

Court of King's Bench of Alberta

Citation: Boileau v NaturEner Energy Canada Inc, 2026 ABKB 627

Date: 20260908

Docket: 0901 09489; 2201 08763

Registry: Calgary

Between:

DAVID BOILEAU, CLAUDE MINDORFF, AND RON BARG

Plaintiffs/Respondents

- and -

NATURENER ENERGY CANADA INC.

Defendant/Applicant

And Between:

DAVID BOILEAU, CLAUDE MINDORFF, RON BARG, AND LOIS MORYS

Plaintiffs/Respondents

- and -

**NATURENER ENERGY CANADA INC., WR ONE PORTFOLIO CORP., WR2
HOLDING CORP., PH2 HOLDING CORP., WILD ROSE 2 WIND LP, and
NATURENER USALLC**

Defendants/Applicants/Appellants

**Reasons for Decision
of the
Honourable Justice C. Dario**

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INTRODUCTION

[1] Two related applications are before the Court on this matter. The first application (“**Application #1**”) is a Summary Dismissal application brought by the defendant/Applicant, NaturEner Energy Canada Inc. (“**NaturEner**”) with respect to **Action #1** (0901-09489). The second application (“**Application #2**”), also brought by NaturEner and other named defendants, is an appeal of Applications Judge Farrington’s decision dismissing NaturEner’s Summary Dismissal application on **Action #2** (2201 08763). Given the overlapping background, issues and parties, I will address both applications in this Decision. Although I address the Application #2 first, in Application #1 the plaintiffs raise issues of *res judicata* which must be addressed given it was brought prior to Application #2 being heard or decided.

[2] Both applications arise from the same underlying factual matrix. The plaintiffs in Action #1 (the “**Plaintiffs**”) are three of four shareholders of West Windeau Inc. (the “**Company**”), the primary assets of which were two wind farm projects under development: Wild Rose 1 Wind Farm and Wild Rose 2 Wind Farm (the “**Projects**”). The fourth shareholder is Ms. Morys (collectively the Plaintiffs and Ms. Morys are the “**Sellers**”, being the plaintiffs to Action #2). Ms. Morys is not a plaintiff to Action #1 but is to Action #2. To avoid confusion, I will refer to the plaintiffs to Action #1 as the Plaintiffs, and the plaintiffs to Action #2 as the Sellers, as all four Sellers are plaintiffs to that action.

[3] By way of Share Purchase and Sale Agreement (“**SPA**”) dated August 10th, 2007 (the “**Closing Date**”), NaturEner acquired the shares of the Company from the Sellers. NaturEner is a wind energy development company amalgamated and registered in Alberta. It is wholly owned by NaturEner USA, LLC, incorporated in Delaware, which develops and operates wind energy projects in Canada and the United States.

[4] The relevant terms of the SPA are described below and reproduced in the attached Appendix 1. By way of introduction, the SPA required NaturEner to take certain steps in developing the Projects following Closing. The terms of the SPA made provision for both contemplated and unexpected factors that could prevent commencement or completion of the Projects. The timing of the commencement of construction (“**Construction Commencement Date**”) of the first Project (“**Wild Rose 1**”) was relevant to the amount of a fee to which the Sellers would be entitled (“**Success Fee**”); the earlier the Construction Commencement Date, the larger the Success Fee. The second Project (“**Wild Rose 2**”) also had a Success Fee payment upon its Construction Commencement Date, however the amount was not tiered in relation to timing. The Success Fee was contemplated as part of the Purchase Price for the Company shares under the SPA. The parties dispute whether the obligation to pay the Success Fee ended after 2 years, 5 years, or was perpetual.

[5] From the outset, each of the four Sellers were hired by NaturEner for various employee, officer or consultant roles related to the Projects. By one year after the SPA closed, each of the Plaintiffs however either resigned or were terminated. Concerns regarding the pace of the development of the Projects were raised to management by at least one of the Plaintiffs just prior to his termination. The fourth Seller, Ms. Morys, ended her employment with NaturEner around April 2019.

Action #1

[6] On July 25, 2009, just under two years after the Closing Date, the Plaintiffs commenced Action #1 alleging NaturEner materially breached the SPA, including section 7.6 of the SPA by failing to use “reasonable best efforts” to contact a reasonable number of reputable wind turbine suppliers, and for failing to use “reasonable best efforts” to proceed diligently and expeditiously with the development and implementation of the Projects with a view to achieving the Construction Commencement Date on or before the certain target dates set out in the Success Fee definition in the SPA. They also claim, with respect to Wild Rose 1, that NaturEner failed to place a purchase order for wind turbines. Consequently, the Plaintiffs argue that they are entitled to a remedy for a breach or non-performance of these covenants in accordance with section 9.3(c) (Limitation of Liability) of the SPA, which remedy is the right to payment in accordance with paragraph (a)(ii) of the definition of Success Fee (described below).

Application #1

[7] NaturEner brings Application #1: the Summary Dismissal application on the basis that a far-reaching, expensive and time-consuming inquiry into the conduct of NaturEner through a trial is not necessary: rather, the plain interpretation of the terms of the SPA, and/or a high-level assessment of the conduct of NaturEner is all that is required to confirm that the Plaintiffs’ claim fails. Although the phrase “reasonable best efforts” is not the typical expression used in contracts of this nature, NaturEner argues that – regardless of the standard imposed – the threshold is low and the claim must fail on the terms of the SPA or a high-level review of the conduct of NaturEner up to the time of filing the Statement of Claim for Action #1, which can be assessed by the records filed with the regulator.

[8] The Plaintiffs contest NaturEner’s interpretation of provisions of the SPA and the sufficiency of the conduct of NaturEner in its attempt to dismiss their claim. They argue the evidentiary threshold is *not* low in a summary judgment application, and particularly not where the standard to be met is reasonable *best* efforts. The Plaintiffs assert that the conduct of NaturEner from before filing the Statement of Claim, as well as after filing must be considered as the conduct complained of is ongoing and the Plaintiffs filed their claim when they did to avoid any allegation of missing a limitation period in light of the nature of the conduct (or omission) alleged. Further, the Plaintiffs note that, rather than being a “far-reaching inquiry,” NaturEner has thus far refused to provide any Affidavit of Records or allow Questioning, depriving the Plaintiffs of access to information relevant to support their claim. On this basis alone, they argue, the summary dismissal application should fail. At the very least, it raises a triable issue.

Standstill and Disclosure

[9] The Plaintiffs filed their Statement of Claim in Action #1 on July 25, 2009. NaturEner filed a Statement of Defence three weeks later. On September 28, 2011, the parties entered into the first of two standstill agreements. Under the first standstill agreement, NaturEner was to provide quarterly reports as to the progress of the Projects’ development. It did so from October 31, 2011 to April, 2018. The Plaintiffs gave notice of their intention to terminate the standstill agreement on March 5, 2019. A second standstill agreement was entered into shortly thereafter on April 4, 2019 and automatically terminated on November 30, 2020. The purpose was to allow settlement discussions. I understand the second standstill agreement was at the request of

NaturEner. The parties agreed to discuss the timing of NaturEner's Affidavit of Records within two weeks of the end of the second standstill agreement.

[10] The Plaintiffs have provided Affidavits of Records, first from Mr. Boileau, and at the request of NaturEner's counsel, then from each of the Plaintiffs. Despite the requirement in the standstill agreement, NaturEner has thus far not provided an Affidavit of Records or engaged in Questioning. Instead, NaturEner advised it would be filing a summary dismissal application. The summary dismissal application was filed on May 31, 2022. While the Plaintiffs state that NaturEner is in breach of its obligation to produce an Affidavit of Records, NaturEner states that there was no response to its notice that it would instead file a summary dismissal application until after the application was filed.

Action #2

[11] In late 2021, the Sellers became aware that NaturEner had reorganized and sold or was selling the Projects to Capstone Infrastructure Corporation (which appears to be the parent company of Capstone Power Corp). On August 3, 2022, the Sellers commenced a second action ("**Action #2**") by filing their Statement of Claim, which was amended on March 16, 2023.

[12] As mentioned, all four Sellers are plaintiffs in Action #2. Capstone Power Corp is the parent corporation to the following named defendants in Action #2: WR One Portfolio Corp., WR2 Holding Corp. and PH2 Holding Corp.¹ These entities individually or collectively with Wild Rose 2 Wind LP may be referred to as "**Capstone**" in this Decision. These defendant entities were each previously Alberta entities wholly owned by NaturEner Energy Canada LLC ("**NaturEner**"), and therefore subsidiaries of NaturEner USA, LLC. In November 2021, independent from the SPA transaction, the shares of each of these entities were purchased by Capstone Power Corp. and renamed and continued in British Columbia. Consequently, the underlying assets forming the subject matter of the SPA and the Projects were held by the Capstone subsidiaries of Capstone Power Corp. Wild Rose 2 Wind LP is an entity continued in Ontario (with WR2 Wind GP Corp. as its limited partner), and was formed after the Capstone acquisition.

[13] Action #2 pertains to the sale and transfer of the shares of the companies in which the primary assets of the Projects were held, and the transfer of the proceeds of such sale outside of Canada, which the Sellers say is contrary to the *Fraudulent Preferences Act*, R.S.A. 2000 c. F-24, and the *Statute of Elizabeth*, 1571 13 Eliz 1-c5.. Further, the transfers arguably resulted in the assignment of the benefits and obligations of the SPA, which were not consented to by the Sellers (the plaintiffs in Action #2) pursuant to the assignment provisions of the SPA resulting in potential liability of the defendants in Action #2. The plaintiffs (Sellers) in Action #2 assert liability of these defendants as successors, assignees or transferees for obligations under the SPA² and in respect of damages that may be awarded pursuant to Action #1. They also claim

¹ WR One Portfolio Corp. in Alberta previously was NaturEner Wild Rose 1 Energy Inc., WR2 Holding Corp. in Alberta previously was NaturEner Wild Rose 2 Energy Inc., and PH2 Holding Corp. previously in Alberta was NaturEner Prairie Home 2 Energy Inc.

² In addition to the payment remedy for a breach of performance as described for Action #1, in Action #2, the Sellers rely on assignment provisions of the SPA that state affiliate assignees under the SPA are jointly and severally liable for the obligations of NaturEner, and non-affiliate assignees are not permitted without the Sellers' consent (section 11.12 of the SPA). They also rely on the payment provisions for payment of the Success Fee regarding Wild Rose 2.

entitlement to a Success Fee regarding Wild Rose 2 on the basis that the construction aspect to that Project has now begun (i.e., the Construction Commencement Date has been achieved).

[14] The defendants to Action #2 (“**Applicants**”) filed Application #2 even prior to filing their Statement of Defence on June 12, 2023. The Applicants are: NaturEner Energy Canada Inc., WR One Portfolio Corp., WR2 Holding Corp., PH2 Holding Corp., Wild Rose 2 Wind LP, and NaturEner USA, LLC. The Applicants assert that Wild Rose 2 Wind LP is not related to or affiliated with NaturEner or NaturEner USA, LLC; it is a partnership formed in Ontario around November 17, 2021.

[15] The Applicants submit the Capstone entities are now no longer subsidiaries of, and unaffiliated with, either of NaturEner or NaturEner USA, LLC. (Limited information has been provided regarding the affiliations of Capstone Power Corp or its shareholder(s).) The Applicants state that NaturEner is the only party with any privity of contract to the SPA and all other parties should be removed from the litigation. The Applicants note Wild Rose 2 Wind LP was never (itself or through a predecessor) a subsidiary of NaturEner USA, LLC.

[16] The Sellers however contend that the Capstone entities should remain as named defendants as they are affiliated or contractually bound entities, being the assignees of rights, obligations and interests in the SPA. Specifically, NaturEner Wild Rose 1 Energy Inc., NaturEner Wild Rose 2 Energy Inc., and NaturEner Prairie Home 2 Energy Inc. were assignees from NaturEner of not just the assets of the Projects but the interests and obligations under the SPA (which assignment also continued to bind the assignor, NaturEner, to the same obligations). As such, the Sellers assert when NaturEner then sold all issued and outstanding shares in NaturEner Wild Rose 1 Energy Inc., NaturEner Wild Rose 2 Energy Inc., and NaturEner Prairie Home 2 Energy Inc. to Capstone Infrastructure Corporation on November 2, 2021, each such company was transferred with not just the assets and interests under the SPA, but also the obligations.³ NaturEner continued to share responsibility for the obligations under the SPA pursuant to its assignment provisions. Capstone Infrastructure Corporation then subsequently assigned the assets of Wild Rose 2 to the newly formed, wholly owned Wild Rose 2 Wind LP, adding it to the parties that are bound to the SPA obligations under the SPA assignment provisions. The Sellers also argue that the Company should not be removed from the litigation, as it is a party to the Closing Note (a promissory note described below).

³ The Sellers assert NaturEner Energy Canada Inc. (NaturEner) transferred the corporate assets related to the WR2 Project from West Windeau into a new corporation named “NaturEner Wild Rose 2 Energy Inc”. The corporate assets related to the WR1 Project remained in West Windeau, which was renamed “NaturEner Wild Rose 1 Energy Inc”. Both corporations remained wholly owned by NaturEner.

The shares of NaturEner Wild Rose 1 Energy Inc. and NaturEner Wild Rose 2 Energy Inc. were transferred to Capstone Infrastructure Corporation on or around November 2, 2021. The Defendant WR One Portfolio Corp is the direct corporate successor of West Windeau and NaturEner Wild Rose 1 Energy Inc. The Defendant WR2 Holding Corp is the direct corporate successor of NaturEner Wild Rose 2 Energy Inc. As such, NaturEner no longer has any ownership or control over the corporations or the Projects. By at least November 2022, NaturEner did not have any ongoing projects at all.

In around late 2022, Capstone announced that it was the new owner of the WR2 Project, and that the assets of the WR2 Project had been transferred into a newly formed, wholly owned subsidiary, the Defendant, Wild Rose 2 Wind LP.

Res Judicata

[17] NaturEner, on behalf of the Applicants (defendants to Action #2), filed a summary judgment application in Action #2, which application was heard in April 2024 and dismissed, but appealed, which appeal is Application #2 before this Court. NaturEner submits a decision in Application #1 could render the appeal of Application #2 largely moot. Application #1 was heard by me before Application #2, however, Application #2 was heard by the Applications Judge prior to Application #1 before me.

[18] The Plaintiffs submit that Application #1 is a replication of the request to interpret the same provisions of the SPA. As such it is almost entirely *res judicata* of Application #2 and therefore should be dismissed on that basis.

[19] NaturEner submits that, while Action #1 engages mostly different issues from Action #2, there is some overlap. Further, NaturEner notes there are duplicative claims for Success Fees for Wild Rose 1 in both Actions #1 and #2, which cannot be permitted.

[20] I find that although there are some different parties to the two different actions, each of the plaintiff and defendant groups' legal interests are largely aligned or derivative (privies) with the respective plaintiff or defendant group in the other action. Further, there is a risk of having different interpretations of the same provisions of the SPA applied in these separate cases with similar participants. While the Applications Judge's decision was not final to the ultimate determination, it was intended to be final to the appropriateness of summary judgment. The extent of the duplication of damages claims, and the overlap of the issues and determinations in the two Applications will be considered further below.

Application #2 before the Applications Judge

[21] On May 9, 2023, the Applicants (defendants to Action #2) applied for summary dismissal of Action #2. The Applicants posed a number of issues for consideration. The issues and positions taken by each of the parties is summarized as follows:

(a) Whether the Sellers' claims for Success Fees are contractually barred.

The Applicants assert they are barred on the basis that both the

- i) obligations to proceed diligently and expeditiously with the development and implementation of the Projects, and
- ii) the obligation to pay a Success Fee,

ended either two or five years after the Closing Date of the SPA, long before the commencement of Action #2.

The Sellers dispute this interpretation of the contract, and argue these obligations are perpetual.

(b) Whether the Sellers' claims for Success Fees are statute barred pursuant to the *Limitations Act*.

The Applicants assert that, pursuant to the *Limitations Act*, there can be no claims for conduct or obligations owing prior to August 3, 2020: two years prior to the filing of the claim for Action #2. Assuming there are no ongoing obligations regarding the

development and implementation of the Projects or to pay Success Fees beyond the 2 or 5 years, the Applicants argue these claims would automatically be statute barred. Even if there were any ongoing obligations of NaturEner regarding efforts towards development and implementation, the Sellers would have been well aware of this long before August 3, 2020, which again renders this claim statute barred.

The Sellers instead interpret the obligation to pay the Success Fee as perpetual. They understand the “**Construction Commencement Date**” (meaning notification to a contractor to commence construction on the respective Project) was achieved with respect to Wild Rose 2 in September 2022, which triggers the Success Fee applicable to that Project. The claim was filed within the two-year limitation period of that date. Further, to the extent that the Plaintiffs are successful in Action #1, the resulting obligation of NaturEner to pay the Success Fee in Action #1 must flow through Action #2 to ensure joint and several liability of all assignees or parties culpable in the oppressive conduct and/or fraudulent preference.

The Sellers also appear to be arguing that the obligation of NaturEner to diligently pursue development and implementation continue and the right to claim for failing to do so renews with the ongoing failures.

- (c) Whether the action against the defendants named in Action #2, other than NaturEner should be dismissed.

NaturEner asserts that a) since the obligations under the SPA ended either after two or five years from the SPA closing, there are no obligations for which such other defendants could be responsible; and b) NaturEner did not assign any obligations under the SPA to any of these parties, thus they are not caught by the assignment provisions.

The Sellers argue a) the obligations under the SPA continue perpetually for each of the Projects, and b) the transfer of the Project assets or shares must be understood as an assignment of the rights and obligations under the SPA in breach of the obligation to obtain the consent of the Sellers.

- (d) Whether the Applicants could be liable for fraudulent conveyances either under *Fraudulent Preference Act* or the *Statute of Elizabeth*, or for oppression under the *Alberta Business Corporations Act*, or is such claim hopeless.

- i) The Sellers plead that NaturEner’s transfer or conveyance of assets to NaturEner USA, LLC, and to any assignees including any defendants in Action #2, constitutes a fraudulent conveyance and/or fraudulent preference under the *Fraudulent Preferences Act*, R.S.A. 2000 c. F-24, and the *Statute of Elizabeth*, 1571 13 Eliz 1-c5. They allege that NaturEner intended to delay, hinder or defraud them as creditors by making NaturEner insolvent or otherwise unable to satisfy amounts owing under the SPA, including any judgment in Action #1 or Action #2. In the alternative, they allege that NaturEner USA, LLC and/or the other defendants had knowledge of NaturEner’s fraudulent intent.
- ii) The Sellers further allege that NaturEner’s abandonment of Wild Rose 1, sale of Wild Rose 2 to a third party, and transfer of the proceeds to NaturEner

USA, LLC amounted to a disposition of substantially all of NaturEner's Canadian assets and fundamentally changed or destroyed the nature of NaturEner's business.

