SUPREME COURT OF NOVA SCOTIA

Citation: *Canco Manufacturing Holdings ULC v. PFI Interests, LLC*, 2021 NSSC 320

Date: 20211116
Docket: *Hfx*, No. 504186
Registry: Halifax

Between:

Canco Manufacturing Holdings ULC

Applicant

v.

PFI Interests, LLC

Respondent

Judge:	The Honourable Justice Ann E. Smith
Heard:	August 31, 2021, in Halifax, Nova Scotia
Counsel:	Cory Withrow, for the Applicant James MacNeil, for the Respondent

By the Court:

Background

[1] The Applicant, Canco Manufacturing Holdings ULC ("Canco"), the Respondent, PFI Interests LLC ("PFI"), and Cabot Manufacturing Holdings ULC ("Cabot Holdings") are the shareholders of Cabot Manufacturing ULC ("Cabot"). Cabot manufactures various building materials, including wallboard and steel studs. Cabot Holdings is not involved in this application.

[2] Mark Buller is the sole director of Canco, and the principal of Marjam Supply Co., Inc. ("Marjam"). Marjam is one of Cabot's customers. Mr. Buller is also a 60% shareholder of Acadia Atlantic ULC ("Acadia"), one of Cabot's biggest customers. John Piecuch is the President, a director, and the majority shareholder of PFI. Marcel Girouard is the sole owner of Cabot Holdings, and owns 40% of the shares in Acadia. Mr. Girouard is also the President and Chief Executive Officer of Cabot.

[3] On March 28, 2017, Canco, PFI, and Cabot Holdings executed Cabot's shareholders' agreement ("SA"), which sets out the shareholdings as follows:

> Canco: 450 Common Shares (45%)
> PFI: 150 Common Shares (15%)
> Cabot Holdings: 400 Common Shares (40%)

[4] On the same date, Canco and PFI executed a voting trust agreement ("VTA"), which named Canco as the "voting trustee", and PFI as the "shareholder". The VTA provided that Canco was entitled to exercise all voting rights in respect of PFI's shares, except with respect to: (1) the approval of capital expenditures by Cabot under $50,000 or over $1,500,000; (2) the sale of all, or substantially all of the assets of Cabot; or (3) the establishment of the sale price of wallboard in connection with a sale by Cabot to Marjam.

[5] At shareholders' meetings held on August 27 and September 9, 2020, Canco brought several motions forward. In addition to voting its own shares, Canco purported to vote PFI's shares in favour of the motions. John Piecuch took the position that the motions raised by Canco fell within the "excluded matters" outlined under section 3 of the VTA, and that, as a result, PFI was entitled to vote its own shares. Mr. Piecuch voted against the motions. Carmen Arguelles, a principal of Canco and acting Chair of the meetings, ruled that PFI had voted in favour of the motions in accordance with the terms of the VTA.

[6] Canco has filed this Application seeking a declaration that it had the right under the VTA to vote PFI's shares at the August and September 2020 shareholders' meetings. In its Notice of Contest, PFI pleads that Canco was not entitled to vote

PFI's shares because the motions fell within the exclusions set out in the VTA. It also seeks a declaration that section 5 of the VTA, which provides that Canco has no duty to account to PFI, is against public policy, making it void *ab initio*.

Issues

1. Was Canco entitled under the VTA to vote PFI's shares on the motions raised at the August and September shareholders' meetings?

2. Has Canco committed a breach of trust or a breach of its fiduciary duties to PFI as trustee?

3. Is section 5 of the VTA against public policy, making it void *ab initio*?

The Shareholders' Agreement

[7] The recitals to the SA provide:

> **SHAREHOLDERS' AGREEMENT** dated as of March 28, 2017 among Canco Manufacturing Holdings, ULC ("**Canco Manufacturing**"), Cabot Manufacturing Holdings Inc. ("**Cabot Holdings**"), PFI Interests, LLC ("**John Holdco**"), Carmen Arguelles ("**Carmen**"), Marcel Girouard ("**Marcel**"), John Piecuch ("**John**") and Cabot Manufacturing ULC, an unlimited liability company incorporated under the laws of the Province of Nova Scotia.
>
> **WHEREAS** the Parties have entered into this Agreement for the purpose of setting forth, *inter alia*, the manner in which the business and affairs of the Corporation shall be conducted, the manner in which the operations of the Corporation shall be financed, and the respective rights and obligations of the Parties arising out of or in connection with the ownership of Shares of the Corporation.

[8] Section 1.6 provides that the SA constitutes the entire agreement between the parties:

Section 1.6 Entire Agreement.

This Agreement constitutes the entire agreement between the Parties pertaining to the subject matter hereof and supersede [sic] all prior agreements, understandings, negotiations and discussions, whether oral or written, of the Parties. There are no representations, warranties, conditions or other agreements, express or implied, statutory or otherwise, between the Parties in connection with the subject matter of this Agreement, except as specifically set forth herein. This Agreement was negotiated through joint discussions and participation of the parties and shall be construed neither against nor in favour of any of them, but rather in accordance with its fair meaning.

[9] Article 3 addresses "Management of the Corporation". Section 3.1(1) states:

Section 3.1 Business Management and Corporation Action.

(1) The powers of the Board of Directors of the Corporation to manage the business and affairs of the Corporation, whether such powers arise from the Act, the Memorandum or the Articles of the Corporation or otherwise, are hereby restricted to the fullest extent permitted by law. In accordance with this Agreement, the Shareholders shall have, enjoy, exercise and perform all the rights, powers and duties of the Board of Directors of the Corporation to manage the business and affairs of the Corporation.

[10] Section 3.1(2) outlines a series of decisions or actions that will not be effective without the affirmative vote of 51% or more of the voting shares or the consent of all shareholders in writing. Section 3.1(3) deals with sales to Marjam:

(3) Establishing the sale price of wallboard in connection with a sale by the Corporation to Marjam Supply Co., Inc. shall require the written consent of 60% of the Voting Shares while Shareholders Controlled by John hold Voting Shares in the capital of the Corporation (the "**John Shares**"), and, in the event that one or more Shareholders Controlled by the trustees of the Building Material Trust purchases all of the John Shares, such decision shall require the written consent of 75% of the Voting Shares.

The Voting Trust Agreement

[11] The recitals to the VTA provide:

> **WHEREAS** the Shareholder holds 150 Common shares … (the "**Current Shares**") in the capital of Cabot Manufacturing ULC (the "**Corporation**");
>
> **AND WHEREAS** the Shareholder and the Voting Trustee wish to make provisions for the manner in which the voting rights attaching to the Shares will be exercised;
>
> **NOW THEREFORE THIS AGREEMENT WITNESSES** that in consideration of the mutual covenants hereinafter provided and for other good and valuable consideration the receipt and sufficiency of which are acknowledged, the parties hereto agree as follows:

[12] Section 1 provides for an endorsement on the share certificates evidencing the voting trust agreement:

> 1. **Endorsement Upon Share Certificates.** All certificates representing the Shares shall be endorsed with the following notice:
>
>   "The Shares evidenced by this certificate are subject to the terms and conditions of a Voting Agreement made as of the 28th day of March, 2017."

[13] Section 2 gives Canco the right to vote PFI's shares:

> 1. **Appointment of Trustee.** Subject to Section 3, during the term of this Agreement, the Voting Trustee shall be entitled to exercise all voting rights of every kind and nature in accordance with this Agreement, including the right to vote in person or by proxy, or execute and deliver written shareholder consents (the "**Rights**"), in any respect of the Current Shares issued to the Shareholder and any other voting shares in the capital of the Corporation issued to the Shareholder following the date hereof ("the **Shares**").

[14] Section 3 sets out the three exemptions to Canco's right to vote PFI's shares under section 2:

> 1. **Voting of Shares.** Except with respect to: (i) the approval of capital expenditures by the Corporation under $50,000 or over $1,500,000, (ii) the

> sale of all, or substantially all of the assets of the Corporation, or (iii) the establishment of the sale price of wallboard in connection with a sale by the Corporation to Marjam Supply Co., Inc. (the "**Excluded Matters**"), until the Termination Date, the Voting Trustee shall cause the Shares held subject to the Voting Trust or subject to a proxy or power of attorney in favour of the Voting Trust to be voted in accordance with the decision of the Voting Trustee.

[15] Section 5 provides that Canco owes no duty to account to PFI:

> 5. **No Duty to Account.** In voting on matters which may come before any meeting of shareholders of the Corporation or otherwise exercising the Rights, other than Excluded Mattes [*sic*], the Voting Trustee may vote the Shares in its sole and absolute discretion subject to applicable law. The Voting Trustee may exercise the Rights to vote in favour of or confirm or ratify any matter, notwithstanding that a vote against such matter might give rise to a right to object, complain, or seek an oppression or appraisal remedy under the *Companies Act* (Nova Scotia) or pursuant to any other applicable legislation or common law. The Voting Trustee shall be under no duty to account to the Shareholder or any other holder of the Shares, nor shall the Voting Trustee incur any responsibility or liability to the Shareholder by reason of any error of law or by any matter or thing done or omitted under this Agreement, except for his wilful misconduct or bad faith.

[16] Section 7 limits PFI's right to transfer the shares, and addresses termination of the agreement:

> **7. Transfers and Termination of Agreement.** The Shareholder is prohibited from transferring, pledging (other than a pledge that has been approved pursuant to Section 4.2 of the Corporation's shareholders' agreement dated March 28, 2017, as may be amended from time to time) (the "**Shareholders Agreement**") or otherwise disposing of the Shares unless the Shareholder causes to be delivered to the Voting Trustee a written agreement with the transferee pursuant to which the transferee becomes bound to the provisions of this Agreement. Notwithstanding the foregoing, in the event that the other shareholders of the Corporation do not exercise their right of first refusal pursuant to Section 6.3 of the Shareholders Agreement, this Agreement shall automatically terminate on the date that the Shareholder sells all of its Shares to a Buyer (as defined in the Shareholders Agreement) in accordance with Section 6.3 of the Shareholders Agreement.

[17] Finally, section 8 gets out several general provisions, including a severability clause:

> d. Severability: If any provision of this Agreement shall be declared void or unenforceable by any court or administrative board of competent jurisdiction, such provision shall be deemed to have been severed from the remainder of this Agreement and this Agreement shall continue in all respects to be valid and enforceable.

The Evidence

[18] Canco's evidence on this application is the affidavit of Carmen Arguelles. Ms. Arguelles was not cross-examined. PFI's evidence consists of the affidavit of John Piecuch. Mr. Piecuch was cross-examined. One additional exhibit, an email chain, was entered by Canco during Mr. Piecuch's cross-examination.

Canco's evidence

[19] In her affidavit, Ms. Arguelles notes that on August 12, 2020, Canco issued a notice of shareholder meeting to all shareholders of Cabot, and to Cabot's CEO and President, Marcel Girouard. The notice outlined several items to be considered at the meeting, including:

> a) Establishing procedures involving extending credit and pricing to Cabot's customers, including but not limited to affiliate companies of any of the board members and shareholders.

