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By Electronic Filing and By Email

May 27, 2011

Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street
27th floor
Toronto, ON M4P 1E4

Dear Ms Walli,

Ontario Power Authority
Board File No.: EB-2010-0279
Our File No.: 339583-000094

Please find attached the Argument of Canadian Manufacturers & Exporters ("CME") in the above-noted matter.

Yours very truly,

Peter C.P. Thompson, Q.C.
PCT/kt
Enc.

c. Miriam Heinz (OPA)
Fred Cass (Aird & Berlis)
Intervenors EB-2010-0279
Paul Clipsham (CME)

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EB-2010-0279

ONTARIO ENERGY BOARD

IN THE MATTER OF sections 25.20 and 25.21 of the *Electricity Act, 1998*;

AND IN THE MATTER OF a Submission by the Ontario Power Authority to the Ontario Energy Board for the review of its proposed expenditure and revenue requirements and the fees which it proposes to charge for the year 2011.

ARGUMENT OF CANADIAN MANUFACTURERS & EXPORTERS ("CME")

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I. INTRODUCTION

1. On November 2, 2010, the Ontario Power Authority (the "OPA") filed a Submission for Review in respect of its proposed 2011 expenditure and revenue requirements and fees pursuant to subsection 25.21(1) of the *Electricity Act, 1998* (the "*Act*"). The OPA is seeking approvals from the Board which include:

(a) Approval of a revenue requirement for 2011 of $78.882M; and

(b) Approval of a usage fee of $0.514/MWh.

2. The revenue requirement of about $79M that the OPA asks the Board to approve covers the resources that the OPA claims it needs to perform its planning and other obligations, including its charge-funded activities. The OPA's charge-funded activities encompass a number of functional areas related to procurement and conservation demand management ("CDM").

3. CME submits that the adjudicative framework applicable to the Board's consideration of the OPA's Submission for Review is as described by Board Staff in its Submission of May 26, 2011, and by the Board in its Issues Decision and Procedural Order No. 2 ("Issues Decision") dated January 11, 2011.

4. The adjudicative framework that applies to the Board's determination of this Application was the subject matter of the Issues Decision. Matters pertaining to the scope of this proceeding, to which counsel for the OPA has dedicated about 50% of its Argument-in-Chief, have already been decided. We do not intend to re-argue those matters. CME relies upon the Board's Issues Decision in determining the scope of this proceeding, in which the Board made the following findings:

> The Board finds that its mandate in this case is limited to approval of the OPA's administrative fees, which comprise approximately 3% of the OPA's total annual spending. However, the Board is of the view that an assessment of the OPA's administrative fees must require an examination

> and evaluation of the management, implementation, and performance of the OPA's charge-funded activities. This is necessary because the OPA's administrative and non-administrative activities that are funded by fees and charges, respectively, are unavoidably linked. It is the Board-approved fees that give the OPA the means to acquire and allocate the resources (e.g. staff) that are required to undertake its various responsibilities, resulting in charge-funded activities. The Board finds that an assessment of the performance of the OPA's charge-funded activities is a necessary, legitimate and reasonable tool for determining the effectiveness of the OPA's utilization of its Board-approved fees.
>
> [...] Therefore, part of assessing whether the OPA's proposed fees are reasonable and appropriate will necessitate an examination of the effectiveness of the OPA's delivery of CDM programs. It could be the case, for example, that the programs are behind schedule or not delivering results commensurate with the fees being allocated to CDM activities. In this case, the Board could reject the OPA's proposed fees and recommend that the OPA return with adjusted proposed fees that allow for higher or lower staff levels or more robust internal control mechanisms as the circumstances might warrant.
>
> [...] But ratepayers have a legitimate expectation, in light of the Board's authority to review the OPA fees, that its work will be efficiently and effectively carried out, and in line with the specific mandates it has received from Government.
>
> [...] However, the Board is of the view that the allocation of the OPA's budget among its objectives and initiatives is germane to this proceeding and that this issue should remain on the issues list. The Board is of the view that an organization with the OPA's sophistication and responsibilities should be able to provide information as to how its budget is allocated among initiatives, for the purpose of assessing whether the proposed fees are reasonable and appropriate. [emphasis added]

5. Having regard to the criteria specified by the Board in its Issues Decision, the topics to be considered when assessing OPA's proposed revenue requirement and fees for 2011 include:

(a) An assessment of the evidence submitted by the OPA to justify its request for approval of a revenue requirement for 2011 of about $79M; and

(b) an examination and evaluation of the management, implementation, and performance of the OPA's planning and charge-funded activities to determine the effectiveness of the OPA's utilization of the $79M of administrative fees it asks the Board to approve.

6. The questions CME urges the Board to consider include:

(a) Are there deficiencies in the way the OPA derives its revenue requirement budget that call into question the appropriateness of the proposed revenue requirement of total of about $79M?

(b) Are there deficiencies in the way the OPA performs any of its planning and charge-funded activities that call into question the appropriateness of the utilization of any portion of the proposed revenue requirement of about $79M? and

(c) If the answer to one or both of these questions is yes, then how should the Board respond to the Application, having regard to the scope of its jurisdiction over OPA's revenue requirement and fees proposals?

II. DEFICIENCIES IN THE EVIDENCE SUPPORTING THE $79M REVENUE REQUIREMENT REQUEST

(i) The Failure to Allocate the Budget Among Objectives and Initiatives

7. In the Issues Decision, the Board established that the allocation of the OPA's $79M budget among its objectives and initiatives is germane to this proceeding. The Board confirmed that an organization with the OPA's

sophistication and responsibilities should be able to provide information as to how its budget is allocated among initiatives, for the purpose of assessing whether the proposed fees are reasonable and appropriate.

8. The OPA develops its budget based on continuing initiatives in combination with new or anticipated initiatives for the upcoming year. The budget process starts with a leadership team strategy session, which then leads to a broader team meeting with all of the senior operational personnel. A template is then provided to the senior operational personnel to commence a "zero based" budgeting process.[1] All of the initial estimates are then totalled, and the OPA executive team reviews the total budget.

9. Independent of this zero based budgeting process, an unknown person or group within the OPA establishes a budget "target level". For 2011, the "target level" was to maintain the OPA revenue requirement budget for 2011 at or below the previous year's budget. OPA witnesses could not say who developed that target, but did confirm that the executive team had responsibility for it.[2] For the 2011 revenue requirement submission, the initial estimate was a little above "target level".[3] The fact that the OPA cannot explain how the target level is established, or even who establishes it, highlights the need for more rigorous internal control mechanisms.

10. Despite the fact that the OPA panel testified that its budget was based on "continuing initiatives" in combination with new or "anticipated initiatives", the OPA is unable to provide the Board with any details on its internal resource costs on an initiative-by-initiative basis. According to the OPA, its accounting system does not track its internal resources on an initiative-by-initiative basis.[4] As such, the OPA is unable to provide the Board with any information on how its budget is

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[1] Transcript, Volume 1, pages 11 to 13.
[2] Transcript, Volume 1, page 14.
[3] Transcript, Volume 1, page 13.
[4] Transcript, Volume 1, pages 9 to 12.

allocated to specific initiatives. This contradicts the OPA's evidence that its "zero based" budgets are based on continuing and anticipated initiatives. Furthermore, this is contrary to the Board's express expectations contained in the Issues Decision: "an organization with the OPA's sophistication and responsibilities should be able to provide information as to how its budget is allocated among initiatives".

11. The OPA's inability to provide details on the allocation of its budget by initiatives materially undermines the Board's ability to objectively assess the reasonableness of the proposed revenue requirement. By way of example, the OPA's Electricity Resource group has a proposed budget of $6.202M for 2011.[5] The OPA witnesses could not explain how much of that budget would be allocated to procurement initiatives as opposed to contract management initiatives, or as opposed to policy and analysis initiatives.[6] Similarly, the OPA seeks approval for an internal resources budget of $8,893,000 for Conservation. Again, the OPA is not able to break out the total internal resources into the various initiatives. The result is that the OPA is unable to advise the Board of the amount of the budget used on implementing CDM programs with LDCs as compared to industrial and demand response programs. In fact, the OPA's witnesses could not, and would not be able to in the future, even advise the Board whether $100,000 or $1 million or $5 million would be spent on any of these particular initiatives.[7]

12. Without this level of detail, the Board is unable to objectively assess whether the proposed $79M budget and its component parts are reasonable and appropriate. No one can objectively evaluate the reasonableness of a $79M budget when it is not known how the costs giving rise to the budget are allocable between the various objectives and initiatives the budget is intended to address.

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[5] CME IR #1.
[6] Transcript, Volume 1, pages 16 to 17.
[7] Transcript, Volume 3, pages 128 to 129.

In these circumstances, the Board should decline to approve the proposed revenue requirement of $79M and send it back to the OPA for revision and allocation among its objectives and initiatives in conjunction with a prior determination and adoption by the OPA of more robust accounting measures that will ensure budgets are being prepared and monitored on an initiative-by-initiative basis.

13. These more robust accounting measures should include the following:

(a) A written budget planning process which codifies the roles and responsibilities of both the operational personnel who conduct the zero-based budgeting and the executive personnel that review the zero-based budgets and implement the overall "target";

(b) A description of both the zero-based budgeting and target-based budgeting processes that the OPA follows; and

(c) A description of the methods that are applied, on an initiative-by-initiative basis, to prepare and monitor the external and internal budgets that, in combination, produce the $79M requested revenue requirement.

14. It should be noted that counsel for the OPA made no submissions in his Argument-in-Chief pertaining to the budgeting process that produced the $79M amount that the Board is being asked to approve. In these circumstances, the Board should provide Intervenors with an opportunity to respond to any submissions with respect to this issue that are made for the first time in Reply Argument.

III. DEFICIENCIES IN THE OPA'S PERFORMANCE OF PLANNING AND CHARGE-FUNDED ACTIVITIES

15. The $79M revenue requirement the Board is being asked to approve covers OPA resources performing the planning function as well as other charge-funded activities related to procurement and conservation. CME submits that the evidence in this case establishes that there are a number of deficiencies in the manner in which OPA resources perform a number of these activities. These deficiencies call into question the effectiveness of the OPA's utilization of the $79M revenue requirement that it asks the Board to approve. The deficiencies that are of concern to CME are described below.

A. PLANNING

(i) Economic Feasibility Assessment Deficiencies

16. The *Green Energy Act* initiatives were first announced in 2009. The overall economic feasibility of the proposed and planned greening of Ontario's electricity system has been a priority concern of CME from the outset.

17. In ongoing proceedings before the Board, CME has asked Hydro One officials to identify the organization that it considers to be responsible for evaluating the overall economic feasibility of the transition of Ontario's integrated power system to the green energy end-state contemplated by these initiatives. When answering these questions Hydro One officials have stated that responsibility for performing such economic feasibility assessments rests with the OPA.[8]

18. However, the evidence in this proceeding reveals that the OPA does not assess and monitor, on an ongoing basis, the overall economic feasibility of the initiatives that it and others are undertaking to respond to the government's initiatives and directives to transition Ontario's integrated power system to the

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[8] Transcript, Volume 6, pages 60-61, Hydro One Distribution (EB-2010-0002).

desired end-state. The total bill impact of these initiatives is a critical component of such ongoing economic feasibility assessments. The OPA, however, does not conduct forward looking total bill impact analyses for particular customer classes. Rather, its assessment of impacts is at a cost per MW level that is generic to all customers.

19. The evidence in this proceeding indicates that the OPA does not apply an economic feasibility test on an ongoing basis to determine sustainability. Instead, the OPA assesses "indicators" of matters pertaining to sustainability. Feasibility, reliability, flexibility, cost, environmental performance, and societal acceptance are matters that the OPA says it considers. According to the OPA, these criteria embody a "holistic look" at sustainability for the electricity system. The OPA neither considers, determines nor applies a threshold for periodic and/or end-state price increases that the economy can withstand.[9]

20. The OPA's focus on the electricity system is limited to whether it provides reliable electricity and complies with government policy. The OPA has not looked at and has not developed any studies on the cost impact on Ontario's economy.[10] This is so despite the fact that the OPA confirms that it has a role or responsibility in making electricity costs transparent in Ontario.[11]

21. The OPA does not currently calculate or develop a total bill impact calculation or forecast. It currently does not undertake a calculation or forecast of the total bill impact of all the moving parts of an energy bill will be, either generally or on a customer specific basis.[12]

22. This evidence strongly suggests to CME that macro economic feasibility assessments related to the affordability and sustainability of all of the OPA's

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[9] Transcript, Volume 1, page 24.
[10] Transcript, Volume 1, page 25.
[11] Transcript, Volume 1, pages 25 to 26.
[12] Transcript, Volume 1, page 137.

initiatives and those of others to implement the government's green energy agenda are not an OPA priority. This is of considerable concern to CME. CME regards ongoing economic feasibility assessments to be critical to controlling the pace of change and the determination of an end-state that does not cause irreparable harm to the Ontario economy.

23. In its October 27, 2010 letter describing its plan to develop "a Renewed Regulatory Framework for Electricity", the Board stated as follows:

> First, the Board will re-examine its approach to network investment planning by transmitters and distributors. This work will include an examination of ways to encourage distributors and transmitters to plan their investments with the total bill impact in mind. Efforts to manage the prioritization and pace of network investments may require an assessment of the combined cost impact of both the proposed network investment and the generation that would be connected by that investment; that assessment should help to ensure that the most cost effective network investments are made first. The Board will also assess whether planning by distributors and transmitters might yield more efficient and effective outcomes if conducted on a more co-ordinated and regional basis.

24. An initial Stakeholder Conference was held on February 2, 2011, and on February 22, 2011, participants were advised that the Board had retained AESI Inc. and Power Advisory LLC to assist with the Distribution Network Investment Planning initiative. However, to our knowledge, no further developments have occurred in connection with that initiative since February, 2011. Accordingly, the nature of the total bill impact assessments that the Board plans to consider is not yet known and its renewed regulatory framework for electricity initiatives is still in its infancy.

25. Accordingly, at this time, electricity consumers find themselves being called upon to pay for billions and billions of dollars of expenditure on green energy initiatives and related network investments without there being any regular ongoing publicly disclosed assessments of the likely affect of these

initiatives on the Ontario economy. This is very troubling to CME and, in its view, a recipe for an unfavourable economic outcome for Ontario.

26. For the $79M it asks the Board to approve for 2011, OPA resources, being the central electricity system planning authority in Ontario, should be regularly providing and publicly disclosing overall economic feasibility assessments of the measures it and others are taking with respect to the greening of Ontario's integrated power system.

27. The deficiencies in the OPA's economic feasibility planning at a micro level with respect to the Fee in Tariff ("FIT") are described in Board Staff's submission. The OPA is woefully behind schedule in producing the economic connection test ("ECT") that is critical to that program. That circumstance corroborates the conclusion that the $79M the OPA asks the Board to approve to support its resources for 2011 are not being utilized to produce the economic feasibility assessments that are essential to the planning functions the OPA is obliged to perform.