- iii) The Sellers also allege oppression. They say NaturEner assigned its interests in the Projects to subsidiaries or third parties without the Seller's consent and without regard to NaturEner's outstanding obligations to them under the SPA. On that basis, they plead that NaturEner's conduct was oppressive, unfairly prejudicial to, and unfairly disregarded their interests. They also rely on NaturEner's failure to confirm that it has sufficient assets to satisfy any obligation determined to be owing, and on NaturEner USA, LLC's stated intention to sell all or substantially all of its United States assets, which they say would further erode their ability to recover any amounts awarded in either action.
- iv) The Applicants respond that these claims cannot succeed. They say the Sellers must establish either that the conveyance was made with intent to defeat or prejudice a creditor, or that the conduct was oppressive to a stakeholder. The Applicants deny that the Sellers have standing because, on their interpretation of the SPA, there are no ongoing payment obligations or amounts owing and therefore the Sellers are not creditors or stakeholders. They further argue that, even if the Sellers had standing, any creditor relationship could only be with NaturEner, and possibly NaturEner USA, LLC, because there is no privity of contract with the other defendants.
- v) The Sellers reply that they are, or have been, potential or actual creditors of the defendants since either the issuance of the Statement of Claim in Action #1 on or about June 24, 2009, or the commencement of Action #2. They allege that the Project transfers were made without regard to outstanding SPA obligations, that those obligations were or ought to have been known by the affiliate assignees, and that the transfers unfairly prejudiced and disregarded the Sellers' interests.
- vi) The Sellers also allege that NaturEner moved proceeds from the sale of the Projects to NaturEner USA, LLC for grossly inadequate consideration, and that NaturEner USA, LLC is in the process of divesting its United States assets. They say these steps were taken to hinder or defraud them as creditors and to impede their ability to enforce any judgment in Action #1 or Action #2.
- vii) Finally, the Sellers rely on the *Statute of Elizabeth* and submit that intent may be inferred from the circumstances, including badges of fraud. They say the transfer of substantially all of NaturEner's assets to related entities, for inadequate consideration, is indicative of fraud. Alternatively, they say that if NaturEner was solvent before the transfers but became insolvent as a result, the transfers are voidable. They add that no evidence has been provided regarding NaturEner's assets and liabilities.

[22] The relief sought by the Applicants before the Applications Judge was to strike the claims for oppression and fraudulent preference or grant summary judgment with respect to those

claims, and to grant summary judgment in whole or in part of the remaining claims, and such other relief as the Court allowed. The Applications Judge declined to grant any such relief.

Applications Judge's Decision in Application #2

[23] In a four-page Endorsement (the “**Endorsement**”), Applications Judge Farrington dismissed the summary judgment application. Regarding a strike application, he notes this type of application requires him to presume the facts plead are true. Thus, the ability to strike depended on contractual interpretation and he determined he could not interpret the contract as requested without more of a factual matrix. Regarding the summary judgment application, he similarly decided that he did not have a sufficient record to give him confidence that he could resolve the contractual interpretation question and issues between the parties fairly at that point in the litigation.

[24] He notes that the litigation is at an early stage, with no Part 5 Questioning or document production. The defendants’ affiant made bald assertions, details sought were objected to by counsel, and the affiant did not have first-hand knowledge of certain key facts.

[25] He declined to decide on any of the issues regarding preference, assignment, limitations, and oppression as they are all fact dependent. The Applicants did not meet the burden proving entitlement for dismissal on the balance of probabilities, and in particular, whether the balance of the original Purchase Price set out in the SPA (and which included the Success Fee) must be paid on the closing of a transaction (the nature of which is not well known) with a third party.

[26] Despite the Applicants suggesting the agreement (the SPA) speaks for itself in supporting their position, the Applications Judge found he required more information, however, he preferred the interpretation of the Sellers. He declined to rule on the same as it was not required to dismiss the strike and summary judgment applications. He determined there are issues of merit requiring a trial.

APPLICATION #2

Issues in Application #2

[27] Before this Court, NaturEner, on behalf of the Applicants (defendants to Action #2), now the “**Appellants**”, brings an appeal of the decision of Applications Judge Farrington’s summary dismissal determination regarding Action #2.

[28] The issues on appeal are whether:

- a) the Applications Judge failed to engage with the limitations defence, which the Appellants say is completely dispositive of the claim with respect to Wild Rose 1,
- b) the Applications Judge failed to engage in the exercise of contractual interpretation, erroneously concluding that:
 - i) there was an insufficient factual matrix;
 - ii) NaturEner’s evidence was insufficient to support summary judgment;
 - iii) post-agreement conduct is relevant to understanding the parties’ objective intent at the time of the contract;

iv) the disputed contract provisions could not be interpreted by looking at the contract as a whole; and

v) to determine whether the obligation to pay the Success Fee is contractually barred, it is necessary to determine whether NaturEner complied with its obligations to develop the Projects.

Standard of Review

[29] An appeal from an Applications Judge is an appeal *de novo*. As the parties to this appeal are not seeking to introduce any new evidence, the review of an Applications Judge’s decision is essentially a correctness review on the existing record: *Alberta Rules of Court*, Alta Reg 124/2010 (the “Rules”), rule 6.14(3); *Fitzpatrick v College of Physical Therapists of Alberta*, 2018 ABQB 989 paras 12 to 16, aff’d on other grounds 2020 ABCA 164; see also *Lesenko v Wild Rose Ready Mix Ltd*, 2024 ABKB 333 at paras 14 and 15. The question is whether the Applications Judge’s decision should stand in light of the record and the issues raised on appeal.

Appropriateness of Summary Judgment Process

[30] Both parties rely upon *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49, as the foremost authority on modern summary judgment in Alberta, which in turn derives from the Supreme Court of Canada’s paradigm-shifting decision in *Hryniak v Mauldin*, 2014 SCC 7.

The Law of Summary Judgement

[31] Pursuant to rule 7.3(1)(b) of the *Rules*, a defendant may apply for summary judgment on the basis that there is no merit to a claim, or part of it.

[32] The proper approach to determine whether a matter is appropriate for summary judgement is set out by Justice Slatter JA in *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49, at para 47:

The proper approach to summary dispositions, based on the *Hryniak v Mauldin*, 2014 SCC 7 test, should follow the core principles relating to summary dispositions, the standard of proof, the record, and fairness. The test must be predictable, consistent, and fair to both parties. The procedure and the outcome must be just, appropriate, and reasonable. The key considerations are:

- a) Having regard to the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis, or do uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial?
- b) Has the moving party met the burden on it to show that there is either “no merit” or “no defence” and that there is no genuine issue requiring a trial? At a threshold level the facts of the case must be proven on a balance of probabilities or the application will fail, but mere establishment of the facts to that standard is not a proxy for summary adjudication.
- c) If the moving party has met its burden, the resisting party must put its best foot forward and demonstrate from the record that there is a genuine issue requiring a trial. This can occur by challenging the moving party’s case, by

identifying a positive defence, by showing that a fair and just summary disposition is not realistic, or by otherwise demonstrating that there is a genuine issue requiring a trial. If there is a genuine issue requiring a trial, summary disposition is not available.

d) In any event, the presiding judge must be left with sufficient confidence in the state of the record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute.

To repeat, the analysis does not have to proceed sequentially, or in any particular order. The presiding judge may determine, during any stage of the analysis, that summary adjudication is inappropriate or potentially unfair because the record is unsuitable, the issues are not amenable to summary disposition, a summary disposition may not lead to a “just result”, or there is a genuine issue requiring a trial.

[33] The Applications Judge assessed whether he could fairly resolve the issues between the parties on the basis of the record, or whether uncertainties in the record or the law reveal a genuine issue requiring a trial. He further considered whether the Applicants had proven their case on the balance of probabilities. He found the record was not sufficient at that point, nor had the Applicants proven their claim on a balance of probabilities.

[34] The Appellants state that the test is more than just whether there is evidence that discloses a triable issue, but whether there is an issue of “merit” that genuinely requires a trial: **WP v Alberta**, 2014 ABCA 404 at para 26, leave to appeal to SCC refused, 36285 (30 April 2015). They assert that the Applications Judge failed to consider that this case was in fact appropriate for summary judgment as the key documents required to interpret the provisions in question were all before the Court: namely, the SPA, the Letter of Intent (“**LOI**”) that proceeded it, and the key evidence regarding the commercial context in which NaturEner acquired the Company’s shares. Evidence beyond that, especially post-agreement conduct, would do little to surmount the primacy of those two documents (the SPA and LOI) in resolving the limitations issue. They argue this case is ripe for summary determination.

[35] I agree that the brevity of reasons provided by the Applications Judge may have resulted in some confounding or obscuring of the rationale behind dismissing the summary judgement application outright. It appears the Applications Judge found the record before him was not sufficient to allow him to properly address the factual matrix in understanding the commercial context in which the contract was formed. The commercial context forms part of the contractual interpretation process in assessing what survival period was objectively intended for the obligations set out in section 7.6 of the SPA and the payment of the Success Fee. The Applications Judge found instead there were genuine issues to be addressed at trial.

[36] Even had the Applications Judge been able to engage in such interpretive process, as will be explained further below, regardless of the period of survival of these provisions, the entire claim could not be dismissed. The Applications Judge addresses the absence of evidence regarding the failure of NaturEner to perform its obligations under the covenants. As I understand his reasons, even accepting the 2- or 5-year limitation of these obligations as advocated by the Appellants, the covenants could still be relevant (and the Success Fee payable regarding Wild Rose 1) if the Plaintiffs are successful in Action #1 based on the insufficiency of NaturEner’s conduct in the two or five years since the Closing Date. Any such liability of NaturEner in Action #1 is potentially carried through the claim in Action #2 to ensure that the

assignees were jointly and severally liable pursuant to the assignment terms in the SPA. This is what I understand the Applications Judge to mean in part by referring to Action #2 as an evolution in the claim. Without being able to determine whether the claims in Action #1 would succeed, the Applications Judge could not determine if the claims in Action #2 still had life. I acknowledge that the Applications Judge did not expressly state this, and the reasons are not completely fleshed out.

[37] What he does say is “whether or not NaturEner Canada Inc. complied with its development obligations is an important part of the analysis, because it determines which part of the Success Fee definition is applicable.” [*Endorsement* page 3.] This could mean, if Action #1 is successful, damages as a remedy for such breach flow through to Action #2. Alternatively, it could mean that he would interpret some of the Success Fee definition as perpetual, while others were time bound. He seems to suggest the second interpretation in stating “If part of the Success Fee definition depends on time parameters, and part does not, that would appear to be an indication as to what was intended.” [*Endorsement* page 3.] I agree that there is a lack of clarity in this meaning and it expands rather than limits the issues for resolution.

[38] Despite the Appellants stating evidence relating to formation of the contract was present, I note little evidence regarding the commercial context in which NaturEner acquired the Company’s shares was provided by the Appellants. Some information regarding the Province’s electrical transmission capacity was provided, but not much beyond that. This left primarily the LOI and the SPA to find the meaning of the SPA terms, which the Applications Judge appears to not have found sufficiently clear. Below, I will address the sufficiency of the SPA alone in interpreting the contract terms, and failing that, the SPA together with the LOI.

[39] With respect to the claims regarding Wild Rose 2 and achieving the Construction Commencement Date for that project in 2022, the Applications Judge found the contract was unclear on whether the obligation to pay the Success Fee continued after the interests in the Project had been transferred (even if the assignment was in contravention of the permitted assignment provisions).

Analysis

[40] The volume of materials and state of the record are relevant to whether summary judgment is appropriate: *Parks v McAvoy*, 2022 ABQB 294 at paras 31 and 33, appeal of parts of order allowed in part, 2023 ABCA 211. Here, the record contains thousands of pages, multiple and overlapping issues, and questions that go to the heart of the trial, including whether the covenants were breached. In those circumstances, summary judgment is less suitable, particularly where Part 5 disclosure has not yet occurred. The Plaintiffs characterize the Applications as a “trial in a box”, where NaturEner is asking the court to decide the entirety of the claim on its merits based on a mountain of documents (but only those documents that assist the Appellants’ case). Such an application is beyond the intention of the summary judgment process.

[41] The Applications Judge found the Appellants failed to meet the burden on a balance of probabilities. He was not satisfied with the evidentiary record to summarily dismiss. While I agree with his conclusion regarding whether summary dismissal could be granted, given the brevity of his reasons, I find it is not possible to assess the correctness of the reasons. For this reason, much of the following analysis will be *de novo*.

[42] By way of summary conclusion, I agree that much of the requested relief rests on the interpretation of whether a “Success Fee” was owing under Action #1 for Wild Rose 1; and whether it is an ongoing contingent liability for Wild Rose 2. Without making those determinations, it is not possible to summarily dispense with most of the claims in Action #2.

[43] Our Court of Appeal in *ConocoPhillips Canada Resources Corp v Shell Canada Limited*, 2024 ABCA 307, at para 19 notes:

Reasons need not address every piece of evidence and every argument, and parties are not entitled to a decision of a certain length simply because they put voluminous materials before the court.

[44] I find, however, that some of the claims, issues and contract provisions raised in the summary judgment application can be further addressed, limited or interpreted. In arriving at the conclusions the Applications Judge did without describing more of the process in arriving at those conclusions, the parties are deprived of further judicial guidance to assist them in these actions. Before me, the parties sought any narrowing of issues and any other guidance the Court could provide in progressing these actions. The parties are facing potentially 20 years of discoverable documents (which, depending on how section 7.6 is interpreted, may ultimately be irrelevant), numerous issues and overlapping actions. Any issues the Court can narrow will assist all parties in the ongoing development of these Actions. I will address each ground of appeal.

a) Barred by the Limitations Act

[45] The relevant provision of the *Limitations Act* is section 3(1)(a), which grants immunity to a defendant for a claim if the claimant does not seek a remedial order within 2 years after the date on which the claimant first knew, or in the circumstances ought to have known:

- (i) that the injury for which the claimant seeks a remedial order had occurred,
- (ii) that the injury was attributable to conduct of the defendant, and
- (iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding.

[46] The limitations issue in both Actions #1 and #2 focuses on when the injury (assuming there is one) arose and when the claimant first knew or ought to have known of it.

[47] The plaintiffs assert in their Statement of Claim for both Actions that NaturEner materially breached the SPA. Specifically, they state it breached section 7.6 with respect to both Projects for failing to use “reasonable best efforts” to contact wind turbine suppliers and to proceed diligently and expeditiously with the development and implementation of the Projects with a view to achieving a trigger date (the Construction Commencement Date) on or before set target dates. Further, it breached section 7.6 of the SPA with respect to Wild Rose 1, by failing to use “reasonable best efforts” to place a purchase order for wind turbines. I refer to these covenants collectively as the “**conduct covenants**”. As remedy, they claim the Success Fees set out in section 7.6 that specifies the damages payable for such a breach (ref. section 9.3).

[48] In Action #2, the Sellers further allege that the Construction Commencement Date was subsequently achieved in September 2022 for Wild Rose 2, and thus, they claim the Success Fee

for that Project from all parties that are jointly and severally liable under the assignment provisions under the SPA.⁴

[49] There are two avenues to this basis for summary dismissal put forward by the Appellants:

- 1) whether the claims regarding the conduct covenants fail due to the covenants expiring 2 or 5 years after the closing of the SPA, thus being well out of time, and/or
- 2) if the conduct covenants continue, whether they are nonetheless statute barred as the injury for which the Sellers seek a remedial order had occurred more than two years prior to the filing of the Statement of Claim.

1. When do the conduct covenants in Section 7.6 expire?

[50] The first issue is whether the conduct covenants in section 7.6 expire after two or five years. The Applicant asks the Court to determine that question as part of its summary dismissal application. More specifically, the Applicant asks the Court to conclude that the obligations in section 7.6 can be clearly interpreted as limited to either two or five years. Although determining that issue may go beyond what is strictly necessary to decide the summary dismissal application, simply finding a triable issue would provide little practical assistance given the breadth of the litigation and the scope of disclosure the parties may face.

[51] I will therefore address the interpretation of section 7.6 in the context of the SPA as a whole. That analysis is also relevant to the other grounds of appeal concerning contractual interpretation addressed below. The relevant SPA provisions are reproduced verbatim in Appendix 1 to this Decision.

The Law of Contract Interpretation:

[52] To determine the meaning of the contract, the Court must ascertain the parties' objective intention at the time the contract was made, applying the principles of contractual interpretation: **Sattva Capital Corp v Creston Moly Corp**, 2014 SCC 53 at para 49. The question is what a reasonable person would have understood the words of the agreement to mean, reading the contract as a whole and from the factual matrix: Geoff R Hall, *Canadian Contractual Interpretation Law*, 4th ed (Markham: LexisNexis, 2020) at 2.5.1. The words used are to be given their ordinary meaning, consistent with the surrounding circumstances known to the parties at the time of formation, and disputed terms are to be interpreted in the context of the agreement as a whole: **Sattva** at paras 47-48; **Tercon Contractors Ltd v British Columbia (Transportation and Highways)**, 2010 SCC 4 at para 64, [2010] 1 SCR 69.

[53] The Appellants argue that commercial contracts should be interpreted in accordance with sound commercial principles and good business sense: **Resolute FP Canada Inc v Ontario (Attorney General)**, 2019 SCC 60 at para 79, [2019] 4 SCR 394; **Scanlon v Castlepoint Development Corp**, [1992] OJ No 2692 at para 89, 1992 CanLII 7745 (ONCA), leave to appeal

⁴ They claim that NaturEner assigned its rights and obligations as Purchaser under the SPA to various affiliates who are now jointly and severally liable with it to pay these fees. Additionally or alternatively, NaturEner assigned the SPA to a third party in contravention of the assignment provisions of the SPA. None of these claims would be statute barred under the *Limitations Act* based on the arguments advanced in Application #2, unless the underlying obligations in section 7.6 were statute barred.

to SCC refused, 23427 (August 5, 1993); **ConocoPhillips Canada Resources Corp v Shell Canada Limited**, 2019 ABQB 727 at para 127, appeal dismissed, notwithstanding finding the reasons of the chambers judge insufficient, 2024 ABCA 307. Courts consider commercial efficacy because “a commercially reasonable result likely more accurately reflects the intention of the contracting parties than one that makes little commercial sense”: **Rosenberg et al v Securtek Monitoring Solutions Inc**, 2021 MBCA 100 at para 105. It is an exercise in determining what the parties objectively intended having regard to the entire written text, relevant contextual background and commercial context.

[54] The Sellers argue, the objective of the court is not to find the most commercially reasonable interpretation, but the one that is plainly supported by the wording of the agreement based on clear and unambiguous language, and if necessary the circumstances surrounding the entering into of the agreement: **Sattva** at para 57.

[55] Both parties’ statements of the law are generally accurate, but they emphasize different aspects of the interpretive exercise. Canadian courts interpret contracts using a practical, common-sense approach directed at identifying the parties’ objective intentions. The contract must be read as a whole, and the words used must be given their ordinary and grammatical meaning in light of the surrounding circumstances known, or reasonably knowable, to both parties at the time of contracting. Those circumstances may assist in understanding the commercial purpose, background, context, and relationship between the parties, but they cannot overwhelm the text or be used to create a new agreement: **Sattva** at paras 47 to 48 and 57 to 58; **IFP Technologies (Canada) Inc v EnCana Midstream and Marketing**, 2017 ABCA 157 at paras 88 and 89.

Application

[56] Section 7.6 requires that NaturEner (itself or through the Company) utilize reasonable best efforts to do three things following Closing, subject to certain limitations. Paraphrasing, section 7.6 says:

NaturEner shall:

- (a) (i) contact a reasonable number of entities generally considered within the Alberta electric industry to be reputable suppliers of wind turbines; and
- (ii) place a purchase order with such supplier for the purchase and delivery of wind turbines for Wild Rose 1, for delivery at the earliest reasonable possible time.

Obligation 7.6(a)(ii) is subject to:

- (A) the retention by the Company of all Licences (including the approval by the AEUB of a needs identification document in respect of Wild Rose 1), and all real property rights required for the ownership and operation of Wild Rose 1;
 - (B) availability of wind turbines at prevailing market prices; and
 - (C) NaturEner’s satisfaction, acting reasonably, that such supplier can supply such turbines within an appropriate timeframe to the Wild Rose 1 site;
- and

- (b) utilize reasonable best efforts to proceed diligently and expeditiously with the development and implementation of the Projects, with a view to the Company issuing a final and irrevocable notice to its contractor to commence with the construction of a Wild Rose 1 or Wild Rose 2 Project on or before the target dates set out in paragraph (a) of the definition of "Success Fee".

