newfoundland labrador hydro
a nalcor energy company

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November 29, 2013

Board of Commissioners of Public Utilities
Prince Charles Building
120 Torbay Road, P.O. Box 21040
St. John's, NL
A1A 5B2

ATTENTION: Ms. Cheryl Blundon
Director of Corporate Services & Board Secretary

Dear Ms. Blundon:

Re: An Application by Newfoundland and Labrador Hydro for approval of the terms and conditions applicable to the supply of electricity to North Atlantic Refinery Limited (NARL)

Hydro has a long standing service agreement with North Atlantic Refinery Limited (NARL) for the supply of power to the refinery at Come by Change. This agreement was approved by the Board in Order No. P.U. 7(2002-2003) flowing from Hydro's General Rate Application. This service agreement was one of four that were proposed to the Board by Hydro following consultation with the Industrial Customers (IC). All but one issue was consented to by Hydro and the IC. NARL did not accept the contract provisions pertaining to the limitation of liability and provided evidence and argument to support its position. In Order No. P.U. 7 (2002-2003), the Board excluded the language proposed by Hydro but did indicate that the parties could bring the matter back before the Board as to issues including insurability of the risk. Hydro was subsequently able to secure insurance liability coverage. On February 4, 2013, a power outage at the refinery in Come by Chance in which NARL has given notice of a claim against Hydro seeking damages. As a result of the claim, Hydro's insurer advised that as of July 1, 2013, it will no longer provide insurance coverage for the Failure to Supply Service in relation to NARL.

As this poses a significant financial risk to Hydro if another incident occurs for which Hydro is found liable, Hydro applies to the Board for approval of an amendment to the terms and conditions under which Hydro supplies electricity to NARL so that the same service agreement terms apply to this customer as apply to the other IC. This includes a limitation of liability under the contract to $1,000,000.

.../2

Please find enclosed the original and eight copies of the above-noted Application, plus supporting affidavit and draft order, as well as correspondence from Hydro's insurer (Schedule A), sections from Ontario's Distribution System Code (Schedule B), sections from Ontario's Transmission System Code (Schedule C), sections from Ontario's Independent Electric System Operators Market Rules (Schedule D) and the decision from *Southcott Estates Inc. v. Toronto Catholic District School Board*, [2012] 2 S.C.R. 675 (Schedule E), which are incorporated in this Application by reference and attached to this Application.

Please contact the undersigned should you have any questions.

Yours truly,

NEWFOUNDLAND AND LABRADOR HYDRO

Geoffrey P. Young
Senior Legal Counsel

GPY/tp

cc: Gerard Hayes – Newfoundland Power
Paul Coxworthy – Stewart McKelvey Stirling Scales
Thomas Johnson – Consumer Advocate
Thomas O'Reilly, QC – Cox & Palmer

IN THE MATTER OF the *Electrical Power Control Act, 1994*, RSNL 1994, Chapter E-5.1 (the EPCA) and the *Public Utilities Act*, RSNL 1990, Chapter P-47 (the *Act*) and regulations thereunder;

AND IN THE MATTER OF an Application by Newfoundland and Labrador Hydro, pursuant to Section 71 of the *Act*, for approval of the terms and conditions applicable to the supply of electricity to North Atlantic Refinery Limited (NARL).

TO: The Board of Commissioners of Public Utilities (the Board)

THE APPLICATION OF NEWFOUNDLAND AND LABRADOR HYDRO (Hydro) STATES THAT:

1. Hydro is a corporation continued and existing under the *Hydro Corporation Act, 2007*, is a public utility within the meaning of the *Act* and is subject to the provisions of the *Electrical Power Control Act, 1994*.

Facts

2. Since 1987, Hydro has had a long standing power supply agreement with North Atlantic Refinery Limited (NARL) for the supply of power to the refinery at Come by Chance. In Order No. P.U. 7(2002-2003) arising from Hydro's General Rate Application, the Board approved a service agreement for Hydro's electricity service to NARL. This service agreement was one of four that were proposed to the Board by Hydro following consultation with the Industrial Customers (IC).

3. With the exception of one issue, all matters under these service agreements were consented to by the IC. NARL did not accept the contract provisions pertaining to the limitation of liability and provided evidence and argument to support its position that its service agreement should not include those provisions. In Order No. P.U. 7(2002-2003), the Board approved the IC service agreements but ordered that in the case of NARL, the limitation of liability provisions of the service agreement (Clause 9.04) would not apply. The Board indicated in its Order that the parties could bring the matter back before the Board as to issues including insurability of the risk (Decision and Order of the Board, Order No. P.U. 7(2002-2003) page 145).

4. Hydro was subsequently able to secure insurance liability coverage which indemnified Hydro for legal liability to a third party, including NARL, for property damage or bodily injury caused by a failure to supply electricity (Failure to Supply Service coverage).

5. On February 4, 2013, a power outage occurred at the refinery in Come by Chance which resulted in the shutdown of power to the refinery due to a malfunction in the Breaker Failure Protection System at the Come by Chance substation, which was designed, installed and operated by Hydro.

6. NARL has given notice of a large claim against Hydro and is seeking damages from Hydro for failing to supply power and the resultant damages incurred during the shutdown of the refinery, including costs for physical damage and loss of profit. This claim is covered by the insurance policy in place at the time of the power outage.

Insurability

7. Hydro was subsequently advised by its insurance provider, AON Risk Solutions, that effective July 1, 2013, the Failure to Supply Service clause would include a specific exclusion removing all coverage for any such claims brought by NARL. This means, that effective July 1, 2013, if Hydro fails to supply power to NARL which results in damages to NARL, Hydro does not have any insurance coverage or other means of limiting its liability for the damages caused by Hydro.

8. Hydro's insurance provider has advised that insurers typically offer Failure to Supply Service coverage to utilities on the basis that the utility's liability is limited under the regulatory contract. When the NARL claim arose and the NARL contract was reviewed by Hydro's insurers, it was determined that since Hydro's liability to NARL was not limited in any way, that the exposure was such that they were no longer willing to provide coverage going forward. Effective July 1, 2013, the Failure to Supply Service coverage remains in force with a specific exclusion removing all coverage for any such claims brought by NARL. (Correspondence dated November 19, 2013, attached as Schedule A).

Industry Standard

9. The inclusion of a clause such as Clause 9.04, limiting the liability of the utility provider, as well as requiring the customer to take reasonable protective measures, is reasonable and standard industry practice. In addition to NARL, Hydro has Industrial Customer Service Agreements with Corner Brook Pulp and Paper Limited, Vale Newfoundland & Labrador Limited, Teck Resources (formerly Aur Resources), and Praxair Canada Inc. These contracts, and subsequent amendments, were approved by the Board in Order Nos. P.U. 7(2002-2003), P.U. 11(2002-2003), P.U. 12(2002-2003), P.U. 6(2003), P.U. 1(2007), P.U. 6(2009)P.U. 17(2009), P.U. 16(2010) P.U. 6(2011), P.U. 15(2011), P.U. 4(2012) and P.U. 6(2012). Each of these Service Agreements contains a clause identical to Clause 9.04. The Industrial Customer Service Agreement with NARL is the only Service Agreement that does not contain a limitation of liability clause.

10. The inclusion of a clause limiting liability is standard industry practice in other provinces. For example, in Ontario, every distributor of electricity in Ontario is licenced by the Ontario Energy Board (OEB). Each licence obligates every distributor to comply with the Distribution System Code (DSC). Each distributor is required to comply with the DSC and is entitled to refuse service to any customer demanding terms more favourable than are permitted under the DSC. Subsection 2.2 – Liability of the DSC (attached as Schedule B) limits the liability of the distributor to damages arising out of its wilful misconduct or negligence in

providing distribution services or meeting its obligations under the DSC, the distributors licence and applicable law. Subsection 2.2.2 excludes liability "under any circumstances whatsoever" for any loss of profits or revenues, business interruption losses, loss of contract or goodwill, or for any indirect, consequential, incidental or special damages, including punitive or exemplary damages whether such damages arise in contract, tort or otherwise.

11. Transmitters of electricity in Ontario are also licenced by the OEB and must comply with the Transmission System Code (TSC) as a condition of licence. Subsection 3.0.7 provides that the relationship between transmitters and customers shall be governed by the version of the Connection Agreement attached to the TSC at Appendix 1 (TSC Agreement). Section 15 of the TSC Agreement (attached as Schedule C) applicable to load customers also limits the liability of transmitters to damages arising out of its wilful misconduct or negligence. Subsection 15.2 excludes liability for "any loss of profits or revenues, business interruption losses, loss of contract or loss of goodwill, or for any indirect, consequential, incidental or special damages, including punitive or exemplary damages." Subsection 15.4 also requires a party to mitigate its losses relating to any claim for indemnification from the other party.

12. Both electricity generators and wholesalers must also be licenced in Ontario and their licences require that each comply with the Independent Electric System

Operator's (IESO) Market Rules. Section 13 of Chapter 1 of IESO Market Rules deals with liability and indemnification (attached as Schedule D). The rules limit liability to situations of wilful misconduct or negligence or omission and exclude damages including indirect or consequential loss or incidental or special damages including but not limited to punitive damages or any loss of profit, loss of contract, loss of opportunity or loss of goodwill.

13. As outlined in the above examples, the limitation of liability provided for in Clause 9.04 is generally included in utility contracts and should therefore also be included in the NARL contract.

Duty to Mitigate

14. Mitigation is a common law doctrine based on fairness and common sense, which seeks to do justice between the parties in the particular circumstances of the case. It is also a principle that is applicable in contract law. As a general rule, a plaintiff will not be able to recover those losses which he could have avoided by taking reasonable steps to limit or reduce those losses (*Southcott Estates Inc. v. Toronto Catholic District School Board*, [2012] 2 S.C.R. 675, attached as Schedule E). While a plaintiff is not under a duty to mitigate, the failure to mitigate generally reduces recoverable losses.

15. Unfortunately, Hydro is unable to ensure that a power interruption will never occur. In Decision and Order of the Board, Order No. P.U. 7(2002-2003) (page 145) it was noted that "a disruption in energy supply on the refinery processes and operations ... requires an emergency shutdown of all process units and causes loss of product through flaring. [NARL] further stated that once production has been interrupted as a result of a power failure it usually take five to seven days to bring the refinery back to full production. Examples were quoted of the extent of damages, estimated to be in excess of $19,000,000 incurred by the refinery for two previous outages" (page 144).

16. If the risk of service interruption would result in such catastrophic loss to the refinery, it is not unreasonable to ask NARL to mitigate against these potential losses and have backup generation in place to ensure that operations critical to the refinery are able to continue. Service interruptions and the repercussions that follow are reasonably foreseeable losses and should be absorbed by NARL as a cost of doing business that NARL should mitigate against. It is not unusual for other customers that have critical operations where the loss of power would be catastrophic, for example, hospitals, to have sufficient backup generation in place in the event that there is a disruption in the supply of power.

17. Given that a short disruption in power could result in substantial financial damages to NARL, the costs associated with implementing a backup generation system are not unreasonable.

Impact on Hydro

18. The lack of coverage, either by insurance or contract, poses a significant financial risk to Hydro. In light of the sensitivity of the refinery to power outages, even those as short as three minutes, it is not appropriate for one ratepayer, NARL, to impose such a financial risk on Hydro, especially where the service agreement bears favourable terms for NARL and the risk is one that is more appropriately borne by NARL.

Equality of Rates

19. Section 73 of the Act requires that "tolls rates and charges under substantially similar circumstances and conditions with respect to service of the same description be charged equally." Paragraph 3(1)(a) of the *EPCA* requires that the rates charged be "reasonable and not unjustly discriminatory". The concept of a utility rate extends to the terms and conditions that apply to that rate. There is no reason to continue with different liability provisions to apply to NARL's service agreement than apply to the other IC. There is no basis to conclude that the transference of this uninsurable risk to Hydro is fair and equitable amongst the IC. Continuing the different liability provision constitutes a form of rate

discrimination which, as is shown by Hydro's inability to insure against the claim exposure, is substantive.

20. Hydro now makes Application that the Board make an Order approving the revision of the contract with NARL (attached as Schedule F) to include the following clause which applies, and which has always applied as approved by the Board, to all of the other IC:

> 9.04 (1) Subject to Clause 9.04(2) hereof, Hydro shall be liable for and in respect of only that direct loss or damage to the physical property of the Customer caused by any negligent act or omission of Hydro its servants or agents. Customer agrees that for the purpose of this Clause 9.04, "direct loss or damage to the physical property of the Customer" shall not be construed to include damages for inconvenience, mental anguish, loss of profits, loss of earnings or any other indirect or consequential damages or losses.
>
> (2) Hydro's liability under subclause 9.04(1) applies only when the direct loss or damage to the Customer arising from a single occurrence exceeds the sum of $100,000.00. In no event shall the liability of Hydro exceed the sum of $1,000,000.00 for any single occurrence.
>
> (3) Customer further agrees that any damages to which it may be entitled pursuant to clause 9.04(1) shall be reduced to reflect the extent to which such losses or damages could reasonably have been reduced if the Customer had taken reasonable protective measures.

21. Generally, Clause 9.04 would limit Hydro's liability to only direct loss or damage to the customer's physical property caused by a negligent act or omission of Hydro. The term "direct loss" specifically excludes damages for inconvenience, mental anguish, loss of profits, loss of earnings or any other indirect or

consequential damages or losses. Specifically, subsection 2 would limit Hydro's liability to damages between the sums of $100,000 and $1 million for each single occurrence. Subsection 3 would reduce Hydro's liability to the extent that the damages incurred could have been reduced if the customer had taken reasonable protective measures.

22. This clause is required as: 1) Hydro is no longer able to obtain insurance coverage for such instances in relation to NARL; 2) it is industry standard to include such limitation of liability clauses in Industrial Customer Power Contracts; 3) NARL should be required to mitigate the risk of damage by having backup generation in place for operations that are critical to the refinery; and 4) due to lack of coverage, either through insurance or contract, Hydro's risk exposure has increased substantially should another incident occur for which Hydro is found liable. It is inappropriate for Hydro to bear this risk. Moreover, it is the same clause that applies to all other members of the Island Industrial Customer class.

Summary

23. The inclusion of a clause limiting the liability of Hydro with respect to damages is:

(a) Required to ensure that rates are not discriminatory as required by Section 3 of the *EPCA* and are equal as required by Section 73 of the Act; and

(b) Justified under tests consistent with generally accepted sound public utility practice as required by Section 4 of the *EPCA*; and

DATED AT St. John's in the Province of Newfoundland and Labrador this 29th day of November, 2013.

Geoffrey P. Young
Counsel for the Applicant
Newfoundland and Labrador Hydro,
500 Columbus Drive, P.O. Box 12400
St. John's, Newfoundland, A1B 4K7
Telephone: (709) 737-1277
Facsimile: (709) 737-1782

IN THE MATTER OF the *Electrical Power Control Act*, RSNL 1994, Chapter E-5.1 (the *EPCA*) and the *Public Utilities Act*, RSNL 1990, Chapter P-47 (the *Act*) and regulations thereunder;

AND IN THE MATTER OF an Application by Newfoundland and Labrador Hydro, pursuant to Section 71 of the *Act*, for approval of the terms and conditions applicable to the supply of electricity to North Atlantic Refinery Limited (NARL).

