

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Minera y Metalurgica del Boleo S.A.P.I. de
C.V. v. Oxbow Sulphur Inc.*,
2026 BCSC 1138

Date: 20260619
Docket: S179138
Registry: Vancouver

Between:

Minera y Metalurgica del Boleo S.A.P.I. de C.V.

Plaintiff

And

**Oxbow Sulphur Inc. d.b.a. International
Commodities Export Corporation**

Defendant

Before: The Honourable Mr. Justice Blok

Reasons for Judgment

Counsel for the Plaintiff:

D. Brown
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S.K. Boyle
P. Palmer
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Place and Dates of Trial:

Vancouver, B.C.
June 3-7, 10-13 and 19-21, 2024

Place and Date of Judgment:

Vancouver, B.C.
June 19, 2026

I. Introduction

[1] This action concerns a dispute between a Mexican mining company and a trading company that supplied the sulphur needed for the mine's processing operations.

[2] By a contract dated January 28, 2008, the plaintiff appointed the defendant as its "sole agent and supplier" for the plaintiff's sulphur requirements at its mine, which was not yet operational. That agreement was amended in 2012 and 2013.

[3] Sulphur shipments began in early 2014 and continued regularly thereafter. From February 2014 to November 2023 there were 78 sulphur shipments arranged by or through the defendant, having a total volume of about 2,200,000 tonnes.

[4] The plaintiff alleges the defendant secretly collected commissions from sulphur suppliers and secretly earned profits by selling sulphur to the plaintiff as principal. The plaintiff submits these actions constituted breaches of the defendant's fiduciary duties, contractual duties and duty of good faith.

[5] The defendant says the relationship between the parties was merely contractual in nature and was not a true agent-principal or fiduciary relationship. The defendant also submits the plaintiff suffered no loss, as the plaintiff continued to purchase sulphur from the defendant after the plaintiff had raised its allegations.

II. Background

[6] The plaintiff, Minera y Metalurgica del Boleo S.A.P.I. de C.V. ("MMB"), owns and operates the Boleo mine and associated processing plant, located in the Mexican state of Baja California Sur. The mine produces copper, cobalt and zinc.

[7] The defendant, Oxbow Sulphur Inc. ("Oxbow"), was a Delaware-incorporated, Texas-based company formerly known as International Commodities Export Corporation ("ICEC") and was engaged in the business of sulphur marketing and logistics. Oxbow operated in Canada through a sister company, Oxbow Sulphur Canada ULC ("Oxbow Canada") from 2013 to 2019, at which time both companies

were acquired by H.J. Baker & Bro., LLC ("H.J. Baker"). Following a series of corporate transactions, H.J. Baker Sulphur, LLC ("Baker Sulphur") became the legal successor to Oxbow, and H.J. Baker Sulphur Canada ULC ("Baker Canada") became the legal successor to Oxbow Canada.

[8] Sulphur is a key material needed in the processing of ore from the Boleo mine. Sulphur is a byproduct of the oil and gas refining process. Companies that refine oil and gas have no use for the sulphur and look to sell it to end users either directly or through trading companies.

[9] MMB, then owned by a Vancouver-based corporation, began developing the Boleo mine in 2007 at the location of a former mine site that had operated for decades. In or around 2012, MMB was acquired by a consortium led by a Korean state-owned resource company.

[10] As noted earlier, MMB and Oxbow (then named ICEC) entered into a written sulphur supply and delivery agreement dated January 28, 2008 (the "2008 Agreement"), and they entered into amendment agreements in 2012 and 2013. The first amendment agreement ("Amendment No. 1") merely addressed the change of name from ICEC to Oxbow. The second amendment, which is dated October 9, 2013 ("Amendment No. 2") was much more substantive, and its import and effects are key points of dispute between the parties. I will refer to the resulting agreement as the Supply Agreement.

[11] There were no shipments prior to Amendment No. 2. Mining operations began in early 2014 and the first sulphur delivery was made in February 2014.

[12] Each sulphur shipment was effected by way of an agreed addendum to the Supply Agreement, a method set out in Amendment No. 2. For each addendum, Oxbow issued both preliminary and final invoices to MMB. The final invoices recorded the final amount delivered, the final cost, and the service fee at \$2.00 per metric tonne, which was the service fee prescribed in the Supply Agreement.

[13] All currency figures mentioned in these reasons are in U.S. dollars unless otherwise indicated.

III. Agreed Facts

[14] Some agreed facts have already been set out in the previous section. Additional agreed facts are as follows.

Sulphur Sourcing by Oxbow

[15] To fully understand the issues in this case, it is helpful to know how Oxbow sourced the sulphur it supplied to MMB. It is also important to note that MMB maintains its employees knew little or nothing of these arrangements.

[16] Generally, Oxbow sourced sulphur from the California ports of Stockton and Long Beach, while Oxbow Canada sourced sulphur from the port of Vancouver. Where the sulphur was sourced from Vancouver, Oxbow would then acquire the sulphur from Oxbow Canada through an intercompany sale.

[17] The bulk sulphur gathered at these ports was sourced from various suppliers and commingled in sulphur piles. In the California ports, up to five producers could have sulphur stored at a particular port. In Vancouver, there were many suppliers, such that anywhere from 20 to 50 suppliers could have sulphur commingled at the port. Oxbow acquired title to certain portions of the sulphur within the commingled common stockpile, but there were no means by which Oxbow could determine which sulphur came from which supplier.

[18] Oxbow (later Baker Sulphur) and Oxbow Canada (later Baker Canada) acquired sulphur on one of two bases:

- a) Spot trading: Oxbow made specific purchases of sulphur from suppliers at a negotiated price. Oxbow incurred losses when it re-sold the sulphur to MMB at a lower price and it earned profits when it re-sold sulphur to MMB at a higher price. The trading profits less the trading losses are the "trading gains". "Spot trading" is also referred to as a "buy-sell" basis.

- b) Netback arrangements: Oxbow had contracts with sulphur suppliers by which Oxbow was required to use reasonable efforts to sell their sulphur at the highest price obtainable in the prevailing market. Often these arrangements obliged Oxbow to “keep the tanks dry”, meaning that Oxbow had to ensure sulphur – at that stage, in liquid form – was removed from the producers’ storage facilities. Under these arrangements, the sales revenue was remitted to the suppliers less the following: (a) certain costs, of which the largest was the cost of transporting the sulphur; (b) an agreed commission, called a “marketing fee”, which was typically around \$1.50 per tonne; and (c) if the price obtained was above a stipulated benchmark price, potentially an incentive fee. Together, the marketing fee and any incentive fee are referred to as the “netback commission”.

Another way of describing this arrangement is that Oxbow, acting on behalf of sulphur producers, managed the logistics of selling sulphur to buyers in exchange for both volume-based fees and the reimbursement of certain costs incurred by Oxbow.

[19] Where Oxbow arranged the vessel charter, Oxbow also received payments called “address commissions”, or “adcom” for short. The evidence is that an address commission is a type of discount from the shipowner to the charterer that is paid once the shipment is complete. In this case, Oxbow arranged vessels for the first nine sulphur shipments and was therefore paid adcom for those shipments. MMB arranged the vessels thereafter.

Amounts at Issue

[20] Though liability is contested, the parties have agreed on the amounts at issue, which are as follows:

- a) Address commissions: Oxbow received address commissions totalling \$105,798.31 on shipments made to MMB.

- b) Service fees: The total amount of service fees received by Oxbow and Oxbow Canada for shipments to MMB is \$5,061,741. Of that total, \$1,305,244 was received up to September 2017 and \$3,756,497 was received afterward. Of the total, Oxbow Canada received \$401,602 pursuant to intercompany sales originating from British Columbia.
- c) Service fee CPI adjustment: Between 2008 and 2016, there was no adjustment to the service fee to reflect the U.S. consumer price index ("CPI") such that, for addenda #2 to #26, Oxbow invoiced, and MMB paid, a service fee of \$2.00 per tonne as set out in the Supply Agreement. In November 2017, Oxbow retroactively charged an additional service fee of \$146,417.17 for addenda #2 to #26 (the "Retroactive Charge"), which represented the additional amount chargeable if a service fee CPI adjustment had been made at the end of each calendar year since 2008.

Oxbow unilaterally collected the Retroactive Charge by subtracting the amount from a credit Oxbow owed to MMB. In addition, for addenda #27 onward, Oxbow has charged, and MMB has paid, a service fee that was calculated as if a CPI adjustment to the service fee was made at the end of each calendar year since 2008.

- d) Trading gains and netback commissions: The total amount of the trading gains and netback commissions received by Oxbow and Oxbow Canada on MMB shipments is \$10,995,695. That sum is comprised of trading gains of \$9,227,510 (83.9 percent of the total) and netback commissions of \$1,768,186 (16.1 percent).

Of that total, about \$2,803,902.23 (25.5 percent of the total) was received up to September 2017, and \$8,191,792.77 (74.5 percent) was received afterward. Of that total, Oxbow Canada received \$433,436 pursuant to intercompany sales originating from British Columbia.

IV. The Agreements

[21] The following are the key provisions of the two substantive agreements:

A. 2008 Agreement

Whereas:

- A. MMB is developing the Boleo Mine ...
- B. MMB will require an uninterrupted supply of a raw feed stock of elemental sulphur in all forms ("Sulphur"), in the approximate amounts of 300,000 metric tons ("tonnes") per year maintaining such quantities of Sulphur as may be specified by MMB on an annual basis, on a competitive market basis, with the objective of realizing the lowest delivered costs to the Mine, without compromising security of supply to MMB...

...

1.0 MMB's and ICEC's Obligations

- 1.1 MMB hereby appoints ICEC as its sole agent and supplier for 100% the Mine's Sulphur Supply Requirements and Sulphur Supply Services for the Initial Term and each Renewal Term of this Agreement.
- 1.2 As MMB's sole agent and supplier of Sulphur, provided a sulphur delivery infrastructure is in place, ICEC shall provide Sulphur for the Mine in accordance with the Plan in the quantities, and at the times, required by MMB in order to meet the Sulphur Supply Requirements at the Best Value for the Term (as hereinafter defined) of this Agreement in priority to all other of ICEC's clients that are receiving sulphur from the same production origins in the following manner:
 - 1.2.1 source and identify suppliers from multiple origins who are able to supply Sulphur, in the required quantities and of the specified quality to achieve the Sulphur Supply Requirements for the Mine acting in MMB's best interests to secure and deliver Sulphur ratably, on a market competitive basis at the lowest cost without compromising security of supply ("Best Value") to MMB;

...

- 1.2.15 be responsible for dealing with any Sulphur that is in excess of the Sulphur Supply Requirements at no cost or inconvenience to MMB

...

- 1.2.16 arrange for the supply, and delivery of all Sulphur on a cost flow-through and transparent basis and provide and perform all requirements described in this Agreement on a completely open book and financially transparent basis;

...

3.0 ICEC'S Representations, Warranties and Agreement

- 3.1 ICEC represents and warrants to MMB that:

3.1.1 it carries on business that includes, among other things, the sale and supply of liquid and solid sulphur ...

3.1.2 it has "know-how", global expertise and ability with respect to liquid and solid sulphur handling, processing, transportation and marketing logistics;

3.1.3 it shall provide Sulphur for the Mine in accordance with the Plan in the quantities, and at the times, required by MMB, as provided for in Article 1.2, in order to meet the Sulphur Supply Requirements at the Best Value for the Term (as hereinafter defined) of this Agreement in priority to all other of ICEC's clients that are receiving sulphur from the same production origins;

...

7.0 Fee Structure and Payment Terms

7.1 ICEC's service fee for acquiring and delivering Sulphur pursuant to this Agreement shall be calculated at the rate of USD \$2.00 / tonne for each tonne of Sulphur delivered to the Mine and accepted by MMB ... All services required to be performed by ICEC for the supply and for the logistics of meeting the Sulphur Supply Requirements in accordance with this Agreement are included in the service fee ... At the end of the first calendar year and at the end of each subsequent calendar year after the Effective Date of this Agreement the services fee will be adjusted to reflect the change in the US Consumers Price Index...

7.2 ICEC shall be entitled to reimbursement of all third party costs required to purchase at source, transport and deliver all Sulphur supplied and delivered to the Mine ... The Parties expressly agree that ICEC shall maintain complete records that evidence all such third party cost incurred ... ICEC's overheads and profit for the supply of Sulphur pursuant to this Agreement are included in the fee payable to ICEC pursuant to Article 7.1 hereof.

B. Amendment No. 2

Whereas, Oxbow and MMB entered into that certain Sulphur Supply and Delivery Agreement, dated as of January 28, 2008 (the "Original Agreement")

...

Whereas, the Parties wish to formalize the establishment of pricing and shipping terms as contemplated in the Original Agreement, including pricing terms and conditions for periodic shipments of approximately 25,000 metric tonnes of Sulphur ... through the remainder of the Term...

Whereas, the parties intend to enter into separate addenda to the Agreement with respect to each Periodic Shipment...

And Whereas, the Parties desire to make the foregoing changes and to make certain changes and additions to the Agreement as set forth herein.

...

2. The parties hereby agree to amend the Agreement as follows:

(a) Article 1 of the Original Agreement is hereby amended by deleting Section s. 1.2.15 of the Original Agreement and by inserting a new Section 1.4 as follows:

1.4 Consistent with the Parties desire as set forth in Section 1.2 to establish terms and conditions for the future supply and delivery of Sulphur on an ongoing basis, the Parties agree that, effective as of October 9, 2013 through the remainder of the Term, Oxbow shall supply MMB with Periodic Shipments on a monthly basis, or as otherwise agreed by the Parties, upon the following terms and conditions:

1.4.1 Each Periodic Shipment shall consist of 25,000 metric tonnes of Sulphur or such other quantity as may be agreed by the Parties.

1.4.2 Unless otherwise agreed by the Parties, the Parties shall arrange for one Periodic Shipment to be made per calendar month...

1.4.3 The Parties shall negotiate in good faith to timely finalize the terms and conditions of each Period Shipment by a date that is at least 30 days prior to the "laycan" date...

1.4.4 The terms and conditions of each Periodic Shipment shall be evidenced by a Periodic Shipment Addendum to the Agreement..., which terms and conditions the Parties acknowledge: (a) represent the Best Value for MMB for purposes of the Agreement, and (b) are consistent with Oxbow's obligations under Section 2 of the Agreement to develop a Plan and provide Sulphur for the Mine in priority to other clients and commitments of Oxbow.

1.4.5 In the event the Parties are unable to reach an agreement with respect to unit price per metric ton of the Sulphur delivered under the Agreement, such unit price will be established [as set out in a specific formula] ... In addition, if either Party feels that the indices referenced above are reflective of prevailing market conditions, then the Parties shall meet and shall negotiate in good faith to determine a new pricing mechanism that more accurately reflects prevailing market conditions.

...

3. Except as expressly set forth in this Amendment No. 2, this Amendment No. 2 shall not constitute an amendment or modification of any other provision of the Agreement...

V. Plaintiff's Case

A. Mark Henderson

[22] Mr. Henderson is a mining executive who was employed by MMB as its general manager for supply chain and logistics. He began employment with MMB in September 2012 and left MMB in September 2014.

[23] In his role as general manager for supply chain and logistics, he was responsible for contracts, procurement (including sulphur procurement), warehousing, and the mine's road and port facilities. He reported to Kyoung Jin (K.J.) Park, MMB's chief operating officer.

[24] MMB was in a startup phase when he began his employment. He said his knowledge of the sulphur market was "basically none" at that point. He was aware there was a contract in place from 2008 (the 2008 Agreement) and that its key features were the volume of 300,000 metric tonnes per year, the support and assistance that Oxbow was to provide to MMB, and the prescribed fee of \$2.00 per tonne that Oxbow was to be paid for acting as agent for sourcing sulphur.

[25] As part of the startup phase with the new owners, Mr. Henderson began assembling information needed for financial forecasts and learning about the sulphur business generally. He introduced himself to Peter Goemans, Oxbow's sales manager, in November 2012, and he asked Mr. Goemans to provide him with the latest version of the 2008 Agreement to ensure he had the current version.

[26] In March and April 2013, Mr. Henderson corresponded with Mr. Goemans to get information about pricing options, as he needed to know the cost of purchasing and shipping sulphur so that he could start forecasting. He also had numerous discussions with Mr. Goemans, who helped him understand the sulphur market and the supply logistics. Although a lot of those discussions had to do with logistics, Mr. Henderson said he was "continually asking" questions in an effort to understand how pricing was modelled and how he could forecast with it. He said his objective

was to identify the price and ensure that MMB was getting the cheapest pricing in the market, "as per the agreement".

[27] Mr. Henderson said he came to have a very good relationship with Mr. Goemans and felt comfortable asking him questions about the sulphur industry.

[28] Internally, Mr. Henderson reported to K.J. Park about the 2008 Agreement, the logistics of sulphur purchases and delivery, and the steps Mr. Henderson was taking to ensure they were getting the best price for the supplied sulphur. While Mr. Park suggested that they might explore other sources for the supply of sulphur, Mr. Henderson told him Oxbow would be doing that for them.

[29] In May 2013, Mr. Henderson and Mr. Goemans exchanged correspondence about current spot market pricing for sulphur, anticipated shipping costs and the ports from which the sulphur would be sourced. Mr. Goemans said the primary sources for MMB's sulphur would be ports on the West Coast, primarily Long Beach and Vancouver. From this, Mr. Henderson understood that Oxbow had access to sulphur at various ports, but he was unaware of any of the arrangements Oxbow had with any sulphur suppliers.

[30] In his reply email dated May 14, 2013, Mr. Goemans attached a sample letter for MMB to provide to Oxbow as Oxbow had "begun to inform producers" and a letter "will be helpful to indicate Oxbow is securing sulphur on your behalf". Mr. Henderson testified that at this point, he understood Mr. Goemans had begun to deal with suppliers to source the sulphur volumes MMB required and to negotiate prices on MMB's behalf. MMB provided the requested letter of introduction to Oxbow in late July 2013.

[31] In that same email of May 14, Mr. Goemans responded on pricing by referring to certain publications, called indices or indexes, which tracked sulphur prices. He noted that these published prices could be "risky" but that "various producers and consumers do track the prices with some using it as a benchmark". Mr. Henderson was at that point unfamiliar with those indices, but he understood from

Mr. Goemans' email that they represented the price at which a producer would sell sulphur to Oxbow on MMB's behalf.

[32] In June 2013, K.J. Park emailed Mr. Henderson to report that a Korean supplier had asked if they could sell sulphur to MMB. Mr. Park was aware of MMB's 10-year contract with Oxbow, but he asked what MMB could do if the Korean supplier offered a good price. Mr. Henderson responded that MMB could direct Oxbow to purchase from that supplier, assuming it was the "best price". Later that month, Mr. Park mentioned he was considering possibly cancelling the Oxbow contract but Mr. Henderson told him there was no ability to terminate the contract and that MMB's only recourse was that Oxbow had to offer the cheapest pricing.

[33] Mr. Henderson testified Mr. Park was under "huge pressure" to get the best price on all contracts and he wanted to ensure MMB was considering competitors. At that point, Mr. Henderson was in negotiations with Oxbow over sulphur supply for both shipping costs and the best (that is, the cheapest) market price.

[34] Mr. Henderson met with Mr. Goemans in person in August 2013 to discuss matters related to the 2008 Agreement. Leading up to that meeting, MMB had been advancing its discussions around volume, but Mr. Henderson was also seeking information from Oxbow about the price at which Oxbow would be purchasing sulphur and how MMB would be able to verify they were getting the lowest price in the market. It was this pricing information that he was seeking at the meeting.

[35] The subject of indices came up during the meeting. Mr. Henderson testified that MMB wanted to understand pricing in the sulphur market and the discussion at the meeting was about how Mr. Goemans could put together a weekly table of market pricing so that MMB could track prices and build their pricing knowledge. He and Mr. Goemans discussed how Oxbow would purchase sulphur from a producer and then pass the sulphur on to MMB at cost. He understood from Mr. Goemans that while there might be a little variability in the market to the time of shipping, with a "small win or small loss for Oxbow at that time", these would come out in the wash (or "wash-up", as Mr. Henderson actually put it).

[36] After the meeting, the two men socialized, and during that informal discussion Mr. Goemans mentioned netback arrangements. Mr. Henderson testified that he did not really take much notice during that discussion and he was not interested in those arrangements anyway because he knew from their discussions that Oxbow was in the market, as agent for MMB, for the supply of sulphur at the lowest price. He said that it was only after litigation commenced that he came to understand that netback arrangements involve a purchase by Oxbow and resale at a higher price to the end user, with a margin or commission paid to Oxbow by the producer. He said this arrangement would have made no sense for MMB as it would be a "double dipping" arrangement with Oxbow.

[37] Following that meeting, Mr. Goemans sent Mr. Henderson a "matrix" of five price listings, which showed two actual transactions (anonymized), two index ranges and the average of the two index ranges. Mr. Henderson said he was led to believe the two anonymized transactions involved buyers similar to MMB.

[38] There was an internal discussion about using indices as a price reference, but Mr. Park made it clear he wanted Mr. Henderson to ensure MMB obtained the cheapest price available.

[39] Discussions with Mr. Goemans on sulphur pricing continued in September 2013. Mr. Goemans suggested that he wanted to cancel the 2008 Agreement and would instead draft a new contract with a pricing process. Mr. Henderson told him there would be issues with cancelling the 2008 Agreement, one of which was that the 2008 Agreement formed a key foundation for the mine's financing. Another issue was that if the contract was cancelled, MMB was likely to contract elsewhere and not deal with Oxbow. Mr. Goemans agreed that was a risk and so instead he drafted an amendment to the contract.

[40] Mr. Henderson said he recalled from these discussions that the service fee would remain the same and MMB would be paying Oxbow as their agent to arrange sulphur purchases at the lowest price. Oxbow would first offer MMB sulphur at a stated price and if MMB agreed then that price would be used. If the parties did not

agree on a price then they would use the index prices to set the price.

Mr. Henderson believed this would then be a direct passing-on of the price Oxbow paid to the producer plus the \$2.00 per tonne agency fee.

[41] Mr. Goemans forwarded a draft amendment on October 7, 2013.

Mr. Henderson reviewed the draft and sent it to MMB's contract team for detailed review. From his own review, he considered that this draft amendment reflected his discussions with Mr. Goemans.

[42] On October 9, Mr. Goemans emailed Mr. Henderson to say, among other things, that "when the contract is finalized we can finalize prices from suppliers", which Mr. Henderson took to mean that the price paid to suppliers would be passed on to MMB.

[43] Shortly afterward, the parties arrived at an agreement on pricing, shipping costs and payment method (Amendment No. 2), which was used with the three or four shipments he was involved with before he left MMB.

[44] The process was to the following effect: MMB first identified both the sulphur volume required and the timing needed for the delivery, with Oxbow then informing MMB of the sulphur price and expected freight cost. Oxbow would then nominate a vessel. On accepting Oxbow's vessel nomination for the sulphur delivery, MMB would pay 30 percent of the CFR (cost and freight) value based on a signed contract addendum, with the balance to be paid 24 hours prior to the loading of the vessel. After completion of loading and documents being made available, which then identified the exact volume shipped, any balance payable by MMB (or refund by Oxbow, if the amount loaded was less than that set out in the addendum), would be invoiced and paid within 24 hours.

[45] Mr. Henderson said he understood the price identified by Oxbow would be the best price available and that Oxbow was simply passing on that best price to MMB.

[46] For the first delivery, Oxbow proposed a vessel, MMB accepted the vessel, Oxbow then proposed sulphur delivery from either California or Vancouver at

differing CFR prices (\$160.50 per tonne and \$166.00 per tonne, respectively) and then MMB accepted the shipment prices. Mr. Henderson said he took the differing prices to reflect the difference in shipping cost between California and Vancouver, but since the prices proposed by Oxbow included freight, he did not know the actual sulphur price. He asked Mr. Goemans for a breakdown of the quoted prices so that he could see the components (actual sulphur price, shipping costs, and disbursements), but Mr. Goemans never provided it.

[47] The resulting invoice for that first delivery merely repeated the aggregated figure of \$160.50 per tonne.

[48] An expert report prepared by forensic accountant Scott Schellenberg shows that Oxbow made an undisclosed profit of \$43,504 on that sulphur shipment. This amount included the sums made by Oxbow arising from the differential between the price it paid to acquire the sulphur and the price Oxbow charged to MMB as well as the sums Oxbow garnered through its netback arrangements with suppliers.

[49] Mr. Henderson said he was not aware that Oxbow had earned those sums on this shipment. He noted that Oxbow would also have received its agreed fee of \$2.00 per tonne. Had he known this information he would have done things differently by not accepting the excessive pricing without it having been explained.

Cross-Examination

[50] In cross-examination, Mr. Henderson agreed that sulphur is essential for the ongoing operation of the mine, and that the 2008 Agreement set out the expectation, back in 2008, that the mine would require approximately 300,000 tonnes of sulphur per year on a priority basis.

[51] In accordance with the wording in s. 1.2.1 of the Supply Agreement, he understood that Oxbow was to "secure and deliver sulphur ratably on a market competitive basis at the lowest cost without compromising security of supply". He also understood that Oxbow was obliged to have sulphur supply alternatives to

ensure the required sulphur deliveries were assured (s. 1.2.2) in priority to Oxbow's other commitments (s. 1.2.12) at the "Best Value".

[52] Mr. Henderson said MMB did not have an immediate need for sulphur in 2008, although he could not say for sure as he was not involved back then, but the 2008 Agreement was a key contract in terms of project financing.

[53] Mr. Henderson said that by the time he arrived at MMB there was no one within MMB senior management who had been directly involved in negotiating the 2008 Agreement or who had direct knowledge of what the "original intention of the parties was" in terms of the 2008 Agreement.

[54] Mr. Henderson acknowledged that Mr. Park mentioned he wanted MMB to cancel the 2008 Agreement. Mr. Park preferred Korean suppliers generally. The 2008 Agreement was one of 20 contracts Mr. Henderson was handling that were going through the same review.

[55] As noted earlier, Mr. Henderson understood the 2008 Agreement was "fundamental to the lenders" and so it could not be cancelled, which is what Mr. Goemans had requested.

[56] Discussions concerning an amendment to the 2008 Agreement commenced between Mr. Henderson and Mr. Goemans in August 2013 and culminated in an agreement reached in October. MMB needed some certainty about pricing and other essential terms as part of forecasting and planning in advance of the launch of the mine's operations. Mr. Henderson's overall objective was to ensure both that the volume and supply was sufficient to run the processing plant and to be confident MMB was getting the best market price.

[57] In those discussions, Mr. Goemans conveyed to Mr. Henderson that he was acting and working on MMB's behalf to get the best result for MMB, though in his testimony Mr. Henderson acknowledged that Oxbow likely had its own commercial objectives. While Mr. Henderson was negotiating with suppliers and contractors for other aspects of the mine's needs, those parties were not working as MMB's agents.

[58] Mr. Henderson agreed he understood that one of the purposes of the amendment was as set out in its preamble, that is, "the parties wish to formalize the establishment of pricing and shipping terms as contemplated in the original agreement". He agreed those terms were unclear in the 2008 Agreement and potentially unworkable from MMB's perspective as there was no pricing mechanism.

[59] Amendment No. 2 deleted certain sections of the 2008 Agreement and added new sections, including s. 1.4.3 and s. 1.4.5. Section 1.4.3 requires the parties to "negotiate in good faith to timely finalize the terms and conditions of each periodic shipment" at least 30 days prior to the "laycan date", meaning the ship's earliest arrival time at the loading port. Section 1.4.5 provides that where the parties cannot reach an agreement on unit price, the price is to be established by using the average of two sulphur indices over the prior five weeks.

[60] Mr. Henderson agreed the index publications provided market information by publishing spot prices for sulphur, although he noted that the information was retrospective in nature. This method was a fallback in case the parties could not reach a negotiated price for a shipment.

[61] He agreed that the price derived from the index averaging method, by virtue of being an average, would not be the lowest possible price. He was comfortable with the index average method because it gave MMB the ability to analyze and ensure that they were where they wanted to be in the market.

[62] Mr. Henderson was questioned about a section in the 2008 Agreement concerning an "Infrastructure Agreement". He agreed that in July 2013 he asked Mr. Goemans whether such an agreement was ever put in place, but he testified that he had no recollection whether an infrastructure agreement was ever located.

[63] It was suggested to Mr. Henderson that there was an error in Amendment No. 2 in that the reference to deleting s. 1.2.15 of the 2008 Agreement should have been a reference to deleting s. 1.2.16 of that agreement. Mr. Henderson did not agree there was an error there. He did agree that it "made sense" that there was a

missing word ("not") in s. 1.4.5, such that it would read "in addition, if either Party feels that the indices referenced above are not reflective of prevailing market conditions, then the Parties shall meet and shall negotiate". He said he could not confirm this was a typo because he did not write the document.

[64] Amendment No. 2 has an appendix that shows the form of addendum the parties agreed to use for each shipment and which set out the terms and conditions of each shipment. Mr. Henderson agreed that, by virtue of s. 1.4.4 of Amendment No. 2, each executed addendum was an acknowledgment that its terms and conditions represented "Best Value" to MMB, with "Best Value" being a term defined in s. 1.2.1 of the 2008 Agreement. Mr. Henderson also agreed that Oxbow's obligations as set out in the 2008 Agreement flowed into each addendum.

[65] Mr. Henderson acknowledged that the payment terms set out in the sample addendum were changed, by agreement, in October 2013. Those were the payment terms in place during his time at MMB.

[66] There were problems with the first sulphur delivery because the ship's configuration was not fully compatible with the configuration at MMB's unloading facility, meaning that unloading could not be completed within the required time. MMB asked Oxbow to divert the vessel and sell the cargo elsewhere, which Oxbow did. Mr. Henderson agreed Oxbow helped MMB find a solution to allow the vessel to discharge, which involved one of Oxbow's vessel chartering specialists flying to the mine site to help come up with a new design for the offloading infrastructure. Mr. Henderson was not aware of any payment made by MMB for those services.

[67] The first completed shipment was documented, in the agreed manner, by way of an addendum, with this being "addendum #2" given the cancellation of the first shipment. Mr. Henderson signed this addendum for MMB on behalf of Mr. Park, who was not on site at the time. Oxbow is shown as the "seller" and MMB as the "buyer". The document contains various other terms, including a provision dealing with Oxbow's role in nominating a vessel.