Obligation 7.6(b) is subject to:

- (i) any Governmental Body ...taking any... action permanently restraining, enjoining or otherwise prohibiting the Company from proceeding with the development and/or implementation of either or both of the Projects;
- (ii) NaturEner determining, acting reasonably, that the economic viability of the Projects (or any of them) have been materially and negatively impacted as a result of any change, condition, event or development (including a prospective change, any change that arises as a result of or from a change in Applicable Law and any change, condition, event or development generally affecting the Alberta electric industry), except any such change, condition, event or development (A) expressly contemplated by the SPA, (B) to which NaturEner (in the case of a representation, warranty or covenant herein from the Sellers) has consented in writing, or (C) caused after the date hereof by NaturEner or any of its Affiliates; or
- (iii) an event of Force Majeure prohibiting or restraining NaturEner or the Company from proceeding with the development and/or implementation of the Projects (or either of them).

[57] The reference to Licenses in 7.6(a)(ii) includes the approval by the Alberta Energy Utility Board (AEUB) of a needs identification document ("NID") for Wild Rose 1 pursuant to section 34(1) of the *Electric Utilities Act* (Alberta). Licenses is a defined term under the SPA.

[58] Section 9.3(c) states the only remedy available to the Sellers for any breach or non-performance by the Purchaser of any Section 7.6 covenants is the right to payment referred to in paragraph (a)(ii) of the "Success Fee" definition. The formula specified in that paragraph is equivalent in value to the highest Success Fee calculation for Wild Rose 1 found in subsection (a)(i)(A) of the Success Fee definition set out below.

Expiry Two Years Post-Closing

[59] The Appellants assert that the covenants in section 7.6 of the SPA, including the obligation to use "reasonable best efforts to proceed diligently and expeditiously with the development and implementation of the Projects," extended only for 24 months after closing. Therefore, by August 10, 2009, NaturEner's covenants in that regard were over. They further assert the obligation to pay a Success Fee extended for roughly five years, but only if a Construction Commencement Date arose. They state any new claims for Success Fees are long over.

[60] NaturEner relies on the survival period in section 6.2 of the SPA. Paraphrased, section 6.2 provides that the representations and warranties, and any covenants of NaturEner not fully performed at or before Closing, survive Closing for the duration of the Survival Period, notwithstanding Closing or any investigation made by or on behalf of the Sellers.

...representations and warranties and, to the extent they have not been fully performed at or prior to August 10, 2007, the covenants of NaturEner,... shall survive the Closing of the transactions contemplated [in the SPA] for the duration of the Survival Period, notwithstanding such Closing nor any investigation made by or on behalf of the Seller[s].

The “Closing” refers to the completion of the purchase and sale as contemplated in the SPA on August 10, 2007. The definition of Survival Period is found at section 1.1 of the SPA, subsection (a) of which states:

"Survival Period" means:

- (a) for all representations and warranties of the Sellers or the Purchaser set forth in this Agreement, other than those listed in *Sections 4.6, 4.7, 4.8, 4.12, 4.14 and 4.27*, a period of 24 months following the Closing Date;

Subsections (b) and (c) are not relevant to the evaluation.⁵

[61] The definition of Survival Period does not refer to covenants. That creates a tension between the definition and section 6.2. NaturEner submits that “covenants” must be read into the definition because section 6.2 expressly refers to them. I do not consider the omission of the word “covenants” from the definition to be so readily dismissed.

[62] The difficulty with NaturEner’s narrow interpretation of the Survival Period is that it cannot have been intended to apply to every covenant that remained unfulfilled at Closing and was not expressly excluded by section 6.2. On that interpretation, for example, the covenant to pay the Success Fee would also terminate after two years. That would mean the payment covenant in section 7.6 expires before the expiry of time periods expressly contemplated in the Success Fee definition itself.

[63] The “**Success Fee**” definition is set out in full in Appendix 1, however, for simplicity, it is broken down into the following categories:

- (a) For Wild Rose 1: where [NaturEner] has materially complied with its covenants in *Section 7.6*, if the Construction Commencement Date occurs:
 - (i) (A) on or prior February 28, 2009, [a calculation is set out with the highest Success Fee payment possible]

⁵ They address the unlimited survival period for the *Sellers’* representations and warranties in *Sections 4.6, 4.7, 4.8, 4.12 and 4.14*, dealing with representations about the clear and unencumbered ownership by the Sellers of the Company shares, and the authorized share capital, share structure and rights that accompany each class of shares of the Company prior to the transfer contemplated in the SPA; that no other agreement to purchase the Company shares exists and no other party has an option or right to purchase or be issued share in the Company; and the survival period of the *Sellers’* representations and warranties in *Section 4.27*, regarding outstanding or potential tax issues.

- (B) after February 28, 2009 and on or prior to February 28, 2010, [a calculation is set out with the second highest Success Fee payment possible]
- (C) after February 28, 2010 and prior to a Call Option Closing Date for Wild Rose 1, [a calculation is set out with the third highest Success Fee payment possible]
- (ii) where the Purchaser has failed to materially comply with its covenants in Section 7.6, and amount equal to [the same calculation as for the highest Success Fee in (a)(i)(A) above is set out].
- (b) For Wild Rose 2: if the Construction Commencement Date occurs prior to a Call Option Closing Date in respect of Wild Rose 2, [a single calculation is set out, which is not tiered to the timing of when achieved].

[64] The “**Construction Commencement Date**” simply means, for each respective Project, the date the Company issues a final and irrevocable notice to a contractor to commence with the construction of that Project.

[65] The “**Call Option Closing Date**” (defined in 10.4) is more complex (and will be addressed further below), however, it essentially cannot occur unless the Company has failed to issue notice of the commencement of the construction of the Project(s) five years after the Closing Date, after which the Sellers have an option to repurchase the Project(s).

[66] Subsection 7.6(a)(ii) sets out that the Success Fee for failing to materially comply with the covenants in section 7.6 regarding Wild Rose 1 is payment of the highest available Success Fee. There is no similar provision for Wild Rose 2. As previously mentioned, however, section 9.3(c) of the SPA dealing with limitations of liability states that the remedy for the breach of any covenants in section 7.6 is the Sellers’ right to the payments referred to in paragraph (a)(ii) of the definition of “Success Fee”. Arguments for how this limitation provision works in light of the circumstances of this case have not been made.

[67] As noted above, applying a two-year survival period to all SPA covenants would cause the section 7.6 conduct covenants to expire before certain periods expressly contemplated by the Success Fee definition. For example, the final Wild Rose 1 period in subsection (a)(i)(C) does not begin until after February 28, 2010, after the two-year Survival Period advanced by NaturEner would have expired. Subsection (a)(i)(B) likewise continues until February 28, 2010. It is difficult to reconcile that interpretation with the inclusion of Success Fee calculations for periods during which, on NaturEner’s interpretation, no fee could become payable.

[68] Similarly, the date set out in subsection (b) of the Success Fee definition for Wild Rose 2 includes any date prior to a Call Option Closing Date, which cannot occur until 5 years after the Closing of the SPA.

[69] NaturEner argues that the covenant to pay the Success Fee continues for approximately five years, consistent with the definition of the Call Option Closing Date. It seeks to distinguish the duration of the section 7.6 conduct covenants from the duration of the payment obligations in the Success Fee definition. Section 6.2, however, does not draw that distinction. Nor does it make sense in the context. First, the Success Fee is not tied to completion of, or production from, a Project. It is tied to the commencement of construction, which would require development efforts of the kind addressed in the section 7.6 conduct covenants.

[70] Second, the Call Option granted to the Sellers is not triggered until five years after the Closing of the SPA. It is commercially unreasonable to expect that the Sellers could not exercise their option for five years from Closing if NaturEner's efforts to pursue development and operation could stop after two years. If NaturEner stopped acting diligently in pursuing these development efforts after two years, the Sellers would have to wait three more years before they could continue any development efforts on the Project(s), potentially negating any progress that had been made prior to the SPA and in the two years after its Closing.

[71] I do not accept NaturEner's attempt to imply different survival periods for the conduct covenants and the payment obligations in section 7.6. Section 6.2 does not support that distinction, and it is not apparent from the structure of the SPA. On the present record, I am not satisfied that the section 7.6 conduct covenants expired two years after Closing while the payment obligations under the same section continued for approximately five years.

[72] Conversely, however, I do not accept an interpretation advocated by the Sellers of section 6.2 that limits its application to only Articles 4 and 5 (Representations and Warranties).⁶ SPA Article 4 is entitled "Representations and Warranties of the Seller", and Article 5 is entitled "Representations and Warranties of the Purchaser". This is followed by Article 6 entitled "Survival of Representations and Warranties". A review of the provisions contained in Article 5 do not reference any covenants of the Purchaser. However, Section 6.2 specifically references the covenants of the Purchaser contained in the SPA and any document delivered pursuant to the SPA (thus not limited to those two articles).

[73] Article 7 of the SPA is entitled "Covenants" and includes various covenants of each party. A two-year limitation of the covenants only makes sense with respect to some, but not others, of the obligations set out in Article 7.⁷ It could apply, for example, the parties working together to file tax returns, the Purchaser retaining material contracts and other documents from prior to the Closing Date. It does not make sense with respect to retaining documents for tax purposes and other documents that by law are required to be held longer. It does not make sense with respect to the payment of the Success Fees or other covenants in section 7.6.

[74] A two-year limitation may be workable regarding NaturEner's obligation in section 7.5 to provide notice to the Sellers of the occurrence of a MOU Contingency Event (since that would need to occur prior to August 2009), but it does not make sense with respect to providing notice of an Interconnection Contingency Event. The SPA expressly contemplates an Interconnection Contingency Event could occur after the MOU Contingency Event, and if that payment amount obligation terminated after the two-year period, the Sellers would automatically lose a million dollars of purchase price consideration (which is also inconsistent with the initial payment consideration contemplated in the LOI, discussed further below).

⁶ The Sellers suggest that if section 6.2 was not in the SPA, the covenants would not be limited to 24 months, thus by adding section 6.2 in and stating "unperformed covenants shall survive the Closing" should not be read as imposing an expiry date on covenants. This however would suggest that the representations and warranties are also not limited to 24 months.

⁷ This includes at section 7.2 NaturEner retaining tax documents for a designated retention period and enabling the Sellers to copy or obtain the originals of such documents before it destroys or gives up possession of them. This retention period includes the period required by applicable laws, which in Canada is generally seven years for tax documents. It also includes a confidentiality covenant which presumably would not be limited to two years, although the contract references a separate Confidentiality Agreement that may address that issue.

[75] Beyond Article 7, the two-year limitation could not apply to any of the covenants of the Purchaser regarding the Call Option and payments required under that option addressed in Article 10; they are not even relevant until after at least five years post Closing. Specific reference is made to section 10.3(a) in which the Purchaser “covenants” to have unencumbered and good title to the Projects as of the Call Option Closing Date.

[76] The reference to covenants in section 6.2 cannot be consistently applied to all the covenants contained in the SPA. The Sellers argue the only interpretation of the reference to covenants in section 6.2 that makes sense is found in section 8.3. That section states:

The obligations of the Sellers to proceed with Closing are subject to the satisfaction of the following conditions, any or all of which may be waived in part or in whole by the Sellers:

- (a) [The representations and warranties of the Purchaser set forth in Article 5.]
- (b) Performance of Covenants and Agreements by Purchaser. The Purchaser shall have performed all covenants and agreements required to be performed by it under this Agreement on the date hereof and the Seller shall have received a certificate signed by an officer of Purchaser to such effect.

[77] If a condition was not satisfied at Closing but the parties nevertheless proceeded, the condition would ordinarily be waived. For that reason, applying a two-year post-Closing survival period to these performance covenants remains difficult unless section 6.2 is understood as preserving, for two years, claims that a covenant required to be performed at Closing was not properly completed despite being represented as complete.

[78] Section 6.2 does not expressly state that the representations and warranties, or any covenants read into that provision, expire at the end of the Survival Period. It states only that they survive for 24 months. Although expiry is often implied by defining a survival period, agreements commonly state expressly that a covenant, representation, or warranty expires at the end of that period. In the context of the SPA as a whole, the wording of section 6.2 is not clear.

[79] Given the foregoing analysis, and the possibility of drafting error, the survival period for post-Closing covenants must be assessed in the context of the SPA as a whole. Read in that context, I am satisfied that the parties did not intend the commitments in section 7.6—whether conduct covenants or payment obligations—to be limited to the two-year survival period in section 6.2. In contrast, I find they must have continued until at least the expiry of the Call Option period, which is five years and 90 days after the Closing Date, and possibly longer.

Expiry Five Years Post-Closing

[80] NaturEner argues that the covenants set out in section 7.6, and in particular the covenants to pay the Success Fees, expire around five years after the Closing. It comes to this interpretation by relying on the definition of the Call Option Closing Date and wording of the Letter of Intent that formed the framework for the SPA.

[81] NaturEner notes that commercial contracts should be interpreted in accordance with sound commercial principles and good business sense: **Resolute FP** at para 79; **ConocoPhillips (ABQB)** at para 127. It argues it does not make sense that the obligation to pay a Success Fee would be perpetual. It suggests this would be “absurd”.

[82] In contrast, the Sellers note that the Success Fee made up the most significant part of the Purchase Price for the Company. (By my calculation, roughly 68% to 79% of the total possible Purchase Price depending on what tier was achieved for Wild Rose 1.) They argue, it would not make commercial sense for them to sell the Projects without having the future possibility to share in the success of the Projects. Further, the one-time payment of the Success Fee per Project, while it could be anytime in the future, is not “absurd” as interpreted at law, it is not commercially unreasonable; it does not frustrate the overall scheme of the SPA or defeat the intentions of the parties entering into the SPA: *Canlanka Ventures Ltd v Capital Direct Lending Corp*, 2021 ABCA 115 at paras 31-32, citing *Consolidated-Bathurst v Mutual Boiler*, [1980] 1 SCR 888.

[83] The Sellers note there are many contracts which provide for a perpetual payment obligation, and this is not viewed as commercially unreasonable or absurd by the courts: *Jedfro Investments (USA) Ltd v Jacyk*, 2007 SCC 55 per McLachlin J. at para 34, [2007] 3 SCR 679; *Ghaili v Jordahl USA Inc*, 2022 ABQB 248 (aff’g Master) at para 65.

[84] The Appellants suggest that the longer they work at the Project, the greater their development costs would be and thus the less they would be able to pay for the Success Fee. This consideration, however, is reflected, at least in part, in the tiered payment rate of the Success Fee for Wild Rose 1. A further consideration is that the payment is not perpetual in the sense of continuous indefinite payments, rather it is a one-time completion payment due upon hitting a particular milestone, but perpetual in the sense of being potentially due anytime in the future without an end date for the completion of that milestone. It may be more accurately described as indefinite.

[85] At this summary judgement stage in the proceedings, the Court was not furnished with information about the revenue generating capability of these Projects, and what proportion the Success Fee would be in relation to that revenue over the lifespan of the wind farm. The Court was also not provided with information regarding the aggregate development costs, or how those costs would increase or decrease over the years. Presumably, the reason for the delays would play a factor in that assessment. This Court was not presented any information on the annual spend on development of these Projects over the years. Consequently, the Court does not have the requisite evidence before it to make necessary findings of fact as to the issue of the commercial absurdity of a perpetual payment obligation. No evidence has been provided to suggest that the payment of the Success Fee at any future time the Project became operational would render the economics of this venture unprofitable, unreasonable, or commercially impractical. The amount of the purchase price the Sellers would forego if the payment obligation terminated after five years is however a compelling consideration.

[86] Consistent with *Sattva* at paras 47-48; *Tercon* at para 64, I must base my interpretation on what a reasonable person would have objectively understood from the words of the document read as a whole, and giving the words used their ordinary meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. While surrounding circumstances can be useful in the interpretive process by deepening my understanding of the mutual and objective intentions of the parties as expressed in the words of the contract, they cannot be used to overwhelm or deviate from the words of the agreement, thereby effectively creating a different agreement: *Sattva* at para 57. As part of that assessment, I find there are other provisions within the SPA that are relevant to this assessment.

[87] Starting with the wording of the Success Fee definition itself, each of (a)(i)(C) and (b) refer to the circumstance of the Construction Commencement Date occurring “prior to a Call Option Closing Date” for the respective Project.

[88] The Call Option relates to the repurchase of one or both of the Projects, and not a repurchase of the Company itself. The “**Call Option Closing Date**” (defined in 10.4) essentially cannot occur unless, by five years after the Closing Date, the Company has failed to cause the commencement of the construction of the Project(s) that the Sellers wish to repurchase. The Sellers then have 90 days to make their election to exercise the option for the relevant Project (or both if neither has commenced construction and the Sellers so elect). If the Sellers elect to exercise the Call Option, the Sellers are given a maximum of 60 days to close the Call Option transaction unless NaturEner, at its option, instead chooses to extend the period of the Call Option for either or both of the Projects by one-year periods. If NaturEner extends the Call Option, for each year it does so, it pays 20% of the Success Fee for that Project (each 20% payment being a “**Repurchase Postponement Payment**”).⁸

[89] Assuming NaturEner did not elect to postpone the repurchase by the Sellers, the Appellants argue these provisions should be interpreted to mean that the obligation to pay the Success Fee ends at most five years and five months after Closing. After the five-year period, if no Construction Commencement Date occurs and the Sellers do not exercise their option within 90 days, they have 60 more days to close the repurchase and after that, the Success Fee payment period expires. If that is what was intended, however, the drafters could simply have worded the Success Fee provisions to refer a period in which the Construction Commencement Date occurs “prior to a Call Option Closing Date, or the expiry of any unexercised Call Option.” It does not say that. Rather, the SPA is simply worded such that the Success Fee is payable if the Construction Commencement Date occurs prior to a Call Option Closing Date (for the applicable Project).

[90] NaturEner argues the dates set out in the Success Fee definition is drafted in a pattern, and should be interpreted to mean “between” the start and end dates set out in each of the stated options. Applying such pattern, it argues it does not make sense for the last option to have no end date. I find this interpretation to be flawed however as, for Wild Rose 1, the first option is “on or prior to” (this is akin to saying any time before) a set date, and only the second option is clearly between two set dates. The interpretation of the third is in dispute. The construction of the provisions does not set out the pattern the Appellants are relying upon. Further, for Wild Rose 2, there is only one time reference and it is “at any time after the date hereof but prior to a Call Option Closing Date”. Again, this wording does not set out a pattern in the manner NaturEner suggests. This argument is not compelling and certainly not decisive.

[91] The final portion of section 7.6(b) requires NaturEner, or the Company, to use reasonable best efforts to proceed diligently and expeditiously with the development and implementation of the Projects “with a view to achieving the Construction Commencement Date on or before the target dates set out in paragraph (a) of the definition of ‘Success Fee’.” The purpose of the “on or before the target dates” wording is not entirely clear. At first glance, it is difficult to reconcile

⁸ The postponement payments (20% of the Success Fee) continue for each year the Call Option is extended. If the Project never reaches the commencement of construction, and the Success Fee is never paid out, the Sellers still can close the repurchase the Project at the end of the applicable postponement year and keep all the Repurchase Postponement Payments.

with interpreting the last period in the Success Fee definition as indefinite. The difficulty is not materially reduced, however, by assuming that the payment obligation ends approximately five years after Closing. If the intended target date was the period before the Call Option Closing Date, the provision could have said so directly. Read in context, I understand the wording as emphasizing the parties' preference that the Construction Commencement Date be achieved as early as reasonably possible within the tiered Success Fee structure. This wording does not substantially assist or detract from either proposed interpretation.