AFFIDAVIT

I, Robert J. Henderson, Professional Engineer, of St. John's in the Province of Newfoundland and Labrador, make oath and say as follows:

1. I am Vice-President of Newfoundland and Labrador Hydro, the Applicant named in the attached Application.

2. I have read and understand the foregoing Application.

3. I have personal knowledge of the facts contained therein, except where otherwise indicated, and they are true to the best of my knowledge, information and belief.

SWORN at St. John's in the Province of Newfoundland and Labrador this 26th day of November 2013, before me:

Barrister – Newfoundland and Labrador

Robert J. Henderson

AON RISK SERVICES

November 19, 2013

Nalcor Energy
Hydro Place
500 Columbus Drive
P.O. Box 12400
St. John's, NL A1B 0C9

Attention: Marilyn Leonard

RE: Failure to Supply Liability Insurance Coverage

Dear Mrs. Leonard:

This insurance coverage, which is included in your General Liability policy, indemnifies (and will defend) Hydro for its legal liability to 3rd parties for Property Damage (including loss of use) or Bodily Injury caused by a failure to supply electricity when such failure is caused by an "occurrence".

Insurers offer the coverage to utilities, (and most utilities would have the coverage), but it is underwritten based on the belief that the utility's liability is limited under regulatory tariffs or by contract.

When the NARL claim arose and the NARL contract was reviewed by Hydro's insurers, they determined the exposure was such that they were no longer willing to offer the coverage going forward due to the absence of a limitation of liability.

Effective July 1, 2013 the above referenced Failure to Supply coverage remains in force but with a specific exclusion removing all cover for any such claims brought by NARL.

Feel free to give me a call if further clarification is required.

Best regards,

Aon Reed Stenhouse Inc.

Darren W. Marsh, P.Eng., CRM, CAIB
Account Executive, Vice President

CC: John Bate, Aon; Tracey Pennell, Nalcor

Aon Reed Stenhouse Inc.
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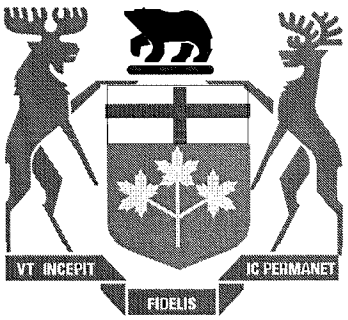

Ontario

ONTARIO ENERGY BOARD

Distribution System Code

Last revised on June 10, 2009
(Originally Issued on July 14, 2000)

Distribution System Code

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Distribution System Code

b. the distributor shall treat the owner or operator of the generation facility as a generator in relation to the connection and operation of that generation facility.

2 STANDARDS OF BUSINESS PRACTICE AND CONDUCT

2.1 Connection Agreement Requirement

Note: Section 2.1 revoked by amendment, effective March 22, 2004.

2.2 Liability

2.2.1 A distributor shall only be liable to a customer and a customer shall only be liable to a distributor for any damages which arise directly out of the willful misconduct or negligence:

1. Of the distributor in providing distribution services to the customer;
2. Of the customer in being connected to the distributor 's distribution system; or
3. Of the distributor or customer in meeting their respective obligations under this Code, their licences and any other applicable law.

2.2.2 Despite section 2.2.1; neither the distributor nor the customer shall be liable under any circumstances whatsoever for any loss of profits or revenues, business interruption losses, loss of contract or loss of goodwill, or for any indirect, consequential, incidental or special damages, including but not limited to punitive or exemplary damages, whether any of the said liability, loss or damages arise in contract, tort or otherwise.

2.3 Force Majeure

2.3.1 Neither party shall be held to have committed an event of default in respect of any obligation under this Code if prevented from performing that obligation, in whole or in part, because of a force majeure event.

2.3.2 If a force majeure event prevents a party from performing any of its obligations under this Code and the applicable Connection Agreement, that party shall:

1. Promptly notify the other party of the force majeure event and its assessment in good faith of the effect that the event will have on its ability to perform any

of its obligations. If the immediate notice is not in writing, it shall be confirmed in writing as soon as reasonably practicable.

2. Not be entitled to suspend performance of any of its obligations under this Code to any greater extent or for any longer time than the force majeure event requires it to do;
3. Use its best efforts to mitigate the effects of the force majeure event, remedy its inability to perform, and resume full performance of its obligations;
4. Keep the other party continually informed of its efforts; and
5. Provide written notice to the other party when it resumes performance of any obligations affected by the force majeure event.

2.3.3 Notwithstanding any of the foregoing, settlement of any strike, lockout, or labor dispute constituting a force majeure event shall be within the sole discretion of the party to the agreement involved in the strike, lockout, or labour dispute. The requirement that a party must use its best efforts to remedy the cause of the force majeure event, mitigate its effects, and resume full performance under this Code shall not apply to strikes, lockouts, or labour disputes

2.4 Conditions of Service

2.4.1 A distributor shall document its Conditions of Service that describe the operating practices and connection policies of the distributor. All distributors shall have a Conditions of Service. Subject to this Code and other applicable laws, a distributor shall comply with its Conditions of Service but may waive a provision of its Conditions of Service in favour of a customer or potential customer.

2.4.2 A distributor shall file a copy of its Conditions of Service with the Board, make its Conditions of Service publicly available and provide a copy to any person requesting it. A distributor shall provide one copy per revision for each person that requests it.

2.4.3 A distributor's existing Conditions of Service will be deemed to meet the standards set out in this Code for a period of one year following the coming into force of this Code, after which point the distributor must comply.

2.4.4 Note: Section 2.4.4 revoked by amendment, effective March 22, 2004.

2.4.5 A distributor's Conditions of Service may be subject to review as part of the distributor's performance based rates plan.

Ontario Energy Board

Commission de l'Énergie de l'Ontario

ONTARIO ENERGY BOARD

Transmission System Code

June 10, 2010

APPENDIX 1

VERSION A - FORM OF CONNECTION AGREEMENT FOR LOAD CUSTOMERS

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PART THREE
LIABILITY AND FORCE MAJEURE

15. LIABILITY

15.1. Except as otherwise expressly provided in this Agreement, the Transmitter shall not be liable for any Party Losses of the Customer whatsoever arising out of any act or omission of the Transmitter under this Agreement unless such Party Losses result from the willful misconduct or negligence of the Transmitter.

15.2. Except as otherwise expressly provided in this Agreement, the Customer shall not be liable for any Party Losses of the Transmitter whatsoever arising out of any act or omission of the Customer under this Agreement unless such Party Losses result from the willful misconduct or negligence of the Customer.

15.3. Despite sections 15.1 and 15.2 but except as otherwise expressly provided in sections 21.4, 27.13.6, 27.13.7 and 27.13.9, neither Party shall be liable to the other, whether as claims in contract or in tort or otherwise, for any loss of profits or revenues, business interruption losses, loss of contract or loss of goodwill, or for any indirect, consequential, incidental or special damages, including punitive or exemplary damages.

15.4. A Party shall have a duty to mitigate any Party Losses relating to any claim for indemnification from the other Party that may be made in relation to that other Party. Nothing in this section 15.4 shall require the mitigating Party to mitigate or alleviate the effects of any strike, lockout, restrictive work practice or other labour dispute.

15.5. A Party shall give prompt notice to the other Party of any claim with respect to which indemnification is being or may be sought under this Agreement.

16. FORCE MAJEURE

16.1. No Liability Where Force Majeure Event Occurs

16.1.1. Subject to sections 16.1.2 to 16.1.4, a Party shall not be liable to the other Party for any failure or delay in the performance of any of its obligations under this Agreement in whole or in part to the extent that such failure or delay is due to a Force Majeure Event.

16.1.2. The Party invoking a Force Majeure Event shall only be excused from performance under section 16.1.1:

(a) for so long as the Force Majeure Event continues and for such reasonable period of time thereafter as may be necessary for the Party to resume performance of the obligation; and

(b) where and to the extent that the failure or delay in performance would not have been experienced but for such Force Majeure Event.

16.1.3. Nothing in this section 16 shall excuse a Party from performing any of their respective emergency-related obligations in the event of an emergency.

16.1.4. A Party may not invoke a Force Majeure Event unless it has given notice in accordance with section 16.2.

16.2. Obligations Where Force Majeure Event Occurs

16.2.1. Where a Party invokes a Force Majeure Event, it shall promptly give notice to the other Party, which notice shall include particulars of:

(a) the nature of the Force Majeure Event and, if known, of its duration;

(b) the effect that the Force Majeure Event is having on the Party=s performance of its obligations under this Agreement; and

(c) the measures that the Party is taking, or proposes to take, to alleviate the impact of the Force Majeure Event.

Such notice may be given verbally, in which case the notifying Party shall as soon as practicable thereafter confirm the notice in writing.

16.2.2. Where a Party invokes a Force Majeure Event, it shall use all reasonable endeavours to mitigate or alleviate the effects of the Force Majeure Event on the performance of its obligations under this Agreement. Nothing in this section 16.2.2 shall require the mitigating Party to mitigate or alleviate the effects of any strike, lockout, restrictive work practice or other labour dispute.

16.2.3. Where a Party invokes a Force Majeure Event, it shall notify the other Party in writing as soon as practicable of the cessation of the Force Majeure Event and of the cessation of the effects of the Force Majeure Event on the Party=s performance of its obligations under this Agreement.

13. Liability and Indemnification

13.1 Liability of IESO

13.1.1 Except as required by section 13.1.2 or as otherwise provided in these *market rules,* the *IESO* shall not be liable for any claims, losses, costs, liabilities, obligations, actions, judgements, suits, expenses, disbursements or damages of a *market participant* whatsoever, howsoever arising and whether as claims in contract, claims in tort (including but not limited to negligence) or otherwise, arising out of any act or omission of the *IESO* in the exercise or performance or the intended exercise or performance of any power or obligation under these *market rules* or under any policy, guideline or other document referred to in section 7.7 or any *market manual.*

13.1.2 Subject to section 13.1.4, the *IESO* shall indemnify and hold harmless a *market participant* and the *market participant's* directors, officers and employees from any and all claims, losses, liabilities, obligations, actions, judgements, suits, costs, expenses, disbursements and damages incurred, suffered, sustained or required to be paid, directly or indirectly, by, or sought to be imposed upon, the *market participant* or its directors, officers or employees to the extent that such claims, losses, liabilities, actions, judgements, suits, costs, expenses, disbursements or damages arise out of any willful misconduct by or any negligent act or omission of the *IESO* in the exercise or performance or the intended exercise or performance of any power or obligation under these *market rules* or under any policy, guideline or other document referred to in section 7.7 or any *market manual.*

13.1.3 For the purposes of section 13.1.2, an act or omission of the *IESO* effected in compliance with these *market rules* or with the provisions of any policy, guideline or other document referred to in section 7.7 or any *market manual* shall be deemed not to constitute willful misconduct or a negligent act or omission.

13.1.4 Except as otherwise provided in these *market rules* other than in this section 13, in no event shall the *IESO* be liable to indemnify and hold harmless a *market participant* or the *market participant's* directors, officers or employees from or in respect of:

13.1.4.1 any indirect or consequential loss or incidental or special damages including, but not limited to, punitive damages; or

13.1.4.2 any loss of profit, loss of contract, loss of opportunity or loss of goodwill,

and no *market participant* shall assert or attempt to assert against the *IESO* any claim in respect of any of the losses or damages referred to in sections 13.1.4.1 and 13.1.4.2.

13.1.5 Each *market participant* shall have a duty to mitigate damages, losses, liabilities, expenses or costs relating to any claims for indemnification that may be made by the *market participant* pursuant to section 13.1.2.

13.2 Liability of Market Participants

13.2.1 Except as required by section 13.2.2 or as otherwise provided in these *market rules,* a *market participant* shall not be liable for any claims, losses, costs, liabilities, obligations, actions, judgements, suits, expenses, disbursements or damages of the *IESO* whatsoever, howsoever arising and whether as claims in contract, claims in tort (including but not limited to negligence) or otherwise, arising out of any act or omission of the *market participant* in the exercise or performance or the intended exercise or performance of any power or obligation under these *market rules* or under any policy, guideline or other document referred to in section 7.7 or any *market manual.*

13.2.2 Subject to section 13.2.4, each *market participant* shall indemnify and hold harmless the *IESO,* the *IESO's* directors, officers and employees and any member of a panel established by the *IESO* from any and all claims, losses, liabilities, obligations, actions, judgements, suits, costs, expenses, disbursements and damages incurred, suffered, sustained or required to be paid, directly or indirectly, by, or sought to be imposed upon, the *IESO,* its directors, officers or employees or the member of a panel established by the *IESO* to the extent that such claims, losses, liabilities, actions, judgements, suits, costs, expenses, disbursements or damages arise out of any willful misconduct by or any negligent act or omission of the *market participant* in the exercise or performance or the intended exercise or performance of any power or obligation under these *market rules* or under any policy, guideline or other document referred to in section 7.7 or any *market manual.*

13.2.3 For the purposes of section 13.2.2, an act or omission of a *market participant* effected in compliance with the *market rules* or with the provisions of any policy, guideline or other document referred to in section 7.7 or any *market manual* shall be deemed not to constitute willful misconduct or a negligent act or omission.

13.2.4 Except as otherwise provided in these *market rules* other than in this section 13, in no event shall a *market participant* be liable to indemnify and hold harmless

the *IESO,* the *IESO's* directors, officers or employees or a member of a panel established by the *IESO* from or in respect of:

13.2.4.1 any indirect or consequential loss or incidental or special damages including, but not limited to, punitive damages; or

13.2.4.2 any loss of profit, loss of contract, loss of opportunity or loss of goodwill,

and the *IESO* shall not assert or attempt to assert against a *market participant* any claim in respect of any of the losses or damages referred to in sections 13.2.4.1 and 13.2.4.2.

13.2.5 Nothing in this section 13.2 shall be read as limiting the right of the *IESO* to impose a financial penalty or other sanction including, but not limited to, the issuance of a *suspension order*, a *disconnection order* or a *termination order*, on a *market participant* in accordance with the provisions of these *market rules.*

13.2.6 The *IESO* shall have a duty to mitigate damages, losses, liabilities, expenses or costs relating to any claims for indemnification that may be made by the *IESO* pursuant to section 13.2.2 including, but not limited to, seeking recovery under any applicable policies of insurance to which the *IESO* or the *market participant,* as the case may be, is a beneficiary.

13.3 Force Majeure

13.3.1 Subject to section 13.3.14, the *IESO* shall not be liable to any *market participant* for any failure or delay in the performance of any of its obligations under these *market rules* or under the provisions of any policy, guideline or other document referred to in section 7.7 or any *market manual*, other than the obligation to make payments of money, to the extent that such failure or delay is due to a *force majeure event*, provided that the *IESO* shall only be excused from performance pursuant to this section 13.3.1:

13.3.1.1 for so long as the *force majeure event* continues and for such reasonable period of time thereafter as may be necessary for the *IESO* to resume performance of the obligation; and

13.3.1.2 where and to the extent that the failure or delay in performance would not have been experienced but for such *force majeure event.*

13.3.2 Subject to section 13.3.14, a *market participant* shall not be liable to the *IESO* for any failure or delay in the performance of any of its obligations under these

market rules or under the provisions of any policy, guideline or other document referred to in section 7.7 or any *market manual*, other than the obligation to make payments of money, to the extent that such failure or delay is due to a *force majeure event,* provided that the *market participant* shall only be excused from performance pursuant to this section 13.3.2:

13.3.2.1 for so long as the *force majeure event* continues and for such reasonable period of time thereafter as may be necessary for the *market participant* to resume performance of the obligation; and

13.3.2.2 where and to the extent that such failure or delay would not have been experienced but for such *force majeure event.*

13.3.3 Neither the *IESO* nor a *market participant* may invoke a *force majeure event* unless it has given notice in accordance with section 13.3.4 or 13.3.5, respectively.