[20] Ms. Arguelles later received an email from Mr. Piecuch, addressed to herself and Mark Buller, indicating that PFI would be voting PFI's shares on the items to be discussed at the August meeting. Mr. Piecuch also expressed his disapproval of business decisions being made by Mr. Buller and Ms. Arguelles in relation to Acadia, one of Cabot's biggest customers. In Mr. Piecuch's view, these decisions would have a negative impact on Cabot's operations and profitability. The email states, in part:

> Mark/Carmen:
>
> While I am in 'catch up mode' with respect to what has and is transpiring with respect to Acadia an [*sic*] Cabot, I am obligated to send this e-mail. Frankly, I am deeply disturbed by the actions you have taken at Acadia, and the direct consequences they will have on the operations and profitability of Cabot.
>
> Collectively, your actions/initiatives will have a significant negative impact on the businesses we are in the process of selling. You are deliberately reducing the value of my equity position in Cabot.
>
> Obviously, and for reasons I am not able to comprehend, you have failed to take into consideration the significant strategic interdependence between Acadia and Cabot and the sales price valuation that incorporates the operations of the two combined businesses. A key strategic factor that has been discussed on many occasions.
>
> Furthermore you have apparently totally ignored the important customer loyalty that Marcel and his family have earned over the past number of years. As a consequence, sales volumes are in jeopardy, which will directly impact Cabot's operations, costs and profitability.
>
> …
>
> This leads me to your request for a shareholder meeting on August 24th.
>
> I am not able to attend for medical reasons, of which you have already been informed. At the same time, you have not provided adequate notice for the meeting. A notice dated August 12th for a meeting August 24th does not provide the appropriate 10 business days notice, which has been confirmed by both of the law

> firms which represent my business interests. As well, you can not just propose to vote my equity interest in Cabot.
>
> We are in the process of selling the business and I am sure you understand that in that circumstance, only I will be voting my equity position. Furthermore, Cabot is in the process of undertaking a significant capital expenditure of approximately $6 million or well above the $1.5 benchmark established in our shareholders agreement. In this situation, my vote must be taken into consideration and I am concerned that your actions could impact already established contractual obligations with the potential of financial damages being awarded to our proposed vendors. Not to mention the potential negative impact on the future cost structure, product profile and profitability of Cabot. Key elements that will determine the sales price for the Cabot business we are planning to sell.
>
> In summary, I believe you have already significantly negatively impacted the valuation of my equity interest in Cabot by your ill conceived actions. A continuation of your current course of activity has the real threat of destroying even more value to the Cabot business. Consequently, I am prepared to take whatever legal action is required to protect the value of Cabot and my equity interest in the Company.
>
> [Emphasis added]

[21] In her response to Mr. Piecuch dated August 24, 2020, Ms. Arguelles placed blame for any issues at Acadia on Marcel Girouard, whom she accused of undermining Cabot's major customers by "pure sabotage". She said he "stepped down", conspired to have Acadia's employees leave the company, and set his son up as a competitor, among other things. As for Mr. Piecuch's statements that they were "in the process of selling the business" and that he planned to vote PFI's shares, Ms. Arguelles responded that "Cabot is not currently for sale". She added that the agenda items to be discussed at the meeting did not fall within the exemptions to the VTA. Ms. Arguelles reiterated that they "have done nothing to impact Cabot negatively". She concluded the email by imploring Mr. Piecuch to "get on the phone

with me and hear both sides before you just take sides against us with misleading/bad information".

[22] The shareholders' meeting took place on August 27, 2020. Ms. Arguelles acted as Chair. According to the minutes she prepared, Ms. Arguelles directed PFI to vote in favour of the motions being voted upon, in accordance with the VTA. Under the heading "Discussion", the minutes indicate:

> John stated that he does not agree to vote in accordance with the Voting Trust Agreement because the outcome of the votes will impact the value of his shares. Carmen replied that none of the topics for the meeting have to do with the sale of the company but she will note the objection.

[23] Canco presented three motions, only one of which is at issue in this Application. The relevant motion (the "Credit and Pricing Motion") was as follows:

> **B. To establish procedures involving extending credit and pricing to Cabot's customers, including but not limited to affiliate companies of any of the board members and shareholders.**
>
> RESOLVED, that Cabot will adhere to the following policy and procedure before extending credit and pricing to a customer:
>
> Credit Line Approval Criteria
>
> 1. New companies must be sold on a COD basis and may be reviewed after one year. A "new company" is a company formed within 2 years; it is not new as in new to doing business with Cabot. Exceptions to this policy will be reviewed on a case by case basis

and any deviation will require the approval by the shareholders in accordance with the shareholder agreement.

2. A credit report on the customer. Credit scores worse than "Good" and reports of pending legal matters, liens and judgements should flag the application.
3. All credit reference responses must be reviewed, including the credit line given by other companies to the customer and past payment performance.
4. Bonded jobs or joint pay agreements may warrant a higher credit line limited to the specific named project.
5. Personal guarantors are required when the applicant is a new company with no or little payment history.

   b. Personal Guarantors must be evaluated to determine if there are sufficient assets to cover the liabilities of the applicant.

1. The shareholders approve all credit lines over $50,000 and customer payment terms exceeding net 30 by vote in accordance with the shareholder agreement. For these customers a personal guarantee must be obtained and that guarantor must have a credit rating of at lease [sic] "good" and assets in their name to support the credit line.

Customer Pricing Criteria

1. Within 7 days following this meeting, the shareholders will create a price list and pricing policies for the company to use in selling product to its customers. Pricing guidelines will include, but not be limited to:
   a. a requirement that shareholder approval is required on all discounted prices below the set profit margins that will be determined by the shareholders. Discounted pricing also includes discounted payment terms. for example, 2% 10 days. 1% cash payment, etc. Factors to be considered by the shareholders for discounted pricing are:
      i. Large orders may receive discounted pricing (large orders need to be further defined by the shareholders)
      ii. Large projects may receive project pricing (large projects need to be defined by the shareholders)
   b. Annual rebates will be considered based on a customer's sales volume during the prior calendar year and a customer's success in achieving the purchasing goals established by Cabot. The guidelines

> will provide a maximum rebate allowable without shareholder approval and require that shareholder approval must be obtained for any rebate exceeding such amount. Factors considered in determining the rebate amount:
>
> i. High volume purchases over a 12 month period
>
> ii. COD customers
>
> iii. Large orders may receive discounted pricing.
>
> iv. Large projects may receive project pricing.
>
> 2. Changes to the pricing policy and references to shareholder approval used herein shall be made by a vote of the shareholders in accordance with the shareholder agreement.
>
> *** The intent of customer pricing, payment discounts and rebates is to assure that a customer meets its purchase targets as established by Cabot.

[24] Under the heading "Discussion", the minutes state:

> John noted that a lot of factors go into establishing pricing to a customer. He noted that Marcel needs to make decisions and policies need to be nimble. John wanted to know how the pricing was going to be established at the meeting. John noted that he is not sure about how he wants to vote and he wants to look at everything on paper.
>
> Marcel noted that he needed to see the policies on paper before a vote.
>
> Carmen noted that the purpose of establishing price guidelines is so Cabot can reach annual profit targets and agreed the policies need to be nimble. Carmen noted that the point is to make a play book so it is easier for Marcel. Carmen noted that the policies should give Marcel parameters so that when he goes outside the parameters he must come to the shareholders, but he can make decisions as long as they are within the parameters. Carmen noted that the resolution being voted on today gives the shareholders 7 days to work on a price list and that a vote will be held today.

[25] Canco voted in favour of the motion, while Mr. Piecuch for PFI and Mr. Girouard for Cabot Holdings voted against it. However, Ms. Arguelles, as Chair, decided that Mr. Piecuch "was obliged in law to honor instructions given to him

under the Voting Trust Agreement, and that John Piecuch had voted against Motion B contrary to those instructions. In result, Motion B passed."

[26] Following the meeting, Ms. Arguelles provided Mr. Piecuch with a copy of the minutes. On August 31, 2020, Mr. Piecuch sent the following email to Ms. Arguelles and Mr. Buller, with a copy to Mr. Girouard:

> Unfortunately, today has been my first opportunity to review your, I assume, draft minutes of our recent shareholders meeting. While these minutes raise a variety of questions on my part, I fundamentally disagree with your assertion that my equity interest in Cabot can be voted by Mark's interests. We are in the process of selling the Cabot and Acadia businesses. You very well understand that under this circumstance, only I can vote my equity position.
>
> Consequently, unless you correct the minutes and recognize my voting authority for my equity position, I will have no other option other than [*sic*] have my attorney initiate legal proceedings in order to protect and validate my family's equity in Cabot.
>
> Frankly, I am perplexed at what has transpired, on your initiative, over the last number of months. The actions taken by Marjam and related entities has done nothing but disrupt and severely damage a well functioning Cabot/Acadia business operation. A business combination that could have had considerable positive momentum going forward.
>
> The significant value that has been created in just over two years through the hard work and time spent by myself, and deservedly by Marcel in particular, has been severely damaged. I will charitably describe your organizational realignment at Acadia, as well as Marjam's failure to meet it's [*sic*] purchase commitments of wallboard and steel that were discussed at length when the new Acadia and Cabot were established as ill conceived, irresponsible and without merit. Your actions have and will have going forward, a major negative impact on both companies [*sic*] profitability, refinancing prospects and valuation at time of sale. Furthermore, your actions have damaged employees [*sic*] morale and sense of security, hurt

> the companies [*sic*] credibility with respect to our current and future customer base and importantly, opened up unwanted publicity and knowledge of the companies [*sic*] inner workings and corporate structure.
>
> Obviously, I need my concerns addressed immediately!
>
> For the life of me, [*sic*] do not understand why you have taken this course of action!
>
> [Emphasis added]

[27] Ms. Arguelles replied to Mr. Piecuch later that day:

> John,
>
> Hope you are well. We've always had the right to vote your shares on the matters addressed at the meeting. We will continue to comply with our voting trust agreement and expect you to do the same. We are not aware of any pending sale of Acadia and/or Cabot. The talks with BNBM terminated several months ago, and we have not been notified of any other prospects. If you and Marcel are in discussions with BNBM or anyone else then we should be notified and involved per our shareholder agreement and subsequent meetings on the matter.
>
> Last we left off you were volunteering to be the middle man to broker a deal between Mark and Marcel – let us know if that is no longer the case. Re: Acadia – I don't know who told you Acadia was thriving, but it is and has been losing money. We are trying to turn Acadia around and using our 40+ years' experience in running a profitable distribution business to assist Acadia in turning a profit. I'm surprised you are taking the position you do when you are very familiar with Marjam's success.
>
> I called you chat [*sic*] but your phones went to VM call me anytime.

[28] Also on August 31, 2020, Mark Buller circulated a notice of shareholder meeting to be held on September 9, 2020. Mr. Buller set out the following matters to be considered:

> This meeting is to consider the following:

> 1. Pursuant to Resolution B which was approved at the August 27 meeting, we must create a Cabot price list within 7 days of the meeting. Although the resolution was passed by majority vote of the shareholders, Canco is willing to extend the time to create the price list from within 7 days to within 10 days. Thus, we have until September 7 to create the Cabot price list and we should immediately start this process and work in good faith to accomplish the task by the 7th. Marcel and I will work next week to develop the price list and will send it to John on the 7th. We will then ratify the price list at the Sept 9 shareholder meeting.
>
>   a. Marcel, as President, we would like your opinion and advise [*sic*] on pricing and margins by early next week. Please also send us any and all current price lists, margin reports and inventory turn reports for each product sold by Cabot by early next week.
>
>   b. We will discuss any follow up comments to or question regarding Cabot price list and decide on the final version.
>
> 2. Credit, including credit terms, to MCR Supplies and any other "new company", as defined at the August 27 meeting. In preparation for this discussion, Marcel, please send us all information used to determine the credibility of these customers, including but not limited to: credit application, credit report of the company and each personal guarantor, three most recent bank statements of the applicant and personal guarantor.
>
> 3. Whether Natalie Girouard, a current employee of a Cabot customer, can be hired by Cabot.
>
> 4. Whether Karine Morneault, currently doing work for a Cabot customer, can be hired by Cabot. …

[29] At the meeting on September 9, 2020, Ms. Arguelles again acted as Chair, and directed PFI to vote in favour of the motions being voted on. According to the minutes, Mr. Piecuch "stated that he does not agree to vote in accordance with the Voting Trust Agreement." With respect to the first motion listed on the notice of shareholder meeting, described as "Motion A", the minutes state as follows:

> RESOLVED, that due to the lack of information that was required to be provided by Marcel, as President and CEO, we do not have enough information to hold a

> vote on resolution "A" at this time. We will extend the time to review pricing until the next shareholder meeting. We hereby hold the President accountable for his lack of cooperation and dereliction of duties.