[92] There is a strong argument that, on the plain wording of the SPA, the Success Fee remains payable unless the Sellers exercise a Call Option, the applicable postponement periods have expired, and the Call Option Closing occurs. That interpretation is supported by the Repurchase Postponement Payment provisions. Section 10.3(b) provides that, if construction of a Project commences during a postponement period, "the Success Fee payable to the Sellers shall be reduced by the Repurchase Postponement Payments" (emphasis added). That wording contemplates a Success Fee remaining payable during postponement periods extending beyond the five-year-and-five-month period advanced by NaturEner.

[93] I recognize that there is a commercial basis to provide NaturEner a mechanism (the postponement payment) to prevent the repurchase of a Project if NaturEner is close to its construction and development. The mechanism is however available to NaturEner for five additional years. Further, the postponement does not negate the obligation to pay the Success Fee if construction commencement is subsequently achieved during the postponement period. If the Repurchase Postponement Payment was just a fee to prevent the transfer independent of the obligation to pay a continuing Success Fee, it could be a set dollar amount rather than being tied to the Success Fee.

[94] As structured, clearly the option of making a payment of the Success Fee for at least 10 years post-Closing made financial sense to NaturEner at the time of purchase, notwithstanding the ongoing and possibly mounting development costs. At that point, even if the Construction Commencement Date had not yet occurred, the full Success Fee would have been fully paid (through five Repurchase Postponement Payments of 20% each). It is not possible to assess whether ongoing development costs would have made paying the Success Fee beyond that period economically non-viable on this provision alone. The full payment of the Success Fee (through five postponements) even if no Construction Commencement Date occurs undermines the Appellants' argument that the payment of the Success Fee beyond a five-year period is "absurd".

[95] The Appellants paint the Call Option as a tool for the Sellers to encourage prompt construction commencement, as it creates an incentive for NaturEner to avoid the risk of the Call Option being triggered before the Construction Commencement Date occurs. The Appellants suggest it allows the Sellers the benefit of the development over five years without the risk. This argument is tempered however and the attractiveness of this tool is moderated by the price tag of exercising the Call Option, being a minimum repayment of the aggregate development costs of the Project, including all of the Purchase Price previously paid to the Sellers.⁹ Instead of

⁹ The Call Option acquisition price being the greater of:

- (a) the aggregate development costs incurred by the Purchaser and/or the Company in respect of the Project(s) selected for repurchase (including the Purchase Price); or
- (b) the fair market value of the Project(s) selected for repurchase, as determined by an independent third-party evaluator satisfactory to the Purchaser and the Calling Parties.

removing the risk from the Sellers of the development of the Projects, it requires the Sellers to hand over control of the development, its pace and the associated costs, all to NaturEner, and only be able to regain control of the Project(s) if it pays for all costs NaturEner expended. In that event, it is NaturEner that is made whole, not the Sellers. In light of this structure, the obligations set out in section 7.6 offer a more expedient compliance tool independent of the Call Option.

[96] The Call Option and associated provisions support an interpretation of an ongoing obligation to pay the Success Fee beyond five years from Closing.

[97] I also consider the definition of “Purchase Price”. The Success Fee is included as part of the Purchase Price; the Success Fee is not described as payable only “if applicable”, “if achieved”, or by other conditional language suggesting that it was merely an optional or time-limited component of the purchase consideration.

[98] Another relevant provision to the interpretation is the definition of the Closing Note. The Closing Note is a promissory note for the NaturEner (and the Company) to pay the Sellers specified amounts in three scenarios: a) for the occurrence of the MOU Contingency Event, payment of the MOU Contingency Amount, b) for the occurrence of an Interconnection Contingency Event, payment of the Interconnection Contingency Amount, and c) for the occurrence of the Construction Commencement Date in respect of the Wild Rose 1 or Wild Rose 2, payment of the Success Fee. This Closing Note is *not* described as being time limited in any way. It does not say it is payable only if a Construction Commencement Date occurs prior to a Call Option Closing Date or the expiry of the Call Option period. Neither is the definition of the Construction Commencement Date limited to occurring prior to a Call Option Closing Date (nor is it otherwise time bound). A review of the Closing Note itself suggests that the Success Fee payment provisions are not drafted to be time bound: if a Construction Commencement Date occurs, the Success Fee is payable.¹⁰ This Closing Note, as referenced in the SPA, which constitutes a promissory note (or promise to pay), is compelling evidence to interpret a perpetual Success Fee obligation.

[99] Conversely, if the payment obligation is interpreted as being perpetual, the Closing Note does not require a time limitation to avoid an ongoing payment obligation once a Call Option is completed. In the event the Call Option was exercised and the Project transferred back to the Sellers, payment under the Closing Note could not be triggered. The Success Fee is not payable unless it is triggered by a Construction Commencement Date. That date can only occur if the Company issues to a contractor engaged by it a final and irrevocable notice to commence with the construction of such Project. Once the Call Option has been exercised and the Project(s) re-

[Emphasis added.]

¹⁰ The wording of the Closing note is as follows:

FOR VALUE RECEIVED [Naturener] and [the Company] hereby promises to pay to [the Sellers] in satisfaction of the payment of the Purchase Price and the Outstanding Boileau Loan, respectively, the following amounts and in the following manner:

... (c) within 10 Business Days of the occurrence of the Construction Commencement Date in respect of the Wild Rose I Wind Farm or Wild Rose II Wind Farm, as applicable, the Company (in the case of (i) below) and the Purchaser (in the case of (ii) and (iii) below) shall pay to the Sellers the Success Fee, which shall be allocated for all purposes in the following manner:

The Sellers shall not be able to demand payment of any principal amount under this Promissory Note until such time payment becomes due and payable hereunder on the happening of one of the contingency events aforementioned.

acquired by the Sellers, the Company would no longer have a reason (or the authority) to issue such a notice for such Project(s).

[100] Consequently, the absence of a time limitation of the promissory note (Closing Note) does not make sense if the obligation to pay the Success Fee is limited to roughly five years and five months.

[101] Looking at all of these provisions in the context of the entire SPA, if the Court limits its interpretation to the four corners of the contract, the Court cannot make the determination that the Sellers' claim is contractually or statutorily barred at this time; there is genuine issue of interpretation for trial. This Court specifically finds that the Success Fee payments are not bound to a two-or five-year post-Closing period. Without limiting the trial judge's ultimate determination on this issue, there is a strong argument that the plain meaning of the words is that the Success Fee is payable (e.g. a perpetual obligation) unless the Sellers exercise (trigger) a Call Option, and the subsequent completion of the Call Option Closing Date as defined in the SPA (which Call Option was not exercised in this case). It is certainly not limited to two or five years from Closing.

Letter of Intent

[102] Reliance on the LOI in interpreting the SPA is expressly addressed in the SPA section 11.3 which states the SPA "constitutes the entire agreement and supersedes all other prior agreements and understandings, including the Letter of Intent, both written and oral, among the Parties with respect to the subject matter hereof".¹¹

[103] Notwithstanding that provision, and although the SPA alone may be sufficient for the Court to determine the intention of the parties, NaturEner refers to and relies upon the wording of the LOI between the parties signed in anticipation of the SPA to provide support for its arguments on the context of this agreement. NaturEner argues that the LOI is important to understanding the intent of the parties to the SPA.

[104] The LOI sets out in paragraphs 2 and 4 the Purchase Price in two forms: an "initial payment" at Closing, and a 'success fee' payment upon the commencement of construction on either of the projects at any time prior to the five-year anniversary of the Closing (emphasis added). It goes on to explain the calculation of the success fee for each Project.

[105] The LOI also contains wording similar to the SPA regarding the Call Option provisions: if construction for a Project commences during a postponement period, the Success Fee payable to the Sellers is reduced by the Repurchase Postponement Payments. The Repurchase Postponement Payment language is materially the same in the LOI and the SPA, although the Success Fee language is not. In the LOI, the success fee is expressly payable only if construction commences within five years of Closing. The fact that the SPA did not carry forward that express five-year limit weighs against reading such a limit into the SPA. At the same time, because the "payable to the Sellers" wording in the Repurchase Postponement Payments provision also appears in the LOI notwithstanding its express five-year limit, that wording carries

¹¹ The LOI contemplates that NaturEner's counsel will prepare the eventual SPA which shall be the definitive agreement between the parties. Neither party raised the principle of *contra proferentem*.

less interpretive weight in the SPA in finding a longer than five-year period was intended than it might otherwise have had.

[106] If then the Court looks beyond the contract for its interpretation, the entire LOI must be considered. The SPA differs from the LOI in many material respects, including:

- The Success Fees in the SPA for Wild Rose 1 are tiered depending on when the Construction Commencement Date begins, which is not true in the LOI.
- In the SPA, the initial payment of the purchase price is significantly reduced (to roughly a half of the LOI amount) and two other payments are introduced that occur after the Closing. The combination of the initial payment and those two new payments in the SPA is roughly the same as the initial payment under the LOI. The result is that roughly half of the initial payment is deferred and conditional in the SPA.
- One of those newly added amounts in the SPA, the MOU Contingency Amount, requires an agreement between the Company and a third-party independent system operator to have occurred that enables the Projects to achieve commercial operation in the calendar year 2009. If the Company fails in reaching such agreement this by that date, the Sellers forego \$1 million of the purchase price unless the Interconnection Contingency event occurs prior to that date. If all payment obligations were to end five years after Closing, and neither of these events would have yet occurred (which are in the control of the Company and third parties, not the Sellers), under the SPA purchase price structure, the Sellers lose half the initial payment contemplated in the LOI.

[107] I recognize that both of these deferred payments were subsequently paid to the Sellers in this case. That is not the point. The parties did not know that at the time of signing the SPA, or it would not be worded as a conditional payment. If the Success Fee payment obligation was limited to five years, there is no explanation of why this enhanced risk of loss of half of the initial purchase price is borne by the Sellers. This risk is even more curious when one considers that part of the deferred payments goes towards retiring the loan already outstanding from the Company to Mr. Boileau. Thus, if the deferred payments were not achieved, the purchase price would not even cover the outstanding loan to the Sellers.

[108] The question, then, is why the Sellers would have accepted greater exposure to development risk in the SPA than under the LOI without receiving something in return. One possible explanation is that the SPA provided a longer period—beyond five years—for the Success Fee to become payable. On that interpretation, if the Construction Commencement Date was eventually achieved, the MOU Contingency Amount and Interconnection Contingency Amount would effectively be recovered through the Success Fee calculation, because amounts already paid to the Sellers, including those contingency payments, are deducted from the Success Fee.

[109] Thus, if the Success Fee were a perpetual expectation, the Sellers would eventually receive the full initial purchase price they expected (i.e., all of the initial payment anticipated in the LOI) regardless of whether these deferred payments were paid, but only if the Project(s) achieve(s) the Construction Commencement Date. Commercially, it is more understandable that the Sellers would risk potentially foregoing half of the initial payments in the near term, expecting they will recoup those amounts later when the Construction Commencement Date is achieved, even if it is years in the future (not just five years from Closing). This is not the only

possible interpretation, but is the one that aligns with “sound commercial principles and good business sense”. No other compelling rationale has been suggested.

[110] It also makes more commercial sense that, given all of the Project development and initiative are in the hands of others, including NaturEner, the Sellers would not jeopardize the majority of the purchase price due to the slower than anticipated progress in the Projects.

[111] The LOI viewed as a whole, and in comparison with the differences from the ultimate SPA, supports the Success Fee payment in the SPA was not limited to 5 years (and was possibly intended to be perpetual) at least as much as it supports a five-year limitation of that obligation. In light of the strong indications in the SPA (including the wording of the Closing Note as discussed above) of a Success Fee payment obligation that is not limited to a 5-year period, and further given the entire agreement provision in section 11.3 of the LOI, I am reluctant to rely too heavily on the LOI.

Commercial Context during the Formation of the Contract

[112] As noted, the Applications Judge did not address the factual matrix surrounding the SPA. There were several material terms that changed between the LOI and the SPA which indicates the parties turned their minds to negotiation prior to finalizing the agreement. The record before me contains little evidence on the commercial context or the reasons the payment structure changed from the LOI to the SPA. NaturEner’s witness had no personal knowledge of contract formation, having joined NaturEner USA, LLC after the SPA was signed. The evidence of Mr. Boileau regarding the LOI upon which the Appellants seek to rely is not determinative, and of minimal assistance.

[113] NaturEner has now twice asked the Court to interpret the disputed SPA provisions on the existing record. I proceed on the basis that NaturEner has advanced the evidence it says is material to that exercise. I am satisfied that the record is sufficient to interpret the section 7.6 payment obligations for the purpose of deciding whether summary dismissal is available. It is not, however, appropriate to finally determine the issue of duration of the Success Fee covenant on this summary application. For present purposes, I do not accept NaturEner’s position that the Success Fee payment obligations are limited to two years, or to approximately five years and five months after Closing. Rather, the SPA terms support the conclusion that those obligations were intended to continue beyond that point. There is a strong and substantive argument that the Success Fee payment obligation is perpetual (indefinite) subject to the occurrence of a Call Option Closing Date. Whether the Success Fee obligations are perpetual, or subject to some other meaningful endpoint – beyond five years - better supported by the SPA, ultimately remains for the trial judge to determine.

Conclusion

[114] Upon a review of the SPA, taken as a whole, and considering the ordinary meaning of the words employed within it, I find no two-year expiry of the conduct covenants in section 7.6, including the obligation to develop and implement the Projects. Nor is there a two-year expiry of the Success Fee payment obligations.

[115] I also find no five-year, or five-year-and-five-month, expiry of the Success Fee payment obligations (i.e., that the obligation ends upon the Call Option Closing Date). Although the LOI referred to payment within five years, the SPA does not impose that limit. Read as a whole, there is a valid argument that the SPA should be interpreted such that the Success Fee is payable when

the Construction Commencement Date is achieved, unless the relevant Project has been transferred back to the Sellers through a completed Call Option or the fee has effectively been paid through Repurchase Postponement Payments. Despite the entire agreement clause in the SPA, this argument is equally supported if one considers the SPA in conjunction with the LOI taken as a whole, and in the absence of evidence of the commercial context suggesting otherwise.

[116] Other than to find it is not limited to two years post-Closing and must extend to at least five years post-Closing, the finding regarding the non-expiry of the conduct covenants does not provide the parties much clarity in assessing the period for which disclosure is required regarding NaturEner's conduct, or the validity of conduct covenant-based claims filed in Action #2 that do not relate to Action #1.

[117] I am not at this juncture making a specific determination as to how long the conduct covenants continue beyond the first five years. The way the SPA is drafted, however, there does not appear to be an obvious basis to distinguish the duration of the conduct covenants in section 7.6 from the payment covenants in the same section. The wording section 7.6 already contemplates various reasons that NaturEner could stop pursuing the development and implementation of the Projects, including the non-availability of wind turbines at prevailing market prices; inability to secure a reliable wind turbine supplier in the required timeframe; force majeure; permanent restraining action by a governmental authority to impede such development or implementation; and even a determination by NaturEner (acting reasonably) that the economic viability of the Projects have been materially negatively impacted (other than caused by NaturEner or contemplated in the SPA). This wording suggests natural limits imposed within the conduct covenants themselves, not based on a time limitation.¹² It precludes however NaturEner unilaterally electing not to pursue the development and implementation of the Projects without one of these objectively valid reasons.

[118] On the other hand, aside from the wording of section 7.6 itself, compared to provisions addressing payment of the Success Fees, there are fewer indicators to rely upon an interpretation of the duration of the conduct covenants. As discussed above, there are compelling reasons to interpret the Success Fee payment obligations as continuing until, at a minimum, after the Call Option(s), and any postponements thereof, have expired, and possibly indefinitely.

[119] Even applying the higher standard described at paragraph 26 of **WP**, the duration of the section 7.6 conduct covenants and the Success Fee payment obligations beyond five years remains an issue of merit that genuinely requires a trial. The claims therefore cannot be summarily dismissed on the basis that those obligations expired within two years, or within approximately five years of Closing. Accordingly, the scope of the claims may be better addressed through the statutory limitations analysis and, where appropriate, case management.

[120] When resolving the covenant duration issue at trial, the trial judge will also need to consider the effect, if any, of the two standstill agreements on the survival, suspension, or enforcement of those obligations.

¹² The cost consequences with respect to failure to comply with the section 7.6 conduct covenants are contained within the Success Fee definition itself and appear to be limited to the Success Fees payable for Wild Rose 1. This is another naturally limiting feature of the section.

a) Are claims barred due to the injury occurring more than two years prior?

[121] Although I do not accept NaturEner's position that the conduct and payment covenants expired after two or five years, it remains necessary to consider whether any alleged injury was discoverable more than two years before Action #2 was commenced. This discussion does not address claims that flow from Action #1; those claims are considered in the analysis of Action #1 below. To the extent the Action #1 claims remain live, whether they may be advanced through Action #2 against NaturEner and the additional defendants arising from the Capstone acquisitions is addressed in the section below entitled "Sale of Shares of Entities with Interests in the Projects".

[122] In Action #2, the Sellers allege acts and omissions breaching the section 7.6 conduct covenants in the years leading to the sale of the Projects, in addition to the transfer of the Projects. NaturEner instead argues that any conduct predating August 3, 2020 is statute barred.

[123] Several matters may affect this analysis: whether there was a new breach of section 7.6 obligations, whether any conditions precedent to section 7.6 were not yet satisfied, and whether the later sale or transfer of the Projects constituted a distinct breach. Additionally, the concept of a continuous breach requires some further discussion.

i) Continuous Breach

[124] An argument raised by the Sellers is that the failure to fulfil the conduct covenants is a continuous breach. The case authorities do not treat every ongoing consequence of a breach as restarting the limitation period. The question here is not whether damages continued after a discrete breach, but whether the alleged failure amounts to a fresh of a continuing contractual obligation (i.e. a continuous breach): namely, an ongoing failure to take contractually required steps on an ongoing basis.

[125] Ontario courts accept a rolling or continuous breach analysis for contractual limitations cases, most notably in *Pickering Square Inc v Trillium College Inc*, 2016 ONCA 179. In *Pickering Square*, the tenant covenanted to operate its business in the premises continuously, and the Court held that each day the tenant failed to operate gave rise to a fresh cause of action and a fresh two-year limitation period.

[126] Like the *Pickering Square* case, the present case deals with an allegation of NaturEner's failure to comply with a specific contractual covenant.

[127] The Ontario authorities support beginning the analysis by characterizing the alleged breach. The categories are generally as follows:

- 1) a failure to perform a single obligation due at a specific time, which ordinarily gives rise to one claim when performance was due;
- 2) a failure to perform obligations that arise periodically, such as quarterly deliveries or payments, where each missed performance may give rise to a separate breach and claim; and

- 3) a breach of a continuing contractual obligation, such as a covenant to operate a business continuously — “at all times” — for the duration of a lease.

Pickering Square at para 26, citing Dixon J. of the High Court of Australia in **Larking v Great Western (Nepean) Gravel Ltd (in Liquidation)** (1940), 64 CLR 221 (HCA), at p 236¹³. A rolling limitation period arises only where the defendant owed and breached distinct periodic obligations or a true continuing obligation to maintain a contractual state of affairs, such that the cause of action is repeatedly renewed.

[128] Alberta courts have adopted the Ontario rolling or continuous breach analysis for contractual limitations cases, assessing whether the breach is: (1) a “once and for all” breach, (2) a periodic breach, or (3) a continuing breach: **Fernandes v Jennings Capital Inc**, 2016 ABQB 594, at para 79, see also paras 80 – 86 for a discussion of the applicable principles¹⁴. A continuing breach is described by way of example as where a:

... covenant is to maintain a state or condition of affairs, as, for instance, maintaining a building in repair, keeping the insurance of a life on foot, or affording a particular kind of lateral or vertical support to a tenement, then a further breach arises in every successive moment of time during which the state or condition is not as promised, ...