13.3.4 Where the *IESO* invokes a *force majeure event*, it shall give notice to *market participants* and shall *publish* notice of the *force majeure event* as soon as reasonably practicable but in any event within two *business days* of the date on which the *IESO* becomes aware of the occurrence of the *force majeure event*, which notice shall include particulars of:

13.3.4.1 the nature of the *force majeure event*;

13.3.4.2 the effect that such *force majeure event* is having on the *IESO's* performance of its obligations under these *market rules* or under the provisions of any policy, guideline or other document or referred to in section 7.7 or any *market manual*; and

13.3.4.3 the measures that the *IESO* is taking, or proposes to take, to alleviate the impact of the *force majeure event.*

13.3.5 Where a *market participant* invokes a *force majeure event*, it shall give notice to the *IESO* of the *force majeure event* as soon as reasonably practicable but in any event within two *business days* of the date on which the *market participant* becomes aware of the occurrence of the *force majeure event*, which notice shall include particulars of:

13.3.5.1 the nature of the *force majeure event*;

13.3.5.2 the effect that such *force majeure event* is having on the *market participant's* performance of its obligations under these *market rules*

or under the provisions of any policy, guideline or other document referred to in section 7.7 or any *market manual*; and

13.3.5.3 the measures that the *market participant* is taking, or proposes to take, to alleviate the impact of the *force majeure event*.

13.3.6 Subject to section 13.3.7, where the *IESO* or a *market participant* invokes a *force majeure event*, it shall use all reasonable endeavours to mitigate or alleviate the effects of the *force majeure event* on the performance of its obligations under these *market rules*.

13.3.7 The settlement of any strike, lockout, restrictive work practice or other labour disturbance constituting a *force majeure event* shall be within the sole discretion of the *IESO* or the *market participant*, as the case may be, involved in such strike, lockout, restrictive work practice or other labour disturbance and nothing in section 13.3.6 shall require the *IESO* or the *market participant*, as the case may be, to mitigate or alleviate the effects of such strike, lockout, restrictive work practice or other labour disturbance.

13.3.8 Where the *IESO* invokes a *force majeure event,* it shall notify *market participants* and shall as soon as practicable *publish* notice of any material change in the information contained in the notice referred to in section 13.3.4 or in any previous notice given and *published* pursuant to this section 13.3.8.

13.3.9 Where a *market participant* invokes a *force majeure event*, it shall as soon as practicable notify the *IESO* of any material change in the information contained in the notice referred to in section 13.3.5 or in any previous notice given pursuant to this section 13.3.9.

13.3.10 Where the *IESO* invokes a *force majeure event*, it shall give notice to *market participants* and shall *publish* notice of the cessation of the *force majeure event* and of the cessation of the effects of such *force majeure event* on the *IESO*'s performance of its obligations under these *market rules* or under the provisions of any policy, guideline or other document referred to in section 7.7 or any *market manual*.

13.3.11 Where a *market participant* invokes a *force majeure event*, it shall give notice to the *IESO* of the cessation of the *force majeure event* and of cessation of the effects of such *force majeure event* on the *market participant's* performance of its obligations under these *market rules* or under the provisions of any policy, guideline or other document referred to in section 7.7 or any *market manual*.

13.3.12 The *IESO* shall *publish* any notice provided to it pursuant to section 13.3.5, 13.3.9 or 13.3.11.

13.3.13 Nothing in this section 13.3 shall be read as limiting the right of the *IESO* to impose on a *market participant* a sanction, other than a financial penalty, including but not limited to the issuance of a *suspension order*, a *disconnection order* or a *termination order*, in accordance with the provisions of these *market rules*.

13.3.14 Nothing in this section 13.3 shall excuse the *IESO* or a *market participant* from performing any of their respective obligations contained in:

13.3.14.1 those provisions of these *market rules* that govern the *IESO* and the *market participant* during an *emergency* or while the *IESO-controlled grid* is in a *high-risk operating state* or in an *emergency operating state*;

13.3.14.2 those provisions of any policy, guideline or other document referred to in section 7.7 or any *market manual* that govern the *IESO* and the *market participant* during an *emergency* or while the *IESO-controlled grid* is in a *high-risk operating state* or in an *emergency operating state*;

13.3.14.3 the *Ontario electricity emergency plan*;

13.3.14.4 the *market participant's emergency preparedness plan*;

13.3.14.5 the *Ontario power system restoration plan*; or

13.3.14.6 the *market participant's restoration participant attachment*,

during an *emergency* or while the *IESO-controlled grid* is in a *high-risk operating state* or in an *emergency operating state*.

13.4 Contractual Liability

13.4.1 The liability and indemnification provisions of sections 13.1 and 13.2 and, where applicable, of any other section of these *market rules* other than this section 13, and the *force majeure* provisions of section 13.3 shall apply to any agreement or contract referred to in these *market rules* or in any policy, guideline or other document referred to in section 7.7 or any *market manual* to which the *IESO* and a *market participant* are parties or to the terms of which the *IESO* and a *market participant* are bound and to all acts or omissions of the *IESO* or the *market participant* in the exercise or performance or the intended exercise or performance of any power or obligation under such agreement, contract, policy, guideline or other document referred to in section 7.7 or any *market manual*. In

the event of an inconsistency between such liability, indemnification and *force majeure* provisions and the liability, indemnification and *force majeure* provisions of such agreement, the liability and indemnification provisions of sections 13.1 and 13.2 and, where applicable, of any other section of these *market rules*, and the *force majeure* provisions of section 13.3 shall prevail to the extent of the inconsistency.

14. Exemptions

14.1 Scope of Exemptions

14.1.1 As provided in the *Electricity Act, 1998* an *exemption applicant* may apply to the *IESO* for an *exemption* from the application of any obligation or standard which is or may be imposed upon the *exemption applicant* or in respect of the *exemption applicant's facilities* or equipment pursuant to these *market rules, market manuals* or to any standard, policy or procedure established by the *IESO* pursuant to these *market rules*.

14.1.2 In this section 14, a reference to an *exemption applicant* shall, where the context so requires, be deemed to include a reference to an *exemption applicant* to whom an *exemption* has been granted by the *IESO Board*.

14.2 Application Process

14.2.1 An *exemption applicant* shall apply for an *exemption* in accordance with the practices and procedures established by the *IESO Board*.

14.3 Effect of Exemption and Monitoring

14.3.1 Failure by an *exemption applicant* to comply with any of the terms and conditions of an *exemption* imposed pursuant to an order of the *IESO Board*, including without limitation any amendments to such terms and conditions, shall constitute a breach of the *market rules*.

14.3.2 An *exemption applicant* to whom an *exemption* has been granted shall from time to time provide to the *IESO* such information as the *IESO* may request for the purposes of monitoring:

SUPREME COURT OF CANADA

CITATION: Southcott Estates Inc. *v.* Toronto Catholic District School Board, 2012 SCC 51, [2012] 2 S.C.R. 675

DATE: 20121017
DOCKET: 33778

BETWEEN:

Southcott Estates Inc.
Appellant / Respondent on cross-appeal
and
Toronto Catholic District School Board
Respondent / Appellant on cross-appeal

CORAM: McLachlin C.J. and LeBel, Deschamps, Abella, Rothstein, Cromwell and Karakatsanis JJ.

REASONS FOR JUDGMENT: (paras. 1 to 63) Karakatsanis J. (LeBel, Deschamps, Abella, Rothstein and Cromwell JJ. concurring)

DISSENTING REASONS: (paras. 64 to 99) McLachlin C.J.

Southcott Estates Inc. *Appellant/Respondent on cross-appeal*

v.

Toronto Catholic District School Board *Respondent/Appellant on cross-appeal*

Indexed as: Southcott Estates Inc. *v.* Toronto Catholic District School Board

2012 SCC 51

File No.: 33778.

2012: March 20; 2012: October 17.

Present: McLachlin C.J. and LeBel, Deschamps, Abella, Rothstein, Cromwell and Karakatsanis JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Contracts — Commercial contracts — Remedies — Specific performance — Duty to mitigate — Single-purpose company entering into agreement for purchase

of land — Vendor breaching contractual obligations — Company seeking specific performance — Whether single-purpose company must mitigate its losses — Whether plaintiff seeking specific performance has obligation to mitigate its losses — Whether trial judge erred in concluding there were no comparable properties available for mitigation.

The appellant S is a single-purpose company incorporated solely for the purpose of a specific land purchase, with no assets other than money advanced to it by its parent company for the deposit relating to such purchase. It entered into an agreement of purchase and sale for a specific property with the respondent. When the respondent failed to satisfy a condition and refused to extend the closing date, S sought specific performance of the contract. It argued that it was not required to mitigate its losses. The trial judge refused to award specific performance but awarded damages to S in the amount of $1,935,500. The Court of Appeal concluded that the respondent had breached its contractual obligations but that S had failed to take available steps to mitigate its losses. It reduced the damage award to a nominal sum.

Held (McLachlin C.J. dissenting): The appeal and cross-appeal should be dismissed.

Per LeBel, Deschamps, Abella, Rothstein, Cromwell and Karakatsanis JJ.: Mitigation is a doctrine based on fairness and common sense, which seeks to do justice between the parties in the particular circumstances of the

case. As a general rule, a plaintiff will not be able to recover those losses which he could have avoided by taking reasonable steps.

The main issue is whether S, a single-purpose corporation, was excused from mitigating its losses when the vendor breached the agreement of purchase and sale, and particularly when it had promptly brought an action for specific performance. As a separate legal entity, S was required to mitigate by making diligent efforts to find a substitute property. Those who choose the benefits of incorporation must bear the corresponding burdens. One such responsibility is to take steps to mitigate losses. A plaintiff cannot recover losses that could reasonably have been avoided. S sought specific performance and was therefore ready to complete the purchase. Its alternative claim for consequential damages was predicated upon its access to capital to complete the agreement of purchase and sale. As such, both claims were premised upon resources that were not tied up as a result of the breach alleged. S can hardly argue that the same money would not have been available for mitigation. In the absence of actual evidence of impecuniosity, finding that losses cannot be reasonably avoided, simply because the corporation is a single-purpose corporation within a larger group of companies, would give these corporations an unfair advantage. If single-purpose corporations were not required to mitigate their losses, this could expose defendants contracting with such corporations to higher damage awards.

This Court has recognized that there may be situations in which a plaintiff's inaction is justifiable notwithstanding its failure to obtain an order for specific performance. If the plaintiff has a "fair, real, and substantial justification" or a "substantial and legitimate interest" in specific performance, its refusal to purchase other property may be reasonable, depending upon the circumstances of the case. A plaintiff deprived of an investment property does not have a "fair, real, and substantial justification" or a "substantial and legitimate interest" in specific performance unless he can show that money is not a complete remedy because the land has "a peculiar and special value" to him. S has not demonstrated such a claim and therefore cannot justify its inaction. S was engaged in a commercial transaction for the purpose of making a profit. The property's particular qualities were only of value due to their ability to further profitability, for which damages were an adequate remedy.

Where it is alleged that the plaintiff has failed to mitigate, the defendant bears the burden of proving that the plaintiff has failed to make reasonable efforts to mitigate and that mitigation was possible. Whether or not there were comparable properties and whether they are profitable is a finding of fact. The trial judge made a palpable and overriding error in finding there were no comparable mitigation opportunities. He failed to consider the reasonable and available inferences arising from expert evidence regarding other land suitable for development sold in the area, the investment properties purchased by the parent company of S and the absence of evidence to the contrary. The respondent discharged the burden of showing that there

were other comparable development properties available in the relevant time period to mitigate the losses.

Per McLachlin C.J. (dissenting): The Board, having breached the contract, bears the onus of proving that S unreasonably failed to mitigate its loss. This entails establishing, on a balance of probabilities: (1) that an opportunity to mitigate the loss was available to S; and (2) that S unreasonably failed to pursue that opportunity. The trial judge's finding that the Board failed to establish that S had an opportunity to mitigate is sufficient to dispose of the appeal. This finding was grounded in the evidence and did not constitute palpable and overriding error. The Board failed to prove that another property comparable to the one that S sought to purchase was available. Neither the evidence of the Board's expert witness nor that of purchases by other subsidiaries of S's parent company established that a comparable property was available for S.

Moreover, S could not be unreasonable in failing to mitigate its loss because it reasonably maintained its action for specific performance. The act of filing a claim for specific performance is inconsistent with the act of acquiring a substitute property. A plaintiff, acting reasonably, cannot pursue specific performance and mitigate its potential loss of damages at the same time. There is no basis on which to conclude that S acted unreasonably in maintaining its suit for specific performance instead of mitigating its loss. S had a "fair, real, and substantial justification" for claiming specific performance. The property was uniquely suited to S's needs for

single-family residential development within the City of Toronto. The evidence supported the view that there were no comparable substitute properties.

Furthermore, it is difficult to conclude that S unreasonably failed to mitigate given that S lacked the financial capacity to go into the market and purchase a substitute property.

Cases Cited

By Karakatsanis J.

Referred to: *Asamera Oil Corp. v. Seal Oil & General Corp.*, [1979] 1 S.C.R. 633; *British Westinghouse Electric and Manufacturing Co. v. Underground Electric Railways Company of London, Ltd.*, [1912] A.C. 673; *British Columbia v. Canadian Forest Products Ltd.*, 2004 SCC 38, [2004] 2 S.C.R. 74; *Red Deer College v. Michaels*, [1976] 2 S.C.R. 324; *Evans v. Teamsters Local Union No. 31*, 2008 SCC 20, [2008] 1 S.C.R. 661; *Redpath Industries Ltd. v. Cisco (The)*, [1994] 2 F.C. 279; *Kosmopoulos v. Constitution Insurance Co.*, [1987] 1 S.C.R. 2; *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415; *Adderley v. Dixon* (1824), 1 Sim. & St. 607, 57 E.R. 239; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

By McLachlin C.J. (dissenting)

Asamera Oil Corp. v. Seal Oil & General Corp., [1979] 1 S.C.R. 633; *British Westinghouse Electric and Manufacturing Co. v. Underground Electric Railways Company of London, Ltd.*, [1912] A.C. 673; *Dunkirk Colliery Co. v. Lever* (1878), 9 Ch. D. 20; *Janiak v. Ippolito*, [1985] 1 S.C.R. 146; *Darbishire v. Warran*, [1963] 1 W.L.R. 1067; *Red Deer College v. Michaels*, [1976] 2 S.C.R. 324; *Roper v. Johnson* (1873), L.R. 8 C.P. 167; *Lagden v. O'Connor*, [2003] UKHL 64, [2004] 1 All E.R. 277; *General Securities Ltd. v. Don Ingram Ltd.*, [1940] S.C.R. 670; *Andros Springs v. World Beauty*, [1970] P. 144; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Apeco of Canada, Ltd. v. Windmill Place*, [1978] 2 S.C.R. 385; *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415.

Statutes and Regulations Cited

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Siebrasse, Norman. "Damages in Lieu of Specific Performance: *Semelhago v. Paramadevan*" (1997), 76 *Can. Bar Rev.* 551.

Yorio, Edward. "A Defense of Equitable Defenses" (1990), 51 *Ohio St. L.J.* 1201.

