCC or any Affiliate of WCCC), or the consummation of a reorganization, merger, amalgamation, consolidation, share exchange or other transaction which has substantially the same result as set out in subsections (c)(1) and (2), and the first clause of this subsection (3); or

(4) shareholder approval of the liquidation or dissolution of the Purchaser or FMC.

Notwithstanding the above, Change of Control shall not include the following:

(i) any acquisition, directly or indirectly, by the Purchaser of common shares of WCCC, including but not limited to a purchase from treasury or any securities convertible into common shares of WCCC whether or not such purchases result in WCCC becoming an Affiliate of the Purchaser;

(ii) any consummation of a sale or other disposition to WCCC or an Affiliate of WCCC of more than 50% of the common shares of FMC or all or substantially all of the assets of the Purchaser or FMC;

(iii) any contribution of assets or an interest in assets by the Purchaser or FMC to an incorporated or unincorporated joint venture, partnership, limited partnership or other form of business organization, for so long as either: (A) the Purchaser or WCCC retains directly or indirectly an undivided ownership interest in such assets of 50% or less but not less than one-third and the Purchaser or WCCC retains the defacto ability or legal right directly or indirectly to direct or cause the direction of the management and policies of such business organization by any means including without limitation through the exercise of votes on a management committee, the right to appoint directors or management, contract or voting trust; or (B) the Purchaser or WCCC directly or indirectly retains an undivided ownership interest in such assets of more than 50%; or

(iv) any merger or amalgamation between the Purchaser and WCCC however so structured.

(d) "**FMC Load-Out**" means: (i) the present coal handling, processing and rail car loading facilities owned by FMC at the Willow Creek Coal Mine; and (ii) any modifications to or replacements of such facilities from time to time, suitable to handle and load coal onto rail or other transportation systems;

(e) "**Force Majeure**" means: (i) acts of God, wars declared or undeclared, revolution, riot, insurrection, civil commotion, fires, floods, storms, slides, epidemics, quarantine restrictions, labour relations disruptions (including strikes, lockouts, illegal work stoppages and slowdowns, and boycotts), regulatory prohibitions, transportation disruptions (including freight embargoes, highway, railway or other delivery disruptions) or power failure at the Willow Creek Coal Mine or the Brule Deposit; except that any such event or circumstance is a major disabling event or circumstance which is beyond the reasonable control of the Purchaser; provided further that lack of money, financing or credit shall not be an event of Force Majeure; and (ii) any adverse change in the market for coal produced from the Willow Creek Mine or the Brule Deposit which leads the Purchaser in good faith to suspend or curtail the production or sale of Royalty Payment Coal;

(f) "**Minimum Royalty Payment**" means: (i) until the end of the first Royalty Payment Year, an amount of nil; and (ii) thereafter, $50,000 per Royalty Payment Quarter ($200,000 per Royalty Payment Year), subject to a cumulative maximum amount of $2.0 million comprised of Royalty Payments and/or Minimum Royalty Payments over the term of the Royalty Payment Agreement; and

(g) "**Royalty Payment**" means the royalty payment of an aggregate amount of up to $26.0 million payable by the Purchaser to the Vendor in accordance with the Plan or as otherwise ordered by the Court and in accordance with the terms set out in this Schedule;

(h) "**Royalty Payment Agreement**" means the royalty payment agreement to be entered into between the Purchaser and the Vendor in accordance with the Plan or

as otherwise ordered by the Court and incorporating the terms set out in this Schedule;

(i) "**Royalty Payment Coal**" means coal from the Willow Creek Coal Mine or the Brule Deposit loaded for shipment through the FMC Load-Out;

(j) "**Royalty Payment Date**" means July 1st;

(k) "**Royalty Payment Quarter**" means each of the four successive three month periods in a Royalty Payment Year with the first such three month period beginning on the first date of the then-current Royalty Payment Year;

(l) "**Royalty Payment Rate**" means, until the end of the first Royalty Payment Year, a payment rate of $1.00 per tonne of Royalty Payment Coal, and thereafter such rate will increase by 2.0% for each Royalty Payment Year on the Royalty Payment Date for such year, with such increases compounding annually until a maximum installment of rate of $1.50 per tonne has been reached and thereafter shall mean $1.50 per tonne of Royalty Payment Coal;

(m) "**Royalty Payment Year**" means a period commencing on the Royalty Payment Date of a calendar year and ending on the date immediately preceding the Royalty Payment Date of the immediately succeeding calendar year;

(n) "**Willow Creek Coal Mine**" means the Willow Creek Coal Mine and the Willow Creek Properties as defined in the Agreement.