[68] Addendum #2 also dealt with risk and insurance, as it prescribes that risk of loss transfers to the buyer once the goods are aboard the vessel or, in industry parlance, "over the rail". Mr. Henderson agreed this is a common term in a buyer-seller relationship.

[69] Mr. Henderson and Mr. Goemans dealt with addendum #2 by an exchange of emails in early January 2014, as referred to earlier. A vessel was nominated, the nomination was accepted, Mr. Goemans set out the CFR prices (\$160.50 per tonne for the California ports; \$166.00 per tonne for Vancouver) and, after doing some research, Mr. Henderson accepted the shipment pricing. Mr. Henderson said the price differential was due to the difference in shipping costs. When it was suggested to Mr. Henderson that MMB was negotiating with Oxbow, and MMB paid a market price for the sulphur, he said "but with the understanding they were providing us with the best value price".

[70] Mr. Henderson acknowledged that at this time Mr. Park questioned him about "a cheaper way" as Mr. Park felt MMB had been overcharged. In early February 2014, Mr. Henderson wrote to Mr. Goemans to ask him to supply the weekly pricing average for January so that he could address Mr. Park's concerns. A month after that, Mr. Henderson introduced Mr. Goemans to another MMB employee, Paul Switch, the marketing manager for MMB, who succeeded Mr. Henderson as the contact for pricing negotiations with Oxbow. Mr. Switch's role included monitoring major commodities including sulphur.

[71] Mr. Henderson agreed that Amendment No. 2 created a pricing mechanism that allowed MMB to reliably predict or estimate the price it was going to obtain for each periodic shipment. He also agreed that the market price for sulphur is constantly changing.

[72] Mr. Henderson agreed he received the pricing matrix sent by Mr. Goemans in August 2013. He noted that this was supposed to been provided weekly.

[73] In July 2014, Mr. Henderson asked Mr. Switch to see what the indications were for sulphur prices in the following months, using the index averaging method in Amendment No. 2. He agreed this was an objective measure as Oxbow had no control over those figures. He also agreed MMB had the option of using that pricing mechanism on any shipment.

[74] Mr. Henderson agreed that for the addenda he was involved with, MMB obtained the quantity of sulphur contracted for, at the quality or specifications it asked for, and at the price MMB agreed to pay.

[75] Mr. Henderson agreed that in 2013 he had numerous discussions with Mr. Goemans on matters such as sulphur pricing, vessel options and transport logistics. He did not agree he was generally familiar with the sulphur industry, but he agreed he was becoming familiar with it and had a basic understanding about how sulphur was supplied and priced. If he had any questions about the industry he felt comfortable asking Mr. Goemans.

[76] Mr. Henderson met with Mr. Goemans in Los Angeles in August 2013. A number of representatives of Daewoo Logistics ("Daewoo") were also in Los Angeles at that time, having been engaged by MMB's parent company. Mr. S.K. Lee was one of those representatives and he also met Mr. Goemans at that time. After the formal interactions, he socialized with Mr. Goemans and he shared with Mr. Goemans his concerns that an analysis he had prepared had been conveyed to a potential bidder during a tender process and used to become the successful bidder. He agreed that his specific concern was about bid rigging. He also shared concerns he had about the financial stability of the Boleo operation.

[77] He agreed that Mr. Goemans had used the term "netback arrangements" during this discussion. It was a term he had not heard before. They also discussed price indices, with Mr. Goemans telling him that some Oxbow customers purchased sulphur based on published indices. He agreed that this was of particular interest to him because it was a pricing mechanism that would ensure MMB paid a price

verified by a third party. In other words, it would allow him to demonstrate to Mr. Park that MMB was paying a third party verified price.

[78] He agreed Mr. Goemans explained that the index price would not perfectly match the actual price paid by Oxbow to the supplier, and if Oxbow paid the supplier more than the index price that was their loss and risk, and if they paid less than the index price then that was their profit and benefit.

[79] Mr. Henderson was shown an affidavit sworn by him on November 21, 2021, where he said:

Upon reading the 2008 agreement and amendment 2, it is clear to me that the reference in section 1.4.4 of the amendment 2 is a typographical error as the reference should be and was intended to be a reference to Oxbow's obligation under section 1 of the agreement.

[80] Mr. Henderson agreed that was his evidence on that date. He said that at the time, he believed it to be true and accurate.

Re-Examination

[81] When asked about the circumstances giving rise to his November 2021 affidavit, Mr. Henderson said he received several messages and calls from Mr. Goemans indicating there was an issue with the contract and he needed him to confirm there was an error in one of the statements. Mr. Henderson was then introduced to one of Oxbow's lawyers, but he told the lawyer he was not interested in getting involved. He said the one thing that stuck with him from his discussion with the lawyer was that they had the ability to subpoena him to give evidence in court and so, in part, he felt obliged to work through the affidavit with them.

[82] The Oxbow lawyer sent a first draft of the affidavit to Mr. Henderson, and Mr. Henderson said he may have made some changes, but he could not recall.

[83] After swearing that affidavit, he took steps to verify things he had said. He testified that on review, and after having further discussions and now understanding

the basis behind what the affidavit was trying to prove, he felt he had been misled in the information he had been given for the affidavit.

B. Sang Keon Lee

[84] Mr. Lee is a general manager of MMB, having been hired in that position in September 2015. He formerly worked with Daewoo in its commodities division. His role is somewhat more limited than his title suggests as he is effectively a departmental manager who is responsible for securing raw materials such as sulphur, and he is not in charge of all of MMB's operations. He was the person responsible for administering MMB's relationship with Oxbow.

[85] At the time he was hired, he reported to Jaime J.H. ("James") Park who, in turn, reported to MMB's chief operating officer. His predecessor was Paul Switch, and before Mr. Switch, it was Mark Henderson.

[86] Mr. Lee was recruited by James Park. The two of them had worked together at Daewoo. James Park expressed concern to Mr. Lee about sulphur procurement as sulphur was MMB's largest input cost.

[87] Mr. Lee said his first activity was to review the 2008 Agreement and Amendment No. 2. He noted the main points, those being that it was a sole agency contract, Oxbow was to secure sulphur at the best value, Oxbow's fee was \$2.00 per tonne and, in Amendment No. 2, there was a pricing mechanism. Mr. Lee took this to mean this was a "cost flow" basis, meaning that Oxbow bought sulphur as agent for MMB and then conveyed the sulphur to MMB at the same price.

[88] After reviewing the contracts, Mr. Lee communicated with Mr. Switch to obtain a history of sulphur prices paid by MMB, as Mr. Lee had noted that Amendment No. 2 provided for negotiated prices in the first instance and he wanted to compare the offered prices versus the index prices. He testified that he never really obtained that information because all shipments had been priced using the index price.

[89] Mr. Lee also inquired, via Mr. Switch, to find out how the pricing formula had come about and how it related to Oxbow's sulphur supply. Mr. Goemans responded by an email dated October 15, 2015, where he said:

In order to delve further into this, a good starting point is to understand how the vast majority of Oxbow's supply is contracted. Oxbow is charged with finding competitive and secure outlets for refinery and gas plant sulphur production. Oxbow does not take positions on this supply but is responsible for managing the logistics chain.

[90] Mr. Lee said that he understood from this response that Oxbow did not make a profit on the transaction as they did not "take a position". Mr. Lee concluded that this was consistent with an agency contract.

[91] Mr. Lee also contacted Mr. Goemans after being introduced. He wrote:

I am so glad to join MMB and also to become a partner with you. You may recall we met a few years ago in LA with Mark.

As MMB ramps up production, our management's key concern is to acquire the most competitive price for sulfur. I think Oxbow's professional expertise on Sulfur can accommodate the management's target. I am open to discuss with you how to achieve this goal by building our relationship step-by-step.

[92] In his testimony, Mr. Lee said he used the phrase "become your partner" because Oxbow was MMB's agent and so they were "on the same team".

[93] Mr. Lee's email carried on:

The typical pattern has been for Oxbow to find a vessel and then provide a quotation based on Index. I believe average Index prices of Fertecon and Argus are not the best value for MMB and I am sure Oxbow can improve on Index pricing.

For next month's shipment, please send me your best price non based on Index price even before booking the vessel.

[94] Mr. Lee testified that his object was to explore any means to improve the price MMB paid for sulphur rather than just accept the index price. MMB's sulphur volumes were increasing, so he thought Oxbow should be able to secure better prices given that MMB was purchasing large volumes over the long term, as distinct from small spot purchases. He conveyed that message to Mr. Goemans.

[95] The first shipment for which Mr. Lee was involved was addendum #10, which was arranged in October 2015. For that shipment, Mr. Lee had noted fluctuations in the indices and so he asked Mr. Goemans to lock in a price based on a prior week's indices. Mr. Goemans responded that the spot price was \$125.00 per tonne at that point, but he could offer \$107.00, which Mr. Lee accepted.

[96] In his expert report, Mr. Schellenberg calculated Oxbow's total profit on that particular transaction at \$129,000, with \$100,000 of that sum derived from Oxbow's sport trading purchases and subsequent sales to MMB and \$29,000 gained from marketing and incentive fees paid to Oxbow from netback suppliers.

[97] Mr. Lee said he was not aware at the time that Oxbow had made those gains. He said, had he known, he would not have agreed to the \$107.00 per tonne price. He understood that theirs was a "cost flow" arrangement, meaning Oxbow would be buying sulphur at \$107.00 per tonne and conveying the sulphur to MMB at the same price, with remuneration of \$2.00 per tonne only, as per the Supply Agreement.

[98] Shortly after the sulphur price was agreed for addendum #10, Mr. Lee sent an email to Mr. Goemans about the difficulties Mr. Lee perceived in Oxbow's advice on pricing and indices. He said:

There have been many gray areas in pricing until now. My main job is to find the best option for Sulfur pricing supported by Oxbow's proven experience. I hope Oxbow truly represents MMB's interest and not the suppliers' because the commission clause in the contract clearly states Oxbow is to find the best value on behalf of MMB transparently.

[99] Mr. Lee testified that the pricing method they were using was very vague and unproductive and he wanted to find an objective and effective way of setting prices. He was also concerned that Oxbow was not doing a very good job.

[100] Mr. Lee was asked about October 2015 emails on the subject of "address commission" or "adcom". Mr. Lee explained that address commission is a type of discount from the shipowner to the charterer that is paid once the shipment is complete. As MMB was the charterer of the delivery vessels, it was entitled to

receive the discount. He said adcom has nothing to do with the suppliers of the commodity as it has to do with ocean freight and not the commodity itself.

[101] Mr. Lee expected that any address commission received by Oxbow would be returned to MMB, but he learned it was being retained by Oxbow. He took this up with Mr. Goemans who, after a long conversation, agreed to return the address commission to MMB. However, those commissions were never returned.

[102] Mr. Lee met with Mr. Goemans in Vancouver in November 2015. In advance of that meeting, Mr. Lee communicated with a representative from Argus, a publisher of one of the industry indices. He wanted to confirm, and did confirm with Argus, that the usual price spread between Vancouver and the California ports was \$5.00 per tonne, with Vancouver having the higher figure. This was of interest to Mr. Lee because the pattern to date was that Oxbow was using the Vancouver index even when the vessel was going to be loading at a California port. He made this inquiry as part of his preparation for the November meeting with Mr. Goemans.

[103] Mr. Lee also sent an email to Mr. Goemans reminding him that Oxbow was MMB's sole agent, as per the contract, and they should meet so they could improve the pricing mechanism.

[104] At the meeting, Mr. Lee emphasized that MMB's sulphur volumes had increased substantially and its sulphur needs were long-term, factors that should lead to a discount from suppliers. He urged Mr. Goemans to ask suppliers for a discount of 5 percent. That topic and the pricing mechanism were the two main issues discussed.

[105] When asked about Mr. Goemans' response to being reminded Oxbow was MMB's agent, Mr. Lee said he reminded Mr. Goemans about that repeatedly and Mr. Goemans never denied it.

[106] Mr. Goemans dismissed the suggestion that a 5 percent discount was possible and said that, at most, they might try for a discount of perhaps 2 or 3 percent.

[107] After the meeting, Mr. Lee sent Mr. Goemans a lengthy email dated November 12, 2015, where he began:

I feel there is a big gap between Oxbow and MMB. Oxbow thinks they have provided a best service with the best price, but MMB management thinks the other way around. It's OK, to narrow this gap to the point we eventually appreciate each other is my job.

He then said:

As agreed to in our meeting, the current contract is purely a sole agent contract, which means Oxbow is using its own "know-how" to transparently find the best value from multiple sources on behalf of MMB and charging a \$2.00/MT commission for this service. However, I am still not comfortable the way you are handling our discussions.

[108] As for the "sole agent" statement, Mr. Lee said he made that statement at the outset of the meeting and Mr. Goemans did not deny it, so they carried on. As for the "still not comfortable" statement, Mr. Lee said this was because Mr. Goemans rejected the idea of asking for a 5 percent discount, saying it was impossible and might lead to stopping sulphur supply in six months. Mr. Lee said he felt that this was "like some kind of threat". He felt that an agent is supposed to follow the principal's intention and try their best as fiduciary, so he was not comfortable when Mr. Goemans immediately replied that a 5 percent discount was impossible.

[109] From their discussions, Mr. Lee understood that Mr. Goemans would go back to the suppliers and discuss how much discount they would offer. However, despite subsequently reminding Mr. Goemans about that "constantly", it never happened.

[110] In his email of November 12, Mr. Lee also said MMB did not want to limit sulphur supply to only Oxbow's supply channels and that Oxbow, as MMB's purchasing agent, should use a broad reach. He said:

That is why I was puzzled to your response to my question of finding us one or two of the best suppliers instead of multiple ones. You answered Oxbow cannot discriminate suppliers by law. This did not make sense unless you represent the interests of the suppliers over those of buyers. Again, please be not confused, Oxbow is not a shipper but an agent for MMB... As you emphasized, if the volume dictates price, why shouldn't we try to focus our whole volume (about 300k MT per year) with a specific supplier or two.

...

When you negotiate with suppliers, let me join you, as a silent observer, so I can convince our management how hard Oxbow does their job on behalf of MMB.

[111] When asked about the last comment in that quote, Mr. Lee said he proposed sitting in with Mr. Goemans because Mr. Goemans had said Oxbow's supply information was strictly confidential. Also, Mr. Goemans had complained that MMB management did not appreciate how hard Oxbow worked on MMB's behalf.

[112] Mr. Lee thought it very unusual that the agent would not be open about its suppliers as the agent negotiates with suppliers on behalf of the principal. In his November 12 email, Mr. Lee had suggested confidentiality could be protected using a non-disclosure agreement, but he believed Mr. Goemans never responded to that.

[113] Mr. Lee sent another email to Mr. Goemans on November 17, 2015, this one discussing a delivery for December. Mr. Lee ended by saying "please keep all records with the suppliers transparently". In testimony, he said he wanted records kept "because this is what an agent is to do on a transparent basis".

[114] Mr. Goemans responded to Mr. Lee's November 12 email by interlineating his responses in the body of Mr. Lee's email. Mr. Goemans did not respond to Mr. Lee's statement that the current contract "is purely a sole agent contract". Mr. Lee took that to mean Mr. Goemans accepted his characterization.

[115] In that same response, Mr. Goemans "committed to discussing discounts with suppliers and would propose a 5% discount from publication prices", but Mr. Lee said the promised discussion with suppliers never happened.

[116] In an email to Mr. Goemans on December 10, Mr. Lee discussed arrangements for a January 2016 delivery and said the pricing should reflect a discount negotiated with suppliers. Mr. Lee said he included this because Mr. Goemans had committed to having those discussions with suppliers. Mr. Lee also reiterated that MMB wanted to confine its purchasers to one or two suppliers in order to get the most competitive price given its purchase volumes.

[117] Mr. Lee continued to press Oxbow to secure a pricing discount as part of a long-term pricing arrangement, but this was still unachieved as of May 2016.

[118] In January 2016, Mr. Lee travelled to Houston to meet with Mr. Goemans. Mr. Goemans arranged for Mr. Lee to meet a representative of Phillips 66, one of Oxbow's suppliers. That part of the meeting lasted only 10 minutes and there was no discussion about the arrangements between Phillips 66 and Oxbow or any pricing discussions. This was not the supplier meeting Mr. Lee was looking for.

[119] The minutes of that meeting reflect a discussion on address commissions. The month prior to the meeting, MMB's legal team had sent a "default letter" raising several issues, including concerns that MMB was not getting the best pricing available and not being paid address commissions. In that letter, MMB demanded various documents, including unredacted copies of the charterparty agreements and documents showing Oxbow's actual purchase prices from suppliers so that it could conduct an audit as provided for in the Supply Agreement.

[120] The minutes of the January 2016 meeting show that Oxbow said it would pay MMB for address commissions for recent vessels. The minutes also indicate MMB was waiting for Oxbow's legal department to respond to its December letter.

[121] Oxbow responded to MMB's default letter on April 18, 2016. In that response, Oxbow agreed that it would pay address commission received on the prior vessels. As for the audit request, Oxbow said it would agree to an audit only in relation to conformance with index prices. Mr. Lee said this was not what MMB had requested.

[122] MMB replied on May 5, 2016, essentially repeating its position that it was entitled to know what Oxbow had paid for sulphur. MMB proposed that instead of a full audit, Oxbow produce all documents relating to prices charged to MMB, including charterparties showing the freight costs. Mr. Lee said "this never happened".

[123] In an email to MMB sent on May 10, 2016, Mr. Goemans said California shippers had no interest in a long-term price agreement, but the Canadian suppliers were interested in some form of volume commitment. Mr. Lee was frustrated that,

after all the delay, the message to MMB was that the California shippers were not interested in any long-term agreement.

[124] Mr. Lee described the general process for MMB's sulphur orders. He said MMB's first step is to send the target laycan, which is the approximate period when MMB wants the ship to arrive at its unloading facility. Sometimes Oxbow would then send an offer price for the sulphur, but there was never a time that Mr. Lee accepted it, so the matter always went to the index price formula. By agreement, the formula was modified in January 2016 such that the price was set by taking the index average for the three weeks immediately preceding the bill of lading date, meaning the date on which the loading of the ship was complete. Oxbow would then identify the loading port to MMB, MMB would nominate a vessel, and MMB then paid in full two days prior to the arrival of the vessel at the loading port.

[125] Mr. Lee was referred to a November 2016 email where Oxbow made an offer at \$85.00 per tonne, which MMB did not accept, and the parties subsequently agreed to \$74.50 per tonne, which I infer was the price arrived at through the index formula. This shipment was reflected in addendum #18. Mr. Lee said that he took the \$85.00 per tonne price to be the price that Oxbow would be paying for the sulphur it supplied.

[126] The corresponding analysis by Mr. Schellenberg shows that for this shipment, Oxbow had acquired sulphur from two spot suppliers at \$69.80 and \$65.17 per tonne, generating profits of about \$152,000, and from two netback suppliers, who paid Oxbow marketing and incentive fees totalling \$13,500. The total profit (leaving aside Oxbow's \$2.00 per tonne commission) was about \$165,000.

[127] Mr. Lee said he was not aware that Oxbow had earned those amounts, and he would never have accepted the price of \$74.50 per tonne had he known.

[128] Mr. Lee was taken to a further shipment, this one from October 2017 (addendum #28), where Oxbow had offered sulphur at \$118.00 per tonne, MMB had not accepted that offer, and the index method resulted in a price of \$110.83 per

tonne. The Schellenberg report indicates Oxbow sourced that entire shipment from their related Canadian company, Oxbow Sulphur Canada ULC, for about \$2.00 less per tonne, resulting in a profit of \$53,492.

[129] Again, Mr. Lee said he was never aware of this, and had he known he would never have agreed to the price that MMB paid.

[130] MMB started this lawsuit in 2017 but continued to purchase sulphur from Oxbow. Mr. Lee explained that the contract was still in place and MMB was bound by it, but MMB wanted to see what the court decision would be. The contract term ended in late 2023. After that, they contacted several other suppliers and ultimately selected H.J. Baker.

[131] H.J. Baker is the successor to Oxbow and so, initially, MMB was not inclined to buy from it. However, Mr. Goemans called Mr. Lee and asked him to allow H.J. Baker to participate in MMB's request for proposals process. Mr. Goemans told Mr. Lee the approaches of Oxbow and H.J. Baker were different, with H.J. Baker being more reasonable, and so he asked that H.J. Baker be given a chance to submit a proposal. MMB concluded that it did not have to disqualify H.J. Baker just because of the lawsuit. Also, H.J. Baker controlled the sulphur volumes coming out of Long Beach, which was much closer to MMB's mine site than Vancouver and so the freight cost was less. In the result, H.J. Baker submitted a proposal, MMB submitted a counter proposal, and an agreement was reached.

[132] The contract with H.J. Baker is not dated, but it came into effect on January 1, 2024. There is no commission or service fee payable under this contract. The sulphur price in that contract is determined according to an index-related formula minus 4.5 percent for shipments out of Vancouver and minus 3.0 percent for shipments out of Long Beach.

Cross-Examination

[133] Mr. Lee said that MMB has approximately 1,000 employees and is primarily owned by Korea Resources Corporation. MMB has lawyers on staff.

[134] When Mr. Lee started with MMB he did not have much experience purchasing sulphur. He was directed to familiarize himself with sulphur procurement by learning as much as he could from Mr. Switch, who was leaving in three months.

[135] Mr. Lee said he was not involved in the negotiations for Amendment No. 2 and he had no knowledge of those negotiations.

[136] Mr. Lee agreed that sulphur is critical to the operation of the mine, which requires around 250,000 to 300,000 tonnes of sulphur each year. The annual sulphur cost is in the range of \$30-\$40 million per year. It is MMB's largest individual expenditure.

[137] He was aware that Oxbow was a sulphur trading company, all the sulphur purchased by MMB came from Oxbow, and that MMB did not purchase from any other sources. While no one told him MMB could not source sulphur from other suppliers, he had noted the Supply Agreement was a "sole agent" contract, meaning MMB could only deal with Oxbow.

[138] In his role, Mr. Lee routinely monitored the global market price of sulphur, doing so by looking at sulphur publications or indices. The two indices used in the Supply Agreement pricing formula were Fertecon and Argus, companies that gather intelligence in the global sulphur market. Price is an important component, but when determining lowest cost, the cost of transportation also factors into that decision.

[139] Although he agreed there was "full and complete" transparency in terms of being able to readily access index information, he said that at the time he did not completely understand what index prices represented. Mr. Lee did not agree that he had "multiple sources of information as to the global sulphur market and pricing", but said he had only limited sources, as he might contact people at Fertecon or Argus, or rely on Mr. Goemans, which is why he asked Mr. Goemans to update him from time to time on sulphur market trends.

[140] Counsel directed Mr. Lee to Oxbow's letter of July 6, 2016, which was part of the correspondence between the parties following MMB's default letter. In that

letter, Oxbow asserted that once MMB's executives learned how complicated it would be to derive a cost for sulphur delivered by 20 or more suppliers, MMB agreed that instead of a cost flow-through basis, it was content with price being set according to price indices. Mr. Lee said, "I never heard that".

[141] Mr. Lee did not agree that he had asked Oxbow to provide a more favourable index price than the one set out in Amendment No. 2. He said that, instead, what he had done was ask for a volume-based discount and a long-term contract discount. As for the index price, what he asked for was a mechanism that offered more certainty. The existing system, based on a single week's index figure, left MMB without knowing the price being paid until the vessel was loaded. The revised system took the index average based on three weeks immediately preceding the bill of lading date. This revised mechanism was not reflected in a formal amendment to Amendment No. 2 but was reflected in each shipping addendum.

[142] Mr. Lee did not agree that this system was "more favourable to MMB" as Oxbow alleged in its July 6 letter. It was not more favourable to either side; instead, it was just fairer.

[143] Mr. Lee agreed that MMB asked that Oxbow source sulphur from California because of the lower freight cost and to use an index specific to California. He said Oxbow agreed to that eventually, although getting them to agree was very difficult.

[144] Mr. Lee also agreed that MMB asked to take over vessel chartering and Oxbow agreed. He said MMB made that request because Oxbow refused to disclose the charterparty agreements and hid their taking of the address commissions. He did not agree that Mr. Goemans had conceded that they had been wrong in taking the address commission, as Mr. Goemans merely said Oxbow would relent to "compromise for the good [of the] relationship".

[145] He did not agree these were changes granted by Oxbow in MMB's favour. He said these changes remedied aspects that were unreasonable to begin with.

[146] Although in its July 6 letter Oxbow had agreed to refund the address commission it had kept (which totalled \$105,000), Oxbow then claimed a CPI-based increase on their \$2.00 per tonne commission and set that off against the adcom amount. Mr. Lee found that very frustrating, as MMB had not yet agreed to any CPI-based adjustment in Oxbow's commission.

[147] There was a fire at the mine site in August 2019, which resulted in the cancellation of a shipment that was due to arrive in September (addendum #47). The planned shipment was unusual in that it involved loading in both Anacortes and Vancouver. This was the only time Anacortes had been proposed as a loading port, and it raised concerns because loading at that port was very slow. Loading in Vancouver typically took two days, but loading in Anacortes was expected to take 10 or 12 days, which made freight costs much higher. Mr. Lee wanted to avoid this, but Mr. Goemans said they had to use that port as the necessary supply was not available at the usual ports.

[148] Mr. Lee understood that from Oxbow's perspective, it was urgent that sulphur be loaded from Anacortes because the supplier had limited space and needed the sulphur to be cleared from its site. Oxbow said that if MMB did not nominate a vessel for that shipment then Oxbow might not be able to supply sulphur in September, and Oxbow would bring in a vessel on its own and sell the sulphur to another buyer.

[149] The proposed laycan for Anacortes, or loading window, was too early for MMB's purposes. Mr. Lee told Oxbow that if Oxbow had to "stick to this laycan in Anacortes, please find an alternative buyer".

[150] Mr. Lee did not agree with the suggestion that he knew Oxbow had purchased the sulphur or that Mr. Goemans had told him that. He said his message did not imply that Oxbow had purchased the sulphur. He had no idea about any arrangements Oxbow might have with any suppliers.

[151] Dealing with the addenda more broadly, Mr. Lee agreed that each addendum specified the terms and conditions for each shipment, including the quantity, quality, shipping date or laycan, discharge conditions, price and payment terms. There were 80 addenda in total, with two of those having been cancelled (addenda #1 and #47).

[152] Mr. Lee agreed that the sulphur received for all completed shipments was at the quantity, quality and price agreed to.

[153] Going back to October 2015, in Mr. Lee's first email to Mr. Goemans he said he felt sure Oxbow could improve on index pricing. In his testimony, he said he felt there should be some discount for volume and a long-term contract. He noted that Oxbow had never sent an offered price but went straight to an index price, and this was a reminder to Oxbow that he wanted them to send an offered price as he felt it should be more favourable than the index price. Later, he also noted that Oxbow used the Vancouver index price even where a California port was used, and he wanted that changed so that the index used was the index for proposed loading port.

[154] Mr. Lee's first shipment discussion with Oxbow was in October 2015 (addendum #10). He emailed Mr. Goemans, setting out the two published index prices, and asked him to lock in a price "at last week's indices". Mr. Goemans responded with a different figure from the indices (\$106.75) and offered \$107.00. He also told Mr. Lee that the current market price was \$125. Mr. Lee said Mr. Goemans effectively questioned why MMB would take market price when the index price was much lower. Mr. Lee said there was no reason to disagree and so he agreed to the \$107.00 price. Mr. Lee noted that \$107.00 was not actually the index price (which was \$106.75) but it was close. Mr. Lee agreed this was his first involvement negotiating prices with Oxbow.

[155] Mr. Lee agreed that there were no supplier names on any of the addenda. Soon after Mr. Lee took over at MMB, Mr. Goemans told him that Oxbow's supplier relationship was strictly confidential, which Mr. Lee thought was very odd.

[156] In June 2016, Mr. Lee emailed Mr. Goemans to express disappointment with Oxbow's lack of effort towards MMB's goal of securing discounts to reflect long-term, large-volume purchases. He told Mr. Goemans that MMB management had instructed him to "urgently contact sulphur suppliers in LB [Long Beach]". He denied that this was a threat but said it was an expression of "strong frustration". MMB preferred to load from Long Beach because of the lesser freight cost, but at that time he was not aware of Long Beach's smaller available supply. He agreed that Mr. Goemans told him that MMB should charter vessels "on a full range basis covering all ports or combinations", and he agreed that security of supply to the mine was MMB's top priority.

[157] Mr. Lee agreed that the objective of the relationship between MMB and Oxbow was a stable, secure guaranteed supply at the most competitive price, as mentioned by Mr. Goemans in an email to MMB dated October 15, 2015.

[158] Mr. Lee acknowledged that, in that same email, Mr. Goemans said: (1) the index formula pricing method "tends to be fairly effective" when sulphur is supplied on a regular schedule "as it tends to smooth out the anomalies in published prices"; (2) the original idea with MMB's original management was to contract with Oxbow so Oxbow could aggregate the supply and offer competitive secure supply; and (3) spot bidders are not always successful in securing supply.

[159] Mr. Lee said that at this point he was just learning the sulphur market. While he knew the index price was an average of averages, he did not understand how that related to the price paid to the original supplier, or why there would be gains or losses that would even out given that Oxbow was acting as an agent.

[160] Mr. Lee agreed that under the new supply contract with H.J. Baker, MMB's contact continues to be Peter Goemans. The current contract provides a pricing mechanism based on an index formula, a netback arrangement with H.J. Baker's suppliers, and discounts of 3 percent and 4.5 percent for Long Beach and Vancouver shipments, respectively. He said this is now a principal supply contract without commission.

[161] Mr. Lee reiterated that he had repeatedly asked Mr. Goemans to get a supplier discount to reflect MMB's volume and long-term needs, but Mr. Goemans did not do so. Mr. Goemans never explained why he did not pursue the requested discount until MMB had sent its default letter, and then Mr. Goemans said the default letter was the reason why he could not pursue the requested discount. Mr. Lee agreed that Mr. Goemans also said Oxbow could not discriminate between suppliers and that the sulphur supply was comingled, but Mr. Lee responded that this could be dealt with by paying commission separately, Oxbow contracting directly with some suppliers, and using a confidentiality agreement. He said MMB could not contract directly with suppliers because of its long-term agency agreement with Oxbow.

[162] MMB's lawsuit was filed just prior to addendum #27, so addenda #28 to #80 were entered into after the litigation had started. Mr. Lee agreed that MMB never objected to the \$2.00 per tonne charge and never objected to the price set out in any of those addenda.