Fernandes at para 83 citing **Larking** at p 236.

[129] Justice Jeffries in **Fernandes** noted the similarities in the legislative frameworks of each of Alberta’s *Limitations Act*, SA 1996, c L-15.1 and Ontario’s *Limitations Act, 2002*, SO 2002, c 24, on the relevant provisions, sufficient to apply the same principles to both, resulting in a continuously renewing limitation date, at paragraph 83:

Under s 3(1)(a) of the *Limitations Act*, after discovery of the continuous breach, the two-year time limitation recommences anew every day that the breach endures. The Plaintiff is “entitled to claim damages for the breach...for the period going back two years from the commencement of its action” (**Pickering Square** at para 38).

¹³ **Larking v Great Western (Nepean) Gravel Ltd (in Liquidation)** (1940), 64 CLR 221 (HCA), at p 236:

If a covenantor undertakes that he will do a definite act and omits to do it within the time allowed for the purpose, he has broken his covenant finally and his continued failure to do the act is nothing but a failure to remedy his past breach and not the commission of any further breach of his covenant. His duty is not considered as persisting and, so to speak, being for ever renewed until he actually does that which he promised. On the other hand, if his covenant is to maintain a state or condition of affairs, as, for instance, maintaining a building in repair, keeping the insurance of a life on foot, or affording a particular kind of lateral or vertical support to a tenement, then a further breach arises in every successive moment of time during which the state or condition is not as promised, during which, to pursue the examples, the building is out of repair, the life uninsured, or the particular support unprovided.

The distinction may be difficult of application in a given case, but it must be regarded as one depending upon the meaning of the covenant. It is well illustrated by the construction given to the ordinary covenant that premises will be insured and kept insured against fire. Such a covenant is interpreted as imposing a continuing obligation to see that the premises are insured, so that the covenant cannot be broken once for all, but, on the contrary, failure to insure involves a continuing breach until the omission is made good.

¹⁴ In **Fernandes v Jennings Capital Inc**, 2016 ABQB 594, a claim was brought on the basis of an ongoing repurchase obligation pursuant to an unanimous share purchase agreement, however, in that case, the USA specified the timeframe for when the repurchase had to occur, being within 9 months of the former employee’s resignation: at paras 13, and 72, thereby classifying it as a once and for all breach, at para 88. No similar express deadline for the completion of the conduct covenants is specified in this case.

[130] Rolling limitation periods for contracts in the context of periodic payments have been recognized at our Court of Appeal in: *Halter v Standard Life Assurance Company of Canada*, 2014 ABCA 57 at paras 13 to 15, and *Pedersen v Soyka*, 2014 ABCA 179, at paras 17, 22 to 24, and 38 to 39; and at the Supreme Court in *Ravndahl v Saskatchewan*, 2009 SCC 7 at para. 22, [2009] 1 SCR 181.

[131] Perhaps because of the number of issues raised on this Application, neither party fully addressed the authorities concerning ongoing breaches or their application to the facts of this case. NaturEner's position rested primarily on its submission that any relevant obligation expired two or five years after Closing. I have not accepted that position. The Sellers rely on specific contractual covenants that they say required ongoing performance, subject to the conditions in section 7.6, and that were continuously breached by NaturEner's ongoing failure to perform. That characterization may fall within the rolling-breach analysis, with the limitation period renewing while the breach continues. It will be for the trial judge, on a proper record, to determine whether the impugned conduct constituted a single breach, multiple breaches, or a continuing breach of the conduct covenants. On the present record and the existing authorities, there is no basis to summarily dismiss the Sellers' claims relating to the conduct covenants on limitations grounds.

[132] In addition to the possible finding of a continuing breach resulting in a daily restarting of the limitations period, there are also the three circumstances mentioned above that could apply to certain portions of the claim in this case such that the relevant limitations period does not commence two years after the Closing. These three circumstances are: a new breach of section 7.6 obligations, unfulfilled conditions precedent that subsequently are fulfilled and therefore trigger the requisite conduct, and a distinct breach, such as through the sale or transfer of the Projects.

ii) New Breach

[133] As a condition of the Standstill Agreement, NaturEner agreed to provide the Plaintiffs updates on the progress of the Projects, which it did from October 31, 2011 to April 30, 2018. In his affidavit, Mr. Boileau referenced receiving these Project updates "to ensure that they were being advanced at a reasonable pace, on the understanding that the Success Fee would become payable upon the triggering of the eventual Construction Commencement Dates". NaturEner's position is that the reports were provided as requested by the Plaintiffs in an attempt to find another means of resolution to Action #1, and not because there were ongoing obligations under the SPA.

[134] The standstill agreement and the subsequent Project reporting could arguably be understood as a re-engagement by NaturEner with its section 7.6 obligations, assuming those obligations continued and assuming NaturEner had previously failed to meet them. If the alleged breach of the conduct covenants is not ultimately characterized as a rolling breach giving rise to a daily renewing limitation period, a later failure to perform those same covenants could potentially constitute a new breach and start a new limitation period, provided the covenants had not expired by that time.

[135] If the alleged breach of the conduct covenants is not treated as a continuing breach, but the covenants themselves had not expired, the limitation analysis may turn on whether NaturEner later either re-engaged with, or continued to perform, its section 7.6 obligations and then failed to perform them. NaturEner argues that, even on that footing, the Sellers had two years from

discovery of the alleged breach to commence Action #2, plus the 75-day suspension of limitation periods arising from the COVID-19 pandemic. NaturEner argues in that circumstance, the Sellers knew or ought to have known of the alleged breach by July 1, 2019, thus the latest they could have commenced the claim was October 15, 2021. Action #2 was not commenced until August 3, 2022. Subject to the two considerations addressed below, being unfulfilled conditions precedent and violation of assignment provision, that would place out of time any Action #2 claim based on an alleged material breach of the section 7.6 conduct covenants, other than claims carried forward from Action #1 related to responsibility for payment of any damages awarded in that action.

iii) Unfulfilled Conditions Precedent

[136] Another consideration is any previously unfulfilled conditions precedent to the obligations in section 7.6.

[137] Whether a claim is statute barred may depend on when the conditions to the section 7.6 conduct covenants were satisfied. If a relevant condition was not satisfied until shortly before August 3, 2020 or later, the alleged breach may not have been discoverable earlier. I address some of the conditions precedent in the Application #1 analysis.

Sale of Shares of Entities with Interests in the Projects

[138] The sale of the Projects may also be a distinct breach from earlier alleged failures to develop the Projects. Depending on the interpretation of the assignment provisions, the transfer may constitute either evidence of non-compliance with the conduct covenants or a separate breach of the SPA (the assignment provision). I understand this is what was meant by the Sellers in the Statement of Claim that the sale by NaturEner of all its shares in the Projects demonstrated that NaturEner has effectively abandoned these Projects and failed to materially comply with the terms of section 7.6 of the SPA.

[139] The analysis of the claims regarding Wild Rose 1 and Wild Rose 2 are distinguishable.

Wild Rose 1

[140] The Appellants assert that the substance of Action #2 regarding Wild Rose 1 is largely repetitive of Action #1 and is *res judicata*. This I believe is a misunderstanding of what the basis of the claim is with respect to Wild Rose 1 in Action #2. Claims in Action #2 that merely duplicate Action #1 are not independently advanced. That does not preclude the Plaintiffs from seeking in Action #2 to enforce any damages awarded in Action #1 against defendants said to be jointly and severally liable as a result of an assignment of interests or otherwise.

[141] For Wild Rose 1, Action #1 already pleads breach of the section 7.6 conduct covenants. Action #2 is relevant to whether any resulting payment obligation was assigned or transferred to, or shared with, other defendants. If the Sellers intend to allege a distinct Wild Rose 1 breach in Action #2, it would be based on a continuing breach of the conduct covenants (if Action #1 was premature) or otherwise limited to the three scenarios listed above: a new breach, fulfilment of conditions precedent (which may negate the original claims in Action #1), or transfer to Capstone constituting a new breach. I note however that a claim relating to a previously

unfulfilled condition precedent that has not been specified in the pleadings would however be statute barred. I address the conditions of the conduct covenants in Part 3 of my analysis of Action #1 below.

[142] As Action #2 involves different plaintiffs than Action #1, Ms. Morys is not able to benefit from Success Fees that could be payable to the other Sellers as a result of NaturEner's failure to comply with section 7.6 with respect to Wild Rose 1 under Action #1 if that claim is successful. Damages in relation to that claim are limited to the three Plaintiffs to Action #1.

Wild Rose 2

[143] The conduct covenants set out in section 7.6(a) do not apply to Wild Rose 2. Any alleged failure regarding Wild Rose 2 must therefore arise under section 7.6(b). In Action #2, such a claim may depend on whether the obligation is properly characterized as continuing, whether a distinct breach occurred after August 3, 2020, or whether a relevant condition precedent was satisfied only on or after that date.¹⁵ The pleadings do not clearly identify a post-August 3, 2020 failure distinct from earlier alleged non-performance, apart from the possibility that NaturEner provided progress reports for many years before later failing to proceed. Nor do the pleadings clearly identify which conditions precedent, if any, were satisfied only within the relevant limitations period. The analysis is further complicated by the structure of the SPA, which appears to contemplate Wild Rose 1 proceeding first. These matters require a clearer record and focused submissions.

[144] The transfer to Capstone is significant because it bears on whether NaturEner or its affiliates would and could make further efforts toward construction, whether the assignment provisions were breached, and whether Capstone's subsequent quick progress with Wild Rose 2 sheds light on the diligence previously exercised.

[145] Action #2 also claims the Wild Rose 2 Success Fee on the basis that the Construction Commencement Date was achieved in or around September 2022. Mr. Boileau says he became aware from a July 3, 2023 news release that Bird Construction Inc. had been awarded engineering, procurement and construction contracts for two wind farms, including Wild Rose 2. In light of the determination that the Success Fee payment is not capped at two or five years, at this time, the Court cannot dismiss this aspect of the claim as being statute barred. The effect of the transfer of NaturEner affiliated entities holding interests in the Projects to a non-affiliated entity on the obligation to pay the Success Fee remains to be determined.

[146] It is worth noting that the parties, again potentially due to the number of issues addressed in these applications, did not make many submissions regarding whether the transfer of assets constitutes an assignment under the terms of the SPA. The Court does not know what specifically was transferred to the various entities or the terms pursuant to which they were transferred.

¹⁵In other words, near or after the limitations date of August 3, 2020 (bearing in mind that the Sellers would then need time to establish whether NaturEner was diligently pursuing those obligations or not).

[147] In summary, none of these claims raised in Action #2 can at this stage be dismissed on the basis that they are statute barred. There remain a number of issues of merit that genuinely require a trial.

Oppression and Fraudulent Preferences

[148] The Appellants argue that the Sellers are not creditors within the meaning of the applicable legislation. That argument depends, at least in part, on the premise that no Success Fee or damages for breach of the section 7.6 conduct covenants could remain owing under the SPA. I have not accepted that premise for the purposes of this application. Because the Sellers may have an arguable claim to a Success Fee or to damages arising from breach of the conduct covenants, the foundation for the oppression and fraudulent preference claims may differ from the way the Appellants framed it. My determination at this stage is therefore confined to whether those claims can be summarily dismissed on limitations grounds.

[149] For example, in the *Fraudulent Preferences Act*, section 5 defines creditors for certain sections of that Act as including: “a surety, and the endorser of a promissory note or bill of exchange, who would, on payment by the surety or endorser of the debt, promissory note or bill of exchange in respect of which the suretyship was entered into or endorsement was given, become a creditor of the person giving the preference within the meaning of sections 2 to 4.” The existence of the Note may relate to whether or not the Sellers fall within this definition.

[150] Similarly, at paragraph 31 of *Palechuk v Fahrlander*, 2006 ABCA 242, leave to appeal to SCC refused, 31672 (1 March 2007), the Court of Appeal interpreted what elements the claimant must establish to obtain a remedy under the *Statute of Elizabeth*. The five elements include that the party challenging the conveyance must be someone who was a “creditor at the time of the conveyance or someone with a legal or equitable right to claim against the transferor”.

[151] In resisting this characterization, the Appellants relied in several respects on their submission that the covenants expired after two or five years. I have not accepted these submissions, specifically, that there is a two-year limitation for the conduct covenants; rather these covenants continue to at least five years from the Closing Date, and possibly beyond. If the Plaintiffs succeed in Action #1, they may be creditors for the purpose of these claims. The analysis in question 4 of Application #1 below also addresses whether the conditions to the section 7.6 conduct covenants were satisfied, triggering the covenanted obligations.

[152] At a minimum, the Appellants cannot argue that no evidence has been adduced of the Sellers possibly falling into this definition. As oppression is one basis of the Sellers’ claim, the parties will also need to make submissions with respect to section 242(2) of the *Alberta Business Corporations Act*, RSA 2000, B-9, as to whether the Sellers fall into the definition of “creditor” or “security holder” under the ambit of that section in light of the Court’s determination regarding the survival period of these covenants.

[153] Noteworthy to the oppression claim is that the limitation period for such claims begins to run when the oppressive conduct terminates or the last act occurs *Seidel v Kerr*, 2003 ABCA 267; *Fernandes* at para 85. That Court notes, “the limitation period may define the time during which a remedy will be awarded, but does not eliminate the entire claim” (*Seidel* at para 54, citing *Amoco Canada Resources v Amax Petroleum of Canada*, 1992 ABCA 93). Thus,

oppressive acts that occurred outside of the two-year limitation period may be statute barred, but any act committed or continuation of oppressive conduct within the two-year period can still ground a claim: **Fernandes** at para 86.

[154] The Appellants also submit that, due to privity of contract, the Sellers cannot be creditors of any party other than NaturEner or NaturEner USA, LLC. That submission rests on the Appellants' assertion that there was no assignment of the SPA. As discussed below, the present record does not permit that issue to be resolved summarily. The assertion that there was no assignment is not supported by sufficient evidence, and the characterization of the transfers will likely ultimately depend on their legal effect rather than on the labels used in the transfer documents.

[155] It does not appear to be disputed that, before the sale to Capstone, the relevant transfers of assets and renaming of entities were to affiliates of NaturEner within the meaning of the SPA. NaturEner says it transferred only interests or assets in the Projects, and not obligations under the SPA. Whether that characterization avoids the assignment provisions is a live issue. The answer may depend on the nature of the transactions, the terms of section 11.12, and the extent to which rights, interests and obligations under the SPA were effectively transferred together. The Appellants' reliance on the absence of a novation or express acceptance by the Sellers does not, on this record, dispose of the issue. Capstone later acquired the NaturEner-affiliated entities by share purchase, and the legal consequences of that acquisition also remain to be determined.

[156] The discoverability of the oppression and fraudulent preference claims may depend on several matters, including the proper interpretation of the assignment provisions, the legal effect of Capstone's purchase of the shares of entities said to be assignees of SPA rights or obligations, and when the Sellers knew or ought to have known of the relevant transfers to third parties. The Sellers claim they first became aware of the Capstone transaction near the end of 2021, which is well within the two-year limitations period. On that basis, and without a more fulsome record, those claims cannot be summarily dismissed as statute barred.

[157] The Sellers also allege that NaturEner was effectively "hollowed out" through the transfer of all, or substantially all, of its assets. If that allegation is established, its legal significance will have to be assessed in light of the oppression and fraudulent preference claims. Further disclosure, including disclosure concerning NaturEner's current asset position and the consideration received for the impugned transfers, is required before that issue can be determined.

Parties to the Proceeding

[158] The request to strike defendants from the claim on a limitations or privity basis is denied. Much of the Appellants' position depends on the Court accepting a two- or five-year expiry of the section 7.6 conduct covenants or Success Fee obligations. I have not accepted that interpretation. At this stage, and without further disclosure about the transfers of the Projects, the alleged assignment of SPA rights and obligations, and NaturEner's asset position, I am not prepared to release any defendant, including Wild Rose 2 Wind LP.

[159] The Appellants also argue there is no privity of contract between the Sellers and any defendant other than NaturEner. That submission cannot be resolved on the present record. Section 11.12 of the SPA raises issues concerning transfers to affiliates, joint and several

liability, and transfers to non-affiliates without consent.¹⁶ There is also a live question whether NaturEner could transfer only benefits or interests in the Projects without corresponding SPA obligations. These matters require additional evidence, disclosure, and focused argument. They cannot be resolved on the bare assertion that no assignment occurred.

[160] The Applications Judge found that the Appellants' assertion that there had been no assignment rested on the bare assertion of a corporate representative. I agree. The evidence does not sufficiently explain the legal effect of the internal transfers, the later Capstone transaction, what Capstone knew or assumed, or whether the transferred entities remain subject to obligations under the SPA. Those issues are not suitable for summary dismissal on the current record.

[161] Nor does NaturEner's statement that it will honour any legal obligations resolve the concern that it may no longer have sufficient assets to satisfy a judgment. That issue remains relevant to the oppression and fraudulent preference claims and requires an evidentiary record, not [irrelevant] assurances.

[162] The Appellants also seek to have the Company released from Action #2. The case for keeping the Company in the litigation based solely on its role in the Closing Note appears tenuous. Its obligations under the note appear to be confined to repayment of the shareholder loan to Mr. Boileau, unlike NaturEner's broader obligations under the note, and I understand that obligation has been satisfied. However, the record does not yet permit the Court to determine the legal effect of the transfers of assets, development rights, or SPA obligations, or the application of the assignment provisions. For that reason, I decline to release the Company from Action #2 at this stage.

[163] I am similarly not prepared to release Wild Rose 2 Wind LP from Action #2 at this stage. The present record and submissions do not sufficiently explain its role, if any, in the transfer of Project assets, development rights, or SPA obligations. Further disclosure is required before the Court can determine whether Wild Rose 2 Wind LP is properly a party to these claims. These and related procedural issues may be addressed through case management following release of this Decision.

[164] Although the Appellants seek a narrowing of the claims where possible, the present record does not permit any of these claims to be dismissed on limitations grounds. Nor can the claims against any named defendant be summarily dismissed on the basis of privity of contract. The Appellants have not negated the possibility that the NaturEner affiliates to which the Projects, or related Project interests and assets, were transferred may be jointly and severally liable with NaturEner under section 11.12(b) of the SPA, or that those obligations were affected by the later Capstone share purchase. There is therefore a sufficient basis, at this stage, to maintain the claims against the named defendants. The request for summary dismissal is denied.

¹⁶ The SPA permits transfers to an Affiliate (broadly defined in the SPA) without notice to the Sellers, provided the assignees remain jointly and severally liable with the assignor for all the assignor's obligations under the SPA (section 11.12(b)). If the transfer is instead to a non-Affiliate, consent must be obtained from the opposing party, which can be withheld if there is a reasonable basis for doubting the financial creditworthiness of the assignee (section 11.12(a)).

2) Failure to Engage in the Exercise of Contractual Interpretation

[165] The Appellants also argue that the Applications Judge failed to engage in contractual interpretation. His reasons do not disclose much of his interpretive process, and in certain places it is unclear which provisions of the SPA the Applications Judge was addressing.

[166] My interpretation of the main provisions in dispute is provided above. Some issues have already been resolved in that preceding analysis. I address the remaining alleged errors in turn only to the extent they require separate comment.

- i) **Alleged Errors: Finding an insufficient factual matrix and**
- ii) **Finding disputed provisions cannot be interpreted by viewing the contract as a whole**

[167] These issues are closely tied and are addressed together here.