Capitalized terms used but not otherwise defined in this Schedule shall have the meanings given to them in the Agreement.

2. For the purposes of the terms set out in this Schedule, the weight in tonnes of Royalty Payment Coal will be determined as follows:

(a) by using a government certified rail track scale at the FMC Load-Out, if such scale is used to determine billing weights for payment to the rail service provider; or

(b) if the tonnage cannot be determined by the method described in subsection 2(a), then it will be determined using the government certified conveyor belt scales at the third-party train receiving facilities used to determine the tonnage received at such facilities, provided that any tonnage amount determined by this method shall be reduced by 0.5% due to moisture gain enroute from the FMC Load-Out to such facilities; or

(c) if the tonnage cannot be determined by either of the methods described in subsections 2(a) or 2(b), then the Vendor and the Purchaser will use all commercially reasonable efforts to determine and agree upon some other method, failing which the determination of tonnage will be referred and finally resolved by a single arbitrator in an arbitration administered under the *Commercial*

Arbitration Act (British Columbia). The place of arbitration shall be Vancouver, British Columbia. The arbitrator shall determine the actual cost of the arbitration to be borne by each Party.

3. All payments due in respect of the Royalty Payment will be made in accordance with the Plan or as otherwise ordered by the Court in the CCAA Proceedings. In the event that the Court orders that the Royalty Payment Agreement is to be entered into with a third party instead of the Vendor, the terms of the Royalty Payment as set out in this Schedule will be revised accordingly for the purpose of preparing the Agreement.

4. If the Purchaser fails to make any payment payable under the terms set out in this Schedule within 30 calendar days at the end of each Royalty Payment Quarter, then the unpaid amount will bear interest from and after that 30th day at a rate of 1.0% per month calculated and payable monthly (which is equivalent to interest at the rate of 12.68% per year calculated and payable annually) both before and after judgment.

5. The Purchaser will, within 15 calendar days of the end of each Royalty Payment Quarter, deliver to the Vendor a statement of the number of tonnes of Royalty Payment Coal for the Royalty Payment Quarter just ended (the "**Royalty Payment Quarter Statement**").

6. Within 30 calendar days of the end of each Royalty Payment Quarter, the Purchaser will pay to the Vendor an amount equal to the greater of:

   (a) the number of tonnes of Royalty Payment Coal for the Royalty Payment quarter just ended, as disclosed in the Royalty Payment Quarter Statement, multiplied by the then-current Royalty Payment Rate; and

   (b) the Minimum Royalty Payment.

7. The Purchaser will not be required to make any Minimum Royalty Payment after the aggregate amount of any Royalty Payments and/or any Minimum Royalty Payments totals $2.0 million.

8. Any amounts payable under the terms of this Schedule will be credited against the aggregate Royalty Payment limit of $26.0 million.

9. Within 90 calendar days of the end of each Royalty Payment Year, the Purchaser will deliver to the Vendor a statement of the amount of Royalty Payment Coal for the Royalty Payment Year just ended (the "**Royalty Payment Year Statement**").

10. For the purposes of establishing the exact amounts to be paid in respect of the Royalty Payment, the Purchaser agrees to keep at a business office in Vancouver, British Columbia (or such other location as is agreed to by the Vendor) a set of records of all shipments of coal through the FMC Load-Out from and after the date of the Royalty Payment Agreement. For the purpose of verifying the correctness of any amounts paid or delivered pursuant to the terms set out in this Schedule, the Vendor or its authorised representatives will, on five business days advance notice to the Purchaser, have full and free access to such records of the Purchaser dealing with such shipments during normal

business hours during the term of the Royalty Payment Agreement and for a period of twelve (12) months subsequent to the termination thereof. The Purchaser hereby grants the Vendor the right at any time to have the Purchaser's shipment records through the FMC Load-Out audited by a firm of Canadian chartered accountants chosen by the Vendor and acceptable to the Purchaser, acting reasonably.