[30] Canco voted in favour of Motion A, while Mr. Piecuch for PFI and Mr. Girouard for Cabot Holdings voted against it. Ms. Arguelles ruled that Motion A passed, but noted, "John stated that Canco does not get to vote his shares." The remaining motions were dealt with in identical fashion, with Mr. Girouard noted to have failed to provide the necessary information, resulting in the voting being held over until the following shareholder meeting.

[31] Canco says the evidence it has put before the court entitles it to declarations that Canco had the right to vote PFI's voting shares in relation to the Credit and Pricing Motion and the September meeting motions, along with declarations that PFI's voting shares were voted in favour of those motions.

PFI's evidence

[32] John Piecuch is the President, a director, and the sole shareholder of PFI. Although Mr. Piecuch said little about himself in his affidavit, he gave evidence about his background on cross-examination.

[33] Mr. Piecuch has been involved in the construction material supply industry for more than 40 years.

[34] Mr. Piecuch holds an MBA in Finance. He began his career with Richardson Securities, which he said is now RBC. He then worked in a consulting business, doing mergers and acquisitions, restructurings, and bankruptcies. From 1979 until 1986, Mr. Piecuch worked for National Gypsum, which he described as the second largest wallboard producer in the world. On January 1, 1987, Mr. Piecuch began working for Lafarge, taking on various roles before becoming CEO of the company. Mr. Piecuch said he started Lafarge's North American gypsum wallboard manufacturing business and was involved in its wallboard business in other parts of the world. He has built and restructured wallboard plants, including some of the largest in the world. Before retiring at the end of 2001, Mr. Piecuch said that he was responsible for tens of thousands of employees in his roles with Lafarge.

[35] Since his retirement Mr. Piecuch has made investments and has been involved in several construction material-related businesses. He has sat on the boards of several public companies.

[36] According to his affidavit, Mr. Piecuch has known Mark Buller personally for approximately 30 years, and he only invested in Cabot because Mr. Buller asked him to become part of the company. On cross-examination, Mr. Piecuch said Mr. Buller approached him near the end of 2015 to ask for his opinion on whether to invest in Cabot, which was, at that time, 100% owned by Marcel Girouard. Because Mr.

Buller was his friend, Mr. Piecuch made several personal visits to the facility. He also arranged for an expert from the largest gypsum wallboard manufacturing company in the world to visit the facility and verify Mr. Piecuch's opinions about the potential opportunity. Eventually, both Mr. Buller and Mr. Piecuch invested in Cabot.

[37] On March 28, 2017, Canco, PFI, and Cabot Holdings entered into the SA. On the same day, Canco and PFI executed the VTA. Mr. Piecuch stated at para. 11 of his affidavit:

> I executed the Voting Trust Agreement because it was part of the overall arrangement that was negotiated and agreed upon between myself and Mark Buller personally. I relied upon Mark Buller's representation that the volume of product [*sic*] that Marjam (a company I have known to be controlled by Mark Buller for many years) was going to buy significant volumes of wallboard and steel stud from Cabot and therefore generate revenue and profit for Cabot. I only provided voting consent and voting rights as a result of those specific representations.

[38] Mr. Piecuch testified that Mr. Buller had committed to purchasing at least 20 million square feet of wallboard and at least $6-7 million of steel studs from Cabot, and it was for that reason that Mr. Piecuch agreed to invest. Mr. Piecuch said the 20 million square feet of wallboard and steel studs would have represented a substantial increase in production volume for Cabot, substantially reducing operating costs and generating additional revenues. His evidence was the new revenues could be invested back into the company, improving Cabot's cost structures and

competitiveness, and making the company more attractive for sale at a higher valuation.

[39] Mr. Piecuch conceded that these alleged purchase commitments by Mr. Buller were not included in the SA, the VTA, or any other written document, but said that he and Mr. Buller discussed them at length on numerous occasions. It was suggested to Mr. Piecuch on cross-examination that if these representations by Mr. Buller were important to Mr. Piecuch, and in fact were the basis for his investment, he would have ensured that they were included in the SA. Mr. Piecuch responded:

> As I said in my affidavit, I've known Mark for almost 30 years. Did business with him. We became personal friends. I think I was one of the only industry people that went to his wedding. He got married late in life. And so this was based on a friendship. Otherwise, I wouldn't have spent the time and effort.

[40] Mr. Piecuch confirmed that he was represented by legal counsel at the time he signed the SA and the VTA. When Mr. Piecuch was asked if he had reviewed and understood the terms of the VTA, he replied:

> I understood the terms. Frankly, this agreement acted as kind of a placeholder. Rather than spend numerous pages describing the voting trust agreement, some of the elements here were just used as a summary of basic discussions related to the three specific exemptions included in this agreement.

[41] When asked for clarification, he said:

> I'm just saying that this basically was a summary of some very detailed discussions, most particularly related to the three exemptions noted in the agreement, in terms of when my vote would be justified.

[42] Applicant's counsel then asked whether there was another contract specifying or outlining the three exemptions in more detail. Mr. Piecuch stated:

> No, because at the time, the three of us had known each other for a number of years. We were friends and under that basis there was a general understanding of the voting trust agreement and what was included in it. It was based more on a friendship relationship.

[43] When asked in cross-examination about the first exemption under section 3 – the approval of capital expenditures by the Corporation under $50,000 or over $1,500,000 - he said emergency situations are common in wallboard plants and, for the sake of speed and convenience, it was agreed that he and Marcel Girouard would make any decisions with respect to capital expenditures of less than $50,000. Any expenditure over $1.5 million would be a major investment for the business, so Mr. Piecuch wanted to have input and vote his own shares in that situation. As for capital expenditures between $50,000 and $1.5 million, Mr. Piecuch said those issues would be discussed at shareholders' or board of directors' meetings and he would be able to have input on them. When asked whether Canco could then vote how it saw fit after hearing from Mr. Piecuch, he said:

> Yes, but, you know, there was, frankly, the understanding, given my knowledge of the wallboard manufacturing business and the operation of a plant like that, as comparison to Mr. Buller and anyone on his staff who did not have much experience, if at all, on operating a wallboard manufacturing facility, that my opinion would hold sway.

[44] When asked in cross-examination about the second exemption – the sale of all, or substantially all of the assets of the Corporation – Mr. Piecuch said it was a very important exemption because he went into the project on the basis that Marjam would purchase a substantial amount of product, and with the intention to spend two or three years operating and fixing up the plant, getting it ready for sale, and then selling it. He said he "wanted to be the final arbitrator on whether it was sold or not, because my 15% vote would either support Mr. Buller's 45%, or Mr. Girouard's 40%."

[45] Mr. Piecuch's evidence regarding the third exemption – the establishment of the sale price of wallboard in connection with a sale by the Corporation to Marjam – was that it was intended to ensure that Marjam, which he said was supposed to purchase the 20 million square feet of wallboard and $6-7 million of steel studs, would not have a competitive advantage over the other customers of Cabot.

[46] In relation to the August shareholders' meeting, Mr. Piecuch stated in his affidavit that he voted against the Credit and Pricing Motion. He believed that PFI

was entitled to vote for itself since Cabot "was in the process of being sold", and because the motion "would directly impact the pricing and payment terms to Marjam and to Acadia Drywall and could have very detrimental impacts on Cabot sales to customers that compete with Marjam and Acadia".

[47] Mr. Piecuch explained his claim that Cabot was in the process of being sold in his affidavit and his oral testimony. He said that in late 2019, BNBM, a major Chinese wallboard and steel stud manufacturer, made inquiries about purchasing both Cabot and Acadia. According to Mr. Piecuch, BNBM initiated an extensive due diligence process with the intent to purchase, at a minimum, a controlling interest in both Cabot and Acadia. In early 2020, Cabot entered into a letter of intent ("LOI") with BNBM for the sale of a controlling interest in Cabot. Mr. Piecuch noted, however, that "with the onset of the COVID-19 pandemic and the inability of the potential purchaser to travel to Canada and complete the due diligence process, the transaction has been delayed". Mr. Piecuch took the position on cross-examination that, as of the date of the hearing, BNBM was still interested in purchasing Cabot. When he was referred to an August 24, 2020 email from Carmen Arguelles where she stated that "the talks with BNBM terminated several months ago", he said she was "incorrect". When asked how he knew that BNBM was still interested, Mr. Piecuch replied, "Well, they haven't told us they're not interested. And just from

rumours you pick up in the industry. They talk about making an investment in Canada." He conceded that BNBM had not reached out to him or any other shareholders at Cabot in writing or otherwise since March 2020. Mr. Piecuch was also shown an email chain that began with a January 31, 2020 email from Marcel Girouard to Jim Holiber, who appears to be a lawyer associated with Marjam, and to Mr. Piecuch, forwarding an email from Shawn Xu at BNBM. The subject line of the email from Mr. Xu is "LOIs and NDA". Mr. Xu wrote:

> Dear Mr. Marcel,
>
> Attached is the LOIs edited by the lawyer. Please have a look to see if it's okay.

[48] The next email in the chain is dated February 25, 2020 and is from Mr. Holiber to Mr. Girouard and Mr. Piecuch. Mr. Holiber wrote, "Have we heard from bnbm?" On the same day, Mr. Girouard replied to Mr. Holiber and Mr. Piecuch, with a copy to Carmen Arguelles, stating, "Nothing new. I think we need to go to plan B." Although Mr. Piecuch did not specifically remember the email exchange, he confirmed that he would have seen it.

[49] Mr. Piecuch stated that "plan B" was to hire a broker to sell the company and/or to approach other players in the industry directly to inquire about their interest

in acquiring Cabot. He added that at the most recent shareholders' meeting on August 27, 2021, the majority voted to retain a broker to sell the company.

[50] Notwithstanding his concession that communication with BNBM had ceased by March 2020, Mr. Piecuch maintained in cross-examination that Cabot was in the process of being sold at the time of the August and September 2020 shareholders' meetings. His evidence was that by that time, he and Mr. Girouard, representing the majority interest in Cabot, had committed to selling the company due to Mr. Buller's alleged failure to honour his purchasing commitments and the resulting deterioration of the relationship between the shareholders. In Mr. Piecuch's view, once that commitment was made, PFI was entitled under the company sale exemption of the VTA to vote its own shares on any motion that was not in the best interest of making Cabot ready for sale and increasing the potential market value of Cabot as a going business concern.

