IN THE MATTER OF THE *Arbitration Act, R.S.A. 2000, c. A-43*

JUDICIAL CENTRE	**Edmonton**
APPLICANT	[redacted]
RESPONDENT	[redacted]
DOCUMENT	**PROCEDURAL DIRECTION**

The Application

1. The Applicant [redacted] seeks a direction that a representative of the Respondent [redacted] and certain employees submit to examinations on oath prior to the hearing of the arbitration.

The Agreement

2. [redacted] and [redacted] are parties to a Sublease/Area Royalty Agreement dated October 1, 2007 (the **Agreement**) which relates to the excavation of aggregate by [redacted] from certain lands in return for a monthly royalty payment payable to [redacted] based on the number of tonnes of aggregate excavated and removed. The Agreement also requires [redacted] to pay a Shortfall Royalty if the excavation of aggregate during any given year is less than 50,000 tonnes. The term of the Agreement is 10 years less one day commencing October 1, 2007.

3. Paragraph 3.2 of the Agreement states:

> Commencing September 15, 2010 and on an annual basis thereafter [redacted] shall have an to option to, from time to time, to exclude specific parcels of [redacted] Lands or [redacted] from production, in the event and during such period or periods of time as it becomes not Economically Feasible to continue excavating Aggregate from the specific parcels or Aggregate is exhausted from the [redacted] or [redacted] In order to exclude such parcels [redacted] shall give written notice prior to October 1st in any given Year of specific parcels to be excluded.

4. "Economically Feasible" is defined in paragraph 1.1(f) of the Agreement:

> "**Economically Feasible**" means a minimum 20% net (before tax) return based upon the then August average aggregate market price in

North Edmonton and [redacted] reasonable direct (hard) cost for aggregate removed from the Lands and transportation to market.

5. Paragraph 11 of the Agreement is an arbitration clause, which states that any dispute or difference between the parties concerning the validity, meaning or effect of the Agreement shall be conclusively settled by arbitration. The arbitration is to be conducted in accordance with the *Arbitration Act*, R.S.A. 2000, c. A-43 (the ***Act***). The arbitration clause does not address the matter of examinations on oath prior to the hearing of the arbitration.

The Dispute

6. Since entering into the Agreement, [redacted] has not excavated any aggregate from the lands.

7. [redacted] claims that the extraction of aggregate from the lands was not Economically Feasible in 2010 and is not Economically Feasible in 2011. On September 27, 2010, [redacted] gave notice to [redacted] that all lands under the Agreement "are not currently Economically Feasible to excavate Aggregates from". [redacted] gave a similar notice on September 30, 2011.

8. [redacted] claims that by these notices [redacted] has stated it intends to breach the Agreement by failing to pay the Shortfall Royalty. [redacted] seeks an award equal to the Shortfall Royalties unpaid for the year ending September 30, 2011 in the amount of $1,500,000 and a declaration that it is entitled to royalty payments for the year ending September 30, 2012.

9. [redacted] states that it has paid [redacted] $4,500,000 in Shortfall Royalties since the Agreement was executed. [redacted] seeks a declaration that the extraction of aggregate from the lands was not Economically Feasible for both 2010-2011 and 2011-2012 and that it is not obliged to pay Shortfall Royalties for those years.

10. The parties have submitted the dispute to arbitration.

Submissions

11. [redacted] claims in its application that it is "in the interests of fairness and efficacy" for [redacted] to explore the available evidence prior to the hearing of the arbitration.