[163] Mr. Lee said he had no idea that Oxbow had paid a different price for the sulphur it supplied. He had thought the price paid by Oxbow was the same as the price paid by MMB. It was only after the litigation started that he found out Oxbow was making a profit on its transactions with MMB. He accepted that MMB was using index prices, but he understood the index price was what Oxbow was paying. He knew nothing of any conversation between Mr. Goemans and Mr. Switch and Mr. Henderson explaining that Oxbow might pay more, or might pay less, to acquire the sulphur. He said Mr. Goemans never told him that.

[164] Mr. Lee agreed that the index figures were verifiable and transparent because they came from third party publications, and Oxbow had no control over either those indices or the prices that resulted from those indices.

C. Discovery Read-Ins

[165] As part of its case, MMB read in extracts from the examination for discovery of Mr. Goemans. Among other things, Mr. Goemans said:

- a) For most of Oxbow's sales, the transaction is a negotiation, with the buyer attempting to extract the lowest price and Oxbow trying to extract the highest price. Requiring Oxbow to get the lowest price on behalf of a customer is at odds with what ordinarily takes place;
- b) Oxbow did not particularize its actual cost of sulphur in any of its invoices. This information would have been irrelevant because the whole structure of the contract had been changed [by Amendment No. 2];
- c) At a meeting in early 2015 he, on behalf of Oxbow, advised Mr. Lee that an error had been made and that Oxbow owed them the address commission. At discovery, he agreed it was his view that the address commissions should be reimbursed to MMB;
- d) In 2008, the sulphur market in North America was principally carried out through buy-sell agreements, where marketers such as Oxbow earned a profit by selling sulphur at a higher price than they bought it. By the time of the 2013 amendment, the sulphur market in North America had shifted principally to netback arrangements;
- e) Since 2013, approximately 90 percent of Oxbow Canada's sulphur volume from producers shipping through Vancouver is sourced through netback agreements and approximately one third of Oxbow's sulphur volume from producers in California are sourced through netback agreements;
- f) Netback arrangements require that Oxbow try to sell the product at the highest possible price;
- g) Some sulphur consumers track prices using published indices and some use them as a benchmark. That type of end user does not pay Oxbow a service fee. He would not characterize the \$2.00 per tonne fee charged to MMB as a service fee but rather as a "risk premium" associated with the 10-year term of the agreement and the risk of being unable to supply, or to aggregate supply, for MMB; and

- h) When he wrote to MMB to say that "Oxbow does not take positions on this supply" he was referring to Vancouver, which typically does not have buy-sell arrangements as the vast majority of volume is marketed on a netback basis. He did not tell MMB that Oxbow would earn a netback fee, or even a bonus netback fee, as he did not consider that relevant.

VI. Defendant's Case

A. Peter Goemans

General and Industry Background

[166] Mr. Goemans is currently the senior vice-president, North America bulk sulphur, for Baker Canada, a subsidiary of Baker Sulphur. He started with Oxbow Canada's predecessor, ICEC, in 2002. H.J. Baker, then a California-based competitor of Oxbow, acquired Oxbow and Oxbow Canada in 2019. Through these various corporate changes he has maintained a similar role, which is acquiring sulphur supply in Canada and the U.S. West Coast and selling it internationally.

[167] Mr. Goemans explained that sulphur, a naturally occurring element, is produced in the oil and gas refining process. As a commodity, the vast majority is purchased by phosphate fertilizer producers, but it is also purchased by metal manufacturers and other enterprises that require sulphuric acid in the production of their products. Most California sulphur is sold to Mexico for fertilizer production or, in the case of MMB, for copper production, but some is sold farther afield. Vancouver-based sulphur has a more varied market, with China being the largest consumer, and the remainder goes to a similar range of buyers as with California sulphur.

[168] Mr. Goemans said sulphur is an "involuntary product" of the oil and gas industry, meaning it is produced regardless of its market price and, as such, is regarded as an "inelastic" commodity. Demand is primarily driven by the needs of the phosphate fertilizer industry. If the demand for fertilizer is low, then sulphur will not be needed, and sulphur prices will go down quickly.

[169] Domestic sulphur is mostly sold in molten form. For international sales, sulphur is put in pelletized form called "prill". The supply chain in California is relatively straightforward as there are groups of refineries located near the ports. In Canada, the logistics chain is more complicated, as some gas plants only have truck transport, some plants and refineries are rail connected, and in either case, the molten sulphur coming from the refineries has to be taken to a prilling facility, where it is accumulated to the point that warrants a unit train to be arranged. The sulphur is then transported by train to the port of Vancouver, where it is placed into a commingled stockpile.

[170] In each of the California ports there would be no more than five suppliers, all large refineries, who have sulphur in the stockpiles. In Vancouver, the stockpile might be made up of sulphur from 20 to 50 different suppliers of various sizes. A small producer might produce 100 tonnes of sulphur per month, and a large producer might produce 15,000 tonnes per month. For that reason, it is not possible for Oxbow to distinguish precisely which sulphur comes from which supplier. Instead, Oxbow uses a running estimate.

[171] MMB needed vessels to be chartered for sulphur transport to its Mexico site. Oxbow was responsible for chartering for the first dozen or so vessels and MMB then took over the chartering responsibilities. For most of its seaborne shipping, Oxbow chartered the vessels, and it had an internal chartering group who made these arrangements. Mr. Goemans said his commercial department was "siloed", or kept strictly separate, from Oxbow's chartering group.

[172] When Oxbow was responsible for vessel chartering, the process would start by the commercial group notifying the chartering group of the time period in which the vessel was required, and the chartering group would then secure and contract the vessel. For deliveries to Mexico, two or three weeks was sufficient notice to make those arrangements.

[173] When MMB made the chartering arrangements, MMB would inform Oxbow of the approximate timing of their next sulphur requirement. Typically, MMB preferred

loading at Long Beach. Oxbow would then take the requested date and determine whether there would be sufficient supply on hand. This supply might affect the loading date, as there might be a need to reduce the stockpile earlier, or a need to wait so that sufficient supply was available. This meant there might be some discussion with MMB about the loading or laycan date. After that date was agreed, MMB would nominate a vessel and, if Oxbow's vetting gave a positive result, Oxbow would approve the vessel. When Oxbow made the chartering arrangements, it was Oxbow that was entering into the vessel charterparties. Oxbow did not enter into those charterparties on MMB's behalf.

[174] MMB typically started this process three weeks prior to the shipment date, which was minimal notice. In order to accomplish what needed to be done, Oxbow had to assume MMB would be asking for a shipment every four to five weeks.

[175] Oxbow tried to accommodate MMB with its preferred loading port of Long Beach. When looking at the supply situation, Oxbow would start with its netback suppliers, determine whether Oxbow would have to procure additional sulphur to fill the vessel and, if necessary, secure that other supply. It is also possible to load sulphur from a combination of ports, and that was done periodically.

[176] Mr. Goemans referred to a number of shipping industry practices and terms, stating or explaining: (1) the charterer is responsible for vessel loading and the receiver of the shipment is responsible for discharge at the destination; (2) there are charges and credits (demurrage and despatch) associated with either delayed or particularly efficient loading and unloading; (3) bills of lading; (4) Incoterms, a publication of international commercial terms; (5) FOB, or free on board, where title and risk transfer as the product is loaded "over the rail" of the ship; and (6) CFR, or cost and freight, where risk transfers at the loading port but the seller is responsible for delivery of the cargo and the associated freight and other costs.

[177] In the case of MMB shipments, 10 to 12 shipments were done on a CFR basis and the remainder were on an FOB basis.

[178] Mr. Goemans described Oxbow as a sulphur marketing company, with Oxbow acting as the "joiner" between buyers and sellers. Oxbow does not purchase sulphur for its own use. Although the contractual relationship with suppliers has evolved over time, the predominant arrangement here was netback. With netback arrangements, Oxbow will list the sale or a basket of sales, carry out the sale, deduct allowed expenses and the agreed marketing fee, and remit the net amount to the supplier or suppliers. The other arrangement, used more often in California, is a buy-sell arrangement, where Oxbow makes spot purchases to stockpile sulphur.

[179] Netback arrangements are the standard in Canada, and they have become more prevalent in California as well.

[180] Netback arrangements typically have a one-year term. The allowable costs associated with netback arrangements can take a long time to finalize (40 to 60 days in straightforward cases) because costs such as demurrage will not be known until the vessel has discharged. In Canada, because of inventory management and the manner in which costs are allocated, cost reconciliation can take up to 15 months to complete. The netback marketing fee covers all the activities Oxbow must engage in to manage the stockpile, arrange trucking and rail transport, and ensure that the sulphur goes from the producer's location to the stockpile and then to the ship.

[181] A key consideration with netback arrangements is the need to ensure the storage tank or tanks of molten sulphur do not get full, which must be avoided because this may force the refinery or gas plant to curtail or even stop production. Oxbow's obligation is to keep sulphur moving by listing and selling it so that production is not affected.

[182] Netback arrangements are not particularly profitable, but it is steady and predictable business and "it keeps the lights on". A typical marketing fee of \$1.50 per tonne does not cover all the overhead involved in the business.

Dealings with Baja Mining and MMB

[183] In 2007 and 2008, Mr. Goemans was a manager with ICEC and responsible for ICEC's predominantly rail-based logistics management of, mostly, molten sulphur. ICEC was a spot buyer of sulphur in California, but its Vancouver business was very small.

[184] Around 2007, ICEC began discussions with Vancouver mining company Baja Mining ("Baja"), which was developing what ultimately became the reopened Boleo mine. Baja was looking to confirm sulphur procurement for the mining project because they needed to demonstrate to their financiers that they had a secure supply of that critical commodity. These discussions were primarily between Don Roberts of ICEC and Eric Norton of Baja, although Mr. Goemans also had periodic involvement. By mid-2007 the parties were discussing a "service agreement".

[185] MMB's initial concept was for molten sulphur to come by rail to a point across the Gulf of California from the mine site, and then be barged over. Mr. Goemans was helping with the rail logistics and freight costs that would be involved with such an arrangement. At that time, Baja's proposal to have sulphur shipped by rail was a very good fit for ICEC's rail business.

[186] In an email inquiry sent to a railroad company in September 2007, Mr. Goemans said "commissioning is expected in 2009", thus indicating this was the time when Baja expected the mine to become operational.

The 2008 Agreement

[187] Ultimately, the parties entered into the 2008 Agreement. Mr. Goemans did not recall who drafted it, but he would have been made aware of a draft at the time. Generally, its terms provided that should the mine come into existence, ICEC would supply 300,000 tonnes of molten sulphur by rail for a 10-year period.

[188] Mr. Goemans said the 10-year term was unprecedented, as most of ICEC's supply agreements had been for one or two year terms. It was also unusual insofar as it positioned ICEC as the sole supplier.

[189] At the time, his assessment of the agreement was that if the mine came to life, there was going to be a lot of planning work needed, but he also thought the mine might never come into production. He said Oxbow has signed many MOU-type agreements over the years and many never come to fruition.

[190] When asked about how ICEC would balance supply "at the lowest delivered cost ... without compromising security of supply", as per the 2008 Agreement, Mr. Goemans said this is "a fairly normal balance" as cost must not be driven down to the point where there is no supply. The price must be good enough to ensure the required supply is available.

[191] The 2008 Agreement required that ICEC "commence discussions immediately with various sulphur producers to define and develop best sulphur supply alternatives", which Mr. Goemans said gave ICEC a "bit of a sales tool" insofar as they would have mentioned to producers at regular customer meetings that there was a prospect for another outlet for their sulphur.

[192] The 2008 Agreement also required that ICEC "proceed to enter into contracts with such sulphur producers on MMB's behalf, to ensure that the required supply of Sulphur is available", but he said, "we never did".

[193] As for the requirement that ICEC prepare a "detailed sulphur supply plan", Mr. Goemans said he prepared some spreadsheet models based on various scenarios, which formed part of ICEC's ongoing discussions with Baja until Baja informed ICEC that shipping molten sulphur by rail was not going to happen.

[194] The 2008 Agreement also required ICEC to arrange the supply of all sulphur "on a cost flow-through and transparent basis". To implement that, ICEC would be required to contract supply from suppliers, procure railcars and contract railroads and trucking companies to be part of the logistics chain. These costs would be added to the purchase price for a final delivered price to the mine.

[195] The 2008 Agreement has a provision referencing an infrastructure agreement, but no infrastructure agreement was ever entered into by the parties.

Mr. Goemans said this related to the creation of a molten sulphur storage facility next to the mine's processing plant. He also noted that the sulphur purity specified in the 2008 Agreement was consistent with molten sulphur, not prilled sulphur.

[196] Mr. Goemans said the \$2.00 per tonne service fee set out in the 2008 Agreement reflected the "significant and unusual nature of a 10-year supply contract" where the start-up time was unknown. He described this as a "risk premium" to reflect all the services and analysis ICEC was providing in advance of start-up as well as all the things they would have to do when the mine finally started.

Events From 2008 to 2012

[197] There were some further discussions with Baja/MMB during this period, but at a certain point the Baja contact person "disappeared" and there were no phone numbers or email addresses for anyone else. Prior to losing contact, ICEC was told that molten sulphur was no longer in the plan and transport would now be by ship, with Baja/MMB now looking at an arrangement involving the long-term chartering of a specific type of self-unloading vessel. A subsequent analysis revealed the contemplated vessel to be unsuitable.

[198] When the contact person disappeared, ICEC thought the mine project was "dead".

[199] ICEC was sold to Oxbow in or around December 2011. Amendment No. 1 was entered into to reflect that change.

[200] The sulphur industry evolved between 2008 and 2012. Canadian production was increasing, Oxbow's business grew to the point it was the largest market aggregator in California, and netback arrangements were being quickly embraced by most producers.

Resumption of MMB Activity

[201] Mr. Goemans said Oxbow had followed various media reports about Baja's status, including refinancing and bankruptcy, with none of the stories being particularly positive, but then there were reports that Baja was still carrying on.

[202] Mr. Goemans connected with Mr. Henderson in November 2012. In an email sent on November 14, Mr. Goemans noted "a number of outstanding items... the most urgent of which is the offload configuration of the jetty for receiving sulphur". At trial, Mr. Goemans said the outstanding items other than the jetty were: (1) whether MMB felt the agreement was still in existence; (2) whether the project was actually proceeding; and (3) if so, the timing for the commencement of operations.

[203] Mr. Goemans and Mr. Henderson met after that, and Mr. Goemans then learned that both Baja and its mining project had been taken over by Korea Resources Corporation, which had formerly been a minority shareholder. They discussed the items mentioned earlier, and they spoke frequently after that.

[204] It was not long before Mr. Henderson made Mr. Goemans aware that the new management of MMB did not like the 2008 Agreement. They felt that the 2008 Agreement would allow "someone lazy to simply pile on costs and pass them through". Mr. Henderson inquired about how sulphur could be purchased in other ways and said the agreement could be altered to reflect that. For his part, Mr. Goemans told Mr. Henderson that Oxbow's business had grown but also evolved into netback-type relationships along with some buy-sell relationships. He also explained netback relationships to Mr. Henderson.

[205] Mr. Goemans said he did not like the 2008 Agreement either, viewing it as more like a memorandum of understanding, or MOU. He said the 2008 Agreement did not resemble a proper marine agreement in any way. He conveyed those views to Mr. Henderson and Mr. Henderson agreed with him.

[206] In March 2013, Mr. Henderson emailed Mr. Goemans to report that MMB was "moving forward quite rapidly with the project now", he now had more insight as to

MMB's requirements and was learning more about sulphur, and he wanted to get their dialogue going again and find a different contract mechanism.

[207] In his discussions about pricing, Mr. Henderson wanted to know if Oxbow had any international buyers who used third party mechanisms to establish the price of sulphur. Mr. Goemans said Oxbow had customers like that. Mr. Henderson also wanted information on spot prices for sulphur as well as shipping arrangements and costs, which Mr. Goemans supplied in an email of May 14, 2013.

[208] In that email, Mr. Goemans also discussed sulphur sources, informing Mr. Henderson that the primary source of MMB's supply would be West Coast ports, but with secondary sources farther afield. As it turned out, secondary sources were never required. Mr. Goemans also provided a spreadsheet summary of pricing information derived from three sulphur publications.

[209] Mr. Goemans testified that sulphur publications are a useful tool to see what is happening internationally for sulphur pricing. He had told Mr. Henderson about those sulphur publications, and he had shared several of them, but Mr. Henderson said MMB could not itself afford to purchase any of those publications. He did caution Mr. Henderson that "the publications can be risky as their sources can be biased and the information is not always timely". At trial, Mr. Goemans explained that the publication firms are in the business of trading information – "informed gossip", essentially – as they are not actually buying and selling sulphur. They do a good job of identifying the market and the trends, but in the short term there can be errors. Later, he described the publications as being "backwards looking".

[210] In August 2013, Mr. Goemans met with Mr. Henderson at Oxbow's Long Beach office, with a dinner afterward, and the attendees were Mr. Goemans, Mr. Henderson and two representatives from Daewoo. At the meeting, Mr. Henderson's focus was on making progress with contracts and supply, but the Daewoo representatives took up substantial time with a presentation about their shipping capabilities. The dinner was more of a social event and was light on business, other than generalities.

[211] After the dinner, Mr. Goemans and Mr. Henderson met at a hotel bar and discussed various matters over drinks. Mr. Henderson wanted to talk about progress on pricing formulas, but as the evening progressed he also expressed frustration with the new management, who felt everybody was trying to cheat them. He also spoke of a spreadsheet he had prepared for bid analysis that had been improperly shared in a manner suggestive of bid rigging.

[212] Later that month, Mr. Goemans sent Mr. Henderson a "matrix of rates", which was sent in response to Mr. Henderson's ongoing request to identify third party pricing mechanisms similar to those used by other sulphur consumers. Two of the rates in the matrix were those for two current buyers, whose identify was anonymized, two rates were derived from figures published by two indices, and the fifth rate was the average of the two index rates. Mr. Henderson asked that this matrix be sent to him weekly, and Mr. Goemans sent it to him weekly.

[213] Mr. Goemans said Mr. Henderson's goal was to change the contract so that pricing was tied to a third-party reference. In that way, he could demonstrate to the Korean management that they were receiving the market price for sulphur.

[214] Mr. Goemans and Mr. Henderson met again in Los Angeles in September 2013. By that point, MMB's project was getting closer to completion. They discussed unloading features at the jetty and discussed finalizing an amendment. In advance of that meeting, Mr. Goemans sent Mr. Henderson a list of items they both needed to "start moving on", one of which was a short-term amendment to the 2008 Agreement that would set out the commercial terms for the first shipment.

[215] There were several discussions concerning a more general amendment to the 2008 Agreement. Mr. Goemans wanted to cancel the old agreement and implement a proper commercial agreement that incorporated normal marine terms. Mr. Henderson said that cancelling that agreement was impossible as it was a cornerstone agreement with MMB's financing.

[216] Mr. Goemans provided to MMB a first draft of Amendment No. 2 in early October 2013. He said he would have notified Oxbow's legal department and directed them to "effectively cancel the other agreement without cancelling it and that this [draft] was going to be going forward as the commercial basis to deal with MMB". Mr. Goemans said the price provision (s. 1.4.5) included a formula that was the result of his earlier discussions with Mr. Henderson; that is, an average of the index figures set out in two publications.

[217] Section 1.4.5 provides for a negotiated price or, if no price is negotiated, a formula-based price. Mr. Henderson wanted price to be formula-based only, but Oxbow wanted an opportunity to negotiate. Mr. Henderson said he was fine with "negotiated price" staying in, but said he would be using the formula approach. Mr. Goemans said he recalled that there were only a few minor changes made to the draft and otherwise it was more or less adopted as initially written.

[218] He said the purpose of Amendment No. 2 was to create independent pricing on a vessel-by-vessel basis, to include standard marine terms and payment terms, and to have a specific addendum for each vessel shipment, like a "mini contract", which contained the detailed commercial terms for each shipment.

[219] Mr. Goemans was asked to compare Amendment No. 2 with other contracts Oxbow had with end users. He said the key commercial terms in Amendment No. 2 were very similar to those in other end user or buyer contracts.

[220] There were later discussions within Oxbow about errors made in the drafting of the Amendment No. 2. There was a missing word – "not" – in one part of the formula provision. Another clause indicated an incorrect clause number that was to be deleted. Another provision referenced an incorrect section.

[221] Amendment No. 2 was later amended to alter the index formula. This change was made at MMB's request.

[222] A first shipment was arranged for December 2013, but it emerged that the hopper configuration of MMB's jetty was incompatible with the ship's cranes. MMB

directed Oxbow to divert the vessel and sell the cargo to another party. MMB really had no obligations for that cargo as Oxbow had made the chartering arrangements and was selling the sulphur on a netback arrangement, so it was ultimately Oxbow's problem to solve. Fortunately, Oxbow found an alternate purchaser and escaped any financial impact.

[223] Oxbow then assisted MMB by having its operations specialist assist MMB in redesigning the discharge hopper. This assistance was extensive and involved the employee being on site for several weeks. It was also unusual assistance as Oxbow's specialist was usually used to solve an Oxbow problem, not a receiver's problem. Oxbow was not remunerated for this assistance.

[224] From this point on, Mr. Goemans' discussions with Mr. Henderson had to do with conducting regular business. They never discussed the agreement again. In Mr. Goemans' view, the 2008 Agreement "was dead to us" because each shipment was dealt with through individual agreements, meaning the addenda.

[225] Mr. Henderson left MMB, and Oxbow was then told to deal with Jaime Park, who Mr. Goemans understood had been senior to Mr. Henderson. Later, Oxbow was told to deal with Mr. Switch. To that point, there had been few shipments and no regular pattern.

[226] Mr. Goemans exchanged emails with Mr. Park in November 2014. Mr. Park inquired about pricing and raised an issue regarding sulphur quality. Mr. Goemans told Mr. Park that Oxbow was interested in having a regular shipping schedule so that Oxbow "could lock in your price as a formula" and allow Oxbow to "lock in the pricing" with its suppliers. In testimony, Mr. Goemans said Oxbow wanted to provide assurance to its netback suppliers there was going to be a regular or predictable ("ratable") delivery schedule that would provide "security of offtake".

[227] The quality issue raised by Mr. Park caught Oxbow off guard. Oxbow came to realize that the quality specification set out in the addenda was a molten sulphur specification (99.95 percent pure), not a formed or solid sulphur specification (99.5

percent pure). Sulphur in prilled form will always be slightly less pure because chemicals are added in the prilling process and there may be other contaminants introduced in handling. Oxbow has "zero control" in terms of meeting quality specifications. This led to Oxbow discovering that while California-supplied sulphur typically met 99.5 percent purity, Vancouver supply did not always do so.

[228] Subsequently, Mr. Switch took over and ultimately the issue was resolved by Oxbow proposing, and MMB accepting, a prescribed penalty where levels of purity were not met, which Oxbow has never guaranteed for any other customer. These provisions were included in every subsequent addendum.

[229] Mr. Park also asked for copies of the vessel charterparties. Mr. Goemans did not consider that particularly notable, as freight is a significant cost and it would be natural to be curious about those contracts. He conveyed the request to Oxbow's chartering group and they provided some redacted charterparties. Oxbow did not consider MMB to be entitled to unredacted copies because Oxbow's chartering group regards these to be intellectual property.

[230] Mr. Goemans was introduced to Mr. Lee in October 2015. Mr. Lee was the fifth person to act as MMB's contact person, as there had been two individuals when Baja was involved, then Mr. Henderson, Mr. Switch and now Mr. Lee.

[231] Mr. Lee felt Oxbow could improve on index pricing and asked that Oxbow send him its best non-index price prior to booking the next vessel. Mr. Lee was signalling that he did not want to use the formula. Mr. Goemans testified that when asked, Oxbow typically quoted the price used when selling to Chinese customers.

[232] Also in October 2015, Mr. Goemans gave Mr. Switch an explanation as to how the price formula had come about. Mr. Goemans said Mr. Switch was already aware of that but he wanted an explanation so he could pass it up the chain at MMB.

[233] In that email, Mr. Goemans explained how the "vast majority of Oxbow's supply is contracted":

Oxbow is charged with finding competitive and secure outlets for refinery and gas plant sulphur production. Oxbow does not take positions on this supply but is responsible for managing the logistics chain.

[234] Mr. Goemans said in saying "Oxbow does not take positions" he was saying that Oxbow's supply was netback supply and not buy-sell supply.

[235] His email continued:

In all cases Oxbow's long term supply customers see the exact price at which the sulphur is sold and see the costs associated with the sale.

[236] Mr. Goemans testified that, again, he was describing a netback arrangement.

[237] Later in his email he said:

It should be pointed out spot bidders are not always successful in securing supply, as an example we are holding a cargo for MMB in November and other than that, there is no surplus product in California to speak of until late December. We have unallocated sales in December out of Vancouver and will delay a decision on this, possibly to the detriment of the supplier, to ensure we protect MMB's operation.

[238] Mr. Goemans said that even though Oxbow never received any forecasts from MMB, by this point a pattern was emerging of fairly regular shipments, and he was signalling to Mr. Switch that Oxbow was protecting MMB's interests. He testified that it would be "to the detriment of the supplier" if sulphur prices were softening, as it would be preferable for the supplier to sell sooner. They would be telling their netback suppliers that Oxbow had a potential sale, meaning a potential sale to MMB.

[239] Also in October 2015, Oxbow offered, and MMB accepted, sulphur at \$107.00 per tonne for the next month's shipment. Mr. Goemans arrived at that price through a combination of the market price for sales to China and also by referencing index prices. This was the one and only time that Oxbow negotiated a sulphur price with MMB. He sent price quotations to MMB for a couple of further months, but Mr. Lee told him to stop as they would use the formula method instead. The prices for addenda #11 to #80 were all set according to the index formula.

[240] Mr. Lee expressed dissatisfaction with the index formula as he felt this did not result in the best possible price. He set out his concerns to Mr. Goemans in an email of October 23, 2015, suggesting they meet to discuss the "best option for price formula for regular purchasing". They met in Vancouver about a month later.

[241] Mr. Goemans said Mr. Lee's email had a tone of distrust. Of that meeting, Mr. Goemans said that while Mr. Lee is a "very quiet, nice man", his requests were "combative" and he challenged various things.

[242] Mr. Lee sent an email after the meeting, and Mr. Goemans responded by making interlineated comments and sending it back to Mr. Lee. Mr. Goemans did not respond to Mr. Lee's assertion that "As agreed ... the current contract is purely a sole agent contract". Mr. Goemans said he did not like it that Mr. Lee had said "As agreed" as they had not agreed to any such thing. Mr. Lee's focus was on his dissatisfaction with the formula price and on getting a discount. Given the tone of the meeting, Mr. Goemans did not want to respond by saying "you're 100 percent wrong about everything". Instead he said he noted Mr. Lee's concerns and hoped they could work things out.

[243] On the issue of discounts, Mr. Lee seemed to believe discounts were available and so he wanted discounts for MMB's shipments. The problem with that was that Oxbow's netback arrangements in both Vancouver and California were based on the premise with that the price obtained for the suppliers has to be competitive. There also had to be security of supply for MMB. If discounts were granted, at the end of the year Oxbow would lose those supply contracts, which would jeopardize MMB's business by jeopardizing its supply. This was a particular concern with California suppliers, who would know that Oxbow could easily sell their sulphur into China at full price. Vancouver supply might be different, as an arguable case could be made to those suppliers that the higher freight costs involved with Vancouver shipments might warrant a discount.

[244] Mr. Lee was offended and visibly irritated when Mr. Goemans said a 5 percent discount was impossible. Mr. Goemans nonetheless committed to engaging

in discussions with Oxbow's suppliers and, subsequently, he did engage in "soft discussions" with Oxbow's largest supplier, making the point about higher freight costs and the value of predictable sulphur "offtake". This was left on a "keep us posted" basis. He also had some initial discussions with two refinery companies in California, but their response was always "what is the market now?" and "what can you sell our sulphur for in China?" They did not give a "hard no", but they needed to be shown a case for providing a discount.

[245] MMB sent a default notice on December 2, 2015. He received a copy and it was also sent to MMB's legal department. MMB sent a follow-up email on January 22, 2016. By that point, Oxbow had already arranged a meeting with Mr. Lee for January 27.

[246] The January 27 meeting took place at Oxbow's offices in Woodland, Texas, where in addition to the meeting, Mr. Lee was introduced to one of Oxbow's suppliers, Phillips 66. The discussions had to do with discounts, Mr. Lee's dissatisfaction with the formula prices, charterparties and address commissions.

[247] MMB and Oxbow agreed to a revision to the indexes such that Vancouver index prices were referenced for California supply, not California index prices, due to the absence of regular data with the latter. Discounts were not resolved.

[248] In May 2016 Mr. Goemans addressed Mr. Lee's request for discounts. He told Mr. Lee that "for security of supply it is essential that MMB charter vessels on a full range basis covering all ports or combinations". Mr. Goemans testified that by this point MMB was doing its own chartering and he was emphasizing the need for MMB to have flexibility. Mr. Goemans sent a further email on the subject about a week later, informing Mr. Lee that "California shippers had no interest in supporting a long-term price agreement", but that "Canadian suppliers were interested but subject to some kind of volume commitment".

[249] Mr. Goemans prepared a draft response to MMB's default letter, and others provided input. Mark Whittemore, Mr. Goemans' supervisor, sent MMB the finalized

version on July 7, 2016. Mr. Whittemore had become more involved because Mr. Goemans was concerned Mr. Lee might have a personality issue with him.

[250] MMB's default letter caused Oxbow to review the legal documents, and during this review they discovered there were errors in Amendment No. 2.

[251] Oxbow's response also dealt with address commissions. Mr. Goemans first learned that Oxbow was keeping these commissions around the time of the Texas meeting. This was unknown to him previously as Oxbow's commercial operations were kept strictly separate from the chartering department. Oxbow concluded that the adcom should be refunded to MMB.

[252] Addendum #47 was the only other shipment cancelled by MMB. For this shipment, a vessel was to call first at Anacortes and then proceed to Vancouver. Anacortes does not have sufficient supply to fully load a vessel so the vessel must be topped off in Vancouver. Oxbow told MMB that it would refund all extra costs. Oxbow had the support of its netback suppliers to do so, with Mr. Goemans confirming to Mr. Lee that the refineries would "pick up 100% of the incremental cost to go into Anacortes", but "if MMB declares it cannot perform we ... will bring in a vessel on our own", with MMB either accepting this as a CFR sale or Oxbow would sell the sulphur to another buyer.