28. The Board should refrain from approving the $79M revenue requirement for 2011 without commitments from the OPA pertaining to the provision and public disclosure, on an ongoing basis, of the economic feasibility assessments that are critical to the implementation of the green energy initiatives in a manner that avoids causing irreparable harm to Ontario's economy.

B. PROCUREMENT

29. Activities that OPA resources perform with respect to procurement that are of concern to CME include:

(a) the lengthy duration of renewable generation contracts at fixed prices;

(b) the level of prices being paid for renewable generation; and

(c) the absence of conditions of curtailment in renewable generation contracts.

30. Matters pertaining to the performance by OPA resources of tasks related to these activities were not explored in any detailed way during the course of this proceeding. CME reserves the right to explore these matters in OPA's Submission for Review with respect to its 2012 revenue requirement.

C. CONSERVATION

31. CME submits that there are a number of deficiencies in the way OPA resources are performing charge-funded activities with respect to conservation that separately, and in combination, call into question the appropriateness of the OPA's utilization of the $79M revenue requirement that it asks the Board to approve.

(i) OPA's Failure to Optimize Its Province-Wide CDM Programs

32. In late March, 2010, the Minister of Energy issued a directive to the Board requiring it to establish individual CDM targets for LDCs. The total of these targets is to equal 1,330 megawatts of provincial peak demand reduction and 6,000 gigawatt hours of energy savings from 2011 to 2014. LDCs can meet their CDM targets through delivery of province-wide CDM programs made available by the OPA, through OEB-approved CDM programs or through a combination of both types of programs.[13]

33. On April 23, 2010 the Minister issued a corresponding directive to the OPA confirming that the OPA would play a key role in coordinating and facilitating CDM opportunities for LDCs.

34. The OPA and the LDCs worked together to develop a budget for the province-wide programs. That budget, which is approximately $1.4 billion, is

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[13] Exhibit A, Tab 2, Schedule 1, page 15 of 52.

available to LDCs in the form of a program administration budget.[14] The program administration budget represents the OPA funds available for use by LDCs to achieve their Board-prescribed CDM targets.

35. The OPA and LDCs spent the better part of 2010 designing new programs, and came out with a suite of province-wide CDM programs jointly designed that achieved a portion, but not all, of the LDCs' province-wide targets. The intention of the OPA and LDCs was that the LDCs would design their own programs to fill in or achieve the rest of their respective targets.[15]

36. To this end, the OPA confirmed that there was an intentional decision by the working group (which included the OPA and LDCs) that the province-wide programs would not cover the entire target. This was because the LDCs wanted the ability to develop Board-approved programs to achieve a portion of their targets.[16]

37. In this hearing, the OPA advised that during the OPA-LDC negotiations, a decision was made to design province-wide programs that would not achieve the entire province-wide CDM target in order to "leave space" for Board-approved programs.[17] According to the OPA, the reason it agreed to "leave space" was because the April 23, 2010 directive established that "the OPA will design OPA-contracted province-wide CDM programs, taking all reasonable steps to collaborate with LDCs". To this end, one of the outcomes of the OPA taking all reasonable steps to collaborate with the LDCs was to negotiate "space" within its province-wide programs. The only parties participating in the negotiations with respect to the Master Agreement, which resulted in the decision to intentionally leave space for Board-approved CDM programs, were the OPA and LDCs.[18]

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[14] Transcript, Volume 3, page 89.
[15] Transcript, Volume 3, page 139.
[16] Transcript, Volume 3, page 140.
[17] Transcript, Volume 4, page 69.
[18] Transcript, Volume 4, page 96.

Thus, the product of that negotiation was a conscious decision to have the OPA's programs fall short of the province-wide CDM targets that had been established by government directive.

38. The Board should refrain from approving the $79M requested revenue requirement without a commitment from the OPA that it will eliminate the feature of its arrangements with LDCs that is designed to allow each and every LDC in the province to develop supplemental CDM programs at additional cost to electricity consumers if the programs were approved by the Board. Utilizing Board-approved revenue requirement amounts to have OPA resources deliberately design province-wide CDM programs that fall short of the conservation targets allocated to each LDC comprises a misuse of the revenue requirement amount the OPA asks the Board to approve. The Board should not tolerate the failure of the OPA to optimize its province-wide CDM programs in order to minimize the extent, if any, to which LDCs need to develop supplemental programs to achieve their allocated CDM targets.

39. The Board should decline to approve the $79M revenue requirement request without a commitment from OPA that this feature of its arrangements with the LDCs will be eliminated forthwith. If the OPA does not provide such a commitment in its Reply Argument in this proceeding, then the Board should decline the revenue requirement request the OPA asks it to approve and send the Submission for Review back to the OPA for re-submission when this feature of its arrangements with the LDCs has been eliminated.

(ii) The Wasteful Incentives for LDCs

40. There are two different financial incentives available to LDC's for the delivery of CDM throughout Ontario. The first is a "performance incentive" administered by the Board. The second is an "efficiency incentive" administered

by the OPA. The efficiency incentive is established by the Master Agreement for province-wide CDM which was negotiated between the OPA and LDCs.[19]

41. The OPA has identified two goals to be achieved through these two financial incentives. The first goal is to meet and exceed conservation targets, and the second goal is to ensure ratepayer value.[20] The OPA agreed that the performance incentive primarily works to enhance the goal to meet and exceed conservation targets, and that the efficiency incentive is primarily tied to the goal of ensuring ratepayer value.[21]

42. Section 4.5 of the Master Agreement sets out a four-part test to determine whether LDC's are eligible for the efficiency incentive, and if so, the quantum of that incentive. First, the OPA determines that the LDC is not in an event of default. Second, the OPA performs a quantitative analysis by looking at the LDC's budget compared to the actual monies spent. This is a mathematical exercise – so long as the LDC has spent more than 80% but less than 100% of their budget, then an incentive is available. Third, the OPA confirms that the CDM program for which the incentive is sought was not terminated. Finally, the OPA retains the ability to ensure that the LDC used "commercially reasonable efforts" in delivering the programs.[22]

43. The phrase "commercially reasonable efforts" is defined at page 2 of Appendix A-1 of the Master Agreement as follows as follows:

> "Commercially reasonable efforts" means all efforts which may be required to enable a Person directly or indirectly, to satisfy, consummate, complete or achieve a condition, transaction, activity, obligation or undertaking contemplated by this Master Agreement and which do not require such Person to expend any funds or assume

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[19] Exhibit I, Tab 2, Schedule 4, Attachment 1.
[20] Transcript, Volume 1, page 130; Volume 3, page 111.
[21] Transcript, Volume 3, pages 111 to 112.
[22] Transcript, Volume 3, pages 115 to 116.

> liabilities other than expenditures and liabilities which are reasonable in nature and amount in the context of the purpose of, and the Initiatives contemplated by, this Master Agreement.

44. According to the OPA, the purpose of the efficiency incentive is to drive LDCs to try and maximize what they can do efficiently with the dollars they receive.[23] According to the OPA, if LDCs do more with less, then that is a form of ratepayer value. To this end, by ensuring that the LDCs use, "commercially reasonable efforts", the OPA retains the ability to ensure that ratepayer value is achieved because it places an obligation on LDCs to use commercially reasonable efforts.[24]

45. The OPA acknowledged that there could be a scenario whereby one LDC spends 80% of their budget in a very effective manner, while another LDC spends 80% of their budget in a non-effective manner. To this end, the OPA agreed that it has the responsibility to assess whether commercially reasonable efforts were used.[25]

46. That said, when asked who has the responsibility to assess whether commercially reasonable efforts were achieved by the LDCs, the OPA witness panel confirmed that who has the responsibility to assess whether commercially reasonable efforts were exercised has not yet been determined with certainty. The best the witnesses could do was to guess that it would likely be a joint responsibility of the OPA's VP, Andrew Pride, supported by the operations group managing the contracts and the LDC key account managers.[26]

47. Furthermore, the OPA confirmed that they have not developed any rules, guidelines, performance metrics, milestones, or targeted results to assess

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[23] Transcript, Volume 3, page 117.
[24] Transcript, Volume 3, pages 116 to 117.
[25] Transcript, Volume 3, page 118.
[26] Transcript, Volume 3, page 119.

whether an LDC has exercised commercially reasonable efforts within the meaning of the Master Agreement. No guidance or management tools are provided to OPA staff beyond the wording contained in the Master Agreement.[27] Without such guidance, CME questions whether OPA staff and management, who are funded by Board-approved fees, have been equipped with the ability to determine whether commercially reasonable efforts are being exercised.

48. Furthermore, the OPA agreed that the definition of "commercially reasonable efforts" contained in the Master Agreement is a "broad definition" that is part of a contract negotiated by two parties.[28] The definition of commercially reasonable efforts leaves significant flexibility to the OPA assessor to determine what is or is not commercially reasonable. The fact that the term is so broadly defined in the Master Agreement exacerbates the need for further guidance andéor management tools to ensure efficient and effective delivery of province-wide CDM programs.

49. During cross-examination, the OPA acknowledged that the phrase "commercially reasonable efforts" is meant in a broad sense.[29] Further, Ms. McNally stated:

> Ms. McNally: So I think the language was carefully chosen -- "commercially reasonable efforts" – that this isn't some secret these are commercially reasonable efforts; it's what a reasonable business running their business would do.

In CME's submission, this assertion should be entirely rejected by the Board.

50. What is, or is not, "commercially reasonable" is contextual to the area of business or the industry to which it is applied. For businesses that have been in existence for long periods of time, guidance can be obtained from industry

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[27] Transcript, Volume 3, page 121.
[28] Transcript, Volume 3, page 122.
[29] Transcript, Volume 3, page 123.

standards and/or jurisprudence. The OPA agreed that the province-wide CDM programs are new, and as such, the meaning of the term "commercially reasonable" in such conservation activities is also a new area. The phrase "commercially reasonable" in the context of conservation has greater ambiguity than in a business that has been run for 50 years, or an industry that has been similar for a long period of time.[30]

51. Furthermore, the Ontario Court of Appeal and B.C. Supreme Court have confirmed that the phrase "reasonable commercial efforts" does not impose a high standard. According to this jurisprudence, it does not even require "good faith", "best efforts", or "*bona fide* efforts". Thus, the ratepayer protection afforded by this provision of the Master Agreement is of minimal value.[31]

52. Another concern is that the efficiency incentive is based on whether reasonable efforts were made to achieve the targets, not on whether the targets were actually achieved.[32]

53. The fact that the OPA has not identified who will be responsible for ensuring ratepayer value by monitoring whether LDCs exercise commercially reasonable effort, and has not developed any guidance or management tools to conduct such an assessment, brings into question the effectiveness of the OPA's delivery of CDM programs. To the extent that the Board agrees that this element of the delivery of province-wide CDM is ineffective, it brings into question the related fees that are subject to Board approval. CME submits that much more robust internal controls must be imposed on the OPA in it monitoring and assessment of the efficiency incentive.

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[30] Transcript, Volume 3, page 125.
[31] See *Nelson v. 535945 British Columbia Ltd.* 2007 BCSC 1544, and *364511 Ontario Ltd. v. Darena Holdings Ltd.* (1998), 55 O.T.C. 13; affirmed by the Ontario Court of Appeal (1999), 120 O.A.C. 280. To assist the Board, we have attached these cases to our submission.
[32] Transcript, Volume 3, page 122.

54. It is a misuse of the revenue requirement funds that the Board is being asked to approve for OPA resources to agree and to continue to administer such wasteful incentives in its arrangements with the Ontario LDCs. The Board should refrain from approving the $79M revenue requirement the OPA asks it to approve for 2011 without a commitment from the OPA that it will forthwith remove these efficiency incentive provisions from its Agreement with the Ontario LDCs. If the OPA does not provide an on-the-record commitment to this effect in its Reply Submissions in this proceeding. then the Board should refrain from approving the $79M revenue requirement. The Submission for Review should be sent back to the OPA for re-submission when the wasteful incentives have been removed from the OPA's arrangements with the LDCs.

(iii) Avoidance of Duplication

55. An important issue in this case is the obligation of OPA resources to evaluate the extent to which LDC proposed CDM programs are duplicative of OPA province-wide programs.

56. The OPA's position on this issue in this case is to defer the Board's determination of the issue to the Toronto Hydro Electric System Limited ("THESL") case.[33] At page 12 of its Argument-in-Chief, counsel for the OPA states as follows:

> The OPA will present its proposals on the substantive role that it should play with regard to reviewing Board-approved CDM programs in its forthcoming submission in EB-2011-0011. The OPA is of the view that its recommended approach can be accommodated within its proposed 2011 operating budget.

57. The OPA's Submission in that proceeding, dated May 24, 2011, contains a constructive proposal for providing the Board with an evaluation of duplication by the OPA, which the Board needs to properly discharge its obligations. The

[33] EB-2011-0011.

Board's views on that proposal, and OPA's commitment to forthwith apply it to each and every LDC that seeks Board-approval for CDM programs that supplement the OPA's province-wide programs needs to be made a matter of record in this proceeding because this is the proceeding in which the OPA is an Applicant. This is the case in which the Board should specify the commitment it requires from the OPA to enable the Board to discharge its obligations to avoid duplication.

58. In order to enlarge the record in this proceeding to enable the Board to specify the commitment it requires from the OPA, we propose and respectfully request that the Board issue an Order pursuant to Rule 11.01(b) of its Rules of Practice and Procedure and order an amendment to the evidentiary record in this proceeding so as to incorporate therein all of the evidence and arguments in the THESL case pertaining to the evaluation and avoidance of duplication.

59. An Order of this nature causes no prejudice to the OPA since it is an active intervenor in the THESL case. Moreover, an Order of this nature is particularly appropriate since the two Board members hearing this case are also members of the panel hearing the THESL case.

60. The Board should be reluctant to approve any portion of the $79M revenue requirement for OPA resources for 2011 without an on-the-record acknowledgment and commitment in these proceedings that OPA resources, covered by the $79M revenue requirement request, will provide duplication evaluations in the manner proposed by the OPA in its Submissions in the THESL proceedings, subject to such refinements that the Board may require.

D. OVERALL

(i) Lack of Efficiency Metrics

61. CME agrees with the Submission of Board Staff that the efficiency metrics currently provided by the OPA are of little utility with respect to measuring

performance. The efficiency measures set out at Exhibit C, Tab 1, Schedule 1, page 3, do not measure whether or not ratepayer dollars have been effectively used through quality assurance and quality control processes. These measures merely test whether various processes were enacted and executed. There is no assessment of the cost effectiveness of the processes. The result is that the OPA sets standards and subsequently advises the Board whether or not the OPA determines that it met those standards.[34] These milestones established by the OPA only assesses whether certain activities have been completed. There is no measure of whether or not the OPA has spent the money efficiently or effectively.