[51] According to Mr. Piecuch, the Credit and Pricing Motion would hurt Cabot's business in two ways. First, it would give Marjam a competitive advantage if Mr. Buller, as a shareholder of Cabot, were to receive information about the criteria by which credit and pricing would be determined for Cabot's other customers. According to Mr. Piecuch, while BNBM was conducting its due diligence, Mr. Buller said he wanted to exit his investments in both Cabot and Acadia. For this

reason, Mr. Piecuch felt that it was inappropriate for Mr. Buller to be provided with credit and pricing information that Marjam could use to its advantage against the other Cabot customers once Mr. Buller was no longer a shareholder. According to Mr. Piecuch, the second way the Credit and Pricing Motion would hurt Cabot's business related to the cash-on-delivery requirement for new customers, which Mr. Piecuch said is "impossible in the current environment" and "not the way the business model works in this industry".

[52] Mr. Piecuch also took the position that PFI was entitled to vote its own shares on the Credit and Pricing Motion pursuant to the exemption related to the sale of wallboard to Marjam, since the credit and pricing policies, once finalized, would apply to "affiliate companies of any of the board members and shareholders".

[53] Before turning to an analysis of the issues for determination, it is instructive to review relevant case law on voting trust agreements.

[54] In its pre-application brief, Canco cites *Field v. Bachynski*, 1976 CarswellAlta 188 (S.C. A.D.) where the Alberta Supreme Court, Appellate Division considered a voting trust agreement between several shareholders who, together, held 51% of the shares of a television company. Through the voting trust agreement, the shareholders gave their right to vote their shares to one party, so that they could vote as a block

and would always retain control of the company at any shareholders' meeting. Prowse J.A., in *obiter*, described the relationship between the parties under the voting agreement as follows:

> 37 Under the voting trust agreement the parties gave up a property right - the right to vote their shares as they saw fit at meetings of shareholders of the Company - and placed that property under the control of the majority. The property right created by the agreement was the right of the majority to vote the shares at the meeting of shareholders of the Company and thereby control the next meeting of the shareholders of the Company.

[55] Canco says the contractual relationship between Canco and PFI is akin to the relationship created in *Field*. The VTA provides that Canco is "entitled to exercise all [of PFI's] voting rights of any kind and nature", except with respect to votes on matters that fall within the three discrete and unambiguous exemptions. Canco submits that none of those exemptions apply to the Credit and Pricing Motion or the September meeting motions. The *Field* decision is the only authority relied on by the applicant in its original brief.

[56] PFI also cites *Field*, but for the conclusion that the parties to the voting trust agreement have a duty to act in good faith, which PFI says Cabot has breached. In *Field*, a dispute arose as to whether each party to the agreement had one vote, as argued by the appellants, or the parties had votes based on their respective shareholdings in the company, as argued by the respondents. If the respondents were successful, the court would need to deal with the second issue argued on the appeal,

relating to a second agreement entered into by the respondents. The second agreement required the respondents to vote as a unit at the next meeting of the founding shareholders to remove the appellants as directors of the company and replace them. It also provided that the respondents would not sell their respective shares without the consent of the other parties to the agreement. The appellants argued that the respondents, by entering into the second agreement, were in breach of the duty of good faith imposed on them by the voting trust agreement.

[57] McGillivray C.J.A. concluded that each party to the agreement had one vote. In his view, the arrangement contemplated by the agreement was analogous to a partnership. As in a partnership, each party was entitled to discussion and good faith. Prowse J.A. concurred, but went on to consider the second issue in the alternative. He wrote, in *obiter*, as follows on the duty of good faith:

> 38 The voting trust agreement provided that such control would be exercised in "the best interest of each party hereto, and of Q.C.T.V.". That obligation and the circumstances that each party accorded others the right to control the right to vote the respective parties' shares imposed on all of the parties the duty to act in good faith.
>
> 39 In support of the conclusion that the parties to the voting trust agreement had a duty to act in good faith, I would refer to the principle enunciated by Lord Chancellor Eldon in *Const. v. Harris*, 37 E.R. 1191, at 1202, Turn & R 496. There a group of eight persons who owned Theatre Royal Covent Garden entered into an agreement. One of the terms was that one Brandon would act as secretary and manager. As such he was to disburse monies received in accordance with the terms of the agreement. Brandon was removed from office by the act of seven of the eight owners without notice to the eighth owner. At p. 1202 the Lord Chancellor stated:

> If the deed of 1812 was then operative, his dismissal ought to have been the act of all the partners: and I call that the act of all, which is the act of the majority, provided all are consulted, and the majority are acting *bona fide*, meeting, not for the purpose of negativing, what any one may have to offer, but for the purpose of negativing, what, when they are met together, they may, after due consideration, think proper to negative. For a majority of partners to say: We do not care what one partner may say, we, being the majority, will do what we please, is, I apprehend what this Court will not allow. So, again, with respect to making Mr. Robertson the treasurer, Mr. Const had a right to be consulted: his opinion might be overruled, and honestly overruled, but he ought to have had the question put to him and discussed. In all partnerships, whether it is expressed in the deed or not, the partners are bound to be true and faithful to each other: They are to act upon the joint opinion of all, and the discretion and judgment of any one cannot be excluded: What weight is to be given to it is another question: The most prominent point, on which the Court acts, in appointing a receiver of a partnership concern, is, the circumstances of one partner, having taken upon himself the power to exclude another partner, from as full a share in the management of the partnership as he, who assumes that power, himself enjoys.

40 That the principle there enunciated is not limited in its application to partners is clear from the decision in *Great Western Railway Company v. Rushout*, 64 E.R. 1121; 5 De. G. & Sm. 309 where the Vice Chancellor (Sir James Parker) stated at p. 1130:

> The next question is as to the exclusion of the Great Western Railway Company's directors from the meetings of the board, and the concealment from them of what has been going on. Now, it was said at the Bar that that course of proceeding was strictly within the letter of the law. I certainly was surprised to hear that proposition, because, upon every principle governing not only bodies of this kind, but governing private partnerships where there is a body of persons, in which the majority is to bind the minority, it is essential to the validity of all their acts that the voice of the minority should be heard, and that the minority should have an opportunity of stating their views; and it is not till they have had the opportunity that the acts of the majority become binding on the minority; and I think Lord Eldon's opinion in *Const v. Harris*, (T. & R. 527) may be referred to as shewing (sic) that, even if the minority had a voice given to them, still, if there existed a combination among the majority, before that voice was heard, to overbear it, he would consider the acts of such a body illegal; and, upon the principles of this Court, I think that would be so. Now, it appears to me (without stopping to consider how it is on the affidavits before that time) that the resolution of the 28th of January, and what followed it on the 4th of February, when a committee for the purpose of carrying out the resolution

> was appointed, is a course of proceeding which the Court has no difficulty in restraining.
>
> 41 In my view the principle enunciated in those cases applies equally in the present circumstances. Under the voting trust agreement the parties had an obligation to act in good faith and make their decision at a meeting. The meeting contemplated by the agreement was one at which decisions would be made by persons whose ability to act was unfettered, who would put forward views, listen to the views of others and, acting in good faith, make a decision. The respondents in coming to a meeting bound by the terms of the second agreement made a mockery of the spirit and expressed intent of the terms of the voting trust agreement.
>
> [Emphasis added]

[58] PFI also relies on *Munden Acres Ltd. v. Lincoln Trust & Savings Co.*, 1975 CarswellOnt 510 (H. Ct. J.) for the proposition that a trustee under a voting trust agreement has a duty to act in the best interest of the *cestui que trust*. In *Munden*, the shares were deposited with Canada Permanent Trust Company while the shareholders were given voting trust certificates. Certificate holders were entitled to notice of shareholder meetings and to attend but were not entitled to vote. PFI cites the following comments by Grange J. on the duties of the voting trustee:

> 20 I have reviewed the facts in detail because I am convinced that it is only by a close scrutiny of the facts that we can determine whether or not there has been a breach of trust. The duties of a trustee are many. For our purposes two of those duties as follows are paramount:
>
> > (1) He must act in the interests of his cestui que trust or at the very least must not act against that interest;
> >
> > (2) He must not deal in the trust res and if he does he must account for his profit so obtained. This rule is sometimes expressed that he must not place himself in a position where he has or may have a conflict of interest with his cestui que trust.
>
> …

> 22 I agree, however, with counsel for the plaintiffs that all those "rights" not normally given to trustees will avail them nothing if in the course of exercising them they acted against the interests of their cestuis que trust. I accept as a part of our law the statement in *Brown v. McLanahan et al.* (1945), 159 A.L.R. 1058 at p. 1064 (U.S. Circuit Court of Appeals):
>
> > It is elementary that a trustee may not exercise powers granted in a way that is detrimental to the cestuis que trustent; nor may one who is trustee for different classes favor one class at the expense of another. Such an exercise of power is in derogation of the trust and may not be upheld, even though the thing done be within the scope of powers granted to the trustees in general terms.

[59] Although not cited by PFI, the intervening paragraph is also relevant:

> 21 The second rule is a stern and inflexible rule and in no way dependent upon good faith or harm to the cestui que trust: *Regal (Hastings), Ltd. v. Gulliver et al.*, [1942] 1 All E.R. 378; *Aberdeen R. Co. v. Blaikie Brothers* (1854), 1 Macq. 461, but it is not applicable here. The terms of the voting trust agreement clearly exclude it. Not only that, but to deny the trustees the right to deal with shares of the company would go against the whole concept of the company. These trustees as directors and officers were recruited to serve without recompense in the hope of success to the company which would be reflected in profit to them. There was nothing to prevent their buying the shares on the open market, subscribing when rights were offered and underwriting the issue. If in so doing they made a profit it was theirs. That the parties can exclude the strict rule is apparent from consideration of *Boulting et al. v. Ass'n of Cinematograph Television & Allied Technicians*, [1963] 1 All E.R. 716, and the cases therein referred to.
>
> [Emphasis added]

[60] The Court went on to consider whether the actions of the trustees "harmed" the shareholders. Grange J. concluded that "[u]pon these facts I must find that these trustees did not act against the interest of the beneficiaries of the trust" (para. 23).

[61] PFI submits that Canco's votes in both the August and September shareholders' meetings were a breach of trust and a breach of Canco's fiduciary duty because they were contrary to PFI's best interests.