[253] Mr. Goemans explained that the port of Anacortes services five refineries in the Puget Sound area, but the associated prilling plant has a very limited stockpile capacity. It needed a vessel to ease the inventory pressure and so Oxbow needed MMB to nominate a vessel and identify the laycan, or range of loading dates. He said he was telling Mr. Lee that the sulphur reserved for MMB would be gone if MMB did not submit a laycan and Oxbow would have to find another buyer to alleviate the inventory pressure. Mr. Goemans later wrote to explain to Mr. Lee that this might mean MMB's next delivery would be delayed.

[254] MMB did not agree to take the shipment and instead declared *force majeure*. This created something of a crisis as Oxbow notified its netback suppliers that it

might have to "distress sell" the sulphur. Ultimately, Oxbow found another buyer, albeit at a discounted price, a situation that was not well received by the suppliers, who indicated this would be a factor when it came time to decide whether they ought to continue to do business with Oxbow.

Pricing Basis over the 80 Addenda

[255] Of the 80 addenda entered into between the parties, only two were based on non-formula or non-index-based prices. Oxbow made price offers for about a year, perhaps two years, until Mr. Lee told him to stop as MMB was going with formula pricing exclusively. Oxbow never received a price offer from MMB.

[256] In his later cross-examination, Mr. Goemans confirmed his discovery evidence that Oxbow never made an offer to MMB for sulphur at a price below the formula price.

Oxbow Canada, Intercompany Sales, and Accounting

[257] Mr. Goemans explained the concept of intercompany sale in the context of Oxbow's dealings with MMB. He said that when a vessel loads in Vancouver the contract is held by the U.S. entity, so the Canadian entity has to sell the material to the U.S. entity, through an intercompany contract, in a way that accords with U.S. and Canadian tax laws.

[258] The vast majority of Oxbow Canada's sulphur supply is marketed on a netback basis using annual netback supply contracts. Oxbow Canada made no direct sales to MMB.

[259] Oxbow's accounting system did not track sales by final consumer. All records are based on netback and so all the recording essentially works back to Oxbow's netback suppliers. Oxbow will not know its actual cost of purchasing sulphur until all costs have been identified, which in the case of California supply could take 60 days after loading has completed. In Vancouver, an estimate of costs might be known within 60 days, but the final costs may not be fully known until 15 months later.

Current Relationship With MMB

[260] Baker Sulphur and MMB entered into a long-term sulphur sales agreement effective January 1, 2024. Mr. Goemans described this arrangement as a "almost a complete mirror" of the arrangement the parties had at the end of their previous arrangement, though the current contract has a discount for California.

[261] When asked why a discount was not available under the earlier arrangements, Mr. Goemans noted that the prior arrangement was a long-term agreement. Part way through that contract, a trade war emerged between the U.S. and China and China issued retaliatory tariffs of 29 percent against U.S. sulphur. At that point China was no longer an alternative market, as it had been when MMB first asked for discounts.

Cross-Examination

[262] Mr. Goemans said the following in cross-examination:

- a) The Supply Agreement obliged Oxbow to ensure there was an uninterrupted supply of sulphur available to MMB and it contemplated that Oxbow would be the one and only supplier of sulphur to MMB. He knew Oxbow was responsible for sourcing 100 percent of MMB's sulphur;
- b) He was aware the 2008 Agreement provided for a \$2.00 per tonne fee, which he understood to be the fee for delivering sulphur. Mr. Henderson told him he did not like the "cost flow-through" because his management did not trust it and wanted to fundamentally change it. He disagreed with the suggestion that Mr. Henderson told him MMB management wanted to understand how they could verify that Oxbow was doing its job properly and delivering at the lowest price;
- c) After meeting Mr. Henderson, he became aware that MMB were going to change from a cost-plus model to an independent price model, which was Mr. Henderson's agenda;

- d) Oxbow generally aims for a margin of \$5.00 to \$6.00 per tonne on all its activities, including spot trading and netback. Netback itself does not earn Oxbow anywhere near that margin, as it averages about \$1.50 per tonne;
- e) Making money on spot trading is not random; instead, it is a matter of skill and knowledge, things that Oxbow was good at;
- f) He denied that he wanted to cancel the 2008 Agreement because he knew it took away Oxbow's ability to profit through spot trading;
- g) Mr. Goemans denied that Mr. Henderson told him he was unfamiliar with sulphur. To the contrary, he found Mr. Henderson to be well organized and prepared. When his discovery evidence was put to him, he accepted he had testified Mr. Henderson told him, "I know nothing about sulphur" and said this answer was true;
- h) Mr. Henderson told him MMB management didn't like the 2008 Agreement because they thought it would make Oxbow lazy. Mr. Henderson wanted an independent or third party-based pricing mechanism. That type of mechanism was attractive to Oxbow because it would work well with Oxbow's netback business;
- i) Mr. Goeman did not consider that Oxbow had any obligations to MMB under the 2008 Agreement. He and Mr. Henderson both wanted to mutually amend it. He did not consider this to be a negotiation; it was more of a collaborative effort and Mr. Henderson made a proposal that Oxbow thought "was workable for us";
- j) At that time, his view of the \$2.00 per tonne service fee set out in the 2008 Agreement was that Oxbow had provided an extremely long guarantee of sulphur supply to MMB at a time when Oxbow was primarily dealing with liquid sulphur on a buy-sell basis. He felt Oxbow was entitled to the fee because Oxbow had helped MMB get financing and had guaranteed supply to MMB in the future, and Mr. Henderson didn't seem "too fussed"

about it. Mr. Goemans saw the fee as a risk premium, although he did not use that term with Mr. Henderson. With Mr. Henderson he simply told him that Oxbow wanted the fee;

- k) When it was suggested to him that he never told Mr. Henderson that Oxbow would earn fees on its netback business, Mr. Goemans said he had explained to Mr. Henderson how Oxbow procured sulphur, which was through a combination of netback arrangements and spot purchases. He acknowledged that in providing this explanation he did not mention that Oxbow earned fees on netback business. He also did not tell him that Oxbow expected to make significant gains on spot trading, but he knew Mr. Henderson was pretty smart and would know that Oxbow would not be spot trading "for fun";
- l) He acknowledged that Oxbow's obligation under a netback arrangement is to sell a producer's product at the highest possible price;
- m) Netback business is far less lucrative than spot trading business. Netback is reliable business but with a low rate of return. Netback business also gives rise to opportunities for other types of business with producers;
- n) He agreed that Oxbow's netback business was "fundamentally at odds" with the structure of the 2008 Agreement, because with netback you start with the price and work back, and "with MMB you start with the cost and build up". With netback, Oxbow is striving to get the market price, and with MMB, the object was to get the lowest price while ensuring security of supply. It was for this reason that he agreed with Mr. Henderson that an index price would be beneficial. An index price would give Oxbow a price that Oxbow could report back to its suppliers for the purpose of a netback calculation and allow Oxbow to earn its netback fee;
- o) Oxbow did not disclose to its netback suppliers the fee it was earning from MMB;

- p) When he provided a "simple matrix of rates" to Mr. Henderson in August 2013, he included two actual arrangements with Oxbow customers, where the price was fixed by reference to index prices. This information was intended to show Mr. Henderson what a comparable buyer would pay for sulphur. Neither of those arrangements involved the payment of a service fee to Oxbow;
- q) Oxbow's legal department drafted Amendment No. 2;
- r) Amendment No. 2 provided a pricing mechanism requiring that the parties first negotiate price and revert to a formula only if they could not reach an agreement. Mr. Goemans disagreed that this was drafted to create the impression that Oxbow was going to continue to act in MMB's best interests and try to get the best available price;
- s) At the time, Mr. Goemans reported to Oxbow's head of credit that the arrangement with MMB "promises to be a very good arrangement for Oxbow" because the original deal was for Oxbow to receive \$2.00 per tonne for approximately 300,000 tonnes of sulphur per year and now Oxbow would be simultaneously collecting netback marketing fees. In testimony, Mr. Goeman said there were further benefits because Oxbow had netback suppliers wanting security of offtake and a buyer (MMB) who wanted security of supply;
- t) He agreed Oxbow took care of its netback suppliers first because Oxbow was contractually obliged to keep their sulphur tanks dry. Once those commitments were fulfilled, Oxbow was free to trade on the spot market and try to make a better return;
- u) Mr. Goemans and Mr. Henderson never discussed the 2008 Agreement after Amendment No. 2 was signed. He said, "it was dead as far as we were concerned". They had abandoned the "buy-sell" arrangement at that

point. He acknowledged that Mr. Henderson never said the 2008 Agreement was dead;

- v) He did not agree that he knew MMB thought Oxbow was providing services by securing sulphur at the best possible price. He said MMB knew Oxbow was procuring supply either through netback or purchase, as he had discussed these with Mr. Henderson;
- w) There was an error in Amendment No. 2 insofar as the reference to clause 1.2.15 should have been a reference to 1.2.16. Clause 1.2.16 deals with cost flow-through and transparent pricing, and these do not make sense when pricing on an FOB or CFR basis and index prices;
- x) In an email dated October 9, 2013, Mr. Goemans conveyed to MMB a "price indication" for MMB's first California-sourced shipment and said, "when the contract is finalized we can finalize prices from suppliers, but we need to do this sooner than later". Mr. Goemans agreed in cross-examination that there was no need for Oxbow to go to a netback supplier to confirm pricing;
- y) The first completed shipment was for 9,000 tonnes at \$160.50 per tonne. That price included the cost of the sulphur, the cost of transport and some estimated port costs. Mr. Henderson asked for a price breakdown but Mr. Goemans did not recall if he ever provided that breakdown. He did not provide MMB any records showing Oxbow's acquisition cost and Oxbow did not particularize the actual sulphur cost in any invoices;
- z) Mr. Goemans agreed Mr. Lee was consistent in wanting Oxbow to go to suppliers and negotiate a discount and that Mr. Lee expressed to him his belief that Oxbow was MMB's agent for the purchase of sulphur;
- aa) In reply to Mr. Switch's request for an explanation of the pricing mechanism and how it had come about, Mr. Goemans replied that the formula approach, while different, "is still consistent with the objective of

stable, secure, guaranteed supply at the most competitive price". He also said, "Oxbow does not take positions on this supply", which was a reference to netback arrangements. He agreed that he intended to communicate to MMB that Oxbow had no financial interest in the supply;

bb) Oxbow did not explicitly tell MMB that Oxbow earned a fee from netback suppliers, but he expected MMB would know Oxbow's supplier services would not be free. However, that topic was never discussed;

cc) In October 2013, Mr. Lee emailed Mr. Goemans to say that he hoped Oxbow "truly represents MMB's interest and not the suppliers" and that Oxbow is to find the best value on behalf of MMB transparently". Mr. Goemans said he had discussions with Mr. Lee on more than one occasion where he rejected Mr. Lee's position on that. However, Mr. Goemans' reply email did not reject Mr. Lee's statement or say that Oxbow was involved as a principal;

dd) When addressing a proposed December 2015 shipment, Mr. Goemans said to Mr. Lee, "we could also lock in pricing somewhere between [two November dates]". Mr. Goemans denied that he was trying to create the impression that Oxbow was locking in pricing with suppliers on behalf of MMB, stating that this would only be for buy-sell (spot trading) sulphur;

ee) Oxbow arranged the vessels for the first nine shipments. In July 2015, MMB asked to see the charterparties, then Oxbow provided redacted versions of the charterparties, and MMB then asked for unredacted versions, as MMB wanted to see the clauses dealing with address commissions. At that point, Mr. Goemans expected MMB would be asking that it be paid these commissions as a credit against freight cost. Instead of disclosing the full charterparties, which would have shown adcom was being paid to Oxbow), he told MMB that the adcom was "going to the suppliers". Ultimately, he told MMB that Oxbow would pay the address commissions to MMB. By the time of trial this had still not taken place;

- ff) In an email of November 23, 2015, Mr. Lee said Mr. Goemans had agreed during the just-completed Vancouver meeting that the "current contract is a purely sole agent contract". Mr. Goemans testified that "we agreed to no such thing at the meeting", but he acknowledged he did not challenge Mr. Lee's statement in his emailed reply. He disagreed that the reason he failed to challenge Mr. Lee's assertion was because he wanted Mr. Lee to continue to believe Oxbow was acting as sole agent for MMB; instead, he said he did not want to be confrontational with Mr. Lee and he was hopeful that they would work things out;
- gg) On December 10, 2015, Mr. Lee again raised the matter of negotiated discounts with suppliers. Mr. Goemans had not yet responded. He met with Mr. Lee in Houston on January 27, 2016, and discussed California pricing at length, with Mr. Lee again expressing the view that a discount was warranted. Mr. Goemans eventually responded to these requests on May 10, 2016, when he reported California shippers were not interested and while Canadian shippers were interested, this was subject to a volume commitment and, in any event, this could not be pursued in light of the legal dispute that had now arisen between Oxbow and MMB;
- hh) In Mr. Lee's post-meeting annotations on those meeting minutes, he noted that he had expected to have discussed long-term supply discounts at the January 27 meeting, but Mr. Goemans said he "needed a few more weeks to finalize with suppliers". In his note on the CPI adjustment for the service fee, Mr. Lee referred back to an email exchange from November 12, 2015, where Mr. Lee had "raised the issue of what is Oxbow's role whether it's an agent or a shipper". In cross-examination, Mr. Goemans agreed that Mr. Lee continued to hold the view that theirs was an agency contract, but he said Oxbow viewed the amending agreement as having changed the relationship, with pricing now on the basis of independent arms-length pricing.

- ii) Around February 2016, Oxbow entered into a "back-to-back" arrangement with a (then) competitor, H.J. Baker, which was similar to a netback arrangement. H.J. Baker was looking for "secure ongoing offtake" for sulphur. Under this arrangement, Oxbow's purchase price and subsequent sale price would be identical, but they would get a fee from H.J. Baker (\$1.00 per tonne) and also get the \$2.00 per tonne fee from MMB. Oxbow did not disclose that arrangement to MMB. There were 33 sulphur trades done with H.J. Baker on this basis;
- jj) Mr. Goemans agreed that in answer to one of MMB's allegations of default concerning the "excessive" \$2.00 per tonne fee, he responded that the \$2.00 per tonne fee was prescribed in the Supply Agreement and the Supply Agreement provided for a CPI adjustment. He considered the audit rights set out in the Supply Agreement to be redundant because of the change to formula pricing, but acknowledged an exception for freight costs. Oxbow had refused to provide its sulphur purchasing records and MMB saw this as a lack of transparency and expressed concerns about that consistently; and
- kk) Both Oxbow and Oxbow Canada were acquired by H.J. Baker in 2019. The Oxbow-MMB agreement was due to expire in late 2023, and H.J. Baker was interested in securing MMB's business at the time of the renewal. Mr. Goemans told Mr. Lee that the new owners were more flexible than the Oxbow owners had been, and Mr. Lee was persuaded to allow H.J. Baker to submit a proposal. This resulted in a long-term sales agreement with an effective date of January 1, 2024. This agreement provides for a formula-based price with discounts of 3 percent for California shipments and 4.5 percent for Vancouver and Anacortes shipments. There are no service fees or commissions in that agreement.

VII. Positions Of the Parties

[263] The submissions of the parties were lengthy and comprehensive. Both parties discussed and examined, in exacting detail, the witnesses' testimony, the six binders of documents, the numerous factual and legal issues, and the applicable legal principles law. My summary follows.

A. Plaintiff

[264] The plaintiff divided its submissions into the following subjects: evidence, legal submissions, legal principles and witness credibility. I will summarize the first two areas but will leave legal principles and witness credibility to be discussed later.

Evidence

[265] The plaintiff highlighted various aspects of the evidence, beginning with the Supply Agreement. The plaintiff emphasized the following provisions:

- a) MMB appointed Oxbow as MMB's "sole agent" for the supply of sulphur needed by the Boleo mine;
- b) Oxbow was obliged to act in MMB's "best interests to secure and deliver sulphur rateably" at "Best Value", a defined term meaning "a market competitive basis at the lowest cost without compromising security of supply";
- c) The supply and delivery of sulphur was on a "cost flow-through and transparent basis", with actual costs to be particularized and MMB having the right to audit Oxbow's records; and
- d) Oxbow's service fee for acquiring and delivering sulphur under the Supply Agreement was \$2.00 per tonne, with "all services required to be performed by [Oxbow]" and all of Oxbow's "overhead and profit for the supply of sulphur" being included in that fee.

[266] The plaintiff emphasizes the evidence of MMB's recurring requests for price clarity and measures that would ensure MMB was getting sulphur at the lowest cost, and notes MMB's lack of knowledge of the sulphur market.

[267] The plaintiff also notes that netback arrangements, which were far less profitable for Oxbow than spot trading, were becoming much more prevalent by 2013 and submits Oxbow would have been looking for ways to maintain its average margins.

[268] Netback arrangements were fundamentally at odds with the Supply Agreement because they required Oxbow to get the highest price for the sulphur producers, and the Supply Agreement required Oxbow to get the lowest price for MMB. Netback arrangements were also at odds with the 2008 Agreement because with netback there is no identified price for the acquired sulphur, merely a balance remitted to the supplier after the deduction of associated costs, and so there is no sulphur price on which to base a cost-plus transaction with MMB. The plaintiff says Mr. Goemans was alive to these issues, but Mr. Henderson was not.

[269] The plaintiff argues that Mr. Goemans took steps to reinforce the notion that Oxbow was acting as agent on MMB's behalf in engaging suppliers, such as suggesting MMB provide letters of introduction so that suppliers would know Oxbow was securing sulphur on its behalf. Mr. Henderson provided a supplier letter as suggested, which confirmed that "Oxbow will be working on [MMB's] behalf to obtain the required volumes of Sulphur to meet our needs".

[270] Throughout all his discussions with Mr. Goemans, Mr. Henderson understood that MMB was contractually entitled to the lowest sulphur price on a cost flow-through and transparent basis. His objective was to ensure Oxbow met that obligation in a way MMB was able to verify.

[271] The plaintiff submits that Mr. Goemans misled or manipulated Mr. Henderson at various points by leading him to believe Oxbow was acting in MMB's interests as MMB's agent. Here, the plaintiff notes Mr. Goemans introduced the topic of indexes

and later proposed index-based pricing, not in the context of an arms-length negotiation but instead in the context of resolving the issues of (1) third party price verification; and (2) the absence, in netback arrangements, of an identifiable sulphur price that could be passed on to MMB.

[272] The plaintiff submits Mr. Goemans' statements about Oxbow's netback arrangements were "deliberately untruthful and misleading" because Mr. Goemans (1) did not reveal to Mr. Henderson that Oxbow earns marketing and incentive fees from netback arrangements; and (2) did not tell Mr. Henderson that a substantial volume of Oxbow's business would continue to be spot trades or that a cost-plus contract was not at odds with spot trades. The plaintiff argues that:

Mr. Goemans wanted to leave the impression the business was entirely netback because he knew that if he could insert a pricing mechanism that, unbeknownst to MMB, was untethered from the price that Oxbow would actually pay to acquire the sulphur, then Oxbow could earn substantial gains on spot trades.

[273] Mr. Henderson was unfamiliar with netback, and while Mr. Goemans provided him with a general overview during one informal discussion, Mr. Goemans did not tell him that Oxbow earned netback fees with those arrangements. As a result, Mr. Henderson had not considered Oxbow's netback arrangements to be significant.

[274] The plaintiff noted that after Amendment No. 2, Oxbow continued to be entitled to a service fee of \$2.00 per tonne, yet provided no actual service because there was now a formula for setting the price. Mr. Goemans did not view it as a service fee either, as he described it as a "risk premium" associated with the lengthy terms of the contract and Oxbow's obligation to ensure supply.

[275] The plaintiff also submits Mr. Goemans misled Mr. Henderson on the matter of index or formula pricing because: (1) he represented index-based pricing was the "best price" on any given day and represented the amount Oxbow paid to acquire sulphur from producers; (2) there would be small gains and losses to Oxbow by using index pricing but these would be a "wash"; (3) the price matrix Mr. Goemans forwarded to Mr. Henderson included transactions Oxbow had with customers who

used index-based pricing, but those arrangements were not analogous to MMB's because those were arms-length sales and the customers did not pay a service fee to Oxbow. The plaintiff submits this misinformation was conveyed by Mr. Goemans to leave the incorrect impression that an index price formula plus a service fee was not unusual and would result in a competitive price.

[276] In the discussions leading up to Amendment No. 2, Mr. Henderson understood the pricing terms would continue to require Oxbow to make an offer and if the parties could not agree on price, the index price formula would be used. In either case, he understood the price would reflect Oxbow's actual sulphur cost, which would be passed on to MMB plus the \$2.00 per tonne service fee.

[277] Mr. Goemans, who had the task of drafting the amendment, instructed Oxbow's legal department to draft an agreement that would effectively cancel the 2008 Agreement without cancelling it. He wanted to both move to an objective price-setting mechanism and continue to charge the \$2.00 per tonne service fee.

[278] The plaintiff made various submissions about the terms included in Amendment No. 2, but I will leave these points until later. Generally, the plaintiff submitted that the 2008 Agreement remained intact in substance, and it was neither a wholesale amendment, as pleaded by Oxbow, nor a "dead" agreement, as characterized by Mr. Goemans.

[279] The plaintiff notes that Mr. Goemans promptly boasted to Oxbow's credit department of this "unusual" agreement which "promises to be a very good arrangement for Oxbow" because Oxbow would collect a \$2.00 per tonne fee along with marketing fees and any spot trading gains. Oxbow's internal analysis recorded that expected profit was \$4.00 per tonne by reason of simultaneously collecting both netback fees and the MMB service fee, with little associated risk.

[280] The plaintiff notes the evidence of Mr. Goemans that Oxbow "took care of [its] netback suppliers first because [Oxbow] was contractually obliged to the netback suppliers to keep their tanks dry", but after that was done, Oxbow was "free to trade

on a spot trade basis and try to make a better return". The plaintiff says Oxbow was successful in that regard as it earned \$1.77 million in netback commissions and \$9.23 million in spot trading gains on sales to MMB, while also collecting \$5.1 million in services fees where, the plaintiff says, no services were actually provided.

[281] The plaintiff submits that after Amendment No. 2 was signed, Mr. Goemans and Oxbow continued to act in a manner designed to leave an impression with MMB that Oxbow was acting as its agent and securing sulphur on behalf of MMB at the best price in return for a set fee. Here, the plaintiff refers to an October 2013 email where Mr. Goemans told Mr. Henderson he would be "finaliz[ing] prices from suppliers", thus suggesting Oxbow was sourcing sulphur at the best available price, a price that would be passed through to MMB. Because of the nature of netback arrangements, there was no need to confirm prices from those suppliers.

[282] Also, when Mr. Henderson asked Mr. Goemans to provide a breakdown of the \$160 per tonne price, as he wanted to understand how the sulphur component of the overall price had been determined, Oxbow never provided that breakdown and never provided any records particularizing the actual sulphur cost.

[283] The plaintiff also points to an approach made by H.J. Baker (then a competitor of Oxbow, but also a sometime supplier) who proposed to Mr. Goemans that H.J. Baker be allowed to negotiate directly with MMB but then pay Oxbow the purchasing commission "on the side". In an internal communication, Mr. Goemans told his superior that this could both help and hurt Oxbow; it would help in terms of providing MMB with assurance they were getting fair prices, but hurt because H.J. Baker could undercut Oxbow from time to time. Oxbow never accepted that proposal, but instead it purchased sulphur from H.J. Baker and re-sold it at a higher price to MMB. The plaintiff says this shows that Oxbow looked for every opportunity to garner as much revenue as possible at MMB's expense.

[284] After Mr. Lee arrived in September 2015, he asserted to Mr. Goemans that Oxbow was MMB's "sole agent" for the supply of sulphur, and repeated this both in

writing and in conversations. He also pressed Mr. Goemans to engage with suppliers to secure discounts on MMB's behalf.

[285] In response to MMB's request for an explanation as to how the index formula had come about, Mr. Goemans said, among other things, that the formula approach is "still consistent with the objective of stable secure guaranteed supply at the most competitive price". However, it was not the most competitive price because it included both Oxbow's netback commissions and its trading gains.

[286] Mr. Goemans' explanation also included the assertion that "Oxbow is charged with finding competitive secure outlets for [suppliers]. Oxbow does not take positions on this supply but is responsible for managing the logistics chain". Mr. Lee took this to mean that Oxbow does not make a profit on these arrangements. Mr. Goemans said he was merely outlining the nature of netback arrangements. However, what Mr. Goemans did not reveal was the fact that Oxbow earned netback fees and incentives. Moreover, this explanation suggests all of Oxbow's supply was acquired through netback arrangements, whereas around 50 percent of supply to MMB was acquired on a spot trading basis, where Oxbow did "take positions".

[287] In that same explanation Mr. Goemans said, "in all cases Oxbow's long term supply customers see the exact price at which the sulphur is sold and see the costs associated with the same". The plaintiff maintains this is misleading because Oxbow did not tell its suppliers that it earned a service fee from MMB. This was another representation intended to leave an impression with MMB that the price it paid reflected what the suppliers received.

[288] Mr. Lee's first transaction was Addendum #10, where he had asked Mr. Goemans for the "best price" not based on index. Mr. Goemans responded that a spot quote would be at \$125 per tonne but that Oxbow would "be willing to continue the practice [of] using the indexes which would result in a price of \$107 per tonne. Based on that advice, Mr. Lee agreed to the \$107 price. Mr. Lee believed the \$107 price reflected the price Oxbow would pay the suppliers. He was not

aware that Oxbow expected to earn undisclosed profits on this sale (which totalled \$129,100) and would have not agreed to that price had he known.

[289] Oxbow also misled MMB on the matter of address commissions. When MMB first requested copies of the charterparties, which would show any address commissions, the charterparties were provided with relevant sections redacted. When MMB pressed Oxbow for unredacted copies showing the relevant clauses, Mr. Goemans responded "[It's] 2.5% adcom and 1.25% to the brokers with the adcom going to the suppliers". This was both evasive and false, and it was intended to conceal the fact that Oxbow had received the address commissions.

[290] Oxbow now accepts that the address commissions must be paid to MMB. The plaintiff says this reflects the fact that Oxbow was MMB's "cost-plus" agent and was required to pass on its actual costs and not retain any benefits such as commissions.

[291] Mr. Lee continued to press his concerns in October and November 2015. In October he wrote "I hope Oxbow truly represents MMB's interest and not the suppliers' because the commission clause in the contract clearly states Oxbow is to find the best value on behalf of MMB transparently". Mr. Goemans' response did not challenge Mr. Lee's assertion. Similarly, when Mr. Lee sent an email confirming matters discussed at their November 2015 meeting in Vancouver, he said "as agreed to in our meeting, the current contract is purely a sole agent contract" to "transparently find the best value" for MMB. Again, Mr. Goemans did not take issue with that statement in his written reply.

[292] While Oxbow asserts that Mr. Goemans did in fact contradict the agency assertion on more than one occasion, the plaintiff submits this testimony is not credible because (1) if it had been done, Mr. Lee would have stated his position differently; (2) Mr. Goemans acknowledged that he agreed to negotiate with suppliers on MMB's behalf, which is irreconcilable with his assertion that he rejected the agency characterization; (3) Mr. Lee testified that Mr. Goemans never refuted

the agency assertions; and (4) there is not a single written communication where Mr. Goemans indicated any disagreement with the agency characterization.

[293] The plaintiff submits Mr. Goemans wanted to maintain the impression that Oxbow was acting as agent in order to justify the service fee Oxbow was being paid.

[294] When Mr. Lee pressed Mr. Goemans to negotiate supplier discounts, Mr. Goemans agreed to do so, which again conveyed to MMB that Oxbow was acting as its agent.

[295] MMB's Default Notice was issued on December 2, 2015. In that notice, MMB asserted that Oxbow was MMB's sole agent, it gave notice that it intended to exercise its right to audit Oxbow's books, and it demanded the repayment of address commissions. Oxbow failed to reply by the requested 30-day deadline and would not deliver a formal response until April 2016.

[296] In the meantime, Mr. Lee continued to press Mr. Goemans to negotiate discounts with suppliers, and he continued to express his understanding that the price MMB was paying was the same price as Oxbow paid suppliers. Mr. Goemans' response to Oxbow suggested he was "in discussions with sulphur suppliers", but his testimony on this point was vague, there were no confirmatory documents, and the evidence suggests any discussions would have been very limited in nature. The plaintiff submits that given Oxbow's contractual obligations to its netback suppliers, those discussions could not have been actual negotiations.

[297] The parties met in Houston on January 27, 2016. Oxbow expected the meeting might be contentious and would involve further discussions about getting discounts. In an internal email, Mr. Goemans wrote "we should be open to a term and volume discount", thus showing that Oxbow was selling as principal, while portraying itself as an agent.

[298] The minutes from that meeting show that Mr. Lee reiterated MMB's position that Oxbow should negotiate a discount with suppliers and Mr. Goemans said that

Oxbow "needs a few more weeks to finalize with suppliers". Oxbow also agreed to devise a pricing formula specific to shipments from California.

[299] In February 2016 Mr. Goemans negotiated an arrangement with H.J. Baker (here, in its role as a spot supplier) where Oxbow would purchase sulphur from H.J. Baker using the MMB California price formula, less \$1.00 per tonne, for resale to MMB. Mr. Goemans did not disclose to MMB that he had shared that index formula price with H.J. Baker or that he had negotiated a \$1.00 per tonne discount.

[300] In May 2016, Mr. Goemans wrote to Mr. Lee to say that "California shippers have no interest in supporting a long-term price agreement", although the Canadian "supplier" [sic] was interested, but subject to a volume commitment. The plaintiff submits this response was untruthful because (1) Mr. Goemans had not attempted any negotiations and had only had "soft discussions" with a limited number of netback suppliers; (2) Oxbow had already negotiated a discount with a California supplier, H.J. Baker; and (3) the assertion by Mr. Goemans that the Default Notice was a barrier to reaching a long-term price agreement was nonsensical.

[301] The plaintiff says that, on the evidence, it is clear Mr. Goemans never intended to seek a price discount for MMB from its suppliers.

[302] Oxbow's response to the Default Notice was to acknowledge MMB's audit rights under the Supply Agreement, but also to claim those rights were limited to the verification of the index formula price calculation, a result that did not require an audit. MMB maintains that the audit provisions were clearly intended to allow MMB to verify that Oxbow was passing along its actual sulphur costs.