62. Board Staff Interrogatory No. 27 asked whether the OPA considered the efficiency metrics provided an indication of whether the OPA achieved value for money for ratepayers in the performance areas tracked. To this end, the OPA confirmed that value for money is assessed through "specific audits" performed at the program level. That said, to date, the OPA has not conducted any audits on efficiency metrics.[35]

63. For 2011, the OPA expected that there would be some audits in the area of electricity resources. The OPA will conduct the analysis of all of the initiatives and assess them based on levels of risk that the OPA considers in the programs and then prioritize those initiatives and set up the audit program. At that time, the OPA would retain external auditors to conduct the audit. To this end, the OPA confirmed that it had not yet decided whether the audit results would be made public as part of the Board process in the future.

64. CME submits that audits undertaken to ensure value-for-money for ratepayers must be publically disclosed. To conduct such an audit in confidence defeats its purpose. Public disclosure of audits is another internal control mechanism that the Board should impose on the OPA.

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[34] Transcript, Volume 3, page 99.
[35] Transcript, Volume 1, page 47.

65. The Board should refrain from approving the revenue requirement request of $79M without a commitment from the OPA that it will forthwith develop a broader set of efficiency metrics as suggested by Board Staff in their Submission. If the OPA does not express that commitment in its Reply Submissions, then the Board should refrain from approving the $79M revenue requirement request and refer it back to the OPA for revision and re-submission accompanied by an on-the-record commitment pertaining to efficiency metrics of the type proposed by Board Staff.

(ii) Insufficiency of External Communications

66. We agree with Board Staff's analysis of this deficiency and urge the Board to refrain from approving the $79M revenue requirement without an on-the-record commitment from the OPA either in Reply Submission or later with a re-submitted revenue requirement request to develop a communication system of the type suggested by Board Staff in its Submissions.

IV. DISPOSITION OF THE APPLICATION

67. CME recognizes that the Board's authority under section 25.21(2) of the *Electricity Act* is not as broad as its rate-setting power under the *OEB Act*. That said, the Board should construe its authority broadly.

68. We urge the Board to find that its authority under section 23 of the *OEB Act* to impose conditions applies in this proceeding brought by the OPA under section 25.21 of the *Electricity Act*.

69. Even if the Board declines to make that finding, the Board should conclude that its power under section 25.21(2) of the *Electricity Act* to refer the proposed revenue requirements and the proposed fees back to the OPA for further consideration with Board recommendations, either expressly or by necessary implication, encompass the power to refrain from approving a revenue requirement request without commitments from the OPA that the Board requires

pertaining to the performance of tasks by the OPA resources that are to be funded with the requested revenue requirement.

70. The statutes under which the Board operates, either expressly or by necessary implication, encompass a disposition of this proceeding that notifies the OPA that the $79M revenue requirement request will not be approved without accompanying on-the-record commitments with respect to the performance of tasks by the OPA resources that are to be funded with the $79M.

71. As already noted throughout this Argument, the OPA can make commitments proposed by CME and others in its Reply Submissions. If the OPA chooses to refrain from making such commitments, then the Board should refrain from approving the Application until it has been re-submitted, accompanied by the on-the-record commitments, which the Board determines that it requires pertaining to OPA's utilization of the resources that will be funded from the revenue requirement the Board is asked to approve.

72. A summary of the commitments CME urges the Board to require is as follows:

(a) Immediate adoption of more robust budgeting and accounting measures to ensure that the OPA's revenue requirement budgets are being prepared and monitored on an initiative-by-initiative basis;

(b) Preparation and public disclosure, on a regular and ongoing basis, of the economic feasibility assessments that are critical to managing the transition to a green energy end-state for Ontario's integrated power system that avoids irreparable harm to the Ontario economy;

(c) Immediate removal of the provisions in the OPA's current arrangements with LDCs that constitute a failure to optimize the OPA's province-wide CDM programs;

(d) Immediate removal of the wasteful incentives in the current arrangements between the OPA and Ontario LDCs;

(e) On-the-record commitments to provide duplication evaluations as proposed by the OPA in the THESL case subject to whatever revisions the Board may require;

(f) Commitments to adopt efficiency metrics as proposed by Board Staff; and

(g) Commitments to enhance external communications as proposed by Board Staff.

V. COSTS

73. CME respectfully requests an award of 100% of its reasonably incurred costs of participating in this proceeding.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 27TH DAY OF MAY, 2011.

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Counsel for CME

Case Name:

Nelson v. 535945 British Columbia Ltd.

Between
Sheila Iona Nelson, Plaintiff, and
535945 British Columbia Ltd., Defendant/Plaintiff by Counterclaim, and
Sheila Iona Nelson and Brad Nelson, Defendants by Counterclaim

[2007] B.C.J. No. 2282

2007 BCSC 1544

63 R.P.R. (4th) 224
2007 CarswellBC 2516
162 A.C.W.S. (3d) 843

Docket: S055786

Registry: Vancouver

British Columbia Supreme Court
Vancouver, British Columbia

W. Ehrcke J.

Heard: September 17-21 and 24, 2007.
Judgment: October 19, 2007.

(56 paras.)

Contracts — Formation — Implied terms — Action by plaintiff seller for damages for breach of agreement of purchase and sale dismissed — Contract stipulated that defendant purchaser was to make "all commercial reasonable efforts" to achieve re-zoning, upon which purchase price would increase — Court held that "all commercial reasonable efforts" was not equivalent to best efforts, and a term could not be implied into contract that defendant was required to make a formal re-zoning application to City Counsel when defendant already knew from city planning staff that such application would likely fail — Decision not to proceed with formal application was commercially reasonable.

Contracts — Interpretation — Commercial reasonableness — Action by plaintiff seller for damages for breach of agreement of purchase and sale dismissed — Contract stipulated that defendant purchaser was to make "all commercial reasonable efforts" to achieve re-zoning, upon which purchase price would increase — Court held that "all commercial reasonable efforts" was not equivalent to best efforts, and a term could not be implied into contract that defendant was required to make a formal re-zoning application to City Counsel when defendant already knew from city planning staff that such application would likely fail — Decision not to proceed with formal application was commercially reasonable.

Real property law — Sale of land — Agreement of purchase and sale — Breach of — Interpretation — Purchaser — Duties and obligations — Action by plaintiff seller for damages for breach of agreement of purchase and sale dismissed — Contract stipulated that defendant purchaser was to make "all commercial reasonable efforts" to achieve re-zoning, upon which purchase price would increase — Court held that "all commercial reasonable efforts" was not equivalent to best efforts, and a term could not be implied into contract that defendant was required to make a formal re-zoning application to City Counsel when defendant already knew from city planning staff that such application would likely fail — Decision not to proceed with formal application was commercially reasonable.

Action by plaintiff for damages for breach of an agreement of purchase and sale -- Plaintiff agreed to sell two apartment buildings to defendant -- Contract specified minimum purchase price, which was to be adjusted upward if defendant was able to have floor space ratio re-zoned -- Contract required defendant to use "all reasonable commercial efforts" to accomplish this, but by closing date re-zoning had not occurred and defendant purchased properties for minimum price of $3,327,110 -- Plaintiff alleged defendant breached contract by failing to use "all reasonable commercial efforts" to achieve re-zoning -- Defendant had many meetings and phone conversations with city planning officials, and informally presented plans for development -- It was made clear to defendant that planning officials did not support redevelopment plan, and that rezoning for higher density sought by defendant was "wishful thinking" -- Defendant felt that a formal application to City Council for amendment to zoning bylaw without support of planning staff would have no chance of success -- Plaintiff argued that although contract did not specifically provide that defendant was required to make a formal application, such a term could be inferred, and that if defendant had done so, it might have been successful, resulting in a sale price of $3,905,738 -- Plaintiff sought damages of difference between that amount and actual sale price, with difference totaling $578,627 -- HELD: Action dismissed -- Based on ordinary dictionary definition, "reasonable" implied sound judgment, a sensible view that was not absurd -- "Commercial" meant having profit or financial gain as opposed to loss as a primary aim -- Reasonable commercial efforts were not "best efforts" or "bona fide" efforts -- A higher standard was not created by use of phrase "all reasonable commercial efforts" -- Defendant's obligation was to pursue matter to point where it became commercially unreasonable to proceed further -- Contract required defendant to take some steps toward re-zoning, but that did not mean those steps necessarily had to include a formal application to City Counsel -- Defendant's conclusion that in political and regulatory climate at that time Counsel would not be receptive to applications for increased density was reasonable -- Defendant reasonably concluded it would not be prudent to spend thousands of dollars to pursue a formal application given low chance of success -- Its decision was commercially reasonable, and plaintiff had not established that defendant breached contract.

Counsel:

Counsel for the Plaintiff: Andrew G. Sandilands.

Counsel for the Defendant: Francis Lamer.

Reasons for Judgment

W. EHRCKE J.:--

Introduction

1 The plaintiff owned two apartment buildings located at 1628 and 1640 Eastern Avenue in North Vancouver, B.C. She entered into a contract of purchase and sale by which the defendant agreed to buy the properties. The contract specified a minimum purchase price, which was to be adjusted upwards if the defendant was able to achieve through rezoning a floor space ratio ("FSR") in excess of 2.3 for those properties and adjacent properties on the same block. The contract required to defendant to use "all reasonable commercial efforts" to achieve this higher FSR. By the closing date, a higher FSR had not been achieved, and the defendant purchased the properties for the minimum price.

2 The plaintiff alleges that the defendant breached the contract by failing to use "all reasonable commercial efforts" to achieve the higher FSR and therefore sues for damages.

3 In the statement of claim, the plaintiff also alleged breach of fiduciary duty, but that claim was abandoned at trial. As well, the defendant filed a counterclaim, but leave to withdraw that counterclaim was granted on the first day of trial.

4 Accordingly, the only issues on this trial are whether the defendant breached the contract and if so, what if any damages have been proven.

The Parties, the Properties and the Contract

5 The properties at 1628 and 1640 Eastern Avenue were owned by Sheila Nelson, but her son, Brad Nelson, had a power of attorney, and it was he who negotiated the contract and dealt with the purchaser.

6 Thomas Meyer was the original owner of the defendant company, 535945 British Columbia Ltd. In 2002, he assembled five properties on the east side of Eastern Avenue between 15th Street and 17th Street in North Vancouver by having his company enter into agreements of purchase and sale with the properties' owners. The two properties in the middle of that group were those owned by the plaintiff. The other three properties on either side were 1600 Eastern Avenue, 1616 Eastern Avenue, and 143 East 17th Street. For convenience, I shall refer to the five properties collectively as the "Eastern Avenue site". All the contracts contained subject conditions. In the case of the contract with the plaintiff, the conditions were not satisfied or waived, and the contract lapsed.

7 In November 2002, Mr. Meyer sold the defendant company to Anthem Properties Group Ltd. ("Anthem").

8 In October 2003, the defendant company, now wholly owned by Anthem, purchased the three properties not owned by the plaintiff, and subsequently entered into discussions with the plaintiff to revive or renegotiate an agreement of sale for her middle two properties.

9 Although the named parties in this action are Sheila Nelson and the numbered company, the actual participants in the negotiations were Brad Nelson for the plaintiff and Anthem for the defendant, or more specifically, Anthem's President, Eric Carlson.

10 Brad Nelson presented Mr. Carlson with his ideas for what Anthem could do with the assembled five properties if the defendant purchased the plaintiff's middle two properties. He presented proposals for the development of a combination of rental and market housing on the assembled five lots. Such a development would require an increase in both the density and height currently permitted by the City of North Vancouver (the "City") for that site. This in turn would require an amendment both to the zoning bylaw and the Official Community Plan ("OCP").

11 One of the goals of the City as set out in the OCP is to maintain affordable and rental housing. Section 5.12.1 of the OCP provides that in medium and high density areas (which would include the Eastern Avenue site) Council may approve additional floor area or density transfers "if there is a commitment to provide affordable or rental housing." The OCP also lists other City objectives, such as heritage conservation and enhancement of the environment, which Council may, at its discretion, reward with a density bonus.

12 Mr. Nelson suggested the possibility of a joint venture, but Anthem made it clear it was not interested. Anthem suggested a fixed price contract with no mention of rezoning, but that did not interest the plaintiff, who hoped to share in the benefits of a rezoned project. Various drafts were exchanged, and ultimately, the parties concluded a contract of purchase and sale (the "Contract") at the end of May 2004. The salient clauses of the Contract are 25, 25.1, 25.2, 25.3, 26, 34 and 36(f).

13 Clause 25 incorporated a subject condition relating to the granting of rezoning by the City. The condition was to be satisfied on or before June 30, 2005 and was stated to be for the sole benefit of the buyer, who also had the right to waive the condition. Clause 25 reads:

> 25. THIS OFFER is subject to the following condition precedent being satisfied or waived by the Buyer within the time specified:
>
> (a) the City of North Vancouver granting the Buyer Official Community Plan amendment, rezoning, and (if required) development permit approval for the Property, to the sole satisfaction of the Buyer, on or before June 30, 2005, or within twenty-four (24) hours of the Buyer receiving formal notice of such approvals from the City of North Vancouver, whichever is the earlier date.
>
> (the "Subject Condition")
>
> If the Buyer fails to notify the Seller, in writing, that the Subject Condition has been satisfied or waived within the time specified, or by such time as may be subsequently agreed, then this Contract will become null and void and the Initial Deposit with accrued interest will be returned

in its entirety to the Buyer.

Upon satisfaction or waiver of the Subject Condition, and notice of same within the time specified by the Buyer to the Seller, the Initial Deposit shall be made non-refundable, as shall be all deposits thereafter.

The Subject Condition is for the sole benefit of the Buyer. The Buyer has the right to waive the Subject Condition at its discretion within the time stipulated and proceed with the transaction herein contemplated.

14 Clause 25.1 dealt with the lot size and provided for an adjustment of the price if a survey showed the size to be different from the assumed size of 18,480 square feet.

15 Clause 25.2 stipulated that the purchase price was to be a minimum of $3,306,386, calculated as $77.79 per buildable square foot, with a minimum overall FSR of 2.3 for the combined five lots, that is, the two lots the plaintiff was selling to the defendant along with the adjacent three lots that the defendant had already purchased in October 2003. Clause 25.2 reads:

25.2 PURCHASE PRICE

Is based on the Buyer obtaining Municipal rezoning and permit approval to allow for a minimum overall project density (Floor Space Ratio, or FSR) of 2.3. This means that for each 1.0 square feet of property area, 2.3 square feet of building area may be constructed within the development. Purchase Price is therefore:

[18,480 sq. ft. land x 2.3 x $77.79/sq. ft. buildable] = $3,306,386.00

Overall project density shall be determined by the gross FSR granted to the Buyer by the City of North Vancouver in the new zoning bylaw governing development of the Property and adjoining lots, namely 143 East 17th Street, 1616 Eastern Avenue + 1600 Eastern Avenue North Vancouver.