[168] The Applications Judge found the relevant SPA terms insufficiently clear, but did not identify the specific ambiguity. To the extent his reasons may be understood as discouraging reliance on other provisions of the SPA when interpreting the disputed provisions, I respectfully do not adopt that approach. The contract must be read as a whole: *Sattva* at paras 47-48; *Tercon* at para 64.

[169] I agree, however, with the Applications Judge that the evidence concerning the circumstances surrounding the acquisition of the Company and the formation of the SPA is sparse. The Appellants' contextual evidence came from a witness who had no personal knowledge of the contract formation, having joined NaturEner USA, LLC in 2008, after the SPA had been executed. Mr. Boileau's evidence, on which the Appellants also rely, is not determinative. Nor does the LOI, standing alone, resolve the interpretive issue given the material changes between it and the SPA and the SPA's express treatment of reliance on the LOI in section 11.3.

[170] Although a fuller factual matrix might have assisted, I am satisfied that the disputed provisions can be interpreted on the existing record by reading the SPA as a whole. NaturEner has repeatedly submitted that the contract can be interpreted on that basis. I have therefore proceeded accordingly.

- iii) **Alleged Error: Finding NaturEner's evidence was insufficient to support summary judgment**

[171] NaturEner argues that it met its obligations in the two (or five) years after the Closing, and even beyond that. They assert the Applications Judge failed to meaningfully interpret "reasonable best efforts", and that on the evidence presented, this standard was patently met.

[172] The Applications Judge did not err in finding NaturEner's evidence insufficient for summary dismissal. Without determining whether the Success Fee and related obligations continued, he could not eliminate the Wild Rose 2 Success Fee claim, potential liability flowing from Action #1, or the oppression and fraudulent preference claims.

[173] Although the sufficiency of NaturEner's conduct is addressed more fully in Application #1, the record before the Applications Judge was not sufficient to determine summarily whether NaturEner breached the relevant covenants. That question is central to the Wild Rose 1 Success

Fee issues raised in Action #1 and may also affect the claims advanced in Action #2. While the precise duration of the conduct covenants has not been finally determined, they continue beyond two years and may continue beyond five years, potentially for the same duration as the Success Fee payment covenant. The record was not sufficient to assess NaturEner's conduct across all potentially relevant periods. Whether such a breach occurred remains a genuine issue meriting a trial.

[174] Further evidence is required on several central issues: whether the conduct covenants were triggered, what steps NaturEner took to comply with them, what rights, interests, or obligations were transferred to other defendants, on what terms, and with what legal effect. The burden was on the Appellants to provide a record sufficient to justify summary dismissal. They have not done so.

[175] Whether NaturEner's conduct satisfies the "reasonable best efforts" standard, and whether the evidence filed on the summary dismissal application is sufficient to resolve that issue, are addressed in the analysis of Application #1 below.

[176] The evidentiary record is also thin on issues central to the oppression and fraudulent preference claims, including NaturEner's asset position, the adequacy of consideration paid in the Capstone transaction, the transfer of those funds to a related NaturEner entity,¹⁷ and whether NaturEner retains sufficient assets to satisfy any judgment in these Actions. A bare assurance that NaturEner will comply with any legal obligation is not evidence that it can do so.

iv) Alleged Error: Finding post-agreement conduct is relevant to the objective intent at contract formation

[177] The Appellants argue the Applications Judge erred in determining the post-agreement conduct is relevant to understanding the parties' objective intent at the time of the contract. In fairness to the Applications Judge, what he said is that "Post agreement conduct may or may not be relevant on the facts here, but a more fulsome factual matrix would assist." [Endorsement page 3.] I understand the comment to be related to the determination of whether the Success Fees and other obligations were intended to be time bound or indefinite, and as a response to the query of why NaturEner was continuing to provide the Plaintiffs progress updates on development of the Projects for many years after the period the Appellants alleged the obligations ceased.

[178] As addressed in the portion dealing with the appropriateness of summary judgement above, there was little evidence provided regarding the context around the contract formation. Further, the meaning of the relevant provisions of the SPA were not clear to the Applications Judge on a plain reading, however, he found the Sellers' position to accord more consistently with a "plain and ordinary meaning", at least at that stage without more context.

[179] The LOI does not resolve the issue. The SPA expressly supersedes the LOI, and the record does not explain the material changes between the two documents. In these circumstances, the LOI cannot displace or override the wording of the SPA.

v) Alleged Error: finding to determine whether the obligation to pay the Success Fee is contractually barred, it is necessary to determine whether NaturEner complied with its obligations to develop the Projects

¹⁷ For example, it must be more than nominal consideration per section 31 of the *Statute of Elizabeth*.

[180] I agree with the Applications Judge’s ultimate conclusion that NaturEner’s compliance with its development obligations remains relevant to whether the Success Fee claims are contractually barred.

[181] As discussed above, Action #2 depends in part on the outcome of Action #1. If the Plaintiffs in Action #1 establish a breach giving rise to a Success Fee or equivalent damages, the issue becomes whether that payment obligation is enforceable against any of the defendants in Action #2. That interplay makes NaturEner’s compliance with its development obligations relevant regardless of whether those obligations are ultimately found to have continued for two years, five years, or longer.

[182] If Action #1 results in damages or Success Fees payable, a further issue arises as to whether obligations under the SPA were assigned or otherwise transferred. The Applications Judge noted that the Appellants’ witness had no personal knowledge of whether the SPA had been assigned, despite her bare assertion that it had not. He found the Appellants had not met their burden on a balance of probabilities and was not satisfied that the evidentiary record permitted summary dismissal. I agree. Furthermore, the determination of whether an assignment occurred requires judicial determination even if the word “assignment” does not appear in the relevant transfer documents. On the present record, it remains unclear whether the assignment provisions of the SPA were triggered. If they were, assignments to affiliated entities could give rise to joint and several liability, and a transfer to a third party without consent could potentially constitute a breach of the SPA and engage the indemnity provisions.

[183] Knowing if there is a breach of the conduct covenants informs the Court as to whether the breach of section 7.6 is applicable independent of whether the Success Fee regarding Wild Rose 2 in response to the subsequent Construction Commencement Date is owing. Whether the section 7.6 conduct covenants were breached also informs the oppression and fraudulent preference claims. If the Sellers or Plaintiffs are potential creditors, the transfers and NaturEner’s asset position may matter. For the reasons already given, those claims cannot be summarily dismissed on this record. There is at least a triable issue on these claims. These are issues of merit that genuinely require a trial. The transfers are not denied, NaturEner’s asset-position evidence is incomplete, and the Appellants’ rebuttal evidence is sparse. I am not satisfied on a balance of probabilities that the oppression or fraudulent preference claims have no merit. I do not find a basis to summarily dismiss these claims.

[184] The defendants submit that Mr. Mindorff’s affidavit was filed late, is not probative of the issues before the Court, and discloses settlement communications that should not form part of the record. I have not relied on that affidavit, or referred to it, in reaching the determinations set out in this Decision. To the extent the affidavit contains settlement communications or a settlement offer, that material shall be struck from the record.

Disposition

[185] The appeal of the Application Judge’s findings is dismissed. Even at the higher standard set out at paragraph 26 of **WP**, there are triable issues related to all points raised by the Appellants. I uphold the finding of the Application’s Judge in declining to strike or summarily dismiss Action #2 in whole or in part.

[186] I find that the Success Fee payment obligations in section 7.6 are not limited to two or five years. The Sellers’ argument that these fees continue to be payable when the applicable

Construction Commencement Date is achieved (subject to the Call Option and Repurchase Postponement provisions) has merit as addressed above. I further find that the conduct covenants are not limited to two years. It is not clear that they expire five years after Closing. There are arguments that have merit that they continue for the same duration as the Success Fee payment covenant.

[187] The current evidence is insufficient to establish that the conduct covenants were satisfied to the requisite standard to allow a summary dismissal of the related claims.

[188] Based on these findings, it cannot be determined on the current record whether:

- a) The transfers of assets and interests, or share sales to various defendants other than NaturEner through the Capstone transaction was itself a breach of the SPA;
- b) The Plaintiffs are creditors or stakeholders, and otherwise satisfy the legislation to seek relief under any of the *Fraudulent Preferences Act*, the *Statute of Elizabeth*, or through the oppression remedies in the *Business Corporations Act (Alberta)*;
- c) The defendants to Action #2 other than NaturEner may be subject to liability for damages owing under Action #1, or are otherwise subject to facilitating relief pursuant to one of the above named statutes;
- d) There was a subsequent or continuing breach of the conduct covenants forming the basis of Action #2 or, if the conduct covenants continue for such period of time, the conditions precedent were satisfied such that the conduct covenants began during the relevant period prior to bringing Action #2; or
- e) Capstone achieving the Construction Commencement Date triggered Success Fee payment under that covenant.

Trial Management

[189] I recognize that the parties requested that the Court, where possible, assist in narrowing the issues for trial. Based on my interpretation of the SPA, and in the absence of a trial of an issue, I am unable to limit the precise duration of the Success Fee or conduct covenants. There is a basis to argue that the conduct covenants continue beyond five years, beyond the expiry of any applicable Call Option, and potentially until the relevant Construction Commencement Date is achieved. It is therefore appropriate that the defendants provide disclosure relevant to the conduct covenants for the period from NaturEner's acquisition of the Projects, directly or through affiliates, to the disposition of each Project through the Capstone transaction. I recognize that this leaves the parties in the unenviable position of potentially requiring disclosure of several decades.

[190] The following statement is *obiter*, however, to assist the parties in moving forward through the disclosure process, I make the following observations and recommendations. The position the Sellers have taken is that during the first standstill period they were receiving reports to ensure that progress was being made on the Projects, and that the first standstill agreement was terminated due to NaturEner's failure in that regard.

[191] One practical approach may be to require disclosure for the period up to the first standstill agreement, or to the first report generated after that agreement took effect, and then to resume disclosure for the period one to two years before the first standstill agreement ended. Although the standstill agreement may affect the limitations analysis, including any allegation of a continuing breach, this staged approach may provide a reasonable initial limit on disclosure that would otherwise be unwieldy.

[192] The reports provided during the standstill period may serve, at least initially, as a practical substitute for some disclosure from that period. That approach remains subject to NaturEner and the Company assessing whether relevant information exists that is not reflected in those reports and should be produced. Once the initial tranche of disclosure has been exchanged, the Plaintiffs or Sellers may, if necessary, apply for further disclosure from any years not yet produced.

[193] A second option for narrowing the issues is to direct a trial of an issue concerning the Capstone acquisition, specifically, whether the relevant transfers constituted an assignment under the SPA's assignment provisions. Such a trial would require a more complete evidentiary record regarding the Capstone acquisition, the earlier transfers within the NaturEner corporate structure, and likely evidence of the rights and interests held by each entity after those transfers in order to assess whether and what obligations also transferred.

[194] This litigation would benefit from case management. The parties may also wish to consider one or more trials of discrete issues to narrow the evidentiary record and focus the remaining issues. Such issues may include a final determination of the duration of the section 7.6 covenants and Success Fee payment obligations, and whether the Capstone transfers constituted an assignment under the SPA.

APPLICATION #1

Issues in Application #1

[195] Two preliminary issues arise in Application #1. The first concerns the admissibility and weight of certain evidence. The second concerns *res judicata*. I address the evidentiary issue first and return to *res judicata* after the issues are set out.

Permitted Evidence

[196] On the preliminary issue of permitted evidence, NaturEner objects to several parts of the record and asks that they be struck or given no, or limited, weight. For example, NaturEner submits that Ms. Morrison's affidavit should be struck because she confirmed that she did not have direct knowledge of the matters addressed and relied instead on information obtained from third parties. NaturEner also challenges the evidence the Plaintiffs characterize as expert evidence, including on the basis of the witness's qualifications and methodology. Although these evidentiary objections were raised, the parties asked that the application focus on the substantive issues. I therefore do not here address each objection. It is sufficient to state that I did not rely on the contested evidence in reaching the conclusions in this Decision.

Issues

[197] Beyond those preliminary issues, the issues before the Court in this case are:

- 1) When do the covenants in section 7.6 expire? Does the SPA impose a 2-year or 5-year limit on NaturEner's obligations under this section?
- 2) Is this matter appropriate for determination by summary judgment?
- 3) Are the Plaintiffs' claims limited to events preceding the filing of the Statement of Claim?
- 4) Did the covenants contemplated by section 7.6 of the SPA arise in light of the caveats contained in that section?
- 5) Does the Plaintiffs' claim that NaturEner is in breach of section 7.6 have merit or in the alternative, does it raise a triable issue?

Res judicata

[198] As discussed in detail in relation to Application #2, there is substantial overlap between the two applications, particularly in the interpretation of section 7.6 of the SPA and the duration of the covenants contained in that provision. Although Application #2 raises some issues that do not arise in Application #1, the applications share common questions and overlapping factual and legal considerations. To avoid inconsistent results and unnecessary repetition, I addressed Application #2 first. To the extent Application #1 raises the same questions concerning the interpretation of section 7.6 and the duration of the covenants, those determinations are *res judicata*. I therefore apply the findings and reasoning from Application #2 to this application. There remain, however, additional issues specific to Application #1 that may assist in narrowing the matters for trial. In considering those issues, I apply the same interpretation and reasoning concerning the duration of the Success Fee payment obligations and whether the conduct covenants are limited to two or five years.

Analysis

1. When do the covenants in Section 7.6 expire?

[199] For the reasons given in Application #2, I find that section 7.6 does not clearly impose the two- or five-year expiry periods advanced by NaturEner on either the conduct covenants or the Success Fee payment obligations. I apply that interpretation to Application #1. The Success Fee obligations are not limited to five years, and there is a substantive argument that they continue beyond the initial Call Option period, potentially until the applicable Construction Commencement Date is achieved, unless a Call Option is exercised and completed or the fee has otherwise been satisfied through Repurchase Postponement Payments.

[200] Similarly, this Court has found that it is not possible to definitively limit on a summary dismissal application the length of the conduct covenants of section 7.6 to two or five years. The conduct covenants continue beyond two years until at least five years and 90 days post-Closing,

however, there are clear arguments that these covenants continue for a longer period, potentially the same duration as the Success Fee payment covenants.

[201] The duration of these covenants is an issue this Court is unable to finally determine on the record before it. This is a genuine issue of merit requiring a trial (possibly in the form of a trial of an issue). For those reasons alone, until the duration of the covenants is finally determined, it is not possible to summarily dismiss Action #1 on the basis of this Summary Dismissal application.

[202] Relying on these findings, I consider the other issues before the Court in this application.

2. Is this matter appropriate for determination by summary judgment?

[203] NaturEner argues that the evidence available to the Court is a sufficient record to fairly resolve the issue with sufficient confidence. It submits that the documents filed with the Alberta Utilities Commission (the regulator that approves the Projects) is the best evidence available as to whether NaturEner discharged its obligations. Those records together with an understanding of the scope and nature of the covenants in section 7.6 of the SPA are sufficient for NaturEner to meet the burden, on a balance of probabilities, of establishing the Plaintiffs' claims have no merit and there is no genuine issue for trial. The obligations the Plaintiffs are insisting must be met are subject to conditions that did not arise, and therefore NaturEner was not required to meet them in the matter suggested by the Plaintiffs or at all.

[204] The Plaintiffs/Respondents instead argue NaturEner has refused to provide any Affidavit of Records or allow Questioning. It is the only party with the relevant information, and such denial is *prima facie* a basis to deny the application. Further, the conditions that NaturEner relies upon in not fulfilling its obligations existed prior to entering into the SPA and therefore do not fit within the exempted circumstances under the terms of section 7.6. Given the issues in dispute, the stage in litigation (and in particular the failure of NaturEner to provide an Affidavit of Records or allow for Questioning under Part 5 of the *Rules*), and the ongoing appeal in Action #2, the Plaintiffs argue that this is not an appropriate case at this stage for summary judgement.

[205] The law governing summary judgment is addressed in the analysis of Application #2 above. The same principles apply here. The question of whether the record is sufficient to permit a fair and just summary determination of each issue raised by NaturEner will be assessed for each issue.

3. Are the Plaintiffs' claims limited to events preceding the filing of the Statement of Claim?

[206] NaturEner argues that regardless of the termination date of the section 7.6 obligations, it did not fail to materially comply with the covenants in section 7.6 as of June 24, 2009, at the time the Plaintiffs filed the claim in Action #1. As such, any failures in meeting the covenants after that time are irrelevant to the claim.

[207] The Plaintiffs instead argue that they filed their claim prior to the two-year limitations period from the Closing of the SPA to ensure that there would be no limitations periods argued.

The breaches allegedly occurred prior to the filing date but continued beyond that date (and were continuing breaches), with respect to Wild Rose 1, to present day, and with respect to Wild Rose 2, until the project achieved the Construction Commencement Date in September 2022.

[208] The wording of the *Limitations Act* is relevant to this question. Section 3(1)(a) of the *Limitations Act* sets out the three conditions that must be satisfied to commence the limitations period:

3(1) Subject to subsections (1.1) and (1.2) and sections 3.1, 3.2 and 11, if a claimant does not seek a remedial order within

- (a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,
 - (i) that the injury for which the claimant seeks a remedial order had occurred,
 - (ii) that the injury was attributable to conduct of the defendant, and
 - (iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding,

or

- (b) 10 years after the claim arose,

whichever period expires first, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

[209] The Court of Appeal of Alberta has confirmed that the focus of the inquiry under section 3(1)(a) of the *Limitations Act* is on the injury, not the cause of action: ***Geophysical Service Incorporated v Encana Corporation***, 2018 ABCA 384 at para 31, leave to appeal to SCC denied, 38486 (23 May 2019). Section 3(1)(a) links immunity with the discoverability of the injury, not the discoverability of a cause of action for any injury: ***Gayton v Lacasse***, 2010 ABCA 123 at para 18. The “statute asks whether the *injury* (assuming liability) warrants bringing a proceeding. It does not ask whether the *particular* statement of claim suit (sic) which later was finally issued had warranted filing at the relevant time. It asks about whether some court proceeding had been warranted”: ***Boyd v Cook***, 2013 ABCA 27 at para 16 (emphasis in original); ***Geophysical*** at para 31. Discoverability pursuant to s 3(1)(a)(i) of the *Limitations Act* only requires the plaintiff have actual or constructive knowledge that the injury, loss or damage occurred: ***Grant Thornton LLP v New Brunswick***, 2021 SCC 31 at para 43, [2021] 2 SCR 704.

[210] An assessment of what constitutes injury in each case is fact specific. While the analysis of knowledge of the injury is the focus (rather than knowledge of a cause of action), what constitutes an injury or sufficient knowledge to inform oneself of having had an injury cannot be considered entirely independent from the cause of action upon which it is premised. Perfect knowledge of the injury, however, is not required: ***Peixeiro v Haberman***, [1997] 3 SCR 549, 1997 CanLII 325 (SCC); ***Hill v Alberta (Registrar, South Alberta Land Registration District)***, 1993 ABCA 75, leave to appeal to SCC denied, [1994] 1 SCR viii; ***Condominium Plan 9421549 v Main Street Developments Ltd***, 2004 CanLII 48788 (AB QB) at paras 55-56, 2004 ABQB 962; ***Ward v Taubner***, 2004 ABQB 565.

[211] In *Stack v Hildebrand*, 2010 ABCA 108 at para 14, the Court of Appeal notes that the principle of discoverability as it applies to section 3(1)(a) of the *Limitations Act* does not require perfect knowledge; however, mere suspicion is insufficient to trigger the running of the limitation period. Rather, the plaintiff can only be considered to have “known” of the claim when he has *some* factual support for his suspicion. While that is the timing of when knowledge commences for the purpose of section 3(1)(a) of the *Limitations Act*, the filing of the claim is not the end date of when further evidence ceases to be relevant.