12. [redacted] argued that one of the issues on the arbitration will be whether paragraph 3.2 of the Agreement is available to [redacted] when [redacted] never excavated any aggregate from the lands, focussing on the phrase "it *becomes* not Economically Feasible to *continue* excavating Aggregate" (counsel's emphasis). [redacted] argued that evidence of the commercial context and background will be relevant to interpret the Agreement, relying on the Alberta Court of Appeal decision in *ATCO Electric Ltd. v. Alberta (Energy and Utilities Board)*, 2004 ABCA 215, which states at para. 77:

> It must be understood therefore that the search for the parties' intentions is conducted on an objective basis, meaning that the focus is on what a reasonable person would infer from the words used. This interpretive exercise must be undertaken with due regard to the entire contract. One cannot simply pick and choose clauses – or parts of clauses – without considering the contract as a whole. It also means being alive to the relevant background against which the contract was concluded, the purpose of the exercise being to ascribe to the written text the most appropriate meaning which the words can properly bear.
> ...

13. [redacted] also claimed that evidence concerning the reasons [redacted] has not excavated any aggregate from the lands, and whether that decision has anything to do with economics, will also be relevant. Finally, [redacted] focused on the definition of "Economically Feasible" and the need to explore the components of the calculation, including the "August average aggregate market price in North Edmonton" and '[redacted] reasonable direct (hard) cost for aggregate removed from the Lands and transportation to market", the latter of which is peculiarly within the knowledge of [redacted]

14. [redacted] stated that it needs examination on oath prior to the hearing to prove its own case, to know the case it has to meet and to challenge the case of [redacted] [redacted] has identified four [redacted] representatives who it claims would have knowledge of the commercial context of the Agreement, [redacted] business plan prior to entering into the Agreement, internal costing, [redacted] reasonable direct (hard) costs and costs for transportation to market.

15. [redacted] anticipated that examinations of [redacted] representatives would take days not weeks.

16. [redacted] opposed the application, on the basis that arbitrations are designed to be a more expedient and cost-effective manner of resolving disputes. [redacted] argued the direction sought by [redacted] would be extraordinary in terms of cost and delay, and that the issue in the arbitration involves the interpretation of a commercial agreement which will be resolved primarily based on objective facts reflected in the records. [redacted] acknowledged that regard may be had to the commercial matrix at the time the agreement was entered into, but only to the extent of the rationale for the inclusion of certain terms, and argued oral discovery will be of limited value with respect to this issue.

17. [redacted] stated that [redacted] has the onus of establishing that examinations prior to the hearing of the arbitration are necessary. [redacted] argued that the examinations sought would result in delay and increased cost and that [redacted] has not demonstrated that these examinations are necessary.

18. [redacted] claimed that the breadth of the request, that is, to examine a corporate representative and four employees, was exceptional. Such examinations would undoubtedly lead to requests for undertakings and further examination on undertakings, which would result in more pre-hearing examinations than would occur if this was a court proceeding. This is inconsistent with the parties' desire as reflected in the Agreement to resolve their disputes in an efficient and cost-effective manner.

19. [redacted] also claimed the request for pre-hearing examinations before documents have been exchanged is premature. Most if not all of the evidence will be addressed in the disclosure of documents. If they are not, [redacted] can make specific requests for additional documents.

20. Finally, [redacted] claimed that the issues in the arbitration are relatively straightforward. The first issue is whether [redacted] can rely on paragraph 3.2 of the Agreement having regard to the fact that no aggregate was removed. The second issue is whether it was not Economically Feasible to continue excavating aggregate, which will require an

assessment of the components of the definition of Economically Feasible, that is, the price and the cost of removing aggregate and transporting it to market.

21. [redacted] argued that the approach to discovery should be incremental and that a more limited approach should be preferred. Alternatives should be considered to the broad request made by [redacted] If some discovery in addition to document discovery is considered necessary, the first step should be interrogatories. This would be less expensive and more efficient. If after interrogatories either party could demonstrate an additional need for discovery, questions could be addressed to [redacted] corporate representative. The person who would be [redacted] corporate representative is not one of the individuals identified by [redacted] but is another person with a complete knowledge of the relevant facts.