16 Clause 25.3 is the clause that the plaintiff says was breached by the defendant. In that clause, the defendant agreed to "use all reasonable commercial efforts to achieve through rezoning the highest overall project density (gross FSR) possible [without jeopardizing the approval process]." The same clause provided that if an FSR of greater than 2.3 was achieved, then the purchase price would be adjusted proportionately upward, to a maximum FSR of 2.7. Clause 25.3 reads:

25.3 BUYER'S BEST EFFORT

The Buyer covenants and agrees to use all reasonable commercial efforts to achieve through rezoning the highest overall project density (gross FSR) possible [without jeopardizing the approval process] and should the Buyer achieve approval for an overall project density of greater than a 2.3 FSR, then the Purchase Price shall be adjusted upwards in proportion to the actual gross FSR achieved, to a maximum of 2.7. For example, if the total project gross FSR achieved is the maximum of 2.7, then the Purchase Price shall be increased as follows:

[18,480 sq. ft. Land x 2.7 x $77.79/sq. ft. buildable = $3,881,410.00]

17 Clause 26 provided that the closing would take place on the 60th day following the subject removal date.

18 Clause 34 provided that the plaintiff would have the right to purchase a finished living unit in the proposed new development at a ten per cent discount below the market price.

19 Clause 36(f) provided that the defendant would allow the plaintiff "reasonable access to periodically review the development status and information available at the city of North Vancouver Planning Department."

20 The final wording of Clause 25.3 was the result of negotiations between the parties during the month of May 2004. Other wording had been suggested but rejected by one or the other of the parties, including: "The buyer covenants and agrees to use reasonable commercial efforts to achieve the highest total project gross FSR possible ..." and "The buyer covenants and agrees to use his best commercial effort to achieve the highest total project gross FSR possible ..."

The Efforts of the Defendant to Rezone the Property

21 The five properties comprising the Eastern Avenue site are occupied by a number of three-storey, wood-frame rental apartment buildings. Under the existing zoning bylaw and the OCP, the maximum permitted density for the site is 1.6 FSR, and the maximum allowable building height is four storeys.

22 The Eastern Avenue site is across the street from an area designated as "Town Centre", which has a permitted height of up to 55 metres and a permitted density of 2.6 FSR. That site is occupied by a large food store owned by Loblaws (the "Extra Foods site").

23 In the summer of 2004, Anthem was in discussions with Loblaws about developing the Extra Foods site. After the Contract with the Plaintiff was signed, Anthem put together a development team to discuss what could be done with both sites. Eric Carlson testified, and I accept, that there were discussions about three possibilities: developing the Eastern Avenue site on its own, developing the Extra Foods site on its own, and developing the two sites together as one project. Although Anthem considered all three possibilities, developing the two sites together was the most attractive, since it was felt there would be synergies that would permit both sites to be developed to their maximum potential. There were a number of reasons for this. The two sites were zoned differently and were treated differently in the OCP. Developing them together might permit density to be shifted from one site to the other. As well, the City was eager for something to be done with the Extra Foods site, and that might have provided leverage for concessions on the Eastern Avenue site if the projects were combined.

24 During the months of August, September and October, the Anthem development team consisting of Eric Carlson (president), Gary Fawley and John Kinney (senior vice-presidents), David Fawley, and others met several times to discuss the project. There are notes of meetings in August, and on September 9, September 10, September 22, September 23, October 22, and October 28, 2004. There were also telephone conversations with City planners on August 6 and November 3, 2004. An architect, Larry Doyle, was hired to prepare preliminary sketches for review by Loblaws and by the City. These sketches included a conceptual site plan for the Eastern Avenue site, with one 9-storey building and two six-storey buildings, that would include both 49 units of rental housing to replace that currently existing on the site, and new market housing. That plan would have required an overall FSR of 2.6.

25 On October 28, 2004, members of the Anthem team met with City planning officials, including Richard White, Karen Russell, and Gary Penway. The Anthem representatives presented the sketches that had been prepared by their architect, Mr. Doyle. David Fawley testified that the City planners were excited about the prospect of redeveloping the Extra Foods site, but not about the Eastern Avenue site. The planners advised that the Eastern Avenue site was subject to a four-storey height limit under the OCP. The planners expressed the view that the proposal for the Eastern Avenue site contained too much density. They also advised that the City was contemplating the possibility of imposing a 10% limit on density bonusing as a result of public concern that had been raised over another project at 612 Chesterfield. David Fawley testified that the planners advised that an FSR of 2.6 was "wishful thinking". That evidence is supported by the notes of the meeting. In his testimony, Richard White said he did not remember using those exact words, "but certainly at the time there would have been concern about the developability of that site."

26 David Fawley testified that what he gleaned from this meeting was that City planning staff would not support an application for an amendment to the OCP or zoning bylaw for the Eastern Avenue site, and although City staff would not prevent them from making a formal application to Council, he felt that without the support of the City planning staff, an application would have no chance of success with Council.

27 Subsequent to the October 28 meeting, there were internal discussions at Anthem. David Fawley met with Gary Fawley, and they concluded that this was not the right time to proceed with a formal application for the Eastern Avenue site. Gary Fawley said they should stop work on Eastern Avenue, and in the result, the defendant made no formal application for rezoning and amendment of the OCP for additional density on

the Eastern Avenue site.

28 Anthem never informed Brad Nelson of its decision not to proceed with a formal application to City Council for increased density. However, Mr. Nelson met periodically with City staff in 2004 and 2005 to enquire about the Eastern Avenue site, and he was thus aware that no formal application had been made. Notwithstanding that knowledge, he never contacted the defendant to object.

29 On June 30, 2005, the defendant waived the subject condition in Clause 25 of the Contract, and the sale of the properties closed at the end of August 2005. The price paid on closing was the minimum specified in the Contract, but adjusted pursuant to Clause 25.1 following a survey, for a total of $3,327,110.10. The plaintiff accepted that amount without prejudice to its right to bring the present action to recover what they say should have been paid had the defendant made greater efforts to achieve a higher FSR. The plaintiff says that if an application had been made, an FSR of 2.7 might have been achieved, for a sale price of $3,905,738. The plaintiff therefore seeks damages in the amount of $578,627.90, that being the difference between the actual sale price and the theoretical maximum sale price.

The Position of the Parties

30 The plaintiff takes the position that the defendant was obliged under the Contract to make greater efforts than it did. Specifically, the plaintiff submits that the defendant was required at least to make a formal application to City Council. The plaintiff submits that the meetings and phone conversations the defendant had with City planning staff were not sufficient to fulfil their obligations under Clause 25.3 of the Contract, and the defendant is therefore in breach. The plaintiff submits that since an application was never made to Council, it can never be known for certain whether it would have succeeded. Since this is due to the defendant's own wrong-doing, the proper measure of damages is the highest price that might have been obtained if an FSR of 2.7 had been achieved.

31 The defendant takes the position that it fulfilled the requirements of the Contract. Neither Clause 25.3 nor any other part of the Contract specifically requires the defendant to make a formal application to Council. Rather, what is required is that it use "all reasonable commercial efforts." That, it says, involves business decisions about what efforts are reasonable, which in turn involves a weighing of cost against the possibility of success. In the political climate that existed in North Vancouver in the fall of 2004 and spring of 2005, there was no reasonable possibility that a formal application to Council would succeed in obtaining an FSR in excess of 2.3, and it was therefore commercially reasonable not to expend the tens or hundreds of thousands of dollars that would have been required to put together a full, formal application. Accordingly, there has been no breach of the contract.

32 In the alternative, even if a technical breach of the contract has been established, the defendant submits that no damages have been proven. Even if the defendant was required to make a formal application, it would not have succeeded in obtaining an FSR in excess of 2.3, and therefore, no damages have been caused by the breach.

The Meaning of "All Reasonable Commercial Efforts"

33 The meaning of the phrase "reasonable commercial efforts" was considered in ***364511 Ontario Ltd. v. Darena Holdings Ltd.***, [1998] O.J. No. 603 (Ont. Gen. Div.). There the numbered company, operating under the name Delta Bingo, entered into an offer to lease an arena from Darena. The offer was conditional on Delta obtaining the necessary approvals and licences to operate a bingo hall on the premises within 60 days. When the approvals were not obtained, Delta sought the return of its deposit. At issue was whether Delta failed to carry out its obligation under the contract to use "reasonable commercial efforts" to obtain the approvals and licences. Delta had been unaware when it entered into the contract that its proposal to locate the bingo hall on the premises was strongly opposed by local residents, the press and city council. When it concluded that its chances of success "did not look good", it decided not to formally put its application before city council. Webber J. found that Delta was entitled to return of its deposit. He concluded that in light of the opposition, Delta's failure to hold a residents' meeting and to put its application formally before council was not a sufficient basis to conclude that it had failed to carry out its obligation under the contract.

34 After noting that he could find no judicial authority on the meaning of "reasonable commercial efforts", Webber J. referred to the ordinary dictionary meaning of the words, and he wrote at paras. 59-63:

para. 59 I rely upon the normal dictionary meaning of these words. Reasonable implies sound judgment, a sensible view, a view that is not absurd. Commercial means having profit or financial gain as opposed to loss as a primary aim or object.

para. 60 These words impose a standard of reasonable commercial efforts, not one of the best efforts or bona fide efforts. The latter standards might engage the defence submission that the application had to be carried to decision. It would seem to me that this standard of reasonable commercial efforts would allow Delta, if it had a doubt from the efforts made that no approval would be granted, to be free to conclude its efforts would not be successful and it could withdraw from the transaction.

para. 61 This standard does not change a true condition precedent into an option to be exercised solely at Delta's discretion. This standard allows Delta to use its reasonable commercial efforts and, it if did, it could not be bound to the proposed lease.

para. 62 There are obligations upon Delta arising from the words reasonable commercial efforts. Those obligations are that Delta could not deliberately prevent the occurrence of the condition. Delta could not take advantage of its own wrongful act. A failure to conclude the lease could not be brought about by Delta's own acts or omissions.

para. 63 In addition, there are other obligations upon Delta, as part of reasonable commercial efforts. It was required to consider what the political realities were in Mississauga, the known and perceived opposition, the extreme financial risk of lack of approval and the nature of the external controlling forces. On the basis of these obligations, Delta was required to consider whether it would make sense to continue with the application.

35 That decision was upheld on appeal: ***364511 Ontario Ltd. v. Darena Holdings Ltd.***, [1999] O.J. No. 1784, 120 O.A.C. 280 (Ont. C.A.). The Ontario Court of Appeal generally agreed with Webber J.'s interpretation of the phrase "reasonable commercial efforts" and in particular, his conclusion that it did not require Darena to pursue an application to the stage where it would be granted or refused, but the Court of Appeal did not agree that a "simple doubt" about the prospects of success would be enough to justify withdrawal from the transaction. Rather, Darena was required to proceed up to the point where the uncertainty of success made it commercially unreasonable to proceed:

para. 4 We do not accept the landlord's argument that in order to comply with the terms of the offer to lease the tenant was required not only to apply to the city and to the province but to pursue those applications to the granting or refusal of approval by those bodies. Nor do we find it necessary or useful to define "reasonable commercial efforts" in terms of "good faith", "bona fides" or "best efforts".

para. 5 We agree with the trial judge that the tenant "could not deliberately prevent the occurrence of the condition" nor could it "take advantage of its own wrongful act". We do not agree that "this standard of reasonable commercial efforts would allow [the tenant] if it had a doubt from the efforts made that no approval would be granted, to be free to conclude its efforts" and on that basis to withdraw from the transaction. A simple doubt would not suffice; uncertainty that made it commercially unreasonable to proceed was required.

36 This interpretation of "reasonable commercial efforts" was adopted by Burnyeat J. in ***GC Parking Ltd. v. New West Ventures Ltd.***, [2004] B.C.J. No. 1106, 2004 BCSC 706. He also referred to ***Atmospheric Diving Systems Inc. v. International Hard Suits Inc.*** (1994), 89 B.C.L.R. (2d) 356 (S.C.) for the proposition that "reasonable commercial efforts" does not impose as high a standard as "best efforts".

37 The phrase used in Clause 25.3 of the Contract in the present case is "*all* reasonable commercial efforts." The plaintiff submits that the use of the word "all" creates a higher standard than "reasonable commercial efforts." With respect, I do not agree. Either the efforts exerted by the defendant in this case were commercially reasonable or they were not. The addition of the word "all" in this context does not impose on the defendant obligations that would be absent if the Contract had merely stipulated "reasonable

commercial efforts."

38 The defendant's obligation was to use all reasonable commercial efforts to obtain an increased FSR. This required them to pursue the matter up to the point where it became commercially unreasonable for them to proceed further. In making that determination, the defendant would naturally take into account all information in its possession about the probability of an application succeeding, and would weigh the probability of success against the cost of proceeding further. If the cost of taking further steps became unreasonably high in relation to the probability of success, so that it would not be commercially reasonable to proceed further, then the defendant would be justified in stopping at that point.

The Expert Evidence And The Political Climate

39 A great deal of evidence was led at trial about other properties in North Vancouver that were being developed at the relevant time, including 140 West 14th Street (Marlborough Towers), the Lions Gate Hospital lands, and 980 Marine Drive. The project of most particular significance, however, was 612 Chesterfield Avenue.

40 The project at 612 Chesterfield was composed of two lots zoned RH-1 (residential high density) occupied by low-rise rental apartment buildings. The owner sought rezoning of the property in order to build a high rise condominium tower and another building to replace the rental housing. The project would have required rezoning to increase the permitted density from 2.3 to 3.56 FSR and to increase the height from 100 feet to the OCP maximum of 150 feet. The project generally had the support of City planning staff. The matter went to public hearing on July 19, 2004. There was heated public opposition over both the request for height and the request for density increases. Nevertheless, Council gave the application third reading that night. The public opposition continued, and in early September 2004, immediately before Council was to consider final adoption of the rezoning bylaw, individual members of Council received more than a dozen angry emails opposing the project. Council took the unusual step of rescinding third reading. They decided to hold a Town Hall Forum on October 6, 2004, and a second public hearing on October 27, 2004. Council deferred a decision at that time and referred the proposal to a third public hearing to be held on December 13, 2004, but prior to that meeting, the developer withdrew its application for rezoning, and proceeded with a project within the existing height and density limits.

41 The experience with 612 Chesterfield led Council to instruct its planning staff to conduct a review of its density bonusing policy. That process took several months. City planning staff presented Council with a number of options, including the possibility of a 10% cap on density bonuses. Ultimately, at the end of April 2005, Council decided to maintain the status quo, but with a direction that any new applications for density bonuses should be reported to Council as soon as possible after the application.

42 All this evidence was considered by the expert witnesses in urban planning who were called at trial. Both the plaintiff and the defendant called such experts to give opinion evidence about the likelihood that an FSR of more than 2.3 could have been achieved on the Eastern Avenue site in the period covered by the Contract.