APPEAL and CROSS-APPEAL from a judgment of the Ontario Court of Appeal (Sharpe, Blair and MacFarland JJ.A.), 2010 ONCA 310, 104 O.R. (3d) 784, 261 O.A.C. 108, 319 D.L.R. (4th) 349, 93 R.P.R. (4th) 159, 71 B.L.R. (4th) 196, [2010] O.J. No. 1772 (QL), 2010 CarswellOnt 2602, setting aside a decision of Spiegel J. (2009), 78 R.P.R. (4th) 285, [2009] O.J. No. 428 (QL), 2009 CanLII 3567, 2009 CarswellOnt 494. Appeal and cross-appeal dismissed, McLachlin C.J. dissenting.

J. Thomas Curry, *Milton A. Davis* and *Paul-Erik Veel*, for the appellant/respondent on cross-appeal.

Andrew M. Robinson, *Elizabeth K. Ackman* and *Andrea Farkouh*, for the respondent/appellant on cross-appeal.

The judgment of LeBel, Deschamps, Abella, Rothstein, Cromwell and Karakatsanis JJ. was delivered by

KARAKATSANIS J. —

I. Introduction

[1] Real estate developers frequently create single-purpose corporations for the sole purpose of purchasing and developing properties for profit. The corporation has limited liability and no assets other than those that arise from the particular real estate investment. The issue raised in this appeal is whether such a single-purpose corporation is excused from mitigating its losses when the vendor breaches the agreement of purchase and sale, and particularly when it has promptly brought an action for specific performance. The further issue is whether the trial judge erred in his finding that there were no other "comparable" properties available to mitigate the loss.

[2] The appellant, Southcott Estates Inc., was part of the Ballantry Group of associated companies that acquired and developed land in the Greater Toronto Area ("GTA"). Southcott was a single-purpose corporation, without assets, created for the sole purpose of developing the property that is the subject of this action. When the vendor, the Toronto Catholic District School Board, failed to satisfy a condition and refused to extend the closing date, Southcott sought specific performance of the contract. It argues that it was not required to mitigate its losses.

[3] The trial judge ((2009), 78 R.P.R. (4th) 285) found that the Board had breached the agreement of purchase and sale and had failed to prove that Southcott could have mitigated its damages. He awarded damages for loss of chance of profit. He refused to order specific performance, finding that the property was not "unique" and damages were an adequate remedy.

[4] The Ontario Court of Appeal (2010 ONCA 310, 104 O.R. (3d) 784) concluded that while the trial judge correctly found that the Board had breached its contractual obligations, he had erred in his approach to mitigation. The court concluded that Southcott had unreasonably failed to take available steps to mitigate its loss and reduced the damage award granted at trial to a nominal sum.

[5] Southcott did not appeal the trial judge's refusal to award specific performance. However, it maintains its losses were not avoidable. The questions raised in this appeal are:

1. Should a single-purpose company mitigate its losses?

2. To what extent must a plaintiff mitigate where the plaintiff has made a claim for specific performance?

3. Did the trial judge err in concluding that there was no evidence of comparable profitable properties available for mitigation?

[6] For the reasons that follow, I conclude that Southcott cannot recover losses that it could reasonably have avoided. I agree with the Court of Appeal that the trial judge erred in concluding that there was no evidence of other development properties that Southcott could have purchased in mitigation. I would dismiss the appeal.

II. Facts

[7] Southcott is a wholly owned subsidiary of Ballantry Homes Inc. and part of a larger group of companies called Ballantry Group of Companies ("Ballantry" or "Ballantry Group"). The Board is a School Board created pursuant to the *Education Act*, R.S.O. 1990, c. E.2, whose affairs were run by a publicly elected Board of Trustees.

[8] Having determined that certain land within a school property was surplus to its needs, the Board put it up for sale. Intending to use the land for residential development, Southcott agreed to purchase the 4.78 acres of land for $3.44 million. It paid a 10 percent deposit and the parties agreed to a closing date of August 31, 2004. It was a condition of the agreement that the Board obtain a severance from the Committee of Adjustments on or before the closing date. On August 30, 2004, the parties agreed to extend the closing date to January 31, 2005.

[9] The Board applied for a severance in November; it was advised that a development plan was necessary but chose to proceed without one. On December 16, 2004, at the municipality's request, the Committee of Adjustments deferred the severance application hearing as premature because it was not accompanied by a development plan. At that time, it became clear to Southcott and the Board that the transaction could not be completed by the closing date of January 31, 2005. The

Board refused Southcott's request to extend the closing date, declared the transaction to be at an end, and returned Southcott's deposit.

[10] Southcott took the position that the Board had breached its obligation to use its best efforts to obtain the severance and commenced an action for specific performance or, in the alternative, for damages.

[11] Southcott admitted that it never had any intention to mitigate its loss and, indeed, never tried to mitigate (para. 137 of the trial judge's decision). Southcott was a single-purpose company incorporated solely for the purposes of this development project and had no assets other than the money advanced by Ballantry for the deposit. It never intended to purchase other land. In fact, Southcott's principal testified at trial that there was no question of it purchasing other land, given that it was involved in this litigation (para. 18 of the Court of Appeal's decision).

[12] The Board led expert evidence that 81 parcels of vacant development land in the GTA were sold between the date of breach and the date of trial. The land was suitable for residential development and within the parameters, of size and price, of other lands purchased by the Ballantry Group.

[13] Corporations within the Ballantry Group purchased seven parcels of land for development purposes during this same period. The principal of Ballantry testified that it was always in the market for new land, had the financial means to

make the purchases, and it would have made these purchases even if Southcott had completed the land purchase from the Board (para. 138 of the trial judge's decision).

III. Decisions Below

[14] At trial, Spiegel J. concluded that the Board had failed to take all reasonable steps to fulfill the severance condition. It breached its best efforts obligation by failing to contact relevant city staff; delaying in processing the severance application; failing to include the proposed plan of use with the severance application; submitting an improper survey; failing to seek appropriate advice; ignoring the advice of the Committee of Adjustments; proceeding with the application for severance even after being advised that it was incomplete and failing to keep Southcott informed (paras. 71-87).

[15] The trial judge found that had the Board used its best efforts, the severance would likely have been granted, and the transaction would have been completed by the closing date. The trial judge was satisfied that the Board's breach caused Southcott's loss (paras. 93-116).

[16] Turning to remedy, Spiegel J. found that specific performance was not an appropriate remedy as the land did not have the quality of uniqueness (paras. 128-33).

[17] However, he concluded that Southcott was entitled to damages. He rejected the Board's argument that Southcott had in fact mitigated damages because the Ballantry Group made several purchases subsequent to the breach of the agreement:

> I find that these subsequent purchases were collateral, independent transactions that did not arise out of the consequences of the breach. In all the circumstances, I do not consider these transactions as mitigatory. [para. 143]

[18] The trial judge found that the Board had not discharged the onus of proving that Southcott failed to take advantage of a reasonable opportunity to mitigate its loss. He held that there was no evidence that any of the available properties were actually offered for sale or could have been profitably developed and he was not satisfied that the properties were comparable (paras. 144-46). He therefore awarded Southcott damages in the amount of $1,935,500 which represented the loss of a 60 percent chance to make profits in the amount of $3,225,827.

[19] On appeal, the Board did not dispute the findings that it had breached its obligation to use its best efforts to obtain the severance required to complete the sale. It challenged the findings of causation and mitigation.

[20] Sharpe J.A., writing for the Court of Appeal, rejected the first ground of the Board's appeal, that the trial judge erred in finding that the Board's breach was the cause of the failure to obtain the severance by the closing date (paras. 11-14).

[21] Regarding the issue of whether the losses could have been avoided, however, the Court of Appeal concluded that the trial judge had erred in law in finding that the Board had not shown that Southcott could have mitigated its losses. First, Southcott's admission that it had no intention of taking any steps to mitigate was sufficient to satisfy the onus resting upon the Board and to shift the evidentiary onus to Southcott to demonstrate that, even if it had attempted to mitigate, it could not have done so. Second, the trial judge erred in dealing with the Board's evidence regarding the land that was available: "By requiring the Board to prove . . . the profitability of individual parcels, the trial judge raised any bar the Board had to satisfy to an unrealistic level" (para. 25). Finally, the trial judge failed to consider that Ballantry's purchases of other lands clearly demonstrated that the directing mind of Southcott knew that investment quality lands, suitable for profitable development, were available on the market. The Court of Appeal stated that Southcott was a distinct legal entity that could not avoid mitigating its loss by arguing that it was a part of Ballantry: the obligation to mitigate rested with Southcott (paras. 24-27).

[22] The Court of Appeal concluded that while Southcott had made out its case for breach of contract, it failed to make out a case for either specific performance or damages. The appropriate award was for nominal damages in the amount of $1.

IV. Mitigation — General Principles

[23] This Court in *Asamera Oil Corp. v. Seal Oil & General Corp.*, [1979] 1 S.C.R. 633, cited (at pp. 660-61) with approval the statement of Viscount Haldane L.C. in *British Westinghouse Electric and Manufacturing Co. v. Underground Electric Railways Company of London, Ltd.*, [1912] A.C. 673, at p. 689:

> The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps.

[24] In *British Columbia v. Canadian Forest Products Ltd.*, 2004 SCC 38, [2004] 2 S.C.R. 74, at para. 176, this Court explained that "[l]osses that could reasonably have been avoided are, in effect, caused by the plaintiff's inaction, rather than the defendant's wrong." As a general rule, a plaintiff will not be able to recover for those losses which he could have avoided by taking reasonable steps. Where it is alleged that the plaintiff has failed to mitigate, the burden of proof is on the defendant, who needs to prove both that the plaintiff has failed to make reasonable efforts to mitigate and that mitigation was possible (*Red Deer College v. Michaels*, [1976] 2 S.C.R. 324; *Asamera*; *Evans v. Teamsters Local Union No. 31*, 2008 SCC 20, [2008] 1 S.C.R. 661, at para. 30).

[25] On the other hand, a plaintiff who does take reasonable steps to mitigate loss may recover, as damages, the costs and expenses incurred in taking those reasonable steps, provided that the costs and expenses are reasonable and were truly

incurred in mitigation of damages (see P. Bates, "Mitigation of Damages: A Matter of Commercial Common Sense" (1992), 13 *Advocates' Q.* 273). The valuation of damages is therefore a balancing process: as the Federal Court of Appeal stated in *Redpath Industries Ltd. v. Cisco (The)*, [1994] 2 F.C. 279, at p. 302: "The Court must make sure that the victim is compensated for his loss; but it must at the same time make sure that the wrongdoer is not abused." Mitigation is a doctrine based on fairness and common sense, which seeks to do justice between the parties in the particular circumstances of the case.

A. *Should a Single-Purpose Company Mitigate its Losses?*

[26] Southcott argues that the Court of Appeal failed to recognize the unique circumstance of a single-purpose corporation in mitigating contractual loss; as a single-purpose company, it was impecunious and unable to mitigate without significant capital investment of the parent company or without the corporate mandate to do so. Further, it submits that it would be reasonably foreseeable to those contracting with a single-purpose corporation that such an entity would have finite resources and a confined corporate mandate. In this case, Southcott acted reasonably, within its ordinary course of business and promptly brought this lawsuit.

[27] Southcott sought specific performance and was therefore ready to complete the purchase. In any event, its alternative claim for consequential damages was predicated upon its access to capital to complete the agreement of purchase and

sale. As such, both claims were premised upon resources, resources that were not tied up as a result of the breach alleged. Indeed, the alleged breach in this case did not affect Southcott's ability to obtain capital. Southcott can hardly argue that the same money would not have been available for mitigation.

[28] Further, the question is factual and it was not suggested at trial that Southcott had no access to capital or that borrowing money would have been unreasonably risky or costly. Southcott did not argue that it was impecunious at trial.

[29] In the absence of actual evidence of impecuniosity, finding that losses cannot be reasonably avoided, simply because it is a single-purpose corporation within a larger group of companies, would give an unfair advantage to those conducting business through single-purpose corporations. In addition, not requiring single-purpose corporations to mitigate would expose defendants contracting with such corporations to higher damage awards than those reasonably claimed by other plaintiffs, based solely upon their limited assets.

[30] The trial judge found that the purchases of development land by other corporations within the Ballantry Group did not in fact mitigate Southcott's loss; that finding is not challenged here. As noted above, he found that the other properties purchased by other members of the Ballantry group were "collateral" in the sense that the purchases would have occurred whether or not the defendant had breached its contract with Southcott (para. 143). However, because Southcott is a separate legal

entity, purchases by other Ballantry corporations of other comparable property did not make those properties "unavailable" for mitigation. As a separate legal entity, Southcott was required to mitigate by making diligent efforts to find a substitute property. Those who choose the benefits of incorporation must bear the corresponding burdens: *Kosmopoulos v. Constitution Insurance Co.*, [1987] 1 S.C.R. 2, at pp. 10-12. Southcott is entitled to the benefits of limited liability, but it is also saddled with the responsibilities that all legal entities have. The requirement to take steps to mitigate losses is one such responsibility. A plaintiff cannot recover losses that could reasonably have been avoided. The overriding issue here is whether Southcott's inaction was reasonable, and if not, whether it could have reasonably mitigated if it had tried to do so.

B. *Southcott Was Required to Mitigate Losses Despite its Claim for Specific Performance*

[31] Specific performance is an equitable remedy that is difficult to reconcile with the principle of mitigation. Obviously, if Southcott had purchased a property in mitigation, it may not have been able to complete its agreement of purchase and sale of the Board's surplus land if ultimately successful in its claim for specific performance. When can a plaintiff seeking specific performance justify inaction and recover losses which may otherwise have been classified as avoidable?

[32] The trial judge found that Southcott did not have a viable claim for specific performance. He found that while the business opportunity may have been

unique, the property itself was not. The trial judge found that what was at issue here was a straightforward business plan, the failure of which could be measured in damages (para. 132). The Court of Appeal agreed. The trial judge's decision not to order specific performance is not challenged in this appeal.

[33] However, Southcott submits that even though it was unsuccessful in its claim for specific performance, it proceeded expeditiously and the claim had real substance because the property was a unique opportunity, given its location and the rarity of such properties in the GTA. As a result, it says that it was not reasonable to attempt to mitigate; the remedy of specific performance would become illusory.

[34] Southcott suggests that there are two separate questions that a court must ask in cases where a plaintiff seeks specific performance: (1) should specific performance be awarded? And if the answer is no, (2) is this plaintiff justified in its mitigatory inaction? Southcott says that the trial judge conflated these two questions and did not consider whether it was justified in failing to mitigate.

[35] This Court dealt with this issue in *Asamera*, at pp. 668-69:

> Before a plaintiff can rely on a claim to specific performance so as to insulate himself from the consequences of failing to procure alternate property in mitigation of his losses, some fair, real, and substantial justification for his claim to performance must be found. . . .
>
> . . .

> . . . Where . . . circumstances reveal a substantial and legitimate interest in seeking [specific] performance as opposed to damages, then a plaintiff will be able to justify his inaction and on failing in his plea for specific performance might then [be able to] recover losses which in other circumstances might be classified as avoidable and thus unrecoverable . . . .

[36] This Court thus recognized that there may be situations in which a plaintiff's inaction is justifiable notwithstanding its failure to obtain an order for specific performance where circumstances reveal "some fair, real, and substantial justification" for his claim or "a substantial and legitimate interest" in seeking specific performance (*Asamera*, at pp. 668-69 (emphasis added)). This does not mean that a plaintiff with such a claim should not attempt to mitigate; rather it recognizes that such a claim for specific performance informs what is reasonable behaviour for the plaintiff in mitigation. See N. Siebrasse, "Damages in Lieu of Specific Performance: *Semelhago v. Paramadevan*" (1997), 76 *Can. Bar Rev.* 551.