Decision

22. It is common ground between the parties that the arbitrator may determine the procedure to be followed in the arbitration and has jurisdiction to order parties or persons to submit to examinations under oath prior to the hearing of the arbitration. Section 25(6) of the *Act* states that the parties shall comply with the directions of the arbitral tribunal, including directions to submit to examination on oath with respect to the matters in dispute.

23. The parties also agree with the objective of avoiding delay and unnecessary expense. To that end, [redacted] proposes oral examinations of four witnesses and a corporate representative of [redacted] which it expects could be conducted in two to three days, or in any event in less than one week. [redacted] proposes an incremental process that would start with document production, then interrogatories, and then but only if necessary an examination on oath of a corporate representative. [redacted] claims it is premature before document production to determine whether any examinations on oath will be necessary.

24. In *Jardine Lloyd Thompson Canada Inc. v. SJO Catlin*, 2006 ABCA 18, the Alberta Court of Appeal held that prior to ordering examinations for discovery of third parties in an arbitration, the tribunal must be satisfied that the evidence may be useful for the

purposes of the arbitration and must weigh the competing relevant interests and value, including the time and expense of additional discovery. In my view, that is an appropriate test to apply in this case. [redacted] has met that test.

25. I have concluded that some pre-trial examinations on oath will inevitably be necessary in this case to ensure, as required by section 19(1) of the *Act*, that the parties shall be treated "equally and fairly". I am satisfied that I can reach this conclusion at this stage, before the production of documents, based on the pleadings, the relevant provisions in the Agreement and the nature of the dispute. I agree with counsel for [redacted] that the relevant background against which the contract was concluded, the reasons [redacted] has not excavated aggregate from the lands, and the price and cost components of the definition of "Economically Feasible", among other things, are facts that will be most efficiently and fairly explored on examination on oath.

26. Having said that, I also consider it important to recognize that one of the purposes of the parties' agreement to resolve their disputes by arbitration was to avoid some of the inefficiencies and unnecessary expense of court proceedings. The scope of examinations proposed by [redacted] is at least as extensive as would be expected if this case were to be litigated, rather than arbitrated, and would undermine that objective.

27. I do not consider that the incremental approach proposed by [redacted] would save time or reduce cost. Interrogatories are often an inefficient method of eliciting facts. They take time to ask and to answer. Frequently the answers provided are not as satisfactory to the examining party as oral examinations. Follow-up interrogatories are often required. I expect that following interrogatories, there would be a request for examinations on oath. Given my view about the inevitability of examinations on oath, this would merely serve to increase the pre-hearing time and cost.

28. I am not however prepared to make the extensive order that [redacted] seeks. Counsel for [redacted] stated in argument that the [redacted] corporate representative would have complete knowledge of the relevant facts. While that remains to be tested, I take that to mean that there is at least one person with a relatively broad familiarity with the critical areas that counsel for [redacted] wishes to explore on examination.

29. To achieve the objectives of fairness and efficiency, and to recognize both the parties' needs to procure relevant evidence before the hearing and the parties' choice of arbitration as the method to resolve their dispute, I have concluded that [redacted] is entitled to conduct examinations on oath prior to the arbitration hearing, but that those examinations will be limited to [redacted] corporate representative and up to two other employees. I have also concluded that a time limit is appropriate and that the examinations are to be conducted in no more than three days. If undertakings are requested, and counsel for [redacted] anticipates a further examination on the undertaking responses, the time for that examination is to be included in the total of three days.

30. I recognize that it is not possible to anticipate before documents are produced and before some examinations are conducted whether this limit on the number of persons to be examined and the total time permitted will be sufficient. Circumstances can change. If following the document production and the examination of these witnesses, counsel for [redacted] considers additional witnesses or time are required, and counsel for the parties cannot reach agreement, I will hear an application for additional discovery.

Dated at Calgary, Alberta.
December 14, 2011

D.J. McDonald, Q.C.
Arbitrator

Counsel for the Applicant [redacted]

Counsel for the Respondent [redacted]