43 The defendant's expert was Frank Ducote. He considered a number of different possible design plans for the Eastern Avenue site, including the one that Anthem had presented to City planning staff in October 2004. In every one of the possible designs, an increase in the density over 2.3 FRS would also require an increase in height well above that permitted in the OCP. Mr. Ducote concluded that there was no possible design for the site that would have had a reasonable chance of approval in the climate that existed in the fall of 2004. He referred to a number of significant impediments, including the fact that the City had not yet concluded its Central Lonsdale Town Centre study, and then wrote:

> Any one of factors could have made the opportunity for success less than likely. The significantly higher building form required would have been a serious hurdle in the absence of a clear policy context. Most significant was the chilling effect of the 612 Chesterfield Avenue rezoning application and the density bonus review it led to, as well as controversy surrounding other major development applications that were in the process during the relevant time period.
>
> Issues surrounding the potential loss of affordable rental housing, possible neighbourhood impacts due to bonuses developments and the process of determining the size of bonuses and transfers all contributed to a chilled development environment. One consequence in all this especially worth noting is that Council deemed it extremely important for rezoning applications

to remain within designated height limits of the Official Community Plan. This included for the City's own lands on Block 62, the City Hall lands, despite the delivery of a widely-supported public amenity like a new library, which was to be paid for through the sale of City land for private residential redevelopment.

...

As a matter of common sense, in my opinion it would have been futile to pursue a high density rezoning application for this site in a medium density RM-1 zone given that an application with broadly similar elements in the high density RH-1 zone failed (612 Chesterfield Avenue property), even when it would have conformed to the applicable OCP height limit. The perception, if not the reality, would have been that nobody at City Hall was protecting threatened affordable housing stock.

Finally, in this political and regulatory environment, I believe that neither staff nor Council, neighbours nor the public at large would have welcomed or supported such a proposition in this location at that time, regardless of the community benefits a developer could reasonably and economically put forward.

44 The plaintiff's expert was Donald Stenson. He offered the following opinion:

In the case of the Eastern Avenue properties site, in my opinion there was at least a chance that the Buyer, with the assistance of a suitable, motivated and creative Architect or a team consisting of knowledgeable and competent professionals such as an Architect, planner, and Landscape Architect, could have produced and submitted a credible application which might have been approved, for rezoning. Such an application could have incorporated a request for density bonuses in return for on-site replacement of rental housing stock and other community benefits, yielding an FSR of 2.3 or more, and if necessary an application for an OCP amendment to provide a modest height increase that would demonstrate (and in fact perhaps serve as a highly suitable vehicle to implement at this location) the principle of Transitional Density and Building Forms that the OCP speaks to in the drawing on Page 18.

45 Mr. Stenson referred in his evidence to a plan that he thought had some possibility of success. Even in his proposal, however, the increase in density would have required a building seven storeys tall, which is 75% in excess of that permitted in the OCP. Mr. Ducote was of the view that such a proposal would not be approved, and in any event, he testified that the proposal was not feasible because putting that much density into a height of only seven storeys would require buildings so deep that the interior would have insufficient access to light from windows.

46 It is noteworthy that even Mr. Stenson did not say that a formal application by Anthem would likely have been approved within the time contemplated by the Contract. Rather, as he put it, if Anthem had made an application, he believed that Council would have given it serious consideration "*in the fullness of time*."

47 This raises the question of whether the Contract imposes a time limit for achieving an increased FSR. The plaintiff submits that it does not. I do not agree. Although Clause 25.3 does not itself refer to a time limit, the purpose of that clause is to provide a formula for fixing the purchase price. The purchase price is the price that would be payable on closing. The closing date is defined in Clause 26 as the 60th day following the Subject Removal date. Clause 25 specifies that subject removal is on or before June 30, 2005. The latest day for closing, therefore, would be August 31, 2005. Thus, the Contract is clear that an increase in the purchase price pursuant to the price formula set out in Clause 25.3 would only be payable if an increase in the FSR above 2.3 were achieved by August 31, 2005.

Were the Defendant's Efforts Commercially Reasonable?

48 The plaintiff submits that the defendant was required under the Contract at least to submit an application to City Council for their consideration. Although there is no clause in the Contract that specifically obligates the defendant to do so, the plaintiff submits that such an obligation be inferred from the whole of the Contract. As the plaintiff put it in written argument:

5. On each of these three issues it is clear that both parties contemplated that there was to be an application for re-zoning. Obviously if there was no application for re-zoning, the whole concept of the price adjustment would be nugatory. If there was to be no re-zoning application, there would be nothing for the Nelsons to buy back. There would be no point in negotiating the "best efforts" clause if there was to be no application.
6. Nowhere in the agreement is there a provision giving Anthem a discretion not to seek re-zoning. However, the Defendant effectively says, "too bad, we simply don't have to apply if we doubt we will succeed."

49 First, it should be noted that the reference to "best efforts" in that submission is not an accurate representation of the language used in the Contract. Although Clause 25.3 has the title "Buyer's Best Effort", that language is not used in the text of that clause. Rather the clause requires the buyer to use "all reasonable commercial efforts." Those two phrases do not set the same standard: ***Atmospheric Diving Systems Inc. v. International Hard Suits Inc.***, *supra*.

50 Second, it I do not agree that the other terms of the Contract would be "nugatory" if no formal application was made to City Council. As a matter of construction, the Contract did require the defendant to take *some* steps towards obtaining rezoning, but that does not necessarily mean that those steps had to include a formal application to City Council. Whether the defendant's efforts had to proceed so far as a formal application would depend on whether taking that step was commercially reasonable in the circumstances.

51 Third, the evidence does not support the conclusion that the defendant effectively said, "too bad, we simply don't have to apply if we doubt we will succeed." The evidence is that Anthem made a business decision not to make a formal application based on the facts that confronted them after the October 28 meeting with City planning officials. On the basis of those facts, Anthem concluded that a formal application would be very unlikely to succeed and that it was commercially unreasonable to proceed.

52 At the time Anthem entered into the Contract with the plaintiff, it appeared that the City might be receptive to granting a density bonus in return for preservation of rental housing on the site. Anthem proceeded to discuss preliminary proposals for the site and had discussions with City planning staff. The Application Package supplied by the City for rezoning applications specifically recommends to an applicant that the first step in applying for rezoning is to discuss the proposed development with City staff. Anthem took that step, meeting with City planning staff on October 28, 2004. By the time that meeting occurred, the political climate had changed, and it was by then clear that Council would not be as receptive to applications for increased density or height as they had been in the past, largely because of their experience with 612 Chesterfield. Planning staff would not, of course, tell an applicant that they could not make a formal application to Council, as to do so would go beyond their proper role. Nevertheless, City planning staff offered the advice to the representatives from Anthem that an FSR of 2.6 for the Eastern Avenue site was "wishful thinking", or words to that effect. Moreover, it is clear from the evidence of both Mr. Ducote and Mr. Stenson that achieving an FSR in excess of 2.3 would have been impossible without exceeding the four-storey height limit imposed by the OCP. Since the time that the OCP was adopted in 2002, City Council has not approved any projects requiring both increased density and a height limit in excess of that permitted by the OCP, with the possible exception of Pinnacle.

53 Mr. Ducote testified that in his opinion, a formal application in the fall of 2004 would have had no reasonable chance of approval by Council. Mr. Stenson's opinion was that if an application had been made, Council might well have deferred their decision, but at least Anthem would have had their application "in the queue" to be considered "in the fullness of time".

54 The standard the defendant was required to meet under the Contract was to make "all reasonable commercial efforts" to achieve an FSR above 2.3 no later than August 31, 2005. They were not required to make all possible efforts. They were not required to make all efforts short of those that would be doomed to certain failure. The standard of reasonable commercial efforts allowed them to make reasonable business decisions in which they would weigh the cost of proceeding beyond the first stage of discussions with City planning staff against the cost of preparing a formal application to City Council. That is precisely what Anthem did. The defendant concluded that the political climate in the fall of 2004 was such that it would not be prudent from a business point of view to spend the many thousands of dollars it would have cost to pursue a formal application to Council, since the chance of success was too low. That decision was commercially reasonable.

55 The plaintiff argues that even if it was reasonable for the defendant not to proceed in the fall of 2004, it should still have made an application in April 2005. The plaintiff points to the fact that by then, the City had completed its review of the density bonusing policy and had decided to maintain the status quo. On the evidence I am satisfied, however, that by that time it was too late for any application to be approved within the time set by the Contract, namely, August 31, 2005. Mr. Nelson testified that he would have been willing to extend the time, but he did not discuss this with Anthem in April 2005, and in any event, Anthem would not have been bound to accept such an alteration of the terms of the Contract.

56 Accordingly, I conclude that the plaintiff has not established that the defendant has breached the Contract. The plaintiff's claim is dismissed.

W. EHRCKE J.

cp/e/qlgxc/qlmxt/qlcas/qltxp

Between
364511 Ontario Limited, plaintiff, and
Darena Holdings Limited, First Professional Management Inc., Stephen-Mitchell Realty Limited, carrying on business as Whitehorn Mississauga Properties, defendants

[1998] O.J. No. 603

55 O.T.C. 13
78 A.C.W.S. (3d) 30

Court File No. 1392/95

Ontario Court of Justice (General Division)
Brampton, Ontario

Webber J.

February 9, 1998.

(36 pp.)

Landlord and tenant — Agreement for lease — Conditions precedent to valid agreement — Non-fulfilment — Deposit — Recovery — Considerations.

This was an action by 364511 Ontario Ltd. for the return of its deposit to lease an arena owned by Darena Holdings Ltd. 364511 offered to lease the arena on November 4, 1994 in order to operate a bingo hall. It submitted a deposit of $21,400 for the first and last month's rent. The offer was conditional for sixty days upon 364511's obtaining the necessary approvals and licenses from the City of Mississauga and the Province to operate the bingo hall. There was substantial opposition to 364511's application. In April 1995, 364511 found a different location in Mississauga that was acceptable. The bingo operation at the second location was approved in December 1995. When 364511 sought the return of its deposit, it was advised by Darena that the 60-day condition was not satisfied. Darena claimed that 364511 did not use reasonable commercial efforts to satisfy the condition, and that it was not entitled to the return of its deposit.

HELD: Action allowed. 364511 was awarded $21,400. The offer contained a true condition precedent, which had to be satisfied before there was a contract. If 364511 used reasonable commercial efforts, it was not bound by the proposed lease. The evidence indicated that 364511 made a genuine effort, and exercised its rights reasonably to obtain the approval to relocate. Although 364511 was aware that approval of its application was remote, the lease condition did not impose a requirement of best or bona fide efforts upon it. Darena also permitted 364511 to continue beyond the 60-day deadline with little apparent interest.

Counsel:

John W. McDonald, for the plaintiff.
Sarit Goldman, for the defendants.

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1 WEBBER J.:— The plaintiff, 364511 Ontario Limited, carries on business under the firm name and style of Delta Bingo (Delta). Delta conducts bingo operations for certain charities. The defendant Darena Holdings Limited (Darena) was the owner of Dixie Arena at 1164 Dundas Street East in Mississauga.

Claims Advanced

2 The plaintiff seeks the return of a deposit made in accordance with an offer to lease the Dixie Arena. Darena claims the deposit is not refundable and claims damages arising from breach of the terms of the offer to lease.

Background

3 Delta advised the City of Mississauga (City) licensing department by a letter dated October 4, 1994 of its intent to relocate in the Dixie-Dundas area where Dixie Arena is located.

4 The City responded by letter dated October 6, 1994 in which it enclosed the criteria and procedures for bingo halls developed by the province dated October 27, 1993.

5 Delta determined that it wished to rent the Dixie Arena because their existing premises at 1250 South Service Road were inadequate. The other reason Delta wished to relocate its bingo hall from 1250 South Service Road to the Dixie Arena was because of the proposed rental arrangements said to be available there. The rental that it would pay would be approximately $4,000.00 per month less than it would pay elsewhere with double the space.

6 Delta's negotiations with Darena to rent the Dixie Arena led to an offer to lease dated November 4, 1994. A deposit was paid, which consisted of two cheques. The first cheque was to Whitehorn, one of the defendants herein, in the amount of $21,187.97, which had been paid for an earlier deal which did not proceed. This sum was transferred as a credit to the present transaction. The second cheque which was for $252.16 payable to Darena, represented the balance of the deposit pursuant to the offer to lease.

7 The date for the commencement of the lease was in accordance with paragraph 4.2:

> 4.2 The Lease Commencement Date shall be the first day of the month in which the earlier of the following events occur:
>
> (a) Sixty (60) days from the date of approval from the city of Mississauga and the Province of Ontario to legally operate a Bingo Hall; or
>
> (b) The date the Tenant opens for business.

8 The deposit paid to Darena of $21,440.13, as noted above, was subject to paragraph 6 of the offer to lease, which reads as follows:

> 6. The Landlord acknowledges receipt of a deposit in the amount of $20,037.50 (plus 7% GST) total deposit of $21,440.13) of which the sum of $10,018.75 (plus 7% GST) is to be applied against the first month's Minimum Rent when same falls due and the sum of $10,018.75 (plus 7% GST) is to be applied against the last month's Minimum Rent when the same falls due. In the event that this Offer is not accepted, the said amount shall be returned to the Tenant without interest or deduction. (underlining added)

9 Delta agreed to enter into a lease in accordance with paragraph 16, which reads as follows:

> 16. Tenant and the Indemnifier, if any, shall execute and Tenant shall deliver to Landlord within fifteen (15) days after receipt thereof by Tenant, Landlord's standard form of Lease incorporating the terms herein set forth and such other amendments as are mutually acceptable to the Landlord's and Tenant's solicitors. In the event that Tenant and the Indemnifier, if any, fail to so execute and deliver the said Lease within the said time, Landlord may elect, by giving written notice to Tenant, to terminate the Agreement resulting from the acceptance of this Offer to Lease, provided that such election shall not be a waiver of any other rights which the Landlord may have.

10 Two of the principals of Delta, Mr. John Cameron and Mr. John Johnstone, indemnified the landlord against any losses pursuant to paragraph 24.

11 The clause that created the issue between the parties is found in paragraph 31 of the offer to lease, which reads as follows:

> 31. This Offer to Lease shall be conditional for a period of sixty (60) days from the date of execution of this Offer to Lease (the "Conditional Date") upon:
>
> (i) 364511 Ontario Limited receiving all necessary approvals and licenses from the City of Mississauga and the province of Ontario to legally operate a Bingo Hall
>
> The tenant agrees that it shall use its reasonable commercial efforts to satisfy the foregoing condition. In the event the condition is not satisfied on or before the Condition Date, this Offer to Lease shall be terminated and the parties shall be relieved from all obligations hereunder provided, however, notwithstanding the foregoing, the Landlord may at its option and by notice in writing to the Tenant extend the Condition Date for a period of sixty (60) days. (underlining added)

12 In accordance with the criteria and procedures received from the City, Delta sent, by covering letter of November 24, 1994, a formal application to relocate from 1250 South Service Road to Dixie Arena. No issue arises that the application was not complete in every way. The same application, complete in every way, was sent to the province to the attention of the Ontario Gaming Commission director.

13 Prior to this application, Delta had applied by letter of September 14, 1994 to the City to increase the prize board for the bingos from $3,500.00 to $5,500.00. This application was referred to the Enforcement Division of the City by council on October 12, 1994. The application for the increased prize board was supported by the Dixie Delta Sponsors Association, as can be observed in a memorandum of November 1, 1994 arising from a meeting held on that date. Delta, in response to concerns as to bingo losses, provided a letter of guarantee on November 8, 1994. This application was entirely separate from the relocation application. As matters developed, Delta's application for an increase of the prize board became a significant issue.