[37] *Asamera* set out the general principles governing mitigation: was the plaintiff's inaction reasonable in the circumstances, and could the plaintiff have mitigated if it chose to do so. Those principles apply to a plaintiff seeking specific performance. If the plaintiff has a "substantial justification" or a "substantial and legitimate interest" in specific performance, its refusal to purchase other property may be reasonable, depending upon the circumstances of the case.

[38] The statements in *Asamera* dealing with specific performance and the determination of what is reasonable conduct must be read in light of *Semelhago v.*

Paramadevan, [1996] 2 S.C.R. 415. In that case, the Court acknowledged that "[w]hile at one time the common law regarded every piece of real estate to be unique, with the progress of modern real estate development this is no longer the case" (para. 20). The Court thus found that it "cannot be assumed that damages for breach of contract for the purchase and sale of real estate will be an inadequate remedy in all cases" (para. 21). Specific performance will be available only where money cannot compensate fully for the loss, because of some "peculiar and special value" of the land to the plaintiff (para. 21, citing *Adderley v. Dixon* (1824), 1 Sim. & St. 607, 57 E.R. 239, at p. 240).

[39] The overriding issue is therefore whether Southcott's inaction was reasonable. Southcott argued at trial that the fact that the property was uniquely well situated gives it the unique character required to constitute a fair justification for specific performance (para. 119 of the trial judge's decision).

[40] I agree with the courts below that this is not a case where the plaintiff could reasonably refuse to mitigate. The trial judge made clear findings that the land was nothing more unique to Southcott than a singularly good investment and that this was not a case in which damages were too speculative or uncertain to be a satisfactory remedy. The unique qualities related solely to the profitability of the development for which damages were an adequate remedy (paras. 126 and 128). The calculation of profits was not conjectural or speculative as the proposed development was not complex, and the only disagreement between the parties regarding the

quantum of damages related to the timing and rate of sale of completed units (paras. 130 and 132).

[41] A plaintiff deprived of an investment property does not have a "fair, real, and substantial justification" or a "substantial and legitimate" interest in specific performance (*Asamera*, at pp. 668-69) unless he can show that money is not a complete remedy because the land has "a peculiar and special value" to him (*Semelhago*, at para. 21, citing *Adderley*, at p. 240). Southcott could not make such a claim. It was engaged in a commercial transaction for the purpose of making a profit. The property's particular qualities were only of value due to their ability to further profitability. Southcott cannot therefore justify its inaction.

C. *The Trial Judge Erred in Finding no Evidence of Comparable Profitable Properties Available for Mitigation*

[42] In this case, Southcott admitted that it made no efforts to mitigate — on the basis that it was not obliged to do so. Southcott submits that the Court of Appeal erred in shifting the onus to the plaintiff based on the admission by Southcott's principal that he had no intention to mitigate through Southcott. Southcott says that the Board did not provide the trial judge with evidence that there was a comparable profitable investment property available for sale. The trial judge found that there were no comparable or profitable properties. Southcott submits that the Court of Appeal erred in disregarding the trial judge's finding of fact and in substituting its own.

[43] The entirety of the trial judge's analysis on this issue was as follows:

> There was no evidence that the properties referred to [by the Board's expert] were actually available to the public for sale but only that they had been sold. Also there was no evidence that had these properties been purchased that they could have been profitably developed. In any event, I am not satisfied that the evidence established that these were comparable properties or that had they been purchased, that the plaintiff's loss would have been avoided or reduced. [para. 144]

[44] Regarding the failure to mitigate, the Court of Appeal found that the trial judge had erred in law:

> First, Southcott's admission that it had no intention of taking any steps to mitigate its loss was sufficient to satisfy the onus resting upon the Board to prove failure to mitigate and to shift the evidentiary onus to Southcott of demonstrating that, even if it had attempted to mitigate, it could not have done so. Southcott led no evidence to that effect. In my view, the trial judge erred by holding that the Board had failed to meet the onus imposed upon it to prove that Southcott had failed to mitigate its damages.
>
> . . . By requiring the Board to prove the precise manner in which 81 parcels of investment land had been sold or to prove the profitability of individual parcels, the trial judge raised any bar the Board had to satisfy to an unrealistic level, particularly in the face of Southcott's admission that it had no intention to mitigate and of the evidence that Ballantry actually did find other suitable development properties to purchase.
>
> Third, the trial judge erred in the manner in which he dealt with the evidence of purchases made by Ballantry. Those purchases clearly demonstrate that the directing mind of Southcott knew that investment-quality lands, suitable for profitable development, were available on the market. [paras. 24-26]

[45] As noted above, where it is alleged that a plaintiff has failed to mitigate damages, the onus of proof on a balance of probabilities lies with the defendant, who must establish not only that the plaintiff failed to take reasonable efforts to find a substitute, but also that a reasonable profitable substitute could be found.

[46] Thus, it would be an error to suggest that the defendant did not have the burden of showing that mitigation was possible even where the plaintiff made no attempt to do so. Further, while I agree that the trial judge erred in dealing with the Board's evidence regarding the availability of the 81 properties, the error is best approached as an evidentiary issue rather than as one engaging the burden of proof.

[47] The finding about whether Southcott could have mitigated involves applying a legal standard; it is a question of mixed fact and law. Whether or not there were comparable properties and whether they were profitable is a finding of fact. Implicit in the Court of Appeal's decision is the conclusion that the trial judge's findings of fact were unreasonable.

[48] For the reasons that follow, I agree with the Court of Appeal that the trial judge erred in principle by failing to consider relevant evidence. In particular, Ballantry's subsequent purchases were evidence that other development properties were reasonably available. These errors skewed his factual analysis on the issue of mitigation. I conclude that the trial judge made a palpable and overriding error in

finding that there were no comparable profitable mitigation opportunities: see *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 10.

(1) The Expert Evidence of Comparable Properties

[49] At trial, the Board presented evidence that 81 parcels of raw land suitable for development and 49 properties subdivided into lots suitable for building were available for sale in the GTA and were in fact sold in the period between January 31, 2005 and the time of trial (para. 136 of the trial judge's decision). The parameters that the Board's expert used in selecting alternative available parcels were sales of land between $1,000,000 and $27,000,000, that had an estimated time to develop of one year or less, and that could be developed for low to medium density residential. These parameters were chosen to match the parameters of the actual purchases made by the Ballantry Group.

[50] Nevertheless, the trial judge concluded that the Board had not discharged the onus of proving that Southcott failed to take advantage of a reasonable opportunity to mitigate. He found that: there was no evidence that the 81 properties were actually available to the public for sale; there was no evidence that, had these properties been purchased, they could have been profitably developed, and the plaintiff's loss could have been avoided or reduced; and in any event, these properties were not comparable properties.

[51] The trial judge failed to consider the available and reasonable inferences of the Board's evidence that there were 81 parcels of raw land suitable for development and 49 properties subdivided into lots suitable for building sold during the time period in issue here. In cross-examination, the Board's expert witness admitted being unaware of the marketing strategies used to sell the 81 properties sold during the period in which the Board suggested that Southcott could mitigate (A.R., at p. 232-33). However, notwithstanding that answer, it is an obvious inference that if 81 properties suitable for development were offered for sale, and were in fact sold, then investment properties were available to developers for sale, particularly in the absence of evidence to the contrary.

[52] Further, the trial judge failed to consider whether the fact that all of the properties the Board's expert testified to were capable of being brought to development in a year could support an inference that their development was profitable. Reasonable inferences of profitability could be drawn based upon the size and price of property or the fact that land was purchased for development purposes by experienced developers. The trial judge did not turn his mind to this evidence.

[53] Finally, the trial judge also failed to consider that an adverse inference against Southcott could be drawn from the fact that it led no evidence about the profitability of the alternative development opportunities.

(2) <u>The Purchases by Ballantry</u>

[54] I agree with the Court of Appeal that the trial judge also erred in failing to consider whether the purchases by the Ballantry corporations provided evidence of other profitable properties available in mitigation. As noted above, the trial judge found (at para. 143) that the other properties purchased by other members of the Ballantry Group were "collateral" in the sense that the transactions would have occurred whether or not the defendant had breached its contract with Southcott and did not represent actual mitigation due to Southcott's distinct legal personality. This is not challenged.

[55] The trial judge did not go on to consider, however, whether these transactions established that those same properties were evidence of "available" comparable mitigation opportunities in the market. Because Southcott is a separate legal entity, purchases by other Ballantry corporations of other comparable property did not make those properties "unavailable" for mitigation. In effect, the trial judge ignored the separate legal personalities of Southcott and the other corporations in the Ballantry Group by failing to consider those purchases as evidence of the existence of mitigation opportunities.

[56] The Ballantry Group companies purchased seven other development properties subsequent to the breach of the agreement, ranging in size from 2.3 acres to 110.8 acres and in price from $3.3 million to $27.1 million. In particular, two specific purchases were clearly comparable. Southcott had agreed to purchase 4.78

acres of land for $3.44 million in August 2004. Ballantry corporations purchased 2.7 acres for $3.3 million in August 2005 and 2.3 acres for $6 million in December 2006.

[57] The defence raised by Southcott, which was accepted by the trial judge, was that the purchases by Ballantry Group of development lands in the GTA were purchases which would have been made in any event, regardless of whether Southcott purchased the Board's property. However, it is no answer to say that other companies in the same corporate group would have purchased the other available lands in any event. It was clear from the testimony of the president of Southcott and co-owner of Ballantry that the Ballantry Group was always purchasing promising development land and that the different companies were simply used as different vehicles to invest.

[58] It was a choice on the part of the principals of the Ballantry Group as to which corporate entity would be used for each purchase and they elected not to use Southcott. In addition, the trial judge found that "[t]he plaintiff['s] proposed development here was not complex, but rather a relatively straightforward plan for the development of 48 semi-detached residential units" (para. 132). In these circumstances, a straightforward development could have been carried out on a different property by Southcott, had it wanted to mitigate its loss. This corresponds to the modern reality recognized in *Semelhago* that "[r]esidential, business and industrial properties are all mass produced much in the same way as other consumer products" (para. 20).

[59] As the Court of Appeal concluded (paras. 25-26), the Ballantry Group's purchases of other properties was evidence that other suitable development lands *were* available and the decision not to purchase them in Southcott's name was based on other considerations. I agree with the Court of Appeal that the trial judge erred in failing to consider these purchases as evidence of other available and comparable development properties.

V. Conclusion

[60] In conclusion, the trial judge erred in failing to consider relevant evidence and made a palpable and overriding error of fact in concluding that Southcott could not have reasonably avoided its loss.

[61] He failed to take into account in his analysis of the mitigation issue that Southcott had simply refused to take any mitigatory action. He failed to consider the evidence of Ballantry's purchases as supporting the inference that alternative parcels were available and that their development was sufficiently profitable to meet Ballantry's requirements. He conflated a lack of evidence regarding the marketing of parcels with a lack of evidence that any of the parcels had been available for sale. He failed to consider whether the fact that all of the properties the Board's expert testified were development properties capable of being brought to development in a year could support an inference that their development was profitable. Finally, he

failed to consider the fact that Southcott did not lead evidence to challenge the Board's evidence regarding alternative development opportunities.

[62] In these circumstances, the Court of Appeal was entitled to look at the record and conclude that the trial judge's findings regarding mitigation were not available to him on the evidence. The evidence of the Ballantry purchases, in the context of Southcott's refusal to mitigate, established that there were opportunities to mitigate by purchasing other development land in the GTA. Failure to mitigate reduces damages. The Court of Appeal concluded that, based upon the investment properties purchased by Ballantry, and in the absence of evidence to the contrary, the Board discharged the burden of showing that other investment properties were available in the relevant time period to mitigate the losses and that the trial judge's finding that there were no comparable properties was not open to him on the evidence. I agree.

[63] I would dismiss the appeal with costs. In light of the result on the main appeal, I need not consider the cross-appeal. The cross-appeal should be dismissed without costs.

The following are the reasons delivered by

[64] THE CHIEF JUSTICE (dissenting) — Damages for breach of contract may be reduced if the plaintiff unreasonably fails to mitigate its loss. To show that a

plaintiff unreasonably failed to mitigate its loss, the defendant who is in breach of the contract must establish: (1) that an opportunity to mitigate the loss existed; and (2) that the plaintiff acted unreasonably in failing to take that opportunity.

[65] The trial judge found as a fact that the defendant had not proved that Southcott had an opportunity to mitigate. This finding, in my view, was grounded in the evidence. This is sufficient to dispose of the appeal. However, if such opportunity were found to exist, I see no basis on which to conclude that Southcott acted unreasonably in maintaining its suit for specific performance instead of mitigating its loss. It follows, in my view, that the judgment of the Court of Appeal should be set aside, and the trial judge's conclusion that the plaintiff established breach of contract and damages should be restored.

I. Background

[66] The Toronto Catholic District School Board contracted with Southcott Estates Inc. for the sale of 4.78 acres of surplus land for $3.44 million. The closing date was August 31, 2004. Southcott was a wholly owned subsidiary of Ballantry Homes Inc., which was in the business of buying property and developing it for residential purposes. Southcott was a single-purpose company created expressly and only for the purpose of buying this parcel of land and developing it with single-family homes. Southcott had no assets except for the deposit it paid on the land.

[67] The land was part of a larger parcel on which school buildings were located so the agreement was conditional upon the Board obtaining a severance from the Committee of Adjustments on or before the closing date. The agreement was signed on June 14, 2004, but only became firm on August 23, 2004. The Board, realizing it might not be able to get severance of the property by the closing date of August 31, 2004, asked Southcott to extend the closing date to a fixed date after severance. Southcott was willing to extend the August 31 closing date, but insisted on a firm final date of January 31, 2005.

[68] The Board's application for severance was heard on December 16, 2004. It was deferred because the Board had failed to include a development plan in its application. This made it impossible for the Board to comply with the January 31, 2005 closing date. Southcott requested the Board to extend the closing date. The Board refused this request, declared the transaction to be at an end, and returned Southcott's deposit.

[69] Southcott took the position that the Board had breached its obligation to use its best efforts to obtain the severance and brought an action for specific performance or, in the alternative, damages.

[70] The trial judge held that the plaintiff was not entitled to an order for specific performance because the property was not sufficiently unique to satisfy the requirements of that remedy. However, he awarded damages in the amount of

$1,935,500, representing the loss of a 60 percent chance to make profits in the amount of $3,225,827. He rejected the Board's argument that Southcott had failed to act reasonably to mitigate its loss, holding that the Board had not established as a matter of fact that mitigation opportunities were available.

[71] The Court of Appeal reversed the trial judge's decision and set aside the award for damages, essentially holding that the evidence, properly viewed, established an unreasonable failure to mitigate.

II. The Requirements of Mitigation

[72] The doctrine of mitigation holds that a plaintiff cannot recover damages for loss that could have been reasonably avoided: *Asamera Oil Corp. v. Sea Oil & General Corp.*, [1979] 1 S.C.R. 633, at p. 660; *British Westinghouse Electric and Manufacturing Co. v. Underground Electric Railways Company of London, Ltd.*, [1912] A.C. 673 (H.L.), at p. 689; *Dunkirk Colliery Co. v. Lever* (1878), 9 Ch. D. 20 (C.A.), at p. 25. A plaintiff is not contractually obliged to mitigate, and in this sense the term "duty to mitigate" is misleading. However, if the plaintiff unreasonably fails to mitigate, its damages for breach of contract may be reduced: *Janiak v. Ippolito*, [1985] 1 S.C.R. 146, at pp. 166-67; *Darbishire v. Warran*, [1963] 1 W.L.R. 1067 (C.A.), at p. 1075.