[212] In the present case, the injury alleged was the failure of NaturEner to diligently pursue certain actions set out in section 7.6 of the SPA (such as to diligently and expeditiously proceed with the development of the Projects). Provided that the injury began at some point in time prior to the filing of the Statement of Claim, and that such conduct warranted bringing a proceeding (which in this case could ostensibly include to avoid a subsequent argument that the claim was statute barred due to not being filed earlier), the Plaintiffs are not limited to the injuries that occurred prior to filing.

[213] Stated differently, provided the failure to diligently pursue the required conduct started prior to the filing of the claim, the ongoing conduct beyond the filing date – and the resultant damages – are relevant to the claim, even if the claim filed includes bases that are only subsequently known (including through amendment of the Statement of Claim). The crystallization of damages does not need to occur prior to the filing of the claim.

[214] If the section 7.6 conduct covenants had expired in the two-year period advocated by NaturEner, there may be a legitimate basis to cut off the assessment of NaturEner’s conduct beyond that date. Given my findings however on the interpretation of section 7.6 of the SPA, however, ongoing conduct beyond that date is relevant. The sufficiency of evidence to support the filing of a claim will be commented upon further in the next section.

[215] “Merits bringing a proceeding” under section 3(1)(a)(iii) of the *Limitations Act* is not subject to the plaintiff being able to prove liability of the defendant. The provision is worded “that the injury, *assuming liability on the part of the defendant*, warrants bringing a proceeding,” (emphasis added). In this case, however, the existence of caveats or conditions before the covenants are triggered is a relevant limitation (although likely more applicable to the analysis of whether an injury occurred pursuant to section 3(1)(a)(i)), which will also be explored further in the next section.

4. Did the covenants contemplated by section 7.6 of the SPA arise in light of the caveats contained in that section? and

5. Does the Plaintiffs’ claim that NaturEner is in breach of section 7.6 have merit or in the alternative, does it raise a triable issue?

[216] These final two issues are closely related and are best addressed together. They go to the core of the question to be addressed at trial: whether the section 7.6 covenants were triggered and whether NaturEner complied with them. For the reasons that follow, I am not satisfied that the present record permits those questions to be fairly resolved without a trial.

[217] The Plaintiffs assert in their Statement of Claim that NaturEner materially breached the SPA, and specifically, the conduct covenants set out in section 7.6 of the SPA, by failing to use “reasonable best efforts” to contact wind turbine suppliers and place a purchase order for wind turbines, and for failing to use “reasonable best efforts” to proceed diligently and expeditiously with the development and implementation of the Projects with a view to achieving a trigger date (referred to in the SPA as the Construction Commencement Date) on or before the target dates.

[218] NaturEner argues that it was not required to develop the Projects at all costs. It submits that its obligation was to use reasonable best efforts, subject to the limitations and conditions set out in section 7.6. In NaturEner’s submission, the phrase must be understood in the commercial context of the SPA and leaves room for reasonable commercial judgment, including a decision not to continue the covenanted steps where doing so no longer makes commercial sense. In this respect, the standard is closer to “commercially reasonable”. NaturEner further submits that the relevant preconditions to performance had not yet been met.

[219] The Plaintiffs, on the other hand, assert that the threshold of using reasonable best efforts to proceed diligently and expeditiously with the development of the Projects was not prohibited by any of the listed caveats or conditions. Further, they state that reasonable best efforts must mean something more than reasonable efforts, however, is something less than best efforts. They assert NaturEner breached each of the conduct covenants.

[220] I agree that context is important in assessing the appropriate effort-standard. The obligation must be reasonable in the circumstances. While the reasonable best-efforts standard allows for some discretion for commercial judgment, I am not persuaded that the phrase “reasonable best efforts” can be treated as similar or closer to “reasonable efforts”. The inclusion of the word “best” must be given meaning. Although the standard may not be as onerous as an unqualified “best efforts” obligation, it appears to require something more than ordinary reasonable efforts. In any event, as discussed below, NaturEner has not established that summary dismissal is appropriate on the present evidentiary record, even if its proposed interpretation of the standard were accepted.

[221] Section 7.6 requires NaturEner to use reasonable best efforts to contact reputable wind turbine suppliers, place a purchase order for Wild Rose 1 turbines for delivery at the earliest reasonably possible time, and proceed diligently and expeditiously with development and implementation of both Projects with the targeted Construction Commencement Dates. The turbine purchase obligation is subject to:

- the Company retaining required Licences (including the approval by the Alberta Energy Utility Board (AEUB) of a NID - a needs identification document - for Wild Rose 1) and real property rights for Wild Rose 1,
- turbine availability at prevailing market prices, and
- NaturEner reasonably being satisfied that the supplier could deliver within an appropriate timeframe.

The broader development obligation is subject to specified limits, including governmental restraint, force majeure, or NaturEner reasonably determining that a qualifying change or event had materially and negatively affected the Projects’ economic viability, except where the change was contemplated by the SPA, consented to, or caused by NaturEner or its affiliates. Section 7.6 including these conditions is reproduced in Appendix 1.

[222] NaturEner argues the conditions (caveats) set out in section 7.6 had not yet been met, thus compliance with the covenants was not yet required. Despite this, it argues it met the first two covenants. More specifically, NaturEner asserts that:

- a) Regarding contacting wind turbine suppliers and placing a purchase order for Wild Rose 1 turbines (sections 7.6(a)(i) and (ii)):
 - 1. it satisfied the obligations by having a wind turbine supply agreement in place by July 2008, pursuant to which NaturEner could secure prompt delivery of turbines when commercially reasonable to do so, and
 - 2. its obligations were contingent on regulatory approvals, which were not obtained prior to the filing of the Statement of Claim.
- b) Regarding all obligations (sections 7.6(a) and (b)): in light of the cost to carry financing, it did not make commercial sense to spend \$100 million to acquire wind turbines until such point that the Project was ready for construction. To require otherwise was commercially unreasonable.

Wind Turbine Supply Agreement

[223] Turning to the first argument, NaturEner argues it satisfied the obligations in sections 7.6(a)(i) and (ii) by having a wind turbine supply agreement in place by July 2008, pursuant to which NaturEner could secure prompt delivery of turbines when commercially reasonable to do so. It notes that turbines were in scarce supply at that time, so securing any contract posed certain challenges. Further, it argues it did not make commercial sense to order the turbines until they were required. This position is tempered somewhat by its own statements that the turbines were in scarce supply, that securing the same was highly competitive involving extensive negotiations, and that once contracted, delivery would be 12 to 18 months later. NaturEner notes a significant non-refundable deposit was required to begin manufacture. Further, the type of turbine had to be approved by the Alberta Utilities Commission. NaturEner changed the proposed type of wind turbine in its application twice.

[224] The Plaintiffs provide several responses. Regarding the obligation to contact a reasonable number of suppliers, the agreement NaturEner relies on to satisfy this obligation was merely a July 2008 extension of an existing United States-focused supply agreement with supplier Acciona. This did not occur until more than 10 months after the SPA closed. Specifically, under the amended supply agreement, the 200 wind turbines originally allocated to a Montana wind farm were reallocated such that 140 went to the Montana wind farm, 6 to a different Alberta project, and the allocation of the remaining 54 would be determined at a later date.

[225] Under the terms of the SPA, NaturEner was to have made efforts to contact a reasonable number of entities generally considered within the Alberta electric industry to be reputable suppliers of wind turbines. The only evidence provided by NaturEner that it made any effort to contact other suppliers is one statement in a 31-page affidavit of Billy Alexander that in 2008, after it determined the Vesta model wind turbine would not be economic, NaturEner contacted other turbine suppliers, including Mitsubishi, Gamesa, Acciona, Siemens, General Electric and Enercon. He states that due to the market at that time, turbine supply was low, prices were high and credit terms were challenging. No evidence of any such communications or responses was provided other than an internal email communication in 2012 suggesting that the manufacturers were aggressively approaching NaturEner employees.

[226] I pause to comment on the nature of the record. The materials include a multi-year history of reports, communications, and selected financial information, all presented by affidavit evidence. The regulatory process, the technical aspects of the turbines, the financial evidence, and the broader Project context require explanation and contextualization. On an issue of this nature, the Court cannot fairly assess this record by reviewing a large collection of documents without the benefit of direct evidence, cross-examination, and focused submissions. For example, the record includes financial modelling concerning the V90 turbines and an associated communication. The affidavit evidence states that those turbines were not economic for Wild Rose 1. Without evidence explaining financial charts, overall costs, expected margins, as well as the assumptions, inputs and minimum return threshold used in that modelling, the Court cannot meaningfully assess that conclusion. The associated communication adds limited assistance. It states that the V90 turbine did not reach the minimum return and compares it with other turbines that produced better, but still borderline, expected returns.

[227] The Plaintiffs also raise a potential conflict of interest concerning Mr. Alexander. They assert that he had a financial interest in the Montana wind farm, which may have stood to acquire the 54 turbines reserved under the Acciona supply agreement. Those turbines ultimately were directed to the Montana project rather than to the Projects. The Plaintiffs further suggest that the Montana project supplied electricity to the same market the Projects were intended to serve, although the evidentiary record does not establish that point.

[228] The only supply arrangement NaturEner identifies from the initial post-Closing years is the July 2008 extension of a pre-existing United States-focused agreement with Acciona. At most, that arrangement created a possibility that 54 turbines could be allocated to the Projects. Those turbines were ultimately supplied to the Montana project.

[229] Even had the 54 turbines been allocated to the Projects, they would have represented only a portion of the 179 turbines required for Wild Rose 1. The Plaintiffs submit that this evidence does not establish that NaturEner used reasonable best efforts to secure prompt turbine delivery when it was commercially reasonable to do so. NaturEner responds that it was not yet commercially reasonable to commit to delivery because the Project was not sufficiently ready.

[230] On the present record, I cannot determine whether the Acciona arrangement was a meaningful step toward securing turbines for the Projects or merely a limited step that satisfied the form, but not necessarily the purpose, of the contractual requirement. The fact that the turbines ultimately went to the Montana project, and that the arrangement covered only a fraction of the turbines required for Wild Rose 1, reinforces the need for a more comprehensive and contextualized evidentiary record.

[231] When the existing turbine supply agreement was extended, all four Sellers were still working for NaturEner and may have had either first-hand knowledge of what was occurring, or possibly some involvement in sourcing the suppliers. The Court would benefit from hearing the evidence of NaturEner's then employees familiar with the efforts undertaken, including the role, if any, of the Sellers while they remained involved with NaturEner.

[232] Mr. Alexander's general statement that NaturEner contacted other suppliers in 2008, without supporting documents or particulars, is insufficient on this summary judgment application to establish compliance with the covenant to use reasonable best efforts to contact reputable wind turbine suppliers. The record does not permit the Court to assess the nature, timing, extent, or seriousness of those efforts.

[233] Nor does the extension of a single United States-based supply agreement, for only a possible allocation of some of the turbines required for Wild Rose 1, establish compliance with the obligation to use reasonable best efforts to place a purchase order for delivery at the earliest reasonably possible time sufficient to justify summary dismissal of the Plaintiffs claim. The arrangement may ultimately be shown to have been reasonable in the circumstances, but that cannot be determined on the current record.

Regulatory Approvals

[234] NaturEner notes that there was no point purchasing turbines without a sufficiently approved project in which to place them. NaturEner argues that, with respect to sections 7.6(a)(i) and (ii), its obligations were contingent on regulatory approvals as set out in the caveats, and in particular subsection 7.6(a)(ii)(A) which states the covenant is subject to:

the retention by the Company of all Licences (including the approval by the AEUB of a needs identification document (or any successor document as designated by Applicable Law) in respect of the Wild Rose I Wind Farm in accordance with and pursuant to section 34(1) of the *Electric Utilities Act* (Alberta)) and all real property rights, in each case required for the ownership and operation of the Wild Rose I Wind Farm;

[235] NaturEner notes a variety of licenses and permits were not yet obtained by the time of the filing of the Statement of Claim, and therefor, the covenants in section 7.6(a) were not yet even in effect.

[236] I disagree with this interpretation of the condition or caveat in a number of respects. First, based on how drafted, this caveat is limited to subsection (ii) of the covenant, being NaturEner's obligation to place a purchase order for Wild Rose 1 turbines. There would of course be no prohibition of NaturEner making inquiries of reputable turbine suppliers. No licenses or permits are required of such activity, and the SPA does not limit the obligation in this way.

[237] With respect to the application of the caveats to s 7.6(a)(ii), the parties disagree on the meaning of the term "Licenses" in this provision. NaturEner interprets the condition or caveat to apply to a variety of licenses required to develop and operate the wind farm that were not yet issued or even applied for. The Plaintiffs assert that interpretation is far too broad and not within the scope of the condition. I agree with the Plaintiffs' concern on how broadly NaturEner is attempting to expand the condition.

[238] "Licenses" is a defined term in the SPA. The definition is found in section 4.24 of the SPA which provision includes the following:

...Part I of *Schedule 4.24* lists all licences, permits, approvals, consents, certificates, registrations and authorizations (whether governmental, regulatory or otherwise but excluding licences within the subject matter of *Section 4.20*) (the "**Licences**") held by or granted to the Company, including with respect to the Projects, and, other than those Licenses which have been applied for but are pending as described in Part II of *Schedule 4.24*, there are no other licences, permits, approvals, consents, certificates, registrations or authorizations necessary to carry on the Business as currently conducted or to operate, own or lease any of the Projects or the other property or assets utilized by the Company as such property or assets are currently owned, leased or utilized. The Sellers have provided a true and complete copy of each Licence described in Part I of *Schedule 4.24*

and all amendments thereto to the Purchaser and a true and complete copy of each application for a Licence described in Part II of *Schedule 4.24* and all amendments thereto. [*Emphasis Added*]

[239] The reference to Licenses in 7.6(a)(ii) is limited by this definition. The way the definition is structured, “Licenses” must be limited to those licences, permits, approvals, consents, certificates, registrations and authorizations identified in *Schedule 4.24* and held by, granted to, or applied for by the Company to carry on the Business as currently conducted, or to operate, own or lease any of the Projects as such property or assets are currently owned, leased or utilized (excluding those within the subject matter of Section 4.20 which relate to intellectual property licenses and have nothing to do with regulatory issues). The reference to “currently” in section 4.24 means at the time of Closing, and not all future licenses that may be required to conduct the Business in the future.

[240] Further, the wording of the condition in section 7.6(a)(ii)(A) refers to “the retention by the Company of all Licences” (emphasis added); not acquisition, obtaining or receiving the Licenses or such similar wording. Retention is interpreted by its ordinary meaning, being the continued possession, use, or control of something. The Plaintiffs cannot be required to retain something that they did not yet possess (except for, based on the definition, the Licenses for which they had already applied and were pending). This limits the expression Licenses referenced in section 7.6(a)(ii) to those licenses already held, or licenses applied for but pending as described in Part II of *Schedule 4.24*, by the Company prior to the Closing of the SPA, required to operate the business as conducted at the time of Closing and to hold the property and assets owned, leased or utilized by the Company as at Closing. There is no indication that any of these Licenses were no longer retained.

[241] The only exception to this Licenses definition provided for in the SPA is the approval by the AEUB of a needs identification document (or any successor document as designated by Applicable Law) in respect of the Wild Rose 1 in accordance with and pursuant to section 34(1) of the *Electric Utilities Act*). That document was expressly referenced in section 7.6(a)(ii)(A) and was still outstanding on the Closing.

[242] Although regulatory approvals are not listed as a precondition to the supplier-contact covenant, NaturEner’s argument has practical force in relation to the purchase-order covenant. It may not have been commercially sensible to purchase turbines before there was an approved Project in which to use them. The strength of that argument depends, however, on the surrounding market and regulatory circumstances, including what the parties understood when the SPA was negotiated and what the SPA required despite those practical considerations. Regulatory approval does not fall within the defined term “Licences” or the enumerated conditions in section 7.6(a)(ii), except for the expressly referenced NID approval. It may nevertheless inform the assessment of what reasonable best efforts required. That assessment cannot be made on the present record.

[243] NaturEner argues its obligations ended two years after the Closing of the SPA, however, I have rejected that interpretation of section 7.6. Even if I had upheld the interpretation of this requirement terminating five years post Closing Date (which I have not ruled on), the NID was approved by the regulator on August 25, 2011, less than five years after each of the Closing Date and the date the action was commenced.

[244] Based on the evidence before me, none of the conditions or caveats that could have delayed or excused this obligation were at play. There is at a minimum a triable issue as to whether this covenant to place a purchase order for Wild Rose 1 turbines was breached. This issue is one of merit that genuinely requires a trial: **WP**. Further, although the third-party regulator is involved in portions of the process, the Court will need to better understand what factors played a role in the four-year delay in receiving the NID, and the responsibilities each party had to move this approval forward.

[245] NaturEner argues this approval was outside of its control and could not be obtained earlier due to a miscalculation in the wind noise that required revising the submission materials to employ a different turbine, delaying its approval. The Court needs to understand the necessity of the revision in obtaining the approval. This is particularly true in light of the fact that after the Company withdrew its application (ostensibly to correct the turbine and wind curve calculation), it reapplied using the same turbines, with the expectation that it could later revise the application to update the turbines it would ultimately use. It is unclear then why the original application could not be allowed to proceed and later revise that application. As the regulator dealt with applications based on the order in which they were filed, one result of the revocation and re-application was to move this Project further down the line of applicants, likely delaying the process. It is unclear what the effect of this delay had on the commercial profitability of the Project.

Commercial Practicality

[246] NaturEner argues that it did not make commercial sense to purchase \$100 million worth of wind turbines until a later point in the Project construction, particularly in light of the financing costs of acquisition. My understanding is that what was required was a \$10 million deposit for a purchase order. Mr. Alexander states that NaturEner's approach was to defer the turbine purchase commitments until *all* approvals necessary to begin construction were obtained to mitigate NaturEner's financial risks.

[247] That may have been NaturEner's commercial preference, but it is not how the SPA was drafted. NaturEner could have made full regulatory approval, or a specified stage of project development, an express condition to the turbine purchase-order covenant. It did not do so. The cost of wind turbines and associated financing was known, or knowable, when the SPA was negotiated. Section 7.6(a)(ii) required NaturEner to use reasonable best efforts to place a purchase order for Wild Rose 1 turbines, with delivery to occur at the earliest reasonably possible time. The applicable conditions address the supplier's capability, turbine availability at prevailing market prices, and the Company's retention of specified licences and real property rights. They do not state that NaturEner could defer placing an order until the Project had reached a particular stage of development. The issue is therefore whether NaturEner's approach satisfied the reasonable best efforts standard in light of the contractual language and the surrounding circumstances.

[248] The Plaintiffs note that wind turbines were then in limited supply and that securing supply was competitive. Those circumstances may explain why securing turbines earlier could have been commercially sensible, despite the cost, in the context of the overall development plan. The present record does not provide sufficient financial or operational evidence to determine whether an earlier turbine purchase commitment would have been commercially impractical. Nor does it adequately explain why the turbine model NaturEner initially sought to

use was uneconomic, or why the turbines ultimately selected were materially different. Additional evidence about market conditions, turbine availability, financing costs, and the reasons for delay would assist in assessing whether NaturEner's approach satisfied the contractual standard.

[249] Commercial practicalities may inform the objective intentions of the parties, but they cannot override the express language of the SPA. The conditions addressing economic viability, governmental prohibitions, and force majeure apply only to the broader development and implementation covenant in section 7.6(b). They do not qualify the separate obligations to contact suppliers or to place a purchase order for Wild Rose 1 turbines. That distinction must be considered when assessing whether NaturEner used reasonable best efforts.