[303] MMB commenced the subject action in September 2017. In submissions, counsel noted that the action was "somewhat exploratory and speculative" at that time because, until records were produced, MMB was unaware that Oxbow had earned additional profits.

[304] The Supply Agreement expired at the end of 2023. MMB was persuaded to allow Oxbow's successor, H.J. Baker, to make a proposal, in part because H.J.

Baker controls the supply from Long Beach, which is MMB's preferred loading port. H.J. Baker now sells sulphur to MMB as principal, there is no service fee, and the price is set on a formula basis less a discount of 4.5 percent for Vancouver and 3 percent from Long Beach.

[305] MMB notes the former contract was much more valuable to it because, under those terms, MMB had the services of Oxbow, an industry expert, who was to supply sulphur at the best available price in return for a service fee of \$2.00 per tonne.

[306] The total amount of trading gains and netback commissions received by Oxbow was \$10,995,695, of which about \$1,768,186 came from netback commissions and \$9,227,510 came from trading gains.

[307] MMB notes that Oxbow earned incentive payments (which were in addition to its regular commission) on its netback arrangements on 36 transactions with MMB, or 45 percent of transactions. This refutes the testimony of Mr. Goemans, who said incentive payments required that Oxbow "beat the market" and were "very rare".

[308] Oxbow's spot trading was even more lucrative, averaging \$8.10 per tonne over all transactions, with gains on nearly every trade. Only seven of 168 individual spot trades resulted in losses, and those losses were small.

[309] In addition, Oxbow was paid a total of \$5,061,741 in service fees. In total, Oxbow earned \$16,057,437 from its dealings with MMB.

Submissions on Liability

[310] MMB submits the Supply Agreement was a binding commercial agreement, whereby Oxbow acted as agent in acquiring and providing sulphur to MMB in return for a service fee.

[311] MMB also submits that the Supply Agreement created a fiduciary relationship between Oxbow and MMB.

[312] Although Oxbow did not directly bind MMB to contracts with third parties, the agreement both contemplated and authorized Oxbow to enter into contracts with third parties in its own name but on MMB's behalf. This applied to both sulphur purchases as well as logistics arrangements for the transport of sulphur to the Boleo mine. This was most clearly illustrated by the vessel chartering arrangements, as the parties agreed that while Oxbow was the named charterer of the vessels, the vessels were actually MMB's vessels, secured for MMB's benefit and at MMB's expense. Oxbow's admission that MMB was entitled to the address commissions is an acknowledgment that it acted as MMB's agent.

[313] Leaving aside those express features of agency, the relationship was also fiduciary when considered on a principled basis:

- a) Oxbow explicitly undertook to act on behalf of MMB, and in MMB's best interests, in exchange for a fee;
- b) MMB was vulnerable to Oxbow's exercise of discretion as to the terms on which it acquired sulphur. While MMB sought to address that vulnerability by having Oxbow act on its behalf on a transparent basis, it still remained vulnerable to Oxbow's exercise of discretion; and
- c) MMB's legal and practical interests, in terms of the cost of sulphur, were directly impacted. Simply put, MMB relied on its agent Oxbow to source its necessary sulphur supply at the lowest cost.

[314] The Supply Agreement did not define how pricing or delivery would be arranged, only that those costs would be passed on. Amendment No. 2 was not the result of arm's length negotiations but, instead, was the parties' way of setting out the details necessary to implement the agency relationship already created.

[315] In the course of the discussions leading up to Amendment No. 2, Mr. Goemans provided a misleading and incomplete explanation as to how index pricing was used and how its netback business worked. Critically, he failed disclose that Oxbow would profit from these transactions at MMB's expense. Specifically:

- a) Mr. Goemans was aware that MMB's main objective was to be able to verify that Oxbow was securing sulphur for MMB at the lowest price;
- b) He represented that indexes are something producers and consumers used to set prices, when he knew that the indexes would not represent the price Oxbow paid suppliers;
- c) He proffered examples of index-based purchasing by "similar" suppliers, without mentioning that those transactions were arms-length transactions where no agency fees were being paid;
- d) He used those examples to lead MMB to believe that index pricing would represent the best available market price and essentially the price Oxbow had paid or would have paid;
- e) He told MMB that netback was a new development since 2008 that had not been contemplated in the Supply Agreement, but netback was not at all new and in fact the Supply Agreement was effectively modelled on the netback model;
- f) He carefully omitted any references to Oxbow's fee and trading arrangements, saying only that Oxbow was reimbursed for transportation and logistics expenses, thus leaving the impression that netback did not generate a price from which MMB's price could be calculated;
- g) He led MMB to believe that all of Oxbow's business was netback and failed to reveal that a substantial portion of Oxbow's business was done on a spot trading basis, which was lucrative to Oxbow;
- h) He actively misled MMB by advising that the index price would approximate the actual amount paid by Oxbow on MMB's behalf, subject only to small gains or losses that would balance as a "wash"; and
- i) He led MMB to believe that the "offer and acceptance" element of the proposed pricing mechanism would facilitate Oxbow in its role as agent in

obtaining the lowest available price, lower than the index prices, when he had no intention of utilizing that method.

[316] All the misleading communications and incomplete disclosure constituted breaches of Oxbow's contractual duty of good faith and its duty not to act in a manner that nullified MMB's benefits under the Supply Agreement.

[317] The plaintiff maintains that the fiduciary relationship of the parties was unaffected by Amendment No. 2. While Oxbow maintains that a drafting error wrongly transposed a section being deleted, arguing that the provision dealing with open book, flow-through pricing ought to have been deleted, Oxbow has failed to lead evidence that would ground its claim for rectification. There was no prior oral agreement on any deletions, whether in favour of Oxbow's current argument or otherwise, and the provision as written logically and understandably deletes a section dealing with excess sulphur, which was rendered superfluous when the supply requirement was restated to be on a shipment by shipment basis, where quantities were specifically stated for each shipment.

[318] Returning to the subject of fiduciary relationships, the plaintiff emphasizes that various provisions of the 2008 Agreement continued in force, including:

- a) Section 1.1: Oxbow was appointed as MMB's sole agent and supplier;
- b) Section 1.2.1: Oxbow was to "source and identify suppliers...acting in MMB's best interests to secure and deliver sulphur on a market competitive basis at the lowest cost without compromising security of supply" – defined in the contract as the "Best Value";
- c) Section 1.2.2: Oxbow was to "enter into contracts with such sulphur producers on MMB's behalf...at the Best Value";
- d) Section 1.2.9: Oxbow was to "make all sulphur supply, purchase, transportation contracting, scheduling and delivery timing decisions...in MMB's best interests";

- e) Section 1.2.11: Oxbow was required "during all discussions and negotiations with Sulphur suppliers...have, as [Oxbow's] main objective, supplying sulphur...at the Best Value";
- f) Section 1.2.12: Oxbow was to "enter into supply contracts with such suppliers to secure the most cost effective, and secure sulphur supply...for the Mine at the Best Value...at all times acting in MMB's best interests and putting MMB's requirements in priority to any other commitments that [Oxbow] may have in respect of the supply of sulphur";
- g) Section 1.2.16: Oxbow was to "arrange for the supply and delivery of all Sulphur on a cost flow-through and transparent basis and provide and perform all requirements described in this Agreement on a completely open book and financially transparent basis";
- h) Section 7.2: Oxbow "shall be entitled to reimbursement of all third party costs required to purchase at source, transport and deliver all Sulphur supplier and delivered to the Mine" and that it "shall maintain complete records that evidence all such third party cost incurred";
- i) Section 7.3: Oxbow was to provide MMB with invoices that "particularize the actual costs incurred or committed to by [Oxbow] for the supply and deliver to the Mine of all sulphur; and
- j) Section 13.1: Oxbow shall "establish and keep records and books of accounts showing expenditures and payments incurred and expended in relation to the provision of all services" and that MMB had the right to audit such records "for the purpose of verifying the charges presented by [Oxbow] to MMB for payment".

[319] The plaintiff also notes ss. 7.1 and 7.2 of the Supply Agreement, which continued to apply after Amendment No. 2, which set Oxbow's fee at \$2.00 per tonne as its only compensation.

[320] From this, the plaintiff maintains that the pricing mechanism in Amendment No. 2 ought to be interpreted in a manner consistent with the continuing fiduciary obligation to deliver sulphur for the lowest price. Specifically in terms of the two-part pricing formula, this was to operate by passing on index pricing when Oxbow had purchased based on index pricing, or by passing on to MMB the better pricing it obtained through its negotiations with producers on MMB's behalf. The plaintiff says this is essentially how MMB presented the pricing mechanism in 2013.

[321] The plaintiff argues, in the alternative, that if the 2013 pricing mechanism relieved Oxbow of its obligation to deliver lowest price, then Oxbow, through the various misrepresentations and failures mentioned earlier, brought it about in a way that was itself a breach of fiduciary duty owed under the Supply Agreement, as well as a breach of its contractual duty of good faith and honest performance.

[322] Once the shipments started, Oxbow continued to breach both its fiduciary and contractual duties by continuing to portray itself as an agent negotiating with suppliers on MMB's behalf to secure the lowest prices available, when it was doing no such thing and had no intention of doing so.

[323] Mr. Lee's continued requests that Mr. Goemans secure discounts from suppliers were met with promises to engage in negotiations but no genuine negotiation attempts were ever made. The reasons for that are now clear: Oxbow's arrangements with netback suppliers required Oxbow to maximize the return to its suppliers, and any discounts with Oxbow's spot trading supply would have had to have come out of Oxbow's own returns or profits.

[324] The one exception was with H.J. Baker, where Oxbow did enter into a longer-term arrangement for purchases at a discount, but Oxbow did not disclose either that discount or its related trading profits to MMB.

Submissions on Damages

[325] Dealing first with damages for breach of contract, MMB submits it was entitled to the benefit of the price that Oxbow actually paid to acquire sulphur, and the failure

to deliver at those prices was a breach of contract. MMB also overpaid by the amounts paid to Oxbow by others for marketing and incentive fees on netback transactions and by the amounts of its trading gains on its spot trading supply. These were also breaches of Oxbow's duty of honest performance and the duty not to nullify MMB's bargained benefit.

[326] For the equitable claims, the plaintiff says all of Oxbow's breaches point to similar remedies based on Oxbow's secret profits and the service fees it charged to MMB. The plaintiff submits breached its fiduciary duty by failing to disclose, during the negotiation of Amendment No. 2, that it was in a position of conflict and expected to earn additional fees and profits, and by subsequently earning those secret profits.

[327] The remedy for those breaches is for Oxbow to disgorge the secret or wrongful trading gains it earned and to repay the service fees it received from MMB.

[328] As for the contract claims, the plaintiff submits Oxbow committed breaches by: (1) breaching its duty of good faith and honest performance in the discussions leading up to Amendment No. 2 by failing to disclose it was in a position of conflict and expected to earn profits; and (2) breaching both the contract and its duty of good faith and honest performance by not delivering sulphur at the lowest price.

[329] The remedy for the contractual breaches are as follows: (1) expectation damages to put MMB in the position that it would have been in had the agreement been performed, with the quantum of damages equal to Oxbow's secret trading gains; and (2) the repayment of the service fee, as there was a complete failure of the consideration it had contracted to receive.

[330] The plaintiff also claims punitive damages, arguing that Oxbow's conduct has been egregious and a violation of "even the most basic tenets of normal commercial conduct", and warrants a stern rebuke. The plaintiff submits a punitive damages award equal to 10 percent of the amounts awarded ought to be made in this case.

B. Defendant

[331] Oxbow submits that the existence of a fiduciary relationship between MMB and Oxbow is the essential question this Court must determine in this litigation.

[332] Equity imposes fiduciary relationships to protect the "peculiarly vulnerable" for the actions of a faithless fiduciary. Fiduciary relationships are reserved for situations that are truly in need of the special protection that equity affords. In this case, the defendant says the relationship between MMB and Oxbow under the Supply Agreement is contractual in nature and not a true agent-principal relationship. While the Supply Agreement and amendments refer to Oxbow as an "agent", the authorities are clear that relationships bearing the nomenclature of "agency" are often, when examined critically, contractual in nature.

[333] This was not a relationship where Oxbow had the discretion to unilaterally affect MMB's legal or practical interests, where MMB was peculiarly vulnerable to Oxbow under the contract terms, or where Oxbow had agreed to act with a duty of loyalty to MMB, forsaking the interests of all others and itself. Instead, these were two sophisticated, arm's length, commercial parties. Oxbow says the Supreme Court of Canada has repeatedly warned against imposing a fiduciary relationship between two commercial parties, as to do so would be the "very antithesis" of the fundamental concept that commercial parties are entitled to act in their own interests: *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at para. 38, 1994 CanLII 70.

[334] MMB's claims in contract all derive from one central complaint: that MMB did not get the lowest possible price for each shipment of sulphur received. However, when the Supply Agreement is correctly interpreted, it is clear that MMB never had a contractual entitlement to the lowest possible price for sulphur. At best (and subject to the terms of Amendment No. 2), MMB was entitled to receive "Best Value" for sulphur which, by the definition in the Supply Agreement, did not mean lowest price.

[335] The defendant notes that, in any event, Amendment No. 2, which was executed prior to any shipment of sulphur to MMB, set the price of sulphur sold to MMB by reference to a pricing formula. At the time MMB entered into Amendment

No. 2, it well understood that the pricing formula was by definition an average of averages, which cannot logically be the lowest price. While Mr. Lee, who joined MMB after Amendment No. 2 was negotiated, may not have liked this deal, his dissatisfaction cannot ground a breach of contract claim against Oxbow.

[336] On damages, the defendant says MMB has not suffered any loss, as demonstrated by its conduct. Despite alleging breach of the Supply Agreement and threatening to terminate it, and then commencing this litigation, MMB continued to purchase sulphur from Oxbow under the Supply Agreement until it expired in 2023. Further, MMB then selected the same people (now Baker Sulphur, but still with Mr. Goemans) as their "new" sulphur suppliers after a competitive tender process.

[337] The defendant says MMB's conduct belies its allegations that Oxbow breached either its fiduciary duties or the Supply Agreement in a way that should be sanctioned by law. Oxbow maintains that it "defies logic" that MMB would continue to purchase sulphur from Oxbow if it truly believed that Oxbow had discretion to affect MMB's legal and practical interests and was actively dishonest in doing so.

[338] The defendant says this should also preclude MMB from obtaining a remedy here. The evidence is clear that at all material times, MMB knew of the conduct of Oxbow about which it now complains. This became particularly clear once MMB commenced this litigation in September 2017. Given these circumstances, it would be inequitable for this Court to award the remedies that MMB seeks.

Evidence

[339] Oxbow notes that MMB did not tender evidence from anyone having contemporaneous knowledge of the 2008 Agreement. Further, the only evidence tendered by MMB concerning Amendment No. 2 was from Mark Henderson, whose tenure was brief.

[340] Oxbow was critical of Mr. Henderson's credibility, noting that he referred repeatedly to "agent" and "Best Value" in his testimony while not doing so in

contemporaneous correspondence, and he explained he had done "further research of the contract" and "learned a lot more about contract" in the ensuing years.

[341] The defendant said the trend of overusing conclusory terms ("agent", "sole agent" and "fiduciary") continued with Mr. Lee, whose efforts were a "thinly veiled attempt to presuppose a legal question and a key issue in dispute in this litigation". Mr. Lee also gave inconsistent answers about whether he understood it was Oxbow that was contracting with suppliers, not MMB. The defendant says Mr. Lee clearly understood Oxbow purchased the sulphur and then re-sold it to MMB.

[342] The defendant says MMB misstated three critical matters in its submissions:

- a) *MMB's Eric Norton drafted the 2008 Agreement and it can be inferred he intended to structure that agreement in a manner similar to a netback arrangement:* Oxbow says there is no evidence as to who drafted the 2008 Agreement and there is no basis on which to infer Mr. Norton would have been familiar with netback arrangements. There is therefore no foundation to the suggested inference about the structure of the 2008 Agreement;
- b) *Mr. Goemans proposed the pricing formula:* The defendant says there is no evidence that Mr. Goemans proposed formula pricing; to the contrary, the evidence shows it was Mr. Henderson who first expressed an interest in buyer who purchased sulphur on that basis; and
- c) *Mr. Goemans sought to avoid cancelling the 2008 Agreement because he wanted to avoid the risk of MMB canvassing elsewhere in the market:* The defendant notes Mr. Henderson's testimony on this was vague as to timing and context, and Mr. Goemans testified that he did not recall Mr. Henderson saying any such statement.

[343] In other respects, the evidence of Mr. Henderson and Mr. Goemans was remarkably consistent, with both witnesses agreeing the 2008 Agreement was commercially unworkable and that MMB wanted an objective pricing mechanism.

[344] The parties negotiated and signed Amendment No. 2, the purpose of which was to (as per a recital) "formalize the establishment of pricing and shipping terms as contemplated in the [2008 Agreement], including pricing terms and conditions for periodic shipments". This established the practice of negotiating agreements for each shipment (the addenda), with both parties acknowledging those terms and conditions would satisfy the "Best Value" for MMB, as per the 2008 Agreement.

[345] The defendant submit Mr. Henderson clearly understood that Oxbow would engage in spot trading when he negotiated Amendment No. 2 because he was aware that "if Oxbow paid less than the index price to a supplier that was their profit and their benefit". Oxbow says he was also aware of netback arrangements at that time because those were explained to him during his meeting with Mr. Goemans in August 2013.

[346] In October 2015, following a request by MMB, Mr. Goemans provided a detailed explanation about "how the current price formula approach for MMB's sulphur came about and how that approach relates to Oxbow's sulphur supply". He explained how the "vast majority" of Oxbow's supply was contracted and proceeded to explain its netback arrangements, which was the context for his comment that "Oxbow does not take positions on this supply".

[347] Mr. Lee became responsible for sourcing sulphur, but he had "little regard" for the terms of Amendment No. 2 and the pricing formula. Instead, he demanded that Oxbow supply sulphur at the lowest possible price, asserting to Mr. Goemans that Oxbow was MMB's agent or fiduciary. While Mr. Goemans did not directly challenge Mr. Lee's characterization of the relationship, other interactions made it clear to Mr. Lee that Oxbow was not MMB's agent.

[348] The defendant reviewed the means by which Oxbow acquired sulphur, a matter I summarized earlier in these reasons. Oxbow would reserve sulphur at the load ports, meaning that it would allocate the required sulphur quantity for MMB's consumption in the event that MMB required it. This ensured security of supply for MMB. If MMB could not take the reserved tonnage for any reason, Oxbow would be

forced to find another buyer and was liable for any financial impact or loss. This was the situation with two of the shipments (Addendum #1 and Addendum #47), where Oxbow was obliged to find alternative buyers at short notice.

[349] MMB continued to purchase sulphur from Oxbow after litigation was commenced in September 2017. There were about 52 shipments made from September 2017 to November 2023 (the end of the contract term), all with signed addenda where MMB verified it was receiving "Best Value" for those shipments.

Legal Principles

[350] The defendant cited authorities addressing the following:

- a) Fiduciary relationships: *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574; *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19; and *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24 [*Elder Advocates*];
- b) The very limited scope for finding a fiduciary duty in the context of commercial relationships: *Air Palace Co. v. Rotor Maxx Support Limited*, 2023 BCCA 393 at para. 63; *Hodgkinson* at para. 38; *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142 at para. 30; and *Litwin Construction v. Kiss*, 1988 CanLII 174 (B.C.C.A.) at paras. 22-24;
- c) The absence of the requisite vulnerability element in most commercial cases where a fiduciary relationship is alleged: *Ironside v. Smith*, 1998 ABCA 366; *Higgins Cohn Brand Management v Kinnikinnick Foods Inc.*, 2016 ONSC 1345; and *Serinus Energy PLC v. SysGen Solutions Group Ltd.*, 2023 ABKB 625;
- d) The important distinction between the discretion imbued in a fiduciary and the discretion left to a party carrying out the obligations taken on by simply entering into a commercial contract: *Bluefoot Ventures Inc. v. Ticketmaster (Citysearch)*, 2007 CanLII 55363 (Ont. S.C.); and

- e) The rarity of any court finding that a party to a commercial contract has forsaken all other interests: *Giles v. Westminster Savings Credit Union*, 2007 BCCA 411.

General Submissions

[351] The defendant's submissions are comprehensive, indeed exhaustive, and so I will summarize only the principal points.

[352] The defendant says MMB's case largely rests on duties allegedly owed by Oxbow to MMB in 2013, when MMB was preparing to start its operations. At that point, the status of the 2008 Agreement was doubtful: MMB had "disappeared" for a number of years, no sulphur had ever been delivered under it, both parties viewed that agreement as commercial unfeasible, and Oxbow did not view itself as having any obligations under it. Fiduciary duties do not arise in a vacuum, and the Court should be reluctant to find an agreement that was never implemented still gives rise to fiduciary obligations.

[353] In order to establish a *rebuttable* presumption of a *per se* fiduciary relationship, MMB must prove the existence of a true agent-principal relationship between Oxbow and MMB. There is a general imprecision in the use of the term "agent", as it often used in situations where there is no true agency, as is the case where a party is an "agent" in name only.

[354] The use of the term "agent" in the 2008 Agreement, and by Mr. Lee in various communications, does not establish that there was an agency relationship. The question is one of substance, not form.

[355] There was no true agency here, because (1) MMB had no ability to bind MMB. Sulphur was only delivered on MMB's specific agreement, and Oxbow entered into third party contracts in its own name and at its own risk; (2) there was a transfer of title and risk from Oxbow to MMB. If the parties were in a true agent-principal relationship, MMB would have at all times held title to each sulphur shipment and born the risk of loss or damage to the sulphur; (3) MMB and Oxbow

were in a buyer-seller relationship, with Oxbow being a middleman between the suppliers and MMB; (4) the fee payable to Oxbow is described in the 2008 Agreement as a "service fee", not a commission, which is how an agent is paid.

[356] Neither was there any implied agency in this case. The applicable factors, as set out in *Siemens v. Howard*, 2018 BCCA 197, do not favour such a finding:

- a) First, the circumstances do not warrant that finding. There is no third party in need of protection here, as is often the case where implied agency is found, and this is not a real estate case, which is the usual scenario where implied agency is found;
- b) Second, despite the references to "agency" in this matter, it was not reasonable for MMB to believe Oxbow was its agent. While Mr. Lee asserted to Mr. Goemans that Oxbow was MMB's agent, Mr. Goemans disagreed with that characterization and told Mr. Lee that. Even if MMB held that belief, it was unreasonable for it to have continued in that belief once Oxbow filed its response to civil claim, where Oxbow expressly denied it;
- c) Third, MMB did not provide instructions to, or have control over, Oxbow. Oxbow contracted directly with its own suppliers and, in fact, held its supplier information confidential. The key terms of each sulphur shipment were negotiated between the parties, not dictated by MMB; and
- d) Fourth, Oxbow's self-interest in the Supply Agreement was known to MMB because MMB knew that Oxbow was purchasing sulphur in its own name and at its own risk. MMB knew Oxbow had netback arrangements with its suppliers and was also engaging in spot trading. These matters make it clear that MMB knew or ought to have known that Oxbow had competing commercial interests.

[357] In terms of contractual analysis, the defendant says MMB's reliance on the 2008 Agreement in arguing for a fiduciary relationship is unsound. No shipments

occurred under that agreement; shipments only took place after Agreement No. 2. In any case, the 2008 Agreement did not create a fiduciary relationship, as most clearly demonstrated by s. 11.1, which stipulates that MMB cannot unreasonably withhold consent for Oxbow to assign the agreement. Courts have found agreements which create a fiduciary relationship are not, by their nature, assignable.

[358] The defendant relies on the contractual interpretation principles set out in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53; and *Resolute FP Canada Inc. v. Ontario (Attorney General)*, 2019 SCC 60. The defendant adds that where more than one contract is entered into as part of a single transaction, the contracts must be read harmoniously to achieve interpretive accuracy and give effect to the parties' intentions: *Ottawa (City) v. ClubLink Corporation ULC*, 2021 ONCA 847.

[359] Looking first at the 2008 Agreement, the defendant says its purpose was not to provide for the purchase of sulphur, but instead was to enable MMB to demonstrate to its lenders that it could, in the future, obtain a steady supply of material that was critical to the operation of the mine. This purpose is evidenced most notably in that part of the agreement where Oxbow makes representations about its expertise in the sulphur market. It is also evidenced through the absence of commercial provisions relevant to sulphur sales and shipments, and by the fact that various stated obligations were never performed by the parties.

[360] By contrast, Amendment No. 2 was entered into by the parties to set the price to be paid for the sulphur, as shown by the recital confirming the parties' intention to "formalize the establishment of pricing and shipping terms". Amendment No. 2 imposed a duty on both parties to "negotiate in good faith", which is antithetical to the concept of a fiduciary relationship because a fiduciary imbued with power, discretion and trust need not negotiate with its beneficiary. Once Amendment No. 2 was entered into, there was no discretion on Oxbow's part in setting the price of sulphur, as the parties agreed on a pricing formula.

[361] Each Addendum involved an arms-length negotiation between the parties on price and terms. For each, the agreed index price was used, the risk of lost or

damaged goods passed on the loading of each vessel, and Oxbow was identified as the "seller" and MMB was identified as the "buyer".

[362] From this, the defendant argues that the parties' relationship did not meet the test for a fiduciary relationship set out in *Frame v. Smith*, [1987] 2 S.C.R. 99. First, MMB has failed to show that Oxbow had the discretion to unilaterally and adversely affect the interests of MMB, and in particular, in regard to price. MMB always had the choice of a negotiated price or the price set according to the agreed formula.

[363] Second, MMB has not shown it was "particularly vulnerable" to Oxbow. To the contrary, MMB was a sophisticated commercial party, with personnel experienced in mining and commodities, as well as its own legal department, and was well able to advocate for its own interests. In fact, during the course of the relationship it negotiated a resolution of a sulphur quality issue, a modification of the pricing formula and a change to the payment terms.

[364] Third, MMB had specific knowledge of Oxbow's trading practices. MMB's assertion that it was unaware of these practices is not borne out by the evidence. Mr. Henderson knew about netback arrangements prior to Amendment No. 2, and Mr. Lee was aware throughout that Oxbow engaged in spot trading.

[365] Fourth, there was no duty of loyalty between MMB and Oxbow in the sense of Oxbow having to forsake its own interests in favour of those of MMB. MMB well knew that Oxbow had its own interests, including the interests of its shareholders, and that they, as buyers and sellers respectively, had contradictory interests.

[366] In answer to MMB's argument that certain provisions in the Supply Agreement require Oxbow to act in MMB's best interests, the defendant say these must be interpreted in context. One provision creates a priority of supply as between Oxbow's customers, but not an obligation on Oxbow to forsake its own interests. Other provisions deal with "cost" and "best value", but these were met through Amendment No. 2, which provided that the price arrived at met the definition of "Best Value" for the purposes of the Supply Agreement.

[367] Fifth, Oxbow never considered itself to be a fiduciary and made that clear to MMB when by informing MMB that Oxbow's client and supplier information was strictly confidential. For its part, MMB never trusted Oxbow as a fiduciary. MMB felt Oxbow might be "lazy", MMB's management felt everyone was "overcharging him" and Mr. Lee was concerned Oxbow was not doing a very good job. This evidence is irreconcilable with Mr. Lee's assertions that Oxbow was an "agent" and "fiduciary".

[368] Oxbow notes there is only one modern case where a fiduciary duty was found to exist between arm's length commercial parties, *Indutech Canada Limited v Gibbs Pipe Distributors Ltd.*, 2013 ABCA 111. The defendant says this case is distinguishable because the plaintiff in *Indutech* was vulnerable to the defendant sales agent by reason of having disclosed confidential information to the defendant, such as the plaintiff's customers, sales, pricing, timing and strategy. That defendant, by setting up a competing manufacturing business utilizing the confidential information, clearly breached its fiduciary duties.

[369] As to the burden of proof, the defendant says MMB bears the burden of proof to establish, on a balance of probabilities, that Oxbow was a fiduciary, and if so, that Oxbow breached its fiduciary duties. Only at that point does the onus shift to Oxbow to establish that it either met its duties or that MMB would have suffered the same loss regardless of the breach.

Rectification

[370] Oxbow alleges there are three typographical errors that are contrary to the intentions of the parties and, accordingly, Amendment No. 2 ought to be rectified. These are:

- a) in section 2(a) of Amendment No. 2, the reference to "deleting Section 1.2.15" was intended to be a reference to "deleting Section 1.2.16";
- b) in section 1.4.4 of Amendment No. 2, the reference to "Oxbow's obligations under Section 2 of the Agreement" was intended to be a reference to "Oxbow's obligations under Section 1 of the Agreement"; and

- c) in Section 1.4.5 of Amendment No. 2, the phrase "if either Party feels that the indices referenced above are reflective of prevailing market conditions" was intended to read "if either Party feels that the indices referenced above are not reflective of prevailing market conditions".

[371] Oxbow says Mr. Henderson confirmed the third of those errors insofar as he agreed in cross-examination that the correction "makes sense". He also supported the second of the errors noted above in an affidavit he swore on November 21, 2021. Oxbow says Mr. Goemans' testimony also confirmed the errors.

[372] Oxbow also notes a court may amend a mistaken contractual provision through the principles of contractual interpretation without resorting to a rectification analysis, citing *Wei Guang Real Estates Development Ltd. v. Netzwerk Productions Ltd.*, 2021 BCSC 215 at para. 35; *Graham v. 10 Tecumseh Ave. West Inc.*, 2015 ONSC 2704; and *Williams Moving & Storage (B.C.) Ltd. v. Canada (Minister of National Revenue)*, 2024 BCCA 160 at para. 71.