[73] The defendant, having breached the contract, bears the onus of proving that the plaintiff unreasonably failed to mitigate its loss: *Red Deer College v. Michaels*, [1976] 2 S.C.R. 324, at pp. 330-31; *Roper v. Johnson* (1873), L.R. 8 C.P. 167. This entails establishing, on a balance of probabilities: (1) that opportunities to mitigate the loss were available to the plaintiff; and (2) that the plaintiff unreasonably failed to pursue these opportunities.

[74] Failure to mitigate may not be unreasonable for a variety of reasons. One such reason may be a "fair, real, and substantial justification" for claiming specific performance: *Asamera*, at pp. 667-68. Another may be lack of financial resources: *McGregor on Damages* (18th ed. 2009), at para. 7-088. The rules for mitigation "do not require the injured party to do what he cannot afford to do when he is seeking to reduce the damages payable by the wrongdoer": *Lagden v. O'Connor*, [2003] UKHL 64, [2004] 1 All E.R. 277, at para. 51 (*per* Lord Hope); see also *General Securities Ltd. v. Don Ingram Ltd.*, [1940] S.C.R. 670.

[75] Unreasonable failure to mitigate loss reduces damages to the extent that mitigation would have avoided the loss: see *Andros Springs v. World Beauty*, [1970] P. 144 (C.A.), at p. 154 (*per* Lord Denning). If a mitigation opportunity would only partially avoid the plaintiff's loss, then only a partial reduction in damages can be justified.

III. Opportunity to Mitigate

[76] The trial judge found that the Board had not discharged its onus of proving that Southcott unreasonably failed to mitigate its loss because it did not establish that the opportunity to mitigate existed. This finding must stand unless it constitutes palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 10.

[77] The Board sought to prove that mitigation opportunities existed in two ways — through the testimony of an expert witness and with evidence of purchases made by other Ballantry companies.

A. *The Evidence of the Expert Witness*

[78] The trial judge found that the Board's expert witness's evidence did not establish opportunity to mitigate the loss.

[79] The Board's expert presented evidence of 81 parcels of raw land and 49 subdivided properties that were purchased in the Greater Toronto Area ("GTA") between January 31, 2005 and the time of trial. The trial judge found a number of shortcomings in this evidence.

[80] First, there was no evidence that the alleged properties the expert referred to were actually available to Southcott; the Board's expert witness admitted to being entirely unaware of whether substitute property was available to the public for sale

during the period in which the Board suggested that Southcott could mitigate (A.R., at p. 233).

[81] Second, the evidence did not establish that these properties were comparable to Southcott's target property ((2009), 78 R.P.R. (4th) 285, at para. 144). Little was known about the properties identified by the Board's expert witness beyond their size, cost, and nearest major intersection. Most were outside the City of Toronto. The properties vary widely in both size and price, including parcels as large as 123.988 acres, as small as 0.251 acres, and costing as much as $23.77 million. The trial judge concluded that the comparability of these properties to Southcott's 4.78 acre target property had not been established.

[82] Third, the trial judge found that the evidence did not establish that alternate properties could have been profitably developed (para. 144). Only a profitable development would mitigate Southcott's loss; an unprofitable one would aggravate it. A plaintiff is not required to take foolish steps that would not reduce its loss. The Board's expert presented no evidence on the potential profitability of the properties he referred to.

[83] The Court of Appeal criticized the trial judge's finding that the evidence did not establish profitability, on the ground that he raised the burden of proof on the Board to an unrealistic level (2010 ONCA 310, 104 O.R. (3d) 784, at para. 25). With respect, the burden was clear — the Board had to establish that alternate properties

could have been profitably developed on a balance of probabilities. There is no indication that the trial judge failed to appreciate this basic principle. See *World Beauty*, at p. 154.

[84] The trial judge found that the Board's expert witness failed to establish that Southcott had opportunities to mitigate its loss. This finding finds support in the evidence and is not vitiated by legal error. It follows that it cannot be set aside: *Housen*.

B. *The Evidence of Purchases by Other Ballantry Companies*

[85] The second way the Board sought to discharge its onus of showing opportunity to mitigate was by evidence that other Ballantry companies had made purchases of development land in the GTA at the relevant time. The Board argued that these other Ballantry purchases had in fact mitigated the loss caused by the Board's breach.

[86] The trial judge accepted the Board's invitation to consider the matter from the perspective of the Ballantry Group as a whole, effectively piercing the corporate veil. He concluded that Ballantry's subsequent purchases were collateral, independent transactions that could not have avoided the loss arising from the Board's breach of contract (para. 143): see *Apeco of Canada, Ltd. v. Windmill Place*, [1978] 2 S.C.R. 385, at p. 389. Leaving aside the question of whether piercing the

corporate veil in these circumstances was appropriate, the trial judge's analysis was not in error. The trial judge's reasoning was that the Ballantry Group, with extensive access to credit, was limited only by the number of properties it could find. The more good properties it could find, the more money it stood to make. In this sense, other purchases by the Ballantry Group were collateral rather than substitutions for the Board's property.

[87] The trial judge, having dealt with the purchases of other Ballantry companies in this way, did not make a finding on whether these properties offered mitigation opportunities for Southcott, as an independent legal entity. The evidence, however, does not support such a finding, in my view. First, there was no evidence that the properties purchased by other Ballantry companies were available to Southcott. At best, Southcott would have been competing with its sister companies for these properties. Whether it would have succeeded in acquiring a comparable property was a matter of speculation.

[88] Second, the evidence did not establish that other Ballantry Group purchases were comparable to Southcott's target property. Under its contract with the Board, Southcott was purchasing a 4.78 acre parcel located in a desirable residential neighbourhood of the City of Toronto suited to the development of 48 semi-detached residential units (para. 132). There was no evidence that any of the other Ballantry purchases were comparable. It is not enough to show that some development land may have been available to companies which may have had different development

strategies. Ballantry had wide ranging interests in residential real estate development throughout the GTA. Southcott had a narrower, specific development objective. To show opportunity to mitigate, the Board had to prove that a property comparable to the one that Southcott sought to purchase was available.

[89] I respectfully cannot agree that two of the subsequent Ballantry purchases were clearly comparable to Southcott's target property (Karakatsanis J., at para. 56). The first (a parcel of 2.7 acres for $3.3 million) was 43 percent smaller than Southcott's target property, cost 70 percent more per acre, and was purchased for the development of a retirement home. The second (a parcel of 2.3 acres for $6 million) was 51 percent smaller than Southcott's target property, cost 260 percent more per acre, and was purchased for development of a high rise building. On the record, these properties were not comparable to the property that Southcott sought to acquire: a 4.78 acre parcel suited to the development of 48 semi-detached residential units. The remaining Ballantry purchases were even less comparable to Southcott's target property. The Board had the burden of establishing the comparability of these properties. It failed to do so.

[90] I see no error in the trial judge's conclusion that the evidence as to other Ballantry properties did not establish opportunities to mitigate the loss suffered as a result of the Board's breach of contract.

IV. Did Southcott Act Reasonably?

[91] The trial judge's finding that the Board failed to establish that Southcott had opportunities to mitigate its loss is sufficient to dispose of the appeal. However, I offer the following comments on whether the Board established, as it was also required to do, that failure to take advantage of any proven opportunities for mitigation was unreasonable.

[92] In my view, it is difficult to conclude that Southcott acted unreasonably. The first reason is that it had a "fair, real, and substantial justification" for claiming specific performance of the contract: *Asamera*, at pp. 667-68. In such circumstances, a plaintiff is not required to mitigate. As explained in *Asamera*, this is simply an application of the rule of mitigation requiring the plaintiff to act reasonably in the circumstances:

> Where those circumstances reveal a substantial and legitimate interest in seeking performance as opposed to damages, then a plaintiff will be able to justify his inaction and on failing in his plea for specific performance might then recover losses which in other circumstances might be classified as avoidable and thus unrecoverable . . . . [pp. 668-69]

[93] The act of filing a claim for specific performance is inconsistent with the act of acquiring a substitute property. A plaintiff, acting reasonably, cannot pursue specific performance and mitigate its loss at the same time. It makes no sense for a reasonable plaintiff seeking specific performance to effectively concede defeat and buy a substitute property. The plaintiff could end up with two properties — one it wanted and one it did not. Furthermore, an action for specific performance is often

motivated by the unavailability of substitutes in the marketplace. A plaintiff's reasonable claim that substitutes are unavailable is inconsistent with the ability to acquire a substitute in the marketplace (E. Yorio, "A Defense of Equitable Defenses" (1990), 51 *Ohio St. L.J.* 1201).

[94] In the end, the trial judge dismissed the claim for specific performance. However, that does not mean that Southcott acted unreasonably in pursuing the claim. Whether a plaintiff had a "fair, real, and substantial justification" for maintaining a specific performance claim is a different question from whether specific performance should be granted at the conclusion of the trial when all the evidence is in and appraised by the trial judge. Plaintiffs can never be certain that an action for specific performance will succeed, particularly as this is an equitable, discretionary remedy. Demanding that losses be mitigated unless success in obtaining specific performance is assured would deter valid claims for specific performance and hold plaintiffs to an impossible standard.

[95] The trial judge, while ultimately rejecting Southcott's claim for specific performance, did not find that Southcott acted unreasonably in pursuing that remedy. Nor does there appear to be a basis for such a finding. It can be fairly argued that Southcott did not act unreasonably in pursuing specific performance of the contract. The property was uniquely suited to Southcott's needs for single-family residential development within the City of Toronto. Though the common law presumption of the uniqueness of real property no longer holds, a claim for specific performance may

still be reasonable if a property has unique characteristics such that a substitute property is not readily available: *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415, at para. 22. Southcott's contention that there was no comparable substitute property found support in the evidence.

[96] Another reason for failing to acquire and develop a substitute property, assuming such a property had been available, is that Southcott lacked financial resources. Southcott did not have the financial capacity to go into the market and purchase a substitute property. It was a single-purpose company with no assets other than the $344,000 advanced to it by Ballantry for the deposit on the target property (trial judgment, at para. 137). Whether it could have obtained financing to buy a different property is at the very least speculative.

[97] In summary, I see no basis for concluding that Southcott acted unreasonably in failing to mitigate its loss, assuming that opportunities to do so were available.

V. Conclusion

[98] I see no basis upon which to set aside the trial judge's conclusion that the defendant did not prove that the plaintiff unreasonably failed to mitigate its loss. His conclusions find support in the evidence and the law.

[99] I would allow the appeal and restore the judgment of the trial judge.

Appeal dismissed with costs. Cross-appeal dismissed without costs, MCLACHLIN C.J. *dissenting.*

Solicitors for the appellant/respondent on cross-appeal: Lenczner Slaght Royce Smith Griffin, Toronto; Davis Moldaver, Toronto.

Solicitors for the respondent/appellant on cross-appeal: Miller Thomson, Toronto.

THIS SERVICE AGREEMENT made at St. John's, in the Province of Newfoundland and Labrador on the day of .

BETWEEN: **NEWFOUNDLAND AND LABRADOR HYDRO**, a corporation and an agent of the Crown constituted by statute, renamed and continued by the Hydro Corporation Act, Revised Statutes of Newfoundland and Labrador, Chapter H-16, (hereinafter called "Hydro") of the first part;

AND **NORTH ATLANTIC REFINING LIMITED**, a company organized under the laws of Newfoundland and Labrador (hereinafter called the "Customer") of the second part.

WHEREAS Hydro has agreed to sell Electrical Power and Energy to the Customer and the Customer has agreed to purchase the same from Hydro according to the Rates set by the Board of Commissioners of Public Utilities for the Province of Newfoundland and Labrador and by the terms of this Agreement;

THEREFORE THIS AGREEMENT WITNESSETH that the parties agree as follows:

ARTICLE 1
INTERPRETATION

1.01 In this Agreement, including the recitals, unless the context otherwise requires,

(a) "**Amount of Power on Order"** means the Power contracted for in accordance with Article 2;

(b) **"Billing Demand"** means the components of the Customer's monthly Power consumption for which Demand charges apply as determined in accordance with Articles 3 and 10;

(c) "**Board"** means the Board of Commissioners of Public Utilities for Newfoundland and Labrador;

(d) **"Demand"** means the amount of Power averaged over each consecutive period of fifteen minutes duration, commencing on the hour and ending each fifteen minute period thereafter and measured by a demand meter of a type approved for revenue metering by the appropriate department of the Government of Canada;

(e) **"Electricity"** includes Power and Energy;

(f) **"Energy"** means the amount of electricity delivered in a given period of time and measured in kilowatt hours;

(g) **"Firm Energy**" means the Energy associated with the Firm Power;

(h) **"Firm Power"** means, except as varied by paragraph 3.02(a) and subject to Clause 3.03, the Demand normally associated with the Amount of Power on Order;

(i) **"Hydro Delivery Points"** means the 13,800 volt bus on Hydro's transformers on the north side of the road adjacent to the Customer's premises in Come By Chance, or at such other location or locations that Hydro and the Customer mutually agree in writing; **(as amended by Order No. P.U. 6(2003)**

(j) **"Interruptible Demand**" means, that part of a Customer's Demand which exceeds its Power on Order, which may be interrupted, in whole or in part, at the discretion of Hydro, and which is supplied to the Customer in accordance with Clause 5.01;

(k) **"Interruptible Energy"** means the Energy associated with Interruptible Demand determined as that Energy taken in each fifteen-minute interval in which Interruptible Demand is taken and it shall be deemed that in such cases Firm Energy is taken at 100 per cent load factor;

(l) **"Maximum Demand"** means the greatest amount of Power during the appropriate Month or part of a Month, as the case may be, averaged over each consecutive period of fifteen minutes duration commencing on the hour and ending each fifteen minute period thereafter, and measured by a demand meter of a type approved for revenue metering by the appropriate department of the Government of Canada;

(m) **"Month"** means a calendar month;

(n) **"Non-Firm Energy"** means Energy associated with Interruptible Demand;

(o) **"Power"** means the amount of electrical power delivered at any time and measured in kilowatts;

(p) **"Province"** means the the Province of Newfoundland and Labrador;

(q) **"Rate Schedules"** means the schedules of rates that are approved by the Board for the sale and purchase of Power and Energy;

(r) **"Secondary Energy"** means that Energy Hydro is willing to sell, according to Clause 4.01, at a rate approved by the Board and which, if not sold, would be

surplus to its needs and likely to result in spillage at one or more of Hydro's hydraulic generating stations;

(s) **"Specifically Assigned Charge"** means the payment made by the Customer in each Month, calculated according to a method approved by the Board, for the use of Specifically Assigned Plant;

(t) **"Specifically Assigned Plant"** means that equipment and those facilities which are owned by Hydro and used to serve the Customer only;

1.02 Hydro and the Customer agree that they are bound by this Agreement and by the agreements and covenants contained in the Rates Schedules. In the event of a conflict between this Agreement and the Rates Schedules, the Rates Schedules shall have priority.

1.03 In this Agreement all references to dollar amounts and all references to any other money amounts are, unless specifically otherwise provided, expressed in terms of coin or currency of Canada which at the time of payment or determination shall be legal tender herein for the payment of public and private debts.