Plaintiff's Evidence

14 Cameron Johnstone of Delta was aware of all of the terms of the offer to lease. The 60-day condition in paragraph 31 in favour of Darena was never implemented. The failure to do so did not matter to Delta as it continued its efforts to obtain approval of the relocation of the bingo hall to Dixie Arena well after the expiration of the 60-day condition.

15 The restrictions on the use of the premises found in paragraph 8.1 of the offer to lease, which state that "... the tenant shall not cause, suffer or permit the Demised Premises or any part or parts thereof to ever be used for: (A) a teen and/or adult cabaret, club, and/or nightclub; or (B) dances; or (C) live entertainment," were of no significance to Johnstone because he was not, at the date of the offer to lease, November 4, 1994, aware of prior difficulties at the Dixie Arena site. Nor was he aware of the City policy found in a city publication entitled Decision. This document refers to a special council meeting of October 19, 1994. From that document, it appears that council, after a year-long review and a number of special meetings, had decided not to approve any additional bingo halls at that time.

16 A meeting took place with Councillor Prentice, in whose ward the arena is located. Cameron Johnstone did not attend that meeting, but it was attended by the two senior members of the firm, John Johnstone and John Cameron. The date of that meeting is problematic. The date that stands out from all the evidence is that it took place on November 11, 1994. Mr. Starr, a witness for the defence, filed a copy of his diary, which indicates a contact with Ms. Prentice on that date, but the evidence is somewhat unclear as to whether, in fact, he met with Ms. Prentice. In any event, a meeting was held with Ms. Prentice either on November 11th or sometime prior to December 5th. If the meeting was held on November 11, 1994 or sometime before November 24, Delta knew of the problems hereinafter discussed pertaining to the site. If the meeting took place after November 24, Delta had no knowledge of site problems.

17 Although Cameron Johnstone did not attend the meeting, he learned of the concerns of Ms. Prentice arising from the former use of the arena as a teenage dance hall. In addition, he was told the surrounding residents were against anything going into the arena. Ms. Prentice had described the problems of drinking outside of the arena, the smashing of bottles, extreme bad language, yelling and swearing, excessive late

night traffic and urinating in the public areas. He observed that these concerns were also reported in the local papers.

18 All of the concerns regarding the site and the position of City Council as to new bingo halls were confirmed to Cameron Johnstone by City staff. In fact, the City had sought and obtained an injunction against the dance hall at a prior date. Mr. Johnstone also met with Ron Nisbet, the City's licensing manager, who reviewed these issues with him. Mr. Johnstone was not aware of all these matters before the offer to lease was signed on November 4, 1994.

19 Notwithstanding whether the meeting occurred on November 11, 1994 or shortly prior to December 5, 1994, the application to relocate was made. The application clearly came before City Council. The arrival of the application resulted in the memorandum dated December 5, 1994 prepared by Ms. Prentice addressed to Mayor McCallion. That memo states, inter alia, as follows:

> To date, there has been no contact with the residents in the area because the proponents left the meeting but I had explained the Astralight problems and the sensitivity of the residents.
>
> There will have to be public meetings to ensure the public's concerns are addressed.

20 The application by Delta was referred to the Director of Enforcement of the City by council on December 14, 1994. The City told Delta of this step by letter dated December 20, 1994. Johnstone sent a letter on January 17, 1995 to First Professional, a development company assisting Darena, which was optimistic notwithstanding what he perceived as opposition to the relocation.

21 On January 27, 1995, First Professional wrote to Johnstone as to the issues that need to be resolved. This letter indicates that the defendants were aware that there were issues outstanding.

22 Prior to the filing of the application to relocate, the defendant First Professional had written to Delta on November 14, 1994, indicating how Delta should proceed. The information contained in this letter is clearly wrong. If Mr. Starr gave this advice, he was in error.

23 Johnstone testified that as soon as the relocation application was filed, matters began to quickly unravel. He observed that everyone connected with the area was up in arms and against the use of the arena site as a bingo hall. His perception was that the opposition to the use of the Dixie Arena for bingo was so intense that nothing was going to happen.

24 As I mentioned earlier, there was also an application to increase the prize board which had been made to the City of Mississauga. This issue became part of the equation because Bingo City and Bingo City Sponsors Associations directed comments to the licensing department indicating their opposition to a prize board increase. By a letter to the licensing department dated December 5, 1994 from the president of the Bingo City Sponsors Association, which enclosed a resolution developed on December 4, 1994 opposing the increased prize board. A letter dated January 26, 1995 from another bingo operator, Lithuanian Martyrs' Church, clearly opposed the increased prize board. Delta's application to increase the prize board to $5,500.00 came before council on February 15, 1995 with a recommendation contained in a corporate report to council to approve the increase. Council adopted the recommendation on February 22, 1995, but, for some unknown reason, the matter was withdrawn from the agenda for further information. It is the evidence of Johnstone that the prize board increase was going to happen no matter what happened with the relocation application. This turned out to be the case.

25 As time passed after the filing of the application to relocate, Johnstone became aware of the political atmosphere as revealed from his contact with City representatives. This atmosphere was highlighted by press reports on December 18th and February 17th, which suggested real opposition to relocation. He was clearly aware of the opposition from Bingo City Hall, its sponsors and the residents. Notwithstanding these difficulties, he proceeded to take a number of steps to be ready to proceed with the lease if, in fact, Delta was successful in obtaining the approval to the relocation. He employed Ultimate Building Design Consultants Inc. to perform the services shown on invoices dated February 7 and February 22, 1995. This company also prepared a site plan. This plan was described by Ron Starr, a professional engineer, as reasonably comprehensive. Delta wrote to the City on February 8th as to the activities which would arise from the existence of a bingo hall in the Dixie Arena. Delta also applied for a permit to construct, which involved altering the interior of the building to accommodate the bingo function. This permit was obtained

on March 3, 1995. Delta also applied to the planning department for a certificate of occupancy. This certificate was granted on March 7, 1995. Johnstone testified as to the many benefits of relocation to the Dixie Arena, which was a freestanding building with parking. All activities could take place on a ground floor with very good seating. The building had a high ceiling and there would be space for all customers. It would be a lower cost operation with a higher profit, even if the prize board were not increased for the charities. It would be a smoke-free building which was aesthetically pleasing. Johnstone anticipated Delta would spend between $750,000.00 to $1,000,000.00 on the interior renovation of the premises.

26 In summary, then, Johnstone had achieved all he could, save and except the resolution of the opposition from Bingo City Hall, the City, the Councillors, the residents and the Bingo City Hall Sponsors. He was reluctant to be involved in a public meeting or to press the application forward through council. In fact, as reported by Starr, he told Starr, on the 20th of March, 1995, that he felt the deal was dead. That comment, of course, was shortly before the meeting of April 5th, which I will refer to in a moment. I accept Johnstone's evidence that he made no efforts to relocate to any other location in Mississauga during this period notwithstanding the evidence of others to the contrary. In fact, no further activity to relocate to another site was made until after the letter of April 25, 1995. Delta then successfully relocated to the Dunwynn Centre.

27 In the midst of all this turmoil, Ron Nisbet called a meeting on April 5, 1995 at City Hall. He invited the Bingo City Hall operators and their sponsors and Delta and its sponsors to this meeting with the express purpose of attempting to solve the dual problem of an increased prize board and the relocation of the Delta operation. A corporate report dated November 28, 1995 made by the Commissioner of Corporate Services as to Delta's subsequent relocation to a site other than Dixie Arena demonstrated the events which occurred in early 1995.

> Delta Bingo Hall operates from the Dixie Mall at 1250 South Service Road. The owner is an Ontario corporation, 364511 Ontario Limited operated by Mr. Cameron Johnstone and Mr. John Cameron. The operators have advised Council and staff on several occasions that the current facility at the Dixie Mall is now incapable of serving Mississauga charities and their clientele at an acceptable level. They indicate that the accessibility to the basement location of the hall is limited to very steep stairs and is physically straining and dangerous to some individuals; further, it must be noted that this entrance also does not meet the standards as fully accessible for the disabled. Concern is also raised with the inadequate ventilation system in the hall for bingo playing patrons.
>
> The consensus of the charities and the owners is that a large amount of local bingo money is being redirected to bingo halls in surrounding municipalities as a result of the unacceptable state of the present Delta Bingo Hall facility.
>
> Mr. Johnstone, in cooperation with the Dixie-Delta Bingo Sponsors' Association, submitted an application to Council on December 14, 1994 to move their bingo hall operation to Dixie Arena on Arena Road. However, the operators of the Bingo City Hall and its Bingo Sponsor Association were concerned with the close proximity of this site to their hall at Dundas and Shepard. Joint meetings with City staff ensued, and alternate locations were pursued. On September 6, 1995 the owners of Delta Bingo made a formal proposal to relocate their bingo hall operation to the Dunwynn Centre at 1650 Dundas Street East. (underlining added)

28 As expressed in that corporate report, the main concern of Bingo City and its sponsors was that the proposed location of Delta in the Dixie Arena was close to their existing facility. They had no difficulty if the relocation occurred to the east of Dixie Road.

29 As a result of this meeting, the parties reached an agreement in accordance with a letter dated April 25, 1995, which states as follows:

> April 25, 1995
>
> City of Mississauga
> 300 City Centre Drive
> Mississauga, Ontario

Attention: Mr. Ron Nisbet

Dear Ron:

Enclosed is a copy of the new programs to be implemented at Bingo City and Delta Bingo Hall pending approval of the up-to $5500 prize board format. These programs have been approved by the Sponsors' Associations and will be run for all sessions at each hall respectively. The price structure will be $22.00 for the 5-strip special package which includes everything except Superjackpots and Mini games.

Any alterations to either the price structure or format will be approved by the sponsor of the event affected and as well as having the other Sponsors' Association being informed of the request prior to the submission of request of change to your office.

Please be advised that Delta Bingo Hall has rescinded the application submitted to move to the old Dixie Arena location. They are currently conducting a survey of the travel patterns of their client base. Delta Bingo's interest in re-location continues and they are looking at sites east side of Dixie Road.

We appreciate your time in this matter. If you have any questions or comments, do not hesitate to contact us.

Thank you.

Approved by:

(signature) (signature)

Todd Leslie Cameron Johnstone

Bingo City Cameron and Johnstone Ltd.

30 Once Delta decided not to proceed in Dixie Arena, Delta moved to the Dunwynn Centre with the approval and consent of the City of Mississauga as expressed in the minutes of the general committee of December 5, 1995 subject to certain conditions. The City approved the new location and advised the Gaming Commission of their approval.

31 The bottom line appears to be that everyone was happy and content when Delta found a location east of Dixie Road. After all of this had occurred, Delta demanded the return of the deposit on June 16, 1995 from the defendant First Professional. The defendant Darena refused for the reasons set out in the letter dated June 27, 1995:

> We confirm that paragraph 31 of the Offer to Lease provides for a sixty (60) day conditional period for 364511 Ontario Limited to obtain all necessary approvals and licences to operate a bingo hall on the premises. We further confirm that this condition was not satisfied.
>
> It is the Landlord's position however, that 364511 Ontario Limited did not use reasonable commercial efforts to satisfy the condition contained in the Offer to Lease, as required by paragraph 31. (underlining added)

32 Mr. Johnstone observed that there had been no discussions with Darena as to any facts upon which Darena relied to take the position set forth in the second paragraph of this letter. He also observed that there had been no discussions with Darena as to why Darena had reached that conclusion. Nor was he aware of any written documents that were relied upon by Darena to reach this particular conclusion.

33 Delta did not seek or obtain a corporate services report, which said reports were produced for the prize board increase and the Dunwynn relocation. It did not require council to consider its application, although it

was on council's agenda. It did not request or organize or allow someone else to call a public meeting of the residents.

John Cameron

34 Mr. Cameron and his partner, John Johnstone, Sr. are senior members of the Delta Group. Each has been actively engaged in the management of bingo halls at many locations and have had occasion to deal with municipal councils on a regular basis. Mr. Cameron is familiar with the two applications for relocation and the increased prize board, both of which were the responsibility of Cameron Johnstone. The application for an increased prize board was made to allow the charities to make a larger income. This application was not tied to any one location. It was made to reflect the general prize board condition which existed in the Province of Ontario at that time. Only two prize boards in Mississauga were still at the $3500.00 level rather than the $5500.00 level. One of those prize boards involved Bingo City and the other Delta.

35 Mr. Cameron's evidence was that the Bingo City Hall was very much against the increase of the prize board but, more importantly, Bingo City was against Delta moving closer to their operation. He describes a meeting which he believed took place on December 5th. This is the same meeting which is referred to earlier as having occurred on November 11th, 1994. He and John Johnstone, Mr. Starr, Ms. Prentice and officials from the City were present. Mr. Cameron described Ms. Prentice as adamant in her opposition to relocation because of the arena nightclub problems as earlier expressed and the concern of the residents who did not want any bingo facility put into the Dixie Arena. Mr. Cameron agrees that Ms. Prentice suggested a residents' meeting which Delta never requested.

36 It was Mr. Cameron's evidence that he never knew of these problems before the lease was entered into or those problems expressed in paragraph 8.1 of the offer to lease. He synopsized Ms. Prentice's evidence as expressing the concern of the residents that there should not be any type of public use of the arena. The memorandum of December 5, 1994 that was sent by Ms. Prentice to the Mayor was never forwarded to him. It was his conclusion that the relocation would fail because of the opposition from the residents, Ms. Prentice, council, Bingo City Hall and its sponsors. Much was made of the issue as to whether he had said that Delta could not afford to move unless the prize board was raised to $5500.00. It was his evidence that they would have moved to the Dixie Arena with the prize board at $3500.00. He testified that such a statement was merely a negotiating tactic. He categorically denies that he told the City officials that they must decide the prize board issue before deciding the relocation. The prize board issue, in his view, should not delay the relocation application. In fact, there was tentative City approval of the increase prize board as of February 15, 1995, well before Delta decided not to proceed with the Dixie Arena relocation.

John Johnstone, Sr.

37 Mr. Johnstone, Sr. also gave evidence that the concerns expressed in paragraph 8.1 of the offer to lease were not an issue for Delta. Mr. Johnstone, Sr. testified Delta's representatives had no knowledge of all the problems until the meeting with Ms. Prentice. In his view, Delta made reasonable commercial efforts to relocate to the arena. Delta wanted the site badly. Mr. Johnstone, Sr. also confirmed that Ms. Prentice expressed the opposition from the neighbours, and that Ms. Prentice was opposed to the relocation. Even though he realized there might be substantial difficulties, he thought Delta could solve the problems, but he was concerned that Ms. Prentice supported the residents' position and would lobby the Mayor and other councillors. After this meeting Mr. Johnstone, Sr.'s sense of the situation was that it seemed hopeless, but he was prepared to take further steps.