[373] Adopting this approach, Oxbow says the following circumstances ought to be taken into account:

- a) The relevant surrounding circumstances concerning Amendment No. 2 include the fact that there had been no shipments of any kind under the 2008 Agreement, which was a document secured merely to obtain financing. Amendment No. 2 was entered into to provide a proper commercial framework, including a pricing formula for sulphur;
- b) Section 1.2.16 of the 2008 Agreement contemplated the supply of sulphur to MMB on a "cost flow-through and transparent basis" that MMB would be able to audit. This cost could not be known to Oxbow for weeks for even months post-shipment, as the actual cost of Oxbow's netback supply includes associated costs that are not known until either 60 days after loading (for California ports) or as much as 15 months (for Vancouver). It is obvious that the parties intended to replace that provision with the

objectively determined pricing formula, and not to replace s. 1.2.15, which had to do with Oxbow's obligations to deal with any excess sulphur secured by Oxbow on MMB's behalf;

- c) New section 1.4.4, which provided for the documenting of each shipment through the execution of an Addendum, refers to the terms and conditions of each Addendum being "consistent with Oxbow's obligations under Section 2" of the 2008 Agreement, but s. 2 has to do with Oxbow's obligation to develop delivery infrastructure if required by MMB. Instead, it is s. 1 of the 2008 Agreement that addresses Oxbow's obligations with respect to MMB's sulphur requirements, including the obligation to secure and deliver sulphur at "Best Value" to MMB; and
- d) Section 1.4.5 of Amendment No. 2 requires the parties, in certain circumstances, to determine a new pricing mechanism "that more accurately reflects prevailing market conditions". Oxbow says there is an obvious error insofar as the current version says this applies where "either Party feels that the indices referenced above are reflective of prevailing market conditions" instead of applying where the indices are *not* reflective of market conditions.

No Breach of Contract

[374] While maintaining the general submission that MMB's allegations of breach of contract are vague, the defendant says the discernable bases for breach of contract are not made out.

[375] As to the claim of breach of contract in "implementing" the Supply Agreement, Oxbow says the 2008 Agreement must be interpreted in light of its purpose, which was to demonstrate to financiers that MMB had a secure supply of an essential input. No sulphur was supplied under the 2008 Agreement. Amendment No. 2 set the mechanism for determining the price to be paid for sulphur, with the pricing formula having been "designed precisely for Mr. Henderson's, and MMB's, benefit".

[376] MMB's argument that Oxbow was obliged to supply sulphur at Best Value, meaning lowest price, is refuted by the terms of the 2008 Agreement itself, which defined Best Value as being on "a market competitive basis at the lowest cost without compromising security of supply". First, "lowest cost" does not mean "lowest price", as the price does not include all the costs of shipping sulphur to the mine. Clearly, the reference to "cost" in the 2008 Agreement means total cost to MMB.

[377] In any event, the other important term in the 2008 Agreement is its reference to security of supply. Oxbow notes that security of supply means Oxbow could not under supply, or supply sulphur of unacceptable quality, or supply sulphur through significant shipping costs, as these would not satisfy the Best Value requirement.

[378] Oxbow notes that Mr. Lee specifically confirmed that "security of supply" was the "number one priority".

[379] MMB got exactly what it contracted for. Amendment No. 2 established the pricing formula and the system of individually agreed addenda for each shipment. By the terms of Amendment No. 2, MMB agreed that each of the ensuing periodic shipments represented Best Value to MMB.

[380] Second, MMB's claim that Oxbow breached the Supply Agreement by failing to act in MMB's "best interests" is unsound because any obligation to act in MMB's "best interests" did not require Oxbow to secure the *lowest* price for MMB, as just noted. In executing Amendment No. 2, with its pricing formula, MMB abandoned any ability to allege Oxbow was not acting in MMB's "best interests" with respect to the price it paid for sulphur.

[381] Also, the very nature of the pricing formula is inconsistent with MMB's purported interpretation of "best interests", as it required the parties to engage in good faith negotiations on price and, if no agreement was reached, the price would be set according to the agreed index formula. As the index formula is an "average of the averages", it is, by definition, not the lowest possible price. This fallback mechanism was necessary because the parties, each acting in its own best

interests, could fail to reach agreement on price before a shipment was required. There can be no suggestion that Oxbow was obligated to subjugate its own interests in the course of these negotiations.

[382] MMB's claim that Oxbow's "overhead and profits" were to be included in the service fee does not mean that Oxbow was unable to enjoy the benefit of the price it actually paid to acquire sulphur from third parties. Oxbow notes the Supply Agreement is an agreement between Oxbow and MMB only and it does not restrict Oxbow's dealings with third parties or its related profits and losses. Mr. Henderson was aware, prior to Amendment No. 2, that Oxbow could incur either profits or losses in its dealings with its third party suppliers, and so MMB cannot now assert a breach of s. 7.2 of the 2008 Agreement. In any event, MMB's submission on this point ignores the effect of Amendment No. 2, which established a pricing mechanism and backup pricing formula. Through this mechanism, pricing was effectively taken out of the parties' hands, as Mr. Henderson had requested.

[383] MMB also alleges that Oxbow breached its contractual obligations to supply sulphur on a completely transparent basis; essentially, MMB appears to raise the question of whether Oxbow failed to discharge its obligations of disclosure to MMB.

[384] Oxbow submits MMB's position overlooks the purpose and effect of the pricing formula in Amendment No. 2. The evidence shows that one of the reasons Mr. Henderson agreed to the pricing formula was to reduce the burden on MMB to audit pricing, which would have been a difficult exercise given that the actual delivered cost of sulphur is not known until several months after shipping.

[385] By moving away from a cost flow-through mechanism to the index price formula, MMB reduced its audit burden on pricing and secured full transparency on each shipment by accessing the publicly available indices, which themselves were made available by Oxbow for MMB's review. Further, for all of the Oxbow-arranged charterparties, Oxbow invited MMB to inspect non-redacted original charterparties at Oxbow's office in accordance with section 13.1 of the 2008 Supply Agreement. In short, Oxbow made all relevant books and records available for MMB's review.

Duties of Good Faith and Honest Performance

[386] Oxbow notes the organizing principle of good faith was not designed to oust a party's ability to contract freely. As noted in *Bhasin v. Hrynew*, 2014 SCC 71 at para. 70, "a party may sometimes cause loss to another — even intentionally — in the legitimate pursuit of economic self-interest ... Doing so is not necessarily contrary to good faith". The Supreme Court of Canada subsequently pointed out that "the requirements of good faith performance" should not be confused "with an injunction to act selflessly in a way that stands outside the ordinary compass of social ordering by contract, in service of a notional solidarity between the parties based on a different theory of justice": *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7 at para. 7.

[387] Citing *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45, Oxbow says the duty of honest performance must be directly linked to the performance of the contract; dishonesty in the abstract, or outside a particular provision of a contract, is not actionable.

[388] In *Bhasin*, the Supreme Court of Canada clarified that: (1) the duty of honest performance "should not be confused with a duty of disclosure or of fiduciary loyalty", and (2) "a clear distinction can be drawn between a failure to disclose a material fact ... and active dishonesty." A failure to disclose a material fact is not in and of itself a breach of the duty of honest performance.

[389] While MMB places great emphasis on the principle from *Callow* that parties must be mindful to correct misapprehensions, Oxbow submits this principle is only applicable where, as in *Callow*, the defendant has been actively deceitful to the clear loss of the plaintiff. Not every misapprehension needs to be corrected, only those misapprehensions that rise to the level of "active deception" do. As the court said in *Callow*, "[r]equiring a party to speak up" in every instance of misapprehension would "confer an un-bargained for benefit on the other that would stand outside the usual compass of contractual justice."

[390] Oxbow repeats that it was not in a fiduciary relationship with MMB. There can be no expectation that Oxbow had to voluntarily divulge all details of its business to its arm's length contracting counterparty. Oxbow was entitled to perform the Supply Agreement consistent with economic efficiency and its own financial self-interest.

[391] There is no basis to suggest Oxbow was dishonest in its sulphur supply performance under the 2008 Agreement as it never supplied sulphur to MMB under that agreement. To the extent MMB argues that Oxbow actively misled MMB, or "lied and schemed" by concealing their netback or spot trading, there is no evidence to support that assertion. As noted earlier, the evidence is that Mr. Goemans told Mr. Henderson about netback before Amendment No. 2 was executed and sulphur supply began. Mr. Henderson had the opportunity to inquire further regarding these profits but he testified he declined to do so, as he "wasn't actually interested". Similarly, MMB knew that Oxbow engaged in spot trading both prior to executing Amendment No. 2 and afterward. Requiring anything more from Oxbow would amount to an impermissible "injunction to act selflessly in a way that stands outside the ordinary compass of social ordering by contract": *Wastech* at para. 7. If MMB was under a misapprehension, it was a misapprehension of its own making; Oxbow did not actively create it.

[392] Since good faith duties do not apply to pre-contractual negotiations (*Styles v. Alberta Investment Management Corporation*, 2017 ABCA 1 at para. 51), MMB has tried to reframe the negotiations for Amendment No. 2 as "how best to implement the terms", in contrast to Oxbow's characterization of the discussions as a "wholesale reworking" of the 2008 Agreement. MMB's characterization does not accord with the evidence.

[393] In any event, the duty of honest performance does not apply to renegotiations of existing agreements: *Royal Bank of Canada v. 4445211 Manitoba Ltd.*, 2015 SKQB 261; *Callow* at para. 37. While the 2008 Agreement contains several references to Oxbow's obligation to act in MMB's best interests, those provisions deal with other issues and do not deal with amendments or renegotiations.

[394] It follows that neither Oxbow nor MMB had a duty to negotiate Amendment No. 2 in good faith, either by virtue of the common law or a provision in the 2008 Supply Agreement.

[395] Even if Oxbow had a duty to negotiate Amendment No. 2 in good faith, it met that duty. The duty of honest performance does not prevent parties from pursuing economic self-interest and it does not impose an ongoing, positive duty of disclosure on a party: *Callow* at para. 81. Here, the evidence is that Oxbow told MMB about netback trading during negotiations for Amendment No. 2, and MMB also understood that Oxbow engaged in spot trading. As a result of the negotiations, the parties settled on a pricing mechanism which Mr. Lee himself conceded was third-party verifiable and "transparent".

Remedies and Damages in Equity

[396] Oxbow notes the "equitable remedy of disgorgement is the driving force of this litigation", as MMB seeks disgorgement of Oxbow's spot trading gains, its earnings from netback trading and the service fees it received.

[397] Oxbow says MMB seeks disgorgement of Oxbow's profits because MMB cannot prove any loss. This is most clearly demonstrated by the fact that MMB continued to purchase sulphur from Oxbow for five years after this litigation was commenced, all the while claiming "secret profits" were being received by Oxbow.

[398] Oxbow says there is a preliminary issue insofar as MMB must elect between the gain-based remedy of disgorgement and the loss-based remedy of damages. It must do so because these remedies are alternative and inconsistent: *Bronson v. Tompkins*, 2012 BCSC 770 at para. 79. Oxbow's position is that MMB was obliged to elect once it was in a position to make an informed choice. Oxbow adds that MMB appears to have elected disgorgement over a loss-based remedy. If MMB says it has not made any election, it must now do so.

[399] Oxbow says: (1) disgorgement is an equitable remedy; (2) there must always be a sufficient nexus between the profit disgorged and the alleged breach of

fiduciary duty; (3) the remedy of disgorgement is subject to a number of equitable principles and defences, including the principle that a plaintiff may not stand by and permit the defendant to make profits and then claim entitlement to those profits; (4) the defences of laches, waiver, acquiescence, estoppel, unclean hands and ratification all require an examination of the plaintiff's conduct, as well as that of the defendant; and (5) a form of duty to mitigate also applies to disgorgement claims, as the plaintiff may be in a position to dissipate the effects of the breach (*Strother v. 3464920 Canada Inc.*, 2007 SCC 24 at para. 90).

[400] Oxbow says that in the event Oxbow is found to have breached its fiduciary duty, MMB's conduct is such that there is no basis on which the Court ought to grant an equitable remedy. Here, Oxbow says MMB always knew Oxbow purchased sulphur from its suppliers both on a spot trading basis and a netback basis, and MMB also knew it had no continuing obligation to obtain sulphur from Oxbow as it threatened to go elsewhere multiple times and MMB repeatedly questioned whether Oxbow was an agent or shipper. Finally, MMB noted Oxbow in default of the Supply Agreement in December 2015 and threatened to terminate it in January 2016, so by December 2015, MMB fully understood its legal rights and held the view that it could unilaterally terminate the Supply Agreement and seek sulphur elsewhere.

[401] In the end, MMB continued to purchase sulphur from Oxbow after litigation commenced through to the 2023 expiry of the Supply Agreement, which belies the serious allegations of breach that MMB now makes. If MMB was truly of the view that Oxbow was in breach of fiduciary obligations or the terms of the Supply Agreement in a way that was detrimental to MMB, it makes little sense why MMB would not further investigate alternative sources for its biggest expenditure.

[402] Oxbow says MMB's conduct shows that this litigation does not concern any loss or harm done to MMB, but rather is an attempt to disgorge rightly earned trading gains from Oxbow.

[403] Disgorgement would not serve the "prophylactic purpose" of protecting a vulnerable beneficiary from the actions of a faithless fiduciary, as this was not the

situation here, and it would not serve a restitutionary purpose given that MMB always paid the price it agreed to for each shipment.

[404] Similarly, there is no restitutionary or prophylactic purpose to any disgorgement award for the refund of the service fees. These were lawfully received under the Supply Agreement.

[405] In the event disgorgement is ordered, MMB's conduct should be taken into account to limit the amount awarded based on a cut-off date similar to that applied in *Strother*. Oxbow suggests various dates, starting with Mr. Lee's email on October 15, 2015, where he said, "there have been many gray areas in pricing until now". Other dates are December 2015, when MMB gave notice of default to Oxbow; September 2017, when MMB commenced this action; and, at the latest, November 2018, when MMB fully canvassed Oxbow's spot trading profits and netback income at an examination for discovery of Mr. Goemans.

[406] Oxbow says "equity aids the vigilant and does not assist those who sleep on their rights" adding that MMB's conduct has dissipated the effect of any fiduciary breach. At a certain point, there is clearly no nexus between the alleged breaches and Oxbow's profits. At several points, MMB had knowledge of the conduct now complained of, yet it did nothing about it. MMB cannot say a lack of information caused it to continue to purchase from Oxbow under the Supply Agreement.

[407] Oxbow made submissions concerning the fees it paid to Oxbow Canada, noting there is no basis on which Oxbow could be ordered to disgorge those fees. Oxbow Canada is not a party to this proceeding, it was not a party to the Supply Agreement, and there were never any direct sales from Oxbow Canada to MMB. There is also no basis on which the Court ought to pierce the corporate veil.

[408] As for equitable compensation, Oxbow notes this is "equity's counterpart to common law damages", and it is a loss-based remedy. Here, there is no loss. MMB did not lose any opportunity to pay a lower price as it paid the price set by the terms of Amendment No. 2. Oxbow's gain is not MMB's loss.

Remedies for Breach of Contract

[409] Oxbow submits that any remedy for breach of contract would be wholly inappropriate here.

[410] Disgorgement is generally not available as a remedy for breach of contract, as it may only be awarded in exceptional circumstances and where other remedies are inadequate. There is no case for that remedy here.

[411] In any event, MMB has, through its conduct, elected to pursue disgorgement as an equitable remedy and should not be permitted to advance a disgorgement remedy rooted in contract in the guise of "expectation damages". Here, the evidence confirms MMB's position would not have changed had the Supply Agreement not been breached as alleged (whether on its terms or with respect to the duty of honest performance). Despite the allegations MMB made against Oxbow beginning as early as 2015, MMB continued to purchase sulphur from Oxbow for the next eight years. Oxbow says this is a complete answer to MMB's claim for expectation damages.

[412] Oxbow submits the principles underlying the doctrines of election and ratification are also relevant here. If a party believes there has been a breach of contract but continues to perform the contract, it has elected to affirm it: *Morrison-Knudsen Company Inc. v. British Columbia Hydro and Power Authority*, 1978 CanLII 1977 (B.C.C.A.). On multiple occasions, MMB elected to perform the Supply Agreement through each successive addenda and continued to obtain sulphur from Oxbow over a period of 10 years. Oxbow says this election should preclude MMB from now seeking damages for breach of the Supply Agreement.

[413] Oxbow also repeats its submissions that MMB failed to mitigate any alleged damages.

Punitive Damages

[414] Oxbow submits there is no evidentiary basis that could justify a punitive damages award against Oxbow. Oxbow's conduct does not meet the standard

required to justify a punitive damages award. At most, MMB might have shown that Mr. Goemans did not fully explain Oxbow's netback or spot trading arrangements. It is difficult to conceive of this as "harsh and outrageous conduct" when MMB re-selected Oxbow and Mr. Goemans as their sulphur supplier following a competitive tendering process in 2023.

[415] Further, punitive damages rarely serve a rational purpose in the commercial context, where the cause of action is contractual and both parties are acting in their respective self-interests: *Whiten v. Pilot Insurance Co.*, 2002 SCC 18. The case here is really about contractual interpretation and performance.

[416] Finally on punitive damages, there must be an actionable wrong independent of the underlying claims for breach of fiduciary duty and breach of contract: *Whiten*. MMB has not pointed to any wrong independent of those claims.

Limitation of Liability Clause

[417] The Supply Agreement contains the following limitation of liability clause:

14.1 Neither Party is liable for indirect, special, incidental, punitive, exemplary or consequential damages or damages for loss of profits arising directly or indirectly from any contract breach, fundamental or otherwise.

[418] A party seeking to avoid a limitation of liability provision must satisfy the three-part test from *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4 at paras. 62, 122 and 123:

- a) As a matter of contractual interpretation, does the exclusion clause apply? This requires that the provision is considered in harmony with the rest of the contract and in light of its purposes and commercial context;
- b) Was the exclusion clause unconscionable at the time the contract was made? This is an application of the normal test for unconscionability in Canadian law, which is a two-part test that considers whether there is (1) an inequity of bargaining power that (2) results in an improvident

bargain. Unconscionability is rarely a valid ground to void a limitation of liability in a commercial context; and

- c) Should the court refuse to enforce an otherwise valid exclusion clause because of the existence of an overriding public policy?

[419] Oxbow says the limitation of liability clause in this case precludes MMB from asserting a damages claim (expectation or otherwise) against Oxbow.

Limitations Defence

[420] Section 6 of the *Limitation Act*, S.B.C. 2012, c. 13, requires that a claim be commenced not more than two years after the date on which the claim was discovered.

[421] Oxbow says MMB's entire claim is time-barred because it knew or ought to have known that Oxbow was making the "secret profits" alleged in its notice of civil claim prior to September 2015. MMB's notice of civil claim was not filed until September 29, 2017.

[422] Oxbow notes that concerns underlying MMB's eventual claim were evident even before Amendment No. 2. Mr. Henderson's evidence was that, in June 2013, Mr. Park: (1) had issues with the 2008 Supply Agreement; (2) believed that Oxbow would not offer the cheapest price; and (3) pressured Mr. Henderson to look at other competitors. Mr. Goemans' evidence was also that, in 2013, MMB felt the 2008 Supply Agreement was one "where someone lazy could simply pile on costs and pass them through." Further, Mr. Goemans told Mr. Henderson about netback trading during negotiations for Amendment No. 2 and Mr. Henderson also understood that Oxbow engaged in spot trading.

[423] From this, it is clear that prior to September 2015, MMB had actual knowledge of the existence of trading profits and a suspicion as to the existence of damages. Yet it did nothing to investigate this suspicion or address any of its concerns about profits. It did not cancel the 2008 Agreement. Mr. Henderson made

no reasonable inquiries of Mr. Goemans during negotiations for Amendment No. 2. Instead, MMB carried on despite its suspicions, executing Amendment No. 2 but remaining wary of Oxbow's competency and performance. It took nearly four years before MMB filed its action.

[424] MMB's concerns did not dissipate after Amendment No. 2 was executed, with Mr. Henderson seeking a price breakdown after the first shipment; MMB's management claiming MMB had been overcharged; discussions ensuing with respect to sulphur pricing; MMB indicating internally that they should look for another supplier; Mr. Lee having suspicions that Oxbow was earning profits in addition to the service fee; and Mr. Lee having a mandate to get a lower price for sulphur. All these matters occurred prior to September 2015.

[425] Oxbow says that at the earliest, MMB discovered or ought to have discovered the claim following the first delivery of sulphur. At the latest, it discovered or ought to have discovered the claim before Mr. Lee was hired in September 2015.

[426] In answer to MMB's argument that its claim cannot be time-barred because Oxbow continued to breach the Supply Agreement by continuously collecting alleged "secret profits" in addition to the service fee, Oxbow says this argument is based on a "rolling limitations period", which this Court has repeatedly declined to recognize under the *Limitation Act: Chancellor v. Maynes*, 2021 BCSC 391 at paras. 73-74.

[427] Oxbow submits that any claim by MMB for breach of the Supply Agreement arose after the first shipment, when Oxbow first accrued an alleged "secret profit". Despite its suspicions, MMB continued to negotiate and execute a separate Addendum for each shipment. In the circumstances, it is illogical to suggest that Oxbow had any periodic or continuous obligations under Amendment No. 2. The result is that there was no rolling limitation period or renewal thereof, and so MMB's entire claim is time-barred.

[428] In the alternative, Oxbow says MMB can only recover damages that accrued up to two years before it commenced its action: *Roberts v. Portage la Prairie (City)*,

[1971] S.C.R. 481; *Gautam v. South Coast British Columbia Transportation Authority*, 2020 BCCA 135.

Address Commissions

[429] Oxbow agrees these ought to have been paid to MMB, but disagrees that MMB's entitlement arises because MMB was entitled to purchase sulphur on a cost flow-through basis. Only the freight was flow-through. The sulphur cost was determined through the pricing formula. Since address commissions were a credit towards freight costs, these would be properly credited to MMB.

CPI Adjustment for Service Fee

[430] Section 7.1 of the 2008 Agreement provides that "at the end of each subsequent calendar year after the Effective Date, the Service Fee will be adjusted to reflect the change in the US Consumers Price Index".

[431] No adjustment was made in the early years because MMB "effectively disappeared" until 2013. In April 2016, Oxbow asserted its right to that adjustment in its formal response to MMB's legal demand.

C. Plaintiff – Reply

[432] MMB made various submissions in reply. MMB's reply submissions on the facts and evidence included the following:

- a) Oxbow's argument that "Best Value" did not mean "lowest price" is belied by several provisions within the Supply Agreement, most notably section 7.2. That section makes it clear Oxbow was to supply sulphur at its actual supplier cost;
- b) The implementation of the pricing mechanism was understood by Mr. Henderson to reflect the price Oxbow paid suppliers, with some small gains or losses to Oxbow, attributable to timing, amounting to a "wash";

- c) In answer to Oxbow's submission that it was Mr. Henderson, not Mr. Goemans, who proposed the pricing formula, the evidence shows indexes were introduced to Mr. Henderson by Mr. Goemans in a market report email of May 14, 2013;
- d) As to Oxbow's submission that the 2008 Agreement was "commercially unworkable", while that agreement did not include specific terms on pricing, it was still an enforceable contract as it obliged Oxbow to acquire sulphur at the lowest cost;
- e) Oxbow's submission that Mr. Henderson was aware of Oxbow's netback arrangements is not a fair characterization of the evidence. While Mr. Goemans told mentioned netback arrangements to Mr. Henderson, he did not disclose to Mr. Henderson that Oxbow earned netback fees and incentive bonuses;
- f) Similarly with Oxbow's submission that Mr. Henderson's knew Oxbow engaged in spot trading. Mr. Goemans did not disclose Oxbow's spot trading and instead suggested to Mr. Henderson that Oxbow's business had shifted to netback. Importantly, Mr. Goemans admitted he did not disclose that Oxbow would earn substantial trading gains on spot trades;
- g) In answer to Oxbow's submission that the 2008 Agreement was entered into only to obtain financing and not intended to be a functional contract, MMB notes that the lenders wanted assurance that MMB had secured a sulphur supply, not an assurance that they *could* get supply in the future. Mr. Henderson's 2013 email expressing an interest in "looking at pricing options" was not an acknowledgment the 2008 Agreement was non-functional; instead, he testified that he was seeking information on the cost of purchasing and shipping the sulphur so that he could start forecasting;
- h) As for Oxbow's submission that it bore the risk of loss because it sold one shipment at a loss due to a fire at the mine site, Oxbow suffered no loss.

After force majeure was declared by MMB, Oxbow sold the shipment to another end user at a discount. Oxbow suffered no loss; it was the netback suppliers who suffered a loss insofar as they received less for their sulphur;

- i) In reply to Oxbow's submission that Mr. Lee knew Oxbow was not acting as an agent, MMB says this is not borne out by Mr. Lee's testimony or communications;
- j) In reply to Oxbow's submission that it did not enter into contracts with suppliers, suggesting it had no discretion to affect MMB's interests, this ignores s. 1.2.2 of the Supply Agreement, which gave Oxbow the right to "enter into contracts" with sulphur producers on MMB's behalf. MMB says Oxbow did enter into contracts on behalf of MMB, just not in MMB's name. The right to enter into contracts on MMB's behalf was essentially the basis on which Mr. Lee repeatedly asked Mr. Goemans to negotiate a discount; and
- k) In answer to Oxbow's submission that a party to a fiduciary relationship must have agreed to "forsake the interests of all others and itself", MMB says Oxbow did just that through s. 1.2.12 of Supply Agreement, which provides that Oxbow will secure sulphur at the Best Value "at all times acting in MMB's best interests and putting MMB's requirements in priority to any other commitments that [Oxbow] may have in respect of the supply of sulphur".

Reply on Legal Issues

[433] In reply to Oxbow's submission that any discretion it had was never exercised, MMB submits that it is the *existence* of discretion that is needed to establish a fiduciary relationship: *Frame* at 136.

[434] In reply to Oxbow's submission that because it contracted with suppliers in its own name, it could not have been MMB's agent, MMB submits this does not

disprove an agency relationship. Agents routinely contract with third parties on behalf of principals without disclosing the existence of the principal or the agency relationship. As stated in G.H.L. Fridman, *Canadian Agency Law*, 3rd ed. (Toronto: LexisNexis Canada, 2017), at 160 [*Fridman on Agency*]:

Where a principal is undisclosed, neither the identity of the principal nor the fact that the agent is acting on behalf of someone else is revealed to the third party with whom the agent contracts. In such instances, the third party believes that he is contracting personally with the agent, and only after the contract has been made, if at all, does the third party become aware that there ever was an agency relationship in existence and capable of affecting his position.

[435] MMB also notes that Oxbow's submission is also irreconcilable with the fact that Oxbow had MMB provide letters to be circulated to sulphur producers to confirm that Oxbow would be purchasing sulphur on MMB's behalf.

[436] MMB notes that Oxbow appears to rely on its own repudiations of its agency obligations as evidence that MMB could not reasonably believe Oxbow would act as its agent, but a repudiation must be accepted to be effective, and MMB never accepted any repudiation.

[437] In answer to Oxbow's argument that context ought to result in a contractual interpretation that there was no agency relationship, MMB says this argument relies on significant errors of contractual interpretation and offends the principle that context cannot overwhelm the actual words used.

[438] In reply to Oxbow's argument that a promise to act in the best interests of another party is insufficient to establish a fiduciary duty, MMB says this assertion is not supported by the authorities cited by Oxbow.

[439] In reply to Oxbow's submission that MMB was not vulnerable because it is a sophisticated commercial entity, MMB says this submission confuses the nature of the vulnerability that is to be considered when assessing whether a fiduciary relationship exists, as fiduciary law is more concerned with the vulnerability that arises from the fiduciary relationship than from any disparity in bargaining power

when the parties create the relationship: *Galambos v Perez*, 2009 SCC 48 at para. 68.

[440] In reply to Oxbow's submissions that *Indutech* concerned a fiduciary relationship only on a *Frame* basis, not on the basis of agency, MMB says the court in *Indutech* noted the trial judge had found a "quasi-agency" fiduciary relationship but had gone on to address the *Frame* test. The Alberta Court of Appeal affirmed that a fiduciary relationship arose under the *Frame* analysis and, given that conclusion, determined it was unnecessary also review whether a fiduciary relationship arose through quasi-agency. Oxbow's further attempt to distinguish *Indutech* on the basis that the agent had access to the principal's confidential information should also be rejected because that was only one of numerous factors on which the court relied to find a fiduciary relationship existed between the parties.

[441] In answer to Oxbow's argument that the existence of an assignment provision in the Supply Agreement is counter-indicative of a fiduciary relationship since agreements which create fiduciary relationships are not assignable, MMB says the authorities cited do not support that proposition and, in any event, the assignment clause here required that MMB provide its consent to any assignment.

[442] In reply to Oxbow's submission that a court may amend a mistaken contractual provision through contractual interpretation principles without resorting to rectification, MMB says this principle has very limited application and cannot be used where the alleged error is not obvious. The main "correction" sought by Oxbow is substantial, does not make commercial sense and there is no evidence it was ever the subject of discussion, let alone agreement, between the parties. This also answers Oxbow's claim for rectification.

[443] MMB also disputes Oxbow's formulation of good faith duties post-*Bhasin*. The effect of *Bhasin* was not to eliminate existing duties and obligations of good faith, but to recognize an organizing principle of good faith to bring coherence to the existing jurisprudence. One of those existing duties of good faith is the duty not to

act in relation to a contract in a manner that nullifies the bargained objective or benefit moving to the other party.

[444] As for Oxbow's submission that MMB must elect between disgorgement and compensatory damages, MMB says it does not claim both disgorgement and compensatory damages for its contract claims. Instead, MMB claims both remedies based on Oxbow's breaches of fiduciary duty.

[445] In reply to Oxbow's submissions concerning laches, waiver, acquiescence, and so on, MMB says there can be no "sleeping on rights" defences where the injured party has brought an action to enforce its rights.

[446] In reply to Oxbow's submission that MMB is precluded from seeking damages because it elected to perform the Supply Agreement, MMB submits that, in the face of a breach, it affirmed the contract and sued to hold Oxbow to its obligations, as it was entitled to do: *Morrison-Knudsen* at para. 130.

[447] As for Oxbow's submission on the limitation of liability clause in the Supply Agreement, MMB submits the clause only applies to contractual damages and does not limit remedies for breach of fiduciary duty. As for contractual damages, it does not limit direct damages, only indirect damages, so the clause does not limit any expectation damages or compensatory damages measured by Oxbow's gain. Finally, the clause does not affect punitive damages, as these cannot be excluded by contract: *Serinus Energy* at paras. 267, 269.

[448] In reply to Oxbow's assertion of a limitation defence, MMB says Oxbow's assertion that MMB knew or ought to have known of Oxbow's secret profits prior to September 2015 is not supported by the evidence. Mr. Henderson was unaware of netback fees and incentive payments and was not told Oxbow expected to earn substantial spot trade gains. Further, Mr. Goemans told Mr. Lee that Oxbow "doesn't take positions".