[62] In *Business Corporations in Canada, Legal and Practical Aspects*, vol. 2 (Toronto: Carswell, loose-leaf, updated to 2016), Paul Martel addresses voting trusts at section 3D(ii):

> A *voting trust* is very similar to a pooling agreement, but it includes an additional element. Shareholders transfer their shares to a depositary (such as a trust corporation) who gives them *voting trust certificates* representing the shares. The depositary collects the dividends on the shares and distributes them to the holders of the certificates. Here again, the shares are not transferable, but the certificates are, by endorsement.
>
> The voting right attached to the shares is exercised by the depositary, not in accordance with instructions received from the depositing shareholders but at his complete discretion, in the interest of such shareholders. Instead of exercising the votes attached to the shares himself, the depositary may also give a proxy to another party, the voting trustee, so that he may vote at his discretion in the interest of the depositing shareholders.
>
> On the expiry of a voting trust, the depositary hands over the shares upon receipt of the certificates.
>
> [Emphasis added]

[63] The concept of voting trusts is also discussed in Donovan W.M. Waters, Q.C., ed., *Waters' Law of Trusts in Canada*, 5th ed., (Toronto: Thomson Reuters, 2021), at pp. 626-627:

> Stock voting trusts are normally designed to protect the management of small companies against the shareholders. For instance, a closely-held family company

> may decide to become a public company, and the shareholders agree to put their shares into trust, the trustee to vote for the existing directors, so that takeovers are prevented. Alternatively, the shareholders of a closely-held company are concerned that on the death of existing shareholders the shares may pass into the hands of persons remote from the family who might favour and otherwise vote for sale of the company to third parties.
>
> Shares are often referred to as consisting of "a bundle of rights." Legally enforceable rights can normally be assigned. Thus, in some situations, the registered owner of the shares (or perhaps a beneficial owner of all the rights in the shares registered in the name of a nominee) may want to assign just the voting right to the trustee while retaining the right to dividends or other rights that may be included in the bundle of rights associated with those shares. However, in *Zeidler v. Campbell* [(1988), 59 Alta. L.R. (2d) 268, 29 E.T.R. 113 (Alta. Q.B.), aff'd (1988), [1989] 1 W.W.R. 490 (Alta. C.A.).], Cawsey J. held that no trust was created where the settlor purported to transfer just the voting rights. He noted that for a trust to be created, the trustee must have title to the trust property. The property must be transferred to the trustee and the transfer must follow the form necessary for that type of property. The property was shares and the transfer of the shares required an assignment of the shares. This, the learned judge said, was never done. There was simply an endorsement on the certificates that the shares were subject to the "Voting Trust Agreement". An argument might well be made that a voting right is itself property and could thus be the subject-matter of a trust. Indeed, in the Court of Appeal, Côté J.A. was prepared to accept that this was a trust noting that "a very good argument can be made that it is a true trust, in substance and in form." However, Côté J.A. assumed, without deciding, that for argument sake there was a trust and on that assumption was still able to reach the same result as Cawsey J. Thus, the question of whether a trust can be created by simply transferring the voting right was not decided and uncertainty remains in the Canadian context as to whether a stock voting trust can be created by a transfer merely of the voting rights.
>
> [Emphasis added]

[64] The voting trust agreement considered in *Zeidler v. Campbell*, 1988 CarswellAlta 85 (Q.B.), aff'd 1988 CarswellAlta 195 (C.A.), was very similar to the agreement executed by Canco and PFI. In *Zeidler*, Ms. Zeidler owned all the shares of Zeidler Forest Industries Ltd. ("Z.F.I."), in either her personal capacity or through her holding company, Zeidler Holdings Ltd. In spring 1984, Ms. Zeidler was advised

to step away from the management of Z.F.I. for health reasons. She requested that her son-in-law, Kenneth F. Campbell, manage the company. To that end, Ms. Zeidler signed a letter of intent promising to create an irrevocable voting trust giving all the voting attributes of all the shares to Mr. Campbell as sole trustee. The trust would last until certain events happened, which had not occurred. Mr. Campbell would run the business and be CEO and chairman. His employment contract would give him a salary plus 20 percent of the company's increase in net income, with an option to take that 20 percent in common shares rather than cash. The parties then signed a formal "Voting Trust Agreement", appending the letter of intent, a formal employment contract for Mr. Campbell, and a consulting contract for Ms. Zeidler. The voting trust agreement incorporated all these appendices as part of it. The voting trust agreement and the employment contract closely followed the letter of intent, including the share bonus.

[65] After about 2 ½ years, Ms. Zeidler's health had improved enough for her to return to managing the operating company. By that time, Ms. Zeidler's daughter and Mr. Campbell had separated. Ms. Zeidler gave Mr. Campbell a notice purporting to cancel the voting trust agreement. She based her case entirely on s. 42 of Alberta's *Trustee Act*, which empowers the court to approve the variation or termination of a trust in certain situations. For Ms. Zeidler to succeed, she had to establish that the

voting trust agreement created a trust. Cawsey J. reviewed the essential characteristics of a trust:

> 10 To bring themselves within s. 42 the applicants must establish that the "Voting Trust Agreement" creates a trust. In Waters, Law of Trusts in Canada, 2nd ed., at pp. 10-14, the author points out three essential characteristics of a trust:
>
> > The foremost of these is the fiduciary relationship which exists between trustee and beneficiary. One party holds the title to property, and manages it, for the benefit of another who has exclusive enjoyment of the property ...
> >
> > A second characteristic of the trust, one which distinguishes it from civil law relationships, is what might be called the dual ownership of trustee and beneficiary ...
> >
> > A third characteristic of the trust is that trust property is not available to the creditor of the bankrupt trustee.
>
> 11 A further definition of trust which was approved by Romer L.J. in *Green v. Russell*, [1959] 2 Q.B. 226 at 241, [1959] 3 W.L.R. 17, [1959] 2 All E.R. 525 (C.A.), by Cohen J. in *Re Marshall's Will Trusts*, [1945] Ch. 217 at 219, [1945] 1 All E.R. 550, and in Canada by Disbery J. in *Tobin Tractor (1957) Ltd. v. West. Surety Co.* (1963), 42 W.W.R. 532 at 542, 40 D.L.R. (2d) 231 (Sask. Q.B.), is to be found in Underhill's Law of Trusts and Trustees, 13th ed. (1979), p. 1:
>
> > A trust is an equitable obligation, binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property), for the benefit of persons (who are called the beneficiaries or cestuis que trust), of whom he may himself be one, and any one of whom may enforce the obligation.
>
> 12 Jacobs, Law of Trusts in Australia, 5th ed. (1986), at p. 7, gives the following description of a trust:
>
> > A trust exists when the holder of a legal or equitable interest in certain property is bound by an equitable obligation to hold his interest in that property not for his own exclusive benefit, but for the benefit, as to the whole or part of such interest, of another person or persons or for some object or purpose permitted by law.

13 One of the requirements of a trust is that the trust property be transferred to the trustee. Waters in the Law of Trusts in Canada, op. cit., at pp. 133-34, discusses the manner in which property is to be transferred to the trustee:

> The property can either be handed over to the donee, or the device of the trust can be employed. If it is to be handed over, the mode of handing over is governed by the type of property in question. For example, land must be conveyed by deed, registration of deeds or title being carried out if required by the jurisdiction in question; chattels must be delivered to the transferee; choses in action must be assigned to the transferee; and in the case of some property, *like shares and patents, a statutory form of transfer is required to be carried out*.
>
> [emphasis added]

14 Then at p. 134 Waters continues:

> In the case of land, the deed of conveyance must be made to the trustees and title registered in their names; in the case of chattels, delivery must be made to them; in the case of choses in action, assignment must be made to them; and where a statutory form of transfer is required, as in the case *of shares, the share transfer form must be completed in their names and their names registered in the company's books*.
>
> [emphasis added]

15 Jacobs, Law of Trusts, at para. 621, states [p. 97]:

> In the case of company shares, as we have seen, all that is necessary for a perfect equitable title is delivery of a duly executed form of transfer to the intended trustee, although no legal title is transferred until registration of the transfer in the books of the company has been effected.

[66] Justice Cawsey then discussed the distinction between trust and agency relationships:

16 In comparing the trust relationship and the principal agency relationship, Waters at p. 43 states:

> Because the trustee is title holder of the property or legal owner — as title holding is popularly known — the beneficiary can only enforce the duties of the trustee through personal action. Nevertheless, it is precisely because a trust is a conveyance of property, and the prime concern of the beneficiary is with that property, that common lawyers are not in agreement as to whether the beneficiary's interest is only a personal, or *in personam* right.

17 At pp. 42-47 in contrasting trust and agency, Waters makes the following statements:

> ... the principal and agent are linked by contractual agreement, while the express trust is a mode of conveyance of property ...
>
> [The trustee] is not only vested with title in the trust property, he contracts with third parties as if he also had the beneficial enjoyment of that title ...
>
> ... the trust is a mode of conveyance of property for the purpose of separate management and enjoyment ...
>
> ... the trustee is title holder of the property or legal owner ...
>
> ... a trust is a conveyance of property ...
>
> ... the trustee's right to freedom from intervention stems from his status of *title holder* ... [emphasis added]
>
> ... a trustee has legal title.

18 At p. 52:

> ... contract is obligation, while trust is transfer.

19 Waters in dealing with the distinction between trust and bailment at p. 63 states:

> The settlor transfers title (popularly called ownership), to the trustee who holds that title for the benefit of the beneficiary.

[67] Applying these authorities, Crawse J. concluded that the voting trust agreement did not create a trust:

> 20 In this case a trust has not been created, as Campbell does not hold title to any property which could be identified as trust property. The "Voting Trust Agreement" uses the word "Trust" only in its name and there is nothing in the "Voting Trust Agreement" to indicate the creation of a trust. Nowhere in the "Voting Trust Agreement" is there provision for Campbell to hold property on trust for identifiable beneficiaries.
>
> 21 A "Voting Trust Agreement" is not a transfer of property such that Campbell would be given the "legal estate" and some ascertainable beneficiary is given the "equitable" estate. The assignment of voting rights is not compatible with the concept of dual ownership of property required for the existence of a trust.
>
> 22 The restrictive endorsement printed on the Z.F.I. shares merely states that the shares are subject to the terms of the "Voting Trust Agreement". This endorsement itself cannot be seen as having the effect of transferring property to Campbell to hold in trust for some ascertainable beneficiary.
>
> 23 In Underhill's Law of Trusts and Trustees, at p. 29, it is stated that the following condition must be met before an express trust is created and is prima facie binding upon a settlor:
>
> > (a) The settlor must have used language from which the court finds, as a fact, an intention to create a trust of ascertainable property in favour of ascertainable persons whose ability to enforce the trust underpins the binding obligation inherent in the trust concept ... If the trust is for abstract, impersonal purposes rather than for persons (whether individual or corporate) it will be void unless the purposes are exclusively charitable ...
> >
> > (b) If the trust be voluntary the intention to create the trust must have been given effect to by way of completely constituting the trust (i.e. the settlor's interest in the property must have been transferred to a trustee or the settlor must have declared himself trustee of it) ...
> >
> > (c) The trust property must be of such a nature as to be capable of being settled.
> >
> > (d) The object of the trust must be lawful ...

> (e) The settlor must have complied with any requisite formalities for completely constituting the trust.

24 Several of these essential conditions do not exist, therefore no trust has been created. The settlors in this case have not used language sufficient to evidence an intention to create a trust. The "Voting Trust Agreement" does not suggest that any property is held on trust. The agreement states at para. 2:

> For the purposes of transferring and delegating to Campbell all of the voting attributes of the Z.F.I. shares (save only as herein expressly limited), and to ensure that Campbell shall have full and absolute control and be in charge of all aspects and operations of Z.F.I. and related assets hereinafter described:
>
> > (a) Mrs. Zeidler and Holdings hereby appoint Campbell to vote the Z.F.I. shares subject to the terms of this Voting Trust Agreement ...

25 The agreement does not evidence any intention that Campbell hold property on trust for ascertainable beneficiaries. All that it does is suggest that Campbell is to be given full and absolute control of all aspects and operations of Z.F.I.

26 The assignment of the voting rights to Campbell does not constitute a transfer of trust property.

27 No trust has been created because the applicants have not complied with the requisite formalities of completely constituting the trust. In order for a trust to be completely constituted the transferor must have done everything which according to the nature of the property was necessary to be done in order to transfer the property.

28 The endorsement on the certificates delivered to Campbell is "the shares represented by the certificate are additionally subject to and bound by the terms and provisions of the 'Voting Trust Agreement' dated July, 1984", which contains restrictions as to disposability and transferability and on dividends and delegates the right to vote the shares to others. Paragraph 8(a)(1) of the "Voting Trust Agreement" prohibits Campbell (without the written approval of Mrs. Zeidler, Zeidler Holdings Ltd. and Mrs. Campbell) to sell, assign, transfer, dispose of, donate, mortgage, pledge, hypothecate, charge or otherwise encumber or deal with the Z.F.I. shares. This clearly indicates that there is no transfer, title or conveyance in the shares to Campbell.