38 Ron Starr, who was sent to this meeting by Richard Samuels of First Professional, met with John Johnstone after the meeting. They agreed that relocation prospects did not look good at that time. Starr, as First Professional's representative, offered to speak to people that were involved in the political scene. Johnstone, Sr. says, however, that he never heard back from him and, as a result, Delta kept trying on its own.

39 He is unable to recall when the efforts to relocate ended, but he is very clear that after the letter of agreement of April 25, 1995, no problem was raised as to the other location. He also confirms that no other locations were considered until the Dixie Arena issue was terminated.

40 Mr. Johnstone, Sr. was unclear as to whether Ms. Prentice said she would call a residents meeting, but he was clear that she wanted the input of the residents before she would take a position. Regardless, in his mind, he believed Ms. Prentice to be 100 per cent opposed to the relocation application. He denies

saying to anyone that Delta could not afford to move until the prize board was increased and that prize board decision should precede the location decision. He received, in his opinion, no encouragement whatsoever from Ms. Prentice that a relocation application would be successful. He, like other members of Delta, stressed that Delta wanted the prize board increase whether it moved or not.

Ronald Nisbet

41 Mr. Nisbet has been the licensing manager for the City of Mississauga since 1994. He has full responsibility for all by-law licensing, including the Delta application to relocate to both Dixie Arena and the Dunwynn Plaza. He agrees that the application for the Dunwynn site, part of which is reproduced at pages 11 and 12 above, describes the problems for Delta at Dixie Arena. He agrees there was clear opposition to Dixie Arena as a relocation site from Bingo City Hall and their sponsors association, and also because of the close proximity of Dixie Arena to the Bingo City Hall site.

42 He confirmed the joint meeting, which he organized, was held on April 5th at City Hall, led to a letter of agreement of April 25, 1995. He stated he was there as an observer. He considered this be a constructive act to bring the parties together. He believed he was acting with the mandate of council, which wanted to resolve difficulties within the municipality on this issue. He reviewed the objectives contained in the corporate report of December 6, 1995 and acknowledged them to be the same objectives that applied to Delta's application to move to Dixie Arena. The issue of Delta's relocation was viewed as a problem. He confirms that no corporate report was made by the City for the Dixie Arena relocation application. The reason for this step was the application was not dealt with in depth and there was the opposition from Bingo City Hall.

43 Mr. Nisbet testified the relocation process involves an application to the Province, which is referred to the City. The applicant can also apply to the City. The City, after consultation and decision, reports to the Province. The Province does nothing until the City reports. He confirmed that the City, on February 15, 1995, gave approval to the increased prize board in their corporate report of that date. The City said that the prize board should be increased notwithstanding Bingo City's opposition, but this application, in his view, was withdrawn by Delta because of Bingo City's concerns, possible opposition at council and the possibility of other locations.

44 Mr. Nisbet was well aware of the problems arising from the Dixie Arena by virtue of the dance hall, the safety concerns raised by the fire department and the failure to obtain a public hall licence in that area. He confirms that Ms. Prentice was also aware of these difficulties. His opinion as to the potential success of the relocation application was guarded. He never said it would not be successful, but he had a number of concerns. He agrees that the decision to relocate is one for council and not for staff notwithstanding whatever recommendation may be made by staff. He agrees that if he had been asked to do a report to council, he would have done it and it would be done without cost to Delta, but he does observe that the relocation and the increased prize board were hot issues at City Hall. His view was that Delta continued to do their utmost to carry the matter forward. He agrees that the concerns of residents can hurt an application. He also indicates that from February 15th through to the April letter, Delta made efforts to relocate to the Dixie Arena but, in his opinion, the application never returned to the council agenda because of the considerations involving the entire application.

Defendants' Evidence
Ronald Starr

45 Ronald Starr, professional engineer, has been involved with the Committee of Adjustment, the Regional Council, City of Mississauga Council, and is presently the Chair of Mississauga Hydro. He has some eighteen years of industrial and development expertise and has considered many licence applications in the past ten years. He was retained as a consultant by First Professional to assist Delta. It appears he had brief meetings with the witnesses from Delta and some ongoing discussions. He stated Delta knew what to do and had filed a complete application. His role was to help or coordinate help.

46 Mr. Starr described the history of the Dixie Arena. It had been a hockey rink originally. It was then turned into a teenage nightclub with many problems as described by other witnesses. The arena had been closed for some period of time and a number of proposals had been made to Darena, none of which had been acceptable to Ms. Prentice or the City Council. He was of the opinion that the Delta application was different because bingo was a viable use for the arena. The zoning requirements could be met and there were no difficulties with drainage, sewer, water and parking. He believes he attended a short meeting on

November 11th with Ms. Prentice and the representatives of Delta and other city staff. It is not clear from his evidence whether Ms. Prentice would agree to the new use or was really opposed to this use. He considered her view to be that a bingo hall use was a better use than other suggested uses but nothing could be done until the residents' concerns were addressed. He believed that she would undertake to address those concerns. Starr testified that Ms. Prentice had suggested the possibility that a seniors facility would be an appropriate use for the property. Starr reiterated, as did other witnesses, that when Delta said that the prize board increase had to be resolved before they could move, the discussion of that process took place and the Delta representatives left the meeting.

47 After the meeting, Starr reported to Samuels, the leasing representative of First Professional Management Inc. who was responsible for the arena lease. This report led to Samuels' letter of November 14, 1994. As noted earlier, this letter was clearly wrong. Starr indicated that he had some contact with Cameron Johnstone with reference to a council meeting of January 18th. It was Starr's understanding that Johnstone would call Ms. Prentice about the meeting. There were additional conversations, the last of which was on March 20, 1995, at which time Delta indicated that the relocation application would not proceed. Mr. Starr made notes of that particular conversation. He recorded Johnstone's comment that the Bingo City was opposed to Delta's prize board and the city officials won't make any decisions. Starr noted that Johnstone also indicated that he felt the deal was dead at the time of the original meeting. Starr did not recall that prior to this conversation, that Delta had said that it could not get relocation approval, that the City was opposed or that Councillor Prentice was opposed. However, Starr did agree and it was his opinion that it appeared that the application was not going the right way because of some unusual problems.

48 Mr. Starr was evasive and argumentative in response to questions as to whether Delta was acting in any non-commercial way during their process. He was of the opinion that the plaintiff had to put the application before council for its consideration to constitute reasonable commercial efforts, notwithstanding the problems that had been raised both before and after the filing of the application. He was of the view that unless you go all the way with the application, then there have not been reasonable commercial efforts. He concedes that there is no written procedure as to the presentation of an application. I draw from his evidence that the truth is that lobbying was required to get all players on side before the application went ahead. He does agree that the meeting called by Ron Nisbet, which resulted in the letter of April 25, 1993, was a commercial effort. He agrees that Councillor Prentice's support was necessary to get the relocation approved and to satisfy the public concerns. It was his view that the appropriate approach was to deal with staff rather than council. He testified that he may have spoken to John Johnstone on the City Hall steps after the meeting with Prentice. His recollection is vague. He believed that the conversation was just about the prize board. When asked if Johnstone had asked him to do all he could to help them, Starr did not recall that conversation.

Maja Prentice

49 Ms. Prentice is a 12-year veteran of City Council. The Dixie Arena is in her ward. As noted, it appears she met on November 11th with John Cameron and John Johnstone, Elaine Buckstein, Ronald Starr and others from the City. She describes the meeting as not being long because the applicants left the meeting when discussions as to the prize board ensued. She had expressed concerns about the application because of its location, the previous history and the problems of the previous tenants and major traffic issues. She does not recall ever having told the applicants that she would oppose the relocation. As a result of her lengthy dealings with Darena, she was prepared to make efforts to see that the matter did proceed. She told Delta that she would work with them and that they should proceed through the process. Before proceeding, however, she believed that a public meeting should be held in accordance with her promise to the residents. Delta was to call her to get this meeting set up. She needed two or three weeks to prepare for the meeting. She indicated she was not contacted by Delta. Her recollection was that Delta's application never came to council, which is incorrect. It was her understanding that Delta was looking at other locations at this particular point in time.

50 In her view, the prize board increase was a major problem which seemed to be more important than relocation. It was also her recollection that Delta expressed that if the prize board increase was not allowed, it could not proceed with the relocation.

51 She was not at the meeting held by Ron Nisbet on April 5th nor does she know much about what took place. She assumed the meeting was to discuss the prize board increase. However, the April 25th letter indicates that relocation also was an issue at that time. She was evasive when asked to whether the proximity of the Bingo City Hall to the Dixie Arena was a major problem.

52 The thrust of all her evidence appears to be that Bingo City was prepared to oppose the prize board increase to keep Delta out of their area. If Delta went elsewhere, then Bingo City would cooperate with Delta. Although she testified that she had little knowledge of the meeting that led to the letter of April 25th, which she never saw, she agrees that Nisbet's meeting was an acceptable procedure. It was a reasonable attempt to try to solve the problems between the two major stakeholders. Prentice agreed there was nothing uncommercial about seeking a prize board increase. Notwithstanding the evidence that the application to relocate never came before council, it seems to be common ground that it was on council agenda. Ms. Prentice indicates she was surprised to see it on the agenda because the prize board issue had not been resolved. As a result, she prepared the memorandum to the Mayor dated December 5, 1994, despite having been told that Delta did not appear ready to proceed with the relocation application.

Richard Samuel

53 Richard Samuel is a leasing agent employed by the defendant First Professional Management Inc. He negotiated the November 4, 1994 offer to lease.

54 His understanding of paragraph 31 of the offer to lease was that the applicants must file the application, follow it up, submit it to council for a decision and obtain the necessary permits, such as the certificate of occupancy and other necessary construction permits. It was his view that paragraph 31 was not an option to rescind if the entire operation were not to be commercially viable. He indicated that Starr's position in this entire scenario was that of a consultant. Starr was very familiar with the City of Mississauga Council. He was retained to help Delta and to allow First Professional to be aware what was taking place.

55 Mr. Samuels appeared to be aware that the application was on the council agenda of December 14, 1994, at which time it was referred to the director of enforcement. The letter from Delta to Samuels dated January 17, 1995 was quite optimistic in tone. Mr. Samuels wrote to the plaintiff on January 27, 1995 expressing concerns about the fact the application had not proceeded but he did not take any steps to follow up on that concern. Samuels was unable to say whether Delta told him that Prentice objected. He indicated that Delta never told him that the City objected nor did Delta ever tell him that the application would not be approved.

56 After Delta had told Darena that Delta would not be proceeding and demanded the return of their deposit, he instructed in-house counsel to write the letter of June 27, 1995, wherein he confirms that the 60-day conditional period to obtain all necessary approvals and licences was not satisfied. Notwithstanding that admission, he instructed in-house counsel to allege that Delta did not use reasonable commercial efforts to satisfy the condition found in paragraph 31. Mr. Samuel agrees that his lawyer drafted paragraph 31. He did not believe that Delta diligently sought or completed all efforts to relocate, which, in his view, would require a council decision. When asked as to why paragraph 31 does not require Delta to go to the City Council, it was his opinion that the logical conclusion was that there must be a decision by council before the issue of reasonable commercial efforts could be addressed. When asked as to why there was no summary of the process to be followed found in paragraph 31 nor any specific statement as to whether a positive or negative answer was required from council, he indicated he was not aware of the licences needed and the time involved. He felt the language was sufficiently clear to both parties that the decision from the council of the City was required. He acknowledges that paragraph 31 imposed no reporting requirement upon Delta. He agrees that the meeting between Delta and Bingo City with Nisbet was not illogical, unreasonable nor non-commercial.

Legal Analysis

57 Both counsel agree that paragraph 31 creates a true condition precedent (Turney v. Zhilka [1959] S.C.R. 578). A true condition precedent is an "external" condition "depending entirely on the will of the third party." The condition must be satisfied before there will be a contract. The condition was not satisfied.

58 The matter does not end there. It is necessary to consider whether Delta made reasonable commercial efforts to have the condition satisfied. This question involves a finding of fact. Before an analysis of that finding can be completed, it is necessary to consider the meaning of the words "reasonable commercial efforts." Counsel could not refer me to any cases for guidance. My own research was unproductive.

59 I rely upon the normal dictionary meaning of these words. Reasonable implies sound judgment, a

sensible view, a view that is not absurd. Commercial means having profit or financial gain as opposed to loss as a primary aim or object.

60 These words impose a standard of reasonable commercial efforts, not one of the best efforts or bona fide efforts. The latter standards might engage the defence submission that the application had to be carried to decision. It would seem to me that this standard of reasonable commercial efforts would allow Delta, if it had a doubt from the efforts made that no approval would be granted, to be free to conclude its efforts would not be successful and it could withdraw from the transaction.

61 This standard does not change a true condition precedent into an option to be exercised solely at Delta's discretion. This standard allows Delta to use its reasonable commercial efforts and, it if did, it could not be bound to the proposed lease.

62 There are obligations upon Delta arising from the words reasonable commercial efforts. Those obligations are that Delta could not deliberately prevent the occurrence of the condition. Delta could not take advantage of its own wrongful act. A failure to conclude the lease could not be brought about by Delta's own acts or omissions.

63 In addition, there are other obligations upon Delta, as part of reasonable commercial efforts. It was required to consider what the political realities were in Mississauga, the known and perceived opposition, the extreme financial risk of lack of approval and the nature of the external controlling forces. On the basis of these obligations, Delta was required to consider whether it would make sense to continue with the application.

64 Delta was aware that there would be no profit if Dixie Arena was not approved as a bingo hall. Delta used an offer to lease with a condition to protect itself from disastrous financial expense if no approval was received from City Council. I conclude that the words reasonable commercial efforts involve a business judgment which must be made by Delta. Whether the business judgment was correct or not is not the criteria that must be applied. To bring this issue into focus, reference may be made to the words of Mr. Justice Judson in the Supreme Court of Canada in Mason v. Freedman [1958] S.C.R. 483 (S.C.C.) at p. 486. In that case, Judson J., when referring to the usual clause in an agreement for sale entitling the vendor to treat the contract as null and void, used these words:

> This proviso does not apply to enable a person to repudiate a contract for a cause which he himself has brought about; New Zealand Shipping Company, Limited v. Société des Ateliers et Chantiers de France. Nor does it justify a capricious or arbitrary repudiation. I am content to adopt the words of Middleton J. in Hurley v. Roy, that the provision "was not intended to make the contract one which the vendor can repudiate at his sweet will". ... His duty was, at the very least, to make a genuine effort to obtain what was necessary to carry out his contract and there can be no doubt in this case that he made no such effort. (underlining added)

To the same effect, at p. 487, Judson J. states:

> A vendor who seeks to take advantage of the clause must exercise his right reasonably and in good faith and not in a capricious or arbitrary manner. This measure of his duty is the minimum standard that may be expected of him, ... (underlining added)

65 The question that must be answered is, did Delta make a genuine effort and exercise its rights reasonably to obtain the approval to relocation. This is a finding of fact. I now turn to the analysis of the evidence.