[250] On the present record, and having regard to the language of section 7.6, NaturEner has not established a sufficient basis to summarily dismiss the Plaintiffs' claims that it breached the supplier-contact covenant or the Wild Rose 1 turbine purchase-order covenant. That conclusion applies even to the limited period before the Statement of Claim in Action #1 was filed on July 25, 2009, and whether the reasonable best efforts is interpreted consistent with NaturEner's or the Plaintiffs' interpretation.

Development and Implementation of the Projects

[251] The final covenant in issue is NaturEner's obligation to use reasonable best efforts to proceed diligently and expeditiously with the development and implementation of both Projects, with a view to achieving the targeted Construction Commencement Dates. This issue is difficult to resolve on the present record because it turns on technical, commercial, and regulatory evidence that has not been fully presented.

[252] Section 7.6(b)(ii) excuses performance of the development and implementation covenant only where NaturEner, acting reasonably, determines that the economic viability of the applicable Project has been materially and negatively affected by a qualifying change, condition, event, or development. The provision expressly includes certain changes in applicable law and developments generally affecting the Alberta electricity industry, but excludes matters expressly contemplated by the SPA, consented to by NaturEner in writing, or caused after Closing by NaturEner or its affiliates.

[253] To rely on that qualification, NaturEner must establish more than the existence of a development affecting the Alberta electricity industry. Critically, the development must not have been something that was known by NaturEner prior to signing the SPA and it must have materially and negatively affected the economic viability of one or both Projects. The present record does not permit this assessment to be made summarily.

[254] The parties made submissions about the changing environment for wind power in southern Alberta before and after Closing, including constraints in the region's transmission infrastructure. Those submissions raise potentially important issues, but submissions are not evidence. The materials filed are technical and provide limited financial context.

[255] This issue is central to the action, and the parties present conflicting positions and evidence, including what was known by NaturEner at the time of entering the SPA and the options available to it. Additional evidence and live testimony on these issues would assist the Court in determining what the parties knew or contemplated at Closing and whether later developments materially and negatively affected the Projects' economic viability.

[256] At the time of Closing, the Company, then still controlled by the Sellers, had negotiated with the regulator an arrangement under which it would bear the cost of constructing a transmission line to connect the Projects to the grid. That appears to have been an atypical approach, however, known to NaturEner. After Closing, the regulator appears to have reassessed that proposal and proceeded on a different transmission-planning basis.

[257] NaturEner relies on post-Closing changes in Alberta's electricity transmission framework, including resulting limits on wind power producers and the pace of the Southern Alberta Transmission Reinforcement project. It says the eventual plan for government-funded transmission reinforcement would substantially reduce the Company's cost of connecting the Projects to the grid. NaturEner submits that, until that transmission solution was available, increased costs or reduced economic viability were relevant to whether the qualification in section 7.6(b)(ii) was engaged.

[258] NaturEner argues that the limitations of the Southern Alberta Transmission Line posed a constraint to the construction of the Projects. The transmission line had to be reinforced to support the new energy transmission that would come online. This pertained not just to the Projects, but other Southern Alberta transmission use requirements as well. It argues there would have been no point in investing in and developing the wind turbine farms only to be blocked from transmitting the energy and thus earning revenue. This contributed to the delay in development of the Projects.

[259] The Plaintiffs provide evidence that the transmission and power grid options, routes, cost estimates and regulatory requirements were already known by NaturEner at the time of the SPA. They state the insufficiency of the existing transmission system in the area surrounding the Projects and need for an upgrade were well known to NaturEner prior to entering into the SPA. Further, the Plaintiffs assert there was more than one method of how to market the energy NaturEner produced, such as purchase power agreements. The Plaintiffs say this gave NaturEner options beyond the limitations it proclaims existed. The availability of a viable alternative market was demonstrated by Capstone having secured a purchase power agreement less than a year after acquiring Wild Rose 2.

[260] NaturEner relies on expert evidence concerning Alberta's transmission constraints and the Projects' financial viability, including the possibility that the two Projects would compete with each other for available transmission capacity if both proceeded. That evidence provides useful context, but it does not resolve the section 7.6(b)(ii) inquiry. A more complete and contextualized record is required on what the parties understood at Closing about transmission constraints, the costs and feasibility of constructing dedicated transmission infrastructure, and the reasons for any later change in the regulator's approach. If the principal effect of waiting for the Southern Alberta Transmission Reinforcement project was to reduce NaturEner's costs, that alone would not justify delaying the Projects' progress or avoiding the contractual consequences of non-performance.

[261] Further evidence is also required to understand the economics of the available transmission options, including the cost of constructing the originally contemplated line, the extent of any redundancy created by SATR, the cost savings from waiting for SATR, and how those considerations compared with the contractual consequences contemplated by section 9.3(c). On the present record, the Court cannot determine whether the transmission developments

materially and negatively affected the Projects' economic viability within the meaning of section 7.6(b)(ii), or whether they primarily created an opportunity for NaturEner to reduce its costs.

[262] For these reasons, I am not satisfied that the present record permits summary dismissal of any of the claims arising from the alleged breach of the section 7.6 conduct covenants.

[263] This application illustrates the limits of what can fairly be determined in a one-day summary process, particularly where the parties ask the Court to address multiple factually complex issues on an incomplete record. The Plaintiffs' characterization of the application as a "trial in a box" is apt (notwithstanding several boxes of submission material were involved).

Litigation Management

[264] For litigation-management purposes, the parties may wish to consider whether a trial of an issue should be directed on the application of section 7.6(b)(ii), including whether the development of SATR, any changes to that proposal, and the associated delays materially and negatively affected the economic viability of the Projects within the meaning of that provision. That issue would require evidence about what was known or contemplated at the time of the SPA, what changed after Closing, the cost implications of the available transmission options, and whether NaturEner's efforts, in light of those circumstances, satisfied the reasonable best efforts standard. Because the issue is central to the overall dispute, the benefits of a separate issue trial may be limited.

Disclosure Period

[265] As explained in Application #2, there is no contractual basis to dismiss the claims on the ground that the section 7.6 conduct covenants or Success Fee payment obligations expired within two or five years respectively of Closing. The scope of disclosure should therefore not be confined by those proposed contractual expiry dates. Such limits potentially could be addressed through case management.

Disposition

[266] In conclusion, the Court declines to summarily dismiss any of the claims related to the alleged breach of the section 7.6 covenants. The record is not sufficient to grant this relief.

[267] The issues concerning application to amend the Statement of Claim (including whether the standstill agreements impact the timing of any limitation to such application), the timing of the Affidavit of Records and other disclosure, Questioning, and whether the two Actions should proceed together should be addressed in case management. During that case management hearing, the parties may address the possibility of a trial of an issue, as suggested above.

[268] Should the parties not agree to the costs for these applications, they may bring the costs determination before me within 45 days.

[269] I thank counsel for their thorough materials and submissions on both applications.

Heard on the 10th and 11th day of September, 2025 and the 11th day of December, 2025.

Dated at the City of Calgary, Alberta this 8th day of September, 2026.

C. Dario
J.C.K.B.A.

Appearances:

Tommy Gelbman / Stephanie Clark, OSLER, HOSTIN & HARCOURT LLP
for the Applicant in Action #1, NaturEner Energy Canada Inc., and the Appellants (all
named defendants) in Action #2

Graham W. Sanson, Buset LLP
for the Respondents, David Boileau, Claude Mindorff, and Ron Barg in Action #1 and
the David Boileau, Claude Mindorff, Ron Barg and Lois Morys in Action #2.

Appendix 1

Relevant provisions from the Share Purchase and Sale Agreement (SPA)

From 1.1 Defined Terms:

"Success Fee" means:

(a) in respect of the Wild Rose I Wind Farm:

(i) where the Purchaser has materially complied with its covenants in *Section 7.6*, if the Construction Commencement Date for the Wild Rose I Wind Farm occurs:

A. on or prior February 28, 2009, an amount equal to:

(1) the Nameplate Capacity of such Project multiplied by \$65,000;

less

(2) all amounts previously paid by the Purchaser pursuant to *Sections 2.3 and 2.4*; or

B. after February 28, 2009 and on or prior to February 28, 2010, an amount equal to:

(1) the Nameplate Capacity of such Project multiplied by \$55,000;

less

(2) all amounts previously paid by the Purchaser pursuant to *Sections 2.3 and 2.4*; or

C. after February 28, 2010 and prior to a Call Option Closing Date in respect of the Wild Rose I Wind Farm, an amount equal to:

(1) the Nameplate Capacity of such Project multiplied by \$47,500;

less

(2) all amounts previously paid by the Purchaser pursuant to *Sections 2.3 and 2.4*; or

(ii) where the Purchaser has failed to materially comply with its covenants in *Section 7.6*, and amount equal to:

A. the Nameplate Capacity of such Project multiplied by \$65,000;

less

B. all amounts previously paid by the Purchaser pursuant to *Sections 2.3 and 2.4*; and

(b) in respect of the Wild Rose II Wind Farm, if the Construction Commencement Date of the Wild Rose II Wind Farm occurs at any time after the date hereof but prior to a Call Option Closing Date in respect of the Wild Rose II Wind Farm, an amount equal to:

- (i) the Nameplate Capacity of such Project multiplied by \$25,000; less
- (ii) all amounts previously paid by the Purchaser pursuant to *Sections 2.3 and 2.4*, if such amounts have not already been deducted pursuant to paragraph (a) of this definition above;

"Closing Date" means August 10, 2007;

"Construction Commencement Date" means, as it relates to the Wild Rose I Wind Farm or the Wild Rose II Wind Farm, the date upon which the Company issues to a contractor engaged by it a final and irrevocable notice to commence with the construction of such Project;

"Nameplate Capacity" means the aggregate of the total maximum designed output at rated International Standards Organization conditions for each wind turbine comprising part of the Wild Rose I Wind Farm or Wild Rose II Wind Farm, as applicable, expressed in MW as specified by the power curve of the manufacturer of such wind turbines; provided that in no event shall maximum capacity exceed 230 MW;

2.3 Purchase Price; Manner and Allocation of Payment

- (a) The purchase price payable by the Purchaser to the Sellers for the Company Shares (the **"Purchase Price"**) shall be the total of the following amounts:
 - (i) \$2,000,000, plus or minus the adjustments determined pursuant to *Section 2.4* (as so adjusted, the **"Closing Payment"**); plus
 - (ii) the Development Cost Amount [which means \$200,000, minus the adjustments, if any, pursuant to *Section 2.4*, subject to audit by the Purchaser;]; plus
 - (iii) the MOU Contingency Amount; plus
 - (iv) the Interconnection Contingency Amount; plus
 - (v) the Success Fee.
- (b) [Addresses the amounts due at the Time of Closing, including the Closing Payment and the Development Cost Amount.]

7.6 Efforts re: Development of Projects

Following Closing:

- (a) the Purchaser shall, or shall cause the Company to, utilize reasonable best efforts to:
 - (i) contact a reasonable number of those entities generally considered within the Alberta electric industry to be reputable suppliers of wind turbines; and
 - (ii) subject to:
 - A. the retention by the Company of all Licences (including the approval by the AEUB of a needs identification document (or any successor document as designated by Applicable Law) in respect of the Wild Rose I Wind Farm in

accordance with and pursuant to section 34(1) of the *Electric Utilities Act* (Alberta)) and all real property rights, in each case required for the ownership and operation of the Wild Rose I Wind Farm;

B. availability of wind turbines at prevailing market prices; and

C. satisfaction by the Purchaser, acting reasonably, that such supplier can supply such turbines to the Wild Rose I Wind Farm site within such time frame as the Purchaser, acting reasonably, determines is appropriate and necessary;

place a purchase order with such supplier for the purchase and delivery of wind turbines for the Wild Rose I Wind Farm, which purchase order shall require delivery of such wind turbines at the Wild Rose I Wind Farm site at the earliest reasonable possible time; and

(b) subject to:

- (i) any Governmental Body having issued an order, degree or ruling or taking any other action permanently restraining, enjoining or otherwise prohibiting the Company from proceeding with the development and/or implementation of the Projects (or either of them);
- (ii) the determination by the Purchaser, acting reasonably, that the economic viability of the Projects (or any of them) have been materially and negatively impacted as a result of any change, condition, event or development (including a prospective change, any change that arises as a result of or from a change in Applicable Law and any change, condition, event or development generally affecting the Alberta electric industry), except any such change, condition, event or development (A) expressly contemplated by this Agreement, (B) to which the Purchaser (in the case of a representation, warranty or covenant herein from the Sellers) has consented in writing, or (C) caused after the date hereof by the Purchaser or any of its Affiliates; or
- (iii) an event of Force Majeure prohibiting or restraining the Purchaser or the Company from proceeding with the development and/or implementation of the Projects (or either of them);

the Purchaser shall, or shall cause the Company to, utilize reasonable best efforts to proceed diligently and expeditiously with the development and implementation of the Projects, with a view to achieving the Construction Commitment Date on or before the target dates set out in paragraph (a) of the definition of "Success Fee".

From 1.1 Defined Terms:

"Affiliate" means, with respect to any Person, any other Person or group of Persons acting in concert, directly or indirectly, that Controls, is Controlled by, or is under common Control with the first mentioned Person, and, for the purposes hereof, "Control" means the possession, directly or indirectly, by such Person or group of Persons acting in concert, of the power to direct or cause the direction of the management or policies of the first mentioned Person, whether through the ownership of voting securities, by contract or otherwise; provided that prior to Closing, but not thereafter, the Company will, for the purposes of this Agreement, be an Affiliate of Sellers and not

of Purchaser, and after Closing, but not prior thereto, the Company will, for the purposes of this Agreement, be an Affiliate of Purchaser and not of Sellers;

"Survival Period" means:

- (b) for all representations and warranties of the Sellers or the Purchaser set forth in this Agreement, other than those listed in *Sections 4.6, 4.7, 4.8, 4.12, 4.14 and 4.27*, a period of 24 months following the Closing Date;
- (c) for Seller's representations and warranties in *Sections 4.6, 4.7, 4.8, 4.12 and 4.14*, an unlimited period following the Closing Date; and
- (d) for Seller's representations and warranties in *Section 4.27*, 90 days after the expiration of any reassessment period in respect of any taxation years, or similar reporting periods, of the Company which end on or prior to the Closing Date after taking into account any extension to such periods resulting from any agreement, waiver, act or omission;

6.1 Survival of Representations and Warranties of the Seller

The representations and warranties of the Sellers contained in this Agreement and any agreement, instrument, certificate or other document or undertaking executed or delivered pursuant hereto shall survive the Closing of the transactions contemplated hereby for the duration of the Survival Period, notwithstanding such Closing or any investigation made by or on behalf of the Purchaser.

6.2 Survival of Representations and Warranties of the Purchaser

The representations and warranties and, to the extent they have not been fully performed at or prior to the Time of Closing, the covenants of the Purchaser contained in this Agreement and any agreement, instrument, certificate or in any document or undertaking executed or delivered pursuant hereto shall survive the Closing of the transactions contemplated hereby for the duration of the Survival Period, notwithstanding such Closing nor any investigation made by or on behalf of the Seller.

4.24 Compliance with Laws; Licences

The Company has complied with all Applicable Law applicable to the Business or the Company (collectively, "**Legal Requirements**") except to the extent that failure to comply would not have a Material Adverse Effect on the Company or the Business. No event has occurred and no circumstance exists that may constitute or result in (with or without notice or lapse of time) a violation of or a failure to comply with any Legal Requirements, and neither the Sellers nor the Company have received any notice or other communication (whether oral or written) from any Governmental Body regarding any actual, alleged, possible or potential violation of, or failure to comply with any Legal Requirement. Part I of *Schedule 4.24* lists all licences, permits, approvals, consents, certificates, registrations and authorizations (whether governmental, regulatory or otherwise but excluding licences within the subject matter of *Section 4.20*) (the "**Licences**") held by or granted to the Company, including with respect to the Projects, and, other than those Licences which have been applied for but are pending as described

in Part II of *Schedule 4.24*, there are no other licences, permits, approvals, consents, certificates, registrations or authorizations necessary to carry on the Business as currently conducted or to operate, own or lease any of the Projects or the other property or assets utilized by the Company as such property or assets are currently owned, leased or utilized. Each Licence, other than those Licences which have been applied for but are pending as described in Part II of *Schedule 4.24*, is valid, subsisting and in good standing and the Company is not in default or breach of any such Licence and none of the Sellers or the Company are aware of any pending or threatened proceeding to revoke or limit any Licence or of any circumstance that may reasonably result in such a revocation or limitation. The Sellers have provided a true and complete copy of each Licence described in Part I of *Schedule 4.24* and all amendments thereto to the Purchaser and a true and complete copy of each application for a Licence described in Part II of *Schedule 4.24* and all amendments thereto.

9.3(c) Limitation of Liability

Notwithstanding any term herein to the contrary, the only remedy available to the Sellers (or any of them) for any breach or non-performance by the Purchaser of any covenant to be performed by it pursuant to *Section 7.6*, shall be the right of the Sellers to the payments referred to in paragraph (a)(ii) of the definition of "Success Fee".

10.4 Call Option Closing Date

The closing date (the "**Call Option Closing Date**") for the transactions in this *Article 10* pursuant to the proper and valid exercise by the Calling Parties of the Call Option (the "**Call Transaction**") will take place not more than 60 days following the exercise of the Call Option, or (a) such other date pursuant to a postponement contemplated by the payment by the Purchaser of one or more Repurchase Postponement Payments in accordance with *Section 10.3(b)*, or (b) or such other earlier or later date as may be mutually agreed between the Calling Parties and the Purchaser, and will be effective as of the Call Option Closing Date. Reasonably promptly following delivery of an Acquisition Notice, the Calling Parties and the Purchaser agree to enter into (or, in the case of the Purchaser, to cause the Company to enter into) a final form of asset transfer agreement to effect such transactions containing such terms, conditions, representations, warranties, indemnities and other matters customarily contained in agreements of such nature and the Calling Parties and the Purchaser agree to enter into *bona fide* good faith negotiations to finalize such agreement as of the Call Option Closing Date. Promptly following the Call Option Closing Date, the Purchaser shall cause the Company to execute and deliver to the Calling Parties all conveyances, assignments, transfers, novations and other documents and instruments the Calling Parties may reasonably consider necessary (the "**Specific Conveyances**") to convey, assign and transfer the Projects Interest to the Calling Parties or their nominee provided that the Company shall hold the Projects Interest in trust for the Calling Parties until such Specific Conveyances are complete and, where applicable, registered.

11.6 Waivers

..... The waiver by any Party of a breach of any provision hereof shall not operate or be construed as a waiver of any prior or subsequent breach of the same or any other provisions hereof.

11.12 Assignment

- (a) No Party may assign its interest in or under this Agreement without the prior written consent of the other Parties, such consent not to be unreasonably withheld or delayed. Consent may be withheld if a Party has a reasonable basis for doubting the financial creditworthiness of the assignee. In making such determination, a Party shall be entitled to review the content of this Agreement and the proposed assignee's creditworthiness directly with the proposed assignee.
- (b) Notwithstanding *Section 11.12(a)*, any Party may assign its interest in or under this Agreement to an Affiliate of such Party without the prior written consent of the other Parties, and the assignee shall be entitled to all rights and be bound by all the obligations of the assigning Party hereunder as of the effective date of the assignment. Notwithstanding and assignment pursuant to this *Section 11.12(b)*, the assigning Party shall not be released from its, her or his (as the case may be) obligations hereunder and the assigning Party and such Affiliate shall be jointly and severally liable for all such obligations of such assigning Party.