1.04 Words in this Agreement importing the singular number shall include the plural and vice versa and words importing the masculine gender shall include the feminine and neuter genders.

1.05 Where a word is defined anywhere in this Agreement, other parts of speech and tenses of the same word have corresponding meanings.

1.06 Wherever in this Agreement a number of days is prescribed for any purpose, the days shall be reckoned exclusively of the first and inclusively of the last.

1.07 The headings of all the articles are inserted for convenience of reference only and shall not affect the construction or interpretation of this Agreement.

1.08 Any reference in this Agreement to an Article, a Clause, a subclause or a paragraph shall, unless the context otherwise specifically requires, be taken as a reference to an article, a clause, a subclause or a paragraph of this Agreement.

1.09 This Agreement may be executed in two or more counterparts, each of which when so executed shall be deemed to be an original, but all of such counterparts together shall constitute one and the same instrument.

ARTICLE 2
AMOUNT OF FIRM POWER

2.01 Subject to this Agreement, Hydro agrees to deliver to the Customer and the Customer agrees to purchase from Hydro the Amount of Power on Order.

2.02 The Customer shall declare to Hydro in writing, not later than October 1 of each calendar year, its Amount of Power on Order for the following calendar year. Such declarations may provide for an Amount of Power on Order to apply throughout the calendar year, or may provide for one or more successive increases at specified times during the calendar year, but subject to Clause 2.05, may not provide for a decrease other than a decrease to take effect on January 1st of that following calendar year. The Amount of Power on Order shall in no event be greater than 45,000 kilowatts.

2.03 Hydro will supply all future Power requirements requested by the Customer additional to the 45,000 kilowatts provided, however, that the Customer's requests for such additional Power be made upon adequate notice in order that Hydro may make suitable extensions or additions to its system.

2.04 If Hydro cannot fully comply with a declaration of Amount of Power on Order made in accordance with Article 2.02 it will, as soon as practicable and in any event not later than November 1 of the year in which the declaration was made, advise the Customer of the extent to which it can comply. If more than one industrial customer requests an increase in their Amount of Power on Order and Hydro cannot in its judgment provide enough Power to satisfy all of the timely requests it has received, Hydro will offer additional Amounts of Power on Order to the industrial customers who made those requests in such amounts as are prorated in accordance to the quantity of additional Amounts of Power on Order in the timely requests it has received from those customers.

2.05 If the Customer obtains a new source of electric generation such that it can decrease or eliminate the amount of Power it requires from Hydro, then, provided the Customer gives Hydro thirty-six Month's written notice of the reduction, the Customer may reduce or eliminate its Amount of Power on Order and its Billing Demand effective on the date that the new generation is to go into service as indicated in that written notice.

ARTICLE 3
PURCHASE AND SALE OF POWER AND ENERGY

3.01 The sale and purchase of Power and Energy shall be at such prices and upon such terms and conditions as are set out in the Rate Schedules and this Agreement.

3.02 Subject to Clause 2.05 and Article 10, the Customer's Billing Demands, which shall each be charged at the applicable rates as approved by the Board, shall comprise the following:

(a) the Billing Demand for Firm Power, which in each Month shall be either

(i) the Amount of Power on Order,

(ii) the lesser of 75% of the Amount of Power on Order for the prior calendar year and, the Amount of Power on Order for the prior calendar year less 20,000 kW,

or

(iii) the Maximum Demand taken up to that time in that calendar year less any Interruptible Demand, if applicable,

whichever is greatest; and

(b) the maximum Interruptible Demand for that Month.

3.03 Notwithstanding that the Billing Demand for Firm Power shall have, by operation of Clause 3.02, exceeded the Power on Order declared for that calendar year in accordance with Article 2, Hydro is not obliged to provide any amount of Power in excess of the Power on Order.

3.04 Notwithstanding anything to the contrary herein, the Customer shall pay in each Month its Specifically Assigned Charge, applicable Demand charges, and Energy charges. Its Energy charges shall comprise its Firm Energy and Non-Firm Energy taken in that Month.

ARTICLE 4
SECONDARY ENERGY

4.01 If Hydro has surplus Energy capability and the Customer desires to purchase it, and provided that appropriate metering is in place, Hydro will deliver Secondary Energy to the Customer for use in its electric boilers, The quantity and availability of Secondary Energy shall be determined by Hydro in its sole discretion, however, once declared to be available, Secondary Energy shall remain available for a period of not less than 72 hours. The rate to be paid for Secondary Energy shall be determined by the Board.

ARTICLE 5
INTERRUPTIBLE DEMAND

5.01 The Customer may in any Month take an amount of Interruptible Demand and Energy in addition to the Amount of Power of Order which shall be billed at the Non-Firm Demand and Energy rates approved by the Board. Provided the Amount of Power on Order is equal to or greater than 20,000 kW, the amount of Interruptible Demand and Energy available shall be the greater of 10% of the Amount of Power on Order and 5,000 kW. If the Amount of Power on Order is less than 20,000 kW, the Amount of Interruptible Demand and Energy available

shall be 25% of the Amount of Power on Order. If Hydro is willing and able to serve the Customer's Interruptible Demand, then the following shall apply:

(a) The Customer shall, if practicable, make a prior request for, or otherwise as soon as practicable notify Hydro of its requirement, specifying the amount and duration of its Interruptible Demand requirements. Such request or notification may be made by telephone and confirmed by facsimile transmission to Hydro's officials at its Energy Control Centre, who shall advise the Customer if such Interruptible Power will be made available.

(b) If serving the Customer's Interruptible Demand would result in Hydro generating from, or increasing or prolonging generation from a standby or emergency energy source, then Hydro will so advise the Customer. If the Customer wishes to purchase Interruptible Demand and Energy at such a time or times, that Power and Energy shall be charged for as calculated by the method or formula approved by the Board.

(c) Notwithstanding anything contrary herein, if service of the Interruptible Demand is disrupted by Hydro or is curtailed by the Customer as a decision to reject the more expensive standby or emergency energy source (which for the purposes of this clause shall be deemed to be a reduction of Hydro of Interruptible Demand), the Billing Demand for Interruptible Power for the Month shall be determined as follows:

(i) If there is a total interruption of Interruptible Demand and Interruptible Energy by Hydro for a whole Month, the Customer shall not be required to make any payment for Interruptible Demand and Energy that Month.

(ii) If there is a total interruption of Interruptible Demand for part of a Month, the Billing Demand for that Interruptible Demand for that Month shall be reduced by a number of kilowatts bearing the same ratio to that Billing Demand as the number of hours during which the interruption occurs bears to the total number of hours in that Month.

(iii) If Hydro requires a reduction of Interruptible Demand for a whole Month, then, the reduced Billing Demand for Interruptible Demand for that Month shall be substituted for the Billing Demand for Interruptible Demand for the same Month, when determining the price of Power and Energy for that Month.

(iv) If Hydro requires the reduction of Interruptible Demand for part of a Month, then, subject to subparagraph (v) of this paragraph 4.01(c), there shall, when determining the price of Interruptible Power and Energy for the Months in which the reduction occurs, be substituted for the Billing Demand for Interruptible Demand for that Month, the number of kilowatts obtained by adding

(a) the reduced Billing Demand for Interruptible Demand for the part of the month during which the reduction was made, averaged over the whole of that Month;

to

(b) the Billing Demand for Interruptible Demand for the part of the Month during which no reduction was made, averaged over the whole of that Month.

(v) In any case arising under subparagraph (iii) or subparagraph (iv) of this paragraph 4.01(c), where a reduction of Interruptible Demand is made for a whole Month or part thereof and the Maximum Demand for Interruptible Demand over that same period is greater than the reduced Billing Demand for Interruptible Demand for that same period, then, instead of that reduced Billing Demand, that Maximum Demand for such period shall be substituted for the Billing Demand for Interruptible Demand for that period when determining the price of Power and Energy for the Month in which the reduction occurs, but, if in any period during which a reduction occurs, the Maximum Demand for Interruptible Demand is less than the reduced Billing Demand for Interruptible Demand, no account shall be taken of that Maximum Demand.

ARTICLE 6
CHARACTERISTICS OF POWER SERVICE AND POINTS OF DELIVERY

6.01 The Power and Energy to be supplied under this Agreement will be delivered to the Customer at three (3) phase alternating current having a normal frequency of sixty (60) cycles and at a voltage of approximately 13,800 volts and delivery will be made at the Hydro Delivery Points.

6.02 Hydro will exercise its best endeavours to limit variation from the normal frequency and voltage to tolerable values.

ARTICLE 7
POWER FACTOR

7.01 The Customer agrees to take and use the Power contracted for in this Agreement at a power factor of not less than ninety percent (90%) lagging at the point of delivery specified in this Agreement.

7.02 Should the power factor be consistently less than ninety percent (90%) lagging, the Customer, upon written notification from Hydro, agrees to install suitable corrective equipment to bring the power factor to a minimum of ninety percent (90%) lagging.

7.03 If the Customer should install static condensers to correct the lagging power factor, the equipment shall be so installed that it can be completely disconnected at the request of Hydro.

ARTICLE 8
METERING

8.01 The metering equipment and meters to register the amount of Demand and Energy to be taken by the Customer under this Agreement shall be furnished by Hydro and if required to be located on the Customer's premises will be installed by Hydro in a suitable place satisfactory to Hydro and provided by the Customer, and in such manner as to register accurately the total amount of Demand and Energy taken by the Customer under this Agreement.

8.02 If the metering is installed on the low voltage side of transformers that are Specifically Assigned Plant or owned by the Customer, an appropriate adjustment will be made to account for losses in the transformers.

8.03 The Customer shall have the right, at its own expense, to install, equip and maintain check meters adjacent to the meters of Hydro.

8.04 Authorized employees of Hydro shall have the right of access to all such meters at all reasonable times for the purpose of reading, inspecting, testing, repairing or replacing them. Should any meter fail to register accurately, Hydro may charge for the Demand and Energy supplied during the period when the registration was inaccurate, either,

(a) on the basis of the amount of Demand and Energy charged for

(i) during the corresponding term immediately succeeding or preceding the period of alleged inaccurate registration, or

(ii) during the corresponding term in the previous calendar year; or

(b) on the basis of the amount of Demand and Energy supplied as established by available evidence,

whichever basis appears most fair and accurate.

ARTICLE 9
LIABILITY FOR SERVICE

9.01 Subject to the provisions of the Rate Schedules and this Agreement, the Power and Energy herein contracted for will be made available for use by the Customer during twenty-four (24) hours on each and every day of the term of this Agreement.

9.02 The obligation of Hydro to furnish Power and Energy under this Agreement is expressly subject to all accidents or causes that may occur at any time and affect the generation or transmission of such Power and Energy, and in any such event, but subject to Clause 9.04, Hydro shall have the right in its discretion to reduce or, if necessary, to interrupt the supply of Power and Energy under this Agreement.

9.03 Hydro agrees to take all reasonable precautions to prevent any reduction or interruption of the supply of Power and Energy or any variation in the frequency or voltage of such supply, and whenever any such reduction, interruption or variation occurs, Hydro shall use all reasonable diligence to restore its service promptly.

9.04 (1) Subject to Clause 9.04(2) hereof, Hydro shall be liable for and in respect of only that direct loss or damage to the physical property of the Customer caused by any negligent act or omission of Hydro its servants or agents. Customer agrees that for the purpose of this Clause 9.04, "direct loss or damage to the physical property of the Customer" shall not be construed to include damages for inconvenience, mental anguish, loss of profits, loss of earnings or any other indirect or consequential damages or losses.

9.04 (2) Hydro's liability under subclause 9.04(1) applies only when the direct loss or damage to the Customer arising from a single occurrence exceeds the sum of $100,000.00. In no event shall the liability of Hydro exceed the sum of $1,000,000.00 for any single occurrence.

9.04 (3) Customer further agrees that any damages to which it may be entitled pursuant to clause 9.04(1) shall be reduced to reflect the extent to which such losses or damages could reasonably have been reduced if the Customer had taken reasonable protective measures.

9.05 Hydro shall have the right temporarily to interrupt its service hereunder in order to maintain or make necessary changes to its system, but, except in cases of

emergency or accident, the service shall be interrupted only at such time or times as will be least inconvenient to the Customer, and Hydro shall use all reasonable diligence to complete promptly such repairs or necessary changes.

ARTICLE 10
REDUCED BILLING DEMAND

10.01 If at any time during the term of this Agreement the operation of the works of either party is suspended in whole or in part by reason of war, rebellion, civil disturbance, strikes, serious epidemics, fire or other fortuitous event, then, such party will not be liable to the other party to purchase or, as the case may be, to supply Power and Energy hereunder until the cause of such suspension has been removed and in every such event, the party whose operations are so suspended shall use all reasonable diligence to remove the cause of the suspension.

10.02 (1) For the purposes of this Clause 10.02 the expression "reduced Billing Demand" means the number of kilowatts to which the Billing Demand is reduced in any of the circumstances referred to in subclauses (2) or (3) of this Clause 10.02.

(2) If the Customer is prevented from taking an amount of Power because of a suspension of its operations due to a reason listed in Clause 10.01, and any such interruption or reduction lasts for one hour or longer, then Hydro shall, on the request of the Customer, allow a proportionate reduction of the Billing Demand as calculated pursuant to subclauses (4) through (9) of this Clause 10.02, provided however that, except for reduced Billing Demands that occur pursuant to paragraphs 10.02(4)(b) or (c), in no such case shall the Billing Demand be reduced below 0.85 of the Amount of Power on Order unless Hydro is unable to deliver Power and Energy in accordance with this Agreement.

(3) If the supply of Power and Energy by Hydro is interrupted or reduced for any of the reasons referred to in Clause 9.02, 9.05 or 10.01, and any such interruption or reduction lasts for one hour or longer, then Hydro shall, on the request of the Customer, allow a proportionate reduction of the payment as calculated pursuant to subclauses (5) through (9) of this Clause 10.02.

(4) For those times when the Customer is prevented from taking an amount of Power because the Customer's refinery operations are suspended or curtailed due to a strike by the employees of the Customer, the Customer's Billing Demand shall be calculated as follows:

(a) for the first 15 days of the strike and for that portion of the strike which exceeds 120 days, the Billing Demand shall be determined in the manner set out in subclauses (5) to (9) of this clause 10.02;

(b) for those whole Months during the period that commences following the first 15 days of the strike and ends not later than 120 days after the strike began, the reduced Billing Demand shall be the Customer's Maximum Demand (less any applicable Compensation Demand), in those Months;

(c) for those part Months that comprise periods that include;

(i) a period that commences following the first 15 days of the strike and ends not later than 120 days after the strike began,

together with one or both of

(ii) a period when the Customer is not affected by a strike or other suspension of its operations due to a reason listed in Clause 10.01,

and

(iii) a period where a strike has continued in excess of 120 days, or where the Customer is affected by any other suspension of its operations due to a reason listed in Clause 10.01,

the Customer's Billing Demand shall be determined by adding

(iv) the Maximum Demand for the part of the Month described in subparagraph (i) averaged over the whole of the Month,

(v) the greater of the Maximum Demand for Firm Power and the Amount of Power on Order for the part of the Month described in subparagraph (ii), if any, averaged over the whole of the Month

and

(vi) the reduced Billing Demand applicable to the period described in subparagraph (iii) averaged over the whole of the Month.

(5) If there is a total interruption of the supply of Power and Energy by Hydro for a whole Month, the Customer shall not be required to make any payment for that Month.