[449] In any event, because Oxbow's obligations under the Supply Agreement were of a continuing nature, the limitation period was reset on each new breach, allowing

Oxbow to claim for all breaches and not just those occurring within two years: *Singh v. Minhas*, 2023 BCCA 7 at paras. 41–43.

[450] In reply to Oxbow's submission that fees paid to Oxbow Canada cannot be disgorged, MMB says its claim is for the fees it paid to Oxbow. The fact that Oxbow chose to forward some of those fees to Oxbow Canada is of no moment in terms of MMB's claim for return of fees. Similarly with trading gains, the fact that Oxbow entered a purchase and sale contract with Oxbow Canada after the sale to MMB was completed, with the effect of splitting those gains – that is, splitting the secret profits – is of no consequence in terms of MMB's claim. It was Oxbow, not Oxbow Canada, which approved the sale price to MMB.

[451] Finally, in reply to Oxbow's argument that MMB failed to mitigate, MMB submits it is entitled to the benefits it contracted for in the Supply Agreement and it commenced an action to enforce those rights. It was not required to terminate the Supply Agreement and purchase sulphur elsewhere. Mitigation is not a live issue when an injured contracting party chooses to "sue and affirm".

VIII. Discussion

A. Credibility

[452] Both sides strongly criticized the credibility of the opposing witness or witnesses. Generally, these criticisms went too far, although I agree with some of the points made.

[453] The three witnesses were knowledgeable and well-spoken. Mr. Henderson was the only independent witness and my perception is that he was honest, forthright and reasonably accurate in recounting events from some years prior.

[454] Oxbow submitted that Mr. Henderson made "repeated and gratuitous" use of the terms "agent" and "best value" during his testimony, which contrasted with his contemporaneous communications, where he did not use the term "agent" in any correspondence with Oxbow. Here, I accept Mr. Henderson's testimony that he has learned more about contracts and related legal matters in the years since, which

may account for his use of those terms at trial. I did not perceive that his use of those terms was part of an attempt or inclination to advocate on behalf of MMB. To the contrary, I found his testimony to be even-handed, and in this regard I note he did not refrain from testifying about certain matters that cast MMB in a negative light.

[455] My impression of Mr. Lee was that he testified honestly, although it was also apparent he has firm views about the nature of the contractual relationship and he did not miss an opportunity to make those views clear.

[456] I draw no adverse conclusion from the fact that, at the outset of trial, Mr. Lee said he wished to testify through an interpreter, despite having testified in English on discovery and communicated in English with Mr. Goemans throughout the subject events. At the start of the trial, I was told Mr. Lee was anxious about testifying in English, but he relented when it was agreed counsel (and the Court) would try to speak slowly and clearly. My impression from hearing his testimony is that Mr. Lee is reasonably competent in English, but certainly not fluent, so his initial lack of confidence seems reasonable and understandable in the circumstances. In the absence of other evidence I am not prepared to conclude this was an attempt to gain some sort of advantage, as implied by the defendant.

[457] While Mr. Goemans also used every opportunity to make his views clear, his tendency was closer to advocacy or near-advocacy, and there were other matters that gave rise to credibility concerns.

[458] MMB detailed a number of these instances in its submissions, most of which I agree reflected adversely on Mr. Goemans' credibility. I will not recount all of these instances, but will instead refer to a few examples.

[459] In cross-examination, Mr. Goemans twice denied that Mr. Henderson told him he (Mr. Henderson) knew nothing about the sulphur market, yet at discovery he conceded Mr. Henderson had said exactly that, and at trial he agreed his discovery answer was truthful. This was a notable reversal on an important point.

[460] He reversed his testimony in similar fashion when asked to confirm that netback arrangements typically require the marketer (here, Oxbow) to sell the product for the highest price. In the course of giving somewhat evasive answers, he denied that this was a requirement common to netback arrangements, but when his contrary discovery answer was put to him he agreed that answer was truthful; in other words, he confirmed that netback arrangements typically require the marketer to obtain the highest price on behalf of the suppliers.

[461] In June 2015, Mr. Goemans responded to an MMB inquiry by telling MMB that adcom on two charterparties had gone "to the suppliers". This was false, as MMB retained the adcom. At trial, Mr. Goemans admitted this statement was false.

[462] Mr. Goemans testified that he made offers to MMB (here, referring to the pricing term that implies the parties should first attempt to agree on a price) "until Mr. Lee came along and told him not to", but in discovery he said he *never* made an offer because MMB told him not to do so.

[463] Mr. Goemans gave highly variable answers about the proportion of Oxbow's Vancouver business that was based on netback. He also gave differing answers about the purpose of the \$2.00 service fee after Amendment No. 2 was entered into, with some answers referring to some non-routine services provided and other answers referring to both helping to finance the mine and to a "risk premium".

[464] Finally, I agree with MMB's submission that Mr. Goemans was, at times, evasive and argumentative, features that were most clearly illustrated when he was asked to confirm his understanding that the 2008 Agreement appointed ICEC (Oxbow) as MMB's sole agent and supplier for all of MMB's sulphur requirements. This was language taken straight from the 2008 Agreement, but instead of answering the question directly, Mr. Goemans deflected by questioning whether the agreement still existed, then acknowledging "there was some level of agreement", and finally asserting "we owed them nothing".

[465] These matters give rise to some substantial concerns with Mr. Goemans' credibility.

[466] I have considered all of these credibility comments and concerns in arriving at my findings of fact.

B. Findings of Fact

[467] The following are my findings of fact on some of the contested issues arising from the testimony of the witnesses.

[468] Dealing first with Mr. Henderson, I accept he had essentially no knowledge of the sulphur industry in 2012 and much of 2013, and for that reason he relied on Mr. Goemans for industry and market information. I am also satisfied that Mr. Henderson was not aware of any arrangements Oxbow had with its sulphur suppliers and, specifically, he was not aware that Oxbow earned netback fees and trading gains.

[469] I accept Mr. Henderson's testimony that Mr. Goemans, through his various interactions and representations, led Mr. Henderson to believe Oxbow was acting and working on MMB's behalf to get the best result and best sulphur price for MMB, and that Oxbow was supplying sulphur at cost, or in the case of index pricing, close to cost with only such minimal variations from actual cost, up or down, that they effectively cancelled one another out.

[470] As to the index pricing proposal, I conclude it is probable that this originated with Mr. Goemans, not Mr. Henderson. The evidence shows that Mr. Goemans first informed Mr. Henderson about the existence of index publications in May 2013; the topic came up in their in-person discussions in August 2013; and in late August Mr. Goemans followed up that discussion by forwarding to Mr. Henderson a "simple matrix of rates", with the message "here is what I am proposing to send to you". That context suggests the initiative was coming from Mr. Goemans. The fact that Mr. Goemans made representations that index pricing would result in a "wash" also suggests the proposal came from him. Finally, I note it was also very much in

Oxbow's interest to have an external price reference to solve Oxbow's inherent conflict arising from its netback arrangements.

[471] Although Mr. Goemans mentioned netback arrangements to Mr. Henderson during some informal socializing in August 2013, he did not tell Mr. Henderson that Oxbow earned fees, including price-based incentive fees, from those arrangements. He also did not tell Mr. Henderson that Oxbow's netback arrangements obliged Oxbow to secure the highest available sulphur price on behalf of its suppliers. Finally, he did not tell Mr. Henderson that when Oxbow acquired sulphur through spot trading it expected to earn significant gains on the subsequent sales.

[472] I am also satisfied that in various interactions Mr. Goemans conveyed to Mr. Henderson the general sense that Oxbow was acting in MMB's best interests as its agent. He reinforced this in some specific ways, including by having MMB provide a letter of introduction to suppliers indicating that Oxbow was securing sulphur on MMB's behalf, and by telling Mr. Henderson that he would be able to "finalize prices with suppliers" when the contract (Amendment No. 2) was finalized, something there was no need to do with its netback suppliers.

[473] As for Mr. Lee, similarly to Mr. Henderson, Mr. Lee understood the MMB-Oxbow relationship to be one of principal and agent, where Oxbow was to procure sulphur for MMB on a cost flow-through basis. On at least several occasions, Mr. Lee reminded or asserted to Mr. Goemans that theirs was an agency relationship, assertions that Mr. Goemans never challenged. I acknowledge that Mr. Goemans testified he verbally challenged Mr. Lee's agency assertions, although not in writing because he did not want to be confrontational with Mr. Lee. However, I do not accept that evidence. In the circumstances of this case, including the fact that Mr. Lee periodically, if not regularly, reminded Mr. Goemans that Oxbow was acting as MMB's agent, it is not plausible that Mr. Lee would have received such a verbal statement from Mr. Goemans without directly responding to or challenging it in writing.

[474] I conclude that it suited Mr. Goemans to remain quiet in the face of Mr. Lee's various assertions of agency so that Mr. Lee would continue to believe Oxbow was acting only in MMB's best interests.

[475] I conclude it was for similar reasons that Mr. Goemans failed to provide a breakdown of the overall per-tonne price when Mr. Henderson requested it and, later, dragged his feet after Mr. Lee asked him to approach suppliers and seek a discount from the index-based price.

[476] Mr. Goemans actively reinforced to Mr. Lee the notion that Oxbow was acting as MMB's agent when he said to Mr. Lee that "we could lock in pricing" for a December 2015 shipment, which conveyed the clear impression that Oxbow was locking in pricing with suppliers on behalf of MMB. He also reinforced an agency relationship when he assured Mr. Lee (via Mr. Switch) that "Oxbow does not take positions" on the vast majority of its supply. I acknowledge that Mr. Goemans testified he was referencing netback when he made this statement, but spot trading was a significant source for Oxbow and Oxbow did take positions on that supply, positions that were very lucrative to Oxbow. Further, based on the Schellenberg report (Exhibit 3, pp. 7–8), it appears that, for the shipments reflected in addenda #2 to #67, approximately half of Oxbow's sulphur supply to MMB was acquired through spot trading, and so netback was not the "vast majority" of Oxbow's supply. In any event, Mr. Goemans' statement was misleading given both the overall context in which it was made and because he failed to mention that Oxbow profited from *both* sources of supply.

C. Rectification/Contract Interpretation

[477] I accept that it is logical to address Oxbow's rectification and related contract interpretation arguments at this point, as the terms of the contract are best established or identified before moving to other aspects of the claims.

Applicable Legal Principles

[478] The applicable legal principles of contractual interpretation are well-settled. The following are from *Sattva Capital* (at paras. 47, 57):

- a) the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction;
- b) the overriding concern is to determine “the intent of the parties and the scope of their understanding”;
- c) a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract;
- d) while the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement such that the court effectively creates a new agreement;
- e) the goal of examining such evidence is to deepen a decision-maker’s understanding of the mutual and objective intentions of the parties as expressed in the words of the contract; and
- f) the interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract.

[479] Oxbow argues that the alleged errors are resolvable through the ordinary principles of statutory interpretation but says, alternatively, they may be addressed through rectification.

[480] The principles applicable to rectification were addressed in *Williams Moving & Storage (B.C.) Ltd. v. Canada (Minister of National Revenue)*, 2024 BCCA 160:

[65] In my view, the appellant’s “rectification” argument does not sit well with the jurisprudence that describes rectification as a “potent remedy” which should be used “with great caution” so as to not undermine the confidence of

the commercial world in written contracts: see *Fairmont Hotels* at para. 13; *Performance Industries Ltd.* at para. 31.

[66] In *Fairmont Hotels*, the Court was clear in emphasising that "rectification is limited solely to cases where a written instrument has incorrectly recorded the parties' antecedent agreement": at para. 13. Despite this limitation, it is true that, for the purposes of rectification, the law does not require a prior agreement between the parties which is concluded and legally binding or which contains all of the relevant terms of a complete agreement: see *2484234 Ontario Inc. v. Hanley Park Developments Inc.*, 2020 ONCA 273 at para. 46; *5551928 Manitoba Ltd. v. Canada (Attorney General)*, 2019 BCCA 376 at para. 11; *Fairmont Hotels* at para. 28.

[67] However, it is "normally necessary (when seeking rectification) ... to show a common understanding on the matter in dispute": see S.M. Waddams, *The Law of Contracts*, 8th ed (Toronto: Thomson Reuters, 2022) at §342. That common understanding must be ascertainable and certain. See, for instance, *5551928 Manitoba Ltd.* at para. 11, where Justice Newbury referred to the following passage from *Halsbury's Laws of England* (4th ed., 1992), vol. 16:

It is unnecessary to find a concluded and binding contract between the parties antecedent to the agreement which it is sought to rectify; it is sufficient to find a common continuing intention in regard to a particular provision or aspect of the agreement. There must, however, be some outward expression of their continuing common intention in relation to the provision in dispute, and that common intention must be formulated with certainty.

Alleged Errors

[481] Oxbow says there are three obvious errors in Amendment No. 2 and says the Court should either interpret Amendment No. 2 in a corrected manner or order rectification to correct them.

[482] The most consequential of these alleged errors concerns s. 2(a) of Amendment No. 2. Section 2(a) deletes s. 1.2.15 of the 2008 Agreement and adds various new provisions dealing with frequency of shipments, the setting of terms and conditions by way of an addendum for each shipment, and providing both a pricing process and pricing formula.

[483] Oxbow says the reference to "deleting Section 1.2.15" was intended to be a reference to "deleting Section 1.2.16". The former provision requires Oxbow to deal with excess sulphur not already delivered, while the latter provision requires Oxbow

to supply sulphur "on a cost flow-through and transparent basis" and "provide all requirements described in this Agreement on a completely open book and financially transparent basis".

[484] Oxbow says that "cost flow-through" ceased to be relevant with Amendment No. 2 because the parties created and agreed on a pricing process and mechanism. Also, due to the nature of netback arrangements, the actual cost of sulphur would not be identifiable until all costs were known, which could take many months. Oxbow says it is logical that a pricing provision would be replacing an earlier provision relating to cost and not replacing a wholly unrelated provision dealing with excess sulphur.

[485] MMB says Oxbow's suggested correction of this alleged error does not make commercial sense, whereas it does make sense to remove a section that no longer has any application. In any event, MMB says principles of interpretation cannot be used to make changes that are not obvious. As to Oxbow's rectification claims, MMB says there is no evidence it was ever the subject of discussion, let alone agreement, between the parties.

[486] It is not at all obvious there is an error here. Section 2(a) of Amendment No. 2 deletes s. 1.2.15, a section dealing with excess sulphur, but it also adds a new section (section 1.4) that establishes a structure of volume-specific periodic shipments. The evidence indicates that regular shipments of specific volumes of sulphur essentially eliminated the prospect that excess sulphur would ever be an issue. There is a subject-matter connection there.

[487] I also do not see that "cost flow-through" is necessarily incompatible with the pricing process and model, as it contemplates a price negotiated between the parties and a default to index pricing only if no agreement is reached. Index pricing, which Oxbow had represented would involve modest gains and losses that would "come out in the wash", can also be seen as broadly consistent with "cost flow-through" to the extent that the index price represented either an approximation of a true market price or the actual price at which Oxbow acquired the sulphur.

[488] As to Oxbow's point that netback arrangements would mean actual costs would not be known for many months and thus s. 1.2.16 ("cost flow-through") would be an entirely impractical provision, this begs the question why Oxbow would have agreed to it in the 2008 Agreement. Though netback arrangements were less common in 2008 (on one version of the variable evidence on this point), they were certainly in use, particularly for shipments out of Vancouver. The alleged impracticality of this provision is not a surrounding circumstance that aids in the interpretation advanced by Oxbow because it was a provision to which Oxbow had previously agreed at a time when it had netback arrangements in place.

[489] Even on a generous view, I cannot conclude that the first alleged error is in fact erroneous.

[490] Oxbow's second alleged error is in s. 1.4.4 of Amendment No. 2, the provision that calls for each shipment to be evidenced by an addendum to the Supply Agreement. Within s. 1.4.4, there is an acknowledgment by the parties that the addendum provisions "are consistent with Oxbow's obligations under Section 2 of the Agreement to develop a Plan and provide Sulphur for the Mine in priority to other clients and commitments of Oxbow".

[491] Oxbow says there is an obvious error here because s. 2 of the 2008 Agreement deals with its obligation to help MMB develop delivery infrastructure. In this regard, Oxbow notes the evidence of Mr. Goemans that one of the shipping options discussed with MMB in early discussions was the transport of molten sulphur by rail to a location across the Gulf of California, with sulphur to be then barged across to the mine. This mode of transport involved methods and technologies with which Oxbow was familiar, but it was not the shipping method ultimately selected.

[492] Oxbow says it makes more sense for that provision to refer to s. 1 rather than s. 2, as s. 1 deals with Oxbow's obligations with respect to MMB's sulphur requirements, including the obligation to secure and deliver sulphur at "Best Value" to MMB. Oxbow also submits that the parties wanted the numerous obligations outlined in s. 1 to apply to each of the addenda.

[493] I agree that there appears to be a disconnection between the provisions. However, s. 1 is a very comprehensive section with 20 separate provisions, and the phrase in question refers to just two of the obligations within those provisions, those being "to develop a Plan and provide Sulphur for the Mine in priority to other clients and commitments of Oxbow".

[494] Rather than attempt a rewriting of the contract, as Oxbow effectively argues, I conclude the best approach is to simply ignore the section reference altogether and treat it as surplusage, as the section already makes clear the specific obligations with which the new provisions are said to be consistent. If the section reference were to be omitted, section 1.4.4 would then acknowledge that the addendum terms and conditions represent Best Value and "are consistent with Oxbow's obligations under ... the Agreement to develop a Plan and provide Sulphur for the Mine in priority to other clients and commitments of Oxbow".

[495] Oxbow's third alleged error is in s. 1.4.5 of Amendment No. 2, which establishes the pricing process and index pricing method. That provision reads, in part, "if either Party feels that the indices referenced above are reflective of prevailing market conditions". Oxbow says there is a missing "not" in that phrase, such that it should read "if either Party feels that the indices referenced above are *not* reflective of prevailing market conditions".

[496] I agree that this is an obvious error. It makes no sense as written, and the evidence at trial shows that the parties considered themselves free to revisit the index formula if they wished, as they did exactly that at one point. However, for that same reason, it appears to be an error of no consequence.

D. The 2008 Agreement

[497] The parties disagree on the status, meaning and effect of this agreement.

[498] I am satisfied that the 2008 Agreement was a binding commercial agreement. It sets out, in some detail, the respective obligations of the parties, their respective representations, the initial term and renewal terms, the fee structure and payment terms, as well as terms dealing with confidentiality, default and termination,

remedies, assignment, audit rights and obligations, and limitation of liability. Within the agreement, both parties confirmed that these were all binding commitments.

[499] The essential terms provided that Oxbow (then ICEC) would utilize its expertise in the sulphur market to act as MMB's "sole agent and supplier" in providing sulphur to MMB at the Best Value (a defined term) for the 10-year term of the contract, in return for a service fee of \$2.00 per tonne.

[500] Oxbow argues that the 2008 Agreement was never performed and that it was essentially unperformable because it lacked the commercial terms necessary to be an effective agreement. Oxbow says the 2008 Agreement was created merely for MMB's financing purposes, MMB then essentially "disappeared", and Mr. Goemans (and Oxbow) did not consider any obligations remained or existed when MMB reappeared in 2013.

[501] I begin my analysis on this point by saying I am not convinced that Mr. Goemans' view of the status of the contract is particularly germane. As to the other issues, while I accept that further commercial terms might have been desirable in order to provide more certainty on price, the contract terms were enforceable as written. Those terms required Oxbow to deliver sulphur to MMB "ratably" (that is, reliably) "on a market competitive basis at the lowest cost without compromising security of supply ... to MMB". That was an enforceable obligation.

[502] Oxbow's submission on this point has more to do with its argument that an agreement that is neither implemented nor performed should not give rise to fiduciary obligations, citing *Buchan v. Moss Management Inc.*, 2008 BCSC 285, aff'd 2009 BCCA 25. *Buchan* is distinguishable; in that case, the evidence was that the parties knew, at the time of execution, the contract would never be performed and so they never treated the subject contract as an executed contract. There is no evidence to that effect here.

[503] Oxbow argues that the sole purpose of the 2008 Agreement was for MMB to obtain project financing, but that states the scope too narrowly. The assurance

needed by the lenders was that MMB had secured a sulphur supply. I agree with MMB's submission that a mere MOU (as per Mr. Goemans' characterization) or unenforceable supply agreement would not have met that requirement.

[504] Oxbow submits it does not make "any commercial sense" for the Court to impose on Oxbow significant, long-term fiduciary obligations to MMB prior to any performance under the agreement, which it defines as the commencement of the supply of sulphur. I note, first, that there are obligations on Oxbow in the 2008 Agreement that would predate the first delivery of sulphur, most notably its obligation to assist MMB in developing delivery infrastructure alternatives. Second, I agree with MMB's submissions that this was not any sort of "fiduciary duty trap that unfairly [sprang] up unexpectedly". Oxbow took on the duties imposed by this contract in exchange for valuable consideration, most notably the right to be the exclusive supplier of sulphur to a large-volume purchaser over a 10-year term.

[505] Whether the 2008 Agreement actually imposed fiduciary duties is the issue I will address next.

E. The 2008 Agreement – Fiduciary Duties

[506] MMB argues that the 2008 Agreement created an agency relationship or an affiliation in the nature of an agency relationship. MMB notes Oxbow had the power to bind MMB to contracts with third parties and did so in the case of the earlier vessel charters. MMB says that this agency or agency-like relationship means the relationship was presumptively fiduciary in nature.

[507] Leaving aside its agency argument, MMB also approaches this issue by referring to basic principles of fiduciary relationships, arguing that the features of the relationship lead to the conclusion it was fiduciary in nature. Here, MMB notes Oxbow undertook to act in the best interests and on behalf of MMB; MMB was ultimately responsible to purchase sulphur secured by Oxbow and, as such, was vulnerable to Oxbow's exercise of discretion; MMB's legal and practical interests were directly impacted; and sulphur was a critical material for the mine and was MMB's most significant expense.

[508] For its part, Oxbow submits that "agency" is a term being thrown about by MMB without regard to proper distinctions that ought to be made. True agency is where a party is authorized to bind a principal, and does so. That did not happen here because Oxbow could not, and did not, deliver sulphur without MMB's agreement and, furthermore, Oxbow contracted in its own name.

[509] I accept that the mere designation of a party as an agent does not create an agency relationship where other features of a true principal-agent relationship are not present. However, there is more to the subject relationship than mere nomenclature.

[510] Leaving aside some special categories of agency (such as agency by estoppel), an agency relationship arises where parties agree that one party (the agent) is granted a power or authority to affect the legal relations of the other (the principal). The power to affect the principal's legal relations with the outside world is the essence of agency: *Fridman on Agency*, §1.14.

[511] A true relationship of agent and principal is presumptively fiduciary in nature, although that presumption is rebuttable: M. Ng, *Fiduciary Duties: Obligations of Loyalty and Faithfulness* (Toronto: Canada Law Book, 2003–2016) (looseleaf) at §2.20.10.

[512] There is another category of relationships described in a leading text as "indirect representation" or "incomplete agency". These arise where a principal appoints an agent to deal with others on the principal's behalf, but on the basis that when dealing with any third party, the agent deals in the agent's own name as principal. As between principal and agent, the relationship is one of agency: P. Watts, *Bowstead and Reynolds on Agency*, 22nd ed. (London: Sweet & Maxwell, 2021), at 13 [Bowstead]. The authors of *Bowstead* note that this relationship arises most commonly in appointments of purchasing agents. This characterization seems to best fit the relationship in this case.

[513] MMB cites *Indutech* as an example of the form of agency described in *Bowstead*. Oxbow disputes the significance of *Indutech*, so I will digress momentarily to discuss that case.

[514] Indutech, a manufacturer of specialized steel products, entered into successive agency agreements with two companies related to one another (the "Gibbs Group" or "Gibbs"), by which the Gibbs Group became the sole sales agent and marketer of Indutech's products. The Gibbs Group received purchase orders from customers, the purchase orders were relayed to Indutech, Indutech then sold the product to Gibbs at a price Gibbs felt the market could bear, and Gibbs subsequently re-sold the product to the customer at that price plus a 5 percent markup. Indutech also paid to Gibbs a commission of 4 percent.

[515] Under the agency agreements, the Gibbs Group was obliged to:

- a) promote, exploit and diligently seek orders for Indutech;
- b) refer all inquiries or purchase orders received to Indutech;
- c) present all purchase orders to Indutech to "bid" on at a pre-mark up price to be passed on to the customer, plus a 5 percent mark-up to be charged to the customer that Gibbs kept as a commission;
- d) keep Indutech informed as to the market situation for its products and the nature and extent of its sales activities;
- e) not compete with Indutech;
- f) not supply to any competitor of Indutech bulk welding wire that could be used to manufacture product of the type Indutech manufactured; and
- g) not engage directly or indirectly with any activities that would be detrimental to Indutech's sales.

[516] The Gibbs Group had full access to Indutech's manufacturing facility and they were entrusted with various confidential matters including scheduling, pricing, manufacturing difficulties and future plans. At trial, one of the principals of the Gibbs Group acknowledged that they had an obligation to act in Indutech's best interests.

[517] Contrary to its contractual obligations, the Gibbs Group (1) supplied bulk welding wire to Indutech's competitors at a profit; (2) charged customers for purchase orders at a markup greater than 5% Indutech's bid price (3) diverted purchase orders to Indutech's competitors in preference to Indutech; and (4) set up a business in competition with Indutech using confidential trade information they had obtained from Indutech through their dealings.

[518] Indutech brought various claims against the defendants, including breach of contract and breach of fiduciary duty. In response, the defendants asserted that no agency relationship arose because they were not empowered under the agreements to enter into contracts on behalf of Indutech.

[519] In reasons found at *Indutech Canada Limited v. Gibbs Pipe Distributors Ltd.*, 2011 ABQB 38, the trial judge concluded:

[388] Much of Indutech's work was directed through the Gibbs Group, and Indutech relied solely on the Gibbs Group to make full disclosure and bring work to its attention, rather than referring it to competitors. Indutech was peculiarly vulnerable to the Gibbs Group in that it relied upon it for information and advice with respect to such matters as pricing and scheduling, as well as projects that were planned. Based on these factors, the Gibbs Group owed a fiduciary obligation to Indutech pursuant to the test set out in *Frame v. Smith*.

...

[395] In summary, fiduciary obligations arose in this case by reason of the agency relationship (albeit not a traditional agency relationship), through application of the Wilson test [from *Frame v. Smith*] for fiduciary obligations outside a traditional category of fiduciary relationship and through application of the LaForest, J. test in *Lac Minerals Ltd.*

[520] The matter went to appeal. There, the Alberta Court of Appeal noted the trial judge had found the Gibbs Group to be fiduciaries on each of three bases: (1) by existence of a quasi-agency relationship; (2) because the relationship met the *Frame*

requirements; and (3) on an *ad hoc* basis. The court noted the latter two bases may be "different ways of stating the same thing": *Indutech* at para. 16.

[521] The court upheld the trial decision, concluding the trial judge was correct in concluding that fiduciary obligations arose under both a *Frame* analysis and on an *ad hoc* basis (at para. 18). As to the argument by the Gibbs Group that the absence of authority to bind Indutech should lead to the conclusion there was no fiduciary relationship, the court said:

[23] However, the absence of authority to bind Indutech does not defeat the conclusion that the appellants had and could unilaterally exercise a power or discretion so as to affect Indutech's legal or practical interests. Such power and discretion can exist in many different ways, of which the power to contractually bind is only one example. Here, it was created through the nature of the appellants' unlimited access to Indutech's customers and sales, including its confidential information on pricing, timing and strategy, all of which was given to [the Gibbs Group].

[522] In the case at bar, Oxbow argues that *Indutech* is distinguishable because the disclosure of confidential information made Indutech uniquely vulnerable to the Gibbs Group.

[523] I am not persuaded by Oxbow's argument. The access and misuse of confidential information were indeed key points in *Indutech*, as Oxbow rightly submits, but that was because one of the typical features of an agency relationship – the authority to bind the principal – was absent. As noted in the extract from *Indutech* above, the authority to bind a principal confers a power and discretion that can affect the principal's legal or practical interests. The court in *Indutech* found that "power and discretion can exist in many different ways" and concluded both power and discretion had been given to the Gibbs Group through its unlimited access to Indutech's confidential information.

[524] Here, there was express authority given to Oxbow to enter into contracts on MMB's behalf. If anything, MMB's argument in favour of agency or quasi-agency is stronger than it was for Indutech.

[525] The final category of relationships relevant here encompasses cases that meet the generalized test of fiduciary relationships articulated in *Frame*. There, Justice Wilson, though in dissent in that case, provided a description of the general characteristics of fiduciary relationships that was subsequently endorsed and refined in such later cases as *Lac Minerals*, *Hodgkinson* and *Elder Advocates*.

[526] Justice Wilson's formulation in *Frame* is as follows:

[59] A few commentators have attempted to discern an underlying fiduciary principle but, given the widely divergent contexts emerging from the case law, it is understandable that they have differed in their analyses ... Yet there are common features discernible in the contexts in which fiduciary duties have been found to exist and these common features do provide a rough and ready guide to whether or not the imposition of a fiduciary obligation on a new relationship would be appropriate and consistent.

[60] Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:

- (1) The fiduciary has scope for the exercise of some discretion or power.
- (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
- (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

[527] For completeness, I should refer to the additional characteristic referred to in *Elder Advocates*, where the court said the evidence "must show that the alleged fiduciary gave an undertaking of responsibility to act in the best interests of a beneficiary". There is evidence to that effect in this case, as several provisions in the 2008 Agreement expressly require Oxbow to act in MMB's best interests in securing and delivering sulphur and in making all sulphur supply and purchase decisions for the mine's sulphur requirements.

[528] Those and other terms of the 2008 Agreement are highly indicative of an agency relationship, as noted in these excerpts:

- 1.1 MMB hereby appoints ICEC as its sole agent and supplier for 100% [of] the Mine's Sulphur Supply Requirements ...