> 29 The fact that the document is referred to as a "Trust Agreement" does not mean that a trust has been created: *McIntosh v. Can. Trust Co.* (1984), 56 A.R. 231 (Q.B.), and *Elgin Loan & Savings Co. v. National Trust Co.* (1903), 7 O.L.R. 1, affirmed 10 O.L.R. 1 (C.A.).
>
> [Emphasis added]

[68] Cawsey J. further noted that the agreement could not be a trust due to the general rule that a trustee may not directly or indirectly make a profit from the trust he administers, and because the agreement referred to consideration passing between the parties, which suggested a contract relationship had been created, and not a trust: paras. 30-32. Cawsey J. continued:

> 33 At pp. 51-52 Waters states as follows:
>
> > One of the clearest statements of the principle now followed is to be found in *Re Schebsman*, a decision of the English Court of Appeal. There du Parcq L.J. said:
> >
> > > Unless an intention to create a trust is clearly to be collected from the language used and the circumstances of the case, I think that the court ought not to be astute to discover indications of such an intention.
> >
> > The decision was endorsed by Disbery J. in *Tobin Tractor (1957) Ltd. v. Western Surety Co.* [supra] where, in an exhaustive discussion of the English and Canadian authorities, the learned judge commented:
> >
> > > The interpretation of either facts or documents must not be warped, distorted or given undue emphasis in order to find the existence of a constructive trust, where a reasonable and impartial interpretation would reveal that such a trust was neither intended nor created; and

> this must prevail no matter how one might sympathize with the third-party beneficiary and wish to help him in the light of the circumstances.
>
> He agreed with Lord Greene M.R. in *Re Schebsman* that one must not "disregard the dividing line between the case of a trust and the simple case of a contract made between two persons for the benefit of a third party."

34 In *Field v. Bachynski* (1976), 1 A.R. 491 (C.A.), Prowse J.A. stated at p. 508:

> Under the voting trust agreement the parties gave up a property right — the right to vote their shares as they saw fit at meetings of holders of the Company — and placed that property under the control of the majority. The property right created by the agreement was the right of the majority to vote the shares at the meeting of shareholders of the Company and thereby control the next meeting of the shareholders of the Company.

35 A share in a public company has several attributes. Two of these attributes are the right to *vote* shares and the right of ownership under the shares which represent an equity in the company.

36 *Field v. Bachynski* was clearly a case in contract law and the interpretation of an agreement and the question of whether or not a trust was created is not addressed in any of the judgments.

37 *Birks v. Birks* (1983), 15 E.T.R. 208 (Que. C.A.), is cited by the respondent as authority for the proposition that even under the civil law of Quebec, the separation of voting rights and ownership of shares is permitted. I agree that the separation of voting rights and ownership of shares is permitted but it is only the ownership or title of shares conveyed to a trustee under the terms of the binding trust that creates a trust relationship.

38 Such a trust relationship is not created by the "Voting Trust Agreement" in this case and I would therefore dismiss this application because I find that the "Voting Trust Agreement" does not create a trust and the provisions of s. 42 of the *Trustee Act* cannot be invoked by the applicants.

[Emphasis added]

[69] On appeal, Côté J.A., for the court, wrote:

> 9 Mrs. Zeidler contends that this is indeed a true trust, which Mr. Campbell denies. A very good argument can be made that it is a true trust, in substance and form. Much of the voting trust agreement may use words of contract or of delegation, but cl. 7 begins "The voting trust created hereby shall enable Campbell to carry on all operations of" the company [emphasis added]. Clause 8 also starts by referring to "the voting trust created hereby" [emphasis added]. Without deciding, I will assume for the sake of argument that it is a trust. Purely for brevity, from now on I will call it a trust.

[70] Assuming without deciding that the voting trust agreement created a trust, the Court of Appeal held that it could not be terminated. Under s. 42 of the *Trustee Act*, court approval of the variation or termination of a trust required the consent of everyone with a beneficial interest in the trust property. Côté J.A. concluded that Mr. Campbell, who opposed termination of the trust, had a beneficial interest in the voting rights.

[71] This Court is not aware of any Canadian case where a Court has held that a voting trust agreement of the kind executed by Canco and PFI creates a valid trust relationship, imposing specific fiduciary duties on the purported trustee. Moreover, despite the parties' use of the terms "voting trust" and "voting trustee", the VTA does not evidence an intention to create a true trust relationship. It does not name PFI as the "beneficiary", nor does it impose on Canco a duty to exercise its discretion in PFI's best interests. To the contrary, section 5 provides that Canco "may vote the

Shares in its sole and absolute discretion subject to applicable law", and that it "shall be under no duty to account to [PFI]".

[72] For the reasons which follow, however, it is not necessary for this Court to decide whether the VTA creates a true trust.

Issue 1: Did Canco have the right under the VTA to vote PFI's shares at the August and September shareholders' meetings?

[73] Whether Canco was entitled to vote PFI's shares on the Credit and Pricing Motion and the September meeting motions depends on whether the motions fell within the three exemptions under section 3 of the VTA. To answer that question, the Court must apply the principles of contractual interpretation. These principles were reviewed in *Jorna & Craig Inc. v. Chiasson*, 2020 NSCA 42:

> [35] The judge correctly summarized the principles of contractual interpretation in the Merits Decision:
>
> > [46] The legal principles to be applied when interpreting commercial contracts are straightforward. The Ontario Court of Appeal summarized them in *Salah v. Timothy's Coffees of the World Inc.*, 2010 ONCA 673, [2010] O.J. No. 4336:
> >
> > > 16 The basic principles of commercial contractual interpretation may be summarized as follows. When interpreting a contract, the court aims to determine the intentions of the parties in accordance with the language used in the written document and presumes that the parties have intended what they have said. The court construes the contract as a whole, in a manner that gives meaning to all of its terms, and avoids an interpretation that would render one or more of its terms ineffective. In interpreting the contract, the court must have

> regard to the objective evidence of the "factual matrix" or context underlying the negotiation of the contract, but not the subjective evidence of the intention of the parties. The court should interpret the contract so as to accord with sound commercial principles and good business sense, and avoid commercial absurdity. If the court finds that the contract is ambiguous, it may then resort to extrinsic evidence to clear up the ambiguity. ...

[47] In *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] S.C.J. No. 53, the Supreme Court of Canada recognized the importance of context in the court's search for intent. Contracts are not made in a vacuum, and "words alone do not have an immutable or absolute meaning": *Sattva*, para. 47. Although "the interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract", decision-makers should use the surrounding circumstances to deepen their understanding of the mutual and objective intentions of the parties, as expressed in the words of the contract: *Sattva*, para. 57. The Supreme Court cautioned, however, that the surrounding circumstances must never be allowed to overwhelm the words of the agreement: *Sattva*, para. 57. Rothstein J., for the Court, defined "surrounding circumstances" as follows:

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

[74] Accordingly, the exemptions under section 3 must be read in light of the entire contract. The Court’s task is to ascertain the parties’ mutual objective intentions in accordance with the language used and having regard to the evidence of the

surrounding circumstances at the time the contract was executed. The Court's interpretation should accord with sound commercial principles and good business sense.

[75] The recitals to the VTA indicate that Canco and PFI "wish to make provisions for the manner in which the voting rights attaching to the Shares will be exercised". Section 2 gives Canco the right "to exercise all voting rights of every kind and nature" "in any respect" of the shares issued to PFI, both before and after March 28, 2017. Section 5 of the VTA provides that Canco may vote the shares "in its sole and absolute discretion subject to applicable law." This broad power to vote PFI's shares is subject only to three exemptions carved out under section 3. Where a vote is with respect to one of these "excluded matters", PFI is entitled to vote its own shares. PFI says the Credit and Pricing Motion and the September meeting motions fell within the exemption with respect to "the sale of all, or substantially all of the assets of the Corporation". It says the Credit and Pricing Motion was also captured by the exemption related to "the establishment of the sale price of wallboard in connection with a sale by the Corporation to Marjam Supply Co., Inc."

[76] The only evidence about the negotiation and execution of the VTA came from Mr. Piecuch. He said the three Cabot shareholders were friends who had known each other for years. Mr. Piecuch and Mr. Buller, in particular, had been personal friends

for more than 30 years. Mr. Piecuch trusted Mr. Buller. As an investor in Cabot, Mr. Piecuch brought extensive experience in the wallboard manufacturing industry to the table. Mr. Buller, on the other hand, apparently had little or no experience operating a wallboard manufacturing facility. Mr. Piecuch said he executed the VTA as part of a larger arrangement negotiated between himself and Mr. Buller, which included a promise by Mr. Buller that Marjam would buy significant volumes of wallboard and steel stud from Cabot. Mr. Piecuch conceded, however, that the details of this larger arrangement, including the alleged representations by Mr. Buller, were never committed to writing.

[77] Mr. Piecuch suggested that the three exemptions, as written, did not tell the whole story. They were merely intended to serve as a "placeholder" or "a summary of more detailed discussions". He said there was "a general understanding" between the parties of the VTA and what was included in it.

[78] While more detailed discussions may, in fact, have taken place between Mr. Piecuch and Mr. Buller, the Court must look to the words chosen by the parties to determine their objective intention. The Court's interpretation will be informed by evidence of the surrounding circumstances, that is, facts known to all parties when the contract was executed. Evidence of surrounding circumstances does not include evidence of subjective intention or of "general understandings" that are inconsistent

with the words used by the parties. Nor does it include evidence with respect to the subsequent actions of the parties. On that point, Mr. Piecuch made much of Mr. Buller's alleged failure to honour the purchasing commitments that Mr. Piecuch said induced him to sign the VTA. These alleged misrepresentations are the subject of a separate action against Mr. Buller. On this Application, however, whether Mr. Buller in fact made, or failed to honour, these purchasing commitments is not before the Court. The Court's task is to rule on the interpretation of the VTA. There is no pleading by PFI that the VTA is invalid due to a failure of consideration, or anything else that would put the matter in issue.

[79] With respect to the company sale exception, PFI submits that Cabot was in the process of being sold in August and September 2020, and that the exemption applied to a vote on any decision that could impact the potential sale price. In this Court's view, however, the evidence does not establish that Cabot was in the process of being sold at the relevant time. Communications with BNBM ended in March 2020. Mr. Piecuch also suggested that Cabot was for sale because he and Marcel Girouard privately committed to sell it, but there is no evidence of a vote to hire a broker or other steps taken to sell the company after talks with BNBM ended. In any event, even if the evidence *did* show that Cabot was in the process of being sold, PFI's interpretation of the exemption goes far beyond what the wording can

reasonably support. The exemption entitles PFI to vote its own shares with respect to the sale of all or substantially all of Cabot's assets, not to vote its own shares *on any matter during a period when Cabot is in the process of being sold*. Mr. Piecuch's own evidence of subjective intention does not support the broad interpretation PFI seeks to place on the exemption now that the relationship between the shareholders has deteriorated. Mr. Piecuch testified on cross-examination that he wanted the company sale exemption included in the agreement because he had always intended to sell Cabot after spending a few years fixing up the plant, and he "wanted to be the final arbitrator *on whether it was sold or not*, because [his] 15% vote would either support Mr. Buller's 45%, or Mr. Girouard's 40%."

[80] I find that the company sale exemption entitles PFI to vote its shares on any motion with respect to whether to sell all or substantially all the company's assets, which would include whether to hire a broker, whether to sell the company to a specific purchaser, and what price the shareholders should accept. There may be other matters that apply to the exemption. However, I find that the exemption did not apply to the Credit and Pricing Motion or the September meeting motions.