(6) If there is a total interruption of Power for part of a Month, the Billing Demand for that Month shall be reduced by a number of kilowatts bearing

the same ratio to that Billing Demand as the number of hours during which the interruption occurs bears to the total number of hours in that Month.

(7) If the reduction of Power is made for a whole Month, then, subject to clause (9) of this Clause 10.02, the reduced Billing Demand for that Month shall be substituted for the Billing Demand for the same Month, when determining the price of Power and Energy for that Month.

(8) If the reduction of Power is made for part of a Month, then, subject to subclause (9) of this Clause 10.02, there shall, when determining the price of Power and Energy for the Months in which the reduction occurs, be substituted for the Billing Demand for that Month, the number of kilowatts obtained by adding

(a) the reduced Billing Demand for the part of the month during which the reduction was made, averaged over the whole of that Month;

to

(b) the Billing Demand for the part of the Month during which no reduction was made, averaged over the whole of that Month.

(9) In any case arising under subclause (7) or subclause (8) of this Clause 10.02, where a reduction of Power is made for a whole Month or part thereof and the Maximum Demand for that same period is greater than the reduced Billing Demand for that same period, then, instead of the reduced Billing Demand, the Maximum Demand for such period shall be substituted for the Billing Demand for that period when determining the price of Power and Energy for the Month in which the reduction occurs, but, if in any period during which a reduction occurs, the Maximum Demand is less than the reduced Billing Demand no account shall be taken of that Maximum Demand.

(10) Where a Billing Demand, a reduced Billing Demand or a Maximum Demand for a part of a Month is to be averaged for the whole of that Month in accordance with subclause (8) of this Clause 10.02, the averaging shall be done by dividing the Billing Demand, the reduced Billing Demand or the Maximum Demand, as the case may be, by the total number of hours in the whole of that Month and multiplying the result by the number of hours to which the Billing Demand, the reduced Billing Demand or the Maximum Demand relates.

(11) In addition to the reductions in Billing Demand that may be made in accordance with this Article 10, Hydro may, in its sole judgment and discretion, make other Billing Demand adjustments from time to time to

decrease the Customer's bill to reflect unusual or unanticipated conditions or to facilitate the testing of equipment or processes by the Customer.

ARTICLE 11
CONSTRUCTION OR INSTALLATION OF TRANSMISSION LINES OR APPARATUS

11.01 For the consideration aforesaid, the Customer hereby grants to Hydro the right to construct transmission lines and accessory apparatus on locations approved by the Customer on, under or over the property of the Customer for the purpose of serving the Customer and the other customers of Hydro, together with the right of access to the property of the Customer at all times for the construction of such lines and apparatus and for the repair, maintenance and removal thereof, provided that nothing in this clause shall entitle Hydro to construct transmission lines and accessory apparatus on or over the Customer's property if such transmission lines are not directly connected with the Customer's premises or some part thereof.

11.02 The Customer shall not erect any building, structure or object on or over any right-of-way referred to in Clause 11.01 without the written approval of Hydro, but subject to that limitation the Customer shall be entitled to make fair and reasonable use of all lands subjected to the said right-of-way.

11.03 Any changes that the Customer may request Hydro to make in the location of any lines or apparatus constructed pursuant to Clause 11.01 shall be made by Hydro, but the Customer shall bear the expense of any such changes to the extent that such lines or apparatus supply Power to the Customer.

11.04 All transmission lines and apparatus of Hydro furnished and installed by it on the Customer's premises shall remain the property of Hydro, and Hydro shall be entitled to remove such transmission lines and apparatus on the expiry or termination of this Agreement.

11.05 For the purpose of using the power service of Hydro, the Customer shall install properly designed and suitable apparatus in accordance with good engineering practice, and shall at all times operate and maintain such apparatus so as to avoid causing any undue disturbance on the system of Hydro, and so that the current shall be approximately equal on all three of its phases.

11.06 If, at any time, the unbalance in current between any two of its phases is, in the judgment of Hydro, excessive to a degree that the power supply system of Hydro and/or the electrical equipment of any other customer of Hydro is adversely affected, then it shall be the responsibility of the Customer to take such reasonable remedial measures as may be necessary to reduce the unbalance to an acceptable value.

11.07 If, at any time during the term of this Agreement, Hydro desires to improve the continuity of power service to any of its customers, Hydro and the Customer will co-operate and use their best endeavours to carry out the improvements either by changes to existing equipment or additions to the original installations of either Hydro or the Customer.

11.08 The Customer shall not proceed with the construction of or major alterations of its equipment or structures associated with any terminal substation at which Power and Energy is being delivered until Hydro is satisfied that the proposals for such construction or alteration are in accordance with good engineering practice and the laws and regulations of the Province, provided that any examination of the Customer's proposals by Hydro shall not render Hydro responsible in any way for the construction or alteration proposed, even if electrical connection is made by Hydro, whether or not any changes suggested by Hydro shall have been made by the Customer.

ARTICLE 12
RESPONSIBILITY FOR DAMAGES

12.01 Beyond the point of delivery, the Customer shall indemnify and hold Hydro harmless with respect to any and all claims that may be made for injuries or damages to persons or property caused in any manner by electric current or by the presence or use on the Customer's premises of electric circuits or apparatus, whether owned by Hydro or by the Customer, unless and to the extent that such injuries or damages are caused by negligence on the part of the employees of Hydro.

12.02 Up to the point of delivery, Hydro shall indemnify and hold the Customer harmless with respect to any and all claims that may be made for injuries or damages to persons or property caused in any manner by electric current or by the presence or use on the Customer's premises of electric circuits or apparatus owned by Hydro and resulting from or arising out of the negligence of Hydro's employees or other persons for whom Hydro would in law be liable, unless and to the extent that such injuries or damages are caused by negligence on the part of the employees of the Customer.

12.03 If any of the transmission lines or apparatus installed by Hydro on the Customer's premises should be destroyed or damaged by the negligence of the Customer, its servants or agents, the Customer shall reimburse Hydro for the cost of their replacement or repair.

ARTICLE 13
PAYMENT OF ACCOUNTS AND NOTICE OF CLAIMS OF CUSTOMER

13.01 Hydro will render its accounts monthly and the Customer shall, within twenty (20) days after the date of rendering any such account, make payment in lawful

money of Canada at the office of Hydro in St. John's, Newfoundland, or in such other place in the said Province as Hydro may designate, without deduction for any claim or counterclaim which the Customer may have to claim to have against Hydro arising under this Agreement or otherwise.

13.02 All amounts in arrears after the expiration of the period of twenty (20) days referred to in Clause 13.01 shall bear interest at the rate of one and one-half (1-1/2%) percent per Month.

13.03 If the Customer is in default for more than thirty (30) days in paying any amount due Hydro under this Agreement, then, without prejudice to its other recourses and without liability therefor, Hydro shall, upon ten (10) days written notice to the Customer of its intention so to do, be entitled to suspend the supply of Power and Energy to the Customer until the said amount is paid, and if the supply is so suspended, the Customer shall not be relieved of its obligations under this Agreement.

13.04 The Customer and Hydro will submit to the other in writing every claim or counterclaim which each may have or claim to have against the other arising under this Agreement within sixty days of the day upon which the Customer or Hydro has knowledge of the event giving rise to such a claim.

13.05 The Customer and Hydro shall be deemed to have waived all rights for the recovery of any claim or counterclaim that has not been submitted to the other party pursuant to and in accordance with Clause 13.04.

ARTICLE 14
ARBITRATION

14.01 If a settlement of any claim made by the Customer in accordance with Clause 13.04 is not agreed to by both parties, the matters in dispute shall be submitted, within three months from the time the claim was submitted, for decision to a board of arbitrators consisting of three members, one to be named by each party to this Agreement and the third to be named by the two arbitrators so chosen, and the decision of any two members of the board of arbitrators shall be final and binding upon both parties.

14.02 The charges of the third member of a board of arbitrators who shall be the chairman of that board, shall be borne by the losing party, and the parties shall bear the costs or charges of their own appointees. Any arbitration hearing commenced under this Article shall be held in St. John's or such other place as the parties mutually agree.

14.03 If the two appointees of the parties are unable to agree upon the third arbitrator or chairman, the chairman shall be appointed upon application of either party to the

Trial Division of the Supreme Court of Newfoundland and Labrador or a judge of that Division.

14.04 The period of delay for appointment by the parties to this Agreement of their respective nominees shall be seven days after notification by the other party to this Agreement of its nominee, and the period for agreement by the two nominees on the chairman shall be ten days.

14.05 The provisions of the Arbitration Act, Chapter A - 14 of the Revised Statutes of Newfoundland and Labrador, 1990, as now or hereafter amended shall apply to any arbitration held pursuant to this Article 14.

ARTICLE 15
MODIFICATION OR TERMINATION OF AGREEMENT

15.01 Except, where otherwise specifically provided in this Agreement and only to the extent so provided, all previous communications between the parties to this Agreement, either oral or written, with reference to the subject matter of this Agreement, are hereby abrogated and this Agreement shall constitute the sole and complete agreement of the parties hereto in respect of the matters herein set forth.

15.02 At any time during the currency of this Agreement, the Customer may terminate it by giving to Hydro two years previous notice in writing of its intention so to do.

15.03 Any amendment, change or modification of this Agreement shall be binding upon the parties hereto or either of them only if such amendment, change or modification is in writing and is executed by each of the parties to this Agreement by its duly authorized officers or agents and in accordance with its regulations or by-laws.

15.04 Subject to Article 10, if the Customer voluntarily or forcibly abandons its operations, commits an act of bankruptcy or liquidates its assets, then, there shall, forthwith, become due and payable to Hydro by the Customer, as stipulated and liquidated damages without burden or proof thereof, a lump sum equal to:

(a) 0.85 of its then current Billing Demand for Firm Power, at the Firm Power Demand charge, multiplied by 24

plus

(b) the remaining net book value of the Specifically Assigned Plant less its salvage value.

ARTICLE 16
SUCCESSORS AND ASSIGNS

16.01 This Agreement shall be binding upon and enure to the benefit of the parties hereto and their respective successors and assigns, but it shall not be assignable by the Customer without the written consent of Hydro.

ARTICLE 17
GOVERNING LAW AND FORUM

17.01 This Agreement shall be governed by and interpreted in accordance with the laws of the Province, and every action or other proceeding arising hereunder shall be determined exclusively by a court of competent jurisdiction in the Province, subject to the right of appeal to the Supreme Court of Canada where such appeal lies.

ARTICLE 18
ADDRESS FOR SERVICE

18.01 Subject to Clauses 18.02 and 18.03, any notice, request or other instrument which is required or permitted to be given, made or served under this Agreement by either of the parties hereto, except for notices or requests pertaining to Interruptible Demand or Secondary Energy, shall be given, made or served in writing and shall be deemed to be properly given, made or served if personally delivered, or sent by prepaid telegram or facsimile transmission, or mailed by prepaid registered post, addressed, if service is to be made

(a) on Hydro, to

The Secretary
Newfoundland and Labrador Hydro
Hydro Place
P.O. Box 12400
St. John's, Newfoundland
CANADA. A1B 4K7
FAX: (709) 737-1782

or

(b) on the Customer, to

President
North Atlantic Refining Limited
P.O. Box 40
Come By Chance, Newfoundland
A0B 1N0

18.02 Any notice, request or other instrument given, made or served as provided in Clause 18.01 shall be deemed to have been received by the party hereto to which it is addressed, if personally served on the date of delivery, or if mailed three days after the time of its being so mailed, or if sent by prepaid telegram or facsimile transmission, one day after the date of sending.

18.03 Except for notices for Interruptible Demand or Secondary Energy, whenever this Agreement requires a notice to be given or a request to be made on a Sunday or legal holiday, such notice or request may be given or made on the first business day occurring thereafter, and, whenever in this Agreement the time within which any right will lapse or expire shall terminate on a Sunday or legal holiday, such time will continue to run until the next succeeding business day. Notices or requests pertaining to Interruptible Demand or Secondary Energy may be given and received by and to the appropriate nominees of the respective parties by voice or electronic communication provided that it is confirmed in writing and transmitted or delivered by facsimile, courier or mail as soon as practicable.

18.04 Either of the parties hereto may change the address to which a notice, request or other instrument may be sent to it by giving to the other party to this Agreement notice of such change, and thereafter, every notice, request or other instrument shall be delivered or mailed in the manner prescribed in Clause 18.01 to such party at the new address.

IN WITNESS WHEREOF Newfoundland and Labrador Hydro and the Customer has each executed this Agreement by causing it to be executed in accordance with its by-laws or regulations and by its duly authorized officers or agents, the day and year first above written.

THE CORPORATE SEAL of
Newfoundland and Labrador Hydro was hereunder
affixed in the presence of: _____

_____ _____

Witness

DULY EXECUTED by
North Atlantic Refining Limited
in accordance with its
Regulations or By-Laws
in the presence of: _____

_____ _____

Witness

(DRAFT ORDER)
NEWFOUNDLAND AND LABRADOR
BOARD OF COMMISSIONERS OF PUBLIC UTILITIES

AN ORDER OF THE BOARD

NO. P.U. __ (2013)

IN THE MATTER OF the *Electrical Power Control Act, 1994*, RSNL 1994, Chapter E-5.1 (the *"EPCA"*) and the *Public Utilities Act*, RSNL 1990, Chapter P-47 (the *"Act"*), and regulations thereunder;

AND

AND IN THE MATTER OF an Application by Newfoundland and Labrador Hydro, pursuant to Section 71 of the *Act*, for approval of the terms and conditions applicable to the supply of electricity to North Atlantic Refinery Limited (NARL).

WHEREAS Newfoundland and Labrador ("Hydro") is a corporation continued and existing under the *Hydro Corporation Act, 2007,* is a public utility within the meaning of the *Act* and is subject to the provisions of the *EPCA;* and

WHEREAS on June 7**,** 2002, pursuant to Order No. P.U. 7(2002-2003), the Board approved service agreements for Hydro's Island Industrial Customers, but with respect to the service agreement to apply to NARL, it excluded the limitation of liability language proposed by Hydro and indicated that the parties could bring the issue back before the Board; and

WHEREAS Hydro has Industrial Customer Service Agreements with Corner Brook Pulp and Paper Limited, Vale Newfoundland & Labrador Limited, Teck Resources (formerly Aur Resources), and Praxair Canada Inc. Each of these contracts contains the limitation of liability language excluded from the NARL contract. These contracts, and subsequent amendments, were approved by the Board in Order Nos. P.U. 7(2002-2003), P.U. 11(2002-2003), P.U. 12(2002-2003), P.U. 6(2003), P.U. 1(2007), P.U. 6(2009) P.U. 17(2009), P.U. 16(2010) P.U. 6(2011), P.U. 15(2011), P.U. 4(2012) and P.U. 6(2012); and

WHEREAS following a 2013 power outage at the North Atlantic Refinery, Hydro's insurers advised that it will no longer provide insurance for the Failure to Supply Service in relation to North Atlantic Refinery Limited; and

WHEREAS on November 29, 2013, Hydro filed an application with the Board requesting that the terms and conditions of its power supply contract with North Atlantic Refinery Limited to limit Hydro's liability for damages to $1,000,000 (the Application);

IT IS THEREFORE ORDERED THAT:

1. The power supply contract between Hydro and North Atlantic Refinery be amended as provided for in the Application; and

2. Hydro shall pay all expenses of the Board arising from this Application.

DATED at St. John's, Newfoundland and Labrador, this day of , .

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_____ _____