11. The Purchaser will be entitled to receive and respond to any questions arising during the course of any audit and to receive and comment upon, prior to finalization, the draft report of the audit findings. A copy of the final report on the audit findings will be provided to the Purchaser upon its completion.

12. The Purchaser will pay on demand any deficiency in payments shown to be due by such audit together with interest calculated in accordance with Section 4 of this Schedule from the date on which such funds would have originally been due and payable in accordance with the terms set out in this Schedule had all the Royalty Payment Quarter Statements required to be delivered pursuant to Section 5 of this Schedule been correct. In addition, if the payments due in any Royalty Payment Year are shown by such audit to have been understated in a Royalty Payment Year Statement by more than 10%, the Purchaser will forthwith reimburse the Vendor for all of the reasonable direct and indirect costs and expenses incurred by the Vendor and its affiliates in ordering and completing the audit.

13. Provided that the Purchaser has fulfilled all of its obligations to keep records, and to report to the Vendor or give the Vendor access to such records all as required by the terms set out in this Schedule, the Vendor's right under Section 10 to call for an audit of the Purchaser's records will be limited to the then-preceding twenty-four (24) month period. Any claim under Section12 must be made within twenty-four (24) months after the date of any statement delivered to the Vendor by the Purchaser in accordance with Sections 5 and 9 which gives rise to such claim.

14. The Vendor may not sell, encumber, assign, convey, transfer or otherwise dispose of any or all of its rights and claims to the Royalty Payment or its other rights and claims arising under the terms of this Schedule without the prior written consent of the Purchaser, not to be unreasonably withheld.

15. All statements delivered by or on behalf of the Purchaser to the Vendor pursuant to the terms set out in this Schedule will be in a form and content, agreed to by the Purchaser, so as to permit the Vendor to use them in connection with applicable financial reporting requirements.

16. If there is:

    (a) a Change of Control and

    (b) no Royalty Payment Coal has been loaded for shipment through the FMC Load-Out in reasonable commercial quantities for a period of twelve (12) consecutive months at any time after the date of the Change of Control, other than if such

cessation of loading for shipment for a period of twelve (12) consecutive months is as a result of:

(i) an event of Force Majeure; or

(i) no coal reserves remaining at the Willow Creek Coal Mine as reported in accordance with National Instrument 43-101 — *Standards of Disclosure for Mineral Projects* (**"NI 43-101"**); or

(ii) coal reserves remaining at the Willow Creek Coal Mine as reported in accordance with NI 43-101 are no longer economic at the prevailing cost and price conditions.

then the Vendor, at its option, may declare 50% of the total amount of the Royalty Payment, less any amounts paid under the terms set out in this Schedule up to the date of such declaration, by the Purchaser to the Vendor in accordance with the terms set out in this Schedule, and such moneys and liabilities shall forthwith become due and payable to the Vendor, and the Vendor may take such actions and commence such proceedings as may be permitted at law or in equity (whether or not provided for herein) at such times and in such manner as the Vendor, in its sole discretion, may consider expedient; all without presentment, demand, protest or other notice of any kind to the Purchaser, all of which are hereby expressly waived by the Purchaser. The rights and remedies of the Vendor hereunder are cumulative and are in addition to and not in substitution for any other rights as remedies provided by Applicable Law.

17. If, at any time and from time to time, the Purchaser proposes to enter into any transaction pursuant to which it will dispose of any right or entitlement to all or any portion of the FMC Load-Out to any third party, then as a condition of such transaction the Purchaser will require that the third party that is acquiring such right or entitlement assume the obligations of the Purchaser under the terms set out in this Schedule to an extent proportionate with the percentage right or entitlement to the FMC Load-Out that such third party will acquire under the proposed transaction.

18. The Royalty Payment, as set out in this Schedule will be secured by specific assignments by way of security granted by FMC and Pine Valley Coal Ltd. of the *Coal Act* (British Columbia) licenses which are in the name of FMC and Pine Valley Coal Ltd. respectively as at the time that the Agreement is entered into and which are as set out in Schedule 1.1(vv) to the Agreement and such assignments will be on terms mutually agreed to between the Purchaser and the Vendor, each acting reasonably. The Vendor agrees to subordinate the aforementioned security interests in favour of one or more arms length third party lenders which provide financing to the Purchaser or FMC from time to time.