[81] Was PFI entitled to vote its own shares on the Credit and Pricing Motion – and by extension, Motion A at the September meeting – because it fell within the

exemption with respect to "the establishment of the sale price of wallboard in connection with a sale by the Corporation to Marjam"?

[82] Canco says the exemption only applies to a shareholder vote on the establishment of wallboard pricing for Marjam, and not to a vote on establishing pricing policies for the company as a whole. Canco further submits that the Credit and Pricing Motion did not seek to establish a procedure or set pricing for any of their customers. Rather, the motion only sought to establish an agreement between shareholders that "within 7 days following this meeting, the shareholders will create a price list and pricing policies […]".

[83] PFI says the exemption applies because the pricing policies would apply to all Cabot's customers, including Marjam. PFI submits that although no sale price was established at the August and September shareholders' meetings, precursory steps toward creating a policy were moved to be agreed upon, which is a necessary step to establishing pricing.

[84] As Mr. Piecuch testified, Mr. Buller, through Canco, is a shareholder in Cabot, and he also controls Marjam, a Cabot customer. He said that the purpose of the exemption with respect to "the establishment of the sale price of wallboard in connection with sale by the Corporation to Marjam Supply Co., Inc." was to ensure

that Marjam would not have a competitive advantage over the other customers of Cabot. So did the Credit and Pricing Motion establish the sale price of wallboard that would be paid by Marjam?

[85] I find that, it did not. The Credit and Pricing Motion proposed that, within seven days following the August shareholders' meeting, the shareholders would create a price list and pricing policies for the company to use in selling product to its customers, including Marjam. Mr. Piecuch, on behalf of PFI, would be involved, together with the other shareholders, in drafting the policy and setting the price list. Once the list and policies were finalized, a vote would be held on whether to ratify them. If the price list and policies established a price for the sale of wallboard to Marjam, PFI would be entitled to vote its own shares. Nothing about the Credit and Pricing Motion, or Motion A at the September 9 meeting, precluded PFI from exercising its right under the VTA to vote its own shares to ensure that Marjam did not obtain a better price than other Cabot customers.

Issue 2: Has Canco committed a breach of trust or a breach of its fiduciary duties to PFI as trustee?

[86] For the purposes of the next two issues, the Court will assume, without deciding, that the VTA created a trust relationship.

[87] PFI says Canco committed a breach of trust or a breach of its fiduciary duties to PFI when it voted in favour of the Credit and Pricing Motion and the September meeting motions because they were contrary to PFI's best interests as beneficiary. PFI writes at paras. 34 and 37 of its brief:

> 34. Mr. Piecuch, on behalf of PFI, was completely at odds with Canco's decisions relating to Cabot and the voting of PFI's shares. These actions are not in the best interest of making Cabot ready for sale and increasing the potential market value of Cabot as a going business concern.
>
> …
>
> 37. PFI made its intention and wishes clear. Canco completely disregarded these opinions and voted to its own benefit, directly contrary to the interests of the beneficiary of the trust. This is [*sic*] breach of its obligations as trustee and subsequently a breach of trust.

[88] In *N-Krypt International Corp. v. LeVasseur*, 2018 BCCA 20, leave to appeal denied [2018] S.C.C.A. No. 90, Fenlon J.A., for the court, considered the nature of a voting trust:

> [23] A voting trust differs from personal trusts established by deed or will in a number of ways. First, it is intended to be a temporary trust, ending on a particular date or event. Second, it is generally terminable at the discretion of the trustee. Third, unlike a personal trust in which the trustee is bound to use the trust property for the exclusive benefit of the beneficiary, the trustee in a voting trust is empowered to vote the shares to the advantage of the company. That object may only indirectly benefit the shareholder and will in some cases work against the shareholder's immediate and direct interest — for example, a vote to defer payment of a dividend so as to invest in a company project. …
>
> [Emphasis added]

[89] PFI takes the position that Canco has a duty under the VTA to vote the shares in PFI's best interests, and that Canco has breached that duty by ignoring Mr.

Piecuch's opinion as to how the shares should be voted. If PFI's interpretation was accepted, however, there would be no reason to execute a VTA in the first place. As voting trustee, Canco has a duty to exercise its discretion to vote PFI's shares in Cabot's best interests, not PFI's. For Canco to be found to have breached its duties under the VTA, the court must be satisfied that by voting in favour of the Credit and Pricing Motion and the September meeting motions, Canco has harmed Cabot, and, by extension, harmed PFI as a shareholder.

[90] As noted earlier, PFI says the Credit and Pricing Motion is bad for the company for two reasons. First, the requirement for cash-on-delivery for new companies proposed in the credit line approval criteria portion of the Credit and Pricing Motion would harm Cabot's business because, as Mr. Piecuch testified, it is "impossible in the current environment" and "not the way the business model works in this industry". It was open to PFI to file expert opinion evidence on this issue, but no such evidence is before the court. There is simply not enough evidence to conclude that Canco failed to act in Cabot's best interests when it voted in favour of implementing a cash-on-delivery policy for new companies.

[91] The second way Mr. Piecuch says the Credit and Pricing Motion is not in Cabot's best interests is that if credit and pricing policies are established, Mr. Buller, as Canco's principal, would have information about how credit and pricing is

determined for Marjam's competitors. This would be problematic, according to Mr. Piecuch, because Mr. Buller has already indicated his willingness to sell his interest in Cabot, and it would give Marjam a competitive advantage for him to have credit and pricing information for Cabot's other customers once he is no longer a shareholder.

[92] This submission lacks merit. Mr. Piecuch's evidence was that when PFI and Canco invested in Cabot, the plan had always been to fix up the plant and sell the company. In other words, it was always contemplated by the shareholders that, at some point, Mr. Buller, the controlling shareholder in both Marjam and Acadia, would no longer be a shareholder in Cabot. If Mr. Piecuch and Mr. Girouard believed that Mr. Buller having information about Cabot's credit and pricing criteria would negatively impact the price they could obtain for Cabot, they would surely have addressed the issue in the SA, or, in Mr. Piecuch's case, simply chosen not to invest in Cabot at all. Moreover, there is insufficient evidence about Marjam's business to conclude that this information would in fact give Mr. Buller some sort of competitive advantage, or that Mr. Buller would use the information to harm Cabot's interests.

[93] It is clear from the evidence that Mr. Piecuch expected, because of his extensive experience in the industry and his friendship with the other shareholders, that his opinions as to what was in Cabot's best interests would be respected and

followed. The fact that things played out differently than he anticipated does not change the terms of the agreement executed by the parties, which gives Canco absolute discretion to vote the shares in what *it* considers to be the company's best interests.

[94] PFI has failed to establish that the Credit and Pricing Motion or the September meeting motions were contrary to those interests.

Issue 3: Is section 5 of the VTA against public policy, making it void *ab initio*?

[95] PFI seeks a declaration that section 5 of the VTA, which provides that Canco has no duty to account to PFI, is against public policy, making it void *ab initio*. PFI says a trustee has, in law, a duty to account, and section 5 is an attempt to contract out of the core duties and responsibilities that are at the heart of a trustee-beneficiary relationship. PFI writes at paras. 40-41 of its brief:

> PFI states that section 5 of the Voting Trust Agreement which allows the Voting Trustee to vote in its sole and absolute discretion, without any duty to account or to follow its fiduciary obligations to the beneficiary, is contrary to public policy and should be declared void *ab initio*.
>
> In the alternative, PFI states that Canco was acting in bad faith when it voted in favour of both the August and the September motions and is therefore not protected by Section 5 of the Voting Trust Agreement relating to the duty to account. Canco was aware that PFI's interests would be negatively impacted by voting in favour of the [*sic*] both motions yet it continued to do so.

[96] For ease of reference, section 5 again states:

> 5. **No Duty to Account.** In voting on matters which may come before any meeting of shareholders of the Corporation or otherwise exercising the Rights, other than Excluded Mattes [*sic*], the Voting Trustee may vote the Shares in its sole and absolute discretion subject to applicable law. The Voting Trustee may exercise the Rights to vote in favour of or confirm or ratify any matter, notwithstanding that a vote against such matter might give rise to a right to object, complain, or seek an oppression or appraisal remedy under the *Companies Act* (Nova Scotia) or pursuant to any other applicable legislation or common law. The Voting Trustee shall be under no duty to account to the Shareholder or any other holder of the Shares, nor shall the Voting Trustee incur any responsibility or liability to the Shareholder by reason of any error of law or by any matter or thing done or omitted under this Agreement, except for his wilful misconduct or bad faith.

[97] The only authority cited by PFI is *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, where Estey J. (dissenting in part) wrote, at p. 221:

> The general foundation for the application of the fiduciary principle and duties arising in connection with corporate operations was reviewed in this Court by Laskin C.J. in *Canadian Aero Service Ltd. v. O'Malley*, supra. The duty to account for property or interests acquired as a trustee by reason of a fiduciary duty was found to exist. There the beneficiary was the company. The Chief Justice for the unanimous Court wrote (at pp. 608-09):
>
> > What I would observe is that the principle, or, indeed, principles, as stated, grew out of older cases concerned with fiduciaries other than directors or managing officers of a modern corporation, and I do not therefore regard them as providing a rigid measure whose literal terms must be met in assessing succeeding cases. In my opinion, neither the conflict test, referred to by Viscount Sankey, nor the test of accountability for profits acquired by reason only of being directors and in the course of execution of the office, reflected in the passage quoted from Lord Russell of Killowen, should be considered as the exclusive touchstones of liability. In this, as in other branches of the law, new fact situations may require a reformulation of existing principle to maintain its vigour in the new setting.
>
> and continued at p. 610:
>
> > What these decisions indicate is an updating of the equitable principle whose roots lie in the general standards that I have already mentioned,

> namely, loyalty, good faith and avoidance of a conflict of duty and self-interest.

[98] The phrase "duty to account" in relation to a trustee or a corporate fiduciary can refer to two different things. First, it can refer to an obligation that arises where a fiduciary has breached the duty of loyalty. In *Waters' Law of Trusts in Canada*, 5th ed., D.M. Waters writes at p. 992:

> When a fiduciary, trustee or not, acquires a profit 'by reason of or by use of his fiduciary position or of opportunity or knowledge resulting from it', the fiduciary is accountable for that gain. Generally it is held as trust property. …
>
> Both the express trustee and the fiduciary who is not an express trustee have an obligation not account for such profits: the express trustee, to the trust beneficiaries; and the non-trustee fiduciary, to the person or persons on behalf of whom he or she is acting.

[99] This is the "duty to account" referred to in *Multiple Access Ltd.* and in *Canadian Aero Service Ltd. v. O'Malley*, [1974] S.C.R. 592. As noted in *Munden Acres Ltd.*, at para. 21, it is open to the parties to a voting trust agreement to waive the rule prohibiting a trustee from deriving a personal profit by reason of his or her role as trustee.