- 1.2 As MMB's sole agent and supplier of Sulphur ... ICEC shall provide Sulphur ... in priority to all other of ICEC's clients ... in the following manner:
- 1.2.1 source and identify suppliers ... acting in MMB's best interest to secure and deliver Sulphur ratably, on a market competitive basis at the lowest cost without compromising security of supply ("Best Value") to MMB;
- 1.2.2 commence discussion immediately with various sulphur producers ... to meet the Sulphur Supply Requirements and, subject to the terms of this Agreement, proceed to enter into contracts with such sulphur producers on MMB's behalf...
- ...
- 1.2.9 make all Sulphur supply, purchase ... decisions with respect to achieving the Sulphur Supply Requirements for the Mine in MMB's best interests ...
- ...
- 1.2.12 enter into supply contracts with such suppliers to secure the most cost effective, and secure Sulphur supply in order to achieve the Sulphur Supply Requirements for the Mine at Best Value ... at all times acting in MMB's best interest and putting MMB's requirements in priority to any other commitments that ICEC may have in respect of the supply of Sulphur;
- 1.2.13 where commercially possible, obtain guarantees of supply from Sulphur suppliers that may be enforced directly by MMB against such suppliers;
- ...
- 1.2.16 arrange for the supply, and delivery of all Sulphur on a cost flow-through and transparent basis and provide and perform all requirements described in this Agreement on a completely open book and financially transparent basis;

[529] I have not marked the particular phrases indicative of agency with special emphasis, as one might normally do, because that highlighting would approach the majority of the words used. Suffice it to say that there are a variety of provisions that point strongly in favour of an agency relationship.

[530] Additional provisions indicative of agency, carried forward from the 2008 Agreement, include those relating to Oxbow's entitlement to reimbursement of "all third party costs" required to purchase and transport sulphur (s. 7.2); Oxbow's obligation to keep records of third party costs (s. 7.2); Oxbow's obligation to provide MMB with invoices that "particularize the actual costs incurred ... for the supply and

delivery to the Mine of all Sulphur" (s. 7.3); and Oxbow's obligation to "keep records and books of accounts showing expenditures and payments incurred and expended in relation to the provision of services" (s. 13.1).

[531] As already noted, Oxbow argues that no sulphur was shipped prior to Amendment No. 2, "meaning it did not owe MMB any duties" until the supply of sulphur began. Oxbow offers no authority for that proposition and I reject it. The 2008 Agreement was an enforceable contract and it gave rise to obligations and duties for both parties. *Frame* and related authorities do not speak of any requirement that there be actual commercial or other activity under a contract; instead, their focus is on the *existence* of duties, powers or discretion.

[532] I am satisfied that the 2008 Agreement created a principal-agent relationship between MMB and Oxbow. As a matter of law, the relationship was presumptively fiduciary in nature, a presumption that is rebuttable.

[533] I turn now to the *Frame* factors:

- a) Scope for the exercise of some discretion or power: Oxbow was given the power to enter into contracts on MMB's behalf and to make all supply and purchase decisions with respect to achieving the sulphur supply requirements for the mine;
- b) Power or discretion to affect the beneficiary's legal or practical interests: Oxbow had the ability to unilaterally exercise that power so as to affect MMB's legal and practical interests; and
- c) Vulnerability to the exercise of discretion or power: Sulphur was a critical material needed for the operation of MMB's facility and it was MMB's largest input expense. MMB was vulnerable because it lacked its own expertise in the sulphur market, it relied on Oxbow's expertise to act in MMB's best interests in securing sulphur at "Best Value" and, by reason of the contractual term appointing Oxbow as its "sole agent and supplier", MMB was not able to source sulphur from or through any other party.

[534] To that I would add the additional characteristic set out in *Elder Advocates* – an undertaking to act in the best interests of a beneficiary. As discussed earlier, this too is satisfied by reason of express provisions to that effect (see ss. 1.2.1, 1.2.5, 1.2.9 and 1.2.12 of the 2008 Agreement).

[535] These characteristics satisfy me that the relationship between MMB and Oxbow, arising from the 2008 Agreement, was fiduciary in nature.

[536] Oxbow argues there are provisions within the 2008 Agreement that are inconsistent with a fiduciary relationship. The first of those are the provisions imposing confidentiality obligations on each of MMB and Oxbow concerning certain commercial information. Oxbow argues that confidentiality provisions are not necessary in fiduciary relationships because confidentiality is an obligation imposed on the parties by the nature of the relationship. I observe that Oxbow's argument is not that confidentiality provisions are inconsistent with a fiduciary relationship, but merely that they are redundant. This is unpersuasive in terms of rebutting the presumption. The fact that the parties made explicit that which was already implicit does nothing to rebut the presumption.

[537] The other provision relied upon by Oxbow is clause 11.1, which prohibits ICEC (Oxbow) from assigning the agreement without MMB's written consent, which consent is not to be unreasonably withheld. Oxbow makes the broad submission that fiduciary agreements are not, by their nature, assignable. The authority relied upon (*Proctor v. Schellenberg*, 2002 MBQB 135) is unpersuasive on this point, as *Proctor* involved an assignment of a liability under a personal services contract, not an assignment of the personal services aspect itself. While I am satisfied there is a general rule that a fiduciary may not, by assignment, foist a replacement fiduciary upon an unwilling other party, in this case Oxbow required MMB's consent. Given the consent requirement, I conclude the assignment provision does not negate or rebut a fiduciary relationship.

[538] The presumption that the principal-agent relationship in this case was fiduciary in nature has not been rebutted in this case. Accordingly, whether under a

principal-agency relationship, a quasi-agency relationship or through the modified *Frame* analysis, I am satisfied that at the time the parties embarked on a discussion of what became Amendment No. 2, Oxbow owed fiduciary duties and obligations to MMB.

F. Fiduciary Obligations & Breaches Leading to Amendment No. 2

[539] I agree with MMB's submission that the discussions leading to Amendment No. 2 were not arms-length discussions. Instead, they were discussions, in a fiduciary context, between principal and agent to provide greater certainty about how pricing and delivery would be determined and implemented. I also agree that MMB's primary goal in these discussions, a goal of which Mr. Goemans was fully aware, was to be able to verify it was getting sulphur at the lowest price (contractually, at Best Value).

[540] As noted in *Bowstead* at 261:

Where an agent enters into any other contract with the principal ..., the agent must act with perfect good faith, and make full disclosure of all the material circumstances, and of everything known to him respecting the subject-matter of the contract or transaction which would be likely to influence the conduct of the principal ...

[541] I conclude that Oxbow breached its fiduciary obligations to MMB in the following ways:

- a) Indexes were introduced by Mr. Goemans as a means by which MMB could be satisfied it was paying a market price, given the difficulties of ascertaining a sulphur price with netback arrangements. However, when Mr. Goemans described to MMB how netback worked, he did not disclose that Oxbow received fees and incentive bonus payments from netback producers and instead described netback only in a general way. I am satisfied that this non-disclosure was intentional;
- b) Mr. Goemans also failed to disclose that Oxbow's netback arrangements with producers obliged Oxbow to obtain the best available price for

sulphur, a direct conflict with its obligation to obtain sulphur for MMB at Best Value. This too was intentional;

- c) Mr. Goemans intentionally gave MMB the impression that all or most of Oxbow's business was done on a netback basis to obscure the fact that a substantial portion of Oxbow's business was done on a spot trading basis. In doing so, he deliberately failed to disclose to MMB that Oxbow earned substantial trading gains on its spot business and expected to continue earning these profits in future; and
- d) Instead, Mr. Goemans actively misled MMB by advising that the index price would approximate the actual amount paid by Oxbow for sulphur on behalf of MMB, subject only to small gains or losses that were attributable to timing, which would balance out to neutral over time.

G. The Supply Agreement

[542] By way of brief reminder, I refer to the post-Amendment No. 2 contract as the Supply Agreement.

[543] I am satisfied that the fiduciary relationship between the parties continued after Amendment No. 2 and therefore during the term of the Supply Agreement. All the clauses referred to in my earlier discussion of agency and fiduciary duty continued in the Supply Agreement, as Amendment No. 2 provided:

- 3. Except as expressly set forth in this Amendment No. 2, this Amendment No. 2 shall not constitute an amendment or modification of any other provision of the Agreement.

[544] I accept that the contractual relationship changed insofar as it now required the parties to "negotiate in good faith" the terms and conditions of each shipment. However, I do not agree that this necessarily means the relationship was no longer fiduciary in nature. Instead, I conclude that the terms imposing a mutual duty to negotiate and providing a pricing mechanism ought to be interpreted in a way that is consistent with the existing fiduciary relationship. This is accomplished by recognizing that Oxbow had a continuing duty to source, secure and deliver sulphur

"on a market competitive basis at the lowest cost without compromising security of supply" and for the parties to resort to index pricing only when Oxbow could not get a better price on which the parties agreed.

[545] While I agree that Oxbow's discretion was now much reduced, all of the other agency-like provisions remained, which satisfies me that the relationship continued to be fiduciary in nature.

H. Other Breaches

[546] I am satisfied that Oxbow breached its fiduciary duty by continuing to represent itself to MMB as acting in MMB's best interests in its dealings with suppliers, when it was not acting in MMB's best interests and made no real attempt to source, secure and deliver sulphur "on a market competitive basis at the lowest cost without compromising security of supply" or to negotiate prices with suppliers on MMB's behalf. That it failed to make any effort to do these things on MMB's behalf is well illustrated by the fact that all but one of the many sulphur shipments over the years were priced according to the index method, meaning that Oxbow never offered to MMB a price that beat the index price.

[547] The substantial gains earned by Oxbow from its transactions with MMB is a strong indication that more favourable prices were readily available in the market.

[548] Oxbow also breached its fiduciary duty to MMB by taking undisclosed profits and commissions through its transactions with MMB. This taking of secret profits and commissions also constituted a breach of the Supply Agreement, which by s. 7.2 limited Oxbow's remuneration, including its "overhead and profit for the supply of Sulphur", to the \$2.00 per tonne service fee.

[549] I conclude that Oxbow's various breaches also constitute breaches of Oxbow's duties of good faith and honest contractual performance.

[550] In *Bhasin*, the Supreme Court of Canada acknowledged that good faith contractual performance is a general organizing principle of contract law and recognized a new common law duty to act honestly in the performance of

contractual obligations. The former requires that parties "perform their contractual duties honestly and reasonably and not capriciously or arbitrarily" (at para. 63). The latter means that "parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract" (at para. 73). These duties differ from the higher obligations of a fiduciary, such as duties of loyalty or the duty to put the interests of the other contracting party first (at para. 65).

[551] Here, Oxbow knowingly misled MMB by various representations and non-disclosures designed to assure MMB that it was acting in MMB's best interests in securing sulphur at the lowest price, and was not taking any "positions" on the supply, when it was not acting in that fashion at all.

[552] I am also satisfied that Oxbow breached its duty of good faith contractual performance by acting in a manner that nullified the bargained objective or benefit to MMB: *Schluessel v. Maier*, 2001 BCSC 60 at para. 130. As MMB put it, by entering into the Supply Agreement, Oxbow relinquished the opportunity to make trading profits and other revenue in return for its appointment as sole supplier of sulphur to a high-volume, long-term customer. In taking undisclosed profits, commissions and incentive payments, it sought to recapture that which it had contractually relinquished and undermined MMB's bargained objective of acquiring sulphur at the lowest reasonable cost.

I. Remedies

[553] Remedies for breach of fiduciary duties are "discretionary, dependent on all the facts before the court, and designed to address not only fairness between the parties, but also the public concern about the maintenance of the integrity of fiduciary relationships": *McBride Metal Fabricating Corp. v. H & W Sales Co.*, 59 O.R. (3d) 97, [2002] O.J. No. 1536 (C.A.). The law in this area "has always maintained within it an element of deterrence": *Hodgkinson* at p. 453.

[554] MMB seeks orders requiring Oxbow to disgorge the trading gains and other amounts earned on the subject transactions. It relies on the principle that a fiduciary must account for profits or benefits that they have wrongly derived from their

position, even if the beneficiary has suffered no loss: *MacMillan Bloedel Ltd. v. Binstead*, 22 B.L.R. 255, [1983] B.C.J. No. 802 (S.C.), citing *Boardman v. Phipps*, [1967] 2 A.C. 47 (H.L.).

[555] As noted in *Strother*, disgorgement of profits may be directed to a prophylactic purpose or a restitutionary purpose:

[75] Monarch seeks "disgorgement" of profit earned by Strother and Davis. Such a remedy may be directed to either or both of two equitable purposes. Firstly, is a prophylactic purpose, aptly described as appropriating

for the benefit of the person to whom the fiduciary duty is owed any benefit or gain obtained or received by the fiduciary in circumstances where there existed a conflict of personal interest and fiduciary duty or a significant possibility of such conflict: the objective is to preclude the fiduciary from being swayed by considerations of personal interest.

(*Chan v. Zacharia* (1984), 154 C.L.R. 178, per Deane J., at p. 198)

[76] The second potential purpose is restitutionary, i.e. to restore to the beneficiary profit which properly belongs to the beneficiary, but which has been wrongly appropriated by the fiduciary in breach of its duty.

[556] MMB also seeks the return of the service fees paid to Oxbow, noting that an agent will lose their entitlement to agreed remuneration if they have acted dishonestly and in breach of their duties: *Fridman on Agency*, at 107.

[557] Oxbow raises a number of equitable defences and limiting considerations, which Oxbow says requires the court:

- a) To consider what is just in all the circumstances of the case. Equity should not be "transformed into a vehicle for the unjust enrichment of the plaintiff": *Strother* at para. 89;
- b) With the equitable defence of laches, to examine the conduct of the plaintiff, as where a plaintiff stands by and permits the defendant to make profits and then claims entitlement to the profits: *3464920 Canada Inc. v. Strother*, 2005 BCCA 35 at para. 55, quoting *Warman International Ltd. v. Dwyer* (1995) 128 A.L.R. 201 at 210 (Aus. H.C.);

- c) To apply, where warranted, an appropriate cut-off date for disgorgement to reflect the point at which the effect of the fiduciary breach is dissipated: *Strother* at para. 90; and
- d) To exclude disgorgement claims involving Oxbow Canada, a non-defendant.

[558] Dealing first with MMB's conduct, Oxbow says MMB should be denied equitable relief because it: (1) failed to assert its rights in a timely manner; (2) always knew that Oxbow purchased sulphur through spot trading and marketed sulphur on a netback basis; (3) was not under any continuing obligation to acquire sulphur from Oxbow, and knew that it could seek sulphur elsewhere; (4) knew Oxbow was not acting as agent; and (5) noted Oxbow in default of the Supply Agreement in December 2016 and later threatened to terminate the agreement.

[559] I have already made findings relating to MMB's knowledge of Oxbow's spot trading and netback arrangements. I am satisfied MMB was unaware that Oxbow acquired sulphur with the intention of re-selling it to MMB at a significant profit. I am also satisfied MMB was not told by Oxbow, and MMB did not otherwise know, that Oxbow's netback arrangements garnered commissions and incentive payments for Oxbow and that those arrangements obliged Oxbow to obtain the highest price possible for the producers.

[560] I do not accept Oxbow's submission that MMB, through Mr. Lee, knew that Oxbow was not acting as its agent. To the contrary, Mr. Lee insisted Oxbow was MMB's agent. The testimony of Mr. Lee referred to by Oxbow reflects Mr. Lee's concern that Oxbow was not doing a proper job as agent; it did not demonstrate that Mr. Lee knew Oxbow was not acting as MMB's agent.

[561] Oxbow says MMB was free to acquire sulphur elsewhere, but the Supply Agreement made it clear that Oxbow was MMB's "sole agent and supplier for 100% [of] the Mine's Sulphur Supply Requirements". On this point, I agree with MMB's submission that it was entitled to the benefits it contracted for in the Supply

Agreement, and so it was entitled to affirm the contract, sue to enforce it and claim damages. Neither the equitable defence of laches, nor any duty to mitigate, requires that a plaintiff abandon its contract rights.

[562] For those reasons, I am not persuaded there is any conduct on MMB's part that should either limit or disentitle entirely its right to equitable relief. Oxbow was a faithless fiduciary in several respects, most notably for having taken secret profits, commissions and incentive payments. Disgorgement (or, perhaps more accurately, an order requiring Oxbow to account) is warranted on a prophylactic basis. Accordingly, I am satisfied that Oxbow should be ordered to account to MMB for the undisclosed trading gains, commissions and incentive payments it earned in the course of its dealings with MMB.

[563] I accept that the situation changed when those gains and payments were revealed in November 2018. The secret profits were no longer secret. Similar to the situation in *Strother*, where the court concluded the disgorgement remedy should cut off at the point the lawyer (Strother) was no longer in a position of conflict, the effect of the fiduciary breach was lessened ("dissipated") at that point: *Strother* at para. 90. Here, once the secret gains were revealed, what was left was essentially a contractual dispute between MMB and Oxbow, with the parties disagreeing on Oxbow's claim of a right to earn monies from its spot trading and netback arrangements.

[564] Oxbow argues that the "dissipation" point ought to be set at various dates, starting in October 2015 when Mr. Lee emailed Mr. Goemans to say "there have been many gray areas in pricing until now". Other dates suggested by Oxbow are December 2015, when MMB issued its default letter; September 2017, when litigation began; and November 2018, when Mr. Goemans revealed the undisclosed payments during his examination for discovery.

[565] I do not agree that any of the earlier dates mark the point where the effects of the fiduciary breach dissipated. One of Oxbow's key fiduciary duties was the duty to

make full and frank disclosure. This did not occur until Mr. Goemans was examined for discovery.

Damages for Breach of Contract after November 2018

[566] MMB submits that damages for breach of contract, including breaching its duty of good faith honest contractual performance, are the same as they would be if Oxbow was required to account for undisclosed trading gains and other revenues. Although damages for breach of contract are expectation damages, MMB argues that the quantum is the same as it would be for a disgorgement remedy because Oxbow ought to have supplied sulphur at the price Oxbow paid for it.

[567] Oxbow contends that Oxbow's profit is not MMB's loss because MMB received what it contracted for pursuant to each addenda.

[568] Oxbow's argument fails to address the fact that the Supply Agreement obliged it to supply sulphur "at the lowest cost without compromising security of supply" and, in effectively ensuring that index pricing was used for all but one delivery, it failed to make any reasonable efforts to fulfill that obligation. Oxbow's argument also fails to reflect my finding that the very agreement giving rise to the addenda method (Amendment No. 2) came about in a fiduciary context, where Oxbow breached its fiduciary duties by both failing to make full disclosure concerning its spot trading and netback arrangements and misleading MMB by advising that the index price would approximate the actual amount Oxbow paid. Finally, the taking of profits, commissions and incentive payments was also a breach of the Supply Agreement as s. 7.2 limited Oxbow's remuneration, including its "overheads and profit", to the \$2.00 per tonne service fee.

[569] I am satisfied that MMB is entitled to damages for breach of contract and breach of its duty of honest contractual performance in an amount equal to Oxbow's trading gains, netback commissions and netback incentive payments for the post-November 2018 period.

Claim for Return of the Service Fees

[570] MMB says Oxbow should be ordered to return the entirety of the service fees MMB paid to Oxbow because there was a "complete failure of the consideration it contracted to receive".

[571] For its part, Oxbow says it provided MMB with a consistent source of supply at the contractually agreed price and, by so doing, ensured the mine remained operational. Oxbow says that, in these circumstances, there would be no purpose served in ordering the disgorgement of the service fees paid.

[572] I do not accept there was a complete failure of consideration in this case. While Oxbow breached its duties in various ways and, in particular, failed to supply sulphur "on a market competitive basis at the lowest cost", it did provide a regular and secure supply of sulphur to MMB. It also provided other forms of support on an occasional basis – for example, when it assisted with the design of the unloading facilities at the mine's marine terminal. In short, MMB received some material value for the fees it paid.

[573] As noted earlier, equitable remedies are not to be unduly harsh and they should not be used as vehicles for the unjust enrichment of a plaintiff. For these reasons, I conclude that it would be excessive to extend the disgorgement remedy to the service fees received by Oxbow.

Amounts Paid to Oxbow Canada

[574] Oxbow paid Oxbow Canada \$401,602 in service fees and \$433,436 in trading gains for shipments sourced from Vancouver. As already noted, Oxbow opposes MMB's claim for those amounts, arguing that Oxbow Canada is not a party to the action and MMB's claim in this regard is an attempt to pierce the corporate veil without a legal basis for doing so.

[575] As I have concluded that Oxbow ought not to be ordered to disgorge the service fees it received from MMB, I need not address this issue insofar as it concerns those fees.

[576] Trading gains also went to Oxbow Canada on sulphur sourced from Vancouver. Oxbow Canada acquired sulphur from netback suppliers and then sold it to Oxbow by way of an intercompany sale. As I understand it, the trading gains sums paid to Oxbow Canada were calculated by working backwards from the price paid by MMB, applying the average netback fees for Vancouver, and then dividing the resulting profit figure equally between Oxbow and Oxbow Canada.

[577] MMB submits that Oxbow knew that Oxbow Canada, its sister company, would earn these sums, and it is no answer for Oxbow to say that a portion of those gains would be paid to another entity. Oxbow says the two companies are legally separate and one is not interchangeable with the other. Oxbow also notes the evidence of Mr. Goemans that compliance with Canadian and U.S. tax laws requires that there be an intercompany sale.

[578] I am not satisfied that there ought to be an order for Oxbow to account for monies earned by Oxbow Canada. Oxbow Canada is not a party to the action, there is no allegation of a joint enterprise between the two Oxbow companies, and MMB did not seek a tracing order in its prayer for relief, although I would add that it is not clear whether tracing could be ordered here in any event. Further, MMB led no evidence contradicting Mr. Goemans' testimony that tax laws require the sulphur to be sold in this fashion. There is no suggestion that this form of transaction or allocation was a sham; indeed, it makes sense that the gain would have to be allocated for tax purposes because otherwise a Canadian vendor could easily shift its tax burden to a tax-friendly or even tax-free jurisdiction. The fact that these transactions or allocations were driven by a legitimate need to be tax-compliant distinguishes this case from *Elekta Ltd. v. Rodkin*, 2012 ONSC 2062, cited by MMB, where a dishonest employee caused some of his defalcation proceeds to be sent to friends and acquaintances and was found liable for the entire sum taken.

[579] As I have found, I am satisfied that Oxbow, the fiduciary here, must account for trading profits it made, but in the circumstances of this case I am not satisfied

that Oxbow must also account for the trading gains or profits of Oxbow Canada, a separate corporation handling the sulphur at an earlier stage in the supply chain.

Address Commissions

[580] Oxbow does not dispute that the address commissions it received for Addenda 2 through 10 are owing to MMB. MMB is therefore entitled to judgment against Oxbow for \$105,798.31.

CPI Adjustment to the Service Fee

[581] Although both parties referred to the CPI issue in their submissions, ultimately the matter was not contested. As a result, I make no order with respect to it.

Punitive Damages

[582] MMB seeks punitive damages against Oxbow for its "egregious" conduct that "violates even the most basic tenets of normal commercial conduct". MMB says Oxbow's conduct deserves a stern rebuke, and suggests an award of punitive damages equal to 10 percent of the total award.

[583] Oxbow says there is no evidentiary basis that could justify an award of punitive damages, although I note this submission is largely premised on the assumption there will be no finding of a breach of fiduciary duty. Oxbow says this case is really about contractual interpretation and performance, and nothing more.

[584] *Whiten* is the leading case on punitive damages. There Justice Binnie, speaking for the majority, said:

[36] Punitive damages are awarded against a defendant in exceptional cases for "malicious, oppressive and high-handed" misconduct that "offends the court's sense of decency": *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 196. The test thus limits the award to misconduct that represents a marked departure from ordinary standards of decent behaviour. Because their objective is to punish the defendant rather than compensate a plaintiff (whose just compensation will already have been assessed), punitive damages straddle the frontier between civil law (compensation) and criminal law (punishment).

[585] Later, at para. 92, Binnie J. noted that punitive damages are "the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant".

[586] Oxbow says *Whiten* requires there to be an "independent actionable wrong", but it did not refer to or cite any fiduciary duty cases. I note that an independent actionable wrong is a requirement associated with contract cases, usually wrongful dismissal or insurance coverage cases, and *Whiten* itself (at paras. 67 and 82) confirms that punitive damages are available in breach of fiduciary duty cases.

[587] In any event, the issue raised by Oxbow was specifically addressed in *Waxman v. Waxman*, [2004] O.J. No. 1765, where the Ontario Court of Appeal said:

[586] Moreover, where liability is founded on breach of fiduciary duty, an independently actionable wrong is not a precondition of punitive damages. Although that is necessary in an action based on breach of contract, where this "private law" agreed to by the parties defines the extent of their obligations to each other, the situation is different where the common law imposes an obligation on one to act as a fiduciary for another. In *Norberg v. Wynrib*, [1992] 2 S.C.R. 226 for example, McLachlin J., writing for herself and L'Heureux-Dubé J., found an award of punitive damages for breach of fiduciary duty to be appropriate without finding an independently actionable wrong. In doing so, she cited with approval the following passage from M.V. Ellis, *Fiduciary Duties in Canada* (Don Mills: Richard DeBoo, 1988) at 20-24:

Where the actions of the fiduciary are purposefully repugnant to the beneficiary's best interests, punitive damages are a logical award to be made by the Court. This award will be particularly applicable where the impugned activity is motivated by the fiduciary's self-interest.

[588] I am satisfied that an award of punitive damages is warranted here to reflect the Court's condemnation of Oxbow's various breaches of fiduciary duty, which include the taking of secret commissions and profits, failing to disclose the conflict between its duty to MMB and both its duty to its netback suppliers and its own interests, misleading MMB by saying it did not take positions on supply and representing to MMB in various ways that it was acting in MMB's best interests as MMB's agent.

[589] In *Procon Mining & Tunnelling Ltd. v. McNeil*, 2010 BCSC 487, Justice C. Ross provided the following helpful summary of the *Whiten* considerations to be taken into account on quantum:

[152] The court [in *Whiten*] emphasized that punitive damages are the exception, and to be used with restraint. The governing rule with respect to quantum is proportionality. Specifically, Binnie J. outlined at paras. 111-25 that a proper award has to be proportionate:

- (i) to the blameworthiness of the defendant's conduct;
- (ii) to the degree of vulnerability of the plaintiff;
- (iii) to the harm or potential harm directed specifically at the plaintiff;
- (iv) to the need for deterrence;
- (v) taking into account other penalties, both civil and criminal, which have been or are likely to be inflicted on the defendant for the same misconduct; and
- (vi) to the advantage wrongfully gained by a defendant from the misconduct.

[590] I consider MMB's suggested quantum of punitive damages to be excessive. I am also not satisfied that the quantum of punitive damages is best set on a percentage basis as the Supreme Court of Canada rejected that approach in *Whiten* at para. 127.

[591] I conclude that the sum of C\$200,000 would suffice to express the Court's condemnation of Oxbow's breaches of fiduciary duty in this case and meet the goals of retribution, denunciation and deterrence: *Whiten* at para. 111. While I have given full regard to all the *Whiten* considerations in arriving at this figure, the matters carrying particular weight here are: (1) the commercial context in which this matter arose; (2) MMB, while vulnerable by reason of its relationship with Oxbow, is a large commercial enterprise that is not otherwise particularly vulnerable (in contrast, for example, to the highly vulnerable plaintiff in *Whiten*); and (3) the disgorgement remedy addresses the advantage wrongfully gained by Oxbow (*Whiten* at para. 124) and will operate as a significant deterrent in and of itself.

J. Other Defences

Limitation of Liability Clause

[592] Oxbow relies on s. 14.1 of the Supply Agreement, which reads:

Neither Party is liable for indirect, special, incidental, punitive, exemplary or consequential damages or loss of profits arising directly or indirectly from any contract breach, fundamental or otherwise.

[593] Oxbow says this clause precludes MMB from asserting a damages claim against Oxbow, whether expectation damages or otherwise.

[594] MMB replies that this clause does not limit damages for fiduciary duty. I agree. I would add that a disgorgement order may not be a damages order at all given that, properly speaking, it is an order requiring an agent or fiduciary to account to its principal or beneficiary for secret or undisclosed payments it has received.

[595] The limitation of liability clause does not limit punitive damages for breach of fiduciary duty.

[596] Finally, I agree with MMB's submission that, fairly read, the limitation of liability clause does not limit *direct* damages for breach of contract, meaning either expectation damages or compensatory damages measured by the defendant's gain.

Limitation Defence

[597] Oxbow maintain that MMB's entire claim is time-barred because it knew or ought to have known, prior to September 2015, that Oxbow was making secret profits. September 2015 is the key date here as MMB's notice of civil claim was filed on September 29, 2017.

[598] I have already discussed, and rejected, the various assertions on which Oxbow bases its claim that MMB knew or ought to have known Oxbow was earning secret profits and other revenues. As noted earlier, while I agree that Mr. Goemans referred to netback in his August 2013 discussion with Mr. Henderson, he did not tell Mr. Henderson that Oxbow earned fees, including price-based incentive fees, from those arrangements. He also did not tell Mr. Henderson that Oxbow's netback

arrangements obliged Oxbow to secure the highest available sulphur price on behalf of its suppliers. Finally, Mr. Goemans did not tell Mr. Henderson that when Oxbow acquired sulphur through spot trading it expected to earn significant gains on the subsequent sales to MMB.

[599] The other matters raised by Oxbow have to do with Mr. Lee's concerns and complaints with Oxbow's performance as agent. As I have found, these were concerns with Oxbow's performance. They do not demonstrate that Mr. Lee knew or ought to have known about secret payments.

[600] Oxbow's other limitation argument, that MMB ought to be limited to damages that accrued within the two-year period prior to the commencement of the action, is answered by *Singh* at paras. 41–43. There, the Court of Appeal held that where a defendant's contractual obligations are of a continuing nature – as they were here – continuing breaches of contract allow the limitation period to be reset each time the breach continues. Accordingly, the limitation period in this case reset each time Oxbow delivered sulphur and retained a secret monetary benefit.

IX. Conclusion

[601] MMB is granted judgment as follows:

- a) For trading gains and netback commissions payments: \$10,562,259 (calculated by taking the total of \$10,995,695 and subtracting \$433,436 for the amounts allocated to Oxbow Canada);
- b) For address commissions: \$105,798.31; and
- c) For punitive damages: C\$200,000.

[602] The U.S. currency judgments in MMB's favour are to be expressed in accordance with the *Foreign Money Claims Act*, R.S.B.C. 1996, c. 155; that is, the amounts payable shall be those amounts of Canadian currency necessary to purchase the equivalent amounts of U.S. currency at a chartered bank located in British Columbia at the close of business on the conversion date.

[603] The parties have leave to address any matters necessary to finalize the award.

[604] Costs to the plaintiff unless the parties wish to make submissions.

"Blok J."