Analysis of the Evidence

66 From the viva voce evidence led and the documentary evidence filed, a chronology of events can be created. Attached as Schedule "A" to these reasons is the chronology, which illustrates the whole course of conduct. It may be summarized in this way.

67 Delta sought to relocate. It found the Dixie Arena. Delta was unaware of the history of the problems at that site. An offer to lease was signed. A meeting was held, which led to concerns. Notwithstanding those concerns, Delta applied to relocate. Ms. Prentice learned of this application and reacted. Bingo City Hall and

its sponsors reacted. The prize board increase application is drawn into the issue of relocation. Council is faced with two matters which have significant political impact. The whole issue of bingo halls has been studied. Reports of concerns as to relocation appear in the local press.

68 First Professional provides a consultant, who seems to do little, but appears to have substantial connections with City Council. Delta continues in 1995 to prepare a design for the site, including a site plan. These activities continue well after the expiry date of the first 60-day term in the offer to lease; namely, January 4, 1995. In fact, the development activities continue beyond the possible 60-day extension, which would have expired on March 4, 1995.

69 The concerns of council, Ms. Prentice, Mr. Nisbet, Bingo City Hall, its sponsors and the residents continue. Delta, at the behest of Nisbet, agrees to meet with Bingo City and their sponsors to discuss a solution. A solution is reached as to both the prize board and the relocation issue. Bingo City Hall gets what it wants. Delta does not relocate close to Bingo City Hall. The prize board is resolved to the satisfaction of both parties.

70 With this background in mind, I find it difficult to conclude how it can be said that Delta did not use its reasonable commercial efforts to satisfy the condition.

71 I conclude Delta was aware that the approval of the relocation was remote, notwithstanding no formal application had gone before council and no formal meeting of residents had been held. This knowledge becomes part of reasonable commercial efforts. Paragraph 31 does not impose a requirement of best or bona fide efforts upon Delta. In addition, I note that Darena allowed Delta to continue beyond the second 60-day extension time with little apparent interest. Darena merely periodically inquired whether any progress had occurred. There was no suggestion by Darena or anyone representing Darena that Delta was not making reasonable and commercial efforts. This concern appears to have arisen as an afterthought.

72 It can be concluded that Bingo City Hall opposed the prize board increase as a strategic stance to prevent Delta's relocation to the Dixie Arena. Bingo City Hall was quite content to cooperate with Delta as to the prize board and another location if Delta did not proceed with the Dixie Arena location. There is no evidence that suggests to me that the plaintiff did not proceed because the cost of relocation was too high. Delta's evidence is that it was prepared to spend substantial sums to alter the premises for its use as a bingo hall. There is no question it wanted to raise the prize board to $5500.00, but I find it was prepared to relocate without an increased prize board. Proof of that conclusion arises from the fact that there was agreement to the prize board increase by City Council approximately two months prior to the letter of agreement of April 25, 1994. If there had been no approval of the prize board increase, then this particular argument might have substance, but in the face of the approval, it makes no sense to say that Delta would not move without the increased prize board. I conclude that Delta made reasonable commercial efforts to obtain the required approval. Refusal or failure to hold a residents meeting and to put the application formally before council is not a sufficient basis to negative this finding.

Defendants other than Darena

73 The defendants First Professional and Whitehorn ask that the action be dismissed as against them, as they have no privity of contract with the plaintiff. I decline to do so for three reasons. First, the original deposit cheque was made payable to Whitehorn. If it had not been joined as a party, then Darena could have raised as an issue that it was only paid $252.16 as a deposit by the second cheque. To ensure final resolution of this matter, Whitehorn was required to be a party. Second, First Professional, from the evidence, negotiated the offer to lease. It was involved in directing Starr to act as a consultant. It monitored the progress through Mr. Samuels, who represented First Professional. At the very least, First Professional was the agent of Darena for all negotiating and ongoing supervision. Third, the action proceeded on a straightforward basis as to the major issue that had to be determined. No additional issues arose from the inclusion of these two defendants. The inclusion of these two defendants did not complicate or expand the issues. These two defendants were necessary parties. They will continue as defendants in this action.

Damages

74 There was brief evidence of the damage claim found in the counterclaim. If a lease had been entered into, Exhibit 6 discloses that the total rent over the lease period would be $912,265.00 less the deposit paid, for a net claim of $892,228.00. I would not allow that amount, as the Dixie Arena was sold by the

defendants on May 1, 1996 for 3.1 million dollars. There is evidence that there was no profit from this sale. The fact that there was no profit is a factor of the building, its location and possible uses and not because of anything done by Delta.

75 I assess the damages claimed by the defendants in accordance with Exhibit 7. These calculations are based on a lease term from May 4, 1995 to May 1, 1996, which produces a loss of $181,090.19. The plaintiff made no submissions as to the veracity or validity of this amount if liability were found to rest with the plaintiff on the counterclaim.

Conclusion

76 There will be judgment for the plaintiff against all defendants for the sum of $21,440.13 and prejudgment interest in accordance with the Courts of Justice Act from the date of demand, June 16, 1996, to this date. The plaintiff shall be entitled to its costs of the action forthwith after assessment on a party and party scale. The counterclaim shall be dismissed without costs. I am prepared to reconsider the issue of costs if there are any offers extant of which I am unaware. If this step is necessary, counsel shall forward their short submissions to my office by way of fax within 15 days of today's date.

WEBBER J.

* * * * *

APPENDIX A

SCHEDULE "A"

CHRONOLOGY

1994

Sept. 14	Letter of Application for increase of Bingo Prize Board
Oct. 4	Letter to City from Delta as to intention to relocate
Oct. 6	Letter from City to Delta acknowledging letter of October 4th
Oct. 12	Prize Board Application of Sept. 14 for increase referred to Enforcement Division
Oct. 18	Cheque to Whitehorn $21,187.97
Oct. 19	City publication - no new bingo halls
Nov. 1	Delta Bingo Sponsors meeting re increased prize board
Nov. 4	Offer to lease and cheque to Darena $252.16
Nov. 8	Delta's guarantee re prize board
Nov. 11	Meeting with interested parties*
Nov. 14	Letter - First Professional to Delta re process
Nov. 24	Letter enclosing application for relocation
Dec. 4	Bingo City Sponsors meeting

Dec. 5	Letter to Ron Nisbet from Bingo City
Dec. 5	Memorandum to Mayor from Prentice
Dec. 14	City referred Nov. 24th application for relocation to Enforcement Division
Dec. 18	Press report as to concerns about relocation
Dec. 20	Letter - City to Delta confirming the Application was referred to Enforcement Division of the City
1995	
Jan. 17	Letter - Delta to Samuels
Jan. 26	Lutheran Church opposition to $5500 prize board
Jan. 27	Letter - Samuels to Delta re status
Feb. 7	Ultimate building design invoice
Feb. 8	Letter to City from Delta about relocation
Feb. 15	General committee report arising from City corporate report re prize board dated Feb. 1/95
Feb. 17	Press report as to concerns about prize board increase and relocation
Feb. 22	Withdrawal from Council of the prize board application
Feb. 22	Ultimate design invoices (2)
February	Site plan
Mar. 3	Permit to construct
Mar. 7	Certificate of occupancy
Mar. 20	Conversation between Ronald Starr and Cameron Johnstone as noted by Starr Meeting - Bingo City, Bingo City sponsors, Delta and Delta Sponsors and Ron Nisbet
Apr. 25	Letter of Agreement

* Date of meeting subject to comment in reasons

qp/d/alp/DRS

Indexed as:

364511 Ontario Ltd. v. Darena Holdings Ltd.

Between
364511 Ontario Limited, (plaintiff/respondent), and
Darena Holdings Limited, First Professional Management Inc., Stephen-Mitchell Realty Limited, carrying on business as Whitehorn Mississauga Properties, (defendants/appellants)
And between
Darena Holdings Limited, (plaintiff by counterclaim/appellant), and
364511 Ontario Limited, John Cameron and John Johnstone, (defendants by counterclaim/respondents)

[1999] O.J. No. 1784

120 O.A.C. 280
88 A.C.W.S. (3d) 574

Docket No. C29234

Ontario Court of Appeal
Toronto, Ontario

Osborne A.C.J.O., Austin and O'Connor JJ.A.

Heard: May 18, 1999.
Judgment: May 21, 1999.

(6 pp.)

Landlord and tenant — Creation of relationship — Essential elements — Offer and acceptance — Agency — Liability of principal and agent to third parties — Liability of both for same debt.

This was an appeal by the landlord and its agents from a judgment allowing the tenant to recover a deposit. The parties entered into a lease agreement. The tenant paid the landlord a deposit prior to its occupancy of the premises. The landlord claimed that the tenant forfeited its deposit by virtue of its failure to fulfil a condition that it obtain licensing to operate its bingo hall business.

HELD: The appeal by the landlord was dismissed. The appeal by the agents was allowed. The tenant complied with the terms of its offer. It did not forfeit the deposit by failing to obtain the licenses. It was understood by the parties that the failure to obtain the licenses did not require the tenant to forfeit the deposit. The judgment against the landlord's agents was set aside. There was no basis for their liability.

Appeal from:

On appeal from Webber J. dated February 9, 1998.

Counsel:

J. Wortzman and J. Kulathungam, for the appellants/defendants.
J.W. McDonald, for the respondent 364511 Ontario Limited.

The following judgment was delivered by

1 THE COURT:-- The defendants appeal from a judgment at trial permitting the plaintiff to recover its deposit on a conditional lease transaction which failed.

2 The plaintiff (tenant) and Darena Holdings Limited (landlord) entered into an agreement whereby the tenant would occupy the landlord's arena to carry on a bingo business.

3 The agreement required the tenant to "use its reasonable commercial efforts to satisfy" the condition that it receive "all necessary approvals and licences from the [city and province] to legally operate a Bingo Hall".

4 We do not accept the landlord's argument that in order to comply with the terms of the offer to lease the tenant was required not only to apply to the city and to the province but to pursue those applications to the granting or refusal of approval by those bodies. Nor do we find it necessary or useful to define "reasonable commercial efforts" in terms of "good faith", "bona fides" or "best efforts".

5 We agree with the trial judge that the tenant "could not deliberately prevent the occurrence of the condition" nor could it "take advantage of its own wrongful act". We do not agree that "this standard of reasonable commercial efforts would allow [the tenant] if it had a doubt from the efforts made that no approval would be granted, to be free to conclude its efforts" and on that basis to withdraw from the transaction. A simple doubt would not suffice; uncertainty that made it commercially unreasonable to proceed was required.

6 The offer to lease provided that the tenant had 60 days within which to get the necessary approvals. At its option, the landlord could extend that period by an additional 60 days. It was common ground that those time limitations were more or less ignored and that both landlord and tenant were prepared to proceed had the approvals become available later. The evidence supports the trial judge's findings that the tenant continued its efforts beyond the 120 days.

7 The evidence also supports the tenant's conclusion that municipal approval was not going to be forthcoming. Mr. John Johnstone's testimony, in particular, was to the effect that the local residents were opposed, the local councillor was opposed and the licencing department was not in favour. In his words, "we were dead". According to Mr. Johnstone, the landlord's agent agreed that "it did not look good". The tenant asked for the agent's assistance but nothing was forthcoming. No timely complaint was made by the landlord with regard to "reasonable commercial efforts".

8 In these circumstances, we see no basis for interfering with the conclusion of the trial judge that the tenant complied with the terms of its offer. The landlord's appeal is therefore dismissed with costs.

9 Judgement was also given against the defendants First Professional Management Inc. ("First") and Stephen-Mitchell Realty Limited, carrying on business as Whitehorn Mississauga Properties ("Whitehorn"). First negotiated the lease as the landlord's agent and provided a consultant to assist the tenant in getting approvals. Whitehorn was the real estate agency involved. The deposit cheque was made payable to it. That money was then transferred to the landlord.

10 The trial judge found that the inclusion of these two defendants neither complicated nor expanded the issues and that they were necessary parties. Accepting those findings, they do not provide any basis for liability. No other basis was suggested. The appeal with respect to First and Whitehorn must therefore be allowed, the judgment against them below set aside and the action dismissed as against them.

11 No separate submissions were made respecting the costs of First or Whitehorn at trial or on appeal. They were not separately represented. Accordingly, no order regarding costs is made with respect to them.

12 The trial judge awarded the costs of the action to the tenant on a party and party basis. The tenant cross-appeals, arguing that it made settlement offers that brought Rule 49.10 into play. The tenant's claim in the action was for a liquidated amount, namely, the amount of the deposit. Its first offer of settlement was for the full amount of the claim plus pre-judgment interest. The second offer added a claim for costs.

13 The landlord counterclaimed for both liquidated and unliquidated damages. The liquidated amount was $474,800.38. The landlord also made offers. The first was for forfeiture of the deposit, $50,000 on the

counterclaim and interest. The second was for forfeiture of the deposit plus costs on a party and party scale.

14 After referring to the decision in Data General (Can.) Ltd. v. Molnar Systems Group Inc. et al (1989), 32 C.P.C. (2d) 33 (H.C.); [1991] 6 O.R. (3d) 409 (C.A.) and Vaughan (Town) v. Alta Surety Co. [1992] O.J. No. 1353 (C.A.), the trial judge awarded only party and party costs. He gave his reasons as follows:

> In the case at bar, the major issue was the interpretation of the words "reasonable commercial efforts". As is apparent from my reasons, the interpretation favourable to the plaintiff was reached after considered deliberation as to the facts and their impact on the words in issue. The plaintiff knew full well what the debate would involve and yet made no offer that could be considered a compromise from its full claim. This stance does not reflect the purpose of the rule. The position of the Court of appeal is clear that a departure from the general rule may be made especially when the Court has the power to "order otherwise".

15 Leave is granted to the tenant to appeal from the award of party and party costs at trial but that appeal is dismissed. In Data General, supra, Morden A.C.J.O. speaking for the court said at p. 417:

> Accordingly, as a matter of justice, there may be a role for an element of compromise in liquidated claim cases where the defendant has relied upon a defence of substance - one that reasonably gave rise to uncertainty on the question of liability, thereby making some form of compromise a reasonable proposition.

At p. 418, describing the case before him at trial, he said:

> The issue raised was complex and difficult - reasonably giving rise to uncertainty as to the outcome. In the particular circumstances of this case, which include the fact that Data General's claim included no element of compromise, I think that the interests of justice justify a departure from the general rule.

16 In our view, the situation in the instant case reasonably gave rise to uncertainty as to the outcome, thereby justifying some element of compromise. Accordingly, we are not persuaded that the trial judge erred in exercising his discretion as he did.

17 To summarize, the judgment against First and Whitehorn is set aside and the action dismissed as against them without costs. The landlord's appeal to this court is dismissed with costs. Leave is granted to the tenant to appeal the award of costs below but that appeal is dismissed, without costs.

18 This was not an easy case and we are grateful to counsel for their excellent factums.

OSBORNE A.C.J.O.
AUSTIN J.A.
O'CONNOR J.A.

cp/e/bbd