[100] The other "duty to account" refers to a trustee's duty to provide a beneficiary with information about the trustee's administration of the trust property. The court summarized this duty in *Spelay (Litigation Guardian of) v. Spelay*, 2007 SKQB 408:

> 16 In common law a trustee has a duty to account. This has been set out in the case of *Sandford v. Porter* (1889), 16 O.A.R. 565 (C.A.) where at paras. 20 and 21, there is the following:
>
> > 20 It seems to have been thought by the solicitors of the plaintiffs that it was the duty of a trustee, upon demand for an account, to lay aside everything else, and to sit down and make out an account for them, at the peril of a suit for an account and costs. But the law is not so unreasonable.
> >
> > 21 The duty of a trustee or other accounting party is to have his accounts always ready, to afford all reasonable facilities for inspection and examination, and to give full information whenever required; but as a general rule he is not obliged to prepare copies of his accounts for the parties interested. ...
>
> 17 In E.E. Gillese, The Law of Trusts (Concord: Irwin Law, 1997), the author summarized the duty of a trustee at page 140 as follows:
>
> > Trustees must keep proper accounts of how they deal with the trust property; as well, they must be ready to produce them for inspection and examination by the beneficiaries. Although beneficiaries have a right to inspect the accounts, the trustee is allowed a reasonable time to assemble the accounts after the beneficiary requests them. If a trustee causes expense through neglect or refusal to furnish accounts, the trustee must bear the expense personally.

[101] There is some authority suggesting that "[t]he courts will not permit the testator or settlor to deprive the beneficiaries or any beneficiary of the right to require an accounting": *Waters*, p. 1194. But what if the beneficiary itself signs a commercial contract giving up its right to information?

[102] In *N-Krypt International Corp.*(*supra*), the British Columbia Court of Appeal held that a shareholder that had executed a voting trust agreement as a condition of the subscription agreement when it purchased the shares had voluntarily surrendered its right to an accounting.

[103] Fenlon J.A. began by considered the nature of a voting trust:

> [20] The judge ordered broad disclosure based on the general principle that a trustee has an obligation to report to his beneficiary, even though that disclosure was inconsistent with the terms of the contract between N-Krypt and Cirius. In my respectful view the judge was led into error because each party focused on only one aspect of their arrangement: N-Krypt insisted trust law governed; Mr. LeVasseur insisted contract law governed. Neither party attempted to reconcile the apparently conflicting principles of trust and contract, of equity and the common law. Although, as I have noted, the judge found N-Krypt was bound by its agreement not to receive the information described in article 12 of the Subscription Agreement, he ultimately determined N-Krypt was entitled to a vast sweep of other information as a beneficiary of the voting trust, without further consideration of the bargain it had entered into. In my view, it was an error in principle to determine N-Krypt's entitlement to information without reconciling the competing principles of contract and trust law raised in this case. I turn now to that exercise.
>
> [21] I begin by considering the trust aspect of the parties' arrangement, and in particular the nature of a voting trust.
>
> [22] The voting trust originated in the United States and eventually moved across the border into Canada. It is a commercial trust originally used in large venture companies, such as those constructing railroads, to protect investors by ensuring the continuity of management they trusted to get the project completed, and to insulate the company from the control of special interest groups for the security of both shareholders and lenders alike: Harry A. Cushing, *Voting Trusts: A Chapter in Modern Corporate History* (New York: The MacMillan Company, 1927) at 16 and 22.
>
> [23] A voting trust differs from personal trusts established by deed or will in a number of ways. First, it is intended to be a temporary trust, ending on a particular date or event. Second, it is generally terminable at the discretion of the trustee. Third, unlike a personal trust in which the trustee is bound to use the trust property for the exclusive benefit of the beneficiary, the trustee in a voting trust is empowered to vote the shares to the advantage of the company. That object may only indirectly benefit the shareholder and will in some cases work against the shareholder's immediate and direct interest — for example, a vote to defer payment of a dividend so as to invest in a company project. These characteristics are present in the Voting Trust Agreement entered into by N-Krypt, which provides:

> 3.1 Until the termination of this Agreement and surrender of the Voting Trust Certificate, the Voting Trustee will, in respect of the Shares deposited with him pursuant to this Agreement, exclusively possess and be entitled to exercise, in his discretion, in person or by attorney, all of the voting rights appertaining to such Shares and all rights in connection with the initiation, taking part in and consenting to any action as shareholder of the Company, including, without limitation, the execution of any shareholders' agreement, provided that the Voting Trustee (either personally or in his capacity as a director or officer of shareholders of the Company) also executes such shareholders' agreement at such time. The Shareholder hereby authorizes the Voting Trustee to waive all rights the Shareholder would otherwise have as a shareholder of the Company, provided that the Voting Trustee also waives such rights at such time (other than with respect to shares to be issued to the Voting Trustee under the Company's stock option plan) and that any transaction resulting in a subscription for shares is in the best interests of the Company as determined by the Voting Trustee, acting reasonably.
>
> 3.2 In exercising the voting rights attached to the Shares the Voting Trustee will exercise his best judgment from time to time to secure suitable directors, officers and employees of the Company to the end that the affairs of the Company shall be properly managed but it is hereby declared and agreed that the Voting Trustee assumes no responsibility in respect of such managing or in respect of any action taken by him as shareholder and the Voting Trustee shall not incur any liability or responsibility by reason of any error of law or of any matter or thing done or suffered or omitted to be done under this Agreement, except only for his own individual wilful and wrongful neglect or misconduct.
>
> [Emphasis added]

[24] Mr. LeVasseur gave evidence that Cirius entered into voting trusts with all other share purchasers up to 2014 because the company was concerned about its distributors being in a conflict of interest. The judge regarded these concerns in relation to N-Krypt as "vague and speculative" (at para. 46). In contrast, he viewed N-Krypt as having legitimate reasons for wanting information about what had been done with its shares and what they were worth. As I have noted, the judge looked to trust law and determined N-Krypt was entitled to information as a beneficiary, relying on the general principle that "[the] trustee has a fundamental duty to account for the trust property … and to report on how it has been dealt with" (at para. 38). Having concluded N-Krypt was not entitled to the information typically available to a shareholder because it was expressly excluded by article 12 of the Subscription Agreement, he determined that N-Krypt as a beneficial owner was entitled to other information well beyond that scope (at paras. 52-53).

> [25] In my respectful view, the judge's focus on a trustee's duty to account to a beneficiary led him away from the fundamental question of the obligations and rights of N-Krypt and Cirius in the context of the commercial agreement they had entered into. Whether N-Krypt is entitled to information turns on the terms of that agreement. The question before the judge was therefore whether the use of a voting trust as a mechanism to give effect to the agreement gave N-Krypt rights as a beneficiary that overrode its contractual commitments.
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> [Emphasis by Fenlon J.A.]

[104] The Court of Appeal then discussed the relationship between contract law and trust law:

> [26] It is helpful at this point to consider the distinct origins of trust and contract law. Whereas contracts stem from the common law, trusts are a product of equity. The relationship between equity and the common law, as well as the origins of the trust are explained in D.W.M. Waters, M.R. Gillen & L.D. Smith, eds., *Waters' Law of Trusts in Canada*, 4th ed. (Toronto: Carswell, 2012) at 5-6:
>
> > One system of law was interpreted and moulded in the King's Courts, and another system of law was gradually being established in the Lord Chancellor's Court, ultimately called the Court of Chancery. The first is the common law in the strict sense, the second is Equity, a gloss upon the first, designed as an act of the King's residual justice to bring equity to bear in the application of the laws of the realm. Equity is superior in authority because it is the King's personal ruling concerning the application of "his" justice in the realm. Equity, like the common law, gradually became institutionalized, with each system using its own forms and procedures, but in matters of substance Equity assumed the existence of the common law, assisting, modifying, and supplementing it.
> >
> > …
> >
> > It was out of this unique state of affairs, which endured even to the point of separately administered systems until the latter half of the nineteenth century, that the trust was born. In the eyes of the common law courts if [the trustee] held the legal title to land or chattels, he had the rights of disposition, management and enjoyment of that property. But, if [the trustee] had earlier promised the transferor to hold the property for the enjoyment of a person other than [the trustee] himself, the Court of

> Chancery was asked and finally agreed to enforce the moral obligation. At law, [the trustee] might be owner in the fullest sense that the common law recognized ownership, but in equity – which [the trustee] could not avoid if he were summoned to account – B, the intended beneficiary, could compel [the trustee] to yield up the enjoyment in the property and indeed administer it on B's behalf.
>
> [Emphasis added.]

> [27] The relationship between equity and the common law is sometimes described by the maxim "equity follows the law": J. McGhee, ed., *Snell's Equity*, 31st ed. (Toronto: Carswell, 2005). The author of *Snell's Equity* elaborates on the meaning of the maxim at 95:
>
> > Where a rule, either of the common or the statute law, is direct, and governs the case with all its circumstances, or the particular point, a court of equity is as much bound by it as a court of law, and can as little justify a departure from it.

[105] Fenlon J.A. concluded that there was nothing unjust about holding N-Krypt to the bargain it made with Cirius:

> [31] Of significance in the present case is the creation of the voting trust as a condition of the purchase of the shares forming the trust property. Together the Subscription Agreement and the Voting Trust Agreement gave effect to the bargain made by N-Krypt and Cirius, whereby Cirius sold shares to N-Krypt and N-Krypt waived its right to information about the company and granted Mr. LeVasseur the right to vote the shares for ten years. As in *Buschau*, the trust was the mechanism used to give effect to the contract and the two are indissociable. From N-Krypt's perspective, the terms of the trust and Subscription Agreement turned out to be imprudent in light of the deterioration of the parties' business relationship. Cirius's concerns about the potential for N-Krypt to be in a conflict of interest may have been overblown. But there is in my view nothing unfair about holding N-Krypt to the terms of the agreement it entered into to give up voting rights and access to corporate information in order to acquire a significant number of shares in Cirius.
>
> [32] I note parenthetically that this appeal is not concerned with whether a shareholder's agreement to waive access to information is contrary to the *Business*

> *Corporations Act*, S.B.C. 2002, c. 57. That is so for two reasons. First, the *Business Corporations Act* applies generally to shareholders, and N-Krypt does not at this point hold legal title to the shares: *Brio Industries Inc. v. Clearly Canadian Beverage Corporation*, [1995] B.C.J. No. 1441 (S.C.). Second, that issue and the extent of a company's obligation to provide information to its shareholders were neither pleaded nor argued below and cannot be addressed in the absence of a proper record.
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> [Emphasis added]

[106] Accordingly, in *N-Krypt*, the Court held that it was not unfair to enforce a contractual provision under which the beneficiary of a voting trust agreed to waive its right to information. In my view, the same is true in this case. Mr. Piecuch is a sophisticated investor with extensive experience in the wallboard manufacturing industry. He was also represented by legal counsel at the time he executed the SA and the VTA. On PFI's behalf, Mr. Piecuch agreed to purchase shares in Cabot and, at the same time, to enter into the VTA. PFI has not pleaded that the VTA is invalid for a lack of consideration or any other reason. There is therefore nothing unjust about holding PFI to the terms of the agreement, which release Canco from any duty to account to PFI.

[107] More importantly, however, even if the Court was satisfied that section 5 of the VTA is against public policy and void *ab initio*, it would have no impact on the outcome of this Application. PFI is aware of how its shares have been voted. There has never been a request from PFI to Canco for that information, nor has Canco ever

refused to provide it. If PFI's real concern is with the language giving Canco the right to vote the shares in "its sole and absolute discretion", that right is "subject to applicable law." As discussed earlier, if the Court assumes, without deciding, that the VTA created a true trust, the "applicable law" would require Canco, as trustee, to exercise its discretion to vote the shares in Cabot's best interests.

Conclusions

[108] Canco had a right under the VTA to vote PFI's shares at the August and September 2020 shareholders' meetings.

[109] Canco is entitled to its costs. If the parties cannot agree on costs, the Court will receive written submissions within twenty (20) calendar days of this decision.

